



DISCOURSES ON METHODS IN INTERNATIONAL LAW: AN ANTHOLOGY

THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE  
IN THE IDENTIFICATION  
OF GENERAL PRINCIPLES OF PROCEDURE

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ABSTRACT: This *Chapter* discusses the role of the International Court of Justice (ICJ) in the development of general principles of procedure and the methods it uses in identifying them. The “World Court” has a special role in the identification of general principles of procedure, and its findings on issues of procedure often reverberate on the work of other international courts tribunals – albeit governed by different instruments regulating their composition, function, jurisdiction and procedure *stricto sensu*. This notwithstanding, the existence of general rules regulating the exercise of their functions has long been recognized. Also in the field of procedure general principles can be drawn from both the inherent features of international law and from domestic legal systems, although the ICJ does not often explain how it identifies them. Whatever their origin, they mould the interpretation of instruments governing the work of international jurisdictional bodies and play a harmonizing function in the multifarious world of international arbitration and adjudication.

KEYWORDS: International Court of Justice – general principles of international law – international procedural law – international courts and tribunals – domestic legal traditions – analogies between domestic and international law.

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## I. INTRODUCTION

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations.<sup>1</sup> It is one of the oldest international judicial institutions operating today and, moreover, is the successor of the Permanent Court of International Justice (PCIJ).<sup>2</sup> Its special authoritativeness in the – by now very rich – world of international jurisdictional institutions is however not only due to age; a number of other factors contribute to shaping the role of an institution often referred to as the “World Court”.

Firstly, the Court’s permanent nature enhances its ability to develop a coherent body of case law.<sup>3</sup> While this prerogative is now shared by a number of other judicial institutions, the ICJ’s vocation to universality – one of the many elements of continuity with the PCIJ – has been present ever since its establishment and is enhanced nowadays by the broad participation in the United Nations Organisation, which reverberates in the Court’s virtually universal jurisdiction *ratione personae* – at least potentially and in respect to States.<sup>4</sup> Moreover, the ICJ remains the only international court of general jurisdiction *ratione materiae*; its institutional link to the United Nations, while not hindering its independence,<sup>5</sup> enhances its role in the promotion of international peace and security through the judicial settlement of international disputes and its overall influence in the international society. This applies specifically as regards its relationship with other international courts and tribunals, although the ICJ is seldom in a position of formal supremacy towards them.<sup>6</sup> A further element contributing to this is a “general perception of legitimacy and fairness of its opinion-forming process”;<sup>7</sup> beyond accounting for the ICJ’s authority in the assessment and development of substantive international law, this perceived fairness of the Court’s decision-making process also explains the influence of the procedural rules and solutions it applies on other arbitral and judicial bodies.<sup>8</sup> To give just one example, in *Larsen v. Kingdom of Ha-*

<sup>1</sup> See Art. 92 of the UN Charter and Art. 1 of the ICJ Statute.

<sup>2</sup> On the relationship between the two Courts see R. KOLB, *The International Court of Justice*, Oxford, Portland: Hart, 2013, p. 51 *et seq.*

<sup>3</sup> *Ibid.*, pp. 49-50.

<sup>4</sup> That only States have *ius standi* in contentious proceedings before the Court is not deemed in line with the present structure of the international society – although advisory proceedings have been used at times to settle disputes involving other international legal entities, notably international organisations.

<sup>5</sup> R. JENNINGS, R. HIGGINS, P. TOMKA, *General Introduction*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS (eds), *The Statute of the International Court of Justice: A Commentary*, Oxford: Oxford University Press, 2019, pp. 4-5.

<sup>6</sup> G. GAJA, *Relationship of the ICJ with other International Courts and Tribunals*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS (eds), *The Statute of the International Court of Justice*, *cit.*, pp. 580 and 583.

<sup>7</sup> T.M. FRANCK, *Fairness in the international legal and institutional system. General course on public international law*, in *Collected Courses of the Hague Academy of International Law*, The Hague: Nijhoff, 1993, p. 9 *et seq.*, p. 303.

<sup>8</sup> See M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, Vol. III, Leiden: Brill, 2016, p. 254.

*waii* the parties contended that “indispensable third party” principle (first upheld by the ICJ in the *Monetary Gold* case)<sup>9</sup> “should be regarded as confined to proceedings in the International Court of Justice and not as extending to arbitral proceedings of a mixed character”.<sup>10</sup> The Arbitral Tribunal took an opposite view, holding that: “[a]lthough there is no doctrine of binding precedent in international law, it is only in the most compelling circumstances that a tribunal charged with the application of international law and governed by that law should depart from a principle laid down in a long line of decisions of the International Court of Justice”.<sup>11</sup> A recent judgment of the International Tribunal for the Law of the Sea (ITLOS) acknowledged that “the notion of indispensable party is a well-established procedural rule in international judicial proceedings developed mainly through the decisions of the ICJ”,<sup>12</sup> although the Tribunal also found that the principle would not apply in the case, as “[t]he decision of the Tribunal on jurisdiction and admissibility does not require the prior determination of Spain’s [*i.e.*, the third Party’s] rights and obligations”<sup>13</sup>.

While specifically the relevance of the indispensable third party principle remains doubtful or was ruled out altogether in the context of other international jurisdictional systems (as in *Turkey-Textiles* within the WTO),<sup>14</sup> the experience of the ICJ offers a number

<sup>9</sup> International Court of Justice, *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), judgment of 15 June 1954.

<sup>10</sup> Permanent Court of Arbitration, case no. 1999-01, award of 5 February 2001, *Larsen v. Hawaiian Kingdom*, para. 11.16.

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

<sup>12</sup> International Tribunal for the Law of the Sea, judgment of 4 November 2016 on preliminary objections, *The M/N “Norstar” Case* (Panama v. Italy), para. 172. See also Permanent Court of Arbitration, case no. 2013-19, award on jurisdiction and admissibility of 29 October 2015, *The Matter of an Arbitration before an Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea between The Republic of the Philippines and The People’s Republic of China*, para. 179 *et seq.*

<sup>13</sup> *The M/N “Norstar” Case*, *cit.*, para. 173. The arbitral tribunal in *Chevron and Texaco v Ecuador* left the question open of whether the principle applies to non-State actors: see UNCITRAL, Third Interim Award on Jurisdiction and Admissibility of 27 February 2012, case no. 2009-23, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, para. 4.60.

<sup>14</sup> WTO DSB, panel report of 31 May 1999, case no. ds34/R, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.5; the Panel considered that “there is no WTO concept of ‘essential parties’”, and that the European Communities, “had it so wished, could have availed itself of the provisions of the [Dispute Settlement Understanding], which we note have been interpreted with a degree of flexibility by previous panels, in order to represent its interests” (*ibid.*, para. 9.11). Moreover, AGWathelet opined that “the principle [...] does not exist in the Statute of the Court of Justice of the European Union and, in any event, could not exist in EU law since it would automatically preclude the possibility of reviewing the compatibility with the EU and FEU Treaties of the international agreements concluded by the Union if the third State that signed the agreement with the Union was not a participant in the proceedings before it” (Opinion of AG Wathelet delivered on 10 January 2018, case C-266/16, *Western Sahara Campaign UK*, para. 57). The issue was raised by France before the European Court of Human Rights (the European Court) in the *Banković* case (decision of 12 December 2001, no. 52207/99, *Banković and Others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, para. 31) but the Grand Chamber decided the case

of other indications as regards the exercise not only of its own judicial functions but also those of other international courts or other judicial bodies. Rosenne notes, in this regard, that the PCIJ drew heavily on the practice of international arbitration, whereas today “[i]n many respects the situation is reverse, the practice of international arbitration between two or more States (and between a State and an international intergovernmental organization) is being closely influenced by the practices of the International Court”.<sup>15</sup> These reasons explain the choice to discuss specifically the role of the ICJ in the identification of general principles of procedure, although this process is never one-sided: the ICJ not only influences choices of other international jurisdictions, but also draws from their experience in order to address procedural problems.<sup>16</sup> Rather than attempting a comprehensive treatment of the topic,<sup>17</sup> this *Chapter* discusses a number of issues that are illustrative of how the ICJ performs this role *vis-à-vis* other jurisdictional bodies – that is, international courts called upon to settle disputes impartially and by applying international legal standards.<sup>18</sup> In analysing these interactions it is always necessary to use some caution, as judicial dialogue is meaningful with reference to comparable situations whereas international courts and tribunals are far from homogeneous and operate in contexts that are often very different from one another. Moreover, they are mutually independent and usually operate without any formal coordination.<sup>19</sup>

on different basis; in other instances, the European Court has addressed the legal position of third States in explicit terms (see M. SCHEININ, *The ECtHR Finds the US Guilty of Torture*, in *EJIL: Talk!*, 28 July 2014, [www.ejiltalk.org](http://www.ejiltalk.org)).

<sup>15</sup> M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, cit., p. 254.

<sup>16</sup> Cf. J.-M. SOREL, H. RUIZ FABRI, *L’exportation du modèle universel vers les juridictions internationales*, in S. GUINCHARD (dir.), *Droit processuel, droit commun et droit comparé du procès*, Paris: Dalloz, 2013, p. 1233 *et seq.* See further below, Section VI.1.

<sup>17</sup> See for this B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London: Stevens & Sons, 1953, p. 256 *et seq.*; R. KOLB, *The International Court of Justice*, cit., p. 919 *et seq.*; M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, cit., p. 254 *et seq.* Cf. also H. THIRLWAY, *The Law and Procedure of the International Court of Justice – Fifty Years of Jurisprudence*, Oxford: Oxford University Press, 2013, p. 1111.

<sup>18</sup> See further below, Section III.

<sup>19</sup> See M. BENNOUNA, *How to Cope with the Proliferation of International Courts and Coordinate Their Action*, in A. CASSESE (ed.), *Realizing Utopia: The Future of International Law*, Oxford: Oxford University Press, 2012, p. 289, stressing that each court is “subject only to the intellectual scrutiny of scholars”. This is not entirely true, as courts are subject also to the (potentially more pervasive) scrutiny of their constituencies, notably the States and other entities that have established them. Dissatisfaction with the outcome of judicial activities may eventually lead to curtailing a court’s powers (see the example of the Eurasian Economic Union Court, as discussed by M. KARLIUK, *The Limits of the Judiciary within the Eurasian Integration System*, in A. DI GREGORIO, A. ANGELI (eds), *The Eurasian Economic Union and the European Union: Moving toward a Greater Understanding*, The Hague: Eleven international Publishing, 2017, p. 171 *et seq.*), unilateral withdrawal from its jurisdiction (see on a recent case N. DE SILVA, *Individual and NGO Access to the African Court on Human and Peoples’ Rights: The Latest Blow from Tanzania*, in *EJILTalk!*, 16 December 2019, [www.ejiltalk.org](http://www.ejiltalk.org)) or the suspension of its operations (as may soon be the fate of the WTO Appellate Body).

