Gernot Biehler

Procedures in International Law

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Preface

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

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

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

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

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

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

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

July 2008 Gernot Biehler

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Chapter 1

A Procedural Perspective in Law

Procedural and substantive law are in a special relationship. Legal procedures help to decide on the merits of bringing an action. Procedures make law real. This is expressed in the equitable maxim that where there is a wrong there is a remedy,[1] a maxim which is equally supported by the civil law doctrine of *bona fide*. This means that where there is an injustice, there should be a procedure to remedy it. Put another way, where there is a legal right there should be a way to give effect to it. This can occur through various means such as court proceedings, arbitration, ombudsmen, tribunals, special commissions or committees. However, this basic relationship between law and procedural remedies seems well recognised: "A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; *i.e.*, no law at all."[2]

The focus of most lawyers is primarily on substantive law. Procedural law is understood mainly as an ancillary subject and is particularly relevant to those determining and enforcing the law in practice. Procedural law in any jurisdiction regulates the hierarchical structure of the courts and the court of final appeal and their proceedings, the decisions of which are generally binding. Procedures are usually also laid down for the enforcement of court decisions.

While most lawyers focus mainly on substantive law and understand procedural law as an ancillary subject rarely worthy of too much attention, the perspective shall be different in this inquiry. A change in perspective may shed a different light on known facts. There is nothing essentially new to be discovered here and this study rather highlights known but hitherto less appreciated legal structures. It is suggested that the analysis of the relationship between substantive laws and those procedures which determine them and provide a basis for their later enforcement is extremely fertile as it may help to disclose properties not least of international law which it may be useful to ascertain. Some simple relationships between the law on the merits and legal procedures shall be examined first, preced-

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[1] Delany, Hilary, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) formulates at p. 13 under the heading "Equity will not suffer a wrong to be without a remedy", "that equity will intervene to protect a recognised right which for some reason is not enforceable at common law".

[2] Chamberlayne, *Evidence* (1911) para. 171 quoted in Walter Wheeler Cook, "'Substance' and 'Procedure' in the Conflict of Laws" (1932-1933) 42 Yale LJ 333, 336, footnote 10.

ing the following more conventional legal considerations. These prolegomena shall be introduced by the following observation: that law[3] cannot exist without procedures; procedures cannot exist without law.

Any law which is not determined and applied procedurally remains in the realm of general statements, principles or maxims. In such a state its place in academia would be with philosophy, theology or social sciences which would not merit its own School or Faculty of Law. It is ultimately the decision in any given case or issue which determines what the law is; extracted from the differing assumptions of the parties and the more philosophical and abstract reasoning of right or wrong, justice, law and equity the definite, defined and defining structures of law emerge. It is this ability to decide which distinguishes the law from all other academic or professional disciplines, severing it partly from the claim to partake essentially in the search for eternal truth(s) (as other sciences and arts endeavour) but providing it with an essential importance for all spheres of life. This makes law unique in character between an art and a profession exemplified both by those pursuing a professional career and those endeavouring to inquire into the nature of law with equal benefit to the subject. It is this capacity to make decisions which is inherently procedural. This quality of legal procedures, of giving effect to a decision, provides substantive law with its special importance as the standard according to which the case is to be decided. It is only by procedurally applying it that law is determined, possibly enforced and made real. Law may be only perceived through its procedures, which means that it cannot exist without them. It surfaces only from the realm of the indeterminate when proceeding to decide. The distinction between procedure and substantive law is one of the most interesting consequences of our attitude towards an independent judiciary. Law is fundamental, everlasting through the rule of *stare decisis*[4] and almost sacred. It represents the experience of ages. On it is based the freedom of the individual. Procedure on the other hand is perceived as entirely practical. It is based on the experiences of ages too but age with procedures is considered often as senility rather than wisdom.[5] There is nothing like *stare decisis*; for procedural rules there is no *stare dictum* rule, it is rather practical utility, convenience for the court and discretion about the standards around which they revolve.

Obviously procedures cannot exist without law as otherwise nothing could be applied to the facts brought before a forum. It is the tool that makes law real and there is no other means to effect this.

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[3] While considering the relationship between law and procedure, law is understood as law on the merits or substantive law as opposed to procedural law which does not provide rules to decide the ultimate conflict between the parties but rather provides the procedure as to how to come to this decision.

[4] See *Trendtex Corporation v Central Bank of Nigeria* [1977] 1 All ER 881 on the exceptions to the *stare decisis* rule in international law.

[5] Thurman Arnold "The Role of Substantive Law and Procedures in the Legal Process" (1931-1932) 45 Harv L Rev 617, 644.

Historically, this intimate relationship between law and procedure was institutionalised when procedures were introduced to determine and enforce the law. Judicial institutions were originally established by what we would now call the sovereign.[6] This source of courts and their procedure is particularly visible in some traditional monarchies where decisions are handed down in the name of the monarch who may be referred to as the sovereign too. In those judicial formulas the idea is preserved that it is the sovereign who decides and the activity of the courts is advisory to this.

For the legal tradition in the English speaking world unified by the traditions of the common law the cradle for this development lies in the *Curia Regis* established by William the Conqueror. In his reign the highest court of judicature was the *Curia Regis*, over which the King himself frequently presided. Its members were the prelates and barons of the realm, and certain officers of the palace. Of these the principal officer was the Chief Justiciary, who in the King's absence was the ruling judge. This office continued until the reign of Henry III, a period of two hundred years, when its judicial functions were transferred to the Chief Justice of the King's Bench. From there the development into the modern courts took its course,[7] however, its historical source which is the *Curia Regis* was notionally preserved, for example, in the Privy Council which may be taken as a literal translation from Latin into English. The latter decides right up to today with the formula "As it is, their Lordships will humbly advise Her Majesty that the appeal should be dismissed"[8] indicating the source of legal proceedings and that the power to decide is that of HM, the Sovereign.

More abstract notions of sovereignty usually preferred by states with a less traditional constitutional structure would nevertheless allow state authority to be identified as the source of court decisions while using formulas in their courts' decisions such as "In the Name of the People", when, for example, "the People" is understood to be the ultimate source of the State's power, in short the sovereign. The same may be said for the formulas found in Muslim countries often referring to Allah as the source of authority for court decisions ("In the name of Allah etc. etc."). By their constitutional understanding Allah is the ultimate source of power in the State. All this would fit in neatly with the original definition of sovereignty provided by Bodin: "The sovereign is high above all subjects. His majesty does not permit any division and incorporates the idea of unity in a State."[9]

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6 Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 28 *et seq*. on the notion of sovereignty in law which will be relevant in the further course of the inquiry.

7 Taken from the instructive Preface of Edward Foss, *A Biographical Dictionary of the Judges of England from the Conquest to the Present Time 1066-1870* (London, John Murray, Albemarle Street, 1870) p. vi.

8 *R v A-G for England and Wales (New Zealand)* [2003] UKPC 22, 17 March 2003, para. 37.

9 Bodin, Jean, *Six Livres de la Republique*, Book VI, para. 1056; Biehler, *op.cit*. p. 28 *et seq*.

This link between legal procedures and state authority or sovereignty may be crucial in understanding some properties and specificities of legal procedures. Law may hardly be conceived without sovereignty[10] or the power of the State which is often condensed in notions, such as jurisdiction or competency. A closer examination shows that it is less the law itself but rather the legal procedure provided to determine and enforce the law (or not) which must be classified in this way. To use the broad meaning of sovereignty encompassing all the power and authority of the State, whether understood as historically personified or in the abstract, it is by the sovereign that law is administered (or not). It is his, her or its (whatever the national constitutional personification of sovereignty provides for) public authority which renders decisions of the courts binding. Legal procedures are an emanation of state authority and they are understood as such. They form part of a country's constitutional structure and partake in the nature of any exercise of state authority; as with the other branches of government they are administered by an hierarchically organised governmentally financed structure handing down binding decisions and operating non discretionary procedures for those subject to them. It is the procedure which determines the properties of any court of law. This not only distinguishes procedures from substantive law, which is usually applied equally among those who are legally equals, subject to a wide discretion of the parties, for example, in the choice of law, but links it to other core activities of a state in the exercise of public authority.

1.1 Law and Procedure

The fact that law is reflected in its procedures helps to both determine and enforce it. The objective of this section is to examine whether there are any unique characteristics of legal procedures as opposed to the body of substantive law, or anything unique about the content or character of procedural principles and rules that render them suitable to shed some specific light on parts of the law, notably in the international context. Substantive law can be seen through legal procedures. To reflect law through its procedures is an unusual perspective. There is a general understanding that law is the body of rules which determines our behaviour. Legal procedure comes in only in the rare event when this behaviour deviates from the rules which necessitate determining and possibly enforcing the law. The law may be understood as the relevant part in this equation while procedures just facilitate it. However, a slightly more detailed examination of both will tell us more.

Legal theory has it that law may be entirely determined through its procedures; Kelsen writes "Law is the primary norm which stipulates the sanction".[11] This

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[10] The notion of sovereignty still focuses on many of the notions like "jurisdiction", "competency", "independence of the judiciary" or just "power" in an unmatched way, Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 28.

[11] Kelsen, Hans *General Theory of Law and State* (Harvard University Press, 1949) p. 2.

view does not, for example, recognise a prohibition against murder but understands as law only the rule which directs the authorities to apply certain sanctions in certain circumstances to those who commit murder.[12] It is the order to apply sanctions which is seen as law and the legal sanctions or order may be seen as procedure in themselves. Indeed, every rule of law can be rephrased to suit Kelsen's perspective.[13] What is usually thought of as the content of law, designed to guide the conduct of people is here merely the antecedent or "if-clause" in a rule which orders someone to apply certain sanctions if certain conditions are satisfied. All genuine laws, according to this view, are conditional orders to apply sanctions. They are all in the form; "if anything of a certain kind happens then apply the appropriate sanction." The overwhelming experience so important for international law[14] that most people in most circumstances observe the rule without even the remotest consideration of sanctions to coerce them is not encompassed by this view. In addition, there may be many more shortcomings of this particular perspective on law summarised by Hart under the heading of "distortion as the price of uniformity".[15] However, these shortcomings are not of interest here. Kelsen's view merely shows that all laws may be seen and potentially explained from the perspective of the possible sanctions they incur. This view of the law is one possible perspective and may facilitate a better understanding of certain parts of the law notably international law. It is well supported by doctrine as this quotation shows:

> "A right without a remedy for its violation is a command without a sanction, a *brutum fulmen*; i.e., no law at all."[16]

Short of concluding that sanctions are procedure it may be said that sanctions involve procedures. There are no sanctions without a procedure. Legal sanctions are closely linked to legal procedures. Procedures may comprise more than just determining and enforcing the law. However, determining and enforcing the law is the core function of any legal procedure.

To sum up; law becomes effective when determined and enforced through a procedure potentially leading to a sanction. Possibly, only law which may be potentially determined and enforced through a procedure is law in the strict sense of Kelsen's approach. From this it follows that it is possible to see laws through procedures which determine their contents in terms of certain sanctions or consequences.

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[12] Example taken from Hart, *The Concept of Law* (OUP, 1994) p. 35 *et seq*.

[13] Hart, *op.cit*. at pp. 36 and 38 gives some examples.

[14] Lowe, Vaughan, *International Law* (OUP, 2007) p. 18.

[15] Hart, *op.cit*. at p. 38 *et seq*.

[16] Chamberlayne, *Evidence* (1911) para. 171 quoted in Walter Wheeler Cook, "'Substance' and 'Procedure' in the Conflict of Laws" (1932-1933) 42 Yale LJ 333, 336, footnote 10.

1.2 Essential Properties of Legal Procedures

To use procedures in international law to reflect on the substantive aspects of the law presupposes knowing what procedures are. Understanding their essential properties helps to qualify procedures in a responsible manner. From the foregoing discussion it follows that every procedure which determines the law in the context of possible authoritative consequences or sanctions would qualify. Although this definition may be correct and useful, a further refining of the notion of legal procedures with regard to applying them to international law is required. It may be expedient to elaborate a structured understanding of legal proceedings which is sufficiently settled in current legal theory and practice to be tested against a plethora of international legal situations far exceeding the complexity of cases which lack an international context. This almost indefinite variety, not only of state practice legally relevant to international law according to Article 38.1.b of the ICJ Statute but all international law, requires a sophisticated but flexible understanding of procedures.

The nature of procedures has rarely challenged legal minds. Notably, the writings on procedure do not contain any consideration of the essential properties of procedure as opposed to substantive law useful to gain insights which may be applied to international proceedings not hitherto analysed.[17] Such authors describe procedure simply as they find it. This is because a more general understanding of procedure seems of no apparent use when elaborating on the specific procedures applied by a certain court or forum. It is only where the difference of substance and procedure is legally relevant to deciding certain cases before the courts that the distinction sought would be provided. It is only in this context that procedure would take on a specific meaning creating a legal notion suitable to be applied by courts and the law. There are few areas of law where the relationship between substantive and procedural law is legally significant and accordingly developed in cases and doctrine. It is when law is applied internationally in different *fora* with their differing procedures that substance and procedure must be distinguished and clearly defined. It is mainly in the field of private international law or the conflict of laws that such a distinction is relevant and some insights on the essential properties of legal procedures may be drawn from this context. This is the field of law where it is necessary to make legally significant distinctions which may lead to different results.

1.2.1 The Legal Distinction Between Substance and Procedure

At this point the benefits of making the distinction between substance and procedure from the standpoint of private international law and the conflict of laws

[17] Delany and McGrath, *Civil Procedure in the Superior Courts* (Thomson Round Hall, 2005) p. 1.

shall be examined. This seems to be the primary field of law where procedures applied by courts and other *fora* need to be distinguished from substantive law. In international private law the distinction between substance and procedure is an important one since matters of substance are generally determined by the *lex causae* while matters of procedure are governed by the *lex fori*.[18] This means that all matters of procedure are governed by the law of the country to which the court where any legal proceedings are taken belongs. All courts will apply their own rules of procedure and not apply foreign rules which in their view are procedural.[19] While their procedure is entirely governed by their own law, matters of substance may be decided according to foreign laws when the applicable conflict of law rules so require. This possible split between the applicable laws of substance and procedure makes it essential for any court to clearly define what it considers to be procedural as opposed to substantive law. This characterisation may be decisive to, for example, the question of whether an action in tort survives in the event of the death of the tortfeasor so that the estate of the deceased may be made liable for the tort. It is possible that this issue might be dealt with as a matter of tort law which is substantive law.[20] From this it follows that the *lex causae* would govern the issue which might allow for such succession in tort actions if it were, for example, German law. Therefore, in addition to reflecting the law on the merits, legal procedures may well be seen to reflect the competency or jurisdiction of any forum to decide in a manner not only mandated by the merits of the case but to decide it differently having regard to its procedure. Generally it may be said that procedures provide a framework for any application of law. What should be examined are the procedural rules of the forum, the *lex fori proceduralis*, when different from the applicable law on the merits, the *lex causae substantialis*. The unusual situation of applying two different sets of laws, both foreign and national, to the same facts of a case although they may not fit with each other, provides an unrivalled opportunity to unravel the nature of legal procedures isolated from their usual amalgamation with their own national substantive laws. So closely are procedure and substance connected that in many cases a refusal to accept that the foreign rules of procedure are to be applied will defeat the policy involved in following the foreign substantive law. However, the principle was outlined by Lord Pearson as follows:

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[18] Binchy, William, *Irish Conflicts of Law* (Butterworths, Ireland, 1988) p. 625; Dicey and Morris, *The Conflict of Laws* (14th ed., Sweet & Maxwell, 2006) p. 177, rule 17, 7-002; Collier, *Conflict of Laws* (3rd ed., CUP, 2001) p. 60; Geimer, Reinhold, *Internationales Zivilprozeßrecht* (5th ed., 2005, Verlag Dr. Otto Schmidt Köln) p. 140; v.Bar, Mankowski, *Internationales Privatrecht* (2nd ed., 2003, Verlag C.H. Beck, München) p. 398 with extensive references to both German and English jurisprudence.

[19] *De Gortari v Smithwick* [2000] 1 ILRM 463 (Supreme Court of Ireland).

[20] *Kerr v Palfrey* [1970] VR 825 (Australia); *Orr v Ahern* 139 A 691 (1928); *Ormsby v Chase* 290 US 387 (1993).

> "The *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures. To some extent, at any rate, the *lex fori* must regulate remedies, because the court can only give its own remedies, having no power to give alien remedies. For instance, the English court could not make provision in its order to enable the plaintiff, in the event of a possible future incapacity materialising, to come back and recover in respect of it. That is alien procedure or an alien remedy and outside the powers of an English court. On the other hand, an English court may sometimes be able to give in respect of a tort committed in a foreign country a remedy which the courts of that country would be unable to give. For instance, the foreign courts might have no power to grant an injunction or to make an order for specific performance or for an account of profits."[21]

This approach is also embodied in convention law**.** Article 10(1)(c) of the Rome Convention of 1980 provides that the law applicable to a contract by virtue of the Convention shall govern:

> "Within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law."

This confirms the priority of procedural rules which provide a limiting framework for the application of all substantive law.

For the purpose of the current thesis this perspective on procedures applied by courts and embodied in conventions has the immeasurable advantage that it necessarily includes an international element; it is the application of the laws of different jurisdictions both foreign and national in a single case which renders any application of the *lex fori proceduralis* when different from the foreign *lex causae substantialis* to be, *inter alia*, an act of judicial delineation between states' authorities to govern the issue before the court according to their laws. Any such procedure providing for such an act may be called international. Results found in this context may be a first subtle step towards discovering the properties of international legal procedures understood exclusively by the judicial function they provide regardless of the institutional background from which they are applied.

In this class of cases applying both national and foreign laws in the same case on the basis of the procedural/substantive law distinction a few more seminal applications of the legal rule which distinguishes procedure when at variance with a foreign *lex causae* shall be displayed and then analysed to ascertain how they may possibly refine and clarify the understanding of legal procedures.

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[21] *Boys v Chaplin* [1971] AC 356, 394.

1.2.1.1 Imprisonment as Procedure

Imprisonment is the ultimate sanction in procedural law if we discount the death penalty. Therefore, this situation is possibly the most striking application of local procedures at variance with the *lex causae*. In *De la Vega v Vianna*[22] the plaintiff, a Spaniard, had the defendant, a Portuguese, arrested in England for non-payment of a debt contracted in Portugal. The defendant claimed that he should be released on the ground that in Portugal imprisonment for debt had been abolished by statute in 1774. The then Chief Justice of England and Wales Lord Tenterden held that the defendant should remain in prison on the basis of the following reasoning:[23]

> "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation in his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

Without employing the terminology of procedure and substantive law the rationale of the decision is that everyone subject to the jurisdiction of the forum is also subject to its sanctions, no matter how severe or illegal they may be under the applicable law of the case which here was Portuguese. The intentions of the applicable law embodied in the statute of 1774 were certainly frustrated.

1.2.1.2 Non-enforceable Obligations Enforced: Specific Performance

It is a common feature of the common law that usually only damages may be claimed when an obligation is breached by the defendant. Specific performance is an exceptional remedy[24] only available in very few instances, for example, when damages cannot serve any reasonable purpose with regard to foreign land. Specific performance may be granted by English speaking courts of the common law world[25] or it may be granted in the field of intellectual property.[26]

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[22] (1830) 1 Barn & Ad 284.

[23] *Ibid*. at 288, recently applied for its basic distinction of law and procedure in *Harding v Wealands* [2006] UKHL 32 (5 July 2006) para. 22.

[24] Neufang, Paul, Erfüllungszwang als Remedy bei Nichterfüllung: eine Untersuchung zu Voraussetzungen und Grenzen der zwangsweisen Durchsetzung vertragsgemäßen verhaltens im US amerikanischen recht im Vergleich mit der Rechtslage in Deutschland, (1998), gives a comparative account of this principle comparing the US law with the German one. T.M. Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 98.

[25] *Penn v Baltimore* (1750) 1 Ves Sen 444; 27 ER 1132. *Richard West and Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 (CA).

[26] *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1955] Ch 37.

A right to performance is substantially different from a right to damages.[27] Although the exceptional nature of the doctrine of specific performance in the Common Law is based on a substantive right to the performance of the contractual obligation in question, the prevailing common law view is that the availability of specific performance is procedural.[28]

This may result in a decision granting specific performance by another forum, for example, a civil law one which applies its own law granting specific performance as a regular procedural remedy even though the applicable *lex causae* derived from the common law does not provide such a remedy. In one such case, the German *Reichsgericht* qualified the exclusion of specific performance according to the applicable English *lex causae* as procedural and did not apply English law but rather the German *lex fori proceduralis*. Thus, a remedy not available under the applicable *lex causae* became available through another forum, distorting the original conceptions of the applicable law. The *Reichsgericht*, the Supreme Court of Germany at the time, elaborated:

> "There is no reason for the German judge to apply the principles of English law based on an actio limiting the right to specific performance only because the case is governed by English law. A distinction must be drawn between substantive laws and their realisation by the court. Foreign rules in relation to the latter are not relevant for the German judge, he only has to apply his own procedural laws." (Translation by the author).[29]

This confirms the observation that referring to some parts of the applicable foreign *lex causae* as procedural by the forum leads to the application of the *lex fori proceduralis* and may substantially alter the decision regardless of the intentions, statutes or laws of the jurisdiction providing the applicable laws.

From this it follows that a lawyer advising a client should be aware of the different remedies of those *fora* which may possibly assume jurisdiction in a case.

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[27] G Calabresi and A.D. Melamed, "Property Rules, Liability Rules and Inalienability: One view of the Cathedral" (1972) 85 Harv L Rev 1089.

[28] *Baschet v London Illustrated Standard Co.* [1900] 1 Ch 73; *Boys v Chaplin* [1971] AC 356; *The Stena Nautica (No 2)* [1982] 2 Lloyd's Rep 336, 341; Dicey and Morris, *The Conflict of Laws* (14th ed., Thomson Sweet and Maxwell, 2006) Chapter 7.

[29] *Reichsgericht* decision of 28 April 1900, Vol 46 RGZ p. 193, 199: "Für den deutschen Richter besteht kein Anlaß diese Grundsätze des englischen Aktionensystems in einem von ihm geführten Prozeß deswegen zur Anwendung zu bringen, weil die Verpflichtung an sich dem englischen Recht untersteht. Es ist zu unterscheiden zwischen dem Inhalt der Rechte und ihrer gerichtlichen Geltendmachung. Die Regeln, die in letzterer Beziehung im Ausland bestehen, sind für den deutschen Richter, der nur sein heimisches Prozeßrecht anzuwenden hat, nicht maßgebend."

1.2.1.3 Calculation of Damages as Procedure

The latter proposition is particularly evidenced by this class of case. It is generally known that large international tort claims are litigated to an unusual extent in the United States. This is partly due to the higher damages awarded there and the industrious endeavours of US lawyers like Mr El Fagan and others. However, it may very well work the other way around. Claims in tort before the English courts seeking damages for injuries caused by asbestos against the US Company TN display this split between procedure and substance.[30] If US law was exclusively applied to the claim, would the quantification of damages be treated as a matter of procedure and therefore governed by English law as the *lex fori*? If quantification is a matter of procedure, then English law will apply, even in a case where some or all of the substantive issues are governed exclusively by US law. This question was both legally and economically significant because treble damages may be awarded under US law, but such an award is unknown to other laws. In *Re T & N Ltd*, it was held that US law was the *lex causae*, but that treble damages could not be recovered because the procedural character of calculating them would be subject to the *lex fori proceduralis*. This was to the detriment of the applicants unable to avail themselves of the generosity of the *lex causae proceduralis*.

The rule may hold true in the opposite direction to the benefit of the applicant as is illustrated by *Hulse v Chambers*.[31] This case concerned a claim for damages for personal injuries sustained in a motor accident in Greece. It was agreed by the parties that the applicable law was Greek law and that it should not be displaced by any subsequent agreement or rule. The head of general damages was recoverable under both Greek and English law but the amount would be markedly less under Greek law. The defendant submitted that the assessment of the amount of general damages should be governed by Greek law as the substantive law. This was rejected by the court, holding that the assessment of the general damages should be made by reference to English law as the *lex fori*. Assessment was a matter for the court's own judgment, not for decision on the basis of evidence as to what a Greek court might order.

This was recently confirmed to what is submitted is an extreme extent in *Harding v Wealands*,[32] which involved a split between Australian *lex causae* and English *lex fori*. The Australian *lex causae* specifically provided statutory limits of liability in cases of traffic accidents. The relevant part of the statute reads: "A court cannot award damages to a person in respect of a motor accident contrary to this Chapter."[33] However, this was exactly what the House of Lords did, allowing an appeal by qualifying the statute with its very precise limitations on possible

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[30] *Re T & N Ltd, In the matter of the Insolvency Act 1986* [2006] 3 All ER 755.

[31] [2001] 1 WLR 2386 (Holland J).

[32] [2006] UKHL 32 (5 July 2006). See also *Boys v Chaplin* [1971] AC 356.

[33] *Harding v Wealands* [2006] UKHL 32 (5 July 2006) para. 73.

damages as procedural and calculating a higher sum for the applicant according to the English *lex fori*. The Law Lords considered the statutory limits of damages concerned not to be within the scope of the defendant's liability for the victim's injuries as such, but to be the remedy which the courts of Australia could give to compensate for those injuries. For purposes of private international law they were seen to be procedural in nature. It is noteworthy that a statutory provision of the applicable *lex causae*: "A court can not award damages …" means in effect: "A court can award damages …" when qualified as procedural by the foreign forum. This may hint at the character of this very qualification as inherently decisive or discretionary rather than exactly summarised from refined insights into the nature of the legal notion of procedure.

This decisive or discretionary character of the procedural qualification may be seen in another application of the same principles which led to the opposite result to that in *Harding v Wealands*. In *Red Sea*[34] in a triple split between the Saudi Arabian *lex causae* and the English and Hong Kong's *leges fori processualis* the former was surprisingly applied. The relevant forum was Hong Kong and unlike the *lex causae* which was Saudi Arabian, under Hong Kong law and English law no claim or counterclaim of subrogated liability could be litigated.[35] The latter rule was as procedural as any rule can ever be. However, it was decided that the plaintiff could rely exclusively on the Saudi Arabian *lex loci delicti causaeque* even if under English and Hong Kong *lex fori* his claim would not be actionable, on the basis that the court should be required to apply a foreign law when its own law would not give a remedy. Such exception, it was held, should be applied to the whole claim, not merely to "specific isolated issues".[36]

Despite this surprising outcome the Privy Council reiterated the accepted principles of the primacy of the forum's procedural laws in clear terms:

> "The court can only provide compensation for wrongs recognised by the sovereign's laws. It cannot entertain claims based on foreign concepts of wrongdoing which it would not regard as tortious. It cannot dispense alien justice".[37]

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[34] *Red Sea Insurance Co. v Bouygues SA* [1995] 1 AC 190.

[35] *Hartmann v Konig* (1933) 50 TLR 114 (HL); *Lucas v Coupal* [1931] 1 DLR 391 (Ont.); *Enns v Lagrange* 6 April 1998 (Alberta); *AGIP Petroleum Co v Gulf Island Fabrication Inc* 920 F Supp 1318 (SD Texas 1996); but see Dicey and Morris, *op. cit.* para. 7-012 with an open view on the procedural qualification of an insurer's right of subrogation and going even further Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 130, recommending a substantial qualification. However, even accommodating the latter views would not remedy the fact that the claim in this case was not originally appropriately stated before the Hong Kong Courts according to all possible laws applicable.

[36] [1995] 1 AC 190, 201.

[37] *Ibid*. at 194.

To eventually reach the very opposite result to this principle would indicate that there was a need for flexibility in the general rule in the interest of substantive justice, a reason not usually encountered when discussing the split in laws necessitated by the application of the forum's own procedural laws. The Privy Council referred to an American Restatement of Law, the US being a jurisdiction known for its flexibility in applying general rules:

> "No purely mechanical rule can properly do justice to the great variety of cases where persons come together in a foreign jurisdiction for different purposes with different pre-existing relationships, from the background of different legal systems. It will not be invoked in every case or even, probably, in many cases. The general rule must apply unless clear and satisfying grounds are shown why it should be departed from and what solution, derived from what other rule, should be preferred. If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice. Even within these limits this procedure may in some instances require a more searching analysis than is needed under the general rule. But unless this is done, or at least possible, we must come back to a system which is purely and simply mechanical."[38]

It is submitted that the approach in *Red Sea* is at variance with all precedent regarding the non-application of the *lex fori proceduralis*, however, this was certainly to the benefit of substantive justice and coherence which is regularly enhanced by not applying two different sets of laws to one case. Allowing for the application of the *lex causae proceduralis* in this case despite its admitted incompatibility with the *lex fori proceduralis* invites some attention. Although many would feel an instant unease with such open inconsistency in applying the Saudi Arabian *lex causae proceduralis*, this flexibility openly displayed by the Privy Council in relation to the general rule provides a most welcome characterisation of legal procedures in the context of possible international splits of laws discussed here. This approach is discretionary in character being bound less by *stare decisis* or other principles than by whatever layer of justification the forum chooses to apply. In *Red Sea* it was able to render substantive justice, a topic less referred to in the other cases applying different sets of laws to one case because of the forum's procedural qualifications. However, the reference to this or other justifications for the flexibility of procedures seems somewhat less accountable or predictable than in the field of substantive law. It may be understood from Red Sea that the primacy of the *lex fori proceduralis* over the *lex causae* tends to be rather a primacy

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[38] American Law Institute, *Restatement of the Law: Conflict of Laws*, 2d (1971) pp. 391-392, after referring to the general rule set out in clause (1) of rule 158 in Dicey and Morris*, The Conflict of Laws* (8th ed., Stevens and Sons Ltd, 1967) "as one which will normally apply to foreign torts".

of the courts and policies of the forum which are normally but not necessarily always embodied in the *leges fori proceduralis*.

To sum up; the calculation of damages is most significant for those litigating. The reference to the applicable *lex fori* gives the forum a wide discretion to grant a very different measure to that provided for by the applicable *lex causae* which is what applicants are mostly looking for and respondents are most reluctant to give when before a court. *Red Sea* hints at the policy character of this discretion.

1.2.1.4 Limitation Periods

The common law regards limitation periods as only barring the remedy rather than extinguishing the substantive right and, therefore, as procedural in character. This is exemplified in *Huber*,[39] which concerned an action based on a French promissory note made in 1813 and payable in 1817. The defendant pleaded that under French law an action upon the note was prescribed at the time of the litigation, but Tindal CJ held that, upon its true construction, French law did not extinguish the debt but only barred the creditor from obtaining a remedy. It was therefore a matter of French procedure which an English court would disregard.

Conversely, in an action brought in Scotland in 1829 on two French bills of exchange accepted in 1810 the House of Lords[40] held the defendant was entitled to rely on the Scottish six year period of prescription because, as Lord Brougham said: "Whatever relates to the remedy to be enforced, must be determined by the *lex fori*, the law of the country to the tribunals of which appeal is made."[41] An extreme result follows if a statute of limitation of the *lex causae* is considered to be part of procedural law as traditionally assumed in the English speaking world, while the qualification of the *lex fori* in relation to its own statutes of limitations is substantive, for example, in German law.[42] In such a case neither would be applicable as was indeed decided by the *Reichsgericht*.[43] This entirely logical and stringent application of the *lex fori proceduralis* rule would leave such a claim unlimited.[44]

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[39] *Huber v Steiner* (1835) 2 Bing NC 203.

[40] *Don v Lippmann* (1837) 5 Cl & F 1.

[41] *Ibid*. at 13, see further abundant references in Dicey and Morris *The Conflict of Laws* (14th ed., Sweet & Maxwell, 2006) p. 197 (para . 7.047) at footnotes 77 and 78.

[42] Geimer, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151.

[43] Vol. 7 (1982) RGZ 21.

[44] An unpractical result which Dicey and Morris, *op.cit.* para. 7- 047 comment on with unusual verve: "A notorious decision of the German Supreme Court once actually reached this absurd result." The reason that any claim should be ruled out as a result of a limitation periods and not be left to expire with those who are able to, claim is not addressed by Dicey and Morris.

English statutory law today requires the application of the limitation period of the law applicable to the substantive issue, the *lex causae*, which is the opposite approach.[45] This is in line with German law[46] and with Article 10.1.d of the Rome Convention of 1980 which stipulates that the applicable law (*lex causae*) should be applied to "the various ways of extinguishing obligations and prescriptions and limitations of actions".

The tendency to apply the limitation periods of the forum according to the primacy of the *lex fori proceduralis* most clearly represented by the Reichsgericht and older English cases gave way recently to a tendency to take them rather from the applicable law, the *lex causae*. This is not only expressed by the German and English statutes noted, and by the Rome Convention, but by many writers.[47] There is much to commend the view that limitation periods should be treated as substantive issues and subject to the choice of law, the applicable *lex causae*. However, this is not surprising because any split in the laws applied by a court to a single case on the basis of the distinction between the applicable law and the differing rules of the *lex fori proceduralis* will necessarily distort the coherent application of one law to the case. Having made the choice of law such a split between the applicable procedural and substantive laws from different legal systems will rarely meet the necessities of justice on the merits. It is to be admitted that the rule of primacy of the *lex fori proceduralis* is not meant to foster material justice as seen from the perspective of the parties but rather the coherence of the court's policies and practices as seen from the bench which may be applied with some discretion. Therefore, it is no surprise that in a field where few if any of the forum's policies may be invoked as in the context of foreign limitation periods, a tendency to let substantive legal coherence have its way may be more readily expected. This would be different in cases where judges would find it appealing to exercise more discretion based on the procedural substantive divide in the calculation of damages, compensation or when policy considerations are involved as will be shown subsequently.

1.2.1.5 Equitable Remedies as Procedural Law

There is one line of thought which may classify equitable remedies as procedural in the choice of law context thus reserving the forum's competency to apply them

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[45] Foreign Limitations Periods Act 1984, with a notable exception to this rule in s. 4 (3), see Yeo, *op.cit*. p. 131.

[46] Article 32 I Nr. 4 EGBGB. See Geimer, Reinhold, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151.

[47] Geimer, Reinhold, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 151, with the valuable hint that this general tendency on the continent and in England has not yet been seen in the US courts; Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) p. 131 with further references.

as *lex fori proceduralis* irrespective of the applicable law. This is based on a statement in *Re Courtney*:[48]

> "… the courts of this country, in the exercise of their jurisdiction … in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect … might be in the country where the lands are situate, or of the manner in which the courts of such countries might deal with such equities."

The question in this case was whether an equitable mortgage could be enforced even though no property interest was created under the *lex situs* which was also the *lex causae*. This *dictum* may be explained as an application of the *lex fori proceduralis* rule as it is a reference only to the jurisdiction of the forum and assumes that equitable principles of the *lex fori* would apply once jurisdiction is established.[49]

The rationale in *Re Courtney* was that equitable jurisdiction will be exercised *in personam* by the court over those subject to its jurisdiction. Equity, in line with its primary task of mitigating the severity of the law,[50] is not limited by the applicable law. It is not concerned with the effect that this may have in other countries. This attitude of equity towards the substantive rules of law as being distinct from and subject to equitable rules, is exemplified by the bitter dispute between the English Chief Justice and the Lord Chancellor settled in the *Earl of Oxford's* case[51] to the benefit of the latter and of equity in general. This provides an easy blueprint to see how foreign laws applied under the jurisdiction of the courts are subject to equity as well. The concept of exercising jurisdiction over persons served with a writ of summons, process or a claim form with a wide discretion to assume jurisdiction or not (*forum conveniens*) would neatly fit the discretionary[52] *in personam* exercise of equity by the courts. These parallel if not identical features of jurisdiction and equity made it easy to see them as intertwined whenever jurisdiction is exercised by a court whose laws, *lex fori*, contained equitable principles. Further, it is convenient for a court to have equitable remedies within its discretion, in particular in relation to a foreign *lex causae*, which is not fully understood or appreciated by a

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48 (1840) Mont & Ch 239.

49 Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.35; 3rd alternative. The view preferred by Yeo is not supported by in *Re Schreiber* (1874), which applied in *Re Courtney*. The applicable German law (*lex causae*) in *Schreiber* did not provide for an equitable mortgage, which was, however, enforced as part of the *lex fori proceduralis*.

50 Delany, *Equity and the Laws of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) p. 1.

51 (1615) 1 Rep Ch 1.

52 Finlay CJ in *Curust Financial Services v Loewe-Lack-Werk Otto Loewe GmbH* [1994] 1 IR 450, 467 refers to the discretion exercised in applying the "clean hands rule" of equity.

judge applying the harsh verdicts of public policy exceptions. The convenience for courts in having equitable remedies available in the exercise of their jurisdiction may be one of the reasons why there are few if any examples of the courts' jurisprudence contradicting this.

Therefore, traditionally the availability of equitable remedies such as, for example, injunctions and specific performance,[53] as well as the applicability of the doctrine of laches and some limitation periods, would have been regarded as exclusively forming part of the *lex fori proceduralis*. Consequently, in cases of alleged breach of contracts governed by foreign law equitable remedies have been granted or refused solely by reference to English[54] or Irish[55] law. More recently the question arose as to whether fiduciary obligations had arisen from an agency contract governed by foreign law. It was held by Mason P in *Kavalee v Burbridge*[56] that the foreign elements in the case did

> "not preclude the engrafting of binding equitable obligations. Anyone cognisant with the history of equity in our legal system would see no difficulty with such a concept in principle."

It cannot be denied that many see a difficulty with such a concept although cognisant with the history of equity. Probably the most thorough and recent study in the field[57] can be seen as a plea against this traditional approach and, indeed, against the application of equitable remedies pre-empting the applicable law. The capacity of the *lex fori proceduralis* to override the applicable substantive law has been limited in several fields by statute, convention[58] or conflicting jurisdiction.[59] This balances the suggestion that the nature and extent of an equitable remedy is procedural for choice of law purposes.[60] It must be admitted that any general rule apply-

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[53] Discussed *supra* in this section at 1.2.1.2.

[54] *Boys v Chaplin* [1971] AC 356, 394; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (specific performance not granted although provided for by the *lex causae* but not by the *lex fori*); *Baschet v London Illustrated Standard Co* [1900] 1 Ch 73 (injunction to restrain copyright); Dicey & Morris, *op. cit*. para. 32-203.

[55] *Lett v Lett* [1906] 1 IR 618, 639 (CA); Binchy, *Conflict of Laws* (Butterworths, 1988) p. 638.

[56] *Kavalee v Burbridge* decision of the Court of Appeal of New South Wales (Australia) 22 April 1998; quoted in Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.52.

[57] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) especially Chapter 1.

[58] Article 10.1.d of the Rome Convention of 1980 stipulates that the applicable law (*lex causae*) applied to "the various ways of extinguishing obligations and prescriptions and limitations of actions" overrides their application as equitable remedies so far as it goes.

[59] *Phrantzes v Argenti* [1960] 2 QB 19 may be read this way but is ambiguous.

[60] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) especially Chapter 4: 4.04; 4.06 to 4.09.

ing equitable remedies such as the *lex fori proceduralis* would have to take account of these explicit exceptions. Article 10 of the Rome Convention of 1980 applicable in most European States which stipulates that the *lex causae contractus* is relevant for the assessment of damages, limitations and the consequences of nullity of the contract[61] "within the limits of the powers conferred on the court by its procedural law," has already been mentioned. However, the critique[62] goes further and will not allow equitable remedies to be seen as procedural. It is maintained that choice of law is relevant where equitable doctrines are sought to be applied in a case involving an international element because there is nothing in the nature of the equitable rules of the law of the forum that requires their mandatory application, and not all principles of equity form part of the fundamental public policy of the forum or are of such a formative nature that the law of the forum should always apply. Equitable remedies should be subject to the same choice of law application as any other substantive law of the forum. Some care[63] is applied not to characterise equitable remedies as procedural as this would render the choice of law irrelevant under the *lex fori proceduralis* rule. For good reason, however, few cases can be brought forward to support this view.

Whether or not the *lex fori* applies once equitable remedies are considered should only be treated here if the answer to this question may contribute to a better understanding of legal procedures in general. An answer would contribute accordingly: if the common law regards such a great variety of legal concepts such as trusts, injunctions, estoppel or presumptions *etc.* to be generally procedural in character, this would certainly inform any understanding of legal procedures in the international context. The fact that equity does not form part of civil law concepts and is rarely understood in non English speaking countries does not detract from this. It suffices that common law countries which constitute one of the two great legal traditions of the world possess this concept of equity which is relevant to defining the scope of legal proceedings, which may well help in understanding procedures from a global perspective. Therefore, the issue should be briefly addressed.

To sum up: equity[64] is a comprehensive system of justice acting *in personam* to remedy inequities caused by the application of the law.[65] In the framework of the

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[61] Article 10 "Scope of the applicable law: 1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; (e) the consequences of nullity of the contract."

[62] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 3.01 *et seq.*

[63] *Ibid.*

[64] See Delany, *Equity and the Law of Trusts in Ireland* (4th ed., Thomson Round Hall, 2007) for a general overview.

[65] *Crabb v Arun District Council* [1976] Ch 179, 187 "Equity comes in true to form, to mitigate the rigours of strict law" *per* Lord Denning MR.

common law it is opposed to the law and in case of conflict it will pre-empt it. Equity has to be applied in such a great diversity of circumstances that its rules can be stated only in general terms.[66] The general character of equitable principles is that they have to be applied having regard to all the exigencies of the case and this leaves great discretion to the judge. Administered by special courts historically their special character has developed in practice procedurally.

From the perspective of equity it would be unjust for any court having jurisdiction over the parties *in personam* to deny equity only because a foreign law was applicable on the merits of a case as equity is understood as an overriding set of judicial principles procedural in character which should be always applied by the court.

This stated attitude of courts when applying equitable remedies conflicts with another concept of justice promoted by the choice of law rules;[67] the most appropriate law should govern the case and possibly in its entirety as laws are a coherent system in themselves. In particular, distinctions between procedural and substantive laws are arbitrary and local and tend to disregard the intertwined character of laws, which advocates the full application of the *lex causae* as far as this is possible and convenient to the forum. All limitations on the application of the proper law through the use of different legal concepts including the primacy of the *lex fori proceduralis* over the *lex causae* should, therefore, be read as narrowly as possible in the interest of the coherent application of the proper law undiluted by the *lex fori* which is foreign to the proper law. Ideas of comity between nations and courts and the general tendency of Conventions in the field to abstractly determine the applicable law as predictably as possible, which however, do not necessarily allow all subtle ideas of equitable justice entertained by the forum to materialise, are put forward to justify the departure from the traditional primacy of equity in courts.

It is to be admitted that these conflicting views are expressions of different concepts of justice derived from various concepts of law. Certainly, it would be too easy to label them as representing only either the perspective of the *lex fori* or the *lex causae sed situs rei.* However, elements of a local attitude or of an internationalised flavour will be found in the arguments of the different sides respectively. The suggested primacy of choice of laws over equity is rooted in international law concepts of the equality of states[68] and their legal orders, indicating an indiscriminate full, equal and "blind" application of their laws as no jurisdiction should sit in judgment over the other and should never apply their own "better" law instead of

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[66] *Boardman v Phipps* [1967] 2 AC 46, 123.

[67] This may summarise not only Yeo's critique but many others too, see Geimer, *Internationales Zivilprozessrecht* (5th ed., Verlag Schmidt Köln, 2005) p. 140 *et seq*. with many references; Niederländer, RabelsZ 20 (1955) 1, 45 suggests that the *lex causae proceduralis* should be applied as far as possible by the forum.

[68] See Article 2.1 of the UN Charter.

the choice of law rules.[69] Historically, international law concerns are of younger origin than equity, therefore, this view would regard itself as more modern. It sees a clear and unmitigated choice of law as the step preceding any application of the *legis forae* in legal procedures. It would take the principles embodied in conventions on the conflict of laws not as exceptions to the normal application of law but as expressions of general principles which must be broadly applied.[70] Indeed, all international conventions in the field would rest on the premise of equality of states, their jurisdictions, laws and courts which would require any judge to apply the law in an abstract way according to the choice of law rule required by the conventions.

Needless to say such a concept of justice is less concerned with the inequities suffered by an applicant and allows only for a very limited discretion of the judges, for example, in using the framework of public policy to rectify gross injustice. Equally it would have more regard to the consistency of foreign law and the equal treatment of the legal concepts of states demanded by international

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[69] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.53 expresses this as follows: "It is against modern understanding of international comity that the forum may use its domestic equitable principles to 'improve' foreign law." *Ibid*. at footnote 130 "No modern court would endorse the statement in *Brent v Young* (1838) 9 Sim 180, 191, 59 ER 327, 331, that 'in the contemplation of the Court of Chancery every foreign court is an Inferior court.'" Although the motives are made admirably clear by Yeo, a note of caution should be added here; first, it is the very purpose of equitable remedies if not to improve the law but certainly to improve its application, and this is obviously meant. This would apply both to any substantive foreign national law, *lex causae*, before any court applying equity. In so far as equity has a non-discriminatory approach, it treats the law and a foreign *lex causae* equally, which as a point of departure is hard to criticise. Secondly, more polemic is the reference to *Brent v Young* which "no modern court would endorse". The remark in *Brent v Young* is not meant to disregard comity by denying the international legal equality of foreign and domestic states, jurisdictions and courts. It is "in the contemplation of the Court of Chancery", meaning from this court's perspective, that other courts (and the Lord Chancellor meant, I submit, 'jurisdictions') exercise only limited jurisdiction (in the case of *Brent* the Surinam courts). This becomes clear by the case's reference one sentence before the quote to *Derby v Athol* 1 Ves Sen 204, 982, 983 where "inferior courts" are defined as those with a limited jurisdiction. It would probably make more sense to understand inferior courts from the Court of Chancery's perspective in this case as courts which may not apply their *lex fori proceduralis* by reason of jurisdiction than to see this as an onslaught against foreign courts' dignity by the Court of Chancery (which would be entirely *obiter* anyway). The rationale would then equally apply to "every foreign court".

[70] See the different attitudes of the ECJ, C-159/02, 27 April 2004, and the House of Lords, [2001] All ER (D) 179, in their respective treatment of *Turner v Grovit*, as characteristic of the legal attitudes here described, especially the statements of the British (supporting the House of Lords in its "equitable" approach) and German (advocating clear cut rules not allowing for equitable anti-suit injunctions) governments before the ECJ, see protocol of 9 September 2003 C-159/02, para. 45.

law.[71] Modernity, coherence and comity between nations and their courts would be the concepts driving change while the other side would argue that the ultimate aim of any court procedure is to render equitable justice in an individual case and that failing to do so would be seen as tantamount to a miscarriage of justice whatever ulterior purposes are put forward.

Neither side has yet won the day; they both rely on different legal concepts which are legitimate and recognised and which have not been yet ultimately aligned. The same was true of law and equity before the decision in the *Earl of Oxford's* case under the rule of James I. Maybe they will never be entirely aligned by one legal *dictum* although this would probably be preferred by those who promote international equality through the vehicle of hard and fast conventional rules as opposed to equity. Equity which has enjoyed primacy over law, both foreign and national in its courts for centuries[72] is likely to be further fostered by the courts leaving such amenable and convenient remedies to their discretion.[73]

The different concepts need not be realigned here: relevant to aspects of procedure from the viewpoint of an English speaking court in the common law tradition is that equity meets the traditional[74] properties of jurisdiction and procedure in an unmatched way. Jurisdiction procedurally exercised as equity is exercised *in personam* on a discretionary and local basis, not abstractly but in a way closely linked with the competence of the court, while assuming a primacy over substantive law both foreign and local.[75] Therefore, the application of equitable remedies in court procedures may inform the scope and understanding of legal procedures in general.

