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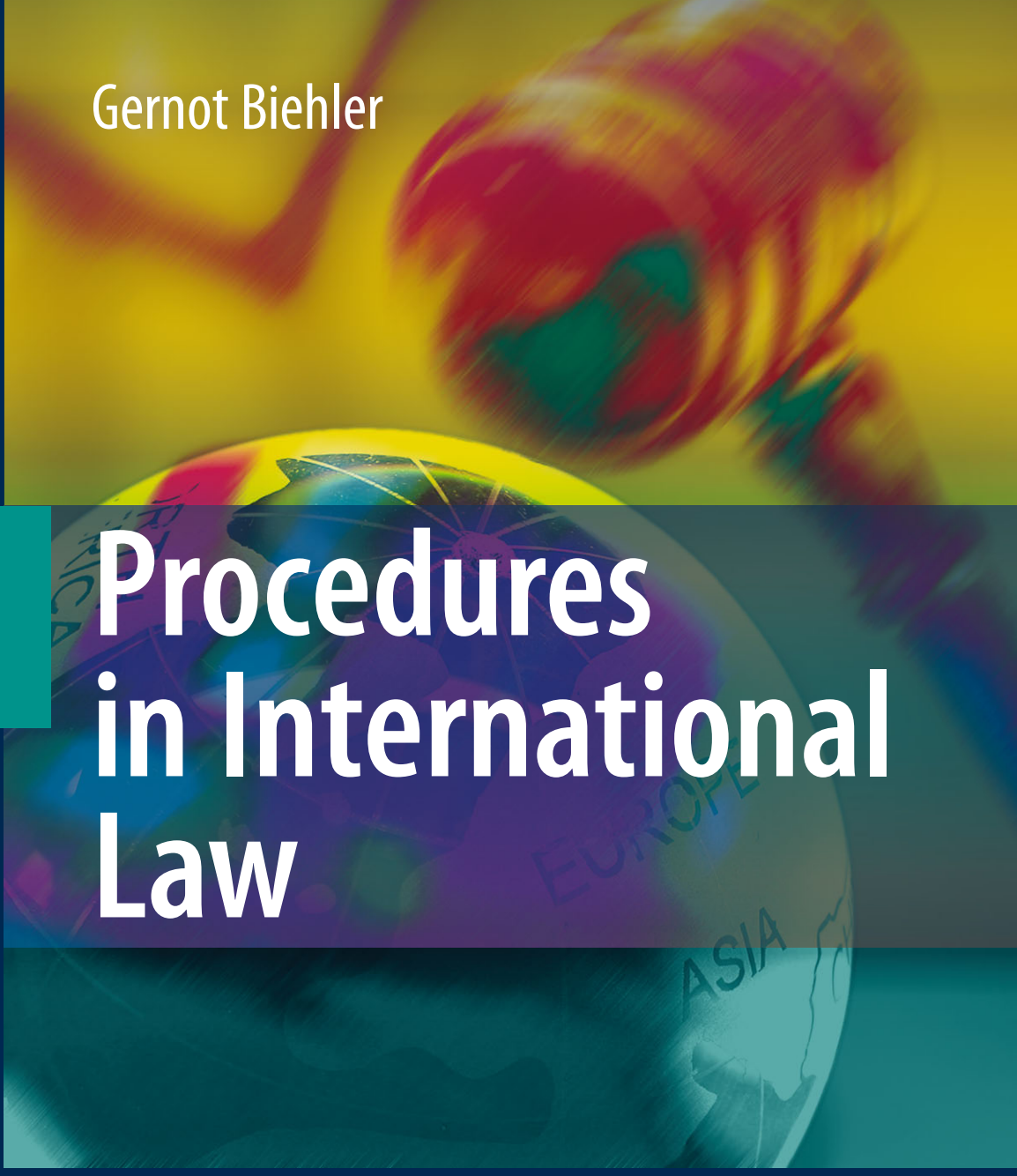

Procedures in International Law

Springer

Chapter 7

International Legal Adjudication

Traditionally, international law is primarily adjudicated upon by international judicial bodies. In particular, the decisions of the PCIJ and its successor court, the ICJ, often called the "World Court", command an unrivalled respect in the field. When considering international jurisdiction, it would be usual to start with a reference to "*The Lotus*"[1] before referring to any of the more recent and more elaborate decisions of other international or national courts. Beginning with the creation of the PCA in The Hague little more than a century ago many international courts have been subsequently established in The Hague and beyond. With the advent of international adjudication international law made an unprecedented development catching the imagination of people beyond the traditional realm of foreign policy makers and the diplomatic elite. It was assumed that international law backed up by international adjudication would eventually create and secure a global community where recourse to force was only permitted in the interest of such community and was best not encountered at all. A world of peace and prosperity was closely associated with the then recently established international adjudicative procedures which it was hoped would settle issues in interstate relationships. Possibly, the state representatives assembled in 1899 and 1907 at the invitation of the Russian Tsar, helped by the brightest lawyers of their era, who created the PCA and the basic instruments of humanitarian international law in The Hague hoped and believed so themselves. Not least the World Wars have taught them differently. The negligent treatment of the organs of the international community by those in power preparing for some military adventures is more than obvious not only in the case of the League of Nations before 1939 but in most military campaigns up to and including the intervention in Iraq by the US-British forces in 2003 or the military forces acting in Kosovo in relation to the United Nations procedures (which will be enforced most diligently by exactly those states if they consider it in their national interests to do so) or the current Colombian military operations in Venezuela and Ecuador. This naturally goes together with a certain disregard for international adjudicative bodies which is felt by some to be an embarrassment. However, their existence and procedures never came under serious threat but developed impressively on the sideline of major political events thriving on the surviving hope of many that they would contribute to a more peaceful and

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[1] *France v Turkey* ("*The Lotus*") PCIJ Ser A, No. 10.

prosperous world which it is still hoped can be achieved by international law and adjudication.

While obviously the major players make sure that none of the major internationally contentious issues ever come close to being scrutinised by the World Court or any international judicial body, the number of cases adjudicated upon internationally is greatly increasing and the sophistication of the decisions including dissenting opinions contributes immensely to the development of international law. Therefore, the traditional focus on the international courts' jurisprudence in international law is still justified to a large extent. The promise to create an integrated international global legal community on the basis of the supremacy of international law and adjudication has not been fulfilled, the not only occasional disregard of ICJ decisions (starting with Albania ignoring the *Corfu Channel*[2] holding in 1949 and most certainly not ending with the US Supreme Court's decision in *Medellín*[3] in March 2008) sends out a clear message.[4] This sidelining of international courts from major political developments by the major powers did not impinge upon the high respect for the World Court and the continuing promise of a more peaceful world vested and incorporated in its mere existence. The further development of other international adjudicative procedures with increasing success in binding the parties to their holdings is evidence of this. The WTO/DSU Panel decisions form the prime example but the IMF Conditionality, the ICAO's Standards and Recommended Practices, the IAEA standards or the FAO and UNEP's Prior Informed Consent Regimes are success stories and it cannot be denied that they have created international law with appropriate and effective international adjudicative procedures for its implementation. This increase of international adjudicative bodies gives rise to new questions. As is outlined in *Prosecutor v Dusko Tadic*:[5]

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

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2 *UK v Albania* ICJ Judgment of 9 April 1949.