In light of this it is important to clarify whether it is at all possible to identify any general principles in the field of international procedure before discussing the scope of these principles; their sources; and their possible content.

I will focus, on one hand, on the perspective adopted by the ICJ on general principles of procedure; and, on the other hand, on whether and in which terms the principles it identifies apply also to proceedings pending before other international jurisdictional bodies, which operate in very different settings and *vis-à-vis* different legal entities. I will mainly consider international jurisdictions (be they permanent or arbitral), although the procedural principles guiding their action arguably also apply to other institutions.

## II. DO GENERAL PRINCIPLES OF PROCEDURE EXIST IN INTERNATIONAL LAW?

The idea that international adjudication as such is governed by a set of uniform principles – regulating the management of proceedings from their institution to their conclusion but also the structure and organisation of the institution which decides a case, its relationship to the parties, the remedies it grants, and the role it can have in the post-adjudication phase, notably as regards review and implementation – is certainly present in the international legal tradition. Morelli himself devoted a significant part of his scholarly reflection to international judicial procedure, including in his 1937 Hague lectures on *Théorie générale du procès international* where he opined that “[l]e problème central de la théorie du procès international consiste dans la détermination de la nature juridique de la sentence”.<sup>20</sup> The international legal environment has changed significantly since then, as have the terms of scholarly discussion on these topics. This is due, on one hand, to the proliferation of international courts and tribunals (which now are much more diverse than at the time of Morelli’s lectures) and, on the other hand, to the growing institutionalisation of international adjudication, which has helped to solve many of the theoretical problems with which Morelli and other Italian scholars were long concerned.<sup>21</sup> Notably the ICJ shares the international legal personality of the United Nations – whereas no similar status was formally attached to the PCIJ when Morelli wrote his Hague lectures. Other international tribunals, such as the International Criminal Court, are autonomous international organisations;<sup>22</sup> and the idea that even non-

<sup>20</sup> G. MORELLI, *Théorie générale du procès international*, in *Collected Courses of the Hague Academy of International Law*, 1937, p. 262. Morelli construed international judgments as “legal facts” (“faits juridiques au sens étroit”), which create legal effects but could not be attributed to any entity endowed with international legal personality (*ibid.*, p. 276).

<sup>21</sup> See among many others D. ANZILOTTI, *Corso di diritto internazionale – I modi di risoluzione delle controversie internazionali*, Vol. III, Roma: Athenaeum, 1915, p. 110; G. SALVIOLI, *Les règles générales de la paix*, in *Collected Courses of the Hague Academy of International Law*, The Hague: Nijhoff, 1933-IV, p. 5 *et seq.*, p. 88 *et seq.*

<sup>22</sup> Under Arts 1 and 4, para. 1, of the International Criminal Court (ICC) Statute, the Court is a “permanent institution” which “shall have international legal personality”.

institutional arbitral tribunals may be endowed with international legal personality, which Morelli objected to,<sup>23</sup> can more easily be accepted today.<sup>24</sup> This issue is not the subject of much discussion at present; scholarly reflection focuses rather on the “judicialisation” of international law and international relations,<sup>25</sup> including the problems stemming from the proliferation of international courts and tribunals;<sup>26</sup> the difficulties they encounter;<sup>27</sup> and comparisons between different judicial bodies operating at the international (and at the national) level.<sup>28</sup>

Comparative analysis does confirm a strong degree of cross-fertilisation also in the field of procedure, leading to the emergence of what is now considered a “common law of international adjudication”.<sup>29</sup> Thus, the constitutive instruments of international courts and tribunals – in the case of the ICJ the Statute (ICJ Statute), the Rules of Court (ICJ Rules) and the other texts regulating procedure – are deemed to reflect procedural fairness<sup>30</sup> and, hence, general principles of procedure. Often, however, the relevance of principles of procedure can rather be detected by analysing solutions adopted in specific decisions, which may in turn inspire later amendments to the ICJ Rules or other relevant texts: indeed, “le droit du contentieux international [...] est dans la cohérence des précédents”.<sup>31</sup>

A comparative analysis of precedents does point to the existence of a set of shared principles guiding the activities of any international jurisdictional organ and which are applied with a significant degree of uniformity notwithstanding the differences in the constitutive instruments, structures, composition, and mandates of courts and tribunals and the diversified nature of the entities that are entitled to appear before them. These differences do imply, however, that the manifestations of procedural principles may at

<sup>23</sup> G. MORELLI, *Théorie générale du procès international*, cit., p. 275 et seq. Morelli also rejected the idea that arbitral tribunals should be considered as organs of the parties to the case.

<sup>24</sup> C. SANTULLI, *Droit du contentieux international*, Paris: LGDJ-Lextenso éditions, 2015, pp. 86-87.

<sup>25</sup> See M. BENNOUNA, *How to Cope with the Proliferation of International Courts and Coordinate Their Action*, cit., pp. 286-288; C.P.R. ROMANO, *Trial and Error in International Judicialization*, in C.P.R. ROMANO, K. ALTER, Y. SHANY (eds), *The Oxford University Press Handbook of International Adjudication*, Oxford: Oxford University Press, 2013, p. 111 et seq.

<sup>26</sup> J.E. DUPUY, C.-M. VIÑUALES, *The Challenge of “Proliferation”: An Anatomy of the Debate*, in C.P.R. ROMANO, K. ALTER, Y. SHANY (eds), *The Oxford University Press Handbook of International Adjudication*, cit., pp. 135 et seq.

<sup>27</sup> C.P.R. ROMANO, *Trial and Error in International Judicialization*, cit., p. 112.

<sup>28</sup> Cf. J.-M. SOREL, H. RUIZ FABRI, *L’exportation du modèle universel vers les juridictions internationales*, cit., *passim*.

<sup>29</sup> C. BROWN, *A Common Law of International Adjudication*, Oxford: Oxford University Press, 2007.

<sup>30</sup> See for instance International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), judgment of 27 June 1986, para. 31: “The provisions of the Statute and the Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice and a fair and equitable opportunity for each party to comment on its opponent’s contention”.

<sup>31</sup> C. SANTULLI, *Droit du contentieux international*, cit., p. 68, also points to the customary nature of such norms (see further below, Section IV).

times vary significantly within each jurisdiction;<sup>32</sup> the aim of attaining the “sound administration of justice” can be pursued in very different ways, based also on practical restraints that each court or tribunal may face. Thus, factors such as the number of applications on the docket of a given court or tribunal, the number of parties involved in a specific case or financial and other practical constraints may influence the timing and form of presentation of defences. For instance, under Art. 43 of the ICJ Statute the oral phase is a structural feature of proceedings before the ICJ,<sup>33</sup> but it may be dispensed with or is absent altogether in different contexts;<sup>34</sup> this is not per se incompatible with the principle of party equality or with the requirement that the parties be given a reasonable opportunity to present their case.<sup>35</sup>

The existence of general principles of procedure is expressly acknowledged by the ICJ: notably in *Land, Island and Maritime Frontier Delimitation (Nicaragua Intervening)*, the Court referred to this notion with regard to the status of interveners in international judicial proceedings.<sup>36</sup> In *South West Africa*, the ICJ also referred to the existence of a “universal and necessary, but yet almost elementary principle of procedural law” when discussing the “distinction [...] between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, and, on the other, the plaintiff party’s legal right in respect of the subject-matter of that which it claims”.<sup>37</sup> More recently, the ICJ held that “the principle of *res judicata*, as reflected in Articles 59 and 60 of its Statute, is a general principle of law which protects, at the same time, the judicial function of a court or tribunal and the parties to a case which has led to a judgment that is final and without appeal”.<sup>38</sup>

<sup>32</sup> S. FORLATI, *Fair Trial in International Non-Criminal Tribunals*, in A. SARVARIAN, F. FONTANELLI, R. BAKER, V. TZEVELEKOS (eds), *Procedural Fairness in International Courts and Tribunals*, London: British Institute of International and Comparative Law (BIICL), 2015, p. 110 *et seq.*

<sup>33</sup> An exception is envisaged only for proceedings before Chambers, under Art. 92, para. 3, of the ICJ Rules, in the event that the parties agree to dispense with the oral phase and the Chamber consents.

<sup>34</sup> Thus, a hearing is not mandatory before the European Court of Human Rights (see Rules 51.5, 54.5, 58.2, 59.3 and 71.2 of the Rules of the European Court of Human Rights) and there is no oral phase before UN Treaty Bodies (see e.g. Rules 88 *et seq.* of the Rules of Procedure of the Human Rights Committee of 11 January 2012, UN Doc. CCPR/C/3/Rev.10).

<sup>35</sup> These requirements, which are set out in Art. 17, para. 1, of the 2012 Permanent Court of Arbitration Rules, are deemed to reflect general principles of procedure: see further below, Section V.

<sup>36</sup> International Court of Justice, *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, judgment of 13 September 1990, para. 102, to the effect that Nicaragua, an intervening State, would not be a party to the case “under the Statute and Rules of Court or the general principles of procedural law”.

<sup>37</sup> International Court of Justice, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, judgment of 18 July 1966, p. 39, para. 64.

<sup>38</sup> International Court of Justice, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, judgment of 17 March 2017, para. 59. Cf. International Court of Justice, *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, advisory opinion of 13 July 1954, p. 53.

At the same time, precisely this example, where the Court was sharply divided as regards the relevance of the principle to the instant case,<sup>39</sup> shows the difficulty of identifying the precise implications of norms whose existence is unanimously acknowledged.