1.2.1.6 Injunctions

Injunctions which are liable to have an effect abroad albeit only issued *ad personam* are most likely to be in conflict with the comity of courts based on the international legal equality of states, jurisdictions and the courts exercising such ju-

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[71] In the Matter of Section 908 of the Taxes Consolidation Act, 1997, as substituted by section 207(1) of the Finance Act, 1999: *Paul Walsh v National Irish Bank* [2008] 2 ILRM 56, 80 McKechnie J outlines : "I would not deliberately offend the integrity of the Isle of Man or its judicial system by granting an order which I knew they would strongly object to. To do so would be downright disrespectful to a sovereign jurisdiction and would be the antithesis of showing due respect for the comity of courts." Not surprisingly the judgment has been appealed by the State. It is considered in more detail in Chapter 5.

[72] The effect of the *Earl of Oxford's* case (1615) 1 Rep Ch 1, giving equity overriding effect is now statutory, see England's Supreme Court Act 1981, s.25.

[73] Although the exceptions to its application in conflict with a foreign *lex causae* like those contained in Article 10.1.d of the Rome Convention of 1980 may increase in the interest of international judicial co-operation.

[74] Not the conventional exceptions of Regulation 44/2001 EC or the Rome Convention 1980 to name only the most important ones.

[75] Employing the *lex fori proceduralis* or the *Earl of Oxford's* case respectively.

risdiction. It is these which give rise to jurisdictional conflicts[76] more than other judicial means[77] which have some effect in foreign countries. Their role in delineating jurisdictions from an international perspective must be carefully considered. They are certainly an aspect of the relevant procedures to be considered in this study.[78] However, in understanding the procedures reviewed in this context, it is submitted that they may not add substantially to what has already been said generally about equitable remedies.

1.2.1.7 Public Policy Exceptions and Political Considerations

Unlike equitable remedies which form part of the common law the public policy exception or the *ordre public* is to be found in all legal orders of this world.[79] As Sir Hersch Lauterpacht observed in *Netherlands v Sweden*:[80] "in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally – or, rather, universally – recognized." It is described as the necessary precondition to applying foreign law with the potential, however, to be the "death of all choice of law" and as a constituent part of the forum's legal procedures.[81] The public policy exception is part of the *lex fori proceduralis*. However, it does not rely only on its qualification as procedural in a choice of law context but transgresses it. It is particularly interesting in the international context as it is directed specifically against foreign law and with it the choice of law. Public policy provides an escape route when reasons to protect fundamental interests of the forum outweigh reasons for applying foreign law.[82]

This definition of public policy would equally fit all other fields of procedural law overriding a foreign *lex causae* discussed here *supra* if perhaps the word "fundamental" is discounted. The public policy exception fulfils the same function

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[76] *X AG v A Bank* [1983] 2 All E R 465; *Walsh v National Irish Bank* [2008] 2 ILRM 56, 80.

[77] *E.g.* service of a writ/ summons/ process/ claim form out of jurisdiction.

[78] *Infra.*

[79] Bar, Christian v. and Mankowski, Peter, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 714: "Mit dieser Vorschrift hat der Gesetzgeber eine Art Überdruckventil geschaffen, das als solches wohl in allen Kollisionsrechtsordnungen dieser Erde vorkommt." Dicey and Morris, *op. cit.* para. 32-230 outline that the public policy exception is applied by "the courts of all countries".

[80] [1958] ICJ Rep 54, 92.

[81] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 715: "Der ordre public Vorbehalt ist gleichsam die conditio sine qua non einer Emanzipation des Kollisionsrechts vom Sachrecht … Er ist eine Art Residualkontrolle des Rechtsanwendungsprozesses, verfassungsrechtlich mittelbar gegründet auf Souveränität und Hoheit des Staates über seine Rechtsanweender. Er ist zugleich aber auch, wenn er im Übermaß benutzt wird, der Tod allen Verweisungsrechts."

[82] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.69 gives this definition.

of preserving the values and laws of the forum in its procedures whether deriving its role in overriding foreign *leges causae* by expressly being qualified as *lex fori proceduralis* or claiming a wider application comprising but transgressing the *lex fori proceduralis*. It shares the properties of procedures already defined as it is discretionary, overriding the application of the foreign proper law and with it undoing choice of law considerations to the benefit of the forum's legal order and jurisdiction. The public policy exception is meant for the more extreme cases and may be described as the outer limit of the court's jurisdiction as defined in its *leges fori proceduralis*. A mere difference between the *lex fori* and the foreign law which would otherwise be applicable, or a difference between the policy of the foreign and national laws is not sufficient to justify the exclusion of foreign law on the ground of public policy. Courts will not refuse to enforce or recognise a foreign right unless it would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[83]

The public policy exception is, unlike the other applications of the *lex fori proceduralis* against the foreign *lex causae*, recognised by Article 16 of the Rome Convention of 1980 which provides: "The application of a rule of the law of any country specified by this convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum." With this international approval in the Rome Convention the public policy exception is probably the only uncontested way for a forum to avoid applying the foreign laws applicable according to its own choice of law rules, although if widely applied it may be the "death of all choice of law".[84] One group of cases revolves around political considerations against the enforcement of contracts which on general principles of the conflict of laws,[85] were governed in each case by a foreign legal system according to which they would have been valid. These are contracts related to citizens of countries with which political relations had broken down.[86]

Perhaps the leading example of this special application of the public policy exception is still *Rio Tinto*.[87] An English company which owned cupreous ore mines in Spain, on various dates prior to the outbreak of the war between Great Britain and Germany, contracted to sell large quantities of this ore to three German companies, to be shipped from Spain to Rotterdam or certain other Continental ports

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[83] *Loucks v Standard Oil Co* 224 NY 99, 111 *per* Cardozo J.

[84] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 715. "Er ist zugleich aber auch, wenn er im Übermaß benutzt wird, der Tod allen Verweisungsrechts."

[85] v. Bar and Mankowski, *Internationales Privatrecht* (2nd ed., Verlag C.H. Beck, München, 2003) p. 713, p. 724 *et seq*. gives an overview over German practice and case law in the field.

[86] *Arab Bank Ltd v Barclays Bank* [1954] AC 495; *Schering Ltd. v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219; *Duncan, Fox v Schrempft and Bonke* [1915] 1 KB 365; *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 292, especially pp. 293-294, 297-299, 302.

[87] *Dynamit AG v Rio Tinto Co. Ltd* [1918] AC 292.

and to be delivered to several buyers by instalments extending over a number of years. At the date of the outbreak of the war some of the contracts had been partially executed, the others were pending. The contracts with one of the German companies were in English form; those with the two other companies were made in Germany and were in the German language. The English company claimed declarations that all the contracts were abrogated on 4 August 1914, by the existence of a state of war between Great Britain and Germany. It was held that, assuming that these contracts were valid by the law of Germany, the contracts were abrogated on the outbreak of war inasmuch as they involved trading with enemy citizens; that the contracts concluded were void as against public policy as tending to be to the detriment of Great Britain and the advantage of its enemy and that the question of whether they were void as against public policy should be determined by the law of the forum which was English. The House of Lords refused enforcement of the contracts while assuming that German law, as the proper law of the contract, might have held the contract to be enforceable as consistent with German law applicable to the contracts. While one of the contracts was arguably subject to English substantive law, English public policy prevailed over both German and English law. The question of whether the court should refuse to enforce an obligation arising under foreign law was not answered by reference to any similarity between the relevant provisions of the foreign and domestic laws (otherwise the contract subject to English law would have been enforced) but only by reference to the exigencies of public policy of domestic law and the actual effect which application of the foreign law would have.

In *Joachimson*[88] the firm of N. Joachimson carried on business in Manchester prior to 1914. The firm had a banking account with the defendant bank in London. On 1 August 1914, the German partner S. Joachimson died and the partnership thereby became dissolved. On that date a sum was standing to the credit of the partnership in a current account. At the outbreak of war with Germany on 4 August 1914, the remaining German partner in the firm, who resided in Hamburg, became an alien enemy. No money was paid out of the bank account after 1 August 1914. After the war an action was brought in the firm's name to recover the said sum as money lent by the plaintiffs to the defendants as bankers. The claim was refused as no demand had been made, nor had any cause of action accrued to the plaintiffs on 1 August 1914 and therefore the action was not maintainable.

The House of Lords made a slightly less harsh decision in *Schering*.[89] In that case by a contract made in February 1936, a German company agreed to purchase German currency from a Swedish bank, payment to be postponed for eight years, and an English company, a subsidiary of the German company, guaranteed the payment as surety and agreed to pay the bank this sum by half-yearly instalments over a period of eight years, at the same time acquiring the right to an assignment

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[88] *N. Joachimson v Swiss Bank Corporation* [1921] 3 KB 110.

[89] *Schering Ltd v Stockholms Enskilda Bank Aktiebolag* [1946] AC 219 distinguishing *Dynamit (Nobel) v Rio Tinto* [1918] AC 260.

of the bank's right against the German company, whose liability to pay the guarantee was to be discharged in the event of the original sum being paid. It was held that, on the true construction of the documents, the respondent bank having fully performed its obligations to the German company before the outbreak of war, nothing remained to be done under the contract, which was one between an English company and a neutral, but to discharge an accrued debt by instalments. Accordingly, since war does not abrogate or discharge a debt incurred before its declaration, the obligation to pay and the right to recover were only suspended.

In *Arab Bank v Barclays*[90] the appellants, whose registered office was in Jerusalem, claimed the amount of the current account standing to the credit of the appellants at the respondents' branch in Jerusalem at the time of the expiration of the British mandate in Palestine at midnight on 14–15 May 1948. On the expiration of the mandate, war broke out between Israel and the Arabs in Palestine. The appellants' office remained in territory controlled by the Arabs, while the respondents' branch remained under the control of Israel. Pursuant to the provisions of the Absentee Property Law 1950 passed by the legislative body of Israel, the respondents paid to the Custodian of Absentees' Property the amount standing to the appellants' credit at the respondents' branch at the termination of the mandate. The law of Israel and the law of Palestine both incorporated the law of England in relation to the effect of war. It was held that the appellants' right to obtain payment was suspended by the outbreak of war.

These examples show that the application of the public policy rule applied in the context of enemy trading is fairly discretionary. It does not take into consideration the merits of the applicable laws of foreign countries, nor even of the applicable substantive law of the country itself (one of the contracts in Rio Tinto was subject to English law), but is rather based on what is seen to be the overriding interests of public policy by the forum. The wartime prohibition against trading with enemy citizens is probably the strongest application of this public policy rule. To exemplify the flexibility and discretion of courts in the field of public policy considerations it may be useful to analyse the public and political considerations in *Kuwait Airways Corp*.[91] While the procedural derogation from the *lex causae (lex loci delicti commissii*) to the benefit of the English *lex fori* was not explicitly justified as a public policy consideration, it would have been better if it had been.

When Iraq occupied Kuwait in 1990 it confiscated the planes of Kuwait Airlines in order to benefit its own airline IAC. In proceedings in tort before the English courts to recover the planes the question arose as to whether the then confiscatory applicable Iraqi *lex causae* could be overcome by characterising parts of the issue as subject to the English *lex fori*, a desirable effect from the English perspective as it would avoid any confirmation of the confiscations. The question was whether there was sufficient flexibility to enable the *lex loci delicti* to be excluded and the question of IAC's title to the aircraft to be decided exclusively by the *lex*

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[90] *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495.

[91] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, 16 May 2002.

fori.[92] As the confiscations were based in statute it was hardly possible to accept the confiscation as a tort at the relevant time according to the Iraqi *lex causae*. Strong reasons of public policy such as the non-actionable[93] illegality of the confiscations under international law and the inconvenient prospect that HM courts would confirm such measures, led the court to look for some flexibility. Indeed, this desire for flexibility persuaded the court to take into consideration the strong policy arguments possibly to the detriment of a consistent application of *lex causae*.[94] Lord Scott in a minority opinion commented on this in the following terms:

> "The flexibility they had in mind, however, was a flexibility that would enable the court to apply English law, the lex fori, rather than the lex loci delicti to a discrete issue in a case where the only significant connection between the action and the foreign country was that the allegedly tortious act on which the action was based had taken place in the foreign country. It may be that they would, if the 'only significant connection' criterion were satisfied, have allowed the lex fori rather than the lex loci delicti to be applied to the case as a whole … There was nothing, however, which suggested that, in a case where the only connection with England was that the action had been brought in England, the advocated flexibility could enable the court to waive the requirement that the allegedly tortious act be such as to give rise to civil actionability under the law of the country where the act was done, still less where that country was in every significant respect the country of the tort."[95]

Although this case does not precisely delineate the *lex fori proceduralis* from the *lex fori* in general, it may hardly claim to have applied the *lex causae* mechanistically without being informed by policy considerations inviting judicial discretion which was exercised by referring the issue to the *lex fori*. Except for the general jurisdiction of the English courts there was no connecting factor maintained which might have indicated the application of the English *lex fori*.[96] This indicates that the reasons for applying the *lex fori* would be similar to those which explain why

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[92] *Ibid.* at para. 159.

[93] *Luther v Sagor* [1921] 3 KB 532, enforcing the confiscations of a then unrecognised regime, see also *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964); Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 5 at footnote 10; Andreas Lowenfeld, "Act of State and Department of State" (1972) 66 AJIL 795.

[94] Rogerson, Pippa, "Kuwait Airways Corp v Iraqi Airways Corp: the territoriality principle in international private law – vice or virtue?" [2003] Current Legal Problems 265, which contains a persuasive critique of the majority.

[95] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, 16 May 2002, para. 187-188, *per* Lord Scott of Foscote dissenting.

[96] Unlike in *Boys v Chaplin* [1971] AC 357, where both parties were English and domiciled in England although the tort took place in Malta.

the *lex fori* is applied to all things procedural. It is submitted that it would have been better to categorise this case under the heading of public policy. However, for the current purpose of assessing the forum's procedural discretion not to apply the foreign *lex causae* applicable according to the choice of law rules this would make no difference.

Public policy's close links with the other procedural remedies described here is evidenced also by those who would not like to see *Re Courtney* as a basis for the general qualification of equitable remedies as procedural, but to see public policy as an arguable basis for the decision instead.[97] In *Re Courtney*[98] Cottenham LC noted that it would be an injustice to deny the creditor the benefit of "his" security, which, as Yeo[99] suggests is only keeping the debtor to his promise which could be characterised in the choice of law context as an enforcement of a contract. In the modern context however, there is little excuse not to take advice from foreign law. It would be better, he suggests, to apply the foreign *lex causae* except where the application of that law would itself be contrary to the public policy of the law of the forum.

One well known procedural feature is the non enforcement of foreign public laws which leads to the non application of the foreign *lex causae* leaving the *lex fori* to be applied. The fact that this doctrine has an effect identical to that of all examples discussed and particularly the close possible connection to the public policy exception found here indicates that it is worth looking at it for some further elucidation on procedural characteristics. In relation to the public policy exception it may be seen as the other side of the coin. Both undo choice of law rules to the benefit of the laws of the forum either because the forum's own fundamental public policies require it or the public policies and laws of another forum require the forum not to apply them. Despite their reverse character they achieve procedurally the same result by either disregarding the foreign public laws or providing them with overriding force as against the normally applicable laws (the fundamental national public policies.)[100] From the procedural perspective they may be more connected than is usually admitted.

Heinemann[101] is probably one of the more recent cases which represents the doctrine quite clearly. The Attorney-General of the United Kingdom sued the pub-

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[97] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) para. 1.47.

[98] (1840) Mont & Ch 237, 252.

[99] Yeo, *Choice of Law for Equitable Doctrines* (OUP, 2004) *op.cit*.

[100] While retaining the usual terminology of "public policy", it must be noted that when applied in legal proceedings the public policy exception becomes law, therefore, it may be right to say here "public policy laws" to make the equation with the non application doctrine more visible.

[101] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 applying the relevant jurisdiction from English, US, Irish, Australian and New Zealand sources; *Huntington v Attrill* [1893] AC 150, 156*; Moore v Mitchell* 30 F 2d 600, 604 (1929); *Buchanan Ltd v McVey* [1954] IR 89; *A-G (NZ) v Ortiz* [1984] AC 1, 21-24; *Re Kingdom of Norway's Application* [1987] 1 QB 433, 478.

lisher and the author of a book in an Australian court, claiming an injunction to restrain the publication of the book which contained information that had been acquired while the author was an officer of the British Secret Service MI6. It was asserted that the disclosure of the information was in breach of a contractual obligation of confidence owed by the author to the United Kingdom Government as a private right. The High Court of Australia, the highest Australian court, held that the claim could not be entertained because it sought to vindicate the governmental interests of a foreign State, that it was a rule of international law that such a claim was not enforceable and that the court would not enforce an obligation of confidence in an action brought to protect the intelligence secrets and confidential political information of a foreign government.[102]

It is noteworthy that in the case Brennan J linked the doctrine expressly with public policy: [103]

> "To give effect to this public policy, a court must be able to discriminate between the cases where it would and cases where it would not be damaging to Australian security and foreign relations to protect the intelligence secrets and confidential political information of the foreign government. … In these circumstances and in the absence of legislative direction, the only course which a court might properly take to ensure that Australian security and foreign relations are not damaged is to refuse to enforce all claims made by a foreign government for the protection of its intelligence secrets and confidential political information."

Further it was stated by Kingsmill Moore J in the decision of the Irish Supreme Court in *Buchanan v McVey* as quoted in *Heinemann*:

> "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, Courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum … If then, in disputes between private citizens, it has been considered necessary to reserve an option to reject foreign law as incompatible with the views of the community, it must have been equally, if not more, necessary, to reserve a similar option where an attempt was made to enforce the governmental claims (including revenue claims) of a foreign State. But if the Courts had contented themselves with an option to refuse such claims, instead of imposing a general rule of exclusion, the task of formulating and applying the principles of

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[102] (1986) 165 CLR 30, 50 *per* Brennan J.

[103] *Ibid*.

> selection would have been one, not only of difficulty, but danger, involving inevitably an incursion into political fields with grave risks of embarrassing the executive in its foreign relations and even of provoking international complications."[104]

It is a small step from this reasoning to further equate the public policy exception with the rule or doctrine preventing the enforcement of foreign public laws as well as foreign penal and revenue laws. In this context this doctrine may be seen as an application of the same principles effective in the public policy exception described above. One of its features is the very discretionary application of these rules. This is easily seen in the application of this general rule of exclusion. In an almost identical case to *Heinemann* the English *lex causae* was not overruled by New Zealand's *lex fori* as expressed in the general rule of exclusion nor was it even discussed.[105] It would be harsh to suggest that the Judges of the House of Lords sitting in their capacity as the Judicial Committee of the Privy Council in London would be more amenable to the core public security interests of their country whose justice they normally administer than the perspective of the Antipodes would suggest.[106] *Arab Bank, Joachimson* and *Schering* are possibly in the same relationship to *Kuwait Airlines* as *Heinemann* is to *A-G for England and Wales v R*. There is obviously no need to state the reasoning of *A-G v R* here, as the London decision on behalf of New Zealand does not address the policy exception at all nor does it even mention *Heinemann* or related decisions. This may in itself be seen as an expression of the discretion of the forum in the context of public policy concerns.

It must be understood that in this field of discretion and national public interests the public policy exception and the non enforcement of foreign public law rule (sometimes called the revenue rule) are occasionally discounted entirely by some courts. In such cases, as in *A-G for England and Wales v R*, obviously no reason is given for this deficit in legal reasoning. As it is the task at this point of the inquiry to elaborate on the practice of legal procedures in the public policy context in order to sharpen the understanding of procedures in terms of how they really work and how they may be best applied and analysed, it may be expedient to look at those cases which discounted totally the rules considered here.

In *Islamic Republic of Iran v Pahlav*[107] the New York Court of Appeal did not admit the claim of Iran against the Shah in relation to his governmental activities for want of jurisdiction (*forum non conveniens*). The same result could have been achieved by applying the exclusionary rule as the targeted acts of the Shah had

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[104] *Buchanan v McVey* [1954] IR 89, 106.

[105] *A-G for England and Wales v R.* (New Zealand) [2003] UKPC 22, 17 March 2003.

[106] It is possible that the Lords in the Privy Council applied the reverse perspective of the reasoning of Brennan J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 48.

[107] 62 NY 2d 474 (1984).

been clearly carried out in his public capacity at the time. In the *Republic of the Philippines v Marcos*[108] on the other hand, jurisdiction was not only assumed, but without any reference to the public policy or revenue rule or the related doctrines of act of state or immunity, the claim of the Philippines was granted.

The same result ensued in *Republic of Haiti v Duvalier*[109] where a Mareva injunction freezing Duvalier's assets in France was enforced by the English Court of Appeal. This made clear that the English Court of Appeal did not consider the non enforcement or revenue rule to be applicable here because the Mareva injunction or freezing order would only be applied if the French decision on the merits was enforceable in England because otherwise there would be no good arguable case.[110] If the claims of the Republic of Haiti against its former ruler had been qualified as public under the rules of the forum, the revenue rule would have applied, and such an enforcement of the French decision could hardly be imagined when applying the revenue rule. Otherwise the English enforcement of the French court's freezing order would have been an indirect enforcement of foreign public rules, a result at variance with the rule here discussed. Damages with a clearly penal character were also awarded by the Privy Council in favour of Hong Kong in a claim against one of Hong Kong's civil servants in respect of the fraudulent exercise of his public duties.[111] In addition, in an old case even a claim of this kind by the King of Prussia against one of his former civil servants was entertained before American courts.[112]

All these cases which do not mention the non enforcement rule are set in an immensely political context in which the governments of the forum countries[113] have a clearly understood policy towards the respective defendants. The non application of the revenue rule could be explained by reference to these respective policies in all the cases and it would be to disregard the only explanation of these different courts' discounting of the revenue rule not to take note of these contexts.

1.2.1.8 Conclusions

The likely conclusions from this overview may seem surprising. Although initially procedures were seen as ancillary to substantive law indistinguishably linked to the latter in their task of giving them effect, a more independent profile of legal procedures has emerged when set at odds with some of the rules of substantive

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[108] 806 F 2d 344 (2nd Cir 1986); 862 F 2d 1355 (9th Cir 1988), cert. den. 109 SCt 1933 (1989).

[109] [1990] 1 QB 202 (CA).

[110] See, for example, *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep 159, 164 (CA) *per* Rix LJ.

[111] *A-G for Hong Kong v Reid* [1993] 3 WLR 1143 (PC).

[112] *King of Prussia v Kuepper's Administrator* 22 Mo 550 (1856); *Sumitomo Bank Ltd v Thahir* [1993] 1 Sing LR 735 (HC).

[113] Here the Privy Council is treated as part of the government of the United Kingdom.

law both local and foreign. In particular, the distinction between the *lex fori proceduralis* and the *lex causae* proved extremely helpful in analysing the ulterior purposes and interests which will be entertained by legal procedures when these are not indistinguishably amalgamated and absorbed in giving effect to substantive laws. It is suggested that this perspective shows that known properties of procedures are generally able to disclose something about substantive laws notably in an international context.

Although most would see procedures mainly as providing a mechanism to determine, give effect to and sanction whatever substantive law is applicable in a case brought before a forum, the profile of legal procedures looks different when it is regarded as distinct from substantive law on its own merits. It emerged from the more general observations made at the outset that procedural rules do not share the properties of substantive laws as embodied in the *stare decisis* rule, which guarantees the stability of the law over time but not the procedures subject to it. For example, if substantive law changes a contract would be governed according to the laws in force at the material time, however, the procedures would not guarantee such stability. In the interest of ulterior purposes they may not enforce substantive law at all, for example, if one party to a contract becomes an "enemy citizen" to the forum or if equity must be done. This is linked historically to the sovereign as the source of all procedures framing the law embodied in the English legal tradition by the *Curia Regis*, as the cradle of modern courts presided over by William the Conqueror.

Procedure and law seen through Kelsen's functional approach as conditional offers to apply sanctions hints at the fact that it is authority not reason which gives effect to the law.[114] In the context of the conflict of laws the international delineation of competing legal concepts by the forum requires a neat distinction between substantive laws and procedures common to all laws in all countries. In discovering common properties, a first step towards establishing international legal procedures which may be understood functionally may be seen. The remarkable pre eminence of the *lex fori proceduralis* over the applicable substantive *lex causae* known to all jurisdictions has shown itself to be a legal tool capable of accommodating a variety of forum interests and standards. These are local or national forum standards often distinct from those provided by the applicable law. They comprise the calculation of damages, limitation periods and most of the other equitable remedies such as injunctions building on the jurisdiction of the forum over the parties to a claim *in personam*. Rather than the international the local perspective governs these procedures which are closely linked to the jurisdiction of the courts and exercised with discretion.

Discretion exercised by granting or refusing service out of the jurisdiction or immunities could have added to the insights gleaned from the application of the public policy exception or the revenue rule. Procedure works to the benefit of the

[114] To rephrase a well known *dictum* of Thomas Hobbes' "*auctoritas non veritas facit legem*".

forum's legal order and standards and, it is submitted, never against. Foreign applicable law and exceptionally even national applicable law[115] may be denied effect by procedures. The political character of applying procedural dominance over substantive laws in a discretionary manner may be discerned in various cases not only involving deposed rulers, revealing that procedural practice has a low value as legal precedent and is better not relied upon. Such practice is erroneously understood to live up to standards of legal precedent known in the application of substantive laws. Procedure may be akin to the discretionary display of sovereign political powers not only in the discontinuation of contractual obligations in times of war. Public order, the primacy of procedure over law, the *Primat des Prozeßrechts*[116] are concepts in this context close to legal notions of sovereignty, jurisdiction, discretion, political exception to law, competency of the forum, authority or power, which are however limited locally to the extent of the forum's reach. There may be seen to be a note of hierarchy in the primacy of procedural law too, giving effect to the authority's political and legal standards. This could be based on two *dicta*, one by Coke J:

> "As a matter of principle, in my view, if a United States court exercises jurisdiction over a person resident in the United States, it is exercising powers inherent in the sovereignty which adheres to the United States. As a matter of principle, too, in my view, English law should recognise the legitimacy of that exercise of jurisdiction. It follows that the answer to the question which I must answer does not lie in investigating the function discharged by the court but lies in investigating the source of the authority of the court. … The source of its authority is to be found in the sovereign power which established it. For those reasons I conclude that the exercise of jurisdiction by a federal district court over a person resident in the United States is, by the standards of English law, a legitimate and not an excessive exercise of jurisdiction."[117]

The other by Holmes J, namely that: "The foundation of jurisdiction is physical power".[118]

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[115] *Dynamit AG v Rio Tinto Co. Ltd* [1918] AC 292, which concerns a contract in English which would have been subject to English substantive law but was nevertheless not enforced because of overriding procedural concerns stemming from the war.

[116] See Schack, Heimo, *Internationales Zivilverfahrensrecht* (C.H. Beck, München, 2002) p. 19 with further references from the German background. The German statutory provision of Article 32.1. No. 3 of the EGBGB makes it clear that the State of the forum has the opportunity to potentially determine everything according to its own *lex fori* if it chooses to do so. This includes the competence to liberally qualify the contents of the *lex fori proceduralis*.

[117] *Adams v Cape Industries plc* [1990] 2 WLR 657.

[118] *McDonald v Mabee* 243 US 90, 91 (1917).

1.2.2 The Public Character of Procedures

The main rule already outlined above is that matters of procedure are governed by the *lex fori* which means in practice that a court's procedure is local and everything which is classified as procedural by the forum will be treated according to its own laws irrespective of the proper law applicable to the merits of the case before it. When discussing the character of legal procedures their public nature, which aligns them with other core activities of a state exercising public authority, was referred to. The public private divide which is legally relevant in relation to the non-enforcement of foreign public laws by the forum[119] and when granting immunity for public acts of foreign states as opposed to private ones[120] may help to inform the view on procedures. The procedural rules of the forum seem to mirror properties seen in public policy or mandatory forum rules within the formative jurisdiction of the forum. They give effect to those core values of the legal system which they are part of. In doing so procedures may be seen to be part of the public exercise of state authority. Legal procedure is a very condensed kind of public authority which is linked to the concept of jurisdiction and sovereignty. This may allow us to understand better the nature of legal procedures wherever they are encountered.

[119] *Bank of Ireland v Meeneghan* [1994] 3 IR 111, and see *supra*.

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

Chapter 2

Procedures in International Law

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

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

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

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

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

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

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

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

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

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

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

6 [2001] ICJ Rep 497.

7 43 ILM 581 (2004).

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

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

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

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

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

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

2.1 Lack of Compulsory Procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.1 General Procedural Provisions in International Instruments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And ICJ Rules Article 31 reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.1.2 Different Features Regarding Non-state Party Procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[34] *Ibid.* at 1430.

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

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

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

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[35] *Ibid.* at 1433.

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

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

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

2.2 Variety of Procedures

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3 National and International Legal Procedures

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

2.3.1 National Procedural Law as International Law

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

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

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

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

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

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

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

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

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

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

[56] See Article 94.2 of the UN Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3.2 General Character of Procedures

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

Chapter 3

The Quest and the Notion

Is there any notion of legal proceedings common to both national and international law which may lead to a better understanding of the genesis of law? Having reviewed the procedural notions used in national and international law in some detail there seem to be substantial differences between them despite a common terminology. However, to find a useful common notion it may be necessary to disregard the different fields of applications on the common functions of procedures. A few thoughts on a possible perspective may help.

3.1 Aim of the Inquiry

The aim of legal procedures is to give effect to substantive law. Legal proceedings originate in authorities which establish procedures, for example, a state or an international organisation. Procedures reflect their origin if the interests of the founding authority are at stake. Therefore, two properties of all procedures may be distinguished; the serving character towards substantive law which ideally is absolute and would always tend to shape procedures in a way which enables substantive law to become effective and would lead to a soft and flexible approach to all procedural formalities (statutes of limitation, formal requirements). On the other hand a limiting character of legal proceedings may be found primarily when interests of the authority which entertains the proceedings are at stake or when formalities no longer serve the ultimate aim of all proceedings which is to make substantive law effective. This applies both to the comprehensive legal procedures of national courts and to the fractured ones seen in international adjudication while the independent strength of national procedures would tend to allow for more authority and less discretion which has the effect of developing more formalities which are not necessary in view of the ultimate aim of procedures. Procedures would determine law.

3.2 Empirical Approach

To many these basic observations may suffice. Common opinion may hold that procedures are necessary but that to dwell on them separately is a waste of time. Why it is worth developing a more sophisticated notion of international procedures?

Looking at the actual working procedures in contentious cases could be potentially useful in dealing with similar cases. A rather abstract notion of procedures would not necessarily be seen as useful for this approach. This common view seeks to apply knowledge directly and to see its immediate practical and economic use. Does it help my case and does it pay off? To put it briefly here meets this attitude suggested by those more interested in tools, tricks and practice. And it is exactly this which fuels the machinery of legal proceedings. Translating this attitude into an academic approach would best foster these interests. To look at existing procedures empirically, taking stock of how many cases are proceeded with in which forum incurring what costs applying what law in what way and deducing from it solidly based recommendations of how to do better may indeed be a worthwhile task. And indeed a little of this may also be found herein, for example, when discussing the different bases of national jurisdictions and the "Italian Torpedoes".

However, this is not all. There is another side of academic insight which pretends to understand the essential nature of notions used and to define their fundamental properties generating usefulness transcending the practical case to case perspective. To imprint a certain understanding by clarifying a notion through logic and beyond by unfolding its inherent idea is another approach which does not lend itself to such easy applause as the empirical one. Academic in the tradition of the original Athenian Academy it merits some short explanation.

Notions can be particularly powerful and although this may be the case everywhere where words are used this power of notions is particularly obvious in the field of law and especially in international law. Suggesting human rights violations, war crimes, exclusive jurisdiction or national sovereignty is a strong contention due to the highly charged nature of the notions used. Their power stems rather from inherent values and ideals transported through these and other notions than from their empirical use or success in past precedents as great as these may be. It is an appeal to a higher order of things which carries the weight in legitimising action when, for example, a threat to peace or an act of aggression is maintained by the UN Security Council to open certain proceedings. A most striking example is the notion of sovereignty. It focuses many state competencies in the international field in an unmatched way. Its use still carries an elaborate meaning originally established in the writings of Jean Bodin but today it even draws together other state properties such as independence or jurisdiction far beyond its historical use when invented to strengthen the claim of the French king to power towards the other estates of the realm. Although originally a notion to describe internal constitutional competencies its change today as denoting first and foremost the international status of states in their relation to one another is remarkable. The idea of a state as a single legal personality with all its extraordinary effects in international law is hardly conceivable without the development of the notion of sovereignty. Today somewhat overcharged with meaning and historical and current understanding the term sovereignty may be at a breaking point. However, it is still a telling example of a notion whose effects and imprints on international law for

centuries and some time to come cannot be discovered by evolving its inherent meaning. In contrast to the term of sovereignty the notion of procedures has not seen an equivalent development. As sovereignty may be overcharged with meaning, procedure may be "undercharged" with any specific meaning and understanding. Devoid of substantial meaning and a political or philosophical history it is more a virgin and poses a special challenge when seen on its own merits. Some leniency of the reader is sought to nevertheless discover notional and legal understanding of legal proceedings in an international context.

3.3 Form and Contents, Procedures and Law

A preliminary hint to the relationship between form and contents may help. Thomas Aquino distinguished form from substance by considering form as an external expression of substance in the metaphysical tradition of Aristotle. The substance of a coin is the metal but its form is a coin. All that exists has a form in which any substance dresses itself and something which has no form cannot exist. Equating form with procedure and substance with substantive law, procedures serve the same aim as form does; the numerical value of a coin printed on its surface clarifies its contents which are its weight and metal composition representing its value. The function of the coin's form is to render this beyond doubt and debate making the coin current for ulterior purposes. Through procedures substantive law is clarified, "coined" and brought beyond doubt when culminating in a decision. Procedures make it possible to distinguish final legal acts from mere preparatory acts or lastly irrelevant considerations (*obiter dicta*). It helps the discretion, facilitates the production of evidence and makes law accountable and verifiable. This is why form and procedure are seen as inherently useful. However, if forms and procedures are allowed to be used without regard to their inherent function of giving effect to the law, they may do exactly the reverse; some requirements may be invented or used in procedures to ultimately prevent the administration of justice. An obsession to adhere to real or fictional formal requirements comes from this and earns some a living but the principle of good faith that still supports substantive law is done a disservice. Any procedure and form serves a social function or an ulterior aim which when not recognisable any more must render form and procedure useless. Stability and flexibility; form and procedure gives reliability and stability; substantive law would ever again require flexibility of forms and procedures to achieve effect. They may be regarded as the two pillars of legal practice.

To get back to the coin; procedure may be seen as the form of substantive law obtaining its essential face through it while without it there will be no face at all. Substantive law will not materialise without procedure. The potential applications and uses of substantive law may be likened to a piece of raw marble (to get away from the ore of the coin) before Praxiteles or Michelangelo got their hands on it. With all its innumerable uses it lacks the essential; getting into being (recognised).

In international law this basic thought is essential; if there is no authority which provides a procedure the abundance of substantive law will stay unrecognised. Neither the authority providing a procedure nor the related enforcement can be disregarded. To sharpen the view for the underlying form and procedure when international law is generated is the focus here and the approach of the book. International law as opposed to national law is an inchoate legal order because there is no consistent procedure to always give effect to it. When there is a procedure then there is law. To see law in this field with its essential procedural roots without which it would wither away in a nothing may help to *cognoscere rerum causas*.

Chapter 4

National Legal Procedures

The focus in this chapter is on those aspects of legal proceedings before national courts which in some way determine international law. On the one hand, national legal procedures are easy to assess; it is the national courts in the fixed hierarchical framework provided by the constitutional and procedural rules of each country which apply and determine both national and international law. Decisions of national and international courts are referred to together as providing a subsidiary means for the determination of the rules of law in Article 38.1.d of the ICJ Statute. They are further characterised in the context of international law by the PCIJ in the *Certain German Interests in Upper Silesia* case:[1]

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

Legal decisions of courts are equated by the PCIJ with other activities of states, such as their laws and administrative measures. This clarifies that national decisions form part of the means by which each state expresses its will. In the words of Professor Mann: "A judgment, viz. a command conveyed through the courts, is not essentially different from a command expressed by legislative or administrative action."[2]

In view of the definition of international customary law given by Article 38.1.b of the ICJ Statute, decisions of national courts are in a favourable position to provide "evidence of a general practice accepted as law", as national decisions not only create a certain practice (*e.g*. in granting diplomatic immunity, assuming contentious jurisdiction or not) but provide with this practice the necessary acceptance as law, the *opinio iuris*, as this is exactly what courts pronounce on. Furthermore, they avoid the sometimes unpleasant experience of international courts and tribunals of not being able to ensure compliance with their decisions as sometimes the state parties concerned ignore these. Adherence and enforcement are a matter of course in relation to the decisions of national courts also in matters of international

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1 *Germany v Poland* [1925] PCIJ Ser A No. 7 p. 19.

2 F.A. Mann, "The Doctrine of Jurisdiction in International Law" in (1964) *Recueil des Cours* p. 73.

law and deserve no further mention. Therefore, the decisions of national courts in areas relevant to international law are in a most privileged position and merit the highest attention. This is expressed again by the PCIJ in the case concerning the *Administration of the Prince von Pless*:[3]

> "Whereas the Court does not consider it necessary to pass judgment upon the question of the applicability of the principle as to the exhaustion of internal means of redress in the present Order since, in any event, it will certainly be an advantage of the Court, as regards the points which have to be established in the case, to be acquainted with the final decision of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and now pending before that Tribunal; and as the Court must therefore arrange its procedure so as to ensure that this will be possible. Whereas it is desirable that the Agent for the Polish Government should be enabled, when preparing his Counter-Case on the merits, to take these final decisions into account."

The PCIJ wished to determine what international law was only after the relevant state practice and *opinio iuris* had been clarified by the national court and did not want to pre-empt this stage. It is noteworthy that this regard for the relevant national decision was irrespective of any procedural necessity to exhaust local remedies, a matter which was not pronounced upon by the PCIJ in this case. However, it was clarified that "the Court must arrange its procedure" to take note of the national court's decision on the issue. This practice is suggested by the PCIJ to be the appropriate stance of international law towards national legal procedures addressing the relevant issues. It guards against discarding them as insignificant or inferior in relation to the determination of international law compared to activities of forums established under international law.

4.1 Jurisdiction

The first procedural step in any legal suit is the assumption of jurisdiction. This is the self assertion of the court's competence or power to decide the case brought before it by the applicant, claimant or appellant. In international legal terminology this judicial authority reflects the self assertion of power of one state concerning its territorial, temporal or subject matter reach. This is when international law comes in, phrased in the words of a senior English judge and scholar:[4]

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[3] *Germany v Poland* [1933] PCIJ Ser A/B No.52 of 4 February 1933 p. 9.

[4] Lawrence Collins, "Public International Law and Extraterritorial Orders" in *Essays in International Litigation and the Conflicts of Laws* (Clarendon, 1994) p. 99. Lord Justice Lawrence Collins as he now is, was one of the first solicitors (Partner of Herbert & Smith, London which was founded by Professor F.A. Mann) ever to become one of HM

> "It should not be necessary nowadays to demonstrate that the exercise of civil jurisdiction by national courts is subject to the constraints of public international law. It is true that terminology sometimes disguises the public international law element. When Kerr on Injunctions stated that the jurisdiction to order acts abroad is 'not founded upon any pretension to the exercise of judicial or administrative acts abroad[5]', or when Lord Justice Kerr said that there was no reason of international comity preventing worldwide Mareva injunctions from being granted,[6] they were saying that no breach of foreign sovereignty would be involved. Sometimes the reference to public international law is more explicit, as when Lord Donaldson MR confirmed that the Mareva injunction should not conflict with 'the ordinary principles of international law' and that, in particular, 'considerations of comity require the courts of this country to refrain from making orders which infringe the exclusive jurisdiction of the courts of other countries'."[7]

What is of interest in the procedures of national courts is their assumption of jurisdiction *vis à vis* other states' jurisdictions, that is to say the limits on jurisdiction resulting from the international or inter-state character of the proceedings.[8] Again in the words of Professor Mann: "It [civil jurisdiction] cannot claim international validity except if and in so far as it keeps within the limits which public international law imposes."[9]

Decisions determining the limits of a national court's jurisdiction also determine the limits of power asserted by one state towards other concerned states. Such determinations are state practice or "facts" as the PCIJ has phrased it. The basic rule of jurisdiction is that it is determined independently by every state's own rules, traditions and practices. It is a primary expression of any state's sovereignty and legal independence, which finds its only limits in the co-ordination with other states' jurisdictions.[10]

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judges in the Superior Courts of England, and is now in the Court of Appeal. He is a distinguished Scholar in the field and Fellow of Wolfson College, Cambridge.

5 *Kerr on Injunctions* (6th ed., Paterson, 1927) p. 11, a reference to *Lord Portarlington v Soulby* (1834) 3 My & K 104, 108.

6 *Babanft International Co. SA v Bassatne* [1990] Ch 13, 32 (CA).

7 *Derby & Co. Ltd v Weldon* (*Nos. 3 & 4*) [1990] Ch 65, 82 (CA).

8 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.

9 F. A. Mann, "The Doctrine of Jurisdiction in International Law" in (1964) *Recueil des Cours* p. 73.

10 Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 46 *et seq*.

Such rules determining the assumption of jurisdiction and the exclusion of other jurisdictions can be exorbitant[11] or sometimes even extravagant in relation, for example, to individuals caught and detained abroad by the US military:

> "the individual shall not be privileged to seek any remedy or maintain any proceedings, directly or indirectly, or to have any such remedy or proceedings sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."[12]

This assertion of executive power in this US order to the detriment of both national and foreign courts' jurisdiction exemplifies the fact that every state determines its own jurisdiction or reach of power independently.[13] Such assumptions of jurisdiction must lead to a conflict with other jurisdictions as any state which has an equivalent rule could make an incompatible claim to hear the case. It is the co-ordination of such claims which is of interest here as it is international law which co-ordinates the conflicting practices of states. The jurisdiction assumed in this US order refers to individuals caught and detained by the US military outside the territory of the United States. It reflects the origins of all jurisdictions which is the power to summon someone. The reverse of the usual understanding of habeas corpus, not as the Sovereign's grant to his subjects, but as a description of an individual in custody to the Sovereign "habeas corpus" would express this situation. All English speaking jurisdictions base the competence of their courts primarily on the presence of the defendant in their territory; as expressed by Justice Holmes: "the foundation of jurisdiction is physical power",[14] meaning sovereignty. Or as Chief Justice Warren puts it, all restrictions on the jurisdiction of courts "are consequences of territorial limitations on the power of the respective States."[15] From the international law perspective this is accepted as expressed by the PCIJ in *Lotus*:

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[11] See Article 3.2 and Annex I with a list of exorbitant jurisdictions "prohibited" under Regulation 44/2001, but accepted by the ECJ in *Krombach v Bamberski* (Case C-7/98); [2001] QB 709. See also Article 18 of the draft Hague Convention on Jurisdiction (which never came into force) with a comparable list of exorbitant assumptions of jurisdictions which are discouraged; http://www.hcch.net/upload/expl37e.pdf.

[12] US Presidential Order of 13 November 2001, for more extensive reference see Biehler, *op. cit*. p. 57 at footnote 31.

[13] Schack, Heimo, *Interntionales Zivilverfahrensrecht* (3rd ed., C.H.Beck, Munchen, 2002) p. 87, para. 186 "… jeder Staat zieht durch seine nationalen Regeln so viele oder so wenig Rechtsstreitigkeiten an sich, wie es ihm zweckmäßig erscheint. Diese Freiheit wird durch keine allgemeine Regeln des Völkerrechts eingeschränkt." ("Every state determines by its own rules how much or how little litigation it assumes and it thinks appropriate. This liberty is not limited by any general rule of international law").

[14] *McDonald v Mabee* 243 US 90 (1917).

[15] *Hanson v Denckla* 357 US 235 (1958).

> "The first and foremost restriction imposed by international law upon a State is that … it may not exercise its power in any form in the territory of another state … It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."[16]

On this basis of this sovereign self determination of jurisdiction the co-ordination of jurisdictions in international law, for example, in the Brussels, Hague and Rome Conventions takes place. They set out a framework in certain areas but do not change the basic nature of national jurisdiction as a display of sovereign power. Beyond this very basic but still valid understanding of jurisdiction it is the more widespread procedural means affecting other jurisdictions such as service out of jurisdiction, enforcement of foreign decisions, application of foreign laws and any injunctive relief which may have extraterritorial effects. Inside the conventional framework it is in these more subtle fields that the judicial delineation of states' spheres of power evolve in national courts' decisions.

The procedures of national courts revolving around jurisdiction may be divided into different groups; fundamentally, there are two directions; either courts want to extend their jurisdiction in areas which may also be claimed by other jurisdictions or they limit their own jurisdiction in cases where general understanding might have expected them to assume it. The first group is procedurally determined by measures like service out of jurisdiction; orders and injunction with potential extraterritorial effect, for example, Mareva or Bayer injunctions or garnishee orders. The procedural means of the second group may be called jurisdictional avoidance techniques and these are related to immunity, prerogatives of the executive power, judicial restraint regarding foreign policy activities, act of state, comity between nations or courts or governmental act exceptions. Taken together they establish the sphere of power determined by the "state" practice of national courts both nationally and internationally. They pose special challenges for lawyers who may be confronted with international legal contexts before national courts. All procedural in nature, they predetermine the outcome of any case and are such a significant aspect of procedures in international law that they deserve special consideration here. Proceedings before domestic courts may be divided into a group which stretches the boundaries of the court's power and jurisdiction and another group which may be labelled as indicative of judicial restraint. Both groups of cases are usually not concerned with the direct application of international law but with determining the civil claims of individuals. It is their implicit effect on the jurisdictional delimitation between domestic and foreign jurisdiction which renders them international procedures relevant for international law at least as indicative of state practice.

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[16] *France v Turkey* "The Lotus" [1927] PCIJ (Ser A) No. 10 p. 18-19.

Other cases before national courts concern claims directly based on international law. These cases are interesting for international lawyers because of the merits of the decisions which determine the scope or existence of some part of international law. Both categories can come together when, for example, jurisdiction is determined by a national court by directly applying international law. This is so when national courts refrain from exercising jurisdiction because of immunities of the defendant based on international law, for example, because he is a head of state or a diplomat. However, it is worth noting that not only the direct application of international law by a national court will render its procedures international. This will also be the case where the direct claim is actually unrelated to international law but the procedure may have repercussions in other states and therefore becomes relevant for international law.

It makes sense to start with the procedural measures of national courts which potentially extend their jurisdiction into areas which may also be claimed by others. They usually please the claimant and frustrate the defendant as the restraint or avoidance techniques of national courts normally have this effect.

4.2 Interest in International Jurisdiction

Different national procedures provide different remedies. Selecting the forum which may assume jurisdiction and provide the best remedy in a case is an important issue for a lawyer advising clients. What is sometimes in a rather derogatory manner called "forum shopping" is the result of the fact that the sovereignty of states expressed in their exercise of jurisdiction is not fully co-ordinated. While co-ordination is progressing with EC Regulation 44/2001 (Brussels I Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters) and the Rome Conventions on contractual and non contractual obligations and several Hague Conventions mainly in arbitration and family matters, most fields of jurisdictional practice are not fully regulated by hard and fast rules but by the discretionary exercise of jurisdiction. In addition, even within conventional rules there is still some discretion exercised by the courts in relation to the assumption of jurisdiction. Therefore, the practice of assuming jurisdiction is relevant to practitioners as it is to international law in general.