3 *Medellín v Dretke* 544 US 660 (2005); *Medellín v Texas* 128 S Ct 1346, 25 March 2008, US Supreme Court.

4 Onuma Yasuaki "The ICJ: An Emperor Without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law" in Nisuke Ando *et al*., (eds.), *Liber Amicorum Judge Shigeru Oda* (New York, Kluwer Law International, 2002).

5 *Prosecutor v Tadic* 38 ILM 1518, 1541(1999); ICTY (Appeal Chamber) Judgment of 2 October 1995.

The existence of many self-contained systems creates the question of what significance one judgment has for other tribunals or courts which is usually associated with the doctrines of *res judicata* or *lis alibi pendens*. This is separately addressed as a new emerging law of conflicts in the preceding chapter.

7.1 Limits

A few common features of all international adjudication shall be mentioned before discussing the ICJ and other bodies separately.

7.1.1 Governing Agreements

Primary limits on the adjudicative power of any international adjudicative body are contained in its governing agreement often called its Statute. There is no body with a general self-determined jurisdiction like in a national system on the international plane although international courts and tribunals do decide on their own jurisdiction.[6] In the founding document, which is an international treaty between states, the jurisdiction of the body is defined and procedural provisions are either directly expressed or are deduced by reference to some rules of procedure or the competence of the court to create its own.

7.1.2 Political Nature

As with the early historical roots of national courts the creation of an international judicial body and the determination of its jurisdiction are based in certain authority or power and may be described as a sovereign or political act. Although any court or tribunal once established is independent in its actual holdings, it is determined and limited by its creating acts and its establishing authorities. Its decisions will be binding only insofar as the creating authorities are able to ensure this. This is, for example, very visible in the case of the Tribunals created by the Security Council of the United Nations, which are the ICTY and the ICTR. As excellently as their decisions may be reasoned, their political nature and direction comes to the fore not least when considering the Srebrenica massacre, which toppled a Dutch government which was seen as responsible for the Dutch soldiers not stepping in at the material moment, but did not lead to any investigation into the shortcomings of those forces by the ICTY, which were politically not considered the primary object of the ICTY focus from the perspective of the Security Council's members which created this tribunal. Although this may be criticised politically this example should make clear that the great variety of international adjudicative bodies are often more embedded in political contexts than the very settled state of adjudica-

[6] See *e.g.,* Article 36.6 of the ICJ Statute.

tion in traditional countries would allow for national courts to be. It would be remiss not to draw a related message from the biographies of the members of the benches[7] where often diplomatic political experience outweighs judicial experience. This must be partly blamed on the early stage of development which the international adjudicative bodies are in. It would not be too surprising if legal historians discover that the *Curia Regis* in Norman times had a more political stance and composition than today's courts or the *Curia Regis*' current emanation, the Privy Council. The strict professionalism of judicial bodies is a historical development and some of the international judicial bodies are still very young.

7.1.3 No Binding Force or Stare Decisis Beyond the Parties

International adjudication works *inter partes* and does not know any rule of *stare decisis.* This is expressed in the context of the ICJ in Article 59 of its Statute and the same can be said for all international bodies. It is the focus on the issue before the bench rather than on the gradual creation of consistent rules of law and their strictly equal application which informs international adjudication. This reflects very well what is said about the application of international law by national courts.[8]

7.1.4 Enforcement Issues

The question of enforcement must be raised in relation to decisions of international courts. This is linked to the fact that power is exercised by national states and all enforcement powers rest either with the consent of the judgment debtor state party to fulfil the judgment or with other usual means of reciprocal sanctions. The WTO/DSU system of authorising trade sanctions in case of disobedience of the judgment debtor is one exceptionally successful example which surpasses anything normally encountered in the enforcement of international judgments. Against the rule in Article 27 of the Vienna Convention on the Law of Treaties which reads: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty …" national laws are regularly brought forward which have the effect of disregarding ICJ decisions.[9]

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[7] Trevor C. Hartley "The Modern Approach to Private International Law – International Litigation and Transactions from a Common-Law Perspective" in (2006) 319 *Recueil des Cours* p. 41 made this point in relation to the "civil law" upbringing of the ECJ judges. See generally Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 110, especially footnote 70.

[8] *Trendtex Corporation v Central Bank of Nigeria* [1977] 1 All ER 881 *per* Lord Denning MR. Nathan Miller "An International Jurisprudence? The Operation of 'Precedents' across International Tribunals" (2002) 15 LJIL 483.

[9] *Germany v US* (*LaGrand)* ICJ decision of 27 June 2001; *Medellín v Dretke* 544 US 660 (2005) (US Supreme Court).

The US Supreme Court gave a prime example of this weakness in terms of the enforcement of international judgments in *Sanchez-Llamas v Oregon*.[10] Chief Justice Roberts speaking for the majority, while stating that although the ICJ's interpretation required "respectful consideration",[11] concluded that this did not compel the court to reconsider its understanding of the Vienna Convention on Consular Relations of 1963 as non binding on national courts of the United States. He continued as follows:

> "Nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts. The ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case,' Statute of the International Court of Justice, Art. 59, 59 Stat. 1062, T.S. No. 993 (1945) (emphasis added). Any interpretation of law the ICJ renders in the course of resolving particular disputes is thus not binding precedent even as to the ICJ itself; there is accordingly little reason to think that such interpretations were intended to be controlling on our courts. The ICJ's principal purpose is to arbitrate particular disputes between national governments. Id., at 1055 (ICJ is "the principal judicial organ of the United Nations"); see also Art. 34, id., at 1059 ("Only states [i.e., countries] may be parties in cases before the Court"). While each member of the United Nations has agreed to comply with decisions of the ICJ "in any case to which it is a party," United Nations Charter, Art.94(1), 59 Stat. 1051, T.S. No. 933 (1945), the Charter's procedure for noncompliance-referral to the Security Council by the aggrieved state-contemplates quintessentially international remedies, Art. 94(2), ibid."

The most recent case in this area which again confirms the US Supreme Court's view in *Sanchez-Llamas* on the issue is *Medellín v Texas*,[12] decided in March 2008.