### III. THE SCOPE OF THE GENERAL PRINCIPLES OF PROCEDURE IDENTIFIED BY THE ICJ

Generally speaking, international courts and tribunals are established through instruments governed by international law and decide disputes in accordance with international law;<sup>40</sup> however, the characterisation of international dispute settlement bodies as “courts” or “tribunals” is not always self-evident.<sup>41</sup> When addressing such issues the ICJ adopts a model that reflects its own experience, but is in principle universal. Thus, in qualifying the United Nations Administrative Tribunal as a “truly judicial body” it emphasised that the provisions of the latter’s Statute (notably those on *Kompetenzkompetenz* and on the finality of its judgments) “are of an essentially judicial character and conform with rules generally laid down in statutes or laws issued for courts of justice, such as, for instance, in the Statute of the International Court of Justice”.<sup>42</sup> Independence and the finality of judgments, which the ICJ has considered to be key features of a “Tribunal”,<sup>43</sup> characterise permanent judicial institutions, as well as institutional and *ad hoc* arbitration; they are guided by general principles of procedure also in the exercise of any advisory competences they may be endowed with.<sup>44</sup> Such principles arguably also apply to institutions exercising similar functions, notably quasi-judicial bodies such as the UN expert bodies or the WTO dispute settlement system:<sup>45</sup> although their views and

<sup>39</sup> The Court was evenly split in deciding on Nicaragua’s request relating to the delimitation of its continental shelf beyond the 200 nautical miles, which was eventually deemed admissible due to President Abraham’s casting vote: see para. 2, let. b), of the dispositif of *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., and the joint dissenting opinion of Vice-President Yusuf, Judges Cançado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower alleged to the same judgment.

<sup>40</sup> See Art. 15 of the 1899 Hague Convention for the Pacific Settlement of International Disputes.

<sup>41</sup> R. KOLB, *The International Court of Justice*, cit., p. 69, also for further references.

<sup>42</sup> *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit. p. 52, and cf. also, p. 55, on revision of judgments.

<sup>43</sup> *Ibid.*, p. 53: “This examination of the relevant provisions of the Statute shows that the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions”.

<sup>44</sup> See Art. 68 of the ICJ Statute.

<sup>45</sup> On this point, see J-M. SOREL, H. RUIZ FABRI, *L’exportation du modèle universel vers les juridictions internationales*, cit., p. 1152. According to C. SANTULLI, *Droit du contentieux international*, cit., p. 32, the findings of expert bodies are actually “jugements déclaratoires”. While this stance is difficult to accept as such, international properly judicial bodies often treat the findings of expert bodies as authoritative, when they



reports are not formally or automatically binding on the parties, whenever they exercise a function of independently assessing the facts and the law in specific cases their function is very similar to that of the ICJ, and the requirements of procedural fairness, which enhance the legitimacy of any substantive decision, are perceived in largely equivalent terms. The situation is different as regards decisions taken by political bodies: for instance, the ICJ has observed that the General Assembly, “in view of its composition and functions, could hardly act as a judicial organ – considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them”.<sup>46</sup>

In some instances procedural rules applied by political bodies may be reminiscent of principles of (jurisdictional) procedure: an example of this is provided by Art. 32 of the UN Charter, which stipulates that every State which “is party to a dispute under consideration by the Security Council shall be invited to participate, without vote, in the discussion relating to the dispute” (thus embodying the right to be heard).<sup>47</sup> Nonetheless, general principles of procedure developed in the field of international adjudication do not necessarily apply in such contexts:<sup>48</sup> as noted by Judge Cançado Trindade, “[i]nternational legal procedure has a logic of its own, which is not to be equated with that of diplomatic relations”.<sup>49</sup> While Judge Cançado Trindade criticised the ICJ for not

follow a “jurisdictional” procedural model (cf., on views not supported by any reasoning, International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), order of 14 June 2019, Joint Declaration of Judges Tomka, Gaja and Gevorgian, para. 5).

<sup>46</sup> *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit., p. 56. An opportunity to reconsider the issue may come from the case recently submitted to the ICJ by Bahrain, Egypt and the United Arab Emirates, challenging a decision of the International Civil Aviation Organization (ICAO) Council (*Appeal against a Decision of the ICAO Council dated 29 June 2018 on preliminary objections (Application (B)) (Kingdom of Bahrain, Arab Republic of Egypt and the United Arab Emirates v State of Qatar)*, Joint Application Instituting Proceedings of 4 July 2018). The applicants consider that the Council ‘is to act in a judicial capacity, with all necessary requirements that are attendant upon that capacity’ when deliberating under Article II of the International Air Services Transit Agreement (Application, para 7) and contend, *inter alia*, that the omission to decide on a preliminary objection (*ibid.*, para 30(iv)) is incompatible with the *ne infra petita* principle.

<sup>47</sup> The decision-making process of the Security Council (with informal consultations between members being organized almost daily) may anyway render this right ineffective: see R. DOLZER, C. KREUTER-KIRCHHOF, *Article 31*, in B. SIMMA, D.-E. KHAN, G. NOLTE, A. PAULUS (eds), *Charter of the United Nations*, Oxford: Oxford University Press, 2012, p. 1059.

<sup>48</sup> Cf. D. HOVELL, *Due Process in the United Nations*, in *American Journal of International Law*, 2016, p. 1 *et seq.*, arguing that in this context the “formalistic ‘one-size-fits-all’ approach to due process – in which the only option is to embrace or reject the judicial approach – lacks normative foundation”.

<sup>49</sup> International Court of Justice, *Questions relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia), order of 3 March 2014, separate opinion of Judge Cançado Trindade, para. 22. The reference to judicial proceedings is clearer in the French version of the opinion: “Le règlement judiciaire d’un différend international a une logique propre, qui ne saurait être assimilée à celle des relations diplomatiques”.

adequately considering the distinction in that specific instance,<sup>50</sup> the Court's case law does confirm that procedural principles applying to international adjudication are not necessarily of relevance in different contexts, including other forms of dispute settlement by third parties. For example, in the *Qatar v. Bahrain* case the ICJ maintained that the decision taken in 1939 by the Government of the United Kingdom concerning the sovereignty over the Hawar Islands was not an international arbitral award, as "no agreement existed between the Parties to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of the law or ex aequo et bono. The Parties had only agreed that the issue would be decided by 'His Majesty's Government', but left it to the latter to determine how that decision would be arrived at, and by which officials".<sup>51</sup> While this did not deprive the decision of its binding force (which depended on the agreement of the parties to the dispute), the ICJ dismissed Bahrain's allegations of bias and unfairness in the decision-making process, on the assumption that "[t]he validity of that decision was certainly not subject to the procedural principles governing the validity of arbitral awards".<sup>52</sup>

#### IV. THE AMBIGUOUS NOTION OF "GENERAL PRINCIPLES OF PROCEDURE" AT STAKE

Even with this proviso, the notion of "general principles of procedure" remains inherently ambiguous and, as Rosenne and Shaw note, "its implications are not self-evident".<sup>53</sup> Indeed, the word "principles" in itself can be used with different meanings in a legal context. Thus the "principle theory", whereby principles are seen as optimisation commands that can be fulfilled to different degrees (whereas rules "are norms that can only be complied with or not")<sup>54</sup> is of relevance also as regards international law and can help understanding the way in which the ICJ and other international courts or tribunals manage procedure.

Furthermore, the notion has also been used at times with more or less direct reference to principles of natural law – such as when the ICJ emphasised that the Genocide Convention's object "on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the *most elementary principles of*

<sup>50</sup> The separate opinion of Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., takes issue with the fact that the order relied on unilateral engagements by Australia as a basis for partially rejecting the requests of Timor-Leste.

<sup>51</sup> International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), judgment of 16 March 2001, para. 114.

<sup>52</sup> *Ibid.*, para. 140.

<sup>53</sup> M.N. SHAW, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

<sup>54</sup> R.M. DWORKIN, *The Model of Rules*, in *The University of Chicago Law Review*, 1967, p. 25; R. ALEXY, *On the Structure of Legal Principles*, in *Ratio Juris*, 2000, p. 295.

*morality*".<sup>55</sup> The reference to "universal and necessary" principles in the passage of the *South West Africa* judgment quoted above similarly hint to this understanding of the notion.<sup>56</sup> However, this same judgment is to the effect the ICJ, being a court of law, "can take account of moral principles only in so far as these are given a sufficient expression in legal form",<sup>57</sup> in line with the positivist stance that permeates the Statute.

A different approach looks instead at the structural function of principles, which are seen as "general normative propositions"<sup>58</sup> moulding the international legal order. Robert Kolb's analysis of general principles applicable to contentious proceedings draws from this concept to argue that principles

"begin by seising upon profound forces, so to speak upon the gravitational pillars on which legal matters, even entire legal systems, are based. This hierarchy of weight and importance makes it possible to see a legal system as a coherent corpus, based on fundamental legal values. Principles also make it possible to apprehend and understand the law within a certain fundamental conceptual unity and balance, rather than just as a collection of scattered and disconnected rules. Principles govern various branches of the law simultaneously, operating as bridges between them and so contributing to the unity and coherence of legal thinking".<sup>59</sup>

In this perspective, a further element of ambiguity relates to the fact that some structural principles of international law have implications on issues of both substance and procedure: for example, the principle of good faith is extremely important in the realm of substantive law – notably in the law of treaties – but also in the field of procedure – for instance as regards estoppel,<sup>60</sup> the duty of loyalty between the parties,<sup>61</sup> or remedies.<sup>62</sup> The

<sup>55</sup> International Court of Justice, *Reservations to the Convention on Genocide*, advisory opinion of 28 May 1951, p. 15 *et seq.*, p. 23 (emphasis added).

<sup>56</sup> *South West Africa Cases*, cit., para. 64.

<sup>57</sup> *Ibid.*, para. 49.

<sup>58</sup> R. KOLB, *The International Court of Justice*, cit., p. 919; also according to A. PELLET, *Article 38*, in A. ZIMMERMANN, C.J. TAMS (eds), *The Statute of the International Court of Justice. A Commentary*, Oxford: Oxford University Press, 2019, p. 925, para. 257, "when associated with 'general' the word 'principle' implies a wide-ranging norm".

<sup>59</sup> R. KOLB, *The International Court of Justice*, cit., p. 919. Cf. further C. TOMUSCHAT, *Obligations Arising for States Without or Against their Will*, in *Collected Courses of the Hague Academy of International Law*, 241 (1993-IV) 195 ss., pp. 239-240; R. WOLFRUM, *General International Law (Principles, Rules and Standards)*, in *Max Planck Encyclopedias of International Law*, 2010, p. 354.

<sup>60</sup> R. KOLB, *The International Court of Justice*, cit., p. 949.