4.3 Delineation in International Jurisdiction – General Principles

The limits of one country's assumption of legal authority or jurisdiction lie in the jurisdiction of another state or forum. It is the policy of the national forum to have regard to these limits which stem from practices and rules relevant in the field of international law both public and private as well as international procedural law. While national courts take note of conflicting jurisdictions, for example, when de-

ciding whether a claim may not be heard because of *forum non conveniens*, some rules of international law are now codified in Conventions which delimit national jurisdiction. Some of those procedural rules which are relevant to international law should be reviewed.

First, there is the principle of *lis pendens* in the international context. When litigation is pending before another forum the matter may not be entertained by a court. This is the directly opposite perspective from that taken by the doctrine of *forum non conveniens*. In the latter case the court considers whether another forum may be better suited to hear the case and if it thinks this is so will stay proceedings to give way to the other forum. Such a decision to stay proceedings because of *forum non conveniens* will take all the circumstances of the case into consideration. A court will make such a decision by using its full procedural discretion which allows for the most appropriate decision in the case. All possible considerations may be entertained but at the same time it is not too easy to predict an outcome due to the discretionary weighing of varied considerations by the bench.

The *lis pendens* rule takes the opposite approach in delineating different *forae* as it does not weigh any considerations of the appropriateness of the relevant *fora* but takes as the only and sole criteria for deciding which forum should yield to the other the fact that a matter is already pending before one of the *fora*. Based on the notion of the formal equality of states, sovereigns, jurisdictions and *fora* in international law as embodied in Article 2.1 of the United Nations Charter, it is a principle which lends itself easily to international agreements, conventions or treaties concerning jurisdiction and indeed forms part of these. As an extreme example if the court which is seised first assumes jurisdiction in an exorbitant way which it should not have done under any of the applicable rules,[17] nevertheless, the *lis pendens* rule as understood in international Conventions and Regulations would exclude any judicial review of this decision by a more appropriate or convenient forum.[18] Further, a judgment based on such a flawed basis of jurisdiction must even be enforced by the other state's courts under the Brussels I Convention. The court of another state cannot review the jurisdiction of the court of the state of origin of the judgment. This fundamental principle, which is set out in the first paragraph of Article 28 of the Brussels Convention, is reinforced by the specific statement, in the second phrase of the same paragraph, that the test of public policy may not be applied to the rules relating to jurisdiction.[19] While serving the idea of abstract equality of courts and countries and that no court should sit in judgment over the decisions of courts of another forum (but rather must enforce them blindly under conventional rules), justice in the case before the bench cannot be

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[17] Article 3.2 and Annex I of Regulation EC 44/2001 (Brussels I Convention on Jurisdiction and Enforcement).

[18] *Krombach v Bamberski*, ECJ (Case C-7/98) Judgment of 28 March 2000; [2001] QB 709.

[19] *Ibid.* at para. 31.

done to the same extent as under the *forum non conveniens* rule or any other discretionary system of national procedure.

The two approaches to potentially conflicting jurisdictions of courts reflect general concepts of law which may even be traced back to the two different kinds of Aristotelian justice. They represent the different ways in which legal procedures may tackle the issues here discussed. They all have their properties and characteristics and can be ultimately distinguished not least by the length, nature and depth of the reasoning in judgments which address the issue. Both approaches governing the delineation of judicial power reflect fundamental concepts applied in the international arena, however, their relationship to each other is not totally settled. While it may be fair to say that in Europe the *lis pendens* approach with its hard and fast character less amenable to the exigencies of the individual case is the more usual one not least because of the Conventions in the field, the failure of the intended Hague Convention on Jurisdiction and Enforcement some years ago[20] indicates that the opposite approach is prevalent on the global sphere, particularly in relation to the United States, Russia, China, India or the Antipodes, leaving room for discretion but unpredictability, judicial activism, legal conflicts and also exorbitant assumption of jurisdiction for ulterior purposes. Therefore, an educated understanding of jurisdictional approaches to international legal proceedings cannot yet be achieved by limiting oneself to one of the principles. Rather it is necessary to have regard to their interaction in international procedures on the merits.

4.3.1 The European Conventional Approach in Conflict

The *lis pendens* rule as the ultimate criteria for deciding jurisdictional conflicts is embodied in the Brussels I Convention which is for most of the member states now applicable as EC Regulation 44/2001.[21] It shows the procedural conflicts and approaches between competing concepts of national procedures allowing for the courts to have discretion in delineating themselves from other courts' jurisdictions. It is submitted that these conflicts show an ongoing procedural development significant for those seeking the most appropriate forum for a party in an issue as well as for international law determining the conventional and other limits of national judicial power. The *lis pendens* rule is intended to benefit the individual litigant and is also intended to serve the public purpose of avoiding a dispute between the courts of different countries as to which should hear the case.

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[20] Schack, Heimo, *Interntionales Zivilverfahrensrecht* (3rd ed., C.H.Beck, Munchen, 2002) p. 56, see Trevor Hartley and Masato Dogauchi, *Explanatory Report to the Hague Convention of 30 June 2005 on the Choice of Court Agreements*, http://www.hcch.net/upload/expl37e.pdf, p. 16 *et seq.*

[21] For details regarding the subtleties of its application regarding Denmark, or the EFTA-Lugano States Norway and Switzerland see Delany and MacGrath, *Civil Procedure in the Superior Courts* (2nd ed., Thomson Round Hall, 2005) p. 26 *et seq*., p. 60 *et seq*.; Layton & Mercer, *European Civil Practice*, Volume 1 (2nd ed., 2005) para. 13.018.

4.3.1.1 Application of the Convention

Article 21 of the Convention which is identical to Article 27 of the said Regulation provides that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the courts first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Once this occurs, it must decline jurisdiction in favour of that court. This is the *lis pendens* rule.

The leading case which addresses the inherent conflict between the two main procedural principles delineating competing national jurisdictions is *Owusu v Jackson*.[22] In 1997, the claimant, a British national domiciled in the United Kingdom, who had suffered a very serious accident while on holiday in Jamaica, brought an action in the United Kingdom for breach of contract against the defendant, who was also domiciled there. The claimant alleged that that the contract for letting a holiday villa, which provided that he would have access to a private beach, contained an implied term that the beach would be reasonably safe or free from hidden dangers. The claimant also brought an action in tort in the United Kingdom against several Jamaican defendants, including the owner and occupier of the beach. Another holidaymaker had suffered a similar accident two years previously and the action in tort against the Jamaican defendants therefore involved a contention that they had failed to take heed of the earlier accident.

The proceedings were commenced in England and were served on the first named defendant in the United Kingdom. Leave was also granted to the claimant to serve the proceedings on the other defendants in Jamaica and service was effected on the third, fourth and sixth defendants. All of these defendants applied for a declaration that the English court should not exercise its jurisdiction in relation to the claim and they argued that the case had closer links with Jamaica and that the Jamaican courts were a forum with jurisdiction in which the case might be more suitably tried. By order of 16 October 2001, the Deputy High Court Judge in England held that it was clear from *UGIC v Group Josi*[23] that the application of the jurisdictional rules in the Brussels Convention to a dispute depended, in principle, on whether the defendant had its seat or domicile in a contracting state, and that the Convention applied to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a non-contracting State. He held that in these circumstances the decision of the Court of Appeal in *In re Harrods (Buenos Aires) Ltd,*[24] which accepted that it was possible for the English courts, applying the doctrine of *forum non conveniens*, to decline to exercise the jurisdiction conferred on them by Article 2 of the Brussels Convention, was bad law. He found that as he had no power under Article 2 of the Protocol of 3 June 1971 to refer a question to the Court of Justice for a preliminary ruling to clarify this point, in the

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[22] *Owusu v Jackson*, ECJ (Case C-281/02) Judgment of 1 March 2005; [2005] QB 1.

[23] Case C-412/98 [2000] ECR I-5925, paras. 59 – 61.

[24] [1992] Ch 72.

light of the principles laid down in *Group Josi*, it was not open to him to stay the action against the claimant as he was domiciled in a contracting state. He also held that he had no power to stay the action against the other defendants, as the Brussels Convention precluded him from staying proceedings in the action against the first named defendant. He therefore held that the United Kingdom, and not Jamaica was the State with the appropriate forum to try the action and dismissed the applications for a declaration that the court should not exercise jurisdiction.

On appeal the Court of Appeal held that if Article 2 of the Brussels Convention were mandatory, the first named defendant would have to be sued in the United Kingdom before the courts of his domicile, and it would not be open to the claimant to sue him under Article 5(3) of the Brussels Convention in Jamaica, where the harmful event occurred, because that State was not another Contracting State. In the absence of an express derogation to that effect in the Convention, it was therefore not permissible to create an exception to the rule in Article 2. The claimant contended that Article 2 of the Brussels Convention was of mandatory application, so that the English courts could not stay proceedings in the United Kingdom against a defendant domiciled there, even if the English court took the view that another forum in a non-Contracting State was more appropriate. The Court of Appeal pointed out that if that position were correct it might have serious consequences in a number of other situations concerning exclusive jurisdiction or *lis pendens*. It added that a judgment delivered in England which was to be enforced in Jamaica against the Jamaican defendants would encounter difficulty in relation to certain rules in force in that country on the recognition and enforcement of foreign judgments. The Court of Appeal therefore decided to stay its proceedings and to refer the following questions to the European Court of Justice for a preliminary ruling:

> "1. Is it inconsistent with the Brussels Convention …, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
>
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
>
> (b) if the proceedings have no connecting factors to any other Contracting State?
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> 2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?"

It is useful to set out the history of the proceedings in some detail as all the relevant considerations had already been put before the national courts before the ECJ was seised of the matter. The main issue was that the claimant had not only sued the first named defendant but had also brought proceedings against a number of Jamaican companies in tort. Since the first named defendant was domiciled in

England, the English courts had jurisdiction over him under the Convention. However, the other five defendants were not domiciled in any member state of the Convention, therefore, jurisdiction depended on English law. The claimant submitted that the English court had jurisdiction over the Jamaican defendants as necessary or proper parties. As the accident had occurred in Jamaica and the evidence was there, the first named defendant thought that Jamaica would be the more appropriate forum. Further, a judgment by an English court against the Jamaican defendants would probably not be enforced in Jamaica. The outcome of English proceedings which would hold the first named defendant liable to the claimant but entitle him to an indemnity from the Jamaican defendants would necessitate new proceedings being brought in Jamaica with the possibility of a different outcome and irreconcilable judgments which would have been avoided by staying the English proceedings under the *forum non conveniens* rule.

The core of the decision can be summarised again in the words of the ECJ:[25]

> "Application of the *forum non conveniens* doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention."

The ECJ addressed all the concerns on the merits with brevity and unambiguous clarity:[26]

> "The defendants in the main proceedings emphasise the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, *inter alia,* as regards the expense of the proceedings, the possibility of recovering their costs in England if the claimant's action is dismissed, the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican standards, the enforceability in Jamaica of a default judgment and the impossibility of enforcing cross-claims against the other defendants.
>
> In that regard, genuine as those difficulties may be, suffice it to observe that such considerations, which are precisely those which may be taken into account when *forum non conveniens* is considered, are not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention, for the reasons set out above."

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[25] Para. 41 of the judgment.

[26] Paras. 44-45 of the judgment.

The ECJ simply held it unnecessary to weigh the benefits of the conflicting approaches, contending that considerations on the merits of conflicting courts' jurisdictions are not relevant, and cannot be used to call into question the mandatory nature of the fundamental rule of jurisdiction of the Convention. Therefore, the rule of *forum non conveniens* and other national rules on jurisdiction may only apply under the Conventions and Regulation when no defendant is domiciled in any EU or EFTA State.

It is not only the *forum non conveniens* rule which comes into conflict with the *lis pendens* rule as applied by the ECJ. As with all discretionary procedural rules equitable remedies such as injunctive relief are particularly liable to come in conflict with the *lis pendens* principle. This was examined by the ECJ in the case of *Turner v Grovit.*[27] The claimant, alleging constructive dismissal, brought proceedings against the defendant in England, claiming two years' salary as compensation. Oppressively and abusively and with a view to frustrating the pending English proceedings, the defendant brought proceedings in Spain against the now unemployed claimant, alleging that his resignation had caused losses equivalent to eight years' salary. The Court of Appeal[28] saw the ploy for what it was and, in a judgment of unusual rhetorical force, ordered the defendant to stop his action, which he did. Why the Spanish court, seised of the matter second, had not already dismissed the action was not clear but the Court of Appeal, suspecting that the defendant was involved in something discreditable, seized the moment.

The House of Lords made a reference to the ECJ[29] asking whether this was consistent with the Convention, and received the answer which had been feared. The court declined to answer a question framed in the narrow terms of the reference. It ruled that anti-suit injunctions were prohibited by the Convention, even where the respondent was acting in bad faith and with a view to frustrating proceedings pending before the English courts.[30] The ECJ outlined that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another EU Member State, even where that party is acting in bad faith with a view to frustrating the existing proceedings. It went on to say that such an injunction constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. That interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court

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[27] (Case C-159/02) Judgment of 27 April 2004; [2005] 1 AC 101. See Briggs (2004) 120 LQR 529.

[28] [2000] QB 345.

[29] [2002] 1 WLR 107.

[30] Briggs "Anti-Suit Injunctions and Utopian Ideals" (2004) 120 LQR 529, 529-533.

of another Member State. This runs counter to the principle of mutual trust which underpins the Convention and prohibits a court, except in special cases occurring only at the stage of the recognition and enforcement of foreign judgments, from reviewing the jurisdiction of the court of another Member State.[31]

One nuance in the ECJ judgment which relates to the procedural nature of the injunction may be noted:[32]

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention."

4.3.1.2 General Comment on the Application of the Convention

This issue directly touches on the judicial authority of national courts and is commented on accordingly. Criticism of the attitude adopted by the ECJ is harsh: "The court insists, in the way of all intellectually insecure fundamentalists, that the whole of the truth can be derived from the mindless repetition of the words of what is now Article 23 of the Judgments Regulation. This nonsense is only lightly touched on, which is a pity."[33] These words from an Oxford Professor and leading authority in the field go as far as appropriate English can go and show the fundamental disagreements of principle.

The ECJ regards a predictable application of the Convention and Regulation as inherently superior to, and more desirable than a judicial approach taking into account all relevant aspects of the case. Codes of law are thought to represent a higher stage of civilisation – a better way of doing things – than the systems that were in force in those countries before the codes. As Hartley points out,[34] it is important to realise that for the ECJ and the continental European legal traditions a Convention or Regulation is not simply a wide-ranging piece of legislation. It em-

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[31] *Turner v Grovit*, ECJ (Case C- 159/02) Judgment of 27 April 2004; [2005] 1 AC 101 paras. 27 -28.

[32] *Ibid.* at para. 29.

[33] Adrian Briggs, "Jurisdiction and Arbitration Agreements and Their Enforcement" (2006) 122 LQR 155, 157.

[34] Trevor C. Hartley, "The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws" (2005) 54 ICLQ 813.

bodies a different attitude towards the law, an attitude that tries to systematise the law through a hierarchy of principles that fit together to form a coherent whole. A limited number of generalised and abstract principles provide the foundation for a second level of more concrete principles. These in turn give rise to the legal rules applicable to individual cases. This system is easier to understand and explain. Moreover, gaps in the law can be filled by deriving new rules from existing principles, thus making the law more predictable. The *lis pendens/ forum non conveniens* conflict before the ECJ provides a clue to the fundamental difference of attitudes between common lawyers and civil lawyers, a difference that becomes apparent to anyone who takes part in international negotiations where lawyers from different parts of the world come together to negotiate international conventions on matters relating to international law or the conflict of laws. This difference is not simply a matter of wanting a legislative instrument with a rational, systematic structure. It is one whereby this element is regarded as more important than practicality and policy. Of course, civil lawyers are concerned with practicality and policy, just as common lawyers appreciate legislation with a systematic structure. The difference is one of priorities: civil lawyers are more concerned with the structure of the law, common lawyers with its operation. This difference of attitude feeds into the approach taken by civilian courts in the interpretation and application of private law. They often seem to regard adherence to principles as more important than a just and satisfactory result in the case at hand. One could say that the civilian approach is theory-driven, while the common-law approach is practice-driven. This attitude is apparent in the judgments of the ECJ, a predominantly civilian court, in the field of conflict of laws.[35]

Although it seems hard to contradict this criticism on the merits it would hardly change the course the ECJ has taken. The Court values the equal application of the Conventions, particularly the *lis alibi pendens* rule, without allowing for any review or evaluation by a national court of the circumstances of a case. The strong feeling that injustice has been perpetrated by the ECJ conveyed by the criticism will not be shared by the bench in Luxembourg. Upholding and developing a common European legal system with hard and fast rules taking precedence over competing considerations is the general direction which European law has taken since *Costa v ENEL*.[36] Reflecting the ancient categories of Aristotelian *iustitia distributiva* and *commutativa*, this is a conflict between different concepts of laws. It would certainly not suffice to see this conflict only as a conflict of common law approaches and Roman civil law, it is more. It is a conflict between the procedures of different courts decided by the application of Article 234 of the EC Treaty and

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[35] The criticism was phrased in these terms by Trevor Hartley, *ibid*, and by the same author, "The Modern Approach to Private International Law. International Litigation and Transaction from a Common Law Perspective" in (2006) 319 *Recueil des Cours* pp. 174-77, where he lists the background of the ECJ judges as evidence that the "ECJ is a civilian court" and its judges have little if any expertise in the field.

[36] ECJ (Case 6/64) [1964] CMLR 425.

the concept of superiority of the ECJ jurisdiction and EC law over national law, which is as well established as it is lacking any coercive persuasion or base. This is particularly so, as Article 10 of the refuted Constitutional Treaty provided such a base but never came into force.[37] Whether *lis pendens* or *forum non conveniens* or anti-suit injunctions or other procedural rules or laws should properly be applied comes down to the question of which court or forum will decide the matter; it is more a contest of authorities and power which is embodied in judicial procedures than a contest of reason or substantive law. This becomes admirably clear when the ECJ outlines in *Turner v Grovit*:[38]

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention."

It is generally accepted that procedure is entirely determined by the forum and forms the core of any judicial authority and power. The ECJ without arguing the case for the Convention on the merits against procedural assumptions of national courts merely establishes a hierarchy of rules which comes down to establishing a hierarchy of courts and setting itself on top: "national procedural rules may not impair the effectiveness of the Convention." That this core *dictum* of the ECJ is based on assumptions rather than reasoned becomes clear by turning it around: "the Convention may not impair the effectiveness of national procedural rules" would sound at least as persuasive given the longstanding history and the unanimous consent in relation to the superiority of national procedural law.[39] Far from

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[37] See from the international law perspective, Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 352.

[38] *Turner v Grovit*, ECJ (Case C-159/02) Judgment of 27 April 2004; [2005] 1 AC 101, para 29.

[39] See, for example, (German) *Reichsgericht* decision of 28 April 1900, Vol 46 RGZ 193, 199: "Für den deutschen Richter besteht kein Anlaß diese Grundsätze des englischen Aktionensystems in einem von ihm geführten Prozeß deswegen zur Anwendung zu bringen, weil die Verpflichtung an sich dem englischen Recht untersteht. Es ist zu unterscheiden zwischen dem Inhalt der Rechte und ihrer gerichtlichen Geltendmachung. Die Regeln, die in letzterer Beziehung im Ausland bestehen, sind für den deutschen richter, der nur sein heimisches Prozeßrecht anzuwenden hat, nicht maßgebend."

"There is no reason for the German judge to apply the principles of English law based on an actio limiting the right to specific performance only because the case is governed by English law. A distinction must be drawn between substantive laws and their realisation by the court. Foreign rules in relation to the latter are not relevant for the German judge, he only has to apply his own procedural laws." (Translation by the author).

suggesting that there are no reasons to be brought forward for the application of the conventional rules, the lack of reasoning by the ECJ admirably qualifies the judgments as a *decisio* in the ultimate sense; assumption of authority "*auctoritas non veritas facit legem*." This is the basis on which courts' procedures and jurisdictions operate and judging from this, the non-discretionary conventional system established by the ECJ, and accepted however grudgingly by the House of Lords will form a solid basis for the delineation of international procedures for some time to come. That development in this direction continues can be seen from the intentions of the EC, formulated in a recent summary, based on Article 65 of the EC Treaty:

> "Article 65
>
> Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:
>
> (a) improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
>
> (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
>
> (c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."

The report reads:

> "For individuals and companies to be able to fully exercise their rights wherever they might be in the European Union, the incompatibilities between judicial and administrative systems between Member States will have to be removed. EU leaders acknowledged this and presented three priorities for action, mutual recognition of judicial decisions: better Crime victims' compensation and increased convergence in the field of civil law.
>
> What is the basic principle underlying judicial co-operation?
>
> The principle of mutual recognition is the cornerstone of judicial cooperation in both civil and criminal matters. The Justice and Home Affairs Council adopted on 30 November 2000, a programme of measures for implementation of the principle of mutual recognition

of decisions in civil and commercial matters. The final goal is that judicial decisions should be recognised and enforced in another Member State without any additional intermediate step, in other words, suppression of exequatur.

What has been done so far?

A number of legislative instruments have already been adopted

In the field of jurisdiction, mutual recognition and enforcement of judgments

- Brussels I Regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
- a new Brussels II Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters, and parental responsibility, replacing Regulation Brussels II
- a Regulation relating to insolvency proceedings
- a Regulation creating a European enforcement order for uncontested claims

In the field of co-operation between the member States

- a Regulation relating to the service of documents in cross-border cases.
- a Regulation concerning the taking of evidence in civil and commercial matters

Furthermore, the Council adopted a decision establishing a European judicial network in civil and commercial matters. These instruments aim to improve the judicial cooperation in practice.

In the field of access to justice

- directive on legal aid for cross-borders litigants;
- directive relating to compensation to crime victims

Several green papers have also been published:

- a green paper on alternative dispute resolution
- a green paper on Injunctions of payment and procedures related to small claims
- a green paper on law applicable to contractual obligations

- a green paper on maintenance obligation
- a green paper on trans-national successions

And four proposals of the Commission are currently discussed in the Council:

- a draft regulation on the law applicable to non contractual obligations
- a draft regulation on creating a European order for payment procedure
- a draft directive on civil mediation
- a draft regulation establishing a European small claims procedure"[40]

There is no doubt that this trend will continue.

4.3.1.3 Effect of the European Conventional System

Unlike on the global scale, in Europe hard and fast predictable conventional principles will govern the delineation of the assumption of authority and jurisdiction by different courts. This certainly has merits and perils as has become clear. The great leap forward is that there are agreed bases of jurisdiction in most relevant disputes. This is somewhat undone by the *lis pendens* rule effectively rectifying even the most blatant disregard of these rules on jurisdiction as exemplified by *Krombach v Bamberski*.[41] This lack of judicial review in relation to national assumptions of even the most exorbitant jurisdictions, as in *Bamberski,* may not be upheld for all eternity. However, for the time being it is the prevalent system and must be taken at face value for what it is worth. All assumptions of power of any kind tend to behave as a law in themselves and would rather sanction the questioning of their basis than make it subject to argument and debate. Language, brevity and contents of the ECJ judgments discussed hint in this direction. As with the doctrine of the Holy and Undivided Trinity in the ancient Church the views of those that contest this will not be entertained. Let us then proceed on this assumption and see what it means for international legal procedures before national courts in Europe.

The primary effect is that the discretion of national procedure seemingly limited by conventional bases of clearly defined jurisdictional allocation in the Brussels and Rome Conventions is handed back to the national courts in a much stronger way when applying even exorbitant national bases of jurisdiction because other *fora* cannot judicially review this discretion but must even enforce judg-

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[40] See http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm (visited 16 April 2008).

[41] ECJ (Case C-7/98) Judgment of 28 March 2000; [2001] QB 709.

ments made on such flawed bases.[42] This almost perverse effect, which was certainly not intended by either the Brussels and Rome Conventions or the ECJ, but is now solidly established, makes it even more important to look very closely at the different bases of jurisdiction employed by the different national courts. The different procedural practices of assuming jurisdiction are ultimately relevant because they are not reviewable and are therefore sacrosanct under the tutelage of the ECJ. It is a licence to exorbitant judicial power which has been handed down by the ECJ which cannot be ignored. Assumption of judicial competency, power and jurisdiction is essentially discretionary, most clearly evidenced by the rule of *forum conveniens* and all the examples of exorbitant jurisdiction in the different national procedural orders,[43] and how self restraint, reason or arbitrary assumptions of jurisdiction will shape what is called establishing progressively an area of freedom, security and justice will now rest entirely with the procedural practices of national courts.[44] This leaves two tasks for the analysis of international legal procedures; first recognising state practice[45] in such unilateral assumptions of legal power. Secondly, that practice must progressively accept and deal with the perils and opportunities of what is usually described as forum shopping[46] or the Italian torpedo[47] in "an area of freedom, security and justice," where the ECJ took away national procedural shields to such practices.

4.3.1.4 National Bases and Choice of Jurisdiction

Only a lawyer who knows the details of national procedural practices in relation to the assumption of jurisdiction would be able to appropriately address the challenges for Europe in this area. Most areas of life are becoming more international; the internet is the prime example but whether tort, contracts or family matters are involved, the links to different legal orders and foreign forums are increasing. Trade in particular is international. In all these fields different laws may be involved and may serve as a connection to certain jurisdictions. This brings opportunities; opportunities to choose the jurisdiction where the interests of the parties are best served. This choice of jurisdiction is often referred to as "forum shopping". This phrase sometimes has a negative connotation hinting at potential misuses of forums not only motivated by promoting justice and the Italian Torpedo[48]

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[42] Trevor Hartley, "The Modern Approach to Private International Law. International Litigation and Transaction from a Common Law Perspective" in (2006) 319 *Recueil des Cours* p. 176 *et seq*. gives an impressive example.

[43] See EC Regulation 44/2001 Article 3.2 and Annex 1 for a list of same.

[44] Article 61 ECT.

[45] Article 38.1.b of the ICJ Statute "Practice accepted as law".

[46] Lynden, Baron Carel J.H. van, *Forum Shopping* (LLP London, 1998).

[47] Mario Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (1997) 7 EIPR 382.

[48] *Ibid.*

is a prime example in this context. However, this negative connotation is largely unjustified. Europe is bigger than one jurisdiction and the world is bigger than Europe, and opportunities should be explored when they are there. This is almost a duty for an international lawyer advising clients properly. Trade and shipping are the prime examples as cargoes will be loaded and discharged in many different countries. Thus, many jurisdictions will qualify for the taking of conservatory measures or the instituting of proceedings. The race to the courthouse[49] of the most suitable jurisdiction is the other catchword relevant under the ECJ's reading of the conventional *lis pendens* rule. Lawyers are mostly familiar with their own country's rules on jurisdiction and sometimes can make an educated guess about those in some neighbouring ones. For example, an Irish lawyer would be not be slow to pronounce on the English system and a German lawyer would probably assume that Swiss or Austrian rules would be fairly close to those that he is used to. However, this would not provide the overview necessary to decide whether there is jurisdiction in a particular country and what the advantages of going to the courts of such a country are. This may come down to considerations such as costs, the calculation of damages, the availability of a jury in civil matters,[50] language or which lawyers practice in the relevant area and should certainly not be ignored by the scholar who wants to assess how judicial power is allocated in states' practices in legal proceedings with an international link. The first prerequisite is to establish the rules for jurisdiction in the different countries. Then their usefulness in different contexts may be assessed. The practitioner may then decide where possible proceedings or measures may be started. The academic would then be able to tell where the international system in the Conventions which allocates jurisdiction has its potential strengths and weaknesses ("The Italian Torpedo") and envisage a suitable development. He would also see where the limits of one state's even exorbitant assumption of jurisdiction lie in the contained European conventional system which does not allow national courts to use their own procedural tools (*e.g.* anti-suit injunctions, garnishee orders, non-enforcement/registration of foreign judgments, *forum conveniens* etc.) to counter other countries' courts' jurisdiction creating an equilibrium still relevant on the global scale.

Therefore, it is sensible to discuss the different national laws of procedure and the legal practice of litigation which are foremost in the field of assuming jurisdiction. As substantive law demonstrates there are many similarities in the way in which problems are solved throughout the world. These similarities can be explained partly by historical reasons and partly because they are the result of a purposive harmonisation and unification in different fields of law. On the European and global levels of law-making, great importance is attached to the harmonisation of substantive law, as can be seen from the efforts of UNIDROIT, UNCITRAL and the Hague Conference. Notwithstanding the many similarities which exist in

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[49] Peter E. Herzog, "Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?" (1995) 43 AJCL 379-399.

[50] For example, in Ireland.

many areas of substantive law, procedural law and in particular procedural practice show great differences of approach which vary from country to country. To a large extent procedural law and practice are purely national affairs: a state determines, for example, which procedures exist, the mechanics of those procedures, which evidence is admissible and the competencies of the judge in the litigation. Furthermore, procedural law and practice are often characterised by traditions which are centuries old, evidenced in gowned officials, wigs, old-fashioned and even archaic language. If procedural law and legal practice had no influence on substantive law, then there would be no necessity to exchange views on streamlining and achieving the degree of harmonisation sought by EC Regulations in the field. National procedural law and practice contribute to the realisation of substantive law. This makes it important in discussing procedural law and practice in an international context. In short, it is sensible to exchange views on different national procedural law and practice in Europe. Apart from this, it is simply entertaining to talk about this subject. It is frequently more fascinating to pay attention to the differences rather than focusing on the similarities, but for lawyers there is a further dimension to the problem because they try to apply procedural law in such a way as to ensure that the substantive law is being implemented to the greatest extent possible in the interest of their clients, a feature common to all national jurisdictions. Procedural law and practice may therefore not create any obstacles to achieving that end. It is extremely useful to learn from other countries how their legal systems solve problems.

4.3.1.5 Forum Selection Under the European Rules; Italian Torpedoes

It is the decision of the ECJ in *Gasser v MISAT*[51] which lays the ground for the present situation of forum selection in Europe. The facts of this case were at follows. For several years Gasser, the registered office of which was in Austria, sold children's clothing to MISAT, of Rome, Italy. On 19 April 2000 MISAT brought proceedings against Gasser before the *Tribunale Civile e Penale* (Civil and Criminal District Court) in Rome asking the court to find that it had not failed to perform the contract and to order Gasser to pay damages. On 4 December 2000 Gasser brought an action against MISAT before the *Landesgericht* (Regional Court) in Austria, to obtain payment of outstanding invoices. In support of the jurisdiction of that court, the claimant submitted that it was not only the court for the place of performance of the contract but was also the court designated by a choice-of-court agreement as the parties had concluded an agreement conferring jurisdiction within the meaning of Article 17 of the Brussels Convention. MISAT contended that, before the action was brought by Gasser before the *Landesgericht* it had commenced proceedings before the *Tribunale Civile e Penale di Roma* in respect of the same business relationship.

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[51] *Gasser v MISAT*, ECJ (Case C-116/02) Judgment of 9 December 2003; [2005] QB 1.

The Austrian court considered that this was a case of *lis pendens* since the parties were the same and the claims made before the Austrian and Italian courts were based on the same cause of action within the meaning of Article 21 of the Brussels Convention, as interpreted by the Court of Justice.[52] The Austrian court stayed proceedings and referred among others the following questions to the ECJ for a preliminary ruling according to Article 234 ECT:

> "May a court other than the court first seised, within the meaning of the first paragraph of Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters [the Brussels Convention], review the jurisdiction of the court first seised if the second court has exclusive jurisdiction pursuant to an agreement conferring jurisdiction under Article 17 of the Brussels Convention, or must the agreed second court proceed in accordance with Article 21 of the Brussels Convention notwithstanding the agreement conferring jurisdiction?
>
> Can the fact that court proceedings in a Contracting State take an unjustifiably long time (for reasons largely unconnected with the conduct of the parties), so that material detriment may be caused to one party, have the consequence that the court other than the court first seised, within the meaning of Article 21, is not allowed to proceed in accordance with that provision?
>
> What course of action must the court follow if, in the circumstances of unreasonable delay it is not allowed to apply Article 21 of the Brussels Convention?"

The position of the intervening party, the United Kingdom, giving the background reasoning for the questions was stated by the ECJ in its judgment as follows:

> "61. The United Kingdom Government also considers that Article 21 of the Brussels Convention must be interpreted in conformity with Article 6 of the ECHR. It observes in that connection that a potential debtor in a commercial case will often bring, before a court of his choice, an action seeking a judgment exonerating him from all liability, in the knowledge that those proceedings will go on for a particularly long time and with the aim of delaying a judgment against him for several years.
>
> 62. The automatic application of Article 21 in such a case would grant the potential debtor a substantial and unfair advantage which would enable him to control the procedure, or indeed dissuade the creditor from enforcing his rights by legal proceedings.

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[52] *Gubisch Maschinenfabrik,* ECJ (Case 144/86) [1987] ECR 4861.

63. In those circumstances, the United Kingdom Government suggests that the Court should recognise an exception to Article 21 whereby the court second seised would be entitled to examine the jurisdiction of the court first seised where

(1) the claimant has brought proceedings in bad faith before a court without jurisdiction for the purpose of blocking proceedings before the courts of another Contracting State which enjoy jurisdiction under the Brussels Convention and

(2) the court first seised has not decided the question of its jurisdiction within a reasonable time.

64. The United Kingdom Government adds that those conditions should be appraised by the national courts, in the light of all the relevant circumstances."

The ECJ held:

"51. … It is clear from the wording of Article 21 of the Convention that it is for the court first seised to pronounce as to its jurisdiction, in this case in the light of a jurisdiction clause relied on before it, which must be regarded as an independent concept to be appraised solely in relation to the requirements of Article 17 (see, to that effect, Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, paragraph 14).

52. Moreover, the interpretation of Article 21 of the Brussels Convention flowing from the foregoing considerations is confirmed by Article 19 of the Convention which requires a court of a Contracting State to declare of its own motion that it has no jurisdiction only where it is seised of a claim which is principally concerned with a matter over which the courts of another contracting State have exclusive jurisdiction by virtue of Article 16. Article 17 of the Brussels Convention is not affected by Article 19.

53. Finally, the difficulties of the kind referred to by the United Kingdom Government, stemming from delaying tactics by parties who, with the intention of delaying settlement of the substantive dispute, commence proceedings before a court which they know to lack jurisdiction by reason of the existence of a jurisdiction clause are not such as to call in question the interpretation of any provision of the Brussels Convention, as deduced from its wording and its purpose.

54. In view of the foregoing, the answer to the second question must be that Article 21 of the Brussels Convention must be inter-

> preted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction."

Despite the clear presentation by the United Kingdom of the problems caused by such an interpretation of the Convention the ECJ confirmed its strict reading. Article 21 of the Brussels Convention must be interpreted as meaning that a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction. No considerations of delay or vexatious intent may be entertained. It has been commented that the ECJ has thus restored the torpedo power.[53] The now well established notion of a torpedo was introduced in this context in an article by Mario Franzosi.[54] He was one of the first commentators who analysed the fact that the Conventions have made it possible to litigate before a judge of an EU/EFTA member state the infringement of a patent registered in another state with the effect that a judge subsequently seised in the country where the patent is registered does not have jurisdiction under the European rules. This is possible as several jurisdictions allow an action to be commenced seeking a declaration of non-infringement which gives the potential infringer/defendant in an intellectual property case the chance to seize a court before he is actually sued by the patent holder. He recognised that the fundamental rule of domicile in Article 2 of the Brussels Convention is that:

> "Subject to the provisions of this Regulation,[55] persons domiciled in a contracting State shall, whatever their nationality, be sued in the courts of that state …"

This permitted, for example, an Italian defendant to be sued in Italy for violations not only of an Italian patent but also of a French, Greek or Danish patent, as the case may be. It is also possible in some EU states to sue someone for an alleged violation of a patent registered outside the EU. Beyond that there are many other connecting factors which may give rise to national jurisdiction under the Convention. This is expressed most clearly in relation to provisional measures according to Article 31 of the Convention/Regulation which reads:

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[53] Pierre Veron, "ECJ Restores Torpedo Power" (2004) International Review of Industrial Property and Copyright Law 17.

[54] Mario Franzosi, "Worldwide Patent Litigation and the Italian Torpedo" (1997) 7 EIPR 382.

[55] Regulation 44/2001 introduces the word "Regulation" instead of "Convention", however, without substantial change; Regulation and Convention are used interchangeably here, as the Convention still survives the Regulation for reasons of no relevance here (see point 22 of the Preamble to the Regulation) and the word Convention also encompasses the Lugano Convention which contains similar provisions to the Brussels Convention/ Regulation with regard to Iceland, Norway and Switzerland.

> "Applications may be made to the Courts of a Member State for such provisional, including protective measures as may be available under the law of that state, even if, under this Regulation, the courts of another member State have jurisdiction as to the substance of the matter."

Franzosi's concern was that an accused patent infringer may start an action in the EU member state of his domicile, asking the court for a declaration of non-infringement of patents registered in other countries both European and beyond. There is no doubt that according to Article 21 of the Convention this action for a declaration would make it impossible for the patentee to sue for infringement in any other EU member state. The existence of litigation in one member state makes it impossible to litigate on the same subject in other European states. If the accused infringer selects a country where the judicial system is excessively slow this may postpone any decision on the merits for a very long time which may be of great economic advantage to him but could amount to a denial of justice to the patent holder. If an action is, for example, brought before a slow-moving Italian court seeking a declaration that there is no violation of patents registered in European countries all European judges must refrain from exercising jurisdiction of their own motion under the *lis pendens* rule of the Convention. Exhaustion of remedies before first instance courts, the court of appeal and the supreme court may take some time not only in Italy. This explains the possibility of subverting the system with actions for declarations of non-infringement in a slow moving country which is a serious challenge to European judicial co-operation. The Italian courts have been notoriously condemned by the ECtHR in Strasbourg for delays amounting to denial of justice. As the ECtHR outlined this Italian practice "reflects a continuing situation that has not yet been remedied."[56] Before the ECtHR in 2000 more judgments were given against Italy on this one question than the combined total of all other judgments against all other European states on all questions.

Gasser v MISAT has shown that it is not only patent infringement which is liable to be served a judicial torpedo under the Convention. International sales and exclusive jurisdiction agreements were the issues in that case and it may be assumed that few areas would be immune from this kind of stalling forum selection. As this is a subject of great practical and academic interest stretching from national to European and international law, how it works today, what it means for international procedural law and what remedy may be envisaged should be elaborated upon.

Gasser was applied in *JP Morgan Ltd v Primacon AG*[57] which shows how an agreement to the exclusive jurisdiction of the English courts may be undermined by tactical proceedings in another EC country. In this case the German firm, Primacon AG, applied for a stay of English proceedings brought by the bank JP

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[56] *Ferrari v Italy* ECtHR, 28 July 1999, para. 21.

[57] *JP Morgan Ltd v Primacon AG* [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep 665.

Morgan Ltd. The proceedings concerned a loan facility agreement which was specifically governed by English law and contained an exclusive jurisdiction clause in favour of the courts of England. Primacon had borrowed under the loan facility and had failed to pay interest pursuant to the agreement. It commenced proceedings in Germany in breach of the jurisdiction clause alleging that the agreement was immoral. The evidence indicated that the German proceedings were commenced to frustrate any attempt by JP Morgan Ltd to seek appropriate relief in the English courts. JP Morgan then issued three sets of proceedings in England. Primacon challenged the jurisdiction of the English court on the basis that the German courts were first seised of proceedings involving the same cause of action. It sought a stay of the English proceedings, relying on Articles 27 or 28 of Council Regulation 44/2001.

The English High Court held that it was difficult to see how the German courts could find that they were entitled to exercise jurisdiction in the face of the exclusive jurisdiction clause. However, the proceedings initiated by JP Morgan Ltd would be stayed until the German courts had determined their own jurisdiction.[58] The implications of the ECJ's interpretation of the Regulation were illustrated in the *Primacom* case. A facility agreement gave exclusive jurisdiction to the English courts. Without warning, the borrower started proceedings in Germany seeking a declaration that certain terms of the agreement were unenforceable. The bank then started proceedings in England. The English judge said that in Germany there is a right of appeal, which could result in considerable delay before a final decision on jurisdiction was reached. The judge also commented that delay was advantageous to Primacom, and appeared to be one of its objectives. Nevertheless, where the English proceedings covered the same ground as the German litigation, the judge felt obliged to halt them while the German courts decided on whether or not they had jurisdiction. Subsequently the German courts decided at first instance that they did not have jurisdiction to hear the case, but a good few months had passed by then. The matter settled before any appeal. However, it shows that there is a risk of debtors using the principle established by the judgment in *Gasser* and confirmed in *Primacon* to avoid their obligations in financial disputes by initiating actions in courts other than those specified in the jurisdictional agreement between the parties in order to cause delay (the Italian torpedo).

The difficulty with these decisions is that this reading of Article 27 of the Regulation denies the national court which is closest to the case, for example, because of a choice of court or of law agreement (prorogation) between the parties any power to determine its own jurisdiction until the courts of the country first seised eventually decline to proceed. It is the inability of the party surprised (usually the creditor) by the other party's (usually the debtor) pre-emptive strike to sue in the named court. This creates both judicial and commercial uncertainty which can be considerable because of, for example, delays, not only in the Italian courts,

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[58] The summary only covers the facts which are relevant here. In the case some other proceedings were not stayed.

which would automatically bar any hearing of the case on the merits in any other court possibly for a long time even if it turns out that the court first seised has no jurisdiction as in *Primacon*.[59] Even the fact that this delay may be a denial of justice within the meaning of Article 6 ECHR does not change the outcome. Practitioners and parties to a case should carefully take note when selecting a forum. Knowledge of jurisdictional bases in different European forums may help as suggested above.

One could analyse the issue by asking whether conflicts of jurisdictions should be resolved by applying the "proper law" regardless of outcome ("conflicts justice"), or rather by directly aiming for the proper substantive outcome regardless of law ("material justice"). The ECJ has opted for "conflicts justice", a somewhat principled approach which does not take the material effects of its reading of Article 27 of the Regulation into account as it is suggested that the ECJ would not like to have created the "Italian Torpedo" in *Gasser*. However, it did. As already mentioned above one procedural remark of the ECJ judgment in *Turner v Grovit*[60] may provide a clue:

> "Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention."

Here, the ECJ does not take the qualification of the measure (an anti-suit injunction "*ad personam*" was at issue before the English courts which is considered a procedural measure taking precedence over the applicable law on the merits as part of the *lex fori proceduralis*) but the material outcome into consideration. It takes the potential material effect abroad (as for example in *Turner* the ECJ took account of the effect of the measure in Spain) into consideration rather than the fact that the appropriate legal qualification of the measure is procedural. This is exactly the opposite approach to that which it displays in all the cases when applying Article 27 of the Regulation, which is also procedural law, without regard to the material outcome (which is the "Italian Torpedo"). This shows that the intent in the decisions of the ECJ is to give the widest possible effect to European rules

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[59] Richard Fentiman "Jurisdiction Agreements and Forum Shopping in Europe" (2006) Butterworth's Journal of International Banking and Financial Law 304.

[60] ECJ (Case C- 159/02) Judgment of 27 April 2004, para. 29; [2005] 1 AC 10.

even when determining national procedural law and practices rather than aiming for the proper substantive outcome ("material justice"). This touches directly on the judicial authority of national courts which is mostly defined by their procedures, their *lex fori proceduralis,* which usually trump all other conflicting laws, particularly the proper law of the case, the *lex causae*. The legal authority of national versus European jurisdiction *in rebus proceduralibus* is engaged here. It is a contest of judicial authority or of judicial domination that is seen here rather than a coherent qualification and application of the appropriate or proper law both material and procedural. The reasoning behind the decision of the ECJ not to allow national procedural pre-eminence of national *fora,* usually so well established in the law of all nations is as follows:

> "It should be noted, however, that the application of national procedural rules may not impair the effectiveness of the Convention. As the Court has held, in particular in its judgment of 15 November 1983 in Case 288/82 Duijnstee v Goderbauer [1983] ECR 3663, a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention ."[61]

The reference of the ECJ to *Duijnstee v Goderbauer*[62] refers to para. 18 in its judgment there:

> "In the present case, both an interpretation according to the law of the contracting state whose courts have jurisdiction under Article 16.4 and an interpretation according to the *lex fori* would be liable to produce divergent solutions, which would be prejudicial to the principle that the rights and obligations which the persons concerned derive from the Convention should be equal and uniform."

This is not a principled approach to the *lex fori* or the proper law applicable to the case but rather an approach which has regard to the equal and uniform application of the Convention which seems to be the ultimate reason for the ECJ not allowing for the national *lex fori proceduralis* in the context of what is now Article 27 of the Regulation. The result of the cases decided by the ECJ such as *Gasser, Turner* and *Primacon* is exactly the opposite. The effect of these decisions is not that "the rights and obligations which the persons concerned derive from the Convention should be equal and uniform" when applied by the national courts in Europe under the Convention but national procedural differences such as for example, the differing time frames of Italian courts can now be taken advantage of in a much stronger way than would be the case without the Convention where the different procedural laws of the national courts were able to provide some checks and bal-

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[61] *Kongress Agentur Hagen v Zeehage BV*, ECJ (Case 365/88) Judgment of 26 January 1989, para. 20.

[62] (Case 288/82) [1983] ECR 3663.

ances. The differences of the national procedures in Europe are given much greater strength and effect.

This is even so when all the courts concerned eventually agree about the appropriate law and forum under the Convention as was the case in *Primacon*, where ultimately there was no disagreement between the relevant German and English courts. The enhanced pre-eminence of national procedural law established by the ECJ may nevertheless cause divergent results which are interesting. The German court held in *Primacon* that English law would apply to the case according to the agreement between the parties which contained a choice of law clause held by the court to be binding. Therefore, in principle the same law applies irrespective of which court rules on the matter in any member state. However, this applies only to the *lex causae*, the law governing the issue before the court which was English law. However, the procedural rules of the court seised first stay German, which is the *lex fori proceduralis*. The rules of public policy form part of the latter and it was alleged in *Primacon* that they may not allow for interest rates as high as those agreed between the Morgan bank and Primacon in their lending arrangements. Indeed the German public policy exception as embodied in Article 6 of the German Introductory Law to the Civil Code (EGBGB) provides for stricter limits in relation to high interest rates, while English law would give more leeway to party autonomy than most civil law jurisdictions. Although this difference is one of degree and not of any fundamental difference between the legal orders, it matters when these different ideas of legal limits are applied to such extraordinarily high sums as in *Primacon*. Therefore, even when applying English law on the merits, the German court would apply different legal limits to the high interest rates agreed between the parties than the English courts, a procedural feature well known from the different calculation of damages by different *fora* even when applying the same laws. Also the validity of forum choices made by the parties may be assessed differently by different courts in different countries. It may be concluded that *Gasser* triggers the necessity of some sophistication in forum selection temporally and spatially, even if all the courts concerned work properly and no undue delay or other inappropriate adverse circumstances are involved.

4.3.2 The Effect of the European Approach Beyond Europe

The European approach exemplified in *Gasser* must be seen rather as an assumption of authority than a system solving issues of competing jurisdictions. However, it will have spill over effects which should be briefly reviewed.