This inherent weakness in terms of enforcing international judgments is due to the fact that usually it will be necessary to proceed through the national authorities of the judgment debtor state. The latter will not always be willing to adhere to such judgments as the examples show. In particular, the reference of the US Supreme Court to the enforcement procedure for ICJ judgments by reference to the Security Council according to Article 94.2 of the UN Charter exposes the weakness of the international adjudicative system even more as the US has a veto in the Security Council according to Article 27 of the UN Charter which until now discouraged any reference to the Security Council under Article 94.2.

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[10] 548 US 331 (2006).

[11] Referring to *Breard v Greene* 523 US 371, 375 (1998).

[12] 128 S Ct 1346, 25 March 2008.

7.2 Strengths of International Adjudication

All international adjudication will always show how far the "real powers" are willing to cede some authority to established judicial procedures. Therefore, international adjudication paints a very real picture of the state of international affairs in terms of not condoning its deficiencies by any pretence**.** Political direction, "good boy" or "bad boy" exceptions, victimisation and many other vices detectable in certain international procedures inevitably reflect certain powers and authorities at work which shape international relations and would otherwise be less visible but by no means non-existent. A comprehensive overview of international adjudication gives more insights into the state of international relations and law than national procedures can ever reveal. This starts with a brief look at the international issues which do not come to any international adjudication, Afghanistan, Kosovo, Guantanamo or Iraq or the listing practice of the Security Council to name but a few which makes clear that these issues stay firmly in the political realm and are understood by their authors not to by subject to any kind of judicial review. While the international adjudicative system's weakness is mostly connected with the enforcement issue its strength in comparison with national courts' adjudication is related to this weakness which from a different perspective reflects strength. It is closely connected with the states' positions reflecting the state of international law as it actually stands. What is so obvious from the perspective of international adjudication leaves national courts regularly in the lurch. They cannot handle this with the ease observed internationally; they are caught by their doctrines requiring them to provide substantive judicial review when this is actually impossible.[13] *Honi soit qui mal y pense*.

7.3 The International Court of Justice

Although there are a number of treaties which provide for legal proceedings it is the International Court of Justice in The Hague which as the principal judicial organ of the United Nations[14] is possibly the best known and most widely respected international judicial institution.[15] This does not mean that ICJ proceedings are more significant than those of other judicial bodies. At times the EU or NATO may seem more powerful than the UN, and the European Court of Justice in Luxembourg or the Geneva Panels of the WTO may often attract greater attention than

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[13] The decision in *Kadi* of the European Court of First Instance, Case 315/02, which is currently pending on appeal before the ECJ as Case C- 402/05 provides evidence of this.

[14] So labelled in Article 92 of the UN Charter.

[15] In Article 57, para. 1 of the UN Charter all other organisations both prior and later ones are labelled "specialised agencies of the United Nations" thus creating the idea of a global network of organisations with the UN at its centre.

the ICJ having a more integrated and efficient procedure in their fields. This would equally apply to the numerous human rights bodies, the most prominent being the ECtHR in Strasbourg. However, it is the ICJ which is truly a global judicial body and, in contrast to other institutions, is unrestricted in terms of subject matter or geography. While the various tribunals, panels and courts in the international arena are gaining significance, the ICJ is still seen by many as the leading international adjudicative institution and certainly sees itself in these terms. This comes from its status as the principal judicial organ of the United Nations,[16] an organisation which is the only one with global membership where all existing states are members. Many of the ICJ features may be taken *pars pro toto* for all international adjudication which justifies treating ICJ procedures more thoroughly while taking note of the other bodies too.

7.3.1 Jurisdiction and Proceedings

The ICJ hears proceedings when the parties agree to submit an issue to its jurisdiction under one of the headings of its Statute's Article 36. The ICJ has no original jurisdiction and only the explicit and voluntary submission of a defendant in a given case will establish the Court's jurisdiction. With it the ICJ procedures more often than not preserve their character of agreed arbitration. The lack of original jurisdiction is reflected in the fact that not even the UN itself is subject to ICJ jurisdiction,[17] despite describing the Court in its Charter as the principal judicial organ of the United Nations.[18] Considering the UN's immunity before any other courts,[19] this leaves many highly contentious acts such as the Security Council's sanctions regimes virtually beyond all judicial scrutiny. Even in the area of interstate dispute resolution the ICJ has no jurisdiction which remotely resembles that which its national cousins enjoy. While the ICJ Statute[20] provides for unconditional general submission to its jurisdiction neither the US nor the UK, France, China, Russia, Japan, Germany nor any African state has taken this step.[21] This limited scope of jurisdiction excludes all those issues where states feel uncomfortable submitting their actions to judicial scrutiny. In this regard anything remotely connected with Anglo-American activities in and around Iraq will hardly appear on the Court's

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16 Article 93 of the UN Charter.

17 Article 34, para. 1 of the ICJ Statute: "Only states may be parties in cases before this Court."

18 Article 92.

19 Article 105 of the UN Charter and the Convention on Immunities of the UN. However, a remarkable exception before the courts of the US will be discussed in context *infra.*

20 Article 36, paras. 1 and 3.

21 Those states who originally did, *e.g.* the US (albeit with a proviso , the "Connolly-Amendment") withdrew it at the first opportunity when this submission was invoked, see *Nicaragua v US* (Preliminary stage) [1984] ICJ Rep 14.

docket. Instead, it is territorial delineation usually in remote areas lacking economic significance which is left to the adjudication of the ICJ. Where politics is at issue, however, such as in relation to the Kuriles Islands between Russia and Japan, the Chinese Sea or the Falklands, territorial disputes will not come before the Court.

While acknowledging its global significance, therefore, the ICJ is an option available to states on a case by case basis without general jurisdiction and therefore resembles more a permanent court of arbitration than any national supreme court. It is useful to note the views of Malcolm Shaw in this respect:

> "Finally, many practitioners and States feel a generalised obligation to further the success of the Court as an organ of the international community from a perception or feeling of responsibility to that community. Judges, international practitioners, both private and governmental, and academics are bound together in this sense."[22]

It is critical to distinguish between the international spirit and the cause of justice promoted by the ICJ and the administration of justice by the court as reflected in its procedures.

7.3.2 Binding Force of Judgments and Enforcement Procedures

Jurisdiction is regularly contested and is in most instances, therefore, the primary procedural issue. Where jurisdiction is established without the defendant's actual agreement, judgments will inevitably be frustrated. For example, an injunction, usually called an interim measure[23] or the incidental jurisdiction[24] in the international context, issued by the ICJ against the US prohibiting the administration of the death penalty in a particular case before the conclusion of the court's proceedings was ignored as already indicated in *Medellín*[25] and *Sanches*.[26] Similarly, Israel disregarded the holding of the ICJ that the wall under construction between the West Bank and Israel was illegal.[27] Neither the binding nature of the decisions

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[22] Malcolm N. Shaw, "A Practical Look at the International Court of Justice", in Malcolm D. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford, 1998) p. 11, 13.