<sup>61</sup> *Ibid.*, p. 946. See e.g., on the late submission of claims or requests, International Court of Justice *LaGrand* (Germany v. United States of America), judgment of 27 June 2001, dissenting opinion of Judge Buergenthal, para. 22, and *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 136; on the integrity of evidence, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cit., para. 15 *et seq.*; on the possibility of an "abuse of process", see International Court of Justice: *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), judgment of 6 June 2018, paras 145 *et seq.*; *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), preliminary objec-

principle of the sovereign equality of States is another good example, as it is reflected not only in substantive norms (such as those relating to immunities)<sup>63</sup> but also underlies important procedural principles such as that of party equality,<sup>64</sup> or the right to conduct arbitral and judicial proceedings without undue interference by other States.<sup>65</sup>

Yet, a discussion of the role of the ICJ in the identification of general principles of procedure necessarily has to focus on Art. 38, para. 1, of the ICJ Statute. According to this provision the Court, in deciding disputes in accordance with international law, “shall apply (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations”. Even in this specific perspective, however, the way in which the ICJ uses the notion of “general principles of procedure” (or similar ones) is not always such as to shed much light on the ambiguities inherent in it.

## V. THE APPROACH IN THE CASE LAW OF THE ICJ

It would seem natural to construe principles of procedure as “general principles of law” under Art. 38, para. 1, let. c), of the ICJ Statute especially since the change in the chapeau of Art. 38 (as compared to the PCIJ Statute)<sup>66</sup> has contributed to clarifying that “general principles of law recognized by civilized nations” are in any case part of international law. Yet, whether “general principles of law” under Art. 38, para. 1, let. c), of the ICJ Statute should be construed by considering only domestic legal traditions is still controversial.<sup>67</sup> The ICJ does not often explicitly draw a general principle of law from domestic legal systems: an example may be found in the *Corfu Channel* case, as regards indirect evidence, which “is admitted in all systems of law, and its use is recognized by international decisions”.<sup>68</sup> A less clear reference may be found in the *U.N. Administrative Tribunal* advisory

tions, judgment of 13 February 2019, para. 113; *Jadhav* (India v. Pakistan), preliminary objections, judgment of 17 July 2019, para. 49.

<sup>62</sup> The ICJ has at times refused to impose guarantees of non repetition because it presumed that the losing party would implement the judgment in good faith: see International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy), judgment of 2 February 2012, para. 138.

<sup>63</sup> *Ibid.*, para. 57.

<sup>64</sup> On this principle see further below, Section VI.

<sup>65</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 27. See further M.N. SHAW, *Rosenne's Law and Practice of the International Court: 1920-2015*, cit., p. 254.

<sup>66</sup> The words “whose function is to decide in accordance with international law such disputes as are submitted to it” were not included in Art. 38, para. 1, of the PCIJ Statute, and were added in 1945.

<sup>67</sup> See R. WOLFRUM, *General International Law*, cit., p. 346 *et seq.* For a different view see C. TOMUSCHAT, *Obligations Arising for States*, cit., p. 314; G. GAJA, *The Protection of General Interests in the International Community*, in *Collected Courses of the Hague Academy of International Law*, 2011, p. 35.

<sup>68</sup> International Court of Justice, *Corfu Channel* (United Kingdom v. Albania), judgment of 9 April 1949, p. 18 (emphasis added). The ICC relied on this precedent to admit indirect evidence in decision on victim's

opinion where the ICJ described *res iudicata* as “a well-established and generally recognized principle of law”, thus apparently hinting at recognition at the domestic level.<sup>69</sup>

It may be worth stressing that these examples all relate to issues of procedure; reference to general principles existing in domestic legal systems on issues of substance is even rarer, although not completely absent. Notably, in its advisory opinion on *Reservations to the Genocide Convention* the ICJ opined that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”.<sup>70</sup> Judge Ammoun, despite criticizing the formulation of Art. 38, para. 1, let. c), of the ICJ Statute, also construed equity as a principle drawn from domestic legal traditions. In his separate opinion in the *North Sea Continental Shelf* cases he maintained that:

“general principles of law mentioned by Article 38, paragraph 1(c), of the Statute, are nothing other than the norms common to the different legislations of the world. United by the identity of the legal reason therefor, or the ratio legis, transposed from the internal legal system to the international legal system, one cannot fail to remark an oversight committed by arbitrarily limiting the contribution of municipal law to the elaboration of international law: international law which has become, in short, particularly thanks to the principles proclaimed by the United Nations Charter, a universal law able to draw on the internal sources of law of all the States whose relations it is destined to govern, by reason of which the composition of the Court should represent the principal legal systems of the world”.<sup>71</sup>

In other instances, the ICJ has ruled out altogether that specific principles could fall under the scope of Art. 38, para. 1, let. c), as when, in the *South West Africa* cases, it held that although *actio popularis* “may be known to certain municipal systems of law, it is not known to international law as it stands at present: nor is the Court able to regard it as imported by the ‘general principles of law’ referred to in Article 38, paragraph 1 (c), of its Statute”.<sup>72</sup> In yet other cases, it has grounded those principles in international law as such, rather than in the domestic legal orders. Thus, in the *Fisheries Jurisdiction* case the principle *iura novit curia* was stated in axiomatic terms, and linked to the qualification of the ICJ as an international judicial organ.<sup>73</sup> In *Timor-Leste v. Australia* the parties had

application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, ICC-02/04-101, *Situation in Uganda*, para. 5.

<sup>69</sup> *Effects of Awards of Compensation made by the U.N. Administrative Tribunal*, cit. p. 53.

<sup>70</sup> *Reservations to the Convention on Genocide*, cit., p. 23.

<sup>71</sup> International Court of Justice, *North Sea Continental Shelf* (Denmark v. Federal Republic of Germany; Federal Republic of Germany v. The Netherlands), judgment of 20 February 1969, separate opinion of Judge Ammoun, p. 135.

<sup>72</sup> *South West Africa Cases*, cit., para. 88.

<sup>73</sup> International Court of Justice, *Fisheries Jurisdiction* (United Kingdom v. Iceland), judgment of 25 July 1974, para. 17: “[t]he Court [...], as an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to

argued that the right to confidentiality of communications between States and their legal advisers was a general principle of law “akin to legal professional privilege”, while disagreeing on the exact content of this right.<sup>74</sup> The ICJ deemed it plausible that States have a right to communicate with counsel and lawyers in a confidential manner, but held that such right “might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations”,<sup>75</sup> rather than deriving it from municipal legal systems. On a number of other occasions, the ICJ has referred to “principles” that are clearly not derived from domestic law, but are rather inherent to the international legal order – at times apparently distinguishing between principles and custom only on the basis of the more general or structural scope of the former. Thus, in the *Corfu Channel* case, the obligation to notify the existence of a minefield in Albanian territorial waters was drawn from “certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.<sup>76</sup> In the *Gulf of Maine* case, the Chamber stated that “the association of the terms ‘rules’ and ‘principles’ is no more than the use of a dual expression to convey one and the same idea, since in this context ‘principles’ clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term ‘principles’ may be justified because of their more general and more fundamental character”.<sup>77</sup> In several other instances the two terms are used jointly, and apparently interpreted as being equivalent to “international customary law”; or at least there is no any clear identification of the part of Art. 38 of the ICJ Statute which is at stake. Thus, in the advisory opinion on the *Interpretation of the Agreement between the WHO and Egypt* the Court identified the existence of an obligation to give a reasonable period of notice for the termination of an existing headquarters agreement stemming from the “general

consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute”. See also *Military and Paramilitary Activities in and against Nicaragua*, cit., para. 29.

<sup>74</sup> *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., paras 24-25.

<sup>75</sup> *Ibid.*

<sup>76</sup> Separate opinion of Judge Cañçado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 44 *et seq.*, on the principle of the legal equality of States.

<sup>77</sup> International Court of Justice, *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America), judgment of 12 October 1984, para. 79. The ICJ further emphasised that, in the context of maritime delimitation, “international law – and in a matter of this kind the Chamber has to refer primarily to customary international law – can of its nature only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective”; “more specific provisions” for the delimitation of maritime areas could be determined only for the purposes of each specific case, whereas there would be no “possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned” (*ibid.*, para. 81).

*legal principles and rules* applicable in the transfer of the seat of a Regional Office from the territory of a host State".<sup>78</sup> It further specified that the precise duration of periods of consultation and negotiation "are matters which necessarily vary according to the requirements of the particular case".<sup>79</sup> Moreover, the use of the term "principle" meant to imply "customary rules" is apparent in cases such as the *Mavrommatis Palestine Concessions*,<sup>80</sup> as regards diplomatic protection, or *Oil Platforms*, as regards the prohibition of the use of force.<sup>81</sup>

This reading of the notion of "principles" is based not only on the case law of the ICJ: the reference to "principles and rules of international law" in Art. 21, para. 1, let. b), of the Statute of the International Criminal Court (ICC Statute) may likewise be construed as a reference to customary international law.<sup>82</sup> In the context of the ICC Statute, this is not problematic, also because Art. 21, para. 1, let. c), specifically provides that, failing other relevant sources, the ICC should also 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 States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".<sup>83</sup> Although this formulation is not completely satisfactory,<sup>84</sup> for our purposes it is important to note that the ICC Statute makes a

<sup>78</sup> International Court of Justice, *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, advisory opinion of 20 December 1980, para. 49 (emphasis added). A few lines earlier a reference to "applicable legal principles and rules" apparently had the same meaning.

<sup>79</sup> *Ibid.*

<sup>80</sup> Permanent Court of International Justice, *The Mavrommatis Palestine Concessions* (Greece v. Britain), judgment of 30 August 1924, p. 12, where the PCIJ stated: "[i]t is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels" (emphasis added).

<sup>81</sup> International Court of Justice, *Oil Platforms* (Islamic Republic of Iran v. United States of America), judgment of 6 November 2003, para. 43.

<sup>82</sup> A. PELLET, *Applicable Law*, in A. CASSESE, P. GAETA, J. JONES (eds), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford: Oxford University Press, 2002, pp. 1071-1072, where he writes: "[i]t is necessary to make a distinction between 'principles' of international law on the one hand, and 'rules' on the other? Undoubtedly not, at least with regard to their nature: in both cases they are customary norms". See also, in regard to the implementing practice, C. CALLEJON, *Article 21 – Droit applicable*, in J. FERNANDEZ, X. PACREAU (eds), *Statut de Rome de la Cour pénale internationale, commentaire article par article*, Paris: Pedone, 2012, p. 775 *et seq.*

<sup>83</sup> No reference to general principles in Art. 293 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), to which Art. 23 of the ITLOS Statute refers: "Article 293 – Applicable law – 1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention. 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree".