The decision in *Owusu* has been outlined at some length and it has become clear that the English courts were bound to assume subject matter jurisdiction under the Convention although they would not have done so without it but stayed the proceedings on the basis of *forum non conveniens* in favour of the Jamaican courts,[63]

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[63] *Owusu v Jackson* [2002] EWCA Civ 877, see the trial judge's decision.

bearing in mind that most defendants, the *locus delicti commissii*, the place of the performance of the contract and the availability of evidence would suggest the Jamaican courts were the more appropriate forum. If the defendant Jackson were held liable to Owusu but was entitled to indemnity from the Jamaican defendants, he would have to bring new proceedings in Jamaica to enforce the English judgment with the possibility of a different outcome. The assumption of English jurisdiction in conflict with the "better" forum of Jamaica was entirely based on the ECJ's reading of Article 2.1 of Regulation 44/2001; without it the claim would have been inadmissible before the English courts.

In *Samengo-Turner v Marsh & McLennan*[64] the English Court of Appeal in its decision of 12 July 2007 applied the rationale of the ECJ's ruling in *Turner v Grovit* in relation to an anti-suit injunction against parallel proceedings in a New York court. The facts were as follows. Samengo appealed against a decision to refuse an anti-suit injunction to restrain proceedings against them in New York by the respondent companies. Samengo and the other claimants were individuals domiciled in England who had been employed as reinsurance brokers by the respondent. They had given notice to terminate their contracts of employment with a view to going to work for a competitor of their employer. The New York proceedings were started a month later and were founded on the terms of an incentive award granted to Samengo under a bonus agreement under which they assumed obligations to repay the award if they engaged in detrimental activity and to provide information to enable the company to determine whether they had complied with the terms of the award. Samengo claimed that the New York proceedings related to their contracts of employment and had been brought by their employer so that the provisions of Article 20 of Regulation 44/2001 required the proceedings to be brought only in the courts of their domicile. The English High Court disagreed and also rejected an alternative ground to the effect that the New York proceedings should be restrained because they were unconscionable, vexatious and oppressive.

The appeal was allowed because Samengo's bonus agreements did relate to their contracts of employment for the purposes of Article 18. The employer could only have sued in England to enforce the terms of Samengo's employment. The Regulation was concerned with the allocation of jurisdiction. This construction gave effect to the objectives of the Regulation.

The New York court had already rejected a challenge to its jurisdiction because of an exclusive New York jurisdiction clause in the bonus agreements. The English Court of Appeal held that the exclusive jurisdiction clause agreed between the parties had to be disregarded under Article 21.1 of the Regulation which reads: "The provisions of this section may be departed from only by an agreement on jurisdiction: 1. which is entered into after the dispute has arisen; …" as the jurisdiction agreement was concluded in connection with the employment contract and a bonus agreement well before the dispute arose.

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[64] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723.

Anti-suit injunctions are a primary means of delineating spheres of jurisdictions between different states. This strong means applied by the English Court of Appeal against the jurisdiction of the New York court, which was based on the prorogation of the parties through the exclusive jurisdiction clause, is quite remarkable. Unlike the exclusive jurisdiction clause in *Primacon* where Germany and the United Kingdom were part of the EC and parties to the Convention and bound by its *lis pendens* rule as understood by the ECJ, the exclusive jurisdiction clause in favour of the New York courts related to a jurisdiction unconcerned with the provisions of the EC Regulation. The strict application of the provisions of the Regulation (here Article 21.1) by the English court amounts to a formal and strict prohibition on a forum choice by the parties in the context of employment contracts. Such prohibition of a forum choice may have a meaning if the employee must be protected against undue domination by his employer. However, this cannot always be assumed when the contracts of employment of stockbrokers working in the City of London and the New York Stock exchange with incomes far exceeding a million per annum who want to work for competitors are at issue. The reverse situation may even become conceivable. The English court decided that "Section 5 [of the Regulation regarding employment contracts] applies to all employees irrespective of any particular need for protection."[65]

The decision of the English court has taken on board the hard and fast approach of the ECJ when applying the rules of the Convention in disregarding the exigencies of the case before it. The Regulation in its Preamble outlines under recital 13: "In relation to … employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provided for." With this the Regulation contains an authoritative determination of the motives of its section 5; to apply it "irrespective of any particular need for protection," as the English court did, would not meet the meaning of the conventional rules.

Further, the application of the Regulation to delineate the jurisdiction of Member States in relation to non member states is not provided for. The Preamble of the Regulation clarifies in recital 15: "In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States." Constant references to the Member States and the internal market as the object of the Regulation are made in its preamble. The only mention of anything going beyond the territory of the Member States is in recital 25: "Respect for international commitments entered into by Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties." Read together with recital 26 which states: "The necessary flexibility should be provided … in order to take account of the specific procedural rules of the Member States" the English court's anti-suit injunction on the basis of Article 21.1 of the Regulation against the New York court seems less persuasive. It may well be argued that the delineation of jurisdiction with states not

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[65] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 35.

subject to the Regulation or Convention is not engaged by the rules of those instruments. To maintain, for example, that Article 20.1: "An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled" could arguably be put forward to bar US jurisdiction for someone employed in the United States and resident there, is hardly conceivable. This would give the Convention a territorial outreach which it was not intended to have and one which it would not be able to maintain, as this would incur conflicting judgments almost as of necessity and would work against any of its original motives**.** All the rules in section 8 of the Regulation are phrased so as to exclusively regulate the jurisdiction of Member States only. The very few provisions which do not contain explicit reference to Member States, for example, Article 29, which provides that: "Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court" should clearly not oblige any court in Europe to stay proceedings under the Convention because, for example, a New York court found that it has exclusive jurisdiction. This is exemplified by the decision of the English Court of Appeal in *Samengo*:

> "The New York court cannot give effect to the Regulation and has already decided in accordance with New York law on conventional grounds that it has exclusive jurisdiction." [66]

The English court obviously did not consider applying the literal reading of Article 25 to the New York proceedings although the wording would have allowed it to do so. Other provisions such as Article 21.1 were, however, applied to the New York proceedings and the exclusive jurisdiction agreement on which it was based assuming that it was "statutorily" bound by it.[67] This inconsistent application and non-application results in a global outreach of the Convention to the New York court's jurisdiction without giving the New York proceedings a status under Article 25. This result is neither supported by international law nor would it be expedient to achieve any reasonable delineation with non Member States' jurisdictions.

It may be concluded that the English courts learned hard but fast how to apply the Convention as interpreted by the ECJ.

4.4 The Global System

The English Court of Appeal applied the rules of Council Regulation (EC) 44/2001 in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd,*[68] a case dealing with employment matters, to the issue of an anti-suit injunction to restrain

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[66] *Ibid.* at para. 43.

[67] *Ibid.* where there is a reference to the "claimant's statutory rights".

[68] [2007] EWCA Civ 723.

the applicant from continuing proceedings before the New York courts. The main basis of the injunction was Article 21.1 of the Regulation/Convention which invalidates the *forum prorogatum* agreed between the parties. In order to review the global system beyond the EU Conventions' territorial reach the proceedings in this case before the New York District Court should provide a good introduction. The different perspectives of the American and European court show how delineation of jurisdiction is effected by the courts in the global arena beyond Europe. This is probably most informative about international law seen as judicial practice and *opinio iuris* in the international realm as the New York court's practice in this field is not predetermined by any international treaty like the EU Conventions and Regulation.

It is obvious that the New York court would not apply Article 21.1 of EC Regulation 44/2001. It would not even do so if it concluded that English law was applicable and considered Article 21.1 to be part of English law to be applied by the English courts. This is because the prohibition of a forum choice, a *forum prorogatum*, by the parties to an employment contract concluded prior to the actual employment conflict is a procedural provision determining jurisdiction of the court. However, the power to determine its own jurisdiction will not be yielded by any court to another country's legal rules and the New York court would not take the English court's determination of its jurisdiction but would rather apply its own *lex fori proceduralis*. The competence to determine its jurisdiction is the core of any court's procedural law and will be applied autonomously.

Unsurprisingly, the US District Court for the Southern District of New York reasoned[69] that the forum selection clause was applicable. The clause provided that the parties

> "irrevocably submit to the exclusive jurisdiction and venue of any state or federal court located in the County of New York for the resolution of any dispute over any matter arising … Moreover … (ii) waive, to the extent permitted by law, any objection to personal jurisdiction or to the laying of venue of any action or proceeding … in the forum stated …, (iii) agree not to commence any such action or proceeding in any forum other than the forum stated in this Section."

Furthermore, a choice of law clause stipulated New York law as the proper law of the contract. The clause stated: "Notwithstanding anything to the contrary (except with regard to Schedule II.D, if applicable[70]), this Agreement shall be governed by

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[69] *Guy Carpenter, Marsh & McLennan v Samengo-Turner et al.,* opinion and orders of 29 June 2007, No. 07 Civ. 3580 (DLC) before Denise Cote J (Slip Copy, 2007 WL 1888800).

[70] Although Schedule II.D contained a non exclusive prorogation clause of the English courts in some respects not relevant here, it stipulated in the significant part: "The remainder of this Agreement will continue to be governed by the laws of the State of New York."

the laws of the State of New York, without regard to conflicts or choice of law rules or principles."

The New York court maintained that even if the defendant had argued that the court lacked personal jurisdiction over him or should grant his *forum non conveniens* motion despite the applicable forum selection clause, such an argument would fail. Parties can consent to personal jurisdiction by means of a forum selection clause, and forum selection clauses are routinely enforced where, first, the clause was "reasonably communicated to the parties" and secondly, the clause was not "obtained through fraud or overreaching," and thirdly, there has been no clear evidence that "enforcement would be unreasonable and unjust." The court did not find that any of these criteria were met and they were not even put forward by the defendant. Under New York law, the interpretation of an ambiguous forum selection clause is a question of law for a court to decide as it did with a predictable outcome.

Two unmitigated assumptions of jurisdiction must be aligned and the English court did this by issuing an anti-suit injunction prohibiting the defendants from continuing the New York proceedings. However, has the English court "won" the battle by creating a precedent which can be applied in future? Was there any discernible law applied to the delineation of the New York and English jurisdictions by the English Court of Appeal? This would presuppose that the rules applied could also work the other way around. Imagine that the New York court orders the defendant to discontinue English proceedings after the English courts have already assumed jurisdiction under a forum choice agreement which is valid under English law but is not recognised in New York because it is found to be at variance with some procedural provision of the forum which is very specific to it and has no equivalent in English procedures. Obviously, the English courts would not hold the defendant to such an anti-suit injunction.

It is submitted that the English decision in *Samengo* does not develop any rules which provide for a proper delineation of jurisdictions which could be generally applied. Therefore, from the perspective of international procedures, it may be seen as an assertion of judicial power in the tradition of the ECJ's reading of the European Convention/Regulation in *Turner v Grovit*,[71] *Primacon*[72] and *Gasser*[73] which certainly does not purport to be an appropriate rule in relation to the New York and other courts outside the reach of the Regulation. It may cause conflicting judgments and orders, judicial unpredictability not only in economic but in employment and other relations internationally and in the worst case create a judicial conflict and may eventually result in things being taken out of the judges' hands. As *Samengo* shows, judicial conflicts are not a matter of the past. They are fought with procedural weapons and only those able to handle them may succeed when

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[71] [2005] 1 AC 101.

[72] *JP Morgan Ltd v Primacon AG* [2005] 2 Lloyd's Rep 665.

[73] *Erich Gasser GmbH v MISAT* Srl (Case C-166/02); [2005] QB 1.

caught off guard by "unfriendly" judicial orders assuming authority from abroad. It is in relation not least to the US that this is a subject to be aware of, while in Europe the Regulation, *Turner v Grovit* and the *lis pendens* rule guarantee that judicial conflicts are matters of the past traded in for Italian Torpedoes and the like which will now be fairly established in the common market. To look beyond it means first to realise that there are no conventional rules delineating jurisdiction between different states like the Conventions and Regulations in Europe. The global project of the Hague Conference of International Private Law on Jurisdiction and Enforcement was meant to create a Convention providing for rules on accepted standards, and frowned on bases of jurisdictions,[74] *lis pendens* and recognition which started in the 1990s. However, it eventually only produced a choice of forum convention which has currently just one member state which is Mexico.[75] This total failure to agree on a global basis of jurisdiction and the lack of any ensuing recognition of judgments must be admitted to be the current state of affairs in the field. Although there are Hague Conventions in special areas such as matrimonial affairs and child abduction, there is no globally applicable convention which could inform states and courts how to solve jurisdictional conflicts such as that which arose in *Samengo*. Therefore national court practice which forms state practice and *opinio iuris* relevant for international customary law under Article 38.1.b of the ICJ Statute must be identified in order to ascertain the customary rules of international law in the field (if there are any) and how international legal procedures may address the issue on the global level.

The English decision sheds interesting light on the granting of its anti-suit injunction:

> "An anti-suit injunction is not a remedy to be dispensed lightly, particularly where the defendants sought to be restrained have brought proceedings in courts of high repute in a friendly foreign state. The injunction of course is directed at the litigating party and not the court. The premise for the remedy is that this party should not be

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[74] The so called white, grey and black bases of jurisdictions, see for the latter "exorbitant" bases Article 18 of the Draft Hague Convention which matches generally the list in Article 3.1 and Annex 1 of Regulation 44/2001.

[75] The Hague Convention on Choice of Court Agreements of 30 June 2005; membership status on the website of the Conference www.hcch.net (visited last 25 April 2008). I had the privilege to participate in the negotiations at an earlier stage when the prospect of a global jurisdictional convention was still vivid among the states. It is suggested that US lawyers (*inter alia* El Fagan) lobbied against it successfully as such a convention may have limited US courts' jurisdiction to their detriment. This was after the idea of a global convention was initially strongly supported if not initialised by the US informed by Professor von Mehren and its Ministry of Justice. See J. Talpis and N.Krnjevis, "The Hague Convention on Choice of Court Agreements of 30 June 30 2005: The Elephant that Gave Birth to a Mouse" (2006) 13 (1) Southwestern Journal of Law and Trade in the Americas 1.

> litigating in that court and so the principles of comity are not offended by granting an injunction which does no more than require that party to comply with his legal obligations and ensure for the claimant that he does so. Although this is the correct analysis, one can understand why not everyone would see the situation in quite this way which is why the court should always be cautious before granting such relief."[76]

Indeed, "one can understand why not everyone would see the situation in quite this way"[77] which would apply particularly to the other court seised which is the New York one. In addition, any court should be cautious before granting relief which is meant and directed to interfere with jurisdiction of foreign courts. The idea that the injunction is directed only to the litigant and not to the court is an entirely national perspective which would not be accepted by the foreign court concerned. The desired effect of the injunction is, however, to discontinue foreign proceedings to the benefit of the domestic court's jurisdiction. This is done through a court order *ad personam* which means to order someone to do or not to do something in another jurisdiction. Therefore, from a strictly territorial perspective the litigant may be considered an agent of the court issuing an anti-suit injunction as he carries out what this court orders with intended effects beyond the territorial limits of this court's jurisdiction. This raises the question of whether under international standards and laws a court of one country may order those subject to its own jurisdiction to perform acts in other jurisdictions or whether this may be considered an illegal interference with the foreign court's and country's jurisdiction. When the English Court of Appeal concluded that "the court should always be cautious before granting such relief" they may have had this in mind.

Before going into litigation practice relevant to this point the question of whether there is an overarching principle barring orders which seek to affect foreign jurisdictions must be clarified. The idea that such an order works only *ad personam* in relation to a person subject to the jurisdiction of the court issuing such an anti suit injunction does not give an answer in relation to the other jurisdiction. This is easily established if we imagine that, for example, in *Samengo* the New York court reciprocates with an anti suit injunction against the English proceedings. Then there is a deadlock with no solution visible. The litigant subject to the jurisdiction *ad personam* of both courts would be held hostage by the unmitigated contradictory assumptions of jurisdiction of different courts. Whatever he does he would necessarily violate the order of one court by adhering to the order of the other court. What he actually does in practice may boil down to the question of which court could issue the harsher sanctions to coerce the litigant to adhere to its orders and not to those of the other court. Whether he has the more vulnerable assets in one or other territory or where his public reputation is more of an issue

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[76] *Samengo-Turner v J & H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 40.

[77] *Ibid*.

may eventually decide to which court's order someone yields. This is certainly not a solution in principle but possibly may be in practice. This kind of ultimate conflict of jurisdictions is rarely encountered in practice as courts and litigants would usually try to avoid it. However, it is neither unknown nor insignificant to state and judicial practices. It is this conflict which shows the need for a solution which would inform all judicial steps regarding potential foreign competing claims of jurisdiction. It is this ultimate conflict which shows the problem best and accepting both competing courts' perspectives as equally significant would eradicate any kind of "escaping the real issue solutions" like referring to the *in personam* nature of equitable remedies (for example, anti suit injunctions) and neglecting with it the intended international legal effect on foreign jurisdictions.

Therefore, this "ultimate" clash or conflict of jurisdictions should be revisited to better understand its nature and envisage solutions which work satisfactorily in both directions. It must be remembered that such conflicts are related to the states' sovereignty, independence and "competency to competency".[78] States conceive themselves as the ultimate arbiters not subject to any coercion from outside**.** This also applies exactly to the self determination of their courts' jurisdiction which is the core of the *lex fori proceduralis*. The self conception of states and their courts as sovereign and competent to independently determine their own reach of power and jurisdiction (outside applicable Conventions and Regulations) does not allow for a higher authority to determine or co-ordinate the jurisdiction of courts of different countries. Therefore, it is submitted that there is no overarching rule delineating competing jurisdictions globally. From the perspective of international law, which is meant to co-ordinate different countries' claims to power, this is unsatisfactory. As Oppenheim writes:[79]

> "Failing that superior legal order, the science of law would be confronted with the spectacle of … States, each claiming to be the absolutely highest and un-derived authority."

Neither for States nor for courts would the traditional notions of sovereignty, competency or (judicial) power facilitate an acceptance of a higher legal rule to address the conflict of jurisdictions between different forums. These notions are developed in a national context and neither suited nor meant to help international co-ordination which is international law. Jurisdictional conflicts are usually addressed by either side with a reference to their own national legal order and notions. The English court's elaboration that its anti suit injunction to discontinue the New York proceedings is "of course … directed at the litigating party and not the [New York] court,"[80] is an example of this. This perspective entirely rooted in na-

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[78] See Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 31.

[79] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992) p. 38.

[80] *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, para. 40.

tional law and national concepts cannot provide a solution acceptable to both jurisdictions and does not allow for any reference to any rule perceiving both competing jurisdictions as equal.

Oppenheim writes further:

> "… it is only by reference to a higher legal rule in relation to which they all are equal, that the equality … of a number of sovereign States can be conceived."[81]

To take the other side as seriously as your own is the start of the solution. Some cases where the jurisdictional conflict was brought to a higher level, so that the foreign court reciprocated with adverse procedural means, for example issuing orders conflicting with those issued by the other country's court, should be presented. It is only then that the nature of the jurisdictional conflict is brought to a stage to require a solution.

In *X AG v A Bank*[82] the English High Court had to deal with conflicting injunctions of the English and American courts. The plaintiffs had successfully brought an action against the defendant, an American bank with a branch in London, seeking a declaration that the defendant owed the plaintiffs secrecy and confidence in respect of their banking accounts with the London branch and on 19 November and 20 December 1982 secured an injunction restraining the defendant from passing any account information to the head office in New York. However, on 11 January 1983, the US District Court for the Southern District of New York subpoenaed the American defendant to produce exactly this account information. The subpoena was addressed to the A bank for attention of "[a]ny officer or authorised custodian of records" and it commands the person addressed to attend before the "Grand Inquest of body of the people of the United States of America for the Southern District of New York to testify and give evidence in regard of an alleged violation"[83] of US law, such violation involving, *inter alia*, the evasion of taxes. The New York order (subpoena) elaborated that the bank had been subpoenaed to produce the account information and had failed to produce that maintained in its London branch as a result of a restraining order of the English High Court there, and went on to say:

> "and upon representation that it is necessary for the better enforcement of said Grand Jury subpoena, and the (N.Y.) court being satisfied that the production of the documents requested by the subpoena is necessary in the best interests of justice and the Grand Jury investigation, it is hereby ordered and adjudged that [the bank] produce all the documents … Relating to any accounts [of the defendants] maintained in its London, England, branch."

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[81] Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law* (9th ed., Longman, Harlow, 1992) p. 38.

[82] [1983] 2 All ER 464.

[83] [1983] 2 All ER 464. New York court order quoted at p. 470.

The predicament in which the bank in consequence found itself is obvious. The New York court's subpoena order was binding on it and requested the bank to produce the documents. On the other hand there was an injunction of the English High Court prohibiting the bank from obeying this New York subpoena. It is not only that the US and English courts assumed jurisdiction in the same matter and that they held that on the merits their own laws should be applicable, meaning that US or English law respectively would be applied as *lex causae*. The issuing of contradictory orders or injunctions "*ad personam*" against the same bank according to their *lex fori proceduralis* brings the underlying issue to light; this is the ultimate jurisdictional conflict on the global level and there is no preconceived abstract rule to settle the issue.

Leggatt J for the English High Court argued the case for the English law and anti suit injunction admirably. This author agrees with his arguments and it may be added that the US Court's order is ultimately meant to help US public aims such as tax and competition/anti-trust interests which would usually not be entertained by foreign courts or jurisdictions under the "revenue exception".[84] On the other hand the New York court's approach is well reasoned too; the head office of a bank in New York is certainly obliged to adhere to the laws under which it is incorporated and situated including the court orders issued there. The head office of a bank or company may certainly order branches to do something, for example, to send documents to its head office. A branch of a company has no legal independence from its head office unlike a subsidiary incorporated in a different country. Therefore, it is not far fetched that the New York Court would use this dependency of the London branch of the bank on its head office in New York to subpoena it to obtain the desired documents from the branch in London. The situation before the English court shows this; the bank as a defendant before it obviously intended to comply with the New York court's order and accept the necessary breach of confidentiality or secrecy under English law in relation to its customers in London incurred by this order. Therefore, these customers instigated the English counter proceedings successfully barring the bank from doing so.

Although the conflicting decisions of the courts reflect the different territorial reaches of jurisdiction they do not lend themselves to detecting a rule which goes beyond this very basic insight. In addition, a strictly territorial perspective would not meet the realities faced by international banks and their multinational corporate customers. As with a shared river between different countries the need to cooperate is obvious and no one state's perspective can be held isolated as the final answer. However, as long as there is no co-operation or agreement no ready made solution is at hand. Particularly, there is no obvious advice for the bank on how to deal with conflicting orders "*ad personam*" from different jurisdictions in which it

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[84] *Bank of Ireland v Meeneghan* [1994] 3 IR 111. For extensive treatment of the public law exception or revenue rule see Anatol Dutta, *Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Mohr & Siebeck, Tübingen, Germany, 2006).

has business interests and assets and is, therefore, vulnerable. The *X AG* case is one of the few which displays this ultimate jurisdictional conflict openly and contains explicit argument on it. Courts and countries usually try to avoid getting to this point and use many techniques to do so which will be examined *infra*. However, only the perspective of this jurisdictional conflict makes clear what purpose such procedural means which try to avoid this conflict have, for example government interventions, *amicus curiae* briefs, act of state or prerogatives. There is a wide range of options between an abstract and "blind" rule which solves such a conflict, like the *lis pendens* rule as applied by the ECJ, and the mere acceptance of some territorial limits as the ultimate limit of any court's and country's power.

Before turning to them, another well known case decided at exactly the same time as *X AG* shows the same jurisdictional conflict in a different context. The Krupp Mak Maschinenbau GmbH, a German company with business interests in the US, was sued for alleged bribery when selling engines. Krupp banked with Deutsche Bank, a German bank with branches in the US. Deutsche Bank was subpoenaed by a US court to present banking information regarding Krupp's accounts which were confidential according to the applicable German law governing the banking relationship between Krupp and Deutsche Bank. The Court order (*subpoena duces tecum*) was addressed to the Deutsche Bank head office in Frankfurt/Germany and its branch offices in Kiel and New York. Failure to obey the order could have resulted in fines and imprisonment according to US law.[85] Krupp secured a restraining order from the Landgericht Kiel based on the bank's secrecy and confidentiality clause in its contract with Krupp enjoining the bank from producing the documents maintained in Germany. Failure to honour the restraining order was made punishable by the German court by a fine of up to DM 500,000 or imprisonment.

The German court reasoned that injunctive relief must be granted to prevent Deutsche Bank from revealing account information falling within the scope of bank secrecy under German law. Krupp's right as a depositor with the bank to secrecy and confidentiality could only be impaired by a lawful order issued by competent German courts or authorities. The court went on to say that it did not share the defendant's (Deutsche Bank) view that orders of American authorities, and the judicial decisions confirming the subpoenas, were tantamount to orders or decisions issued by German authorities or courts. It elaborated further that it was not called upon to review or even to criticise the opinion of the US Court and abstained from any evaluation of that opinion. It accepted the opinion of the competent judge in the US as a fact and merely decided what effect, if any, the opinion had on the legal relationship between the parties under German law. Deutsche Bank's contention that its failure to produce the requested information and documents could be regarded by the American court as contempt, and be punished as such, was not persuasive. Since the defendant was only following the command of

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[85] *In Re Grand Jury 81-2* Order of the District Court for the Western District of Michigan of 9 June 1982, see statement of facts, Judgment of the Landgericht Kiel, Germany of 30 June 1982, English translation in 22 ILM 740 (1983).

a German court which, in turn, was based on the valid banking contract between the parties, it was hard to conceive for the German Court that an American court would consider behaviour in obedience to a German court's order as contemptuous of an American court order or of American prosecuting authorities.

It is submitted that this statement of the German court is a reference to the idea of sovereign equality of states in international law,[86] their jurisdictions and courts, and the territorial reach of their powers. *X AG* and *Krupp* have common features; they not only represent the ultimate judicial conflict and address it from both sides of the equation but both have a bank with branches or head offices as well as assets in either jurisdiction as the object of the original court orders. The parties were then barred from complying with this original court order by the foreign courts which issued a contradictory order. Obviously, the courts on either side assumed that they could enforce their orders irrespective of the orders of conflicting foreign courts. In *Krupp* the US court eventually ordered "that the Deutsche Bank AG shall take any necessary steps to comply fully and completely, within 30 (thirty) days of the date of this order, with the subpoena served upon its New York branch on February 18, 1982".[87] It is interesting to look at how the US court in *Krupp* reacted when confronted by Deutsche Bank with the German court order and some arguments as to why it should comply with it.[88]

The bank argued before the US court that it did not have *in personam* jurisdiction over the head office of the Deutsche Bank in Germany where the documents requested were situated. This position is summarised in a memorandum produced in the proceedings:[89]

> "We have found no case that supports the proposition that this court has the power by virtue of subpoena served on its New York branch office to compel Deutsche Bank, an alien non-party to the instant grand jury investigation, to produce records located in Germany which pertain wholly to the Bank's transactions in Germany with a German customer. With regard to the matters being investigated by the grand jury, Deutsche Bank has not had any contact with the United States. This Court should not find in the incidental presence of a Deutsche Bank branch in New York a ground for the assertion of power to compel production of documents unrelated to its New York branch."

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[86] Article 2.1 of the Charter of the United Nations: "The Organisation is based on the principle of the sovereign equality of all its Members."

[87] *Re Grand Jury 81-2* Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742**,** 751 (1983).

[88] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC. of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 751 (1983).

[89] 22 ILM 742, 743 (1983).

It argued that under German Law (§§ 93, 404 AktG) it is unlawful to disclose any business secret and that failure to comply with this law would expose the Deutsche Bank manager to prosecution and civil liability in Germany.

Further, it suggested that a feasible alternative to the subpoena directed against the bank might be that the US court issue letters rogatory[90] seeking the assistance of the German courts to secure the desired material as only a German court's order could release the bank from its obligation of banking secrecy concerning documents in Germany (§ 404 AktG).

Commenting on this suggestion the US court outlined:

> "The gist of this argument is that consideration of international comity and diplomacy require that the sought after documents be pursued through 'regularised intergovernmental channels of international judicial assistance which enable the governmental authorities to seek evidence abroad with a minimum of infringement on national sovereignty, i.e. letters rogatory."

However, the US court did not seem too impressed and addressed the three arguments which were jurisdiction, the German Law and court order and alternative international judicial assistance in a very clear manner which is worth presenting as it possibly represents a judicial attitude regularly encountered in such a situation of international judicial conflict. It is a perspective based in its national law and does not take the international law view of an objective bystander in relation to the conflicting assertions of jurisdiction as essentially equal.

On its jurisdiction to order documents from Germany:[91]

> "… the maintenance by Deutsche Bank of an active branch office in New York provides sufficient evidence that the bank 'purposefully avails itself of the privilege of conducting activities within the … (United States) …, thus invoking the benefits and protection of its laws.'[92] Therefore, since the bank has deliberately and continually operated within the jurisdiction of the US, this court may exercise jurisdiction over the bank in order to enforce American law … In short, the bank's argument that the records in Germany are beyond the jurisdictional reach of these subpoenas and the orders of this court ignores the continuous and systematic presence of the Bank in the United States and attempts to dodge the obligation that presence imposes upon the bank with respect to American law."

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[90] International Legal Assistance under the Hague Convention on Evidence (Rechtshilfe nach dem Haager Beweisübereinkommen).

[91] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 745 (1983).

[92] The court refers to *Hanson v Denckle* 357 US 235, 253 (1958); *Bersch v Drexel Firestone, Inc* 519 F 2d 974 (2nd Cir 1975).

On the conflicting German court order based on German law obligations of banking secrecy:[93]

> "… recent case law from a wide variety of American courts reflects movement toward a general rule that a witness may not refuse to comply with a subpoena merely because compliance may subject him to sanctions in foreign countries."[94]

And on the German government:[95]

> "Neither am I convinced by the bank's representation that the German government has taken such a position against disclosure of the records. If indeed the German government has taken such a position, it has done so without the benefit of hearing the United States' reasons for seeking the records, and I have no doubt that being fully informed, the German officials would have given their customary respect to the legitimate efforts of the American government to enforce its criminal laws."

The court then goes on to weigh up the German and American conflicting legal interests:[96]

> "… the court is not insensitive to the German interest in bank secrecy. However, there are significant American interests at stake in this case, namely the enforcement of American criminal law and the proper functioning of federal grand juries. … In short, I am convinced that the US' interest in enforcing its criminal laws outweigh any countervailing interests or hardship asserted by the bank."

On the alternative procedure to the subpoena, which would have involved issuing letters rogatory to seek German judicial assistance, the court held:[97]

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[93] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 747 (1983).

[94] The court refers to *Societe Internatioanle v Rogers* 357 US 197 (1958); *US v Vetco Inc* 644 F 2d 1324 (9th Cir 1981)*; SEC v Banca Della Svizzera Italiana* Fed Sec L Rep (CCH) 98; 346 (SD NY 1981); Note Ordering Production of Documents from Abroad in violation of Foreign Law (1964) 31 Chi L Rev 791.

[95] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 747 (1983).

[96] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 748 and 749 (1983) with further reference, *inter alia*, to *US v First National City Ban*k 396 F 2d 897 (2nd Cir 1968).

> "Certainly, this alternative is available to the United States. It seems, however, that letters rogatory are much less desirable than the subpoena. … the United States has chosen subpoena as the preferred method of obtaining the records. I am satisfied that method is both lawful and proper."

The conclusion "that the Deutsche Bank AG shall take any and all necessary steps to comply fully and completely, within thirty (30) days of the date of this order, with the subpoena served" does not seem surprising.

The *X AG* and the *Krupp* cases may be taken as examples of the ultimate conflict of jurisdictional claims in international relations between different courts. They do not offer solutions of a sufficiently general nature to work in both directions. Further, it is submitted that up to the present time there is no solution available which can definitively settle such conflicts. However, the courts show certain tendencies which suggest how to deal with and approach competing claims of foreign jurisdictions. It is the manner in which those courts which are exposed to such jurisdictional conflict approach it which may indicate solutions for settling the issues. This is treated here fairly extensively given the relatively small number of cases of direct judicial confrontation of competing courts' injunctions and orders. However, the essential issue is the same in all cases of extension of power, jurisdiction or competency into the realm of what is claimed by another state to be its power, competency or jurisdiction irrespective of whether it is judicial, legislative or executive activity which is involved. All measures which have intended or unintended extraterritorial effects like competition measures, anti trust laws, claw back statutes, securities legislation and numerous injunctions like anti-suit or international garnishee orders issued by national authorities or courts face the same basic problem. The great variety of forms in which this "ultimate" international conflict of courts or jurisdictions appears often disguises rather than clarifies the actual problem. However, it is possible to see this ultimate judicial conflict as the core issue between national and international law and procedure which advocates a closer examination.

The German Court (*Kiel Landgericht*) in *Krupp v Deutsche Bank*, 30 June 1982; 22 ILM 740 (1983) indicated that it would accept the opinion of the US court as a fact and merely decided what effect, if any, the opinion had on the legal relationship between the parties under German law. This is a territorial approach with a reference to international legal equality of states and their courts in that the German court observed that orders of American authorities and the judicial decisions confirming the subpoenas were not tantamount to orders or decisions issued by German authorities or courts. It is a categorical approach more related to the perceived status of courts, countries and their decisions than the subject matter of the

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[97] *Re Grand Jury 81-2* Opinion and Order of the US District Court for the Western District of Michigan, Northern Division, Case No. M 82-2 MISC of 10 June 1982 judgment of Douglas W. Hillman J, 22 ILM 742, 749 (1983).

issue before the court. This thinking is closer to public international law and its strict territorial limitations of sovereignties. It could be equally applied to every competing jurisdictional claim or measure with extraterritorial effect irrespective of the subject matter at issue. Vocabulary like "violation of territorial sovereignty and independence" could be employed.

The US court opined differently. No reference to any kind of abstract delineation of courts' international jurisdiction or state powers is to be detected; rather there are many references to US national law. The answer to Deutsche Bank's contention that the court lacked jurisdiction over its head office in Germany was given only with reference to US rules assuming jurisdiction over it because of the Deutsche Bank branch in New York not mentioning that this US national base of jurisdiction is internationally considered as exorbitant[98] as indicated by Deutsche Bank when outlining that its branch in New York has no business relation to Krupp or any of the issues relevant to the case. Hints to international comity and diplomacy and that the sought after documents be pursued through regularised intergovernmental channels of international judicial assistance do not receive any consideration. The strong hint given by Deutsche Bank relating to the German government's intervention is not accorded any significance either; the US court has no doubt that being fully informed, the German officials would have given their customary respect to the legitimate efforts of the American government to enforce its laws. This suggestion may not go down too well with the German officials intervening in the proceedings as it labels their intervention as ill informed and disrespectful to American legal interests. It simply accords them no relevance nor does it accord any to international law arguments. It is the perspective of national law displayed as the only relevant law. The US court balances German banking secrecy laws with American interests concluding that US interest in enforcing its criminal laws outweigh any countervailing German interests. This is in sharp contrast to the German court's assessment of the US court's order which is taken as "fact" and not commented upon. While the German court's thinking categorically requires it to abstain from any evaluation of the US court's opinion, as it is in the realm of another sovereign not to be reviewed, the US court weighs German banking secrecy as well as the German court order with its own interests in the enforcement of US laws. American law retains with this a much more flexible approach, considering any abstract categories based on sovereign equality of courts and countries only as possibly minor criteria in evaluating the conflict, and favours a balancing of interests looking at the merits of the case.[99] These two approaches have obviously developed from different backgrounds. The US Restatement, Conflicts of Laws reads:

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[98] See Article 18 of the Hague Draft Convention on Jurisdiction and Enforcement.

[99] This is the approach so admirably outlined for conflicting areas of law by Andreas Lowenfeld, "Public Law in the International Arena; Conflict of Laws, International Law, and Some Suggestions for their Interaction" in (1979) 163 *Recueil des Cours* pp. 315 – 428.

> "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."[100]

In *SEC v Minas de Artemisa*[101] relying on this section, the court modified a subpoena requiring the production in Arizona (US) of corporate books located in Mexico, since compliance would have required a violation of Mexican law. As modified, the subpoena ordered the corporation to apply to Mexican fiscal authorities for permission to remove the books, or, in the alternative to require the corporation to allow the SEC to copy the books in Mexico, thus avoiding a violation of Mexican law. This old US practice reflects, for example, the current "Baltic formula" used by English courts when issuing Mareva (or asset freezing) injunctions whereby they place any extraterritorial order at the discretion of the local foreign courts.[102] However, in the US this limitation on its courts' powers was rejected by the US Supreme Court in *Societe Internationale v Rogers*.[103] This litigation is most interesting in itself and the procedural handling of the case even more so as it is highly politicised as it challenges the massive US confiscations of Swiss property as enemy property (although Switzerland was neutral in World War II). This challenge, however, was not entertained by the US courts as certain material requested by the court could not legally be delivered under Swiss law to serve the US proceedings.[104] The argument of the Supreme Court is interesting:

> "… to hold broadly that petitioner's failure to produce the … records because of fear of punishment under the laws of its sovereign precludes a court from finding that the petitioner had 'control' over them, and thereby from ordering their production, would undermine congressional policies made explicit in the 1941 amendments … Rule 37 is sufficiently flexible to be adapted to the exigencies of particular litigation. The propriety of the use to which it is put depends upon the circumstances of a given case, and we hold only that accommodation of the Rule (37 on Civil Procedure) in this instance

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[100] US Restatement, Conflict of Laws, para. 94 (1934).

[101] 150 F 2d 215 (9th Cir 1945).

[102] *Bank of China v NBM LLC* [2002] All ER 717; *Baltic Shipping v Translink* [1995] 1 Lloyd's Rep 673.

[103] 357 US 197 (1958).

[104] Although it was found that there was no collusion between the plaintiff and the Swiss authorities prohibiting the production of the documents under Swiss penal law, it was held that the plaintiff had control (although the court admitted that he had not) over the documents and upon non-production the claim was dismissed under Rule 37 (b)(2) of the Federal Rules of Civil Procedure.

> to the policies underlying the Trading with the Enemy Act justified the action of the District Court in issuing this production order."[105]

It was not just fear of prosecution under Swiss law which made the plaintiff fail to produce the documents in the US court. It was the constructive seizure of the documents in Switzerland by the Swiss Government to make sure that the plaintiff would be unable to produce the documents in the US in violation of Swiss law which barred the Swiss party from complying with the US Court's order.

Not accepting the German barring court order in *Krupp* nor the seizure of the document by the Swiss government in *Societe Internationale* as justification for non-compliance with the US court orders indicates the wide discretion US courts assume in weighing all circumstances, including political exigencies, to come to a conclusion less informed by doctrines of international law than by staying firmly rooted in national legal thinking.[106]

Some try to find rules to solve the "ultimate" jurisdictional conflict. Two approaches may be readily identified each associated with either the European (German and English) or American courts in the cases discussed; on the one hand a fine and abstract delineation of jurisdiction based on the international law principle of the sovereign equality of states and their courts favourably expressed in an abstract "blind" rule equally applicable to either side of the equation and inclined to favour international judicial co-operation (letters rogatory) over unilateral procedural means with extraterritorial effects. Or, on the other hand, a focus on the substantive issue before the court where every aspect may be taken into consideration and weighed up with a wide discretion and where foreign illegality in respect of a court order is only one among many other factors but not necessarily the decisive one. The first approach is found in the Brussels and Hague Conventions and is centred in international law. Such principles were formulated recently by the American Law Institute together with UNIDROIT.[107] Principle 28 applying the *lis pendens* and *res judicata* doctrines internationally and Principle 31 indicating International Judicial Co-operation as the standard form of production of evidence from abroad speak with a clear voice. They still need to be endorsed by judicial practice. This is necessary in order for them to claim persuasive authority not least within the American jurisdiction. Needless to say, this is still to be achieved.

The other alternative more favoured by American courts is centred around national law, less rule based and so is less predictable in outcome, however, it takes

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[105] 357 US 197, 204-206 (1958).

[106] Further elaboration with many references in Anonymous, "Limitations on the Federal Power to Compel Acts Violating Foreign Law" (1963) 63 Col L Rev 1441; Anonymous, "Ordering Production of Documents from Abroad in Violation of Foreign Law" (1963-64) 31 U Chi L Rev 791, summing up at p. 810, footnote 79 that actions taken by American Courts faced with these problems have also not been consistent reflecting the use of discretion.

[107] ALI/UNIDROIT, *Principles of Transnational Civil Procedure* (CUP, 2006).

the issue before the court into consideration as well as an unlimited number of aspects which may be weighed up by the judge. Certainly, all the conflicting foreign court orders, laws and governmental interventions will be taken into consideration, not as a conclusive basis for any decision but just as additional factors to be assessed in the court's judicial discretion drawing intensely on principles associated with the pre-emptive public force of the national *lex fori proceduralis* in the conflicts of laws. This approach is inclined but not bound to favour national considerations on the merits and execute them internationally if possible. It is certainly very flexible and the outcome of the *X AG* or *Krupp* cases in the real world shows this. Both were settled with diplomatic help and intervention saving faces[108] but left any legal procedural principles as uncertain as before. Using discretion in not pursuing its own orders in the face of foreign illegality or compulsion would draw on ideas of comity among courts or states and other notions known from international law and relations as they justify a court practice which would be different if no foreign law or state with competing jurisdiction existed. This is necessarily the realm of international law although remaining firmly within the framework of the court's national procedure and discretion. The procedural means employed by a court in yielding some jurisdiction to the benefit of other jurisdictions based on international legal aims are fairly established. They will be discussed in the following chapter.

A very current incident may indicate how unpredictable any exercise of jurisdiction may be. One of the most senior private bankers of UBS, the world's leading wealth manager, has recently been detained by authorities in the United States as a "witness" in an investigation into whether the Swiss bank helped American clients to evade US tax obligations.[109] He was not charged himself with any offence but was being under a "material witness warrant" in connection with a US Department of Justice investigation. It may be assumed that any advice and any account information the Swiss banker has given to US customers would be subject to Swiss banking confidentiality and secrecy. In Switzerland violation of banking secrecy is a crime.[110] Therefore, the move to arrest a leading Swiss banker in the

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[108] See for the *Krupp* case Bertele, *Souveränität und Verfahrensrecht, eine Untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritorialer Jurisdiction im Verfahrensrecht* (Tübingen Mohr & Siebeck, 1998) p. 524, with an abundance of reference material from the US, French, German, English and Swiss courts in this area in the book.

[109] According to the *Financial Times,* 7 May 2008, p. 1 "Top UBS Banker Held in US Tax Probe" it is Martin Liechti, a Swiss national, resident and domiciled in Switzerland, responsible for customers from America in the Zurich based UBS.

[110] Article 273 Schweizerisches Strafgesetzbuch/ Swiss Penal Code: "Whoever attempts to obtain a trade or business secret in order to disclose it, or whoever discloses such a secret to a foreign official or private organisation, or to a foreign business firm, or to their agents, shall be punished with imprisonment. … The judge may also levy a fine." See also Article 47 Swiss Banking and Business Secrecy Act which provides equally for imprisonment and fines in case of divulging information which is professionally secrecy.

US as a witness to provide information which most probably would be a crime to release under Swiss law which is most likely to be the proper law of the banking contract (*lex causae*), is exactly the ultimate jurisdictional conflict again. This time the banker travelling through Miami was physically arrested although not charged with an offence by the US authorities. This may be compared to the situation faced by Deutsche Bank in *Krupp* where the bank was ordered to disclose information by the US court as a witness rather than as an accused but coerced by a material subpoena to do so against the prohibition of the German law applicable to the information and documents situated in Frankfurt in Germany. The initial regard that the US authorities have for the Swiss jurisdiction's limits on disclosing banking secrets to foreign authorities will be probably comparable to the regard they had for the German legal limits in *Krupp*. It will be very much informed by the US court's *lex fori proceduralis* which includes the "material witness warrant" and less by any procedural means in favour of the Swiss law which may claim to be more closely connected to the banking relationship between UBS and its customers in Zurich. To focus on Martin Liechti who will very likely be asked by the US authorities to reveal information which is confidential according to his native Swiss law shows this ultimate jurisdictional conflict possibly even better than the cases presented earlier which concern legal personalities rather than a natural person. His release and the solution of the underlying jurisdictional conflict will depend on the ingenuity of his and UBS' lawyers and the support of Switzerland in making it clear that the "foreign compulsion doctrine" sometimes applied by US courts,[111] should be applied here too. However, the decision in *US v Field*[112] shows that any prediction is premature.

In *US v Field* the US Court of Appeal was faced with a very similar challenge. Field, a Canadian citizen, was the managing director of Castle Bank and Trust Company (Cayman) Ltd, located in Georgetown, Grand Cayman Island, British West Indies. The British West Indies is a Royal Crown Colony of the United Kingdom. The colony, however, has autonomy and its own banking secrecy laws distinct from those which apply in England.

On 12 January 1976, Field, while in the lobby of the Miami International Airport, was served with a subpoena directing him to appear before a grand jury on 20 January 1976. During his testimony, Field was asked several questions concerning his activities on behalf of Castle and its clients. Field, however, refused to answer these questions on the ground that to do so would be a violation of the bank secrecy laws of the Cayman Islands.

The Court of Appeal held that Mr Field, although a Cayman Island resident and Canadian national and therefore a non resident alien in the United States could be subpoenaed while accidentally present in the United States to testify before a grand jury investigating the possible tax law violations of others, even though the

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[111] Discussed by Leggatt J in *X AG v A Bank* [1983] 2 All ER 464.

[112] 532 F 2d 404 (5th Cir 1976).

very act of testifying might subject him to criminal prosecution in the country of his residence for violating that country's (Cayman Islands) bank secrecy laws. To back up his case Mr Field submitted an affidavit by an expert on Cayman law that stated that he could be subject to criminal punishment for answering the questions before the grand jury. The affidavit, moreover, stated that the bank examiner of the Cayman Islands could require Mr Field to state whether he had testified before the grand jury. If Mr Field refused to answer the questions of the bank examiner, he would be subject to a criminal penalty of up to six months imprisonment. The US government as appellant in the proceedings did not contest that Mr Field in testifying before the grand jury would subject himself to criminal prosecution in the Cayman Islands, his place of employment and residence.

Mr Field's second contention was that as a matter of international comity the US court should refuse to enforce the subpoena. It was suggested that an appropriate accommodation between the law of the United States and that of the Cayman Islands must lead the US court, exercising its discretion, to decline enforcement. Mr Field argued that nations should make every effort to avoid the situation present here, where one nation requires an act that the other nation makes illegal.[113]

In refuting these arguments the US court reasoned that the decision to be made required a balancing of all the several varied factors in determining whether the United States' or the Cayman Islands' legal command would prevail. It starts with a reference to Section 40, Restatement (2nd) of the Foreign Relations Law of the United States, which reads:

> "Limitations on Exercise of Enforcement Jurisdiction where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state."

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[113] See *United States v First National City Bank* 396 F 2d 897 (2nd Cir 1968) Restatement (2nd), Foreign Relations Law of the United States, s 40 (1965).

The first and most important factor to be considered according to the US court was the relative interest of the states involved. The United States sought to obtain information concerning the violation of its tax laws. On the other hand, the Cayman Islands sought to protect the right of privacy that is incorporated into its bank secrecy laws. The Cayman Government position appeared to be that any testimony concerning the bank would violate its laws. Therefore, either the United States or the Cayman interest had to give way, a state of affairs which represents the ultimate jurisdictional conflict between countries.

In deciding which of the irreconcilable laws should give way to the other the US court outlined the significance of the US legislation and the right of the grand jury to obtain information needed. It concluded that to defer to the law of the Cayman Islands and to refuse to require Mr Field to testify would significantly restrict the essential means that the grand jury had of evaluating whether to bring an indictment.