[23] According to Article 41 of the ICJ Statute.

[24] John G. Merrills, "Reflections on the Incidental Jurisdiction of the International Court of Justice" in Malcolm D. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford, 1998) p. 51.

[25] *Medellín v Dretke* 544 US 660 (2005); *Medellín v Texas* 128 S Ct 1346, 25 March 2008, US Supreme Court.

[26] *Sanchez-Llamas v Oregon* 548 US 331 (2006).

[27] HCJ 7957/04 *Mara'abe v Prime Minister of Israel* Judgment of 15 September 2001.

nor the existing enforcement provisions[28] appear to have encouraged compliance by states. Significantly, enforcement procedures for ICJ decisions provided for in Article 94, para 2 of the UN Charter have never been invoked reflecting a general consensus that judicial enforcement is simply not a recognised element of inter-state procedures.

A judgment is not binding except between the parties and in respect of the particular case.[29] Even the *ratio decidendi* has no value as precedent and the principle of *stare decisis* does not seem to apply. In this sense, ICJ judgments are not law but just create obligations *inter partes et inter se*.[30] The legal status of ICJ judgments contrasts sharply with that of judgments of national courts in the area of national law. It is exemplified by not according international judgments a status pursuant to Article 38, para.1 (d) of the ICJ Statute comparable with treaties, custom and general principles but instead according them the status of scholarly articles or academic publications.

The Court's special position as the most traditional international judicial body or tribunal stems from its history. Like its predecessor, the Permanent Court of International Justice, it was intended to further integration and global peace and security, and it was intended that its decisions would be binding. The idea was to establish an international judiciary and this is reflected in the membership of the Court. States' willingness to submit to the Court's jurisdiction pursuant to Article 36, para. 2 of its Statute suggested such an aim was achievable. However, all these declarations are gone, withdrawn or rendered ineffective. If a forgotten compulsory submission clause in a treaty stemming usually from the historical period of the aftermath of a war comes to the fore it may serve still to establish jurisdiction but will inevitably be withdrawn at the earliest opportunity.[31]

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[28] Article 94 of the UN Charter: "1. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. 2. If a party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

[29] Article 59 of the Statute of the ICJ.

[30] G. Fitzmaurice "Some Problems Regarding the Formal Sources of International Law" in *Symbolae Verzijl* (The Hague, La Haye 1958) p. 153, 157-160. See Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice* (Cambridge, 2005) p. 48 with reference to Heinrich Triepel.

[31] The highly visible and symbolic beginning of this general withdrawal of submissions began with US President Reagan's withdrawal from the Article 36.2 submission after the *Nicaragua v US* case, text of the declaration of 7 October 1985 in 24 ILM 1742 (1985), followed by similar steps after the *Oil Platform* and the *Avena/LaGrand* cases in relation to the special submissions to the Iran-US Friendship Treaty of 1955 and the 1st Add. Protocol to the VCCR 1963 respectively.

7.3.3 Function and Labelling

There is a long tradition of political labelling of judicial institutions which does not always accurately reflect these bodies' true functions. The institution which existed before the ICJ's predecessor and which is still in existence today, the Permanent Court of Arbitration in The Hague, is a case in point. This aimed to maintain global peace through international adjudication and law as a reliable alternative to warfare.[32] It was established under the 1899 and 1907 Conventions for the Pacific Settlement of International Disputes which codified the law of interstate dispute settlement.[33] In Articles 15 of the 1899 and Article 37 of the 1907 Convention this was defined as having "as its object the settlement of disputes between States by judges of their own choice on the basis of respect for law." This is usually taken as a definition of international arbitration, although it also sums up the work of the ICJ. The links between the two institutions have been formalised; Article 4 of the ICJ Statute gives the Permanent Court of Arbitration an explicit role in the judges' nomination process. Furthermore, Article 31 of the Statute provides that the parties may choose a judge for their case. In chamber proceedings[34] "the number of judges to constitute such a Chamber shall be determined by the Court with the approval of the parties". Rosalyn Higgins, once President of the Court, comments on this:

> "… although, formally, any Chamber will consist of five judges selected by the President, in reality those judges will be selected with the joint agreement of the litigating parties."[35]

A German professor and former legal adviser to the *Auswärtiges Amt* made a pronouncement in similar terms.[36] Therefore, striking similarities between ICJ proceedings and international arbitration can be seen.

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[32] Hans Wehberg, *The Problem of an International Court of Justice* (Oxford, 1918) pp. 128 – 171; Heinrich Triepel, *Die Zukunft des Volkerrechts* (Leipzig, 1916) p. 13 *et seq*.

[33] Manley O. Hudson, *The Permanent Court of International Justice*, *1920-1942* (2nd ed., New York, 1943) p. 4.

[34] Article 26 ICJ Statute and Article 17 of the Rules of Procedure of the ICJ.

[35] Rosalyn Higgins, "Remedies and the International Court of Justice: An Introduction" in Malcolm D. Evans (ed.) *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford 1998) p. 6.

[36] Herrmann Mosler, "Eine allgemeine, umfassende, obligatorische, internationale Schiedsgerichtsbarkeit: Das Programm des Grundgesetzes und die internationale Realitat" in Hailbronner, Ress, Stein (eds.) *Festschrift Fur Karl Doehring* (Springer Verlag Berlin, Heidelberg, New York, 1989) p. 607, 614: "Dieser Vorgang trägt Züge der Bildung von Schiedsgerichten."

7.3.4 Character of an Arbitral Award

This conclusion is at odds with the outlook of those who focus on the political role of the Court. Equating its proceedings with arbitration appears to downgrade the intended role of the Court as a primary, permanent and global judicial body on a global scale, a Supreme World Court. However, a clear distinction must be drawn between the procedural and the substantive political stances. The political stance adopts the national legal distinction between arbitration and adjudication and assumes the same distinction exists in an international law context. Recourse to arbitration in the national context often reflects the failure of formal legal procedures to meet the needs of the parties; it is deemed too slow or too expensive. However, such a view has no place in the field of interstate dispute settlement. While international courts are without comprehensive compulsory jurisdiction, all interstate judicial settlement procedures will to a large degree possess the features of arbitration in a national context which is *ad hoc* and consensual. Endowing the Hague institution with the latter characteristic is a mark of the political desire for integrated and compulsory interstate adjudication in the future. It should be said, however, that the procedures followed there do largely reflect a formalised method of arbitration.