<sup>84</sup> For a criticism of this formulation see A. PELLET, *Applicable Law*, *cit.*, p. 1070.

clear distinction between principles drawn from the international legal order as such and principles drawn from municipal legal systems – which apply only residually and subject to their consistency with international law. Other international criminal tribunals have been open not only to rely on general principles of law<sup>85</sup> but also to embark on fairly detailed comparative analysis of solutions adopted at the domestic level.<sup>86</sup>

On the contrary, the ICJ usually acknowledges the existence of general principles in axiomatic terms. This is in part linked to the fact that international courts and tribunals emphasise the “creative” component of international adjudication whenever relying on general principles of law – and this does not depend on whether the principles are stake are drawn from the international or the domestic legal orders. For instance, according to Christian Tomuschat “[t]o invoke such principles looks as if politics were allowed to make a direct inroad into the field of international law, thereby annihilating the autonomy of law with regard to politics”.<sup>87</sup> Hermann Mosler similarly pointed out, in this context, that

“the international judge does not decide on the basis of an accumulation of domestic legal principles [...]. Starting from a common denominator, he has the creative task of maintaining the essential features of the general principle while at the same time finding the appropriate solution for the international legal relation upon which he has to pass judgment. The norm which he applies is a norm of international law, taken from principles observed in domestic legal orders and adapted by him to the particular needs of international relations”.<sup>88</sup>

The method used by the ICJ in identifying general principles is, moreover, part of the more general approach of the ICJ in assessing international legal rules. Indeed the Court, which has only recently begun to rely on pronouncements of other international judicial and quasi-judicial bodies, is similarly reluctant to engage in surveys of State practice when assessing the existence and content of customary rules of international

<sup>85</sup> Thus in *Prosecutor v. Erdemović* the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber decided to raise preliminarily, and *proprio motu*, the question of the validity of the guilty plea entered by the Appellant finding “nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties” (judgment of 7 October 1997, IT-96-22-A, para. 16). For further examples see B. BONAFÉ, P. PALCHETTI, *Relying on general principles in international law*, in C. BRÖLMANN, Y. RADI (eds), *Research Handbook on the Theory and Practice of International Lawmaking*, Cheltenham: Elgar, 2016, p. 171, and see also p. 168, for judicial and arbitral practice in other areas.

<sup>86</sup> See for instance ICTY, judgment of 14 January 2000, IT-95-16-T, *Prosecutor v. Kupreškić and Others*, paras 539 and 730 *et seq.* (on the possibility for the Trial Chamber to requalify facts). Some hybrid tribunals apply domestic procedural law: see L. CARTER, F. POCAR (eds), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Cheltenham: Elgar, p. 10.

<sup>87</sup> C. TOMUSCHAT, *Obligations Arising for States*, cit., p. 311.

<sup>88</sup> H. MOSLER, *General Principles of Law*, in *Encyclopedia of Public International Law*, vol. 7, 1984, pp. 95-96; A. PELLET, *Article 38*, cit., p. 929, para. 266.



law<sup>89</sup> and only exceptionally makes express reference to national judicial decisions for this purpose.<sup>90</sup> Nonetheless, the case law discussed above shows that the ICJ as well applies both principles belonging to the international legal order as such<sup>91</sup> and principles initially elaborated *in foro domestico* – the latter being relevant only insofar as they are compatible with the structural features of the international legal order and can thus be transposed thereto.<sup>92</sup> While this dichotomy is detectable also as regards procedure, a further layer of complexity relates to the fact that arguably principles of procedure are gradually being consolidated into customary international law through the case law of the multifarious international courts active today.<sup>93</sup>

## VI. THE INTERACTION BETWEEN STRUCTURAL FEATURES OF THE INTERNATIONAL LEGAL ORDER AND NATIONAL LEGAL TRADITIONS IN THE FIELD OF PROCEDURE

The ICJ's apparent reluctance to rely on national legal standards in identifying general principles of law does not only depend on the "large amount of discretion"<sup>94</sup> inherent in selecting from domestic legal rules or in the difficulties of conducting a comparative analysis.<sup>95</sup> While these factors may explain its hesitations at least in part, another reason lies in the difficulty of transposing this kind of principles into a legal order with very different structural features. In the *Status of South West Africa* advisory opinion,<sup>96</sup> Judge McNair acknowledged that "International law has recruited and continues to recruit many of its rules and institutions from private systems of law" but warned against the risks of "importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules"<sup>97</sup>. In the *Barcelona Traction* case Judge Fitzmaurice highlighted:

"when private law concepts are utilized, or private law institutions are dealt with in the international legal field, they should not there be distorted or handled in a manner not in conformity with their true character, as it exists under the system or systems of their crea-

<sup>89</sup> G. GAJA, *The Protection of General Interests*, cit., p. 37.

<sup>90</sup> The judgment in *Jurisdictional Immunities of the State*, cit., refers extensively to domestic judicial decisions at paras 72 *et seq.*, as the practice of many countries in the field of immunity mainly stems from case law.

<sup>91</sup> Whether these principles should be construed as falling under the scope of Art. 38, para. 1, let. b), rather than Art. 38, para. 1, let. c), of the ICJ Statute has relatively little practical importance.

<sup>92</sup> A. PELLET, *Article 38*, cit., p. 929, para. 267; F. SALERNO, *Principi generali di diritto (diritto internazionale)*, in *Digesto*, 1995, p. 524 *et seq.*

<sup>93</sup> See C. SANTULLI, *Droit du contentieux international*, cit., p. 68, defining general principles of procedure as "droit coutumier voulu".

<sup>94</sup> G. GAJA, *General Principles of Law*, in *Max Planck Encyclopedias of International Law*, Oxford: Oxford University Press, last update 2013, p. 373 *et seq.*

<sup>95</sup> The caution of the ICJ in this regard is in contrast with the practice of some arbitral tribunals (*ibid.*).

<sup>96</sup> International Court of Justice, *International Status of South West Africa*, advisory opinion of 11 July 1950, separate opinion of Judge McNair, p. 149.

<sup>97</sup> *Ibid.*

tion. But, although this is so, it is scarcely less important to bear in mind that conditions in the international field are sometimes very different from what they are in the domestic, and that rules which these latter conditions fully justify may be less capable of vindication if strictly applied when transposed onto the international level. Neglect of this precaution may result in an opposite distortion, – namely that qualifications or mitigations of the rule, provided for on the internal plane, may fail to be adequately reflected on the international, – leading to a resulting situation of paradox, anomaly and injustice”.<sup>98</sup>

Specifically as regards judicial and arbitral settlement of disputes, the international legal order lacks a unitary jurisdictional system, which is typical feature of modern domestic jurisdictions; as discussed above, this has not prevented the emergence of a coherent body of principles regulating procedure. Other differences between international law and domestic legal orders do, however, raise some sensitive issues also as regards the identification of general principles of procedure: as Rosenne notes, “in connection with procedural law the Court has frequently had occasion to reject analogies drawn from internal law, principally because the analogies were false and irrelevant”.<sup>99</sup> At the same time, the drafting history of the Statute shows that reference to general principles of law under Art. 38, para. 1, let. c), was deemed appropriate on issues of procedure as well. Thus, in an often quoted statement to the Advisory Committee of Jurists Lord Phillimore “pointed out that the general principles referred to [...] were those which were accepted by all nations in foro domestico, *such as certain principles of procedure*, the principle of good faith (*bona fide*), *the principle of res iudicata*, etc.”.<sup>100</sup>

Indeed, some features of international procedure are closely connected to the structure of the international legal order and have very little in common with domestic principles of procedure (Section VI); others are also inherent to national judicial systems and are components of the right to a “fair trial” – although in international law they may be articulated differently reflecting the peculiarities of this specific legal order (as is the case, for instance, with the principle of party equality) – (Section VI).

<sup>98</sup> International Court of Justice, *Barcelona Traction, Light and Power Co.* (Belgium v. Spain), judgment of 5 February 1970, separate opinion of Judge Fitzmaurice, pp. 66-67. The same need for caution was emphasised also in the framework of the ICTY, notably in President Cassese’s separate and dissenting opinion in the *Erdemović* case: “[T]he body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law” (ICTY, appeal judgment of 7 October 1997, IT-96-22-A, *Prosecutor v. Drazen Erdemović*, separate and dissenting opinion of Judge Cassese, para. 3; cf. also his criticism of the treatment of duress by the Appeals Chamber, *ibid.*, para. 11 *et seq.*).

<sup>99</sup> M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, cit. p. 376.

<sup>100</sup> League of Nations, *Advisory Committee of Jurists for the Establishment of a Permanent Court of International Justice. Proces-Verbaux of the Proceedings of the Committee June 16th-July 24th 1920. With Annexes*, The Hague, 1920, p. 335.

## VI.1. STRUCTURAL FEATURES OF THE INTERNATIONAL LEGAL SYSTEM AND GENERAL PRINCIPLES OF PROCEDURE: THE PRINCIPLE OF CONSENT

Among structural differences between domestic legal orders and international law shaping the identification of general principles of procedure is the consensual nature of international jurisdiction.

The main difference between the domestic and the international legal orders lies in the role of consent, which is rather limited in the case of national courts but of paramount importance in the field of international adjudication and international dispute settlement more generally. In line with the contention that international procedural law is “essentially volitional”,<sup>101</sup> the ICJ has construed the existence of a “general principle of consensual jurisdiction”;<sup>102</sup> this general principle of procedure is embodied in several provisions of the Statute, as it moulds not only jurisdiction and access to the ICJ but also the composition of the Bench in specific cases, the actual management of procedure and the post-adjudication phase. The principle, however, has a much broader impact, as it also influences the interpretation of other rules embodied in the ICJ Statute or in the ICJ Rules, well beyond what the Statute’s express provisions convey.<sup>103</sup> An apt example in this regard is the “indispensable third party” principle, mentioned above: in the *Monetary Gold* case the ICJ held that ‘to adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court’s Statute, namely, that the Court can only exercise jurisdiction over a State with its consent’.<sup>104</sup> Still, in this kind of situation jurisdiction (and, therefore, consent) does exist over the original parties to the case; the fact that the ICJ and other inter-State courts or tribunals abstain from exercising their jurisdiction under these specific circumstances is ultimately a matter of judicial propriety,<sup>105</sup> and testifies to the overarching influence of consent in inter-State adjudication. In this respect it is not surprising that the principle has been actually applied in the context of the ICJ and of non-institutional arbitration (and specifically with reference to the position of States), whereas judicial institutions endowed with compulsory jurisdiction and/or considering the position of non-State actors either have not formally acknowledged the principle or have not applied it *in concreto*.

The importance of the principle of consent in the interpretation of the Statute is apparent also in the field of intervention, which has been the subject of a complex case

<sup>101</sup> M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, cit., p. 254.