In the balancing process regarding the foreign (Cayman Islands) law it was noted that the US allows wide discretion to investigatory bodies in obtaining information concerning bank activities.[114] There could be no question that Mr Field would be required to respond to the grand jury's questions if this was solely a domestic case. An important factor in the reasoning of the US court was the practice of foreign states. It went on to say that in the United Kingdom such evidence can be obtained.[115] One sentence should be quoted here: "Indeed, even the Swiss government, which is notorious for protecting the privacy of financial transactions, might provide under certain circumstances to the United States information concerning Swiss banks." [116]

However, the latter quotation makes reference to a clause of the Swiss US treaty on Mutual Assistance in Criminal Matters of 1973. Irrespective of the fact that most probably this treaty would not apply to the case here the US court in *US v Field* made reference to the special provisions of the treaty concerning organised crime in Article 6. In the definition of organised crime in Article 6.3.b of the Treaty one criteria is that the group threatens or "commits acts of violence or other acts which are likely to intimidate and are punishable in both States," and whatever may be said about any international banking activity[117] the gist of the issue is

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[114] *United States v Miller* 425 US 435 (1976).

[115] See *Clinch v Inland Revenue Commissioners* [1974] 1 QB 76; *Williams v Summerfield* [1972] 2 QB 512.

[116] See Note (1974) 15 Harv Int'l LJ 349, 359 which makes reference to a US Swiss treaty on Mutual assistance in Criminal Matters of 25 May 1973.

[117] The US court in *US v Field* was not slow to qualify foreign banking quite unfavourably (pp. 408-409): "Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of 'white collar' crimes; have served as the financial underpinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and

that the activities in question were certainly not "punishable in both States". Without that double criminality provision very close limits apply under Article 7.2.c requiring that the concerned person may be successfully prosecuted resulting in "imprisonment for a sufficient period of time so as to have a significant adverse effect on the organised criminal group." This qualifies the indeed exceptional provision of the Treaty in Article 8.4 which reads:

> "Provisions in municipal law which impose restrictions on tax authorities concerning the disclosure of information shall not apply to disclosure to all authorities engaged in the execution of a request under paragraph 2 of Article 7."

US v Field again shows the balancing process which takes account of various aspects of jurisdiction but does not allow for any categorical delineation of jurisdiction associated with arguments of international legal equality of countries and their jurisdictions or of the comity of courts.

An even more current incident which illustrates the jurisdictional conflict issue is the *Turner*[118] case. US officials investigating alleged bribes in a Saudi arms deal subpoenaed Mike Turner, the chief executive of BAE Systems, Britain's biggest military contractor, and his colleague on their arrival in the United States at George Bush International Airport in Houston, Texas, on 12 May 2008. The summonses were part of a US Justice Department investigation of bribery charges related to a large arms deal in Britain involving a series of warplane sales to Saudi Arabia agreed in the mid-1980s and valued at up to $80 billion. The Serious Fraud Office in the United Kingdom dropped an inquiry into the deal in December 2006 after then Prime Minister Tony Blair said the probe threatened national security. In June 2007, the company said that it had been notified that the US Justice Department had begun investigating BAE's compliance with anti-bribery laws, including in relation to dealings with Saudi Arabia. The US Justice Department had no comment to make about the issue of the subpoenas according to a department spokesperson. A BAE spokesperson said that he could not confirm or deny British media reports that personal electronic devices belonging to Mr Turner and his colleague, including laptops, had been seized and examined before they were allowed to continue their trip. They were not prevented from entering the United States and

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exchanges; have served as essential ingredients in frauds including schemes to defraud the United States; have served as the ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions, mergers and takeovers; have covered conspiracy to steal from the US defence and foreign aid funds; and have served as the cleansing agent for 'hot' or illegally obtained monies. The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. HR Rep No. 91-975, 91 Cong 2d Sess 12 (1970), U.S. Code Cong & Admin News 1970, p. 4397."

[118] See *Financial Times* and *Reuters* Reports of 18 May 2008.

according to media reports Mr Turner was detained for a period of half an hour and has since returned to Britain.

Most current is a decision of the Italian Court of Cassation of June 2008 which exemplifies the risks of "blind" recognition and enforcement of other European countries' decisions. The Rome Court of Cassation approved a writ relating to the property of Germany in Italy after proceedings on 6 May 2008 in a decision of early June 2008. If Berlin refuses to pay damages for acts by the German Forces during World War II, assets such as the Villa Vigoni, which overlooks lovely Lake Como in Italy which is the property of Germany and part of its cultural policy (Goethe Institute) could be seized, sold and the money given to the plaintiffs as a result of the Greek court's damages ruling over an incident in Distomo, Greece in 1944.[119] The Greek judges had awarded the victims' relatives nearly €29 million ($45 million) in the 1990s, but Berlin declined to pay. A bid to seize the German cultural office in Athens, the Goethe Institute, was subsequently prohibited by the Greek government as Article 923 of the Greek Civil Procedural Code requires the consent of the Greek government before any seizure of foreign states' property may take effect. This authorisation was denied by the Greek Minister of Justice. However, such a clause does not exist in the Italian Code of Civil Procedure nor is it known in many other procedural codes.

The Distomo plaintiffs then decided to ask Italian courts to enforce the Greek ruling and succeeded. The Rome judges declared the Villa Vigoni as security for the debt. Normally, sovereign immunity prevents precisely what the Greek and Italian courts have ordered: individuals suing a foreign state in their own courts. As the rationale for any kind of state immunity is that States can only be sued in relation to their state activity (*actae de iure imperii*) before international tribunals.

So what happens if Italian judges do enter a damages finding against Germany in the end? Could the Villa Vigoni be put on the block in an auction? Could the Rome branch of the Goethe Institute be boarded up and put on the market? It is very hard to predict what will happen. Immunity may not save Germany from paying any more as the Rome Court of Cassation did not apply immunity in its most recent decision. The preceding decision of the Greek court of Levadia in Distomo[120] was upheld. The Greek Supreme Court composed of 51 judges sitting found an emerging customary rule containing a tort exception to state immunity with a territorial nexus to the forum. It accepted the formulation contained in the European Convention on State Immunity as customary, although Greece was not a member to the Convention but Germany was. The Court arrived at this result after a thorough review of all available instruments on state immunity, most of them in draft form at the time, as well as of the case–law of other jurisdictions, mainly the

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[119] *Kalogeropoulos et al. v Germany* Court of Livadia decision 137/1997, confirmed by the Areos Pagos (Areopag, Greek Supreme Court) decision of 4 May 2000 *Germany v Prefecture of Voiotia*, case 11-2000 reported in 49 Nomiko Vlma 2000, 212-229 and ILDC 287

[120] Biehler, *Auswärtige Gewalt* (Mohr & Siebeck Tübingen, 2005) p. 308 *et seq.* gives an comprehensive account of the case.

United States. The strong dissenting opinion, led by Chief Justice Matthias, reached the opposite conclusion, namely that no such custom exists.

The possible enforcement in Italy of the Greek judgment unenforceable in Greece by the Rome court under the European rules of recognition is an example of inconclusive proceedings in international law. The Greek decision which cannot be executed in Greece because of the lack of Greek governmental assent under Article 923 of the Greek Procedural Code may be possibly executed in Italy. The unusual harshness of the original Greek decision not granting immunity to Germany may well have been triggered by the Greek judges' knowledge of the necessary governmental assent making any embarrassment of their own government in its international relations impossible when it does not wish to execute the judgement. To avoid embarrassment in international relations is also one of the main aims of sovereign immunity. The applicants in the Greek case were well advised to leave Greece where the decision may not be enforced for Italy, where the enforcement may be obligatory under the applicable rules. Particularly, Article 1 sentence 2 and Preamble consideration No. 9 of the Rome II Convention/Regulation on Non-Contractual Obligations which seem to explicitly exempt such cases from its remit does not do so if a court holds that the tortious acts in question are not done "de iure imperii". This is exactly what the Rome court and the majority of the Greek court reasoned. The Greek *lex fori proceduralis* is local and although the Greek Article 923 may have informed the Greek judges in their judgment on the merits it has no effect in Italy. Under the Rome II Convention it is doubtful that Italian courts could apply immunity when asked to enforce the Greek judgment even if they wished to do so. It is arguable that the Italian Courts are not to review the denial of immunity by the Greek Courts in their enforcement procedures. A remedy may be to apply the full Greek law including the Greek Civil Procedural Code although it forms part of the Greek *lex fori proceduralis* which is under the traditional understanding only locally applied. In this case courts should not decide "blindly" otherwise the "Italian Torpedo" gets an ever enhanced meaning as already foreshadowed in *Ferrini v Germany*.[121]

4.5 Basis of Jurisdiction in Different Countries

4.5.1 Jurisdiction

National bases of jurisdiction may be significant to both academics and practitioners. To know which court will admit which application and why is the start of all legal proceedings. It is the individual forum's rule on jurisdiction which both enables successful forum shopping and to appropriately answer such moves from the

[121] Italian Court of Cassation decision of 11 March 2004, (2004) 87 Rivista di Diritto Internazionale 539; comment Andrea Bianchi in (2005) 99 AJIL 242, 248.

other side. To be aware that, for example, applications for negative declarations (as a first procedural step to forum shopping, some injunctive relief or countermeasures) will be entertained by Irish or Italian but not by Greek or German courts could be useful.

Considering the immense significance of the approaches of different countries to jurisdiction, it is surprising that there is no full compilation of the different bases of jurisdictions available yet. Only some hints in, for example, Annex 1 of the EC Regulation 44/2001 on exorbitant bases of jurisdiction of EC member states can be found. However, the national bases of foreign jurisdictions both European and others are still quite difficult for any lawyer to ascertain. The following compilation is a step in this direction. It will help to provide an initial idea beyond the rules embodied in EC regulations. Where cross border civil proceedings are being initiated, issues such as jurisdiction and choice of law were formerly covered by the 1968 and 1982 Brussels Conventions. In the same way that rules of service within the EU are now laid down in EC Regulation 1348/2000, Regulation 44/2001 now provides rules on jurisdiction.

The general bases on which courts will accept jurisdiction, however, remain those that have evolved over time through conventions, treaties and custom. In Europe the Rules of the EC Regulation 44/2001 shape the approach to international litigation. The main basis of jurisdiction is Article 2.1 of EC Regulation 44/2001 which reads:

> "Subject to this Regulation, persons domiciled in a Mamber state shall, whatever their nationality, be sued in the courts of that Member State."

Domicile as defined autonomously by EC law remains the primary ground of jurisdiction and this is reflected in Article 2 of Regulation 44/2001.

This main rule is subject to exceptions in Article 5 *et seq*. of the Regulation (Brussels II). In Article 23 of Regulation 44/2001 and in all other national laws on national jurisdiction the choice of the parties concerning the court, the *forum prorogatum*, takes precedence over the general rule of jurisdiction but for the exclusive or mandatory bases of jurisdiction. As this is a common feature of all jurisdictions discussed in this section it is not any more mentioned when discussing the national rules on jurisdiction.

In addition, the EC Regulation 864/2007 (Rome II) on non-contractual obligations which will enter into force on 11 January 2009 provides in Article 14 for the *lex prorogatum*, the law chosen by the parties, and in Article 4.2 for the law of the place of the habitual residence of the parties to take precedence over the general rule in Article 4.1 which is to apply the law of the country in which the event giving rise to the damage occurred irrespective of the countries in which indirect consequences of the event may have occurred. This rule is remarkably different from the rules applied in most countries according to their national law which is the *lex loci delict commissii*. Except for Denmark (see Article 3 of EC Regulation 44/2001

and Preamble consideration No. 40 of EC Regulation 864/2007) both Conventions/Regulations will have decisive effects for the Courts of the EC and EFTA Member States. However, national bases of jurisdiction remain relevant for two main reasons.

Primarily, the strict "blind" application of the recognition rules in Europe guaranteed by the ECJ, for example, in *Krombach v Bamberski* ensures that national (even exorbitant) assumptions of jurisdiction based on outlawed (Article 3.2, Annex 1 EC Regulation 44/2001) national law will remain enforceable and even strengthened by the compulsory recognition/enforcement rules of the EC Regulation. This is one reason to be familiar with those provisions beyond the rules of EC law. This defies the intention of Article 3.2 which provides that certain rules of national jurisdiction, which are listed in Annex 1, cannot apply to persons domiciled in a Member State and who are being sued in the courts of another Member State. These include provisions allowing jurisdiction to be founded on a variety of circumstances apart from domicile. It refers, for example, to the rule in the United Kingdom, which enables jurisdiction to be founded on the document instituting the proceedings having been served on the defendant during his temporary presence in the UK, the presence within the UK of property belonging to the defendant or the seizure by the plaintiff of property situated in the UK. It also covers Paragraph 23 of the German *Zivilprozessordnung* (Code of Civil Procedure), which contains a similar provision relating to property and Articles 14 and 15 of the French *Code Civile*, which identify contractual obligations entered into in France with a French national as a basis for jurisdiction. The bases of exorbitant jurisdiction in national laws are mentioned here. The most significant application of the national rules of jurisdiction combined with the EC Regulation's *lis pendens* rule is the application for a negative declaration at a court with certain procedural specificities symbolised by the "Italian Torpedo". To deal with those challenges may only be possible with due regard to the national bases of jurisdiction.

The second reason is the application of the EC Regulations' jurisdictional rules in cases of conflict of jurisdictions beyond the EC/EFTA Member States' courts. This applies particularly to Northern American assumption of jurisdiction which does not follow the rules of the EC Regulations and inevitably will be in conflict with European assumption of jurisdiction. US courts would equally assume jurisdiction and not apply the *forum non conveniens* or another rule to the same effect in favour to the EC Regulations' standards. The same may certainly be said for many major jurisdictions such as China, Japan, India, Brazil, South Africa or Australia to name but a few. Aside from cases of direct jurisdictional conflict with jurisdictions outside the EC the question will be where to best launch or defend a case from an international perspective. This would require some regard to national procedural bases of jurisdiction which are presented here. This list contains the primary national provisions relating to jurisdiction:

Austria

Paragraph 66 *Jurisdiktionsnorm* reads:

> "(1) Der allgemeine Gerichtsstand einer Person wird durch deren Wohnsitz bestimmt. Der Wohnsitz einer Person ist an dem Orte begründet, an welchem sie sich in der erweislichen oder aus den Umständen hervorgehenden Absicht niedergelassen hat, daselbst ihren bleibenden Aufenthalt zu nehmen."

Austria bases its jurisdiction mainly on habitual residence. Every person is accorded a place of general jurisdiction based on the relationship of his person to a court district. As a rule, cases are initiated in the place of general jurisdiction of the defendant. The place of general jurisdiction of a natural person is based as a rule on the person's legal or habitual residence; one person can also be accorded several places of general jurisdiction.

The place of general jurisdiction of a legal person (company association both national and foreign) mostly depends on the location of its registered office. However, branches of foreign companies may provide a base of jurisdiction too if business is done by these branches in Austria which is related to the claim brought forward.

In some cases, actions can be initiated not only according to the defendant's place of general jurisdiction, but also optionally in another jurisdiction, an elective venue (*Wahlgerichtsbarkeit*). The Austrian Law of Judicature recognises more than twenty different elective venues for civil proceedings alone, for dealing with contractual and statutory relationships under the law of obligations or various claims under the law of property, as well as elective venues of a procedural kind. These might include the forum of the place of performance or the place named on the invoice (contracts). They could be the *forum rei sitae* (jurisdiction at the place where the subject matter in controversy is situated) or the place where damage was inflicted (tort/delict), or else the place of a cross-action. The ways in which these are dealt with can sometimes vary greatly from other comparable European and national rules on jurisdiction.

Austrian law expressly provides for the following places of jurisdiction in the case of the claims listed below:

For claims arising from contracts (not employment contracts): actions to determine the existence or non-existence of a contract, actions to demand the performance of, or the rescinding of a contract, as well as actions brought to demand compensation for non-performance or partial performance of a contract can all be brought at the court where performance of the contract is required of the defendant, according to the agreement of the parties. (The place of jurisdiction is the place of performance.) The agreement must be documented.

For liability in tort: disputes over damages arising from the manslaughter of, or the injury to one or several persons and damages arising from false imprisonment or bodily harm can also be heard in the court in whose district the conduct which caused the damage took place, which is the *lex loci delicti commissii.*

For cases of damages claimed under civil law as a result of criminal acts: damages which are claimed under civil law as a result of criminal acts can be asserted at the court at which the criminal proceedings have been initiated.

No exorbitant bases of jurisdiction are known in Austrian law.

Belgium

Article 624 *Code Judiciaire* reads:

> "Hormis les cas où la loi détermine expressément le juge compétent pour connaître de la demande, celle-ci peut, au choix du demandeur, être portée:
>
> 1° devant le juge du domicile du défendeur ou d'un des défendeurs;
>
> 2° devant le juge du lieu dans lequel les obligations en litige ou l'une d'elles sont nées ou dans lequel elles sont, ont été ou doivent être exécutées;
>
> 3° devant le juge du domicile élu pour l'exécution de l'acte;
>
> 4° devant le juge du lieu où l'huissier de justice a parlé à la personne du défendeur si celui-ci ni, le cas échéant, aucun des défendeurs n'a de domicile en Belgique ou à l'étranger."

Belgium knows four main bases of jurisdiction which are the domicile of the defendant, the place where an obligation is contracted or must be executed, the chosen place of performance of the relevant act and the place where the defendant happens to be when no defendant has a certain domicile. The Belgian legal system is based on the plaintiff's freedom of choice. The general rule is established in Section 624(1) of the Judicial Code. Normally, the plaintiff brings the case before the judge of the place of residence of the defendant, or of one of the defendants. What if the defendant is a legal person? A legal person's place of residence is that of its main place of business, *i.e.* the administrative headquarters from which the undertaking is managed.

An exorbitant base of jurisdiction is contained in Article 638 of the Judicial Code/Code judiciare/Gerectelijk Wetboek.

Denmark

Paragraph 235 *Retsplejeloven* reads:

> "§ 235. Retssager anlægges ved sagsøgtes hjemting, medmindre andet er bestemt ved lov.
>
> Stk. 2. Hjemtinget er i den retskreds, hvor sagsøgte har bopæl. Har sagsøgte bopæl i flere retskredse, er hjemtinget i enhver af dem.

> Stk. 3. Har sagsøgte ingen bopæl, er hjemtinget i den retskreds, hvor han opholder sig.
>
> Stk. 4. Har sagsøgte hverken bopæl eller kendt opholdssted, er hjemtinget i den retskreds, hvor han sidst har haft bopæl eller opholdssted."

Habitual residence of the defendant is the main Danish criteria for assuming jurisdiction. There are some alternative bases of jurisdiction (*lex loci delicti commissii*, where the effect of the tort materialises and place where the obligation is contracted):

> "Sager mod personer, der driver erhvervsmæssig virksomhed, og som vedrører denne virksomhed, kan anlægges ved retten på det sted, hvorfra virksomheden udøves.
>
> Sager om rettigheder over fast ejendom kan anlægges ved retten på det sted, hvor ejendommen ligger.
>
> Sager om kontraktforhold kan anlægges ved retten på det sted, hvor den forpligtelse, der ligger til grund for sagen, er opfyldt eller skal opfyldes.
>
> Sager om erstatningsansvar uden for kontrakt kan anlægges ved retten på det sted, hvor den skadevoldende handling er sket.
>
> I sager om forbrugeraftaler kan forbrugeren anlægge sag mod den erhvervsdrivende ved sit eget hjemting, når forbrugeraftalen ikke er indgået ved forbrugerens egen henvendelse på den erhvervsdrivendes faste forretningssted."

Finally, some provisions on exclusive jurisdiction are found which reflect those in most other states including rules on international jurisdiction which are relevant as Denmark is not subject to the EC Regulation 44/2001, see Article 3 of the Regulation. These are the Danish rules of exclusive jurisdiction:

> "Sager om forældremyndighed skal anlægges ved retten på det sted, hvor barnet har bopæl.
>
> Sager om faderskab indbringes for retten på det sted, hvor moderen har hjemting.
>
> Sager om ægtefælleskifte anlægges ved retten på det sted, hvor ægtefællerne har bopæl. Har de ikke bopæl i samme retskreds, foretages skiftet af retten på det sted, hvor de sidst har haft fælles bopæl, såfremt en af dem fortsat har bopæl i retskredsen."

Finland

Chapter 10 Code of Judicial Procedure reads:

> "When someone intends to bring against another a civil action involving a debt or other personal action, the latter shall be summoned

> to the court of the district in which he/she has his/her home and domicile. A person who has no domicile in Finland shall be summoned to the court of the locality where he/she is found or where he has property in the country. If a Finnish citizen is living abroad, he/she may also be summoned to the court of the locality where he/she last had a domicile in Finland. A citizen of a foreign State who does not have home and domicile in Finland may, in the absence of separate provisions regarding the citizens of said State, be summoned to the court of the locality in Finland where he/she is found or where he/she has property."

The main rule is that the action is brought at the general lower court of the defendant's place of residence. This applies also to a situation where the defendant is a legal person. Only a small minority of actions are processed elsewhere.

Unlike the German Article 23 of the Civil Procedure Order the Finnish property rule is not considered exorbitant because it is assumed that it is subsidiary to all other bases of jurisdiction.

France

Article 42 *Code de Procédure Civile* reads:

> "La juridiction territorialement compétente est, sauf disposition contraire, celle du lieu où demeure le défendeur. S'il y a plusieurs défendeurs, le demandeur saisit, à son choix, la juridiction du lieu où demeure l'un d'eux.
>
> Si le défendeur n'a ni domicile ni résidence connus, le demandeur peut saisir la juridiction du lieu où il demeure ou celle de son choix s'il demeure à l'étranger."

French jurisdiction is mainly assumed by choice ("sauf disposition contraire"), at the place of residence of the defendant, in the case of several defendants the choice among those is with the applicant and in the case that there is no known residence of the defendant the applicant may sue at his place of residence or at a place of his choice if he lives abroad.

If the defendant is a natural person, it is the court of the place where he is domiciled or resident. For a legal person (company, association, etc.), it is the place where it is based, generally the place where it has its head office. It may be that the main premises known are distinct from the head office; in this case, it is possible to refer the matter to the court in the place where the main premises are located. For major companies with several branches, the matter may be referred to the court in the place where one of these branches is located. Some specific provisions should be noted. With regard to contracts: the plaintiff may bring the matter before the court in either the place where the defendant is domiciled, or, according to the nature of the contract, the place where the goods were delivered or the ser-

vice provided. With regard to tort actions or proceedings involving a civil claim as part of criminal proceedings: the claim must be brought before the court in the place where the defendant is resident, or that of the place where the damage was suffered or the harmful event took place. In a matter involving property, the plaintiff may bring the matter before the court in the place where the property is situated. In a matter involving alimony, the plaintiff has the choice between the court in the place where the defendant is resident and that where the creditor lives; in other words, the plaintiff's own court.

Article 14 of the French Civil Procedure Code provides jurisdiction in lawsuits where the applicant is a French national (exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001, but see ECJ in *Krombach v Bamberski*).

Germany

Paragraph 13 *Zivilprozessordnung* reads:

> "Der allgemeine Gerichtsstand einer Person wird durch den Wohnsitz bestimmt."

Residence is the main criteria according to German law. In the case of a person who has no place of residence, the place where he is staying in Germany is taken as a basis and, if no such place is known, his last place of residence. In the case of a legal entity, its registered office is conclusive. For certain types of claims, the plaintiff has the option of choosing a different jurisdiction than that of where the defendant lives (special, not exclusive jurisdictions). Examples of this are as follows:

In the case of the disputes arising from a contractual relationship and the existence of such a relationship, proceedings can also be initiated in the court of the place where the disputed obligation is to be performed (Section 29(1) of the German Rules of Civil Procedure (Zivilprozessordnung – ZPO). An agreement regarding the place of performance is only material for procedural purposes if the contracting parties belong to the group of persons who are authorized under Section 38(b)(1) ZPO to conclude jurisdiction agreements (see (c)). The term "contractual relationship" includes all contracts governed by the law of obligations, regardless of the type of obligation. Where the employment courts have jurisdiction, the provision applies accordingly.

In respect of claims arising from prohibited acts, the court in whose area the act has been committed also has jurisdiction. The victim of a criminal act may in the course of criminal proceedings make applications intended to assert financial claims accruing to him from the criminal act at the court where the charge has been preferred. In respect of divorce proceedings, substantive jurisdiction lies solely with the Family Court (*Familiengericht*) (a division established at the District Courts) in whose district the spouses have their usual joint residence (meaning the actual focus of their lives). If no such residence exists in Germany at the time when the proceedings become pending (meaning service of the application

document or statement of claim), sole jurisdiction lies with the Family Court in whose district one of the spouses is usually resident together with the couple's underage children. If this does not establish a jurisdiction, sole jurisdiction lies with the Family Court in whose district the spouses have had their joint habitual residence, provided that one of the spouses is still usually resident there at the time when the proceedings become pending (see above). If this also does not apply, the defendant's habitual place of residence is conclusive, unless there is no such place of residence in Germany. In this event, the plaintiff's habitual place of residence is decisive. If this also does not establish a jurisdiction, the Family Court at the Berlin – Schöneberg District Court has sole jurisdiction for those without a clear place of residence where they may be sued.

Where an Act specifically designates a jurisdiction as being exclusive, it takes precedence over all other jurisdictions, *i.e.* the proceedings can (admissibly) only be initiated within the exclusive jurisdiction. Exclusive jurisdictions arise in particular from special Acts: If the proceedings relate to land or to a right equivalent to land (*e.g.* hereditary building right), sole jurisdiction in particular cases lies with the court in whose district the subject matter is located; this relates to proceedings arising from ownership or from a charge on real property, disputes relating to freedom from a charge on real property, possessory actions, boundary dispute actions and actions for a partition (Section 24 ZPO).

In debt collection proceedings, sole jurisdiction lies with the District Court where the applicant has his general jurisdiction, in other words usually his residence or registered office (Section 689(2) ZPO). In compulsory enforcement proceedings, sole jurisdiction lies with the District Court, as the enforcement court, in whose district the enforcement action is to take place or has taken place (Section 764(2), Section 802 ZPO). In the case of compulsory sale by auction or compulsory administration of land, sole territorial jurisdiction lies with the District Court, as enforcement court, in whose district the land is located (Section 1(1), Section 146 of the German Compulsory Auction Act (Zwangsversteigerungsgesetz), Sections 802, 869 ZPO).

However, if the defendant has assets in Germany even unrelated to the claim he may be sued in Germany according to Paragraph 23 *Zivilprozessordnung* (*Allgemeiner Vermögensgerichtsstand*) which is exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001.

Greece

Articles 22 and 23 of the Civil Procedure Code stipulate that the court, within the district of which the defendant is domiciled, has jurisdiction.[122] If the plaintiff is not domiciled in either Greece or abroad, the competent court is the one in the area where he has his habitual residence. If the place where he is habitually resident is not known, the competent court is the one in the area where his last place of domi-

[122] Anagnostopoulos, "Greece" in Van Lynden (ed.), *Forum Shopping* (LLP, 1998).

cile in Greece was and if there was no place of domicile, his last place of habitual residence. Legal entities (companies both national and foreign) capable of being involved in legal proceedings are subject to the competence of the court in whose region their seat is located.

Some special bases of jurisdiction are known to Greek Law. Contractual disputes; disputes relating to the existence or validity of an *inter vivos* legal transaction and all rights deriving from it can also be brought before the court within whose territorial jurisdiction the legal transaction was entered into or where fulfilment was made. Disputes for liquidated damages and for compensation due to delict during negotiations can also be brought before the same court.

Tort-related disputes can be brought before the court within whose territorrial-jurisdiction the tort was committed even if the claim relates to a person who has no criminal liability. Claims for damages and restitution resulting from crimes and for financial satisfaction due to moral harm or mental anguish can be brought before the criminal court handling the case.

A procedural provision should be noted which became prominent in the Distomo/Kalegoroupoulos/Levadia litigation. Article 323 demands that any execution of judgments against foreign states and their property in Greece requires prior authorisation of the Minister of Justice (and will normally not be granted).

Ireland

The appropriate District or Circuit in which to bring a civil claim is determined by the location where the defendant or one of the defendants ordinarily resides or carries on any profession, business or occupation, or at the election of the plaintiff between those bases of jurisdiction. In most contract cases the appropriate District or Circuit is the one where the contract is alleged to have been made, in tort cases, where the tort is alleged to have been committed and, in cases relating to tenancy or title to real property, where the premises or lands the subject of such proceedings are situated.

These Irish rules are common law rules developed by the courts reflecting the rules as they stood until very recently in England too and are understood as such widely in the English speaking world as a kind of traditional standard. However, the basic rule of jurisdiction which is based on the presence of the defendant in the territory when having been served with proceedings even if accidental is exorbitant jurisdiction according to Article 3.2./Annex 1 EC Regulation 44/2001.

Italy

Article 3 Civil Procedure Code (Law No. 218 of 14 May 1995) reads:

> "La giurisdizione italiana non e' esclusa dalla pendenza davanti a un giudice straniero della medesima causa o di altra con questa connessa."

The competent court is that of the place where the defendant is resident or domiciled or, if that place is unknown, the court of the place where the defendant is living.

If the defendant has no residence, domicile or place of abode in the country, or if the abode is unknown, the competent court is that of the place of residence of the plaintiff.

For legal persons the place of jurisdiction is where they have their head office or (choice of the party) an establishment and a representative authorised to bring legal proceedings. Companies without legal personality, associations and committees have their headquarters in the place where they habitually carry out their activity. Exceptions are contained in rules of exclusive jurisdiction and some mandatory jurisdiction in the public interest when *e.g.* the Italian State sues.

Exclusive jurisdiction overrides other jurisdictions provided for in law; however, competence determined by exclusive jurisdiction is not mandatory and may be changed where cases are related.

Exclusive jurisdictions are: the jurisdiction established by law for cases involving rights *in rem* and possessory actions (law of the place where immovable property is situated, section 21 Italian Code of Civil Procedure, CCP); that of inheritance cases (place where the succession is opened, section 22 CCP); that of cases involving business associates or co-owners of property (place where the company has its registered office or place where the jointly-owned property is located, section 23 CCP); that of cases involving the management of assets (place where the assets are managed, section 24 CCP).

Appeals against enforcement jurisdiction on the basis of the nature and value of cases are governed by general rules while territorial competence is invariably attributed to the court of the place of execution, namely the place where execution is pending.

Relevant for the "Italian Torpedoes" is the admissibility of a claim for negative declarations sometimes connected with the use of exorbitant bases of jurisdiction which are contained in Articles 3 and 4 of Act/Law No. 218 of 31 May 1995.

Luxembourg

Article 25 Civil Procedure Code reads:

> "En matière personnelle ou mobilière, ainsi qu'en toutes matières pour lesquelles une compétence territoriale particulière n'est pas indiquée par la loi, la juridiction compétente est celle du domicile du défendeur; si le défendeur n'a pas de domicile, celle de sa résidence. En matière contractuelle, la demande pourra également être portée devant le tribunal du lieu où l'obligation a été ou doit être exécutée."

The defendant's domicile and if there is no domicile his residence is the main criteria for assuming jurisdiction. As a rule, the court for the defendant's place of residence is assumed to be his domicile. If the defendant is a natural person, this means the court for his domicile/residence. For a legal person such as a company or an association, it will be the court for the place where it has its registered office. Sometimes a company's main establishment will be separate from its head office.

In such cases it is possible to sue in the court for the place where the main establishment is. For major firms with several branches, the action can be brought in the court for one of the branches. Some exceptions to the basic rule may be noted:

- Contracts: the claimant can bring an action either at the place where the defendant is resident or, depending on the nature of the contract, the place where the goods are to be delivered or the services are to be performed.
- In cases in tort/delict and in civil proceedings joined to a criminal prosecution: the claim may be presented in the court for the place where the defendant lives or the court for the place where the loss was suffered or the harmful act occurred.
- Real property: the claimant can sue in the court for the place where the property is situated.

Netherlands

Article 126, 1 Civil Procedure Code reads:

> "De gedaagde kan de roldatum, vermeld in het exploot van dagvaarding, vervroegen door aan de eiser bij exploot een vroegere roldatum te doen aanzeggen, met vermelding van het uur indien alsdan een terechtzitting plaatsvindt. In zaken waarin partijen niet in persoon kunnen procederen, wordt hierbij tevens procureur gesteld."

The basic rule for proceedings commenced by writ of summons in the first instance (see Article 99 of the Code of Civil Procedure) is that, except where the law determines otherwise, the civil court with competence in the place where the defendant lives shall have jurisdiction for proceedings of this nature. Where the defendant does not have any known place of residence in the Netherlands, the court in the place where the defendant actually resides (in the Netherlands) shall have jurisdiction.

Exceptions to the general rule of residence are referred to in the Netherlands as "alternative jurisdiction". The claimant has the opportunity to choose between the basic rule and the alternative rule. These are:

- In labour cases/agency cases (Article 100 of the Code of Civil Procedure), the court in the place where labour is normally performed shall also have jurisdiction.
- In consumer cases (Article 101 of the Code of Civil Procedure), the court in the place of residence, or, in the absence thereof, the court in the place where the consumer actually lives shall also have jurisdiction.
- In cases concerning obligations arising from a wrongful act (Article 102 of the Code of Civil Procedure), the court in the place where the harmful event occurred shall also have jurisdiction.

- In cases concerning immovable property (Article 103 of the Code of Civil Procedure), the court in the place in which the property, or the greatest part of said property, is situated shall also have jurisdiction. In cases concerning the leasing of residential accommodation or business accommodation, exclusive jurisdiction shall be enjoyed by the subdistrict court with jurisdiction in the area in which the leased property or the greater part thereof is situated.
- In cases concerning estates (Article 104 of the Code of Civil Procedure), the court in the deceased's last place of residence shall also have jurisdiction (this jurisdiction is also referred to as the court with jurisdiction in relation to the "house where the deceased last resided" *i.e.* the municipality in which the deceased died).
- In cases concerning legal entities (Article 105 of the Code of Civil Procedure, for example, cases concerning the dissolution of legal entities, the nullity or validity of decisions taken by legal entities, the rights and obligations arising for members or partners), the court in the place where the legal entity or company is domiciled or has its place of business shall also have jurisdiction.
- In cases concerning application of legal provisions in respect of bankruptcy, moratoriums on payments and debt rescheduling (Article 106 of the Code of Civil Procedure), the court of which the delegated judge forms part shall also have jurisdiction, or, where no delegated judge has been appointed, the court that pronounced the moratorium on payments. The Bankruptcy Act [*Faillissementwet*] also contains a number of jurisdiction rules, which rules shall prevail over the rule indicated above.

Portugal

Article 65 Civil Procedure Code reads:

> "1 – Sem prejuízo do que se ache estabelecido em tratados, convenções, regulamentos comunitários e leis especiais, a competência internacional dos tribunais portugueses depende da verificação de alguma das seguintes circunstâncias:
>
> a) Ter o réu ou algum dos réus domicílio em território português, salvo tratando-se de acções relativas a direitos reais ou pessoais de gozo sobre imóveis sitos em país estrangeiro …"

The basic rule regarding territorial jurisdiction is that the court with jurisdiction over the case is that of the place where the defendant lives. If, however, the defendant does not have a habitual residence, his residence is unknown or he is absent, the case will be brought to the court of the place where the plaintiff lives. If the defendant's domicile and residence is in a foreign country, the case will be brought in the court of the area where the defendant is present. If the defendant is not in Portugal, the case will be brought to the court of the place where the plain-

tiff lives. When this latter domicile is in a foreign country the Lisbon court will have jurisdiction for the case.

In relation to legal persons and companies, the general rule is as follows. If the defendant is the State, the court of the defendant's domicile is replaced by the court of the plaintiff's domicile. If the defendant is another legal person or a company, the case will be brought in the court of the area of the defendant's main registered address or that of the branch office, agency, subsidiary, delegation or representative, depending on whether the case is brought against the main part of the company or the latter entities. However, cases brought against foreign legal persons or companies which have a branch, agency, subsidiary, delegation or representative in Portugal can be lodged in courts in the areas where these have their registered addresses even though the case is being brought against the main company.

Special provisions exist in following cases:

- Cases involving property rights such as the division of jointly owned property, eviction, separation of inherited property from the existing estate of the heir, and foreclosure, as well as those cases involving reinforcement, substitution, reduction or releasing of mortgages should be put to the court for the area where the property in question is located.
- Cases for demanding the fulfilment of obligations, compensation for non-fulfilment or incomplete fulfilment of obligations and the termination of a contract due to non-fulfilment will be brought, at the choice of the creditor, in either the court of the place where the obligation should have been fulfilled or in the court of the place where the defendant lives.

For civil liability cases based on torts/delicts or illegal acts or hazards, the court with jurisdiction is that of the area in which the act occurred.

The court of the port where a ship's cargo, which has been declared under general average rules, was or should have been delivered has jurisdiction to decide on this damage. A case involving losses and damages resulting from a collision of ships can be brought in the court of the area where the accident occurred, the court of the domicile of the owner of the ship which struck the other, the court for the place where this ship is registered or in which it is located, or the court for the first port of call of the ship which was struck.

For company special recovery or bankruptcy proceedings the court with jurisdiction is that of the area in which the company has its registered offices or in which the company carries out its main activity.

The court of the district in which any branch, agency, subsidiary, delegation or representative set up in Portugal of a foreign company is located has jurisdiction to hear special recovery or bankruptcy proceedings resulting from obligations contracted in Portugal or which should be fulfilled here. The liquidation will, however, only involve assets located in Portugal.

There are exorbitant bases of jurisdiction provided for in Articles 65 and 65 A of the Civil Procedural Code (Codigo de Processo Civil) and Article 11 of the Labour Procedural Code.

Spain

Article 22 LOPJ of 1 July 1985 (Law regulating Spanish judicial system) reads:[123]

> "En el orden civil, los juzgados y tribunales españoles serán competentes:
>
> 1. Con carácter exclusivo, en materia de derechos reales y arrendamientos de inmuebles que se hallen en España; en materia de constitución, validez, nulidad o disolución de sociedades o personas jurídicas que tengan su domicilio en territorio español, así como respecto de los acuerdos y decisiones de sus órganos; en materia de validez o nulidad de las inscripciones practicadas en un registro español; en materia de inscripciones o de validez de patente y otros derechos sometidos a deposito o registro cuando se hubiere solicitado o efectuado en España el deposito o registro; en materia de reconocimiento y ejecución en territorio español de resoluciones judiciales y decisiones arbitrales dictadas en el extranjero."

Like in the preceding Portugese law the Spanish law assumes exclusive jurisdiction for all issues relating to land and immovables in Spain and otherwise accepts the domicile of the defendant as a basis of jurisdiction, however, there is a long catalogue of special jurisdictional bases.

The basic rule stipulates that the Spanish courts assume jurisdiction where the defendant has his legal residence, or in the absence of this, where he lives. If the defendant does not have his legal residence or live in Spain, the Court of First Instance of the district where the defendant is or where he last lived has jurisdiction. If none of these criteria can be applied, the plaintiff may refer the case to the Court of First Instance of the district in which he has his legal residence.

Spanish courts leave the determination of territorial jurisdiction to the plaintiff in the following cases:

- Plaintiffs/claimants can choose to bring cases against employers and professionals regarding matters arising from their business or professional activities in any place where they conduct these activities.
- Cases may also be taken against companies in the place where the legal relationship or situation referred to in the dispute occurred or is taking effect, provided that they have an establishment or representative in that place.

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[123] See generally Giménez, "Civil Justice in Spain: Present and Future. Access, Cost and Duration" in Zuckerman (ed.) *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998) on the chaotic nature of procedural legislation and difficulties for international practitioners in particular. The recent law of 2000, although intended to be a single, uniform civil procedure code, does not include all individual institutions of civil justice.

- Proceedings concerning property, when brought with regard to various properties or to only one, which is located in different jurisdictions. In this case, the plaintiff can choose any one of the jurisdictions.
- Proceedings for the presentation and approval of accounts which must be produced by administrators of borrowed capital, when it is not determined where they should be presented. In this case, the plaintiff can choose between the place where the defendant has his legal residence and the place where the administration is carried out.
- Disputes concerning inheritance, in which the plaintiff may choose between the courts of the last place in Spain where the deceased had his legal residence and the places where most of the properties in the inheritance are located.
- Proceedings concerning intellectual property, in which the plaintiff can choose between the place where the infringement took place, the place where there are indications that it took place, and the place where the illegal examples are.
- Disputes concerning unfair competition, when the defendant is not established, does not have his legal residence or does not live in Spain. In these cases, the plaintiff can choose between the place where the act of unfair competition took place and the place where it is taking effect.
- Cases exclusively concerning the custody of minors or concerning maintenance claimed by one parent from the other on behalf of the minors, when both parents live in different judicial districts. In these cases, the plaintiff can choose between the court in the place where the defendant has his legal residence and the one in the place where the minor lives.

Sweden

Chapter 10 *Rättegångsbalken* reads:

> "The competent court for civil cases in general is the court for the place where the defendant resides."

A case must be brought where the defendant is resident. A natural person is considered to be resident in the place where he or she is registered. Legal persons are normally taken to be resident at the place where they have their head office.

It may also be possible to bring a case before a Swedish court even if the person does not live in Sweden. If the defendant has no place of residence the case may be brought at the place where they are staying, or, in some cases, at the place where they last lived or stayed.

In some civil disputes a case may be brought in Sweden even if the defendant is resident abroad. Bases for such jurisdiction are the existence of property owned by the defendant in Sweden or that an agreement has been entered into in Sweden.

This applies in tort/delict; anyone who has suffered damage may bring an action at the place where the harmful act was performed or where the damage occurred. An action for damages as a result of a criminal act can be brought in connection with a prosecution for the crime. Consumers can bring a case against a company in their own court in consumer cases involving small sums. Cases involving liability to pay on the basis of a contract can in some cases be brought at the place where the contract was entered into. On the other hand there is no provision in Swedish law conferring jurisdiction on the court at the place where a contract is to be performed. A case against a company involving a dispute which has arisen in connection with a business activity can in some cases be brought at the place of business.

Actions involving child custody, housing and visiting rights are normally heard at the place where the child is resident.

Swedish law provides for exclusive jurisdiction in a number of cases:

- Land law disputes must be dealt with by the court in the place where the land is situated. Some disputes involving property must be dealt with by a land court or a rent or leasehold tribunal. Again, this depends on where the property is located.
- Cases involving inheritance laws must be heard by the court in the place where the deceased lived.
- Disputes to do with marriage and the division of property between spouses are heard by the court in the place where one of the parties lives.

Where a dispute must be heard by the Labour Court or the Market Court the case cannot be brought before the general court in the defendant's place of residence.

For most disputes involving environmental law, maritime law, industrial and intellectual property law and family law, where there is an international dimension, there are special rules which confer jurisdiction on only one court which is usually the court where the harm accours or the child resides.

The Swedish Court of Appeal has exclusive jurisdiction to hear petitions involving the enforcement of decisions of foreign courts.

United Kingdom

The Courts in the United Kingdom follow different rules of jurisdiction as the United Kingdom is comprised of several jurisdictions notably England and Wales, Scotland, Northern Ireland, the Isle of Man and the Channel Islands (Guernsey and Jersey) and Gibraltar. However, the main base of jurisdiction is presence and service in the jurisdiction (England and Northern Ireland, Gibraltar, Isle of Man and Channel Islands). In those latter mentioned jurisdictions inside the UK courts would assume jurisdiction under the common law rules known to all English speaking countries particularly service in the jurisdiction and *forum conveniens* or the EC Regulations (Brussels and Rome) when applicable. The main basis of jurisdiction is service of a claim form (summons, writ or process in other countries' terminology) on a defendant present in the jurisdiction.

However, this main basis of jurisdiction in most jurisdictions of the UK is considered to be exorbitant under the Brussels II EC Regulation 44/2001 Annex 1 in cases when the service of proceedings/claim form has been effected on the defendant during his temporary presence in the UK. This applies also when the only basis of jurisdiction is property belonging to the defendant unrelated to the proceedings.

Section 16 Civil Jurisdiction and Judgments Act 1982 reads:

> "1) The provisions set out in Schedule 4 (which contains a modified version of Title II of the 1968 Convention) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where—
>
> (a) the subject-matter of the proceedings is within the scope of the 1968 Convention as determined by Article 1 (whether or not the Convention has effect in relation to the proceedings); and
>
> (b) the defendant or defender is domiciled in the United Kingdom or the proceedings are of a kind mentioned in Article 16 (exclusive jurisdiction regardless of domicile)."

In relation to Scotland which is a jurisdiction in the civil/Roman law tradition, some specific provisions should be noted. The central principle of the Scottish rules of jurisdiction is that persons, whether legal or natural, are to be sued in the courts for the place where they are domiciled. Some special rules and practices exist:

- Contract – a person may also be sued in the courts for the place of performance of the obligation in question.
- Delict/tort – a person may also be sued in the courts for the place where the harmful event occurred.
- Disputes arising out of the operation of a branch, agency or other establishment – here there is jurisdiction in the courts where the branch/agency is situated.

In certain classes of proceedings a court shall have exclusive jurisdiction regardless of domicile or any other jurisdictional rule. These are:

- in proceedings which have as their object rights *in rem* in, or tenancies of, immoveable property, there is exclusive jurisdiction in the courts for the place where the property is situated. Although where the tenancy is for temporary private use for a maximum period of six months the courts of the defender's domicile shall also have jurisdiction, if the landlord and tenant are natural persons domiciled in the same country.
- in proceedings regarding the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, there is exclusive jurisdiction in the courts for the place where

the company, legal person or association has its seat. In proceedings which have as their object the validity of entries in public registers, there is exclusive jurisdiction in the courts for the place where the register is kept. In proceedings concerned with the enforcement of judgments, there is exclusive jurisdiction in the courts for the place where the judgment has been or is to be enforced.

United States

The Courts in the United States both Federal and State would assume jurisdiction under the common law rules known to all English speaking countries. The main basis of jurisdiction is service of process (summons, writ or claim form in other countries' terminology) at a defendant present in the jurisdiction. This is *e.g.* embodied in the New York Statutes on Jurisdiction of Courts.[124]

"Para 301. Jurisdictions over persons, property or status.

A courts may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

Para 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortuous act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortuous act without the state, causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, it he
   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce, or
4. owns, uses or possesses any real property situated within the state

[124] Quoted from Andreas Lowenfeld, *International Litigation and Arbitration* (3rd ed. Thomson West, 2005) p. 1.

(b) … (matrimonial matters)

(c) Effect of appearance. Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

It is the clause in para 302 (a) 3. and 4. "doing business" or owing property both unrelated to the cause of action (or the equivalent provisions in the other states of the United States) which can be seen in some circumstances to be exorbitant normally leading to non recognition of judgements by foreign courts.

In relation to the personal capacity to sue and to be sued there are Federal Rules in the US. Rule 17 Federal Rules of Civil Procedure reads:

"Capacity to sue or be sued is determined as follows:

(1) for an individual who is not acting in a representative capacity, by the law of the individual's domicile;

(2) for a corporation, by the law under which it was organized; and

(3) for all other parties, by the law of the state where the court is located, except that:

(A) a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; and

(B) 28 U.S.C. §§ 754 and 959(a) govern the capacity of a receiver appointed by a United States court to sue or be sued in a United States court."