The Court's procedure may therefore be characterised as consensual and adversarial but never obligatory.[37] It is slow to employ measures which would never be enforced anyway.[38] The Court will always try to ensure that procedure does not prejudice either party, particularly in terms of the establishment of facts or applicable law.[39] The ICJ Statute provides only for a loose framework. The Rules of

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[37] Earlier hopes after the 2nd World War at the launching of the ICJ of convincing a large number of States to submit generally and unconditionally to the Court's jurisdiction according to Article 36, para. 2 and 3 of its Statute and to generate through these submissions something closer to an international compulsory jurisdiction and with it a proper adjudication of conflicts comparable to national jurisdiction did not materialise despite earlier indications to this end. The main stages of this withdrawal from anything which may have led to a more compulsory adjudication of interstate disputes were the *Nicaragua v US* case, text of the US declaration of withdrawal of 7 October 1985 in 24 ILM 1742 (1985). See also the similar steps taken after the *Oil Platform* and the *Avena/LaGrand* cases in relation to the special submissions to the Iran-US Friendship Treaty of 1955 and the 1st Add. Protocol to the VCCR 1963 respectively.

[38] See the cautious approach to issuing a default judgment in Article 53.2 of its Statute. This provision makes clear that it is neither an adversarial nor a compulsory procedure followed by the Court. In *Nauru v Australia*, Preliminary Objections [1992] ICJ Rep 240, 253 *et seq*. the ICJ took the view that international law did not lay down any specific time limits for proceedings and that it was for the Court to determine "whether the passage of time renders an application inadmissible." The most striking example is the disregard of the Court's halt to the execution of the two German nationals by the USA in *Germany v USA* (*LaGrand*, interim measures) [2001] ICJ Rep 466.

[39] *Nauru v Australia loc. cit*. *infra* p. 255.

Procedure set out in Article 30 grant wide discretion to the judges. It is intended to create resolutions which save face, address needs and in general bring about a mutually satisfactory settlement. Although the Statute provides that the Court shall make all arrangements connected with the taking of evidence,[40] may call upon counsel to produce any document or to supply any explanation[41] or may at any time establish an enquiry mechanism or commission an expert opinion,[42] it lacks a means of enforcement. No evidence or witness may be compelled or supoenaed by the Court. There are no exclusion rules or anything comparable to the national contempt of court rules enforcing procedural orders.[43] No leave to serve proceedings or to seek evidence can be granted except through the State upon whose territory the notice has to be served or the evidence procured[44] and the State concerned has full discretion to grant such a request. Where consensus breaks down, one party usually abandons proceedings, rendering the case meaningless.

Furthermore, the peace keeping function of international adjudication as originally envisaged after the World Wars would require the main issues of international friction to be addressed by the Court to further their solution on the basis of international law integrating the international community of states towards containing the arbitrary use of force by the stronger states. However, no such issues have ever been subject to any form of adjudication by the Court: the Berlin Airlift 1948, the Berlin Wall from 1961 to 1989, the Hungarian Uprising 1956, the status of the Suez Canal and its possible illegal seizure by Nasser, the Cuban Missile Crisis 1963, the Prague Spring 1968, the rights of the Turkish minority in Cyprus, Trieste, Apartheid, Vietnam, the Kuriles Islands, Cambodia, Israel, Iraq were never examined by the Court. It would seem that dealing with such issues would have promoted the stated aim of securing peaceful settlement by adjudication. Instead, territorial delimitations continue to form possibly the largest share of the Court's work today.[45] In this sense ICJ proceedings are somewhat similar to those initiated in classical interstate arbitration. The types of cases that the ICJ usually

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[40] Article 48.3.

[41] Article 49.

[42] Article 50.

[43] K. Highet "Evidence, the Court and the Nicaragua Case" (1987) 81 AJIL 1, 10; S. Schwebel, "Three Cases of Fact-Finding by the International Court of Justice" in S. Schwebel, *Justice in International Law* (CUP, Cambridge, 1994) p. 125; K. Highet "Evidence and Proof of Facts" in L.F. Damrosch (ed.), *The International Court of Justice at a Crossroad* (Transnational Publishers, Dobbs Ferry, New York, 1987) p. 355.

[44] Article 44 of the ICJ Statute.

[45] Rosalyn Higgins, "Remedies and the International Court of Justice: An Introduction" in Malcolm D. Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford 1998) p. 7: "…the Court has a very strong record in this subject area. Even now, out of ten cases currently on its docket, some three concern boundary issues. The jurisprudence is both heavy and well settled: the Court is extremely well placed to apply the law it has done so much to establish."

decides are the same kind as traditionally handled by the Permanent Court of Arbitration. The rather non political territorial demarcations which have not led to a full-blown dispute between states are the most common class of case successfully decided by the Court.

7.3.5 Submission to Jurisdiction

The Court can do only what States permit it to do. The example of the 1949 West German Constitution (*Grundgesetz*) is useful in this regard. It provides that Germany should submit to the compulsory jurisdiction of the ICJ.[46] This was then termed a "general, obligatory, international jurisdiction of a court of arbitration." Arbitration described the function of the ICJ. However, interestingly, Germany never declared its submission to the ICJ's jurisdiction under Article 36.2 of its Statute nor to any other comparable body of international obligatory adjudication or arbitration. This omission may be seen not to be in line with German constitutional law, however, despite the strong incentive of a constitutional provision urging general submission the German practice just not to submit to the ICJ jurisdiction is in line with the practice of most States which do not have to overcome a constitutional obstacle to stay clear of any compulsory adjudication in interstate relations as Germany does.

One reason for preserving the character of arbitration is the detailed, insightful judgments which help to promote a greater understanding of international law. This occurred in the *Nicaragua v US*[47] (merits) case of 1984 and again in respect of the *Congo v Belgium*[48] case in 2002.These elaborate judgments are intended to inform the concept of international law and are noted for this more so than their *ratio decidendi*. It is, however, doubted by Lauterpacht that "the supposedly rigid delimitation between *obiter dicta* and *ratio decidendi* [is] applicable to a legal system [not] based on the strict doctrine of precedence." [49]

This interplay between the *ad hoc* and flexible approach towards arbitration and the somewhat more defined ICJ procedures may be observed in several cases. Disputes came before the ICJ which were the subject of bilateral negotiations and debates in the Security Council of the United Nations.[50] While a case was pending be-

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[46] Artikel 24 Abs. 3 des Grundgesetzes: "Zur Regelung zwischenstaatlicher Streitigkeiten wird der Bund Vereinbarungen über eine allgemeine, obligatorische, internationale Schiedsgerichtsbarkeit beitreten."