<sup>102</sup> *Land, Island and Maritime Frontier Dispute*, cit., para. 99.

<sup>103</sup> S. FORLATI, *The International Court of Justice. An Arbitral Tribunal or a Judicial Body?*, Cham: Springer, 2014, p. 31 *et seq.*

<sup>104</sup> *Monetary Gold Removed from Rome in 1943*, cit., p. 32.

<sup>105</sup> H. THIRLWAY, *The Law and Procedure*, cit., p. 870. Cf. however B.I. BONAFÉ, *Indispensable Party*, in *Max Planck Encyclopedia of International Procedural Law*, Oxford: Oxford University Press, last update February 2018, para. 35 *et seq.*, on the different readings of the principle’s rationale.

law.<sup>106</sup> Notably in *Land, Island and Maritime Frontier Dispute* the ICJ distinguished between intervention “as a party” and “as a non-party” (a stance that finds no textual basis in the Statute).<sup>107</sup> According to the Chamber, “[t]he competence of the Court in this matter of intervention is not, like its competence to hear and determine the dispute referred to it, derived from the consent of the parties to the case, but from the consent given by them, in becoming parties to the Court’s Statute, to the Court’s exercise of its powers conferred by the Statute”;<sup>108</sup> there is therefore no need to prove the existence of a specific jurisdictional link between the intervening State and the original parties in order for intervention under Art. 62 to be admissible. At the same time, the intervening State does not automatically become a party to the case if a further jurisdictional link is missing: as the ICJ pointed out in the *Continental Shelf* case, any exception to the “fundamental principles underlying its jurisdiction; primarily the principle of consent, but also the principles of reciprocity and equality of States [...] could not be admitted unless it were very clearly expressed”.<sup>109</sup>

A different solution, whereby interveners under Art. 62 of the ICJ Statute should be considered as parties to the case, has been advocated also in light of a comparative analysis of domestic legal systems – where voluntary interveners usually qualify as parties to the proceedings.<sup>110</sup> I do not purport to take a stance on this specific issue, but one aspect is worth noting: even if one should consider that such a conclusion is correct under municipal law, automatic transposition of this “general principle of procedure” in the realm of international adjudication would raise some difficulties, precisely because of the paramount role of consent in the international context. Arguably the ICJ has taken its interpretative approach too far, thus depriving Art. 62 of its potential as a means of ensuring legal certainty in complex situations (since the judgment it renders is not deemed to be *res iudicata* between the intervening State and the original parties);<sup>111</sup> nonetheless, it is not surprising that the ICJ rejects any analogy with solutions adopted at the domestic level in this particular field as this is exactly one of the aspects where general principles of international procedure would diverge from national ones.

It is also noteworthy that consent shapes intervention in different international jurisdictional systems, albeit with very different practical outcomes. On the one hand, in-

<sup>106</sup> See only M.N. SHAW, *Rosenne’s Law and Practice of the International Court: 1920-2015*, cit., para. 355 *et seq.*

<sup>107</sup> See *Land, Island and Maritime Frontier Dispute*, cit., para. 99.

<sup>108</sup> *Ibid.*, para. 96.

<sup>109</sup> International Court of Justice, *Continental Shelf* (Libyan Arab Jamayria v. Malta), judgment of 21 March 1984, para. 35.

<sup>110</sup> A. DAVI, *L’intervento davanti alla Corte internazionale di giustizia*, Napoli: Jovene, 1985, p. 146; Davi, who was writing before the developments in the *Land, Island and Maritime Frontier Dispute* case, considered the existence of a jurisdictional link to be a requirement for intervention under both Arts 62 and 63 of the ICJ Statute (*ibid.*, pp. 194 and 255).

<sup>111</sup> S. FORLATI, *The International Court of Justice*, cit., p. 200 *et seq.*

tervention it is virtually unknown in the framework of non institutional arbitration;<sup>112</sup> on the other hand, it is fairly common in other contexts where, however, it is either more clearly framed in the form of an *amicus curiae*<sup>113</sup> or at any rate it is part of a system based on compulsory jurisdiction.<sup>114</sup>

## VI.2. GENERAL PRINCIPLES OF PROCEDURE COMMON TO DOMESTIC LEGAL SYSTEMS

In the past it seemed difficult to draw any general principles of procedure from domestic law, due to the differences in the various legal traditions.<sup>115</sup> While many of these differences are still present today, the principle of fair trial and its different components, which are embodied in human rights standards, have arguably become a common denominator applying at municipal level. This is true especially for the “equality of arms” principle, which is now considered as a key component of the right to a fair trial, with its two main ramifications pertaining on one hand to the independence and impartiality of courts,<sup>116</sup> and on the other hand the “adversarial principle”, that is the right to be heard, on a basis of equal footing with the other party.<sup>117</sup> Other components of the right to a fair trial concern the rights of access to a court,<sup>118</sup> to effective judicial proceedings within a reasonable time,<sup>119</sup> and to the finality and execution of judicial decisions.<sup>120</sup>

Not all of these principles apply to international adjudication: most notably, the right of access to a court is ensured at the international level only insofar this is in keep-

<sup>112</sup> S. YEE, *Intervention in Arbitral Proceedings under Annex VII to the UNCLOS?*, in *Chinese Journal of International Law*, 2015, p. 79 *et seq.*

<sup>113</sup> This is the case of intervention under Art. 36, para. 2, of the European Convention on Human Rights.

<sup>114</sup> See Art. 10 of the WTO Dispute Settlement Understanding (DSU); in this framework the possibility for potential interveners to begin parallel cases facilitates third party participation beyond what is mandatory under the DSU, notably by allowing their participation at the preliminary consultation stage (C. CARMODY, *Fairness as Appropriateness: Some Reflections on Procedural Fairness in WTO Law*, in A. SARVARIAN, F. FONTANELLI, R. BAKER, V. TZEVELEKOS (eds), *Procedural Fairness in International Courts and Tribunals*, cit., p. 286) and through attribution of enhanced third party rights.

<sup>115</sup> A.P. SERENI, *Principi generali di diritto e processo internazionale*, cit., p. 40.

<sup>116</sup> See Human Rights Committee (CCPR), General Comment no. 32 (2007) on the Right to Equality before Courts and Tribunals and to a Fair Trial (Article 14 of the International Covenant on civil and political rights) of 23 August 2007, CCPR/C/GC/32, para. 3.

<sup>117</sup> See the ICJ stance in *Military and Paramilitary Activities in and against Nicaragua*, cit. See also European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotins v. Latvia*, para. 119: “the adversarial principle and the principle of equality of arms, which are closely linked, are fundamental components of the concept of a ‘fair hearing’ within the meaning of Article 6 § 1 of the Convention. They require a ‘fair balance’ between the parties: each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent or opponents”.

<sup>118</sup> General Comment No. 32, cit., para. 9.

<sup>119</sup> *Ibid.*

<sup>120</sup> See European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights (civil limb)*, Council of Europe, 2019, para. 92 *et seq.*

ing with the principle of consent to jurisdiction discussed above.<sup>121</sup> At the same time, the ICJ's case law points to the fact that other components of the principle of fair trial are key features of *international* adjudication as well, and should be applied not only when this is set forth expressly by the instruments governing the activities of an international court (as is the case, notably, for international criminal tribunals).<sup>122</sup>

For instance, it was pointed out above that the ICJ has identified the independence and finality of judgments as typical features of a "truly judicial body",<sup>123</sup> and that it took its own Statute – which embodies the principle of impartiality in Art. 2 and includes a number of safeguards to effectively guarantee it<sup>124</sup> – as a model to "test" the independence of other institutions. Comparable safeguards also exist as regards other permanent international courts, but independence is a key component also of non-institutional arbitration: according to the Partial Award in the *Croatia v. Slovenia*, "Procedural fairness includes the right to an impartial and *independent* judge".<sup>125</sup>

The principle of *res judicata*, as embodied in Art. 59 of the ICJ Statute, is also considered a feature of the international judicial function although the case law of the ICJ is in itself unclear as to its scope, and oscillates between broad readings of the principle – notably in *Bosnia v. Serbia*<sup>126</sup> – and more restrictive stances.<sup>127</sup> In *Nicaragua v. Colombia* the ICJ posited: "the decision of the Court is contained in the operative clause of the judgment. However, in order to ascertain what is covered by *res judicata*, it may be nec-

<sup>121</sup> See further, S. FORLATI, *Fair Trial in International Non-Criminal Tribunals*, cit., p. 103 *et seq.*

<sup>122</sup> See Art. 21, para. 3, of the ICC Statute; Art. 21, para. 2, of the ICTY Statute; Art. 20, para. 2, of the International Criminal Tribunal for Rwanda (ICTR) Statute.

<sup>123</sup> *Effects of Awards of Compensation Made by the U.N. Administrative Tribunal*, cit. p. 52.

<sup>124</sup> See notably Art. 4, para. 1, of the ICJ Statute on the role of national groups in the Permanent Court of Arbitration in nominating candidates to the Bench; Art. 16 of the ICJ Statute stipulating restrictions to the exercise of political and administrative functions, or professional activities; Art. 17 of the ICJ Statute prohibiting the involvement in any case as an agent, counsel or advocate and setting the standard for disqualification in specific cases; Art. 18 of the ICJ Statute on dismissal. On the ICJ's independence from UN political organs see R. JENNINGS, R. HIGGINS, *General Introduction*, pp. 4-5.

<sup>125</sup> Arbitral Tribunal, *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, partial award of 30 June 2016, para. 227.

<sup>126</sup> International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, paras 135–136. See S. WITTICH, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, in *European Journal of International Law*, 2007, p. 599. See also C. BROWN, *Article 59*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS (eds), *The Statute of the International Court of Justice*, cit., p. 1561.

<sup>127</sup> See International Court of Justice, *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 11 November 2013, joint declaration appended by Judges Owada, Bennouna and Gaja.

essary to determine the meaning of the operative clause by reference to the reasoning set out in the judgment in question".<sup>128</sup> Moreover,

"[i]t is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successively submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled".<sup>129</sup>

The ICJ then concluded that in its previous judgment "it did not take a decision on whether or not Nicaragua had an entitlement to a continental shelf beyond 200 nautical miles from its coast"<sup>130</sup> – whereas the according to the joint dissenting opinion Nicaragua's claim had been rejected as the burden of proof was not met.