4.5.2 Service of Proceedings

The aim of this study is to provide an overview of the rules governing cross border civil proceedings in Member States of the European Union and in those states which have contracted to the major international treaties on civil proceedings. These include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom and the United States. The system of initiating proceedings, selecting jurisdiction and enforcing judgments as envisaged by the treaties and other legal instruments currently in force is examined in some detail. Inconsistencies in the domestic law of a number of states with regard to cross border proceedings are also identified. There is a need for awareness of the systems of procedural law operating in different jurisdictions if businesses and private citizens are to enforce their

rights abroad successfully.[125] This is obviously an issue in the light of rapid growth in international commerce and continued globalisation. It is particularly important in the European Union, however, where Community law instruments since the year 2000 have made bold attempts to harmonise procedural rules in such proceedings.[126] It is hoped to assess the extent to which procedural rules as they pertain to international civil disputes themselves constitute a body of international law, which can be said to operate effectively.

4.5.2.1 Hague Convention

The Treaty of the Hague of 1 March 1954 and the Treaty of the Hague of 15 November 1965 concerning the service and notification of judicial documents are also known as The Hague Service Conventions. Contracting states include the above mentioned list. Generally, Articles 2 to 7 of the Convention refer to the service of documents on persons outside the Contracting State and provide for the designation of a Central Authority in each state to whom such documents should be forwarded. In most cases the role is given to a branch of the national courts or to the public prosecutor. Articles 8 to 11 provide for the service of documents by Contracting States through their diplomatic or consular agents or indeed by post, provided the receiving state does not object. In accordance with Article 11, Contracting States may also, by agreement, devise their own channels of transmission for judicial documents. Such arrangements continue to exist between certain Contracting States, though use of the Central Authority procedure envisaged in Articles 2 to 7 results in greater clarity for practitioners seeking to initiate proceedings in another Contracting State.[127]

4.5.2.2 Council Regulation (EC) No 1348/2000

More recently, however, Article 11 has been given effect in a manner which helps to avoid the instability of various bilateral or multilateral treaties between small collections of neighbouring states. Regulation 1348/2000 possesses the inherent benefits of a Community law instrument, incorporates many aspects of the Hague Service Conventions and adds clarity to others.[128] It also supersedes the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 to which the above states are signatories. Article 2 of Regulation 1348/2000 provides for "transmitting and receiving agencies", which are to

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[125] See generally Grubbs (ed.), *International Civil Procedure* (Kluwer Law International, 2003).

[126] Council Regulation (EC) No. 44/2001 and Council Regulation (EC) No. 1348/2000.

[127] See Stokke and Surlien, "Norway" in Van Lynden (ed.), *Forum Shopping* (LLP, 1998) on the multilateral treaty in force between Sweden, Finland, Norway, Iceland and Germany.

[128] Council Regulation (EC) No. 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

be nominated by Member States for the purpose of serving documents. Most states already possess such a system in the form of a designated "Central Authority", as required by the Hague Service Conventions. Article 2(3), however, clarifies the position for those Member States which are federal in nature and permits more than one such agency to be designated. This is given effect, for example, in the German Code of Civil Procedure, whereby each of Germany's 16 *Länder* possesses its own "agency".[129] While Denmark exercised its entitlement not to adopt Regulation 1348, it has subsequently adopted its provisions in a limited form.[130]

4.5.2.3 Lugano Convention

The Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1988 governs the procedure for service of proceedings amongst EU Member States and members of the European Free Trade Association. The provisions are identical to the Brussels Convention and, following Regulation 44/2001, are now largely relevant only in cases involving non-EU EFTA Member States.

4.5.2.4 Noteworthy Domestic Provisions

A number of states have contained in their own domestic law provisions which relate to service abroad and which supplement the provisions of the above instruments and indeed further their aims. However, it is frequently the case that domestic law is selective about the states in which it renders service of proceedings simpler. Common law countries, Scandinavian countries, Benelux countries and some central European countries, for example, operate reciprocal arrangements of one form or another.

The United Kingdom courts generally do not require parties to obtain leave to serve proceedings outside of the jurisdiction. Where proceedings are being served outside Ireland, Order 11 of the Irish Rules of the Superior Courts sets out the High Court procedure. Order 11, rule 2 makes provision for cases where the defendant resides in Northern Ireland, England or Scotland and entitles the Court to have regard to the jurisdiction and powers of local courts in considering whether to grant leave to an applicant seeking to serve proceedings there. Neither the Hague Service Conventions nor Regulation 1348/2000 explicitly envisages such a

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[129] *Zivilprozessordnung.*

[130] Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil and commercial matters. Article 3(1) of the Agreement provides that amendments to the regulation shall not be binding upon or applicable in Denmark. Article 4(1) provides that Denmark shall not take part in the adoption of opinions and that implementing measures shall not be binding upon or applicable in Denmark. Article 5(1) provides that international agreements entered into by the Community shall not be binding upon or applicable in Denmark.

procedure but it is clearly of particular relevance to applicants in the Republic of Ireland wishing to serve proceedings in Northern Ireland. As practitioners in both parts of Ireland will be aware, this is a common occurrence.

In Denmark the Administration of Justice Act contains no specific rules regarding service of proceedings outside the jurisdiction. It appears to be common practice, however, to effect service by means of the local Danish embassy or consulate.[131]

The following list contains the primary sources of domestic law relating to service of proceedings abroad:[132]

Austria

Paragraph 11 *Zustellgesetz* reads:

> "Services to destinations abroad shall be effected in accordance with existing international agreements or in any case in the way permitted by the laws or other legal provisions of the state where service shall be effected or in accordance with international practice, in case of necessity with the support of Austrian official representation authorities abroad."

Belgium

Article 40 Civil Procedure Code reads:

> "A ceux qui n'ont en Belgique ni domicile, ni résidence, ni domicile élu connus, la copie de l'acte est adressée par l'huissier de justice sous pli recommandé à la poste, à leur domicile ou à leur résidence à l'étranger et en outre par avion si le point de destination n'est pas dans un Etat limitrophe, sans préjudice des autres modes de transmission convenus entre la Belgique et le pays de leur domicile ou de leur résidence. La signification est réputée accomplie par la remise de l'acte aux services de la poste contre le récépissé de l'envoi dans les formes prévues au present article. A ceux qui n'ont en Belgique ni à l'étranger de domicile, de résidence ou de domicile élu connus, la signification est faite au procureur du Roi dans le ressort duquel siège le juge qui doit connaître ou a connu de la demande; si aucune demande n'est ou n'a été portée devant le juge, la signification est faite au procureur du Roi dans le ressort duquel le requérant a son domicile ou, s'il n'a pas de domicile en Belgique, au procureur du Roi à Bruxelles.

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[131] Rosenberg, Overby and Nielsen, "Denmark" in Lynden (ed.), *Forum Shopping*.

[132] See generally http://www.lexadin.nl/wlg/ and http://www.ec.europa.eu/civiljustice/ .

Les significations peuvent toujours être faites à la personne si celle-ci est trouvée en Belgique. La signification à l'étranger ou au procureur du Roi est non avenue si la partie à la requête de laquelle elle a été accomplie connaissait le domicile ou la résidence ou le domicile élu en Belgique ou, le cas échéant, à l'étranger du signifié."

Denmark

There is no specific provision in Danish law on service of foreign process.

Finland

Chapter 11 Code of Judicial Procedure reads:

"Section 1 (690/1997)

(1) The court shall see to the service of notices, unless otherwise provided below.

(2) The court may entrust the service of a notice to court personnel or a process server. At the same time, the court shall set a deadline for service and, where necessary, issue further instructions on service.

Section 2 (1056/1991)

(1) On the request of a party, the court may case entrust the service of a notice to the party, if it deems there to be justified grounds for this. At the same time the court shall set a deadline for service and a deadline for the delivery of the certificate of service to the court. (690/1997)

(2) If the service of a summons is entrusted to the plaintiff, he/she shall be notified that if he/she at the time when the court resumes the hearing of the case has not delivered a certificate of service, carried out before the deadline and according to the provided procedure, the case may be discontinued. At the same time the plaintiff shall be notified that he/she can request an extension to the deadline, a new deadline or that the court see to the service of the summons.

Section 3 (1056/1991)

(1) When the court or the public prosecutor sees to the service of a notice, service shall be carried out by sending the document to the party:

(1) by sign-for-delivery post; or

(2) by regular post, if it may be presumed that the addressee receives notice of the document and returns the certificate of service before the deadline.

(690/1997)

(2) The postal authorities shall be notified of the date when the service by sign-for-delivery post is at the latest to take place.

Section 3a (595/1993)

(1) When the court sees to the service of a notice, a notice other than a summons may be served also by posting it to the address of service indicated to the court by the addressee. (690/1997)

(2) The addressee shall be deemed to have been served with the document on the seventh day after the posting."

France

Article 648 *Code de Procédure Civile* reads:

"Tout acte d'huissier de justice indique, indépendamment des mentions [*obligatoires*] prescrites par ailleurs :

1. Sa date ;
2. a) Si le requérant est une personne physique : ses nom, prénoms, profession, domicile, nationalité, date et lieu de naissance ;

   b) Si le requérant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement.
3. Les nom, prénoms, demeure et signature de l'huissier de justice ;
4. Si l'acte doit être signifié, les nom et domicile du destinataire, ou, s'il s'agit d'une personne morale, sa dénomination et son siège social.

Ces mentions sont prescrites à peine de nullité."

Germany

Paragraphs 166–190 *Zivilprozessordnung*. Paragraph 176 reads:

"(1) Wird der Post, einem Justizbediensteten oder einem Gerichtsvollzieher ein Zustellungsauftrag erteilt oder wird eine andere Behörde um die Ausführung der Zustellung ersucht, übergibt die Ge-

> schäftsstelle das zuzustellende Schriftstück in einem verschlossenen Umschlag und ein vorbereitetes Formular einer Zustellungsurkunde.
>
> (2) Die Ausführung der Zustellung erfolgt nach den §§ 177 bis 181."

Greece

Article 134 Civil Procedure Code provides that, where proceedings are to be served outside of Greece, then service is to be made on the public prosecutor of the court in which the proceedings are pending, who, in turn passes the documents to the Greek Foreign Ministry for transmission abroad. Service is considered to be effected at the time the proceedings are served on the public prosecutor.[133]

Ireland

Order 11 Rules of the Superior Courts reads:

> "1. Service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever—
>
> (a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or
>
> (b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action, or
>
> (c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction; or
>
> (d) the action is for the administration of the personal estate of any deceased person, who, at the time of his death, was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Ireland …"

Order 11A Rules of the Superior Courts provides:

> "Service out of the Jurisdiction under Council Regulation (EC) No. 44/2001 (Civil and Commercial Matters)

[133] Anagnostopoulos, "Greece" in Van Lynden (ed.).

1. The provisions of this Order only apply to proceedings which are governed by Article 1 of Regulation No. 44/2001 and, so far as practicable and applicable, to any order, motion or notice in any such proceedings.
2. Service of an originating summons or notice of an originating summons out of the jurisdiction is permissible without the leave of the Court if, but only if, it complies with the following conditions:
   (1) the claim made by the summons or other originating document is one which, by virtue of Regulation No. 44/2001, the Court has power to hear and determine, and
   (2) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union (other than Denmark).
3. Where an originating summons or notice of an originating summons is to be served out of the jurisdiction under rule 2, the time to be inserted in the summons within which the defendant served therewith shall an enter an appearance (including an appearance entered solely to contest jurisdiction by virtue of Article 24 of Regulation No. 44/2001) shall be:
   (1) five weeks after the service of the summons or notice of summons exclusive of the day of service where an originating summons or notice of an originating summons is to be served in the European territory of another Member State of the European Union (other than Denmark), or
   (2) six weeks after the service of the summons or notice of summons exclusive of the day of service where an originating summons or notice of an originating summons is to be served under rule 2 in any non-European territory of a Member State of the European Union (other than Denmark).
4. (1) Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in a Member State of the European Union or a Contracting State of the 1968 Convention or a Contracting State of the Lugano Convention for the purposes of Regulation No. 44/2001 or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant.
   (2) This rule shall not apply to proceedings to which the provisions of Article 22 of Regulation No. 44/2001 concerning exclusive jurisdiction or Article 23 of Regulation No.

44/2001 concerning prorogation of jurisdiction apply. Service of such proceedings on all co-defendants shall be governed by the provisions of this Order.

5. (1) Subject to the provisions of Regulation No. 44/2001, where the parties to any contract have agreed without conferring jurisdiction for the purpose of Article 23 of Regulation No. 44/2001, that service of any summons in any proceedings relating to such contract may be effected at any place within or without the jurisdiction on any party or on any person on behalf of any party or in any manner specified or indicated in such contract, then, in any such case, notwithstanding anything contained in these Rules, service of any such summons at the place (if any) or on the party or on the person (if any) or in the manner (if any) specified or indicated in the contract shall be deemed to be good and effective service wherever the parties are resident. If no place, or mode, or person be so specified or indicated, service shall be effected in accordance with these Rules.

(2) Where a contract contains an agreement conferring jurisdiction to which the provisions of Article 23 of Regulation No. 44/2001 concerning prorogation of jurisdiction apply and the originating summons is issued for service out of the jurisdiction without leave under rule 2 of this Order and is duly served in accordance with these Rules, the summons or notice of summons shall be deemed to have been duly served on the defendant.

6. Where the defendant is not, or is not known or believed to be, a citizen of Ireland, notice of summons and not the summons itself shall be served upon him.

7. Subject to the provisions of this Order, notice in lieu of summons shall be given in the manner in which summonses are served.

8. Where a defendant wishes to enter an appearance to contest the jurisdiction of the Court for the purposes of Article 24 of Regulation No. 44/2001, he may do so by entering an appearance in Form No. 6 in Appendix A, Part II of these Rules.

8A. While the Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters annexed to Council Decision No. 2005/790/EC of 20 September 2005 (OJ L 299/61 of 16 November 2005) signed at Brussels on 19 October 2005 and approved on behalf of the Community by

Council Decision No. 2006/325/EC of 27 April 2006 (OJ L 120/22 of 5 May 2006) is for the time being in force, notwithstanding any other provision of these Rules to the contrary, the provisions of these Rules which relate to Regulation No. 44/2001 shall apply in relation to the Kingdom of Denmark, to the extent permitted, and subject to any modifications made necessary, by that Agreement, and the provisions of these Rules which relate to the 1968 Convention shall not apply.

9. For the purpose of this Order:

"the 1998 Act" means the Jurisdiction of Courts and Enforcement of Judgments Act 1998;

"the 1968 Convention" means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (including the protocol annexed to that Convention), signed at Brussels on the 27th day of September 1968, including the 1978 Accession Convention, the 1982 Accession Convention, the 1989 Accession Convention and the 1996 Accession Convention;

"Contracting State of the 1968 Convention" means Contracting State as defined by section 4(1) of the 1998 Act, other than a Member State of the European Union in which Regulation No. 44/2001 is in force;

"Contracting State of the Lugano Convention" means a Contracting State as defined by section 17(1) of the 1998 Act;

"domicile" is to be determined in accordance with the provisions of Articles 59 and 60 of Regulation No. 44/2001;

"Regulation No. 44/2001" means Council Regulation (EC) No. 44/2001 of 22 December 2000, (O.J. L. 12 of 16 January 2001 and L. 307/28 of 24 November 2001) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters as amended by Commission Regulation (EC) No. 1496/2002 of 21 August 2002 (O.J. L. 225/13) and by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded of 16 April 2003 (O.J. L. 236/33);

"summons" includes, where the context so admits or requires, any other originating document."

Italy

Article 142 Civil Procedure Code (Law No. 218/1995) reads:

> "Salvo quanto disposto nel secondo comma, se il destinatario non ha residenza, dimora o domicilio nello Stato e non vi ha eletto domicilio o costituito un procuratore a norma dell'art. 77, l'atto e' notificato mediante spedizione al destinatario per mezzo della posta con raccomandata e mediante consegna di altra copia al Ministero degli affari esteri per la consegna alla persona alla quale e' diretta.
>
> Le disposizioni di cui al primo comma si applicano soltanto nei casi in cui risulta impossibile eseguire la notificazione in uno dei modi consentiti dalle Convenzioni internazionali e dagli artt. 30 e 75 del D.P.R. 5 gennaio 1967, n. 200.
>
> (1) Articolo così modificato dal Dlgs. 30 giugno 2003, n. 196.
>
> (2) La Corte costituzionale con sentenza 3 marzo 1994, n. 69 ha dichiarato l'illegittimità costituzionale degli artt. 142, terzo comma, 143, terzo comma, e 680, primo comma, del codice di procedura civile nella parte in cui non prevedono che la notificazione all'estero del sequestro si perfezioni, ai fini dell' osservanza del prescritto termine, con il tempestivo compimento delle formalità imposte al notificante dalle Convenzioni internazionali e dagli articoli 30 e 75 del D.P.R. 5 gennaio 1967, n. 200."

Luxembourg

Article 14 Civil Code reads:

> "L'étranger, même non résidant dans le Luxembourg, pourra être cité devant les tribunaux luxembourgeois, pour l'exécution des obligations par lui contractées dans le Luxembourg avec un Luxembourgeois; il pourra être traduit devant les tribunaux luxembourgeois, pour les obligations par lui contractées en pays étranger envers des Luxembourgeois."

Netherlands

Article 45 Code of Civil Procedure reads:

> "1. Exploten worden door een daartoe bevoegde deurwaarder gedaan op de wijze in deze afdeling bepaald.
>
> 2. Het exploot vermeldt ten minste:
>
> a. de datum van de betekening;

b. de naam, en in het geval van een natuurlijke persoon tevens de voornamen, en de woonplaats van degene op wiens verzoek de betekening geschiedt;

c. de voornamen, de naam en het kantooradres van de deurwaarder;

d. de naam en de woonplaats van degene voor wie het exploot is bestemd;

e. degene aan wie afschrift van het exploot is gelaten, onder vermelding van diens hoedanigheid.

3. Indien het exploot een vordering tot ontruiming betreft van een gebouwde onroerende zaak of een gedeelte daarvan door anderen dan gebruikers of gewezen gebruikers krachtens een persoonlijk of zakelijk recht, van wie naam en woonplaats in redelijkheid niet kunnen worden achterhaald, behoeft het deze naam en deze woonplaats niet te vermelden, noch de persoon aan wie afschrift van het exploot is gelaten.

4. Het exploot en de afschriften daarvan worden door de deurwaarder ondertekend."

Portugal

Article 1094 Civil Procedure Code reads:

> "1 – Sem prejuízo do que se ache estabelecido em tratados, convenções, regulamentos comunitários e leis especiais, nenhuma decisão sobre direitos privados, proferida por tribunal estrangeiro ou por árbitros no estrangeiro, tem eficácia em Portugal, seja qual for a nacionalidade das partes, sem estar revista e confirmada.
>
> 2. Não é necessária a revisão quando a decisão seja invocada em processo pendente nos tribunais portugueses, como simples meio de prova sujeito à apreciação de quem haja de julgar a causa."

Spain

LEC of 7 January 2000 provides that service of proceedings on foreign defendants domiciled abroad should be carried out pursuant to applicable international treaties or conventions in force.

Sweden

Chapter 33 *Rättegångsbalken* reads:

> "Applications, notices, and other pleadings in litigation shall state the name of the court and the name and residence of the parties.

The party's first written pleadings shall specify the party's:

1. occupation and the national registration number of the person or organization,
2. postal address, the address of the place of work and, where appropriate, any other address where the party can be found for service by a bailiff,
3. telephone number to the residence and workplace; however, the number of a secret telephone subscription needs to be stated only if the court so orders, and
4. other circumstances of importance for service upon him.

   When a legal representative conducts the party's action, corresponding information shall be stated about him. When the party has retained an attorney, his name, postal address and telephone number shall be stated.
5. a summons application shall state information about a private defendant in the respects stated in the second and third paragraphs. However, information about the occupation, workplace, telephone number of the defendant or his legal representative or about the defendant's attorney need be furnished only if the information is available without special inquiry for the applicant. If the defendant lacks a known address, information shall be supplied about the inquiry made to establish that.

If a party requests that a witness or another person shall be heard, the party is obliged to furnish information about him to the extent stated in the fourth paragraph.

The information stated in paragraphs 1 through 5 shall refer to the state of affairs existing when the information was filed with the court. If a change occurs in any circumstance or the information is incomplete or incorrect, the court shall be notified thereon without delay. (SFS 1985:267)"

United Kingdom

Rules 6.19 and 6.20 Civil Procedure Rules 1998 (S.I. 3132 of 1998) read:

"Service out of the jurisdiction where the permission of the court is not required

6.19 (1) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the 1982 Act and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Convention territory; and

(b) (i) the defendant is domiciled in the United Kingdom or in any Convention territory;

(ii) Article 16 of Schedule 1 or 3C to the 1982 Act, or paragraph 11 of Schedule 4 to that Act, refers to the proceedings; or

(iii) the defendant is a party to an agreement conferring jurisdiction to which Article 17 of Schedule 1 or 3C to the 1982 Act, or paragraph 12 of Schedule 4 to that Act, refers.

(1A) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which the court has power to determine under the Judgments Regulation and –

(a) no proceedings between the parties concerning the same claim are pending in the courts of any other part of the United Kingdom or any other Regulation State; and

(b) (i) the defendant is domiciled in the United Kingdom or in any Regulation State;

(ii) Article 22 of the Judgments Regulation refers to the proceedings; or

(iii) the defendant is a party to an agreement conferring jurisdiction to which Article 23 of the Judgments Regulation refers.

(2) A claim form may be served on a defendant out of the jurisdiction where each claim included in the claim form made against the defendant to be served is a claim which, under any other enactment, the court has power to determine, although –

(a) the person against whom the claim is made is not within the jurisdiction; or

(b) the facts giving rise to the claim did not occur within the jurisdiction.

(3) Where a claim form is to be served out of the jurisdiction under this rule, it must contain a statement of the grounds on which the claimant is entitled to serve it out of the jurisdiction.

Service out of the jurisdiction where the permission of the court is required

6.20 In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if –

General Grounds

(1) a claim is made for a remedy against a person domiciled within the jurisdiction.

(2) a claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.

(3) a claim is made against someone on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

(3A) a claim is a Part 20 claim and the person to be served is a necessary or proper party to the claim against the Part 20 claimant."

United States

Rule 4 Federal Rules of Civil Procedure reads:

"(f) Serving an Individual in a Foreign Country.

Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as directed by the the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders."

4.5.2.5 Security for Costs

A regular feature of cross border civil proceedings is security for costs. This is often sought by the defendant solely on the basis that the plaintiff resides outside the jurisdiction and that difficulties may be encountered in pursuing him for costs, should the plaintiff be successful. The trend in Contracting States to the main conventions is to provide for security for costs where a party is resident abroad but to explicitly exempt those residents of other Contracting States from having to provide security. Order 29, rule 2 of the Irish Rules of the Superior Courts goes a step further however, and specifically provides that the plaintiff's Northern Ireland address shall of itself not be a sufficient basis on which to grant the defendant's security for costs. It may of course be argued that such a provision is obsolete as the Brussels Convention and now Regulation 1348/2000 require the applicant to pay or reimburse the costs of service in another Member State. Indeed Order 29, rule 8 provides that no defendant shall be entitled to an order for security for costs where the plaintiff is resident in a Contracting State. Nonetheless, it is perhaps significant that certain domestic codes were furthering the conventions' aims prior to the Community regulation requiring that they do so where such arrangements were of obvious practical benefit to parties in the states concerned.

4.5.3 Recognition and Enforcement

As in the case of jurisdiction or choice of law issues, the primary instrument within the European Union for recognition and enforcement of foreign judgments is Regulation 44/2001. The Brussels and Lugano Conventions remain the primary international law instruments in this area.

Article 33 of the Regulation provides for recognition of judgments by a Member State without any "special procedure" being required. Most states examined here have adopted a reasonably straightforward and efficient application procedure, whereby a foreign judgment will be recognised and/or enforced.

Articles 34 and 35 specify situations in which a foreign judgment should not be recognised or enforced. These include where such recognition is contrary to public

policy, where a defendant was not properly served with proceedings or other procedural irregularities occurred, where the judgment conflicts with a domestic judgment already given in a dispute between the same parties or where the judgment is irreconcilable with an earlier judgment given in the same cause of action in another Member State.

The following list contains the primary domestic provisions relating to recognition and enforcement:

Austria

The *Exekutionsordnung* (Enforcement Act) provides for the enforcement and recognition of foreign judgments. This is not possible if no treaty or convention exists with the state in which the judgment was given. Further, recognition is not possible if the defendant was unable to participate in proceedings, the type of judgment or order is not enforceable in Austria or the general principles of the Austrian legal system would be violated by enforcement.

Belgium

The Judicial Code contains the general domestic provisions on enforcement and recognition. Should the rights of the defendant have been breached or if *ordre publique* would be violated, foreign judgments will not be recognised. One noteworthy aspect of the Belgian system is the provision in the Judicial Code permitting domestic courts to examine whether foreign law was correctly applied.[134] The main conventions and treaties on enforcement and recognition prohibit this and their provisions would take precedence over domestic law should the situation arise.

Denmark

There is no provision in domestic law for the enforcement and recognition of foreign judgments. Judgments falling outside the scope of the Brussels and Lugano conventions, therefore, cannot be recognised by the Danish courts.

Finland

There is no provision in domestic law for the enforcement and recognition of foreign judgments. A similar situation prevails to that in Denmark.

France

The *Code Civile* lays down a procedure involving application to the *Tribunal de Grande Instance* (Civil Court) in the case of judgments from both Contracting States and those outside the conventions.

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[134] Lefebvre, "Belgium" in Grubbs (ed.).

Germany

Where the judgment of a Contracting State is at issue, the procedure is relatively straightforward. Paragraph 328 of the *Zivilprozessordnung* contains the general domestic provisions on enforcement and recognition. Where no conventions or treaties apply a judgment may be recognised and declared enforceable provided reciprocity is guaranteed, there are no procedural irregularities and the judgment would not contravene *ordre publique.*

Greece

A procedure involving application to the one-member Court of First Instance is envisaged in the Civil Procedure Code in the case of judgments from both Contracting and non-Contracting States.

Ireland

Application is made to the Master of the High Court for enforcement. Following the expiry of the defendant's time limit within which to appeal a decision to enforce, the enforcement order takes effect. Where non-Contracting States are concerned, judgments will be recognised and enforced where they are in accordance with conflict of laws principles.

Italy

Where the judgment of a Contracting State is at issue, an application for enforcement may be filed with the relevant Court of Appeal. Where no conventions or treaties apply, Law 218/1995 provides that enforcement and recognition proceedings may be instituted before the Court of Appeal. An application may be refused if the rights of the defendant have been violated or if *ordre publique* would be contravened.

Luxembourg

Where the judgment of a Contracting State is at issue, the procedure of enforcement and recognition is relatively simple. Where no conventions or treaties apply, the general domestic provisions contained in Articles 545–556 and 2123–2128 of the Civil Procedure Code provide for an application process. Provided that certain rights of the defendant have not been violated, that there are no procedural irregularities and that *ordre publique* would not be breached, the application will be considered.

Netherlands

Where the judgment of a Contracting State is at issue, the procedure is relatively simple. If not, however, there is no provision in domestic law for recognising or enforcing foreign judgments *per se*. Nonetheless, should new proceedings in the Dutch courts be instituted, the relatively efficient procedure envisaged in Article 431 of the Civil Procedure Code can lead to enforcement and recognition.

Portugal

Where the judgment is given in a non-Contracting State, a procedure for enforcement and recognition is laid down in Article 1094 of the Civil Procedure Code. Factors excluding recognition include failure to uphold the rights of a defendant, procedural irregularities or contravention of *ordre publique*.

Spain

Where the judgment is given in a non-Contracting State, Articles 951–958 of the Civil Procedure Act provide for a similar procedure to that of Portugal.

Sweden

In contrast to many of the above states, the Swedish system is somewhat restrictive with regard to the recognition and enforcement of foreign judgments.[135] Where treaties or conventions apply, the enforcement of a judgment will generally require the initiation of enforcement proceedings in the Court of Appeal.[136] Where no treaties or conventions apply, however, there is no uniform regulation of recognition and enforcement of foreign judgments. A judgment that is not formally recognised or enforced, however, may still be used as proof of certain facts by the parties in Swedish proceedings.

United Kingdom

Where the judgment of a Contracting State is at issue, recognition will be in accordance with the Regulation and will only be denied on very limited grounds. Where other states are concerned, the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 set out a procedure for the recognition and enforcement (called "registration") of foreign judgments which are final and conclusive, do not injure the rights of a defendant and are in accordance with public policy and normally does not go to the merits of the case in a much more liberal way than experienced in continental jurisdictions.

United States

No federal act, treaty or constitutional provision governs the recognition of foreign judgments in the United States.[137] However, the Uniform Foreign Money-Judgments Act has been adopted by twenty-two states. It provides for recognition where a foreign judgment is final and conclusive and enforceable where rendered. Under the act, contraventions of public policy or injustice to a defendant are grounds for refusal of the application.

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[135] Broman and Granström, "Sweden" in Grubbs (ed.).

[136] Lynden, *Forum Shopping,* p. 273.

[137] Grubbs and DeCambra, "United States" in Grubbs (ed.).

4.5.3.1 Noteworthy Domestic Provisions

In addition to the domestic provisions identified above, various provisions often exist outside the area of civil procedure, which nonetheless affect recognition and enforcement in international civil proceedings.

In Ireland, for example, the Maintenance Orders Act 1974 provides for the enforcement on a basis of reciprocity of maintenance orders made in either part of Ireland, and in England, Wales and Scotland.[138]

In the Netherlands the preliminary injunction procedure known as *kort geding* has been referred to as "a prominent example of informality".[139] Traditionally intended for use in cases in which the interests of one party would be damaged by lengthy delays in litigation, it has gradually developed into a relatively speedy summary procedure used in a wide variety of district court proceedings. Statistics indicate that most cases last no longer than six weeks and it is rare for new proceedings to be initiated subsequently.[140] The procedure has been identified as particularly useful in patent law cases, which are often complex and expensive.[141]As such cases frequently involve an international element, it is not difficult to see the benefits which would flow from a harmonised international *kort geding* procedure in areas of international civil law. This may go some way to avoiding the procedural flaws which inevitably arise in such litigation.

From an examination of the enforcement and recognition procedures in force internationally it would seem that the main international conventions lead to a presumption that a judgment in a civil or commercial matter given by a court of another Contracting State is to be enforced.[142] The regime in EU Member States is clarified to a large degree by Regulation 44/2001. A foreign judgment from another Contracting State, therefore, is likely to be recognised and enforced in the absence of a number of clearly established circumstances. Even where judgments of non-Contracting States are at issue, most states have developed a clear framework for deciding on enforcement and recognition, which ought to provide practitioners with a good deal of guidance as to the likely decision in any given case.

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[138] Nowlan, "Ireland" in van Lynden (ed.).

[139] Blankenburg, "Civil Justice: Access, Cost and Expedition. The Netherlands" in Zuckerman (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998).

[140] Blankenburg, "Civil Justice: Access, Cost and Expedition. The Netherlands" in Zuckerman (ed.), *Civil Justice in Crisis Comparative Perspectives of Civil Procedure* (OUP, 1998).

[141] Brinkhof, "Between Speed and Thoroughness: The Dutch 'Kort Geding' Procedure in Patent Cases" (1996) 18(9) EIPR 499-501.

[142] Grubbs (ed.), *International Civil Procedure* (Kluwer Law International, 2003), xlvii.

4.5.4 Conclusion

The vital tools for a practitioner in the area of international civil proceedings must consist of the above treaties and conventions and, where EU Member States are concerned, both recently introduced regulations. The great majority of domestic provisions relating to service of proceedings, jurisdiction and recognition and enforcement of foreign judgments possess common characteristics. Where inconsistencies do occur, does this pose an obstacle to those engaged in cross border litigation? It must be noted that many previous domestic bars on initiating such proceedings are now rendered obsolete by the Hague, Brussels and Lugano Conventions. Where non-Contracting States are involved, many domestic regimes now have clearly defined rules, such as in the area of recognition and enforcement of foreign judgments. It is also the case that many of the above states' bilateral treaties or domestic civil procedure codes in fact further the aims of the main conventions, alongside which they co-exist.

Chapter 5

Limiting National Jurisdiction by Procedural Means

5.1 Introduction

At a global level there is no general rule which limits courts from assuming jurisdiction even in a way which is considered exorbitant by many. This may lead to a jurisdictional conflict of competing jurisdictions as outlined in the preceding chapter. A jurisdictional conflict shows that there is a need to address the issue of competing jurisdictional claims when there is no special rule, for example, European Regulations and Conventions, to solve the conflict, perhaps with a strict application of the *lis pendens* or *res judicata* doctrines. It has been outlined that national jurisdiction is determined independently by the national *lex fori proceduralis* and since the *Lotus* case[1] no general and substantial limits to national jurisdiction may be found in international law allowing for a variety of agreed limits in Conventions applying to special areas of law.

While a country and its courts may extend jurisdiction into fields claimed by other competing jurisdictions they may choose not to do so. In cases of conflict with competing jurisdictions it may refrain from exercising jurisdiction which is normally assumed. This may be done in the interests of good relations with the other country assuming competing jurisdiction. Comity between courts is a phrase often met in this context. In cases of direct involvement of foreign states and their agents in national litigation immunity is the most common ground on which decisions to refrain from assuming jurisdiction are based. If a public act of a foreign state is an indirect issue in litigation between private parties the act of state doctrine may be employed to the same end. If the focus is on a "better" jurisdiction the classical *forum non conveniens* doctrine renders the same service. Foreign policy prerogatives should be mentioned in this context too. The more general term comprising all these procedures which limit a domestic court's jurisdiction is the notion of judicial (self) restraint relating to some foreign competing interests both jurisdictional and political.

What do they have in common? "Reduced to its simplest, the justification for use of avoidance techniques … is to allocate in the most appropriate manner suit-

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[1] *France v Turkey* [1927] PCIJ Reports, Series A No. 10.

able to all interests and the ends of justice jurisdiction between the forum and the foreign States."[2] This means that it is their common purpose to limit their own national court's competency to adjudicate. This is done by the autonomous means of their own procedural laws which allow foreign claims not to be judged by the forum to the benefit of international relations, the freedom of the executive government to conduct foreign policy or the claim of another forum both international and national. All these procedural means employed to foster international judicial co-operation originate in the national context and are still partly applied outside the realm of foreign relations and international law in national constitutional contexts. A plea of immunity is granted under national law, for example, in most states to the legislature and its members or in the case of France and others to the President of the Republic while in office. The British monarch and most of her international peers would enjoy immunity from adjudication not only in foreign countries but in their own countries too according to their national constitutional provisions. The unhindered function of heads of state or members of parliament is held in most national laws to be preferred to the immediate right of a prosecutor or creditor to seek justice from the bench. In the national context immunity is justified because of the division of powers between the different branches of government, legislative, executive and judicial. Internationally, it is in order to maintain peaceful relations between states and their organs notably courts that immunity is granted. Act of state (or the equivalent *acte de gouvernement* or *justizfreier Hoheitsakt*) is also a national law doctrine invented to exempt some public governmental acts of particular importance from being judicially scrutinised before national courts in the interests of individuals. The reason for this approach is that it is in the remit of the executive power to decide certain things and this is not limited to foreign affairs.[3] The French *acte de gouvernement* would largely have the same field of application as the common law act of state doctrine or the German *justizfreier Regierungsakt.*[4] All these doctrines are defences to substantive law that require the forum court to exercise restraint in the adjudication of disputes relating to legislative or other governmental acts which a state has performed within the limits of its competency as seen by the *lex fori proceduralis*. All these doctrines will be applied on the merits stage except the plea of immunity which will be entertained at the preliminary stage. However, whatever the stage at which these procedural tools become effective, barring jurisdiction or barring the claim to be adjudged on the merits will have ex-

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[2] Hazel Fox "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 361, 392.

[3] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 *per* Lord Fraser and at 407 *per* Lord Scarman and at 411 *per* Lord Diplock, all considering that the subject matter of executive power and not its source determines justiciability.

[4] Husen, Paul van, "Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?" Deutsches Verwaltungsblatt 1953, pp. 70 -73; Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, 2005) p. 95 *et seq*.

actly the same effect. When applied they all have the effect that no decision on the merits will be handed down by any court. Therefore, it is submitted that it is not necessary to dwell on the subtle procedural distinctions between those avoidance techniques.[5] Their common effect and purpose as well as the different approaches taken by national courts in characterising issues as preliminary or substantive indicates that all procedural avoidance techniques can be seen to be substantially similar. This certainly would apply from an international law perspective where the effect of not assuming jurisdiction rather than the subtle reasoning of the different courts would count as state practice in establishing international customary law within the meaning of Article 38.1.b of the ICJ Statute.

All these doctrines originating in a national law context are now well established in serving international co-operation based on the idea of legal equality of states under international law as expressed in Article 2.1 of the United Nations Charter. From it follows the rule of non interference (Article 2.7) in the domestic affairs of another state and the prohibition of the use of military force to effect this (Article 2.4). These doctrines are from this perspective emanations of international law condensed into means of national procedural law. The classic statement of the act of state doctrine which appears to have taken root in England as early as 1674[6] may be understood as giving a valid ground for all those doctrines mentioned. As Chief Justice Fuller outlined in the US Supreme Court:[7]

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

This does not rule out the making of distinctions deriving from the differing origins of the doctrines. As Lord Millett states in relation to the act of state doctrine and immunity:

> "As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of sovereign acts of a foreign state."[8]

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[5] Hazel Fox "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 361 introduces this term for the different doctrines in this context, which seems very useful.

[6] *Blad v Bamfield* (1674) 3 Swans 604; 36 ER 992.

[7] *Underhill v Hernandez* 168 US 250, 252 (1897).

[8] *R v Bow Street Magistrate, ex p. Pinochet Ugarte* (No 3) [2000] 1 AC 147, 269 (HL).

Any of these contentions of Lord Millett are open to debate, as immunity may be applied by a court in relation to a state defendant which does not appear before it and consequently does not plead immunity meaning that immunity is not only a plea but must be considered *ex officio* by the courts under certain circumstances. Immunity is certainly part of domestic law not only in the form of statutes regulating and incorporating immunity nationally, such as the US Foreign Sovereign Immunities Act or the UK State Immunities Act, but as outlined immunity is accorded constitutionally to members of parliament, government and sometimes heads of state and it is submitted that the doctrine of foreign state immunity is derived from the national doctrines. However, these distinctions do not have any practical significance for the outcome and effect of the doctrines mentioned and may, therefore, be put to rest.

Before turning to the details of the single avoidance techniques of national procedural laws serving international relations and law, it is submitted that they are more closely linked than usually admitted. Certainly, immunity is a defence at the preliminary stage for a foreign state or its agents against the jurisdiction of the forum while act of state and judicial restraint or non justiciability are usually considered at the merits stage in proceedings between private parties where the legality or validity of a foreign official act must be implicitly addressed by the court in order to decide the case. It is not only that there will be a common effect in that there will be no decision on the merits if one of these doctrines is applied but the regard which the court has to the non-justiciability of foreign state acts which deserve immunity in the interest of international law which brings them together. This has been recently shown in *Ansol Ltd v Tajik Aluminium Plant*,[9] where act of state, non-justiciability, judicial restraint and immunity were pleaded together.[10] The same can be observed in *Wood Industries Ltd v United Nations and Kosovo*[11] even including the *forum non conveniens* plea. All possible distinguishing marks between them, for example, whether the act of state doctrine or judicial restraint can be waived by the party benefiting, are contentious and no clear distinction can be asserted except that immunity is usually pleaded by a state party at an earlier procedural stage than the other avoidance techniques. The joint plea of all of these techniques in *Ansol v Tajik* shows their close procedural and substantive relationship which will usually indicate that they should be considered together.

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[9] [2006] EWHC 2374 (Comm).

[10] See para. 148 *et seq*. of the judgment of Cresswell J.

[11] US District Court for the Southern District of New York Case No. 03-CV-7935 (MBM), see *amicus curiae* brief on behalf of Kosovo.

5.2 Act of State

As with all procedural avoidance techniques serving foreign policy and international law objectives the act of state doctrine has its origin in a national doctrine rendering certain public acts of the government non-justiciable, sometimes based on the idea of the division of powers between the courts and the executive and parliament and developed from there to cover foreign acts of state. Therefore, the act of state doctrine gives effect to a policy of judicial restraint and non-justiciability.[12] It provides that the court of the forum should not adjudicate upon or call into question legislative or other government acts of a foreign state within the limits of its own territory or competency. This precludes the court from inquiring into the motives of the foreign state in carrying out an act of state.[13] The doctrine applies usually when the relevant foreign state is not a party to the proceedings as it would then usually plead immunity in relation to its state acts. However, there is nothing to bar its application in cases in which a state is a party and has for whatever reason not pleaded immunity in relation to its relevant state acts. Act of state can be applied even when not pleaded and it has this in common with judicial restraint or immunity in cases where the state party does not appear and the court decides that it can enjoy immunity *ex officio*. As Ackner LJ outlined in *The Playa Larga*:[14]

> "Sovereign immunity is derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases. However, the same basic principle applies to an Act of State, which is also an exercise of sovereign power. An Act of State is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts, but if it then appears that the act complained of was an Act of State the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness of the act complained of: the decision is that because it was an act of State the court has no jurisdiction to enter a claim in respect of it."

The court will consider the act in question to see whether it is in truth a sovereign act or an act of a private or commercial character.

In *A Bank v B Bank*[15] Morritt LJ referred to the fact that counsel for the intervener had relied on comity as descriptive of a principle requiring the courts in England to decline to grant relief which would constitute interference in the inter-

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[12] *Kuwait Airways v Iraqi Airways* (*Nos. 4 and 5*) [2002] 2 AC 883, 927 *per* Lord Hope.

[13] *William & Humbert v W & H Trade Marks (Jersey) Ltd* [1982] AC 368, 431 *per* Lord Templeman.

[14] [1983] 2 Lloyd's Rep 171, 193.

[15] [1997] FSR 165.

nal affairs of a foreign sovereign state. This principle was relied on to support the general proposition that the action was non-justiciable and the narrower point that the claim for delivery up or destruction upon oath of all infringing articles within the United Kingdom and in the possession, power or control of the defendant would be destructive of confidence in the currency in question and an unwarranted intrusion into the internal affairs of the state by which it was issued. However, Morritt LJ rejected these submissions in the following terms:

> "The word 'comity' is no doubt a convenient word by which to refer collectively to the principles of law and diplomatic behaviour which regulate the relations between friendly sovereign states. But if it is itself a principle wider than that established or recognised by *Buttes Gas and Oil Co. v Hammer*[16] then the careful limitation of that principle in the manner to which I have referred earlier would have been unnecessary."[17]

Morritt LJ also referred to the judgment of Justice Scalia in the concluding passage of the opinion of the US Supreme Court in *W.S. Kirkpatrick & Co Inc v Environmental Tectonics Int.*[18] where he had observed: "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The Act of State doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." Morritt LJ expressed the view that this statement was particularly apposite to the case before him. He stated that he could understand that the trial of the action might be embarrassing to the state whose currency was involved but the issues to be resolved did not include the validity of any sovereign act of that state. He concluded that in his view it was the duty of the court in England to determine the dispute as to whether the patent granted to A Ltd was infringed by B Bank and that he would allow the appeal against the decision of the trial judge.

Whether the act of state doctrine or judicial restraint can be waived by the party benefiting has not yet been decided. On the one hand, this was suggested *obiter* by Ackner LJ in *La Playa Larga*, however, he stated in the case that an act of state plea would fail on the merits anyway which makes his former point not only *obiter* but weak. The discretion of the party benefiting to rely on the doctrine or not has never been upheld anywhere and is contradicted by *dictum* in the same case. Ackner LJ held that the court "must refuse to adjudicate", which indicates that it is not within the discretion of the parties to decide whether the doctrine will be applied once the relevant facts have been established.

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[16] [1982] AC 888.

[17] [1997] FSR 165, 176.

[18] 493 US 400 (1990).

In the United States the act of state doctrine has been defined in the following terms in the US Supreme Court by Justice Scalia:[19]

> "This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon 'the highest considerations of international comity and expediency'.[20] We have more recently described it, however, as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs.[21] Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our executive branch accorded sovereign immunity to such acts[22]; or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals …[23]
>
> In every case in which we have held the act of state doctrine applicable, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In Underhill v Hernandez,[24] holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." … In Sabbatino,[25] upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void.

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19 *WS Kirkpatrick & Co v Envtl Tectonics Corp, Int'l* 493 US 400 (1990).

20 *Oetjen v Central Leather Co.* 246 US 297, 303 –304 (1918).

21 *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964).

22 *Alfred Dunhill of London, Inc v Republic of Cuba* 425 US 682, 695-706 (1976) (opinion of White J).

23 See *First National City Bank v Banco Nacional de Cuba* 406 US 759, 768 -770 (1972) (opinion of Chief Justice Rehnquist).

24 168 US 250, 254 (1897).

25 *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964).

French law uses the term of "*actes de gouvernement*" to come to a result comparable with the act of state doctrine in English speaking jurisprudence.[26] However, the distinction between act of state and immunity or judicial restraint is not used. It is said that the application of an *acte de gouvernement* leads to immunity and judicial restraint. The great charm and advantage of the French doctrine is that it comprises both national and international issues such as the division of powers between parliament and the executive government[27] as well as international relations.[28] The latter is the most important field of application of the French doctrine. This has been determined in the French Greenpeace[29] case.

It is submitted that the German courts would come to a comparable result, although the terminology that they use is less straightforward. Historically, the act of state doctrine as *justizfreier Hoheitsakt* or *Regierungsakt* was well established in German law.[30] It was seen as opposed to the administrative act *Verwaltungsak*t of the state authorities which was fully subject to judicial review while the *Regierungsakt* was not.[31] This would apply particularly to so-labelled diplomatic acts in the realm of foreign affairs.[32] This was summarised by the *Oberverwaltungsgericht* Münster (Court of Administrative Appeals) as follows:

> "Anträge, mit denen Maßnahmen … begehrt werden, die in den Bereich der Außenpolitik fallen, sind im verwaltungsgerichtlichen Verfahren unzulässig"[33]
>
> "Applications which fall into the realm of foreign policy are inadmissible in administrative judicial review procedures before this court."

The background to this case was that the British army, then still an occupying army in Germany, was causing a nuisance to German residents who sued before

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[26] See Rougevin-Baville, Irresponsabilité des Puissamces Publiques, in F. Gazier and F. Drago (eds.), *Dalloz, Encyclopedie de Droit Publique, repertoire de la Responsabilité de la Puissance Publique* (Paris 1988); Virally "L'introuvable acte de gouvernement" RDP 1952, 317; R. Chapus "L'Acte de gouvernement, Victime ou Monstre?" D. Chronique, p. 5.

[27] CE 20 February 1989, Allain [1989] Rec 60.

[28] CE 29 October 1954, Taurin [1954] Rec 566.

[29] CE 1995 Association Greenpeace France. Solution validée par la CEDH. Lodemann, Catharina, *Die Geschichte des französischen acte de gouvernement* (2005, Verlag Peter Lang Frankfurt), provides a good summary and treatment of the case law.

[30] Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, Tübingen, 2005) p. 88 *et seq*.

[31] Eyermann and Fröhler, *Kommentar zur Verwaltungsgerichtsordnung* (9th ed., 1988) zu § 42 VwGO, Rz. 70 et seq.: Stelkens in Stelkens/Bonk/Leonhardt *Kommentar zum Verwaltungsverfahrensgesetz* (5th ed., 1998) zu § 42 VwVfG, Rz. 97.