[47] *Nicaragua v USA* (Merits) [1986] ICJ Rep 14.

[48] ICJ, 14 February 2002.

[49] It had been even denied by Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens, London 1958) p. 61 that the distinction between *obiter* and *ratio* has any meaning in the international context without the rules of precedence applying to the ICJ decisions.

[50] *Greece v Turkey* (*Aegean Continental Shelf*) [1978] ICJ Rep 3, para. 29.

fore the ICJ[51] the UK and Iceland concluded an agreement on the matter through bilateral negotiations. The existence of this agreement was naturally considered by the Court after its conclusion during the hearing on the merits. Several judges asked counsel whether the agreement between the parties rendered the proceedings before the court meaningless. The UK indicated that the judgment might be helpful to ongoing negotiations on long term arrangements beyond the present agreement between the parties. The Court asserted that such agreements should be encouraged as being in line with the aim of the UN to support the peaceful settlement of disputes.[52] There was no incompatibility between ICJ adjudication and other means of settlement nor any hierarchy as the Court did not have the final say on bilateral agreements between the parties when continuing its procedures until judgment. The issue of the bridge over the Danish Straits (Great Belt) was settled entirely by an agreement between the parties reached just before the date fixed for a hearing.[53]

7.3.6 The UN and Individuals Before the ICJ

There is consensus that only states may be parties to cases before the ICJ as Article 34.1 of the ICJ Statute expressly prescribes this. This is particularly relevant to not subjecting the United Nations Organisation in its dealings to international adjudication. Combined with its general immunity the UN and other international organisations act without any kind of external judicial review of its acts.

It is submitted that this immunity expressed in Article 34.1 is inappropriate in this absolute form as there is no residual jurisdiction which could address any issue arising before independent courts.[54] This absolute immunity is unlike that enjoyed by states which only enjoy immunity for their acts of state in other jurisdictions relative to other states but never absolutely; it is their home state jurisdiction which may kick in when other jurisdictions are barred by immunity from adjudicating. The case of *Pinochet* who was eventually tried before the courts of his country as opposed to those of England or Spain gives an example. In relation to the UN it is interestingly the US which is the only state not party to the UN immunity convention leaving it to the US courts (subject to the seat state agreement between the US and the UN which contains some relevant provisions) to exercise some jurisdiction over the UN. Although this is not practised the fact that the US is not party to the relevant convention may not be entirely accidental. If the ICJ were given jurisdiction to hear cases against the UN *de lege ferenda*, maybe the Security Council's listing procedures would be better served than before benches more remote to the dealings of the Organisation such as the ECJ.[55]

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[51] *UK v Iceland* (*Fisheries Jurisdiction*) (Merits) [1974] ICJ Rep 3.

[52] *Ibid.* at 41.

[53] *Finland v Denmark* Order of 10 September 1992 [1992] ICJ Rep 348.

[54] It also creates serious difficulty in terms of adjudicating indirectly on UN activities as currently pending in *Kadi v EU*, ECJ (Case C-402/05).

[55] *Kadi v EU* (Case C-402/05).

Individuals seem to be excluded from access to the ICJ. However, leaving aside the diplomatic protection which states may give to individual interests in proceedings before the ICJ[56] sometimes the individual may have *locus standi* before that court as some will be surprised to learn. Although the ICJ website reads: "The Court has no jurisdiction to deal with applications from individuals, non-governmental organizations, corporations or any other private entity. It cannot provide them with legal counselling or help them in their dealings with the authorities of any State whatever," it must be admitted that it can have exactly this function if the UN General Assembly chooses to ask for it. It judicially reviewed the Administrative Tribunal's decision on the application of an individual. In its Advisory Opinion concerning the application for review of Judgment No. 333 of the United Nations Administrative Tribunal, the Court decided that the United Nations Administrative Tribunal[57] did not fail to exercise the jurisdiction vested in it and did not err on any question of law relating to provisions of the Charter. This special review procedure is remarkable as is the decision of the ICJ in the case.[58]

7.4 The Court of the Commonwealth of Independent States

With the demise of the Soviet Union 1991 the Commonwealth of Independent States (CIS) was established by all former member states of the Soviet Union except the Baltic States. The Organisation created a court by Agreement signed in Tashkent (Uzbekistan) on 15 May 1992. Article 5 of the Agreement provides:

> "The Commercial Court of the Commonwealth shall be created for the purpose of the settlement of interstate economic disputes, which are not justiciable by the highest national courts of arbitration and commercial courts …".

The Treaty on Creation of an Economic Union[59] provides in Article 31:

> "The Contracting Parties pledge to resolve their disputes in respect to interpretation and implementation of the present Treaty by means of negotiations or through the Economic Court of the Commonwealth of Independent States. If the Economic Court finds that a

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[56] *Canada, Belgium v Spain* (*Barcelona Traction*) [1970] ICJ Rep 3.

[57] *Yakimetz v Secretary-General of the United Nations* Judgment No. 333 of 8 June 1984 (AT/DEC/333).

[58] See Biehler*, International Law in Practice* (Thomson Round Hall, 2005) pp. 191-193.

[59] Signed in Moscow by Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgystan, Moldova, Russian Federation, Tajikistan, and Uzbekistan. Tukrmenistan and Ukraine did not sign the treaty, but became associate members, with Turkmenistan becoming a full member on 24 December 1993. Georgia became a full member in October 1993.

> State Member of the Economic Union has failed to fulfil an obligation under the present Treaty, the State shall be required to take necessary measures to comply with the judgment of the Economic Court. The Contracting Parties shall work out and conclude a special agreement on the procedures for deliberation of disputed issues in respect to economic relations of the entities of the Member States of the Economic Union, as well as on a system of sanctions for non-fulfilment of the assumed obligations. If the Contracting Parties fail to resolve their disputes by means of negotiations or through the Economic Court of the Commonwealth of Independent States, they have agreed to resolve them in other international judicial bodies in accordance with their respective rules of procedure."[60]

The Court's jurisdiction to interpret international norms and instruments can be exercised during decision making in contentious cases as well as on independent "requests from highest levels of government of the member-states, institutes of the CIS, highest commercial courts and courts of arbitration and other highest bodies, that deal with economic disputes on a domestic level."[61] This latter list of institutions that have a right to request advisory opinions has been in practice extended to include non governmental organisations.[62]

As the ICJ reflects the state of international affairs in its judgments the Court of the CIS reflects the state of the countries within its jurisdiction. A rich jurisprudence on custom, military personnel and free movement has evolved which seems to be observed by the states.[63] However, the more politicised questions not only of oil transfers between the states concerned but even of customs duties applied to vodka are not brought before the court, which openly retains its character as an arbitration institution. The right of non governmental organisations to ask the court for advisory opinions has not yet been employed.