The objections of the dissenting judges and the uncertainties in the case law show the difficulty of identifying a generally accepted notion of *res judicata*, which may well depend on different approaches to this issue in domestic legal traditions.<sup>131</sup> At the same time Judge Greenwood has emphasised that

"[a]lthough the doctrine of *res judicata* has its origins in the general principles of law [...] it is now firmly established in the jurisprudence of the Court [...]. *Res judicata* is also well established in the case law of other international tribunals [...]. It is therefore unnecessary to examine the not inconsiderable differences which exist between different national legal systems regarding the concept of *res judicata* [...]. It is the principle of *res judicata* in international law, in particular as developed in the jurisprudence of the Court, which has to be applied".<sup>132</sup>

This is an approach that finds some support also as regards the ICJ's reading of other principles of international procedure.

Notably, the ICJ deems that also the principles of equality between the parties and of the equality of arms are part of the general principles of international procedure, where they are corollaries of the principle of sovereign equality among States – one of the "fun-

<sup>128</sup> *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., para. 59.

<sup>129</sup> *Ibid.*, para. 61.

<sup>130</sup> *Ibid.*, para. 83. The criticism by the dissenting judges (para. 19 *et seq.* of the joint declaration appended by Judges Owada, Bennouna and Gaja) related to this aspect of the Court's findings.

<sup>131</sup> S. WITTICH, *Permissible Derogation from Mandatory Rules?*, cit., p. 607.

<sup>132</sup> Joint dissenting opinion of Vice-President Yusuf, Judges Cañado Trindade, Xue, Gaja, Bhandari, Robinson and Judge *ad hoc* Brower, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast*, cit., para. 4.

damental principles underlying its jurisdiction".<sup>133</sup> The procedural components of party equality and of the equality of arms are difficult to typify rigidly; they affect the Court's composition, the possibility to respond to claims, the treatment of evidence, financial aid – and at times also indirectly safeguard other interests (such as the ones to the protection of witnesses<sup>134</sup> or to the integrity of judicial proceedings as such).<sup>135</sup> Similar considerations apply to the principle of good faith and loyalty between the parties;<sup>136</sup> to the principle of effectiveness of judicial proceedings, as it emerges notably in the ICJ case law on provisional measures;<sup>137</sup> and to the principle *onus probandi incumbit actori*.<sup>138</sup>

As was noted previously, the ICJ applies these principles of procedure on bases that are at times different from the ones relevant in domestic legal orders. On the other hand, the *IFAD* advisory opinion confirms that the principles of procedure that the ICJ applies at inter-State level (and, more specifically, the principle of party equality) play a role also as regards situations where non-State actors are involved.<sup>139</sup> In that Advisory Opinion the ICJ expressly relied on the Human Rights Committee's General Comment No. 32 in order to assess whether fair trial standards, and more specifically the principle of the equality of arms, had been respected in the very peculiar framework it was dealing with – that of advisory proceedings concerning the review of a judgment of the ILO Administrative Tribunal on a complaint brought by an employee. The ICJ stressed that "the principle of equality of parties follows from the requirements of good administration of justice" and "must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified on objective and reasonable grounds".<sup>140</sup> The flexibility granted by Art. 66, para. 2, of its Statute

<sup>133</sup> See *Continental Shelf beyond 200 Nautical Miles*, cit., para. 53 and, *supra*, Section VI.1. Cf. Institut de droit international, Resolution on *Equality of the Parties before International Investment Tribunals*, The Hague Session, 31 August 2019, Preamble.

<sup>134</sup> International Court of Justice, *Application of the Convention for the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia), judgment of 3 February 2015, para. 18 *et seq.*

<sup>135</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, cit., para. 15 *et seq.*

<sup>136</sup> See above, footnote 61 and corresponding text.

<sup>137</sup> See notably *LaGrand*, cit., para. 102: "The object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved". See K. OELLERS-FRAHM, *Article 41*, in A. ZIMMERMANN, C. TOMUSCHAT, K. OELLERS-FRAHM, C.J. TAMS (eds), *The Statute of the International Court of Justice*, cit., p. 1049 *et seq.*

<sup>138</sup> R. KOLB, *The International Court of Justice*, cit., p. 928 *et seq.*; C. SANTULLI, *Droit du contentieux international*, cit., p. 538 *et seq.*

<sup>139</sup> For international criminal law see S. NEGRI, *Equality of Arms : Guiding Lights or Empty Shell?*, in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Appraisal of Institutions and Procedures*, London: Cameron May, 2007, p. 13 *et seq.*, p. 43.

<sup>140</sup> International Court of Justice, *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, advisory



in order to safeguard party equality, by ensuring that the affected individual could make her views known in writing and by not holding a hearing,<sup>141</sup> was in line with its previous practice in this context. The ICJ did, however, also call into question the compatibility of the Administrative Tribunal of the International Labour Organization (ILOAT) review system with the “present-day principle of equality of access to courts and tribunals”, insofar as only one party, in this case the International Fund for Agricultural Development (IFAD), could seek a review of an ILOAT judgment by the ICJ, whereas the affected employee did not have a corresponding right.<sup>142</sup> While, for the reasons explained above in this pages, it would be difficult to draw from this case the assumption that the principles of fair trial, as enshrined in International Human Rights Law, apply as such also before international courts and tribunals, this case is emblematic of the convergence between standards of procedural fairness as applicable in international and domestic jurisdictional proceedings. This convergence is particularly important whenever proceedings before international courts and tribunals replace domestic remedies; in such situations individuals and other private legal persons are arguably entitled to full respect for the principle of fair trial.<sup>143</sup>

## VII. IMPLEMENTATION OF GENERAL PRINCIPLES OF PROCEDURE BY DIFFERENT INTERNATIONAL COURTS AND TRIBUNALS

The general principles of procedure mentioned above with reference to the ICJ are also applied by other international courts and tribunals, although not necessarily in an identical way. Lack of uniformity in their implementation may depend on a number of different factors. For instance, the different limitations that usually apply to the office of members of permanent and *ad hoc* jurisdictions influence the way in which the appear-

opinion of 1 February 2012, para. 44. See also International Court of Justice, *Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization*, advisory opinion of 23 October 1956, p. 86.

<sup>141</sup> *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, cit., para. 44.

<sup>142</sup> *Ibid.* See also para. 39: “While in non-criminal matters the right of equal access does not address the issue of the right of appeal, if procedural rights are accorded they must be provided to all the parties unless distinctions can be justified on objective and reasonable grounds ... In the case of the ILOAT, the Court is unable to see any such justification for the provision for review of the Tribunal’s decisions which favours the employer to the disadvantage of the staff member”.

<sup>143</sup> According to L. CARTER, F. POCAR (eds), *International Criminal Procedure*, cit., p. 8, “the consideration that the exercise of criminal jurisdiction over international crimes is primarily a prerogative and responsibility of State authorities [...] requires that the complementary exercise of such jurisdiction by international or hybrid courts must conform with the same fair trial conditions that are required and expected from States”. The same consideration would seem to apply to comparable situations beyond the area of international criminal law.

ance of impartiality is implemented in these different contexts;<sup>144</sup> and human rights courts may be more likely to shift the burden of proof or to rely on adverse inferences than inter-State courts because in that particular setting it is easier to detect structural imbalances in the position of the parties which may justify such a step.<sup>145</sup> In respect of the issue of timeliness of proceedings, according to the Arbitral Tribunal in the *Croatia v. Slovenia* arbitration procedural fairness also includes “the right to a timely decision in respect of the matters consigned to the Tribunal under the Arbitration Agreement”.<sup>146</sup> The ICJ itself has not laid much emphasis on the requirement that judicial proceedings be concluded within a reasonable time; in this and other contexts, such as the ITLOS or the WTO, the issue has been discussed mainly as one of overall efficiency of the Court’s working methods, rather than in terms of respect for parties’ rights.<sup>147</sup> Nevertheless, the *Congo v. Uganda* case discussed below shows a growing awareness of the importance of this element especially in proceedings directly affecting individual rights. It is of course true that systemic difficulties may hinder full implementation of this principle, as the experience of the European Court of Human Rights shows.

At the same time, international courts and tribunals enjoy a measure of discretion in settling issues of procedure that is not typical of contemporary national legal systems, where procedure is usually rather rigidly regulated by the legislature.<sup>148</sup> It is by now acknowledged that international courts and tribunals have an inherent power to regulate procedure, and they use it so as to ensure respect for general principles of procedure. This discretion, which led the ICJ to be described as “master of its own procedure”,<sup>149</sup> finds expression in Art. 30, para. 1, of the ICJ Statute – whereby “[t]he Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure”.<sup>150</sup> Comparable provisions are included in the constitutive instruments of

<sup>144</sup> S. FORLATI, *Fair Trial in International Non-Criminal Tribunals*, cit., pp. 111-112.

<sup>145</sup> *Ibid.*, p. 110.

<sup>146</sup> *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, cit., para. 227.

<sup>147</sup> See D.W. BOWETT, J. CRAWFORD, I. SINCLAIR, A.D. WATTS, *The International Court of Justice. Efficiency of Procedures and Working Methods: Report of the Study Group established by the British Institute of International and Comparative Law as a contribution to the UN Decade of International Law*, in *International and Comparative Law Quarterly*, 1996, p. 1 *et seq.*; R. HIGGINS, *Respecting Sovereign States*, cit., p. 121; H. CAMINOS, *The International Tribunal for the Law of the Sea*, in *The Law and Practice of International Courts and Tribunals*, 2006, p. 13 *et seq.*, p. 21.

<sup>148</sup> A.P. SERENI, *Principi generali di diritto e processo internazionale*, Milano: Giuffrè, 1955, p. 65 *et seq.* Common law judges certainly have broader flexibility in this regard than their civil law counterparts.

<sup>149</sup> See for example separate opinion of Judge Cançado Trindade, *Questions relating to the Seizure and Detention of Certain Documents and Data*, cit., para. 3.

<sup>150</sup> A greater proximity with the role of judges in domestic proceedings exists as regards Art. 48 of the ICJ Statute, which sets forth: “[t]he Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence”.

other international courts, and arbitral tribunals similarly enjoy an inherent power to regulate proceedings (albeit usually to a lesser extent than permanent courts).<sup>151</sup> This element may help in explaining the greater readiness of the ICJ and other international jurisdictional bodies to rely on general principles (including those stemming from domestic legal systems) precisely in the field of procedure.<sup>152</sup>

Judicial discretion does not imply, however, that international courts and tribunals are free to decide which procedural rules to apply. Notably the conduct of proceedings before the ICJ is governed by its Statute, by its Rules, and by other relevant instruments, such as the Practice Directions and the Resolution on Internal Judicial Practice.<sup>153</sup> The PCIJ pointed out, in this regard, that it is only when “[n]either the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court’s jurisdiction” that the Court itself “is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law”.<sup>154</sup> As this passage makes clear, neither the parties nor the Court itself may derogate from the ICJ Statute – in this specific sense, the Statute is peremptory.<sup>155</sup> Broadly speaking, general principles of procedure that are not directly embodied in the constituent instruments of a given court or tribunal are applied as a tool for interpreting statutory provisions and other applicable rules of procedure, or in order to fill any gaps. As is also suggested by the *Mavrommatis* judgment, this discretion is granted to courts so that they can ensure the “sound administration of justice”. This rather elusive principle covers considerations related to the protection of the judicial function, to efficiency and integrity of proceedings, as well as the rights of third parties,<sup>156</sup> thus counterbalancing, at least to some extent, the role of consent and of party autonomy.