[32] Schneider, Hans, "Gerichtsfreie Hoheitsakte" in Recht und Staat 1951, p. 42 *et seq*., Helmut Rumpf, *Regierungsakte im Rechtsstaat* (1955) p. 21 *et seq*.

[33] *Anon v Germany ex parte British Military Government in Germany, Oberverwaltungsgericht* Münster, Beschluss vom 23.9.1958 in DVBl. 1959, 294.

the German courts putting forward some environmental concerns against the use of the land by the British. The application was not granted against the German executive government which had allocated the private lands of the applicants to the British military for use free of charge under the international law of belligerent occupation. The court found that jurisdiction and *locus standi* must be denied as the case concerned the review of *justizfreier Hoheitsakt*, on this there is unanimity in the jurisprudence of courts and scholarly works.[34] In an answer of the *Auswärtiges Amt* (Foreign Ministry) to the Bundestag, the German government made reference to this decision of the Münster *Oberverwaltunggericht* and elaborated:

> "Der erkennende Senat habe in seinem Beschluss ausgeführt, dass die geforderten Maßnahmen in den Bereich der Beziehungen zu ausländischen Staaten fallen und damit zu den justizfreien Hoheitsakten gehörten. Das Gericht habe sich mit dieser Entscheidung der von der Bundesregierung vertretenen Rechtsauffassung angeschlossen."[35]
>
> "The Senate/bench (of the court) elaborated in its decision that the requested measures are part of the relations between foreign states and, therefore, must be considered to be part of state acts not subject to judicial review. The Court followed with this decision the legal opinion held by the Federal Government."

The *Bundesverwaltungsgericht* (Federal Administrative Court of Final Appeals) has also applied the *justizfreier Hoheitsakt*,[36] as has the *Bundesgerichtshof* (Supreme Court).[37] However, the *Bundesverfassungsgericht* (Federal Constitutional Court) *obiter* felt uneasy about reducing access to the court[38] with the *justizfreier Hoheitsakt* doctrine in the light of the constitutional guarantee to judicial review.[39] This apodictic approach of the latter court albeit *obiter* has led to the demise of the development of the doctrine in German law and a practice on the part of the courts of reformulating the incompatible principles of full judicial review on the one hand and necessary discretion in foreign affairs including respect for foreign state acts on the other hand only in terms of judicial self restraint or prerogatives, *außenpolitische Einschätzungsprärogative der Regierung*. However, they will reach the

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[34] "darüber besteht in der Rechtsprechung und im Schrifttum Einigkeit" loc. cit.

[35] *Bundestagsdrucksache* 3/756 zu 5. (of 11 December 1958). Translation by the author.

[36] BVerwG in DVBl 1963, 728.

[37] BGH MDR 1971, 200.

[38] Under Article 19.4 of the *Grundgesetz* (Constitution) which is comparable to Article 6 of the ECHR. See BVerfG E 4, 157, 169.

[39] See Article 19.4 of the German Constitution, Grundgesetz. Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, Tübingen, 2005) p. 98 *et seq*. with commentary on the doctrine in German law.

same result as they would have if they had applied the act of state/*justizfreier Hoheitsakt* doctrine directly.[40]

It may be said that despite the subtle distinctions in arguing the procedural exception in relation to foreign relations and international law there is a common approach taken by most courts of most countries in this field which justifies reciprocally taking note of the jurisprudence of various countries.

5.3 Comity

The same considerations put forward in the context of the act of state doctrine, foreign policy prerogative or foreign sovereign immunity leading to judicial restraint or abstention are sometimes described as comity of courts or nations. It is submitted that there is no substantial difference between them in relation to their aim or effect. However, as immunity, judicial restraint and act of state each cover a certain angle of the same subject matter and have their distinct applications and historically developed doctrines so does comity. It is suggested that comity is probably the widest notion with the less clearly defined field of application. The normal understanding of "comity" indicates even a non legal content. Comity is exercised between people and is usually understood as politeness or appropriate behaviour. Between states it describes good practice in the diplomatic area and the mutual regard observed towards other states' concerns. Most of what evolved as international law could be described in those terms. It would be going too far to assume that there is a doctrine of "comity" with a defined content. However, the use of the term by courts is regularly concerned with accepting other countries' claims to jurisdiction in a contentious matter and limiting a state's own jurisdiction accordingly. This relates to everything described in the context of limiting rather than extending its jurisdiction in the international realm. Thus, comity comprises all notions discussed here and it may be said that the act of state doctrine, immunities and prerogatives are rooted in the comity between courts and nations when directed to serve international relations. As Diplock LJ outlined in *Buck v Attorney General*:[41]

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, *videlicet*, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to

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[40] Petersmann, Ullrich, "Act of State, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt" in Jahrbuch des Öffentlichen Rechts Neue Fassung 25 (1976) p. 587 *et seq*.

[41] [1965] Ch 745, 770 (CA).

> apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent."

What was outlined as the doctrine of comity, of which immunity is one of the commonest applications, could also be said in relation to other applications of the rules of comity by courts in the field of international law and relations:

> "The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law containing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction, as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is about nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction."[42]

The US Supreme Court in *F.Hoffman-La Roche Ltd v Empargran SA*[43] recently applied comity in relation to the jurisdiction of other countries in the sensitive area of the extraterritorial effects of US competition legislation. The US Foreign Trade Antitrust Improvements Act 1982 (FTIA) amending the "Sherman Act" was applied to some price fixing conduct of international pharmaceutical companies in relation to vitamins. After referring to other cases,[44] it was outlined that there is a rule of "prescriptive comity" which

> "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world."[45]

The concerns of comity were relevant in the case of the extra-territorial application of US Antitrust laws as other nations had not adopted competition laws similar to the United States' laws and disagreed about the ways to proceed in cases of infringement like price fixing. By applying prescriptive comity as the US Supreme

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[42] *Ibid.*

[43] 542 US 155 (2004).

[44] *Hartford Fire Insurance Co. v California* 509 US 764, 817 (1993); *Murray v Schooner Charming Betsy* 2 Cranch 64, 118 (1804).

[45] 542 US 155, 163 *per* Justice Breyer for the court.

Court phrased it regard was had to the diverging stances of other jurisdictions as represented in the case for Germany, Japan and Canada. This was done by limiting the scope of the international application of its own antitrust statutes.

Very recently in *Walsh v National Irish Bank*[46] the Irish High Court decided not to authorise the Irish Revenue Commissioners to obtain information from a bank in Ireland in relation to Irish residents' accounts according to Irish statutory provisions because it respected the concept of the comity of courts towards the Isle of Man jurisdiction. It applied Manx law to the requested customers' account information. Considering the strong tendency of courts normally to apply their own law to a bank's headquarters in their own territory, sometimes even in relation to their operations abroad,[47] this self restraint on the part of the Irish court is quite remarkable. It may be seen as the opposite of the ultimate judicial conflict displayed *supra* in the preceding chapter. It was an unambiguous case as all relevant material was situated in the territory of Ireland and there was no longer a branch or subsidiary of the bank in the Isle of Man which could have asserted any rights against an Irish court order based on Manx law.[48] Nor was there any incentive for the Irish court to let the Irish Revenue Commissioners down for the benefit of Irish residents who may have evaded Irish taxes. The context of this decision shows what forceful considerations must be associated with the comity of courts in order to justify a decision which would be totally untenable without the idea of comity. This decision displays a very far reaching acceptance of foreign law as limiting a domestic jurisdiction's reach. A more abstract delineation of the competing Irish and Manx jurisdictions became instrumental and as one of the most far reaching decisions of a court it may be either hailed as a model for judicial restraint under the flag of comity of nations and their courts or blamed for neglecting the forum state's vital interests for the benefit of remote and rather abstract foreign interests. Therefore, it may be justifiable to consider the reasoning of the court in some detail.

The applicant, Mr Walsh,[49] asked the National Irish Bank in Dublin to disclose the account information of Irish residents in relation to accounts held in the Isle of Man before 2002 when the National Irish Bank offered deposit facilities in Douglas. Specifically the applicant sought an order

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[46] [2008] 2 ILRM 58.

[47] *X AG v A Bank* [1983] 2 All ER 465; *SEC v Minas de Artemisa* 150 F 2d 215 (9th Cir 1945).

[48] See the rights asserted by the Fruehauf France branch of Fruehauf US as confirmed by the French Cour d'Appel in Paris, [1968] DS Jur 147, [1965] JCP II 14,274 bis. An English language summary of the case is available in 5 ILM 476 (1966). See William Laurence Craig, "Application of the Trading with the Enemy Act to Foreign Corporations owned by Americans: Reflections on Fruehauf v Massardy (1969-1970) 83 Harv L Rev 579.

[49] Mr Paul Walsh, the applicant in the case was a Principal Officer with the Revenue Commissioners and was attached to the Offshore Assets Group responsible for dealing with Irish residents, who might have sought to evade their tax liability by the use of offshore accounts.

> "… that … in relation to persons holding deposits with the Isle of Man branch of National Irish Bank, the respondent do make available for inspection by the applicant, from books, records or documents maintained by the respondent or from books, records or documents to which the respondent has access, the following information:–
>
> (C) A schedule, whether in electronic or paper form, of all deposit holders with an address in the State having accounts with the Isle of Man branch of National Irish Bank where the balance on the account exceeded £5,000 or €6,350 at any time setting out:
>
> (1) The name and address of the account holder,
>
> (2) The date the account was opened and the amount of the opening balance,
>
> (3) The maximum balance on the account over the life of the account, and
>
> (4) If applicable the date of closure of the account." [50]

A time schedule for the supply of this information was then set forth.

As an authorised officer of the Irish Revenue Commissioners, the applicant based his claim on the statutory provision of section 908 of the Irish Taxes Consolidation Act 1997, the relevant parts of which read as follows:

> "(2) An authorised officer may, … make an application to a judge for an order requiring a financial institution, to do either or both of the following, namely –
>
> (a) to make available for inspection by the authorised officer, such books, records or other documents as are in the financial institution's power, possession or procurement as contain, or may (in the authorised officer's opinion formed on reasonable ground) contain information relevant to a liability in relation to a taxpayer, …"

No explicit exception is contained in the Act which may exempt the bank from complying with an order the purpose of which is to enable the Irish Revenue Commissioners to obtain information regarding potential tax evaders, when otherwise, for example by reason of the common law duty of confidentiality, such information may not be available. It could, therefore, be argued that the Act has extra-territorial application. However, it was not necessary to decide on the question of the Act's extra-territorial reach as the facts of this case related only to the Irish jurisdiction and territory as the respondent bank was incorporated in Ireland with its headquarters in Dublin and could supply the information, and produce the

[50] *Ibid.* at 60.

documents, within the Irish jurisdiction without any contact with or effect in the territory of the Isle of Man. From the perspective of the Irish authorities bringing the action the true and real connecting jurisdiction was Ireland and not that of the Isle of Man. The respondent bank, whose head office was in Ireland, was a legal entity under Irish law, the taxpayers whose account details were sought were Irish citizens and residents, and it was most likely that any movement on such accounts would have had an instruction input from Ireland. Furthermore, if the suspicions of the Revenue Commissioners were correct, the account holders might have evaded and/or might continue to evade their Irish taxation responsibilities. These circumstances make this case exceptional and its considerations of comity as remote as they can possibly be. In the words of McKechnie J: "The question then arises as to what difference the Isle of Man location makes to this application? Are the facts that the respondent bank is subject to Irish law, that it has its principal place of business in this jurisdiction and that the information and records requested are most probably reachable from its Dublin office, sufficient to justify this court in granting the order sought? Or do other considerations prevent such an outcome?"[51]

The bank in opposing the order suggested such "other considerations" should be decisive, claiming essentially that the Irish court had no jurisdiction to make the order as sought because the target of the order was a branch of the respondent bank which was then located in the Isle of Man and not to a branch which was located in the Irish jurisdiction. It is noteworthy that the NIB branch in the Isle of Man was dissolved in 2002 and all relevant information transferred to Ireland to the bank headquarters in Dublin thereafter.

McKechnie J followed this line of argument with reference to comity:

> "The reference to "a principle of comity" includes the mutuality of respect which each judicial system affords to another. Therefore if the particular circumstances of any given case should require it, the court of the country whose jurisdiction is being invoked, should exercise self restraint so as to avoid the possibility of a conflict between that jurisdiction and its foreign neighbours."[52]

It is suggested that this formula excellently describes what the principle of comity is meant to achieve and what it also has in common with all other avoidance techniques.

The decision relies on some scholarly work on statutory interpretation.[53] In coming to his conclusion McKechnie J follows the author of that work and outlines that one reason for restricting the literal meaning of a statutory Act is "a principle of

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[51] *Ibid.* at 76.

[52] *Ibid.*

[53] Francis Alan Roscoe Bennion, *Statutory Interpretation* (4th ed., Butterworths, 2002) p. 306.

comity which confines its operation within the territorial jurisdiction of the enacting state".[54] Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. This, it is submitted, is one of many instances where the express words of any statutory provision are taken to be subject to implications altering their literal meaning. The rules of comity and international law indicate that it is for each territorial government to regulate the inhabitants and affairs of its own territory.

McKechnie J could further rely on some Irish precedents[55] and a similar case in Wales in which Lord Denning held for the English Court of Appeal:[56]

> "I was impressed at first by [this] argument (that the sought court order was purely personal '*in personam*' and therefore did not interfere with the Isle of Man jurisdiction)… But on reflection I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American bank, or any other bank in the Isle of Man which is not subject to our jurisdiction. The branch of Barclays Bank in Douglas, Isle of Man, should be considered as a different entity separate from the head office in London. It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man government. It has its customers there who are subject to one Manx Law. It seems to me that the court here ought not in its discretion to make an order against the head office here in respect of the books of the branch in the Isle of Man in regard to the customers of that branch. It would not be right to compel the branch … or its customers … to open their books or to reveal their confidences in support of legal proceedings in Wales."

Based on this understanding of comity of courts and nations McKechnie J comes to a conclusion which would have been very different without regard to comity.

> "Even therefore if the Revenue Commissioners are correct in submitting that s. 908 [of the Irish Taxes Consolidation Act 1997] applies to National Irish Bank, with its registered office in Dublin, I

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[54] Bennion *ibid*. p. 306.

[55] *Chemical Bank v McCormick* [1983] ILRM 350 *per* Carroll J at 354: " … I do not propose to make such an order in case there would be a conflict of jurisdiction, which should be avoided in the interest of the comity of courts", and the English cases *Mackinnon v Donaldson* [1986] 1 All ER 653,658 and *Re Grossman* (1981) Cr App R 302 *per* Lord Denning.

[56] *Re Grossman* (1981) Cr App R 302, 307-308.

> would not deliberately offend the integrity of the Isle of Man or its judicial system by granting an order which I knew they would strongly object to. To do so would be downright disrespectful to a sovereign jurisdiction and would be the antithesis of showing due respect for the comity of courts. I would therefore decline to grant the order sought."[57]

The larger part of the judgment is not concerned with international law and comity of courts but with determining the proper law applicable to the banking contracts between National Irish Bank and its Irish customers in relation to the former accounts in its Isle of Man branch. Only on the basis that Manx law applied to those accounts according to the Irish law of conflicts or international private law McKechnie J was prepared to limit his own court's jurisdiction to the benefit of the principle of comity. This interplay between the determination of the proper and applicable law as a precondition to considering the reach of the domestic court's jurisdiction is remarkable. It is reflected in the arguments of the defendants in *X AG v A Bank*, [58] where they claimed that New York law, New York being the seat of the headquarters of the bank, should apply to the banking contract relating to the Swiss applicant's accounts with an American bank's branch in London. The applicable law determined according to the national rules of international private law was held to be relevant by Leggatt J for the delineation of the English and American jurisdictions. The defendant bank's argument was that the confidentiality of the account information should not be enforced if performance of the contract required the doing of an act which violated the law of the place of performance. The background to this case was that the New York court lifted the duty of confidentiality and the English court wanted to decide whether this would affect the confidentiality of information located in the London branch of the American bank. After finding English law to be the proper law regarding the London branch, the court delineated the English and American jurisdictions accordingly in favour of the English in what it is submitted was probably the fiercest clash of jurisdictions in the field.

The same recourse to international private law was had by McKechnie J in *Walsh v National Irish Bank*, quoting *X AG v A Bank*,[59] refuting the applicant's contention that the proper law of the banking relationship between Irish citizens and residents and National Irish Bank in relation to banking information available in its Irish headquarters must be Irish. He made a number of interesting observations in relation to Manx law as the applicable law considering *deprecage* between Irish and Manx law and the Rome Convention of 1980 and indicating that the question of which place had the closest connection to the relationship between the bank and the customers must be decisive. He concluded as follows:

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[57] [2008] 2 ILRM 56, 80.

[58] [1983] 2 All ER 464, 475.

[59] [2008] 2 ILRM 56, 69.

> "… the respondent when offering its services in the Isle of Man and the account holders who availed of such services, both did so on the presumed understanding that the applicable law would be Isle of Man law and not the law of this jurisdiction. Otherwise it makes absolutely no sense for a person with an Irish address to open an account in the Isle of Man rather than in Ireland. As it is not suggested that these accounts were opened to facilitate the carrying on of a business, trade or profession, I can see no good reason to have an account, which is subject to Irish law, in an Isle of Man branch of an Irish bank."[60]

McKechnie J certainly did not feel that his primary task was to come down on potential tax evasion. He made this remarkably clear:

> "Finally there was a suggestion running through a number of submissions made by the Revenue Commissioners that if this court should grant the order as sought, the respondent bank would be most reluctant to frustrate its effects by seeking an injunction in the Isle of Man. I am not sure precisely what the applicant means in this regard. However could I categorically say that this Court is not in the business of making orders which rely for their compliance, in part upon public opinion, in part upon the fear of public reaction or in part upon moral obligations. In the absence of a justifiable legal basis no such order should issue."[61]

This judicial stance should be borne in mind if the reported[62] offer of the German government to sell stolen banking secrets concerning Irish residents' confidential accounts in the Principality of Liechtenstein to the Irish government gives rise to effects which may be scrutinised by the Irish courts.[63]

Turning back to the discussion of the proper law in *Walsh*, both at common law and under Article 4.2 of the Rome Convention of 1980, the relationship between the NIB and its former account holders in the Isle of Man was held to be more connected with the Isle of Man than it was with the Irish jurisdiction. The branch in question could never have existed unless authorised by Manx law; it could op-

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[60] *Ibid.* at 74.

[61] *Ibid*. at 80.

[62] *Irish Times*, 28 April 2008, p. 13. "The Pursuit of Tax Evaders" (editorial of the chief editor Geraldine Kennedy) "And the German tax authorities have offered to share information, secured from a whistleblower, about any Irish residents with offshore investments in Liechtenstein, a tax haven." The whistleblower was actually offering the stolen information to the German secret service (*Bundesnachrichtendienst*) for several million euro which he reportedly received.

[63] See the assessment of comparable international collaboration of security services in *R v Horseferry Road Magistrates Court, ex p. Bennet* [1994] 1 AC 42.

erate only in accordance with that law which meant that the creation, maintenance and retention of records, accounts and information, of any and every account holder, was, *inter alia,* subject to such law. Access to and the operation of such accounts was likewise governed by that law. Of course of crucial significance was the fact that the accounts were opened, operated and kept in the Isle of Man. In addition, repayment is the essence of any banking contract and this obligation could only be legally enforced by an account holder in the Isle of Man.

This two step approach of determining the appropriate or proper law of the issue (*lex causae*) in order to indicate the realm of the jurisdiction and with it the reach of the court's orders (*lex fori proceduralis*) informed by international law considerations of comity of courts cannot but be highly commended. It indicates the reach of international law both private and public in providing a pattern to address these most intrinsic legal challenges which global exposure has given rise to. Anything less would be bound to be one-sided, limited or ignorant. To set other interests above the full scale of the formidable legal reasoning employed by McKechnie J in *Walsh* would scarcely suffice.

5.4 Executive Certificates

To establish underlying facts in the realm of foreign relations and international law it is advisable for national courts to involve the executive branch of government to ensure that all organs of the state both judicial and executive speak with one voice. Although normally courts guard their independence against the executive branch of government's influence in relation to international relations it must be the reverse in this context as differing views of the executive and judicial branch of government in matters relevant to international law cannot be entertained. This materialises in communications of the executive branch to the courts either at the request of the courts or just on its own initiative when it thinks it to be appropriate to let the court know its views on an issue. It is the Foreign Ministry which usually issues such a communication which can take the form of a letter and may be referred to as an executive certificate, a letter of interest or *amicus curiae* brief when the court has chosen to invite the views of the government in this specific form. Information of this kind is almost entirely confined in practice to the underlying facts justifying or questioning the application of avoidance techniques by courts as discussed here. They often concern the status of a foreign government or its agents or the existence of a state, for example, the disintegrating former Soviet Union or Yugoslavia or unifying Germany (*e.g.,* when considering ownership of embassy property before the courts in foreign countries). Such certificates are usually seen as conclusive by courts and where this is not the case by virtue of the doctrine of the independence of courts it is unheard of for such a certificate of a government not to be followed by its own courts. Sometimes, there are statutory provisions providing for such certificates. An example is section 47 of the Irish Diplomatic Relations and Immunities Act 1967 which provides:

> "In proceedings in any court a certificate purporting to be under the seal of the Minister and stating any fact relevant to determine whether a judicial or semi-judicial body, an arbitration or conciliation board, an organisation, community, body, diplomatic mission, consular post or person is entitled to inviolability or to an exemption, facility, immunity, privilege or right under a provision of this Act or of an order made under this Act shall be *prima facie* evidence of the fact."

However, it is clear that certificates of governments are not limited to those cases where they are provided for by statute. This was made clear by the Irish High Court which considering certificates of governments beyond the remit of this statutory provision.[64] That a certificate "shall be *prima facie* evidence of the fact" means that it is conclusive and there is no suggestion that a court will not follow its government's certificates. Lord Esher MR confirms that conclusive evidence is given by those means which must be followed by courts:[65]

> "In the first place it is clear that the proper mode of obtaining information with respect to the status of the defendant was adopted by Wright, J., who communicated with and obtained a letter from the Colonial Office. We are told by that letter that the Sultan, 'generally speaking, exercises without question the usual attributes of a sovereign ruler.' … The first point taken was that it was not sufficiently shown that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*.[66] I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign."

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[64] *Zarine v Owners of the SS Ramava* [1942] IR 148.

[65] *Mighell v Sultan of Johore* [1894] 1 QB 149, 158 (CA).

[66] 4 A & E 59.

The "one voice" argument to be guaranteed by executive certificates was prominently put forward by Lord Wilberforce in *Rio Tinto Zinc Corp v Westinhouse Electric Corp*:[67]

> "The intervention of Her Majesty's Attorney General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of the United States investigatory jurisdiction extra-territorially against the United Kingdom companies. The courts should in such matters speak with the same voice as the executive … they have, as I have stated, no difficulty in doing so."

In *Attorney General for Fiji v Robt Jones House*[68] the New Zealand High Court had to decide whether the acts concerning the lease of property in Wellington by the Fiji government which came to power by violent and illegal means should be recognised while there was no official recognition by this government of the executive government of New Zealand which was the forum state. Quilliam J requested a certificate from the New Zealand Minister of Foreign Affairs to advise the court:

1. Whether the New Zealand Government recognises the Government in Fiji …
2. If so is that recognition de facto. i.e. does it recognise that such a Government has effective control over most of the territory of Fiji and that this control seems likely to continue or is that recognition de jure, i.e. does it recognise that such a Government not only has effective control over most of Fiji's territory but that it is firmly established, or is that recognition upon some other basis and if so upon what basis.

The answer of the Foreign Ministry was as follows:

> "1. The New Zealand position has been for many years that formal acts of recognition in respect of new Governments in other countries are unnecessary as a matter of international law and except in most unusual cases, undesirable.
>
> 2. New Zealand's general practice, therefore, has been to leave any questions of recognition in respect of new Governments to be inferred from the nature and level of its dealings with such Governments. …"

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[67] [1978] AC 547, 617.

[68] [1989] 2 NZLR 69.

The Minister then proceeded to offer the High Court some factual information about the state of relations between New Zealand and Fiji in order to enable the Court to make its own assessment. It reads in part:

> "The New Zealand Government has made clear its very strong and continuing disapproval of the two coups in Fiji. But since the installation of the present interim Government in Fiji there has been some improvement in the level of relations. Contacts on Ministerial level have been undertaken and the development assistance programme to Fiji has been resumed. However, relations have not by any means returned to what they were before the coup in Fiji. Development of relations with the new government beyond their present level will now depend on future developments in Fiji."[69]

This answer casts light on the subtle relationship between the Foreign Ministry and the court which must express itself on a question relevant to international relations and law. This is not specific to the New Zealand situation but will be found everywhere. The court is meant to decide clearly the question before it (in this case whether the lease of the house in Wellington between Fiji and the claimant could be affected by the acts of the non-recognised government) which results in an answer of yes or no. The Foreign Ministry usually conducts foreign relations with a different perspective; it is not one single question which must be ultimately decided but a variety of factors which must be weighed against one another which usually leads to a slightly ambiguous position leaving room for future developments. The Foreign Ministry does not like to bind itself by taking a legal position which may be held against it. Therefore, it will try to avoid a clear cut answer in favour of a multifaceted statement which may give the court a hint as to how it may proceed (which is the very task such a letter is meant to fulfil) but will try to avoid any clear legal commitment whenever possible to leave room for discretion in relation to the foreign country in question. This diplomatic reaction is a necessary result of the different tasks fulfilled by those maintaining international relations with a long term perspective as diplomats and those who are asked to decide an issue brought before them as judges.

The government statement in *Fiji v Robt Jones House* is an excellent example of this difference of perspectives. Obviously, some phrases in the certificate are directed more to the international community and Fiji than the court, for example, when the government says that it "has made clear its very strong and continuing disapproval of the coups in Fiji." This is, however, not meant to lead to any conclusions by the court relevant to the case before it. This is different from the statement that: "Contacts at Ministerial level have been undertaken" which is a clear hint that the government of Fiji is taken by the New Zealand government as the effective government in power and should also be accepted as such by the

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[69] Quoted in "Recognition of Foreign Governments in New Zealand" (1991) 40 ICLQ 162, 164.

court. To ensure that the government of Fiji does not understand this as an implied recognition or a political licence by the New Zealand government to feel free to do what it wants, the letter to the court continues "Development of relations with the new government beyond the present level will now depend on future developments in Fiji." At this juncture political and diplomatic language and necessities meet judicial needs and executive certificates reflect this in a special way.[70]

This became particularly clear when the Chief Justice of Hong Kong, then still a British colony, asked the London Foreign Office whether Formosa was part of China or whether it was a foreign territory *vis à vis* China. The Foreign Office certified that the British government had ceased to recognise the Nationalist Government of China but that Formosa was still *de jure* part of Japan, but that the Nationalist Government has "superior authority" to administer the island as a belligerent occupant.[71] A comment on this executive certificate sums it up: [72]

> "The truth, of course, is that the United Kingdom is compelled by political exigencies to be vague. In some situations a government cannot be committed to a specific political manoeuvre merely at the instance of a private litigant or of a private member in the House.[73] It is notable that Foreign Office certificates, which are binding on English courts, have since the days of the Spanish Civil War been couched in such cautious and frequently evasive language that in fact the whole question has been passed back to the courts for factual finding."

The basic problems in relation to the division of executive and judicative powers in the constitutional structure of a state that arise when issuing executive certificates have been addressed in *Duff Development Corp v Government of Kelentan*.[74] Viscount Cave stated that:

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[70] See the various conclusive executive certificates issued in exceptional circumstances in *R (Alamieyeseigha) v The Crown Prosecution Service* [2005] EWHC 2704 (Admin); *Trawnik v Lennox* [1984] 2 All ER 791; [1985] 2 All ER 368 (CA); *R. v Secretary of State for Foreign Affairs, ex p. Trawnik,* The (London) Times; 18 April 1985; *Carl Zeiss Stiftung v Rayner and Keeler (No. 2)* [1967] 1 AC 853 (Comment by F. A. Mann "The Present Legal Status of Germany Revisited" (1967) 16 ICLQ 760, 788); *Bank of Ethopia v National Bank of Egypt and Ligouri* [1937] Ch 513; *Banco de Bilbao v Sancha* [1938] 2 KB 176; *Luther v Sagor* [1921] 3 KB 532; *Zarine v Owners of the SS Ramava* [1942] IR 148.

[71] *Civil Air Transport Inc. v Chennault* (1950), Hong Kong Action No. 5, see Editorial note in (1956) 50 AJIL 415, 416.

[72] Editorial note in (1956) 50 AJIL 415, 416.

[73] This reference to the "House" may be meant to refers to the House of Commons, where opposition parliamentarians may put questions to the government which trigger answers comparable to those given in executive certificates to courts.

[74] [1924] AC 797.

> "It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be questioned by the parties."[75]

When there is no conclusive answer a Canadian Court[76] concludes:

> "The Department of Foreign Affairs has the power to issue an executive certificate when it wishes and, when it does so, the court is bound by its contents. When it does not, the court, in light of all the evidence put before it, must determine for itself the status of a foreign country. In leaving the power to the court to make this determination, the State Immunity Act[77] keeps law and diplomacy separate. Thus the Act achieves its purpose of integrating into Canadian law the principle of state immunity under customary international law with due regard for its underlying concern for the sovereignty, independence, dignity and equality of states."

Sometimes executive certificates of foreign governments or foreign ministries may be requested under the applicable rules by courts and will then come under scrutiny. When Germany sought extradition of one of its (former) citizens from South Africa, it provided a certificate to the South African authorities which came to be assessed by the courts. The facts were as follows.[78] Herr Geuking, a former German citizen, was convicted in December 1990 on several counts of fraud and arson in Germany and was sentenced to imprisonment. When his appeal to have the conviction and sentence set aside failed, he fled to South Africa and obtained South African citizenship through naturalisation in 1995. In November 1996,

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[75] *Ibid.* at 805-806.

[76] *François Parent et Specnor Technic Corporation et Corporation Specnor Technic International c. Singapore Airlines Ltd. c. Civil Aeronautics Adminstration*, 2003 IIJCan 7285 (QC CS), ILDC 181 at para. 53 of the judgment: "Lorsque le politique et le diplomatique peuvent ou veulent admettre officiellement la situation, ou lorsqu'ils souhaitent la contrôler, le ministère a le pouvoir d'émettre un certificat aux termes de l'article 14 de la Loi. Cette preuve déposée au dossier étant concluante, le tribunal est alors lié par le contenu sous réserve toutefois de l'interpréter" and in para. 54: "Par contre, quand le politique et le diplomatique ne peuvent officiellement reconnaître la situation ou que le ministère s'abstient d'émettre un certificat, la tâche d'évaluer les faits, et d'en tirer les conclusions de droit qui s'imposent, revient alors au tribunal saisi de la demande."

[77] Canadian State Immunity Act incorporates the international law of immunity into Canadian Law and is comparable to the British SIA or the US FSIA. In its Article 14 it expressly provides for executive certificates on the issue of immunity.

[78] *Geuking v President of the Republic of South Africa* 2004 (9) BCLR 895 (CC), ILDC 283.

Germany requested Geuking's extradition so that his German sentence could be enforced and so that he could answer to a further fifteen counts of fraud. Since no extradition agreement existed between South Africa and Germany at the time, the extradition proceedings were to commence on the basis of section 3(2) of the South African Extradition Act No. 67 of 1962, which empowers the President to authorise the extradition of a person by written consent in the absence of an extradition agreement with the requesting State. Such consent was given on 30 May 1997. In April 1998, a warrant for Geuking's arrest was issued and extradition proceedings commenced in a magistrate's court pursuant to section 10(2) of the Extradition Act on the strength of a certificate submitted by Germany indicating sufficient evidence to warrant the prosecution of the applicant. The appellant claimed that the conclusive nature of the section 10(2) certificate constituted an invasion of the independence of the judiciary and was thus inconsistent with the provisions of section 165 of the Constitution which reads:

> "(1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

The submission was that a foreign prosecutor should not be allowed to dictate the manner in which the South African magistrate must make this decision. This was refuted by Goldstone J in the following terms:

> "[T]he [German foreign] certificate is conclusive solely with regard to a question of foreign law. The inquiry by the magistrate does not constitute a trial in which guilt or innocence has to be determined. … the provisions of section 10(2) do not interfere in any way with the independence of the judiciary by rendering conclusive the opinion on foreign law by an appropriate foreign official from the country seeking the extradition. In my opinion, the provisions of section 10(2) in no way interfere with or detract from the independence of the judiciary or violate the separation of powers."

With this the system of foreign governmental executive certificates was upheld by the South African court.

5.5 Amicus Curiae Briefs

Although substantially the same as executive certificates, *amicus curiae* briefs have developed a slightly different profile. While executive certificates are usually formulated at the request of the court, the *amicus curiae* (friend of the court) often represents its own interests and applies on its own initiative to be heard by the court to make its views known. However, participation as an *amicus curiae* must be distinguished from a third party intervening. An intervening party will be subject to the court's jurisdiction and be bound by the court's decision as a party to the proceedings. An *amicus curiae* stays outside the binding proceedings and has leave only to make its views known which is meant to assist the court rather than to pursue its own interests before the court as an intervening party. Where executive certificates (or letters of interest as they are called in the US) would be used in the UK, often the US courts and government[79] choose the *amicus curiae* procedure. Probably, at least in the US governmental interventions (foreign and national) in contentious legal procedures are mainly effected through the *amicus curiae* procedure and only occasionally by letters of interest from the Legal Adviser to the Secretary of State to the court.

In *Belize Telecom v Government of Belize*[80] a court order stipulating monetary sanctions against the defendant, an African state, was at issue. The US government intervened with an *amicus curiae* brief which outlined:

> "In this case, despite the lack of any explicit authorization or enforcement mechanism in the FSIA,[81] the district court has imposed monetary contempt sanctions upon a foreign state. The United States has a substantial interest in the proper interpretation and application of the FSIA because of the foreign policy implications of U.S. litigation involving a foreign state. Those foreign policy interests are particularly significant where, as here, a U.S. court's orders are likely to be viewed as an affront to the dignity and sovereignty of the foreign state. The United States also has a significant interest in the treatment of foreign states in U.S. courts by virtue of the reciprocal treatment of the United States Government by the courts of other Nations. Accordingly, the United States has participated in this litigation to express its position that a U.S. court should not impose monetary contempt sanctions upon a foreign state.

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[79] The Website of the US Department of State Legal Adviser contains documents on the annual practice of the US in international relations with some *amicus curiae* briefs in current litigation.

[80] *Belize Telecom v Government of Belize* US Court of Appeal 11th Circuit. Case No. 06-12158.

[81] The US Foreign Sovereign Immunities Act 1976 incorporating international law on immunity into US law.

> … The imposition of such sanctions also contravenes international practice, and could adversely affect our nation's relations with foreign states and open the door to reciprocal sanctions against our Government abroad."

Although it is mostly the US government which acts as *amicus curiae* before its own courts it may be also a foreign government or a group thereof, for example, organised in the European Union ("EU"). Many foreign governments[82] together with the EU presented an *amicus curiae* brief in *Donald Roper v Christopher Simmons* before the US Supreme Court.[83] It reads:[84]

> "The European Union ("EU") considers the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community. … The EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant. The EU and its Member States share the widespread opinion of the international community of States that the execution of persons below 18 years of age at the time of their offences violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations**.** Furthermore, the EU and its Member States are opposed to the death penalty in all cases and accordingly aim at its universal abolition. … The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other *amici*."

In *Hoffmann La Roche Ltd v Empagran S.A.*[85] the decision of the US Supreme Court takes note of the *amicus curiae* briefs as stated in the following terms by Justice Breyer speaking for the court:

> "Brief for Federal Republic of Germany et al. as Amici Curiae 2 (setting forth German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble

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[82] Canada, Iceland, Norway, Liechtenstein, New Zealand, Mexico and Switzerland with the Member States of the EU and the Council of Europe, see p. 21 of the *amicus curiae* brief.

[83] 543 US 551 (2005).

[84] http://www.internationaljusticeproject.org/juvSimmonsEUamicus.pdf (visited 15 May 2008) p. 21.

[85] 542 US 155 (2004).

> damages in private lawsuits against German companies"); Brief for Government of Canada as Amicus Curiae 14 ("treble damages remedy would supersede" Canada's "national policy decision"); Brief for Government of Japan as Amicus Curiae 10 (finding "particularly troublesome" the potential "inter-fere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty."[86]

An *amicus curiae* brief was also prepared on behalf of Kosovo in *Wood Industries Ltd v United Nations and Kosovo* [87] which reads in part:

> "This court should embrace one or more of several doctrinal bases to decline deciding this case on the merits. Several interrelated doctrines of sovereign immunity, the doctrine of *forum non conveniens* and the Act of State Doctrine require this court to avoid reaching the merits of this lawsuit. It should dismiss the lawsuit, allowing it to be heard, if the plaintiff so desires, in the Special Chamber of the Kosovo Supreme Court."

This synopsis of the related doctrines or avoidance techniques is informative. As Hazel Fox comments:[88] "Reduced to its simplest, the justification for use of avoidance techniques, particularly of the plea of immunity, is to allocate in the most appropriate manner suitable to all interests and the ends of justice jurisdiction between the forum and the foreign States."

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[86] *Amicus curiae* brief for Federal Republic of Germany *et al*. at 28–30; Brief for Government of Canada as *Amicus Curiae* 11–14. See also Brief for United States as *Amicus Curiae* 19–21 (arguing the same in respect to American antitrust enforcement).

[87] US District Court for the Southern District of New York Case No. 03-CV-7935 (MBM), see *amicus curiae* brief on behalf of Kosovo at http://operationkosovo.kentlaw.edu/amicus/Amicus%20Brief-posted-web.htm#_Toc59606115 (last visited 15 May 2008).

[88] "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.) *International Law* (2nd ed., OUP, 2006) p. 361 at 392.

Chapter 6

Substantive International Law Before National Fora

6.1 Challenges in Applying International Law

6.1.1 Unalterable Procedures of National Courts

National courts pronounce regularly on international law.[1] Whether immunity is granted[2] or a ship in distress on the open sea may avail herself of a safe haven in an adjacent port[3] or the suggested illegality of the British American Iraq campaign is put forward as a justification for disobeying military orders[4] let alone international humanitarian law or human rights; there are few areas left where substantive international law may not have an impact. This increasingly requires national courts to determine and apply international law in various contexts as part of their national legal proceedings.

The main challenge involved in this task is that national legal procedures are not made for international law. The international community of states as creator and patron of international law[5] does not appear itself before the national bench.[6]

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1 Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing, Oxford and Portland, Oregon, 2005) gives an impressive overview of how substantive international law (alphabetically) from aviation law to warfare and weapons law is applied by the English courts.

2 *Dralle v Republic of Czechoslovakia* Austrian Supreme Court, 10 May 1950, 17 ILR 155, Case No. 41.

3 *ACT Shipping (PTE) Ltd v Minister of the Marine* [1995] 3 IR 406.

4 *Germany v Pfaff* Bundesverwaltungsgericht of 21 June 2005, (2006) NJW 77, ILDC 483.

5 Colin Warbrick "States and Recognitions in International Law" in Malcolm Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 217 *et seq*.: "States were the original and remain the prime actors in the international legal system."

6 Except in the rare event of foreign states' appearances as *amicus curiae,* exemplified *infra* in *F. Hoffmann La Roche* (Germany, Canada and Japan before US courts) or in their "private" capacity when commercial activities on the same level with private companies are at issue usually excluding the application of some parts of international law to the benefit of some applicable national law. See Lowenfeld, *International Economic Law* (2nd ed., OUP, 2008) p. 518 *et seq.* "Litigation Around the World"; Hazel Fox, *The Law of State Immunity* (OUP, 2002) p. 272.

Most of the national procedural means rooted in international law are "avoidance techniques"[7] such as immunity, act of state, judicial restraint or prerogatives concerning foreign policy which exist exclusively to ensure that states will not have to appear before domestic courts. Therefore, national courts will normally pronounce on questions of international law, not between states directly as the ICJ would do, but indirectly as an incidental question in lawsuits where at least one side is a private party. This provides a unique context to questions of international law shedding a specific light on it but making the treatment of international law subject to the limitations stemming from the context and from procedures not originally made for international law suits.

Another consideration is that before national courts usually national procedures, the *lex fori proceduralis*, are applied irrespective of the substantive law relevant to the case before the court including international law. Except for the procedural means described in the preceding chapter, national procedures do not make any allowances for international law. The traditions of the forum which prescribe how justice is rendered are not altered when international law applies. The immense procedural flexibility of international adjudication known from the ICJ, the PCA and many other international *fora* accustomed to determining international law issues between states often more arbitrating between the state parties than handing down judgments with ultimate authority, is unknown to national courts. The advantage of national procedures, on the other hand, is that they produce effective judgments which provide state practice and *opinio iuris* besides giving evidence of the state of international law within the meaning of Article 38.1.b and d of the ICJ Statute, something which international judicial bodies are not always able to deliver.

Another difference is that international law is usually determined by state practice and only in exceptional cases by adjudication whereas national law is almost entirely determined by adjudication (based on common law and statutes) and it is only in very exceptional cases that an alleged injustice suffered cannot find its way to a national court. All this gives national procedures certain features which do not match those found in international law.

6.1.2 Conflict with the Floating Nature of International Law

Sometimes it is questioned whether international law is really law and not just a branch of power politics. This recurring concern is related to its deep roots in state practices and politics which give a distinct character to international law. The constant influence of states in reshaping international law through their dealings, opinions and practices particularly in the field of international customary law, gives international law a floating character. It is not stable and unal-

[7] Term borrowed from Hazel Fox "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm Evans (ed.), *International Law* (2nd ed, OUP, 2006) p. 361.

tered through the ages, a property which is, however, very much associated with other fields of the law. This idea of unaltered and stable law finds its procedural expression in the rule of *stare decisis* applied by English speaking courts all over the common law world. Similar approaches can be found in the rules of statutory interpretation which aim for consistency in both the civil and the common law worlds. This rule of *stare decisis* applied by the common law courts as part of their own procedural law is particularly unsuited to take cognisance of the floating character of international law and also poses a certain challenge for judges who are not accustomed to questioning parts of their forum's procedural laws (*lex fori proceduralis*) because of the character of the substantive law to be applied by them (*lex causae*).

This issue was addressed in *Trendtex Trading Corporation v Central Bank of Nigeria*.[8] The reasoning in the case addressing this question was linked to the doctrines employed to apply international law as part of national law, the transformation and incorporation theories. It is submitted that the question of how to deal procedurally with questions of international law in relation to *stare decisis* could be argued without recourse to the transformation/incorporation issue. However, it does no harm to present the argument as it is presented in *Trendtex*. It was suggested by the defendant[9] that change in international law is subject to the *stare decisis* rule because international law is part of the law of England only inasmuch as the particular rule has been adopted and made part of English law by legislation or judicial decision: otherwise it is a mere source of potential law but not (yet) law before the English courts. Only once a principle is adopted and made part of English law, does it become a rule of law. Therefore, a subsequent change in international law even if proved by evidence to be the subject of a general consensus among the nations cannot have any effect in England until adopted and made part of English law.

Lord Denning MR expressed himself clearly in relation to this contention starting from the very nature of international law:

> "It is certain that international law does change. I would use of international law the words which Galileo used of the earth: 'But it does move.' International law does change: and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law[10]. Again, the

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[8] [1977] QB 529 (CA).

[9] *Ibid*. at 542.

[10] See the "Statement of Opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H. S. Maine appended to the Report of the Royal Commission on Fugitive Slaves (1876) p. XXV, paras. 4 and 5.

> extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly:[11] The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts – of our country and of theirs – have given effect to them, without any legislation for the purpose."[12]

Understandably, he concluded that an earlier decision of a national court (in this case it was the English Court of Appeal) on the state of international law is not binding on the courts today. As international law itself knows no rule of *stare decisis,* he opines for the court that the courts should not apply such a rule when determining the contents of international law. If a national court today considers that a rule of international law has changed from what it was some time ago, it can give effect to that change, and apply the change in English law, without waiting for a higher court or parliament to do it.

6.1.3 Procedural Effects

This chapter is designed to give an overview of national courts' procedural practices in applying substantive international law. It is not intended to give an account of substantive international law as applied by national courts but rather to select certain cases representing situations which give rise to certain procedural challenges. As already outlined, international law before national courts is not dealt with in the abstract or in a neat inter state situation. In many cases questions of international law will only be implicitly dealt with. However, international law will only be relevant to the court (and it will only be necessary for the court to pronounce on it) when it makes a difference to the outcome of the case which it is called upon to decide. This is what brings together all cases dealt with here and it is also the situation in which "international law matters". In other words all cases which would have been decided differently but for international law are relevant to this discussion.

Starting from this perspective some situations may be distinguished; international law may be relevant in a lawsuit between private parties, however, it may well be that the forum state or a foreign state acts as applicant or defendant against a private party. The very unusual action in which two states are parties before a national bench is not unheard of[13] but is extremely rare and has not given rise to any particular insights. It will not be addressed here. From these

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[11] See *R v Kent Justices, ex p. Lye* [1967] 2 QB 153, 173, 189.

[12] Notably in the decision of the Privy Council in *The Philippine Admiral* [1977] AC 373.

[13] *Federal Republic of Yugoslavia v Croatia and other states* (successor states of the former Yugoslavia), Cour de Cassation (France, Supreme Court), decision of 12 October 1999 on appeal from the Cour d'Appel (Court of Appeal) Paris, 1st Chamber Civil, section C, of 27 February 1997.

possible scenarios before national courts applying international law a certain structure develops which it is suggested may reveal certain procedural patterns as courts will act differently depending on the different character of the parties and the questions. This not only applies to politicised questions often encountered in the international law context, when, for example, the UK/US Iraq campaign or Guantanamo figures prominently in the proceedings, but also to the commercial character of operations and the attitude of parties which in the case of states can be very different to those involving private individuals or multinational companies. When an individual wants to probe foreign policy[14] over his government's involvement in the Iraq war a court may act differently than where a bank's relationship to its corporate customer in different jurisdictions[15] or an arms deal bribery case[16] is at issue. It is the special context of these cases which not only sets the agenda but presents certain challenges to the procedures of national courts because they cannot but have an impact on the foreign policy options of the governments concerned. The increasing variety of contexts is part of what is usually called globalisation.

Traditionally, national courts were only extremely rarely exposed to international law because it was perceived as largely irrelevant as it focused on the foreign relations administered by the governments among themselves without judicial assistance let alone advice. There was an accepted if not intended lack of familiarity with the nature of this field of law on the part of national judges which was perceived as diplomatic rather than judicial. International law was seen as the esoteric preserve of a handful of very distinguished professors or Foreign Ministry mandarins, but not something which impinged on the professional lives of ordinary practitioners or national courts. In addition, a sometimes convenient employment of avoidance techniques coupled with a transformative approach to international law secured the overriding nature of national over international law at least before such domestic courts. Over time broader constituencies,[17] inventive litigation such as the revival of the US Alien Tort Claims Act 1789 to extend jurisdiction to agents of foreign states, a litigious stress on human rights,[18] and the growing influence of international or European norms at a national level have rendered the traditional hesitation of courts to address international law less tenable. An enhanced role for all international norms is accepted by most national judges

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[14] *Horgan v An Taoiseach* [2003] 2 IR 468.

[15] *X AG v A Bank* [1983] 2 All ER 468.