7.5 Other International Adjudicative Bodies and Their Procedures

Having introduced a general framework and probably the most high profile and a more obscure example of institutionalised adjudication on the international plane, an overview of the general effect which international adjudication procedures render to the benefit of international law may be useful.

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[60] 34 ILM 1309 (1995).

[61] 1992 Regulation Art 5 § 2; note: unofficial translation of the provision.

[62] Case -1/2-96 as quoted in Gennady M. Danilenko "The Economic Court of the Commonwealth of Independent States" (1998-1999) 31 NYU Journal for Int'l & Po 893, 904 who gives general information on the Court.

[63] http://www.worldcourts.com/eccis/rus/decisions/ (visited 29 May 2008).

7.5.1 The Effect of the Variety of International Adjudicating Bodies

International adjudication is a recent invention. As outlined before it emerged on a global level only about one hundred years ago with the establishment of the PCA and certainly with the PCIJ. Until very recently only the ICJ, PCA, ECJ, ECtHR, the Andean Court[64] and the IACtHR existed. Particularly after the termination of the division of the world into an eastern and western political bloc after 1990 a number of international instruments established several judicial panels, tribunals and courts. In the commentary on a current overview which is given of all existing judicial benches on the international level,[65] it is rightly outlined that the greatest challenge is to portray what can be called, although it is an oxymoron, "an anarchic system" without exaggerating its level of order. The grouping and sub-grouping of all these bodies and mechanisms into a taxonomy does not imply the existence of an "international judicial system", if by system it is meant "a regularly interacting or interdependent group of items forming a unified whole" or "a functionally related group of elements". Many more bodies have been created since 1990 including the panels and the Appellate Body of the WTO/GATT in 1994,[66] the Court of Conciliation and Arbitration of the OECD[67] and the International Tribunal for the Law of the Sea (ITLOS) in Hamburg in Germany.[68] Arbitral arrangements with a certain permanent character outside the PCA have also emerged in the framework of NAFTA,[69] the Mercosur[70] dispute settlement system, the Energy Charter Treaty,[71] the World Bank Inspection Panels[72] and its Inter-American and Asian counterparts,[73] while the Caribbean Court of Justice[74] for the CARICOM States is the final court of appeal for member states of the Caribbean Community.

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64 Andean Treaty (Cartagena Agreement) 18 ILM 1203 (1979), which entered into force in 1984.

65 Project on International Courts and Tribunals PICT, comment by Cesare Romano at http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf (visited 29 May 2008).

66 1867-9 UNTS 1.

67 Convention on Conciliation and Arbitration within the conference on Security and Cooperation in Europe OECD of 15 December 1992, 32 ILM 557 (1993).

68 UNCLOS, 1833 UNTS 3, Annex VI (ITLOS Statute).

69 North American Free Trade Agreement (US, Canada and Mexico) 32 ILM 289, 605 (1993).

70 Treaty establishing the Common Market between Argentina, Brazil, Paraguay and Uruguay (Treaty of Asuncion) 30 ILM 104 (1991); Protocol for the Settlement of Disputes 36 ILM 691 (1997).

71 34 ILM 360 (1995).

72 34 ILM 520 (1995).

73 Inter-American Development Bank. Decision on Independent Investigation Mechanism, 10 August 1994, Minutes DEA/94/34/sec 142; Philippe Sands, Ruth Mackenzie and Yuval Shany (eds.) *Manual on International Courts and Tribunals* (Butterworths, 1999) pp. 313-317.

In the field of international criminal law the ICC, ICTY and ICTR[75] operate in the sphere of human rights protection[76] and many other judicial bodies have also emerged.[77] There is not only an increase in numbers of institutions of this kind but also in recourse to most of these courts and tribunals. In the 1970s the ICJ had, for example, usually one or two cases pending whereas now there are ten times as many awaiting decisions. More than 300 disputes have been referred to the WTO dispute settlement panels since 1995 when the new system with a more effective enforcement mechanism was set up. The same tendency may also be observed in relation to other tribunals. It is not accidental that this tendency goes together with the end of the east/west divide after 1990. States are more ready to leave more to adjudication as less questions seem to relate to the core political values which states are eager to protect from external evaluation. Another aspect is the international authority of international adjudication which has been welcomed as giving legitimacy to certain state action. It is a way to explore mutually acceptable solutions which are increasingly sought after.

However, the disadvantages of a non-integrated system should not be underestimated. Although the conflicts within international adjudication shall be addressed separately in the final chapter, some features should be mentioned in this context.

The ICTY Appeals Chamber expressly disregarded the ICJ jurisprudence on state responsibility in *Tadic*.[78] At issue was whether some acts of others could be attributed to the accused and whether some of his acts could or must be attributed to the state of Yugoslavia. Acts of private individuals and groups not part of the state hierarchy (for example, independent guerrilla fighters) had previously been the subject of judicial consideration by the ICJ.[79] The ICJ held that the US cannot be held responsible for the acts of some opposition guerrilla fighters (the "Contras") in Nicaragua despite the heavy financial and other support rendered to their fighting by the government of the US. The threshold for assuming international law responsibility for such acts by supporting states was not the *cui bono* rule but whether the state had exercised some "effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[80] This effective control test seemed uncontested until the ICTY gave its opinion in *Tadic*. The ICTY summarised its position by stating that international law did not always require "the same degree of control over armed groups or private individu-

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74 www.caribbeancourtofjustice.org.

75 Antonio Cassese, *International Criminal Law* (OUP, 2003).

76 UN HRC (ICCPR 1st Add. Protocol), and Optional Protocol to the Convention on elimination of discrimination against women 39 ILM 281 (2000).

77 See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 34 ILM 1453 (1995).

78 *Prosecutor v Tadic* 38 ILM 1518 (1999).

79 *Nicaragua v USA* (Merits) [1986] ICJ Rep 14, 65.

80 *Ibid.*

als for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as *de facto* organ of the State."[81] According to the ICTY the necessary standard for assuming state responsibility varied between the USA and Yugoslavia. In the former case it was the effective control test which relieved the US from being held responsible for the acts of the "Contras" in the early 1980s although they were financed and very likely directed in their operations by US agents devoted to toppling the Sandinista government with the help and through the "Contras". In the latter case Yugoslavia was held responsible in circumstances where it did not have effective control or any proven influence comparable to the influence executed and evidenced by the US in *Nicaragua*.

Why this double standard? What is then the applicable standard under international law concerning state responsibility for individuals and independent groups? Is it the ICJ "effective control" test or the dissenting ICTY standard? Is there a law applicable to one state and not to the other, one for the US and one for Yugoslavia? Is there law at all? The variety of international adjudication entails such questions which may be answered with some ease by reverting to an earlier thought.