The issue was recently raised by Judge Cançado Trindade in the *Reparations* phase of the *Congo v. Uganda Case*: in addressing the request by Uganda to postpone the deadline for submission of the counter-memorial, he stressed that reparations,

“in cases involving grave breaches of the International Law of Human Rights and of International Humanitarian Law, cannot simply be left over for ‘negotiations’ without time-limits between the States concerned, as contending parties. Reparations in such cases

<sup>151</sup> S. FORLATI, *The International Court of Justice*, cit., p. 19 *et seq.*, also for further references.

<sup>152</sup> B. BONAFÉ, P. PALCHETTI, *Relying on general principles in international law*, cit., p. 173.

<sup>153</sup> The latest versions of these documents are available online at [www.icj-cij.org](http://www.icj-cij.org).

<sup>154</sup> *Mavrommatis Palestine Concessions*, cit., p. 16.

<sup>155</sup> R. KOLB, *The International Court of Justice*, cit., p. 80 *et seq.*

<sup>156</sup> R. KOLB, *La maxime de la ‘bonne administration de la justice’*, in *L’Observateur des Nations Unies*, 2009, p. 5 *et seq.* For a critique see H. THIRLWAY, *Procedural Fairness in the International Court of Justice*, in A. SARVARIAN, R. BAKER, F. FONTANELLI, V. TZEVELEKOS (eds), *Procedural Fairness in International Courts and Tribunals*, cit., p. 243 *et seq.*, pp. 245-246.

are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings, – the surviving victims, and their close relatives, prolonged in time –, and the need to alleviate it”.<sup>157</sup>

The Court emphasised “the need to rule on the issue of reparations without undue delay” in its order on the time limits for the filing of the counter-memorials.<sup>158</sup>

While in this situation Uganda’s position was not shared by the Democratic Republic of the Congo, arguably in many circumstances respect for the parties’ shared choices and wishes in the management of procedural matters is actually conducive to the sound administration of justice<sup>159</sup>– as also shown by the fact that several provisions of the Statute leave specific procedural choices to the parties or require the ICJ to hear the their opinion before settling such kind of issues.<sup>160</sup> Even when this is not specifically set forth by the Statute, the ICJ leaves some room for parties’ choices, in line with the principle of party autonomy. Thus, for instance, in the *Construction of a Road and Certain Activities* cases, the Court invited the parties to “to come to an agreement as to the allocation of time for the cross-examination and re-examination of experts” within a certain deadline;<sup>161</sup> only when no agreement could be found in this respect did the Court inform the parties of its “decision in respect of the maximum time that could be allocated for the examinations”.<sup>162</sup> As this example shows, in any case, in most procedural instances party autonomy has to be exercised under the ICJ’s control: under specific circumstances the ICJ could arguably depart from the parties’ shared wishes and/or act *proprio motu* in this field, in order to protect its judicial function and for considerations related to efficiency, timeliness and integrity of the proceedings – including protection of the parties, witnesses and victims. The weight a jurisdictional body gives to each of these components varies significantly also in light of the circumstances in which it oper-

<sup>157</sup> International Court of Justice, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), declaration appended to the order of 15 July 2015, para. 7. See also Judge Cançado Trindade’s declaration appended to the order of 11 April 2016, especially para. 20; and Judge Cançado Trindade separate opinion appended to the order of 6 December 2016, which concerned the time-limits for the filing of the counter-memorials. Cf. also R. HIGGINS, *Respecting Sovereign States and Running a Tight Courtroom*, in *The International and Comparative Law Quarterly*, 2001, p. 121 *et seq.*

<sup>158</sup> International Court of Justice, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), order of 6 December 2016, cit.

<sup>159</sup> See, as regards provisional measures, S. FORLATI, *Il potere della Corte internazionale di giustizia di modificare misure cautelari precedentemente adottate: quali limiti all’esercizio della funzione giudiziaria internazionale?*, in *Rivista di diritto internazionale*, 2015, p. 903 *et seq.*

<sup>160</sup> See, for instance, Art. 26, para. 3, of the Statute on Chambers; Art. 39 thereof on the use of languages; Art. 101 of the ICJ Rules.

<sup>161</sup> International Court of Justice, *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua v. Costa Rica), *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua), judgment of 16 December 2015, paras 34-35.

<sup>162</sup> *Ibid.*, para. 37.

ates.<sup>163</sup> While the interpretative powers inherent in adjudication may at times be stretched to the limit out of consideration for such principles, it is not admissible for courts or tribunals to disregard provisions included in their constitutive instruments and that are not in themselves flexible. The question arises as to whether the ICJ, or other international tribunals, should nonetheless apply provisions that they deem incompatible with the general principles of procedure and what other option is left to them. The issue has been addressed in the *IFAD* advisory opinion,<sup>164</sup> where inconsistency with the principle of party equality stemmed directly from the “inequality of access to the Court arising from the review process under Article XII of the Annex to the Statute of the ILOAT”.<sup>165</sup> The ICJ came to the conclusion that, in light of the steps it took “to reduce the inequality in the proceedings before it, [...] the reasons that could lead it to decline to give an advisory opinion are not sufficiently compelling to require it to do so”.<sup>166</sup> While in this context the ICJ’s power of interpreting the Statute was used to avert, to the extent possible, the risk of inequality, the ICJ clearly indicated that it would have abstained from exercising its functions, for reasons of propriety, had it deemed the conflict with the principle of equality of the parties to be irredeemable. The ICJ also took similar steps in the framework of contentious proceedings (notably when applying the principle of the “indispensable third party”);<sup>167</sup> arguably, this would be open to other international courts or tribunals whenever they considered that compliance with the instruments governing their activities would be in open conflict with general principles of procedure or that the integrity of the judicial proceedings would otherwise be disrupted. This was confirmed by the Partial Award made by the Arbitral Tribunal in the *Croatia v. Slovenia* arbitration. According to this decision an international tribunal has not only, “in the absence of any agreement to the contrary [...], jurisdiction to determine its own jurisdiction”;<sup>168</sup> but also “inherent jurisdiction to decide whether the ‘arbitration process as a whole has been compromised to such an extent that [...] the arbitration process cannot continue’”.<sup>169</sup> More specifically, the Tribunal considered that it “has the

<sup>163</sup> For instance, the high number of applications pending before the European Court of Human Rights significantly influences the way it manages procedure.

<sup>164</sup> *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, cit., p. 10.

<sup>165</sup> *Ibid.*, para. 48.

<sup>166</sup> *Ibid.*

<sup>167</sup> See S. FORLATI, *The International Court of Justice*, cit., p. 113 *et seq.*

<sup>168</sup> *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, cit., para. 157.

<sup>169</sup> *Ibid.*, para. 168. This option was advocated by Croatia, as the arbitration was tainted by the inappropriate behaviour of a party-appointed arbitrator and encountered a series of other difficulties (an account of the events is *ibid.*, para. 9 *et seq.*, and para. 169 *et seq.*). See also A. SARVARIAN, R. BAKER, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, in *EJILTalk!*, 28 July 2015, [www.ejiltalk.org](http://www.ejiltalk.org) and A. SARVARIAN, R. BAKER, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, in *EJILTalk!*, 7 August 2015, [www.ejiltalk.org](http://www.ejiltalk.org).

duty to safeguard the integrity of the arbitral process and to stop that process if it cannot ensure that integrity”,<sup>170</sup> concluding however that the “procedural balance between the Parties is secured”, “on the basis of all remedial action taken” and in light of its readiness to reopen the oral phase giving “each Party a further opportunity to express its views concerning what it regards as the most important facts and arguments”.<sup>171</sup> The Tribunal further took the stance that “as long as an impartial and independent decision-making process can be guaranteed, procedural fairness requires that the process be continued, rather than be put on hold with uncertain consequences for the ultimate resolution of the Parties’ dispute”.<sup>172</sup> While both the ICJ and the Arbitral Tribunal have been reluctant to abstain from performing their functions in such circumstances, it is ultimately for each international court to assess whether this aim can be ensured appropriately in light of the circumstances of each case.

## VIII. CONCLUSIONS

Although international jurisdiction is not organised as a unitary and coordinated system, the case law of the ICJ testifies to the existence of general principles of procedure that apply to all international courts and tribunals and identify the international jurisdictional function as such. Some of these principles – specifically, the principle of consent – are inherent in the international legal order, where, moreover, especially permanent international courts enjoy broad discretion to regulate the exercise of their functions in order to attain the sound administration of justice. Other principles – notably the principles of independence, party equality, and *res iudicata* – are applied also at domestic level, where they are embodied in the notion of “fair trial”. In the *IFAD* advisory opinion the ICJ has relied on this notion to indicate that the principle of party equality applies not only in inter-State proceedings, as a corollary of the principle of sovereign equality, but also in situations where individuals or other non-State actors are involved.

However, precisely this case shows that, even when it relies on principles that apply also at a domestic level, the ICJ looks at international standards rather than domestic practice in order to identify them. International procedural law has developed on the basis on international judicial practice: Judge Greenwood’s observations in this regard are confirmed by the fact that other international courts and tribunals also deem to be bound by the general principles of procedure identified by the ICJ, although some uncertainties exist and the actual modalities of implementation of such principles may

<sup>170</sup> *In the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia*, cit., para. 183.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.* para. 227. In a rather unusual move, the Arbitral Tribunal also decided that Slovenia should provisionally cover the additional costs originated by the prolongation of the proceedings “beyond the originally envisaged timetable” (*ibid.*, para. 231, let. e)).

vary significantly. Moreover the approach of the ICJ – whereby an impossibility of reconciling the texts governing the exercise of its judicial function with general principles of procedure would lead it to decline to exercise jurisdiction – is also shared by other jurisdictions, although appropriate use of judicial discretion in matters of procedure may often avert this risk.