[16] Sylvia Pfeifer "BAE executives held as US steps up arms deal probe" in *Financial Times*, 19 May 2008, p. 3 with further reports on the US subpoenas.

[17] Harold H Koh "Transnational Legal Process" (1994) 75 Neb L Rev 181, 184.

[18] Yuval Shany "How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts" (2006) 31 Brook J Int'l L 341, 352 *et seq*.

in their legal proceedings.[19] This is further strengthened by a tighter co-operation between courts which may even sometimes use international norms and standards including opinions from other courts to improve their own standing nationally in relation to other branches of the government.[20] The avoidance techniques are under some pressure which may gradually limit their application.[21] Today, many national courts entertain claims which were formerly considered justiciable only at an interstate level before international courts or arbitrators. This increased application of international law by national courts results in a further approximation between the work of national courts and international adjudicative bodies. However, they do not usually address the same parties as international adjudication remains the domain of interstate disputes as opposed to the normally incidental nature of international legal questions before national courts. Yet, both national and international procedures address the same issues, affect the same legal relationships and apply the same laws, norms and standards. Sometimes this is even mirrored in parallel proceedings in both international adjudicative bodies and national courts.[22] A clear tendency on the part of many states to extend their jurisdiction into areas claimed by others through long arm statutes or aggressive judicial practices[23] not only by the US but by Germany[24] and others[25] may be observed. These developments give national courts a much more prominent role in determining and adjudicating on international law and a more global impact than ever before in history. It is not anything new that national courts generally regard international law, for example, as part of the law of the land and apply it but the intensity and increasing areas in which international law will be relevant and applied is unprecedented. Therefore, the legal procedures employed in this context deserve special attention.

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[19] Francesco Francioni "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l L J 587 *et seq*.; Ann-Marie Slaughter "Judicial Globalisation" (2000) 40 Va J Int'l L 1103, 1105 *et seq*.

[20] Anthony Arnull, *The European Union and the Court of Justice* (2nd ed., OUP, 2006) p. 99.

[21] Hazel Fox, *The Law of State Immunity* (OUP, 2002), pp. 272, 523.

[22] The *LaGrand* and *Avena* cases (ICJ and US Supreme Court) are a sad example; *Sanchez-Llamas v Oregon* 548 US 331 (2006); *Beit Sourik Village Council v Israel* (Israelian) HCJ 2056/04; 58(4) PD 807; *Ecuador v Occidental Exploration & Petroleum Co* [2005] EWHC 774 (QB).

[23] Haig Simonian, "Top UBS banker held in US tax probe" *Financial Times,* 7 May 2008 p. 1 :"… the detention [of the Swiss banker by the US] was an aggressive tactic and might have been chosen by the [US] authorities to put pressure on UBS [the leading Swiss bank] and its employees to reveal its business practices."

[24] German Act to introduce the Code of Crimes Against International Law of 26 June 2002, 42 ILM 998 (2003).

[25] Canadian Geneva Convention Act, RS, 1985, c G-3.

6.2 Individual Applicants and Defendants

International law has an impact in a great variety of areas where litigation takes place between private parties. In family affairs or commercial dealings any transborder transaction may be subject to international rules codified in conventions or treaties both in relation to the substantive and the procedural law applicable.

6.2.1 The Incidental Nature of International Law or Direct Effect

International law is rarely directly invoked by private litigants. It is usually indirectly relevant in determining their private law obligations and is treated by the courts implicitly as an incidental question. However, there are cases where direct effect is given to international treaties.

In *Okpeitcha v Okpeitcha*[26] the wife and six children of the defendant lodged a complaint alleging violation of his obligation to provide them with financial support with the Constitutional Court of Benin. Some of the children were minors under 18 years of age, and Mrs Okpeitcha was a housewife without any income. The court, unable to identify any basis in national law for its decision, held that by failing to provide his family with the necessary financial assistance, Mr Okpeitcha had violated Article 29(1) of the African Charter on Human and Peoples' Rights. The court elaborated:[27]

> "Considérant qu'il ressort des éléments du dossier et notamment de la réponse faite par dame Aline Odode épouse Okpeitcha aux mesures d'instruction de la Cour que Monsieur Mathieu Okpeitcha a cessé sans motif d'assurer l'entretien et l'éducation de ses enfants et partant, de sa famille; qu'en se comportant comme il le fait, Monsieur Mathieu Okpeitcha viole l'article 29 alinéa 1, 1er tiret de la Charte Africaine des Droits de l'Homme et des Peuples."
>
> "Considering that it emerges from the information in the file, and particularly from the response made by Mrs Aline Odode married Okpeitcha to the court orders, that Mr Mathieu Okpeitcha has ceased without grounds to ensure the upkeep and education of his children and thus of his family; that in behaving in this way, Mr Mathieu Okpeitcha violates article 29(1) of the African Charter of Human and Peoples' Rights."

The complainants in *Maja Dreo v Slovenia*[28] argued before the Constitutional Court of Slovenia that the provisions of a Slovenian Statute, which did not allow

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[26] Constitutional Court of Benin, decision of 17 August 2001, DCC 01–082, (2002) AHRLR 33 (BnCC 2001); ILDC 192.

[27] *Ibid*. at para. 10.

[28] *Individual constitutional complaint procedure*, U–I–312/00, 23 April 2003, Constitutional Court of the Republic of Slovenia, Official Gazette RS, No. 42/2003; ILDC 414.

separated parents to maintain joint custody of their child, violated Article 18 of the UN Convention of the Right of the Child (CRC), according to which parents share joint responsibility for the upbringing and development of their child. The court held that the provisions of Article 9, paragraph 3, of the CRC are clear and precise enough to be self–executing in so far as they recognise the right of the child to maintain personal relations and direct contact with both parents on a regular basis. Since the provisions of the CRC prevail over the Act because these provisions are higher up in the hierarchy of norms and enacted subsequently, this right of the child is clearly and without doubt recognised in the Slovenian legal order, even if the Slovenian Statute does not also recognise the access right as a right of the child, and even if it does not promote this right in a more explicit manner.[29]

A copyright conflict[30] shows the potential impact of international law in areas where this is rarely expected or encountered. The claimants, a music publishing company in England, sought a declaration that they were the owners or alternatively the exclusive licensees of the UK copyright in certain Cuban music. They based their alleged rights on assignments in writing, dating from the 1930s and 1940s, made by the Cuban composers of the works, and on "confirmation of rights" documents signed by the composers' heirs in about 1989 or 1990. The defendant music publishing companies also claimed to be the exclusive licensees of the same copyright, pursuant to a licence granted by a Cuban state enterprise which claimed to be the owner of the disputed copyright on the basis of a Cuban law of 1960. This law was passed in the wake of the Cuban Revolution in order to "re-exert Cuban control over intellectual property rights owned by Cuban nationals and to prevent further exploitation of these rights by foreign companies",[31] such as the claimants.

The claims were denied because as a matter of public international law no state ought to seek to exercise sovereignty over property outside its own territory, and because no state can expect to make its laws effective in the territory of another.[32] The court also highlighted the view of Lord Templeman[33] that there is undoubtedly a national and international rule which prevents one sovereign state from changing title to property so long as that property is situated in another state. In addition, the court relied on statements in *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation*,[34] where Lord Hoffmann considered it a general principle of international law that one sovereign state should not trespass upon the authority of

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[29] Paras. 14 and 20 of the decision.

[30] *Peer International Corpn v Termidor Music Publishers Ltd (Editora Musical de Cuba, Part 20 Defendant)* [2003] EWCA Civ 1156; [2004] Ch 212.

[31] *Peer International Corpn v Termidor Music Publishers Ltd (Editora Musical de Cuba, Part 20 Defendant)* [2003] EWCA Civ 1156, para. 14.

[32] Para. 37 of the judgment.

[33] *Williams and Humbert Ltd v W & H Trademarks (Jersey) Ltd* [1986] 1 AC 368.

[34] *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2003] 3 WLR 21; ILDC 254.

another by attempting to seize assets situated within the other's jurisdiction[35] and where Lord Millett thought it to be a near universal rule of international law that sovereignty, both legislative and adjudicative, is territorial, in that it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals.

6.2.2 Indirect Application of International Law

What may be the most striking feature procedurally is the very indirect application of international law rules in private litigation. International law is applied but very much determined by the context. Two typical applications of these indirect applications of international rules and standards may be found when sanctions or expropriation against foreign countries are decisive before national courts.

6.2.2.1 Sanctions

Sanctions have recently become of great importance in international relations.[36] They are meant to disrupt private economic relations. Contractual obligations are meant to be severed or terminated and may not be fulfilled under a sanctions regime. Sanctions may have their roots in Article 41 of the United Nations Charter and with it the authority of the Security Council or they may just be unilaterally imposed by one or more states. Notably the United States has a long tradition of unilateral sanctions which has led to some litigation of relevance here.[37] Superimposed by the UN or the US, sanctions must be considered by courts when economic relations between private entities are at stake. The freezing of bank accounts interferes with the contractual relationship between a bank and its customers at the heart of which is the obligation of the bank to repay its debt (or the other way around as the case may be). Delivery of goods, payment for received goods or banking guarantees may be an issue and normal legal relationships may necessarily be severely harmed by sanctions. The approach to these issues in this context should be to analyse the final procedural impact of sanctions. However, sanctions originate either directly in international law when imposed by the UN Security Council or in major US foreign policy interests when imposed unilaterally. The former group of sanctions pose serious questions in relation to judicial review before national courts and the ECJ and should be dealt with separately from the international implementation of US sanctions which raise very different questions to be addressed later.

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[35] Para. 41 of the judgment.

[36] The ideas on sanctions expressed here had been developed earlier in a response to Andreas Lowenfeld in our joint Fourth Annual Hibernian Law Journal Lecture; see Andreas Lowenfeld "Sanctions and International Law: Connect or Disconnect ?" (2003) 4 Hibernian Law Journal 1; Gernot Biehler "Legal Limits to International Sanctions" (2003) 4 Hibernian Law Journal 15.

[37] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 890.

6.2.2.1.1 UN Sanctions

Since the stalemate of the superpowers ended in 1990 the United Nations Security Council has authorised more and more sophisticated kinds of actions identifying not only states or regimes but numerous individuals as targets of so called "smart" sanctions.[38] The United States as the most potent actor on the international scene may be seen as the principal author of this action and it has also implemented a great variety of measures unilaterally. Economic measures for political ends[39] are often portrayed as a preferred alternative to the use of military force or simply doing nothing. Certainly, it seems persuasive to compare sanctions with military force or with general inactivity on the international plane which for a long time paralysed UN security policy reflecting the stalemate between the then dominant superpowers. Neither option appears too attractive. Presented as the only other way out in a given scenario the solution seems inevitably to be sanctions particularly when these are labelled as "smart". However, it is important to scrutinise carefully this favourable approach to sanctions on its own merits. Do sanctions conform to standards and values embodied in international law, in particular humanitarian values? What are the main underlying considerations which advocate or refute them? Who is actually responsible for improving a situation found not to conform to certain international law standards? Is it the implementing state, the Security Council, its Sanctions Committee or when applicable the European Union? To shed light on some of these questions two issues must be addressed; human rights and the sanctions' regimes and individuals indirectly hurt by the implementation of sanctions frustrating their payments or the performance of contracts entered into before the sanctions were endorsed.

Sanctions and Human Rights are currently often discussed in the context of so-called "humanitarian intervention". This is not meant to denote the intervention as humanitarian but an effort to achieve a more favourable situation through military intervention. An otherwise illegal means, the use of force, is held by many to be justified in view of its aims. The landmark example remains the air raids on Belgrade in early 1999.

Here the reverse situation will be considered; legal sanctions should be weighed against their detrimental humanitarian effects. Can actions be legal under international law if they cause humanitarian suffering not justified save by their ulterior political aims? How far may sanctions legally subject the population and their humanitarian needs to political ends?

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[38] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 708 provides a list of all sanctions following the end of the cold war.

[39] Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 847 provides this broad definition of sanctions in international law; *Trade Controls for Political Ends* (2nd ed., 1983) is the title of his first book on the issue which outlines the different characters and political backgrounds of trade sanctions *e.g.*, between the former Soviet Union and the US and the "trade wars" between the EU and the US.

Sanctions have been severely criticised on these grounds. The General Assembly has given a critical account of the detrimental humanitarian effects of the Iraq sanctions and their contradiction of international humanitarian standards on behalf of the UN Economic and Social Council.[40]

The most striking attacks against the United National sanctions against Iraq between the first and second Iraq war were launched by UN organs and UN officials themselves. The then UN Humanitarian co-ordinators in Iraq, the Irish former Assistant Secretary General of the UN, Dennis Halliday, and his successor Count Hans Sponeck[41] quote "Caritas", "Save the Children" and "UNICEF" in support of their contention that "the current policy of economic sanctions has destroyed society in Iraq and caused the death of thousands, young and old."[42] This criticism is based on the UN Secretary General's statement to the Security Council that "the humanitarian situation in Iraq poses a serious moral dilemma … we are accused of causing suffering to an entire population … we are in danger of losing the argument … about who is responsible for this situation in Iraq – President Saddam Hussein or the United Nations."[43]

Assuming there was or may have been some serious suffering in Iraq which may have been caused by sanctions, it has to be acknowledged that the internal Security Council Sanctions Committee procedures, for example, "food for oil" or the individual granting of permission to supply goods which are needed, did not always address these humanitarian needs satisfactorily. There may be a conflict between some sanctions' political aim, for example, to weaken the Iraqi government and the possibly devastating humanitarian effects of the sanctions. It would be frustrating to style these effects as the price to be paid for the political aims endorsed by the Security Council. Such reasoning would provide a blanket justification for those exercising physical power for all measures violating international legal standards.

Admittedly, measures adopted according to Article 41 of the United Nations Charter are to be carried out by the member states in accordance with the present Charter as provided for by Article 25 UNC. The general prohibition against interfering with the domestic jurisdiction of states in Article 2 para. 7 UNC will be overcome by its express provision that enforcement measures under Chapter VII shall not be prejudiced.[44]

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[40] UN General Assembly, Doc. E/cn.4/Sub.2/2000/33: "The adverse consequences of economic sanctions on the enjoyment of human rights". This report was drafted by Prof. Bossuyt from Belgium and adopted by the Economic and Social Council of the General Assembly on the recommendation of its Human Rights Committee.

[41] See their joint article in *The Guardian,* 29 November 2001 "Former UN relief chiefs Hans von Sponeck and Dennis Halliday speak out against an attack on Iraq".

[42] Halliday and Sponeck, in *The Guardian,* 29 November 2001.

[43] Discussing the humanitarian needs in Iraq, UN Document SG/SM/7338, SC/6834.

[44] Lowenfeld, *International Economic Law*, p. 855 quotes the provision in detail in footnote 2; he also provides a most excellent overview on "Iraq and the Role of Sanctions" p. 871, which goes much further in terms of analysis than is provided here.

Let us assume the Security Council did not foresee the human rights consequences of its sanctions. Was the Security Council in a position to remedy this situation when it was informed by the Secretary General of the undesirable results in this case? Article 41 UNC does not make any provision for the ending of sanctions nor do the resolutions of the Security Council. It is held therefore that a sanction resolution can be terminated only by another resolution adopted in accordance with the Security Council's normal voting procedure. All permanent members are allowed to veto such a resolution. This means if only one of the five permanent members has a political interest in upholding the sanctions they can be neither amended nor terminated. The Iraq sanctions provide a leading example as they were adopted explicitly in connection with the illegal occupation of Kuwait in 1990 but continued in force after this reason ceased to exist.[45] Other reasons, for example the alleged existence of Iraqi weapons of mass destruction[46] did not provide some of the permanent five members with a reason to continue with the sanctions, however, they were not able to change the course of the sanctions. France and Russia, backed by a clear majority of states urged the termination of the sanctions during the second half of the nineties. The voting procedure and the US insistence[47] on continuing with the sanctions did not allow for that.

However, certain exemptions and moderations in the application of sanctions were permitted by the Security Council's Sanctions Committee under the "oil for food" programme. All members were free to apply for certain exemptions and some prohibitions seem to have been to some extent negotiable.[48] The "oil for food" programme, although so heavily criticised by the then UN humanitarian representatives in Iraq, was set up to meet, *inter alia*, humanitarian needs under the sanctions regime. It should be acknowledged that some of those needs were met by the Sanctions Committee's procedure. Others were probably not. The Committee is a political body as is the Security Council. Its decisions reflect the political strengths and weaknesses of its members. The proposal of a German company to provide some water supply equipment might not obtain the approval of the Com-

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[45] SC Res. 661 of 6 August 1990 is the basic resolution in this context and provides that its purpose is "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."

[46] Hans Blix, *Disarming Iraq, the Search for Weapons of Mass Destruction*, 2004. The chief UN weapons inspector at the time of the Iraq sanctions and the US/UK led invasion describes the stances of Blair, Chirac and Bush in his account on the issue; summary in *The Independent*, 8 March 2004, p. 17.

[47] The then US Secretary of State Albright said in May 1998: "The fact that Iraqi children are dying is not the fault of the US but of Saddam Hussein … It is ridiculous for the United States to be blamed for the dictatorial and cruel, barbaric ways that Saddam Hussein treats his people." Quoted from Gregory Gause; "Getting It Backward on Iraq" (1999) 78 Foreign Affairs 54.

[48] Lowenfeld, *loc.cit*. p. 871 *et seq*. gives some examples *e.g.* granting permission to fly over Iraqi territory for the Muslim pilgrimage in Saudi Arabia which would have been prohibited under the Iraq sanctions regime.

mittee because of some US competitor.[49] To sum up, the Security Council sanctions procedure is a political process which could not claim to resolve conflicting human rights considerations and sanctions implementation according to legal standards from the perspective of an objective bystander.

It is to be concluded that the Security Council does not have a mechanism which sufficiently balances human rights and concerns in the implementation of sanctions. The efforts of the Secretary General, the General Assembly or the UN representatives in Iraq in trying to make an impact[50] were not too successful. How could the conflicting aims be realigned, who could weigh these up?

Usually, weighing conflicting legal obligations[51] is the task of a court of law if this balancing process can be achieved by the application of legal standards. The obligation to implement sanctions and to adhere at the same time to human rights standards are certainly legal obligations of states under international law.

The International Court of Justice in The Hague may entertain the claims of states against other states but would not be competent to directly revise actions of the United Nations. The open challenge of Security Council sanctions by Libya in the *Lockerbie* case before the ICJ brought a confirmation of this situation although it is claimed by some that the ICJ reviewed some Security Council resolutions by affirming their validity.[52] No other judicial authority under international law may decide on the legality of Security Council sanctions. Its acts do not lend themselves too readily to judicial review.[53] This would also be true in relation to regional or unilateral sanctions.

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[49] In this case the fervent support of the German government for the proposed contract was certainly enhanced by the fact that the company provided employment in the constituency of one of the leading politicians and supporters of Chancellor Schroeder in the Bundestag. The US opposition to this contract in the Committee, backed by its government's veto power, may have had comparable reasons as seemingly no connection between the denial of permission and the aims of the sanctions could be reasonably established. The example given by Lowenfeld, *loc.cit*. p. 850, footnote 5, that the strongest proponents of sanctions were some domestic US producers who wanted to keep the sanctioned country's exports out of the US, may be summed up in his words: "sometimes motives are mixed".

[50] Two of them, Halliday and Sponeck, resigned because they felt frustrated by the futility of their attempts to bring in human rights considerations in order to balance some of the sanctions' harsh effects on the population.

[51] Assuming that there is a legal obligation on the member states of the United Nations to adhere to the human rights standards and that it is doubtful whether the effects of the sanctions were in line with this obligation. For the sake of argument Bossuyt's (UN GA ECOSOC) assumptions that violations effected by the sanctions existed shall be taken for granted.

[52] August Reinisch "Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions" (2001) 95 AJIL 851, with detailed references on p. 865 *et seq*.

[53] See Colin Warbrick "The Jurisdiction of the Security Council: Original Intention and New World Order(s)" in Patrick Capps *et al* (eds.), *Asserting Jurisdiction* (Hart Publishing, 2003) p. 127 *et seq*., gives an excellent overview on this question of SC judicial review.

Does that mean that the states' governments carry out the balancing process individually and implement sanctions only in so far as they think it is right to do so. There is a practice in the UK, the US, Jordan, Portugal and South Africa, which may support the contention that states have a certain autonomy to implement sanctions or not to do so if they think that there are considerations adverse to them. When the UK unilaterally announced that it would no longer enforce Security Council sanctions against what was then Rhodesia and the US followed suit, the General Assembly passed a resolution[54] "deploring the moves by certain states to lift sanctions unilaterally" and declared that the sanctions[55] could only be revoked by the decision of the Security Council and "that any unilateral action in this regard would be a violation of the obligation assumed by member states under Article 25 of the Charter". Jordan did not enforce some of the Iraq sanctions during the Iraqi invasion of Kuwait which was of some significance. Jordan is a neighbouring state of Iraq and has considerable trade with it. No steps were taken to seek to force Jordan to comply with the sanctions. There is state practice which suggests that states do not have a discretion in implementing sanctions; France and Russia among others opposed the sanctions against Iraq in the second half of the 1990s in line with the Secretary General's reports on humanitarian grounds that they caused massive damage to the civilian population. These states, however, did not feel entitled to take steps on their own behalf and their political opposition did not cause any visible benefit to the people concerned.

To allow states to decide themselves how far they think the obligation to implement sanctions goes in the light of some humanitarian legal considerations would meet fierce criticism and would obviously undermine the very system of sanctions and render sanctions potentially futile. Winston Churchill's remarks about the then Prime Minister Chamberlain in relation to the useless sanctions of the League of Nations against Italy's invasion of Ethiopia come to mind: "First the Prime Minister had declared that sanctions meant war; secondly, he was resolved that there must be no war; and thirdly, he decided upon sanctions. It was evidently impossible to comply with these three conditions."[56] This is the point of the efficiency of sanctions and it should be taken seriously. They can function only when applied generally. However, this is rather a statement of feasibility than of law. States would not like to see their political aims pursued by powerful sanctions to be diluted by legal considerations assessed by some "objective bystanders" or whosoever. This would certainly meet determined opposition. The international community of governments has therefore made the UN as immune from all legal scrutiny or weighing processes as has ever been possible.[57] Does this really mean that the

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[54] No.192 of 18 December 1979.

[55] Security Council Resolution 253.

[56] Winston Churchill, *The Gathering Storm* (Cassell, 1948) p. 175.

[57] Articles 103, 105 UNC and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, Article II para. 2 in Vol. 1 UNRS p. 16; see a discussion with further references in Reinisch, *Developing Human Rights*, *loc.cit*. p. 866.

effects of sanctions may not be legally reviewed? Two considerations militate against this. The political character of sanctions and their direct effects on the individual who is usually the beneficiary of some fundamental or human rights may lead to a different conclusion. It would be too easy to state that although sanctions may result in effects coming close to the gravest crimes under international law, causing starvation and the death of civilians, and even though the purpose of the sanctions may be no longer valid, the political situation in the Security Council prevents the lifting of these sanctions. The pursuit of political aims may not be the ultimate answer of international law.

Even considering a rather less dramatic scenario, who might be a suitable "objective bystander" to hear the case? Sanctions interfere voluntarily with valid contracts entered into before they came into force. Someone may have delivered some goods to Iraq but not yet received full payment. Even if he has reserved ownership until full payment is made it does not help as all imports and exports into Iraq will cease immediately without exception.[58] Or the other way around; an Iraqi supplier has delivered but not received payment. Can it be an equitable result not to offer any solution? The European Court of Justice declined to provide relief when it concluded:

> "The alleged damage can be attributed … only to the United Nations Security Council Resolution No. 661 (1990) which imposed the embargo on trade with Iraq. It follows from the forgoing that the applicant has not demonstrated the existence of a direct causal link between the alleged damage and the adoption of Regulation No. 2340/90."[59]

With this the ECJ denies national or European responsibility for the implementation of sanctions and their effect on the individual concerned. However, this is a questionable conclusion. Security Council Resolutions address states and bind them according to Article 25 UNC under international law. Their national implementation requires member states to actively co-operate and to participate. As the UK, US, Jordanian, Portugese and South African practice shows, some governments use political discretion to stop applying or not to implement sanctions. At that stage the responsibility of the implementing state towards all people under its authority comes into play. The imperative of the Security Council resolution has to be balanced against other considerations, political and legal. This is shown by US authorities.[60]

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[58] See *Dorsch Consult Ingenieursgesellschaft mbH v Council of the European Union and Commission of the European Communities* (Case T-184/95); 117 ILR 363.

[59] See *Dorsch*, 117 ILR, 363, 388 (para.74); this Resolution 2430/90 was meant to implement Security Council Resolution 661 into national law in this case collectively for the members of the European Communities.

[60] *Diggs v Shultz* 470 F 2d 461 (DC Cir 1972); see Jose Alvarez "Judging the Security Council" (1996) 90 AJIL 1, 12, footnote 64.

There Security Council resolutions mandating sanctions were held to be unenforceable in the light of domestic statute law of more recent origin. This proves beyond doubt the responsibility of the national legal order addressed by the Security Council at the level of international law to assess conflicting legal considerations. This may be done by executive or judicial decisions or by legislation. In any case it has to be done to bring sanctions into a legal context. The need to integrate sanctions into the international legal order necessitates that states balance conflicting legal interests. The governments or courts of either Berlin or Baghdad should have found an equitable solution to enable payment in *Dorsch*.[61]

In *Bosphorus*[62] by virtue of a lease agreement made in April 1992, Yugoslav Airlines (JAT) leased two of its aircraft to Bosphorus which were then registered in the Turkish Register of Civil Aviation, thus rendering them Turkish without affecting JAT's ownership. One of the planes arrived in Dublin in April 1993 for the carrying out of maintenance work. The Irish government issued instructions in May 1993 that "the aircraft was to be stopped" according to EC Regulation 990/93 of the same year which incorporated the United Nations Security Council Resolution 820/1993 prohibiting trade with what was then Yugoslavia according to Article 41 of the United Nations Charter. The New York UN Sanctions Committee notified Ireland that the aircraft fell within the terms of these provisions. A judicial saga began which left the essential question of judicial review of the sanctions on the merits unanswered.[63]

The Irish High Court held that the United Nations resolutions did not form part of Irish domestic law, the Security Council Resolution did not bind the court and in relation to the finding of the Security Council Committee concluded that "the unexplained conclusion of the United Nations Sanctions Committee was of no value to the court." The majority and controlling interest in the aircraft was held by the applicant alone and so Murphy J held that the sanctions did not apply.

However, in view of its desire to formally comply with the sanctions requirements from an international perspective[64] the government appealed against the re-

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[61] *Dorsch Consult Ingenieursgesellschaft mbH v Council of the European Union and Commission of the European Communities* (Case T-184/95); 117 ILR 363.

[62] *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).

[63] Biehler "Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement" (2006) 28 DULJ 317; in the context of the conflict of judicial levels both national and international, the case is treated more thoroughly in Chapter 9 of this book.

[64] The written submissions in the Strasbourg case lead us to assume that the owner of Bosphorus, Mr Ozbay, had considerably alienated part of the government so that it would not agree that he was a *bona fide* applicant in the matter although the court subsequently confirmed him to be such.

lease of the plane to the Supreme Court[65] which in turn according to Article 234 EC referred the question to the ECJ of whether the sanctions applied to Bosphorus. The ECJ answered this question in the affirmative, considering itself bound in making this decision by the Security Council Sanction Committee's decision to the same effect. Imposing its own reading of the Security Council sanction instead of that of the competent national court the Luxembourg court made it impossible to consider any judicial review on the merits of such highly political measures severely inhibiting property rights and access to the court. The rather bizarre reasoning of the ECtHR in this case that these rights must generally be seen as safeguarded by the ECJ (although not one word of the ECJ judgment available to the ECtHR considered any of Bosphorus' possible property or judicial review rights) left the applicant without anything remotely close to judicial review and implicitly established the extra-judicial character of Security Council sanctions. It must be admitted that this is in the ultimate interest of sanctions and of those who are able to impose them, being the executive governments of the most powerful states assembled in the Security Council notably the United States. From the perspective of the (possibly erroneously) targeted individual plaintiffs this seems untenable.

The latter position was elaborated on by the Advocate General of the ECJ in the pending case of *Kadi*.[66] Kadi has been listed by the US through the Security Council[67] and his assets have been frozen now for many years leaving him virtually without means and without any substantial judicial review. The Advocate General of the ECJ stated as follows:

> "50. The respondents argue, however, that in so far as there have been restrictions on the right to be heard and the right to effective judicial review, these restrictions are justified. They maintain that any effort on the part of the Community or its Member States to provide administrative or judicial procedures for challenging the lawfulness of the sanctions imposed by the contested regulation would contravene the underlying Security Council resolutions and therefore

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[65] The facts are represented here in a slightly simplified manner as there had been not one but two High Court and two Supreme Court decisions and to distinguish them would not contribute to the issue dealt with here.

[66] *Kadi v EU*, ECJ (Case C-402/05). See the judgment of the Court of First Instance of 21 September 2005 *Kadi v Council and Commission* (Case C-315/01). The opinion of the Advocate General is of 16 January 2008. The long period since (I write this at the end of June 2008) without any decision of the ECJ is unusual and invites speculation about the reasons for the delay which may relate to the strong executive interest in avoiding judicial review on the merits.

[67] Biehler "Individuell Sanktionen der Vereinten Nationen und Grundrechte" (2003) 41 *Archiv des Völkerrechts* 169; describing at p. 172 the "blacklist" and the procedures employed in listing at the Security Council through the then US Office of Foreign Assets Control. This is possibly one of the first publications addressing the issue. The legal questions then identified have not been answered yet.

jeopardise the fight against international terrorism. In consonance with that view, they have not made any submissions that would enable this Court to exercise review in respect of the specific situation of the appellant.

51. I shall not dwell too much upon the alleged breach of the right to be heard. Suffice it to say that, although certain restrictions on that right may be envisaged for public security reasons, in the present case the Community institutions have not afforded any opportunity to the appellant to make known his views on whether the sanctions against him are justified and whether they should be kept in force. The existence of a de-listing procedure at the level of the United Nations offers no consolation in that regard. That procedure allows petitioners to submit a request to the Sanctions Committee or to their government for removal from the list. Yet, the processing of that request is purely a matter of intergovernmental consultation. There is no obligation on the Sanctions Committee actually to take the views of the petitioner into account. Moreover, the de-listing procedure does not provide even minimal access to the information on which the decision was based to include the petitioner in the list. In fact, access to such information is denied regardless of any substantiated claim as to the need to protect its confidentiality. One of the crucial reasons for which the right to be heard must be respected is to enable the parties concerned to defend their rights effectively, particularly in legal proceedings which might be brought after the administrative control procedure has come to a close. In that sense, respect for the right to be heard is directly relevant to ensuring the right to effective judicial review. Procedural safeguards at the administrative level can never remove the need for subsequent judicial review. Yet, the absence of such administrative safeguards has significant adverse affects on the appellant's right to effective judicial protection.

52. The right to effective judicial protection holds a prominent place in the firmament of fundamental rights. While certain limitations on that right might be permitted if there are other compelling interests, it is unacceptable in a democratic society to impair the very essence of that right. …

53. The appellant has been listed for several years in Annex I to the contested regulation and still the Community institutions refuse to grant him an opportunity to dispute the grounds for his continued inclusion on the list. They have, in effect, levelled extremely serious allegations against him and have, on that basis, subjected him to severe sanctions. Yet, they entirely reject the notion of an independent tribunal assessing the fairness of these allegations and the reasonableness of these sanctions. As a result of this denial, there is a real

> possibility that the sanctions taken against the appellant within the Community may be disproportionate or even misdirected, and might nevertheless remain in place indefinitely. The Court has no way of knowing whether that is the case in reality, but the mere existence of that possibility is anathema in a society that respects the rule of law.
>
> 54. Had there been a genuine and effective mechanism of judicial control by an independent tribunal at the level of the United Nations, then this might have released the Community from the obligation to provide for judicial control of implementing measures that apply within the Community legal order. However, no such mechanism currently exists. As the Commission and the Council themselves have stressed in their pleadings, the decision whether or not to remove a person from the United Nations sanctions list remains within the full discretion of the Sanctions Committee – a diplomatic organ. In those circumstances, it must be held that the right to judicial review by an independent tribunal has not been secured at the level of the United Nations. As a consequence, the Community institutions cannot dispense with proper judicial review proceedings when implementing the Security Council resolutions in question within the Community legal order.
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> 55. It follows that the appellant's claim that the contested regulation infringes the right to be heard, the right to judicial review, and the right to property is well founded. The Court should annul the contested regulation in so far as it concerns the appellant."

The use of the word "anathema" here by the Advocate General is telling.

It must be noted that in an order of 27 April 2008 the ECJ granted leave to three executive governments at this late stage to intervene to oppose the Advocate General's views. One is a veto power of the Security Council itself. Needless to say they do not hurry and no statement has yet been received by the ECJ.[68]

UN sanctions are likely to cause inconvenience to some courts for some time to come. The refreshing contrast of the US jurisprudence in *Diggs v Shultz*[69] to what has been described here is not forgotten.

6.2.2.1.2 US Sanctions Internationally Applied

Currently, the US Department of Treasury Office of Foreign Assets Controls maintains economic sanctions programmes (asset freezing) applicable to the Western Balkans, Belarus, Burma (Myanmar), Ivory Coast, Congo (Kinshasa), Iran, Iraq, former Liberian Regime of Charles Taylor, North Korea, Sudan, Syria

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[68] As of the end of May 2008.

[69] *Diggs v Shultz* 470 F 2d 461 (DC Circuit 1972); cert. den. 411 US 931 (1972). ("Byrd Amendment").

and Zimbabwe. The US Department of Commerce Export Administration maintains export/import controls in relation to Cuba, Iraq, North Korea, Iran, Rwanda and Syria.[70]

All these measures are meant to apply internationally and to interfere with private or commercial relationships between individuals and companies. They are not unique to the US as other states have also imposed sanctions at a national level. This was done, for example, by the UK, Canada, Australia and New Zealand against Argentina and vice versa during the Falklands conflict in 1982 or by states implementing cold war sanctions before 1990 against the then communist bloc.[71] However, currently the measure and sophistication of sanctions is rather unique to the US. Litigation before the US courts challenging these measures is non-existent as the sanctions are legally based in national law and may hardly be tried generally.

However, the US government directed US banks in London and elsewhere to refuse to honour payment or withdrawal orders from entities identified by the US sanctions, for example, Iranian account holders. This amounts to a jurisdictional challenge comparable to those dealt with in another context in this book,[72] notably in *X AG v B Bank*.[73] What had been said there was repeated in *Libyan Arab Foreign Bank v Bankers Trust Co*,[74] where the issue was dealt with according to principles of private international law. The facts of this case were as follows. At 4 pm on 8 January 1986 the President of the United States of America signed an executive order freezing all Libyan property in the United States or in the possession or control of United States persons including overseas branches of United States persons.[75] The Libyan Arab Foreign Bank as plaintiff demanded payment of US$131m, the balance standing to the credit of the London account at the close of business on 8 January 1986 and a further US$161m on

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[70] See the websites of these organisations; Lowenfeld, Andreas F., *International Economic Law* (2nd ed., OUP, 2008) p. 892, footnote 9.

[71] For those more advanced in age the COCOM in Paris which co-ordinated these sanctions among the Western States is a vivid memory still. See Adler-Karlsson, *Western Economic Warfare 1947-1967* (McGraw Hill, New York, 1968).

[72] Chapter 4.4.

[73] [1983] 2 All E R 465.

[74] [1989] QB 728.

[75] "I, Ronald Reagan, President of the United States, hereby order blocked all property and interests in property of the Government of Libya, its agencies, instrumentalities and controlled entities and the Central Bank of Libya that are in the United States that hereafter come within the United States or that are or hereafter come within the possession or control of U.S. persons including overseas branches of U.S. persons. The Secretary of the Treasury, in consultation with the Secretary of State, is authorized to employ all powers granted to me by the International Emergency Economic Powers Act 50 U.S.C. 1701 et seq. to carry out the provisions of this Order. This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register. Ronald Reagan The White House 8 January 1986".

the basis that that sum should have been transferred from the New York to the London account on 8 January. The defendant, the Bankers Trust Co, refused to pay contending that it would be impossible for them to make any payment to the plaintiffs without committing an illegal act in the United States. The plaintiffs commenced proceedings before the English High Court, claiming the sums in debt or damages. The court held *per* Staughton J

> "There is no dispute as to the general principles involved. Performance of a contract is excused if (i) it has become illegal by the proper law of the contract, or (ii) it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done. I need cite no authority for that proposition since it is well established and was not challenged. Equally it was not suggested that New York law is relevant because it is the national law of Bankers Trust, or because payment in London would expose Bankers Trust to sanctions under the United States legislation …"[76]

However, he concluded that the proper law of the contract was English law and thus with reference to *X AG v A Bank*[77] held the US decree not to be applicable to it.

6.2.2.2 Expropriation

Confiscations and expropriation are usually connected with some regime change in a country and the original expropriated owner is usually the applicant against a beneficiary of the expropriation where its proceeds are within the reach of another forum. Both possible positions of either disregarding or upholding the effects of the expropriation have been reasoned in *Luther v Sagor* in both the High Court and the Court of Appeal.[78] At issue were confiscations by the Soviet Union which were not recognised by the United Kingdom. A plethora of cases followed the reasoning of *Luther v Sagor* virtually giving effect to such expropriations. The latest is a fascinating case concerning the expropriation of some multi national oil interests by the Chavez government of Venezuela and the handling of it by the English High Court in *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA*.[79] The full set of judicial means and safeguards reflecting 90 years of experience of commercial enterprises with expropriations including freezing orders, arbitrations and bank guarantees is reflected in this case. However, the basic reasoning which gives effect to the expropriating measures is virtually unchanged since *Luther* which makes it unnecessary to cover any of the cases in too much detail including celeb-

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[76] [1989] QB 728, 743.

[77] [1983] 2 All ER 465.

[78] [1921] 1 KB 456; [1921] 3 KB 532.

[79] [2008] EWHC 532 (Comm), 20 March 2008.

rities such as *Sabbatino*[80] (Cuban expropriations before US courts) or the *Bremer Tabakfall*[81] (Indonesian expropriations before the German and Dutch courts).

However, almost as current as *Mobil Cerro Negro Ltd v Petroleos de Venezuela SA* and possibly more fertile in relation to the implementation of substantive international law diverting from the *Luther* "avoidance of substantive international law to the benefit of international relations" line of argument is *National Unity Party v TRNC Assembly of the Republic.*[82] It may indicate a further development in the area and it is therefore proposed to cover it more thoroughly as it has not found the appropriate attention yet elsewhere.[83]

At the core of the dispute is Article 159/1–b and c of the TRNC Constitution of 1985 which reads:

> "All immovable properties, buildings and installations which were found abandoned on l3th February, 1975 when the Turkish Federated State of Cyprus was proclaimed […] shall be the property of the Turkish Republic of Northern Cyprus notwithstanding the fact that they are not so registered in the records of the Land Registry Office; and the Land Registry Office records shall be amended accordingly."

This provision was meant to expropriate the property of Greek Cypriots who were resettled to the Republic of Cyprus in the south of the island after the Turks took control in Northern Cyprus after 1974. However, until 1995, the TRNC authorities carefully avoided any direct expropriation by issuing only a type of "possessor certificate" which did not transfer title of these properties to Turkish Cypriots using the abandoned houses of the Greek Cypriots. This changed in 1995 when title was transferred to Turkish Cypriots triggering dispossessed Greek Cypriots to apply to the European Court of Human Rights (ECtHR) against Turkey in relation to

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[80] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).

[81] *Vereneigde Deli-Maatschppijen v Deutsch-Indonesische Tabak Handelsgesellschaft mbH*, decision of the Oberlandesgericht Bremen (Court of Appeal of Bremen, Germany) of 21 August 1959, translated partly by Martin Domke, "Indonesian Nationalisation Measures before Foreign Courts" (1960) 54 AJIL 305, 313 *et seq*.; however see the Dutch decision of the Amsterdam Court of Appeal with a different outcome *Senembah Maatschappij NV v Republiek Indonesie Bank Indonesia and De Twentsche Bank NV,* decision of 4 June 1959, 1959 Nederlandse Jurisprudentie 850.

[82] Annulment Lawsuit under Article 147 of the Turkish Republic of Northern Cyprus Constitution, Supreme Court sitting as Constitutional Court, Judgment D 3/2006 of 21 June 2006. The original language is Turkish, a translation of parts of the judgment is reported in "International Law in Domestic Courts" ILDC 499 (internet service of Oxford University Press), which is taken as the basis of this comment.

[83] Biehler "Property Rights for Individuals under International Humanitarian Law" (2007) 45 *Archiv des Völkerrechts* 432. The discussion of the TRNC case here is mainly based on my comments in this article.

their property rights in the TRNC.[84] The ECtHR attributed international responsibility for Convention violations in Northern Cyprus to Turkey, due to its overall effective control in this part of the island. With this decision the ECtHR strongly indicated that this was a situation which may give rise to the application of the international humanitarian law of occupation as codified in the Hague Convention (IV) of 1907 and its safeguard of private property in Article 46. With a view to meeting the standards set out in the ECtHR's judgments,[85] the TRNC Parliament passed a Property Law on Compensation, Exchange and Return of Immovable Properties to Greek Cypriots in 2005 providing for different types of redress such as compensation (in lieu of return of their properties and/or for their loss of use), exchange of property, or restitution of their original properties. It must be noted that the ECtHR itself is only competent to express itself on the European Convention on Human Rights which is a human rights instrument. Therefore, the ECtHR did not expressly decide whether the Hague Convention IV and humanitarian law was applicable. However, by accepting Turkey as the defendant in the cases brought forward by the Greek Cypriots, the ECtHR implicitly admitted that Turkey was internationally responsible for the dispossessions in the TRNC which means that she exercised effective control in a foreign territory. These are exactly the preconditions which trigger the application of the law of occupation (*ius in bello*) as codified, *inter alia*, in Article 46 of the Hague Convention IV. To put it the other way around; Turkey could not be a defendant before the ECtHR if it were not to be held responsible internationally for acts happening in the TRNC.

The main opposition party (Ulusal Birlik Partisi–UBP) in Northern Cyprus filed an application to the TRNC Constitutional Court against this Property Law returning Greek Cypriot property arguing that it was unconstitutional as Article 159 of the TRNC Constitution declared the property of displaced Greek Cypriots to be state property. In the hierarchy of norms, the Constitution had the highest position, and neither legislation nor international law prevailed over it. Therefore, it was argued, the Property Law should not be able to undo the constitutional provisions which were explicit and unequivocal in expropriating the displaced Greek Cypriots. So the Constitutional Court was faced with the option of either upholding the 2005 Property Law which met standards of international law but disregarded Article 159 of the TRNC Constitution or applying the latter and with it violating international law. This conflict made this decision highly significant in determining the relationship between national (constitutional) and international

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[84] *Loizidou v Turkey* (Preliminary Objections, 23/03/1995; Application No. 40/1993/435/514) and more generally *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94), *Xenides–Arestis v Turkey* (admissibility decision, 14/03/2005; Application No. 46347/99).

[85] The main motive of the TRNC Court may have been to structure the TRNC legal procedures in such a way that they would be accepted as valid domestic remedies barring direct individual access to ECtHR jurisdiction until their exhaustion (Article 15 ECHR). In *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94) para. 102 the ECtHR elaborated that "for the purposes of the […] convention, remedies available in the 'TRNC' may be regarded as 'domestic remedies' of the respondant state (Turkey)".

law, what the current international (customary) law actually is in relation to private property expropriated under the effective control of a foreign power (occupation) and finally what status as a source of international law according to Article 38.1 of the Statute of the ICJ a non-recognised state's court's decision such as this would have in international law.

The court in determining the relationship between national (constitutional) and international law presented the view of the traditional primacy of international law starting from Article 27 of the Vienna Convention on the Law of Treaties which reads:

> "A party may not invoke the provision of its internal law as justification for its failure to perform a treaty …"

This general claim to primacy which is usually understood to comprise both treaties and custom is certainly anything but generally accepted by national laws. Some national courts faced with such a conflict between an international law obligation and a national (statutory) law would rather argue the preponderance of at least national constitutional or statutory provisions over any kind of international law.[86] Therefore, this judicial holding on a direct conflict between Article 159 of the TRCN Constitution and international law is remarkable as it is probably one of the first direct conflicts of a constitutional provision with international law addressed and decided by a court. It contrasts nicely with other courts' avoidance techniques[87] in the case of such conflicts.[88]

The decision of the TRNC Constitutional Court to give priority to international law over the constitutional provision in Article 159.4 was based[89] on a holding of the PCIJ relating to Polish Nationals in Danzig.[90] It reads:

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[86] For the USA, *Diggs v Shultz* 470 F 2d 461, cert. den. 411 US 931 (1972); for the UK, *Mortensen v Peters* (1906) 8 F (J) 93; for Ireland, *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97; for Germany, Land-Gericht Hamburg (Chilean Copper Case) in *Aussenwirtschaftsdienst* 1973, p. 163; *Kunig in Vitzthum* (ed.) *Völkerrecht* (3rd ed., 2004) *Völkerrecht und staatliches Recht*, para. 152, p. 137 *et seq*.: "Es gibt jedoch keinen Anhaltspunkt dafür, dass das Grundgesetz sich selbst unter den Vorbehalt seiner Nichtkollision mit allgemeinem Völkerrecht stellen würde."

[87] The term is borrowed from Hazel Fox "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States, in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 363.

[88] The Bundesverfassungsgericht/German Federal Constitutional Court in BVerfGE 84, 90 *et seq*. was faced with a similar conflict between international legal property rights of dispossessed owners under foreign occupation and the German Constitution's Article 143.3. guaranteeing this expropriations similar to Article 159.4 of the TRNC Constitution. It upheld the constitutional provision and just decided not to address the conflict with international law before it.

[89] Para. 72 (concerning Article 27of the VCLT) and para. 54 (concerning the customary rule as expressed in the PCIJ Polish Nationals in Danzig case) of the judgment.

> "[…] a State cannot adduce as against another State its own Constitution with a view of evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig."

This case lends itself favourably to be applied in the circumstances of the TRNC. The minority rights and the status of Polish nationals in the then internationalised area of the Free City of Danzig[91] was decided on the basis of international stipulations as opposed to conflicting domestic rules. The TRNC Constitutional Court felt that this approach should be equally applied to the Greek Cypriot minority in Northern Cyprus. With it the court decided in a principled way to favour international law over its explicit constitutional provision.

On the substantive law issue of what the current international (customary) law actually is in relation to private property expropriated under the effective control of a foreign power (occupation), the court restated Article 46 of the Hague Convention IV that immovable private property in a territory under military control cannot be appropriated by the invading belligerent.[92] Displaced persons, therefore, must still be regarded as owners of their land. Although the TRNC is not recognised internationally and is thus prevented from entering obligations by becoming a member of international treaties its international obligations at the time of the beginning of the occupation in 1974 remain in force and the TRNC is obliged to follow the rules of customary international law. Article 46 of the Hague Convention IV reflects current customary law and was therefore applied by the court.[93]

It needs no further elaboration to say that this judgment is most welcome. It strengthens international law in relation to conflicting national constitutional provisions, confirms its applicability even in special circumstances such as, for example, the non-recognised status of the TRNC and applies Article 46 of the Hague Convention IV as customary international law. It remains to address the issue of the legal value that this decision of a non-recognised state's court would have as a source of international law according to Article 38.1 of the Statute