First, international adjudication is only meant to be binding among the parties who agree to it as stipulated in Article 59 of the ICJ Statute. This feature characteristic of arbitration is present everywhere in international adjudication. Its reflex in national law on the basis of *stare decisis* has been settled since *Trendtex*.[82] Therefore, to apply different standards of international law to different parties is not so unheard of in the international law context although it would be *anathema* in national law.

Secondly, it reflects the procedural setting. An international court or tribunal with its procedure does not operate in a vacuum in pronouncing on issues of real life before it according to unaltered principles of absolute law, although this is what most would associate with courts in general and what earns them their high regard which easily surpasses that accorded to executive governments in most cases. An international judicial body has an origin, a statute and an agenda, which is particularly visible when a political body like the Security Council of the United Nations creates a judicial body designed to adjudicate on specific people and activities in a country against which the same Security Council had enacted sanctions[83] at the same time. The bench of the ICTY reflects this as no judge remotely

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[81] *Prosecutor v Tadic* 38 ILM 1518, 1541 (1999).

[82] *Trendtex Corporation v Central Bank of Nigeria* [1977] 1 All ER 881 *per* Lord Denning MR.

[83] See *Bosphorus*, where the harsh effects came down on Bosphorus airline when the states which had enacted the sanctions in the Security Council had already lifted them (except for the single Bosphorus case) and were negotiating with government at Dalton. (*Bosphorus v Minister for Transport and Ireland* [1994] 2 ILRM 551 (Irish High Court); [1997] 2 IR 1 (Irish Supreme Court); ECJ (Case C- 84/95) [1996] ECR I – 395; (2006) 42 EHRR 1 (ECtHR).

close to the Yugoslav government could be found on it. This is not to comment politically on the ICTY but to draw attention to its purposeful origin, its statute and its agenda which are not to be understood without regard to this context. From this perspective the decision of the ICTY to create different legal thresholds and standards for the US support of the "Contras" and the Yugoslav support of the Serb Bosnian groups does not look so surprising anymore. It reflects what international is to reflect. The state practice of the US to wholeheartedly support the ICTY adjudication and its adverse position to the ICJ in *Nicaragua* or currently to the ICC, whose descriptive jurisdiction may include acts done by its agents is in line with the withdrawal by the US of its submission to the ICJ jurisdiction according to Article 36.2 of the ICJ Statute after the Nicaragua decision of this court. The jurisdiction of international courts and tribunals is embedded in state practice and politics and may not be compared with the independence of most national courts from the politics of their respective national executive governments. However, even in the latter cases the political framework of all national judiciaries is still detectable when they apply the *ordre public*, trading with the enemy provisions, prerogatives, act of state or the political question doctrine resulting in "judicial restraint". What seems a very exceptional situation before national courts is much more visible with bodies which adjudicate in an international context. The value as a precedent of an international decision cannot be fully appreciated without analysing the origin, statute and agenda of the bench. Such analysis should not be mistaken for a criticism of the political context as this would be beyond the brief of international lawyers but rather as a step towards clarifying whether state practice and *opinio iuris* would support a decision beyond its context shaped by international politics.

When it was the politically approved agenda of the Security Council to come down on the then Yugoslav state agents but it was implicitly agreed not to cover Dutch or American responsibilities in relation to the Srbrenica massacre, this agenda must not be mistaken for international law applicable to all other circumstances although the ICTY formulated its decision in legal terminology indicating that it is law also applicable to other cases it pronounces upon. This can be seen from the subsequent ICJ judgment in the *Genocide Convention* case[84] where the ICJ did not follow the ICTY approach in *Tadic*.[85]

The national treatment of international adjudication of the *Milosevic* case by Yugoslavia/Serbia[86] or the US in *Medellín*[87] reflects this state of international law.

This means that the special focus of the international court or tribunal must be taken into consideration when evaluating its jurisprudence. It is the WTO/DSU

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[84] *Bosnia v Serbia* (Application of the Genocide Convention, Merits) judgment of 26 February 2007, paras 396-407.

[85] More cases of divergent jurisdiction of international adjudicative bodies are presented by Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP 2003) p. 123 *et seq*.

[86] Serbian Constitutional Court, ILDC 29.

[87] *Medellín v Dretke* 544 US 660 (2005); *Medellín v Texas* 128 S Ct 1346, 25 March 2008.

panels which are mainly focused on international free trade as is the ECtHR on the implementation of the ECHR and the ECJ with European law pre-eminence and so on. The ICJ is a "free standing international tribunal which has no links to a standards setting treaty such as the (ECHR) Convention".[88] And the jurisprudence of the ICJ cannot be of assistance to other bodies because of the substantial differences between them.[89]

These remarks are not meant to deny that most adjudicative bodies agree most of the time about the substantive law they apply and that there is a body of international law which can be collected from their coherent decisions. The presented and other divergences between their jurisprudence are the exception rather than the rule. However, such divergences are not procedurally addressed by international courts as there is no hierarchical system ensuring any uniformity of decisions on the international field, such as giving the ICJ the competence to resolve disparities in international decisions. Further there are no agreed procedural rules applied by the international adjudicating bodies comparable to those employed by national courts to address divergences like distinguishing *lis pendens, res judicata* or *forum non conveniens*. This allows inconsistent international judgments to co-exist and requires a reading which takes into account their courts' origin, statute and agenda when evaluating their bearing on international law. From the perspective of international law "it is desirable to have a framework through which it [the fragmentation of international adjudication] may be assessed and managed."[90] However, such a framework must reflect the desire of the states to create a hierarchical coherent judicial structure approaching standards known from the national legal systems. This determination to adhere to standards cannot yet be universally observed in all states and is bound to prescribe limits on executive governmental discretion in the conduct of foreign affairs. It would not augur well for the ICTY, however it might give the ICJ an enhanced role. If states indicate their willingness to move in this direction it will be a worthwhile task to work towards this goal. However, in relation to the present state of international adjudication and law, one should not underestimate

> "the dangers of attributing to an international tribunal such as the Court inherent powers traced on the basis of municipal analogies. It needs to be recalled once more that the essence of jurisdiction is consent: if the Statute expresses the consent to a limited power … it is self contradictory to argue that, by creating a court, they implicitly consented to a wider power."[91]

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[88] *Loizidou v Turkey* (1995) 20 EHRR 99, 132 (ECtHR).

[89] *Loizidou v Turkey* (1995) 20 EHRR 99 (ECtHR).

[90] ILC Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN Doc A/CN.4/L.676 para. 249.

[91] Hugh Thirlway "The Law and Procedure of the ICJ 1960-1989: Part Nine" (1998) BYIL 1, 21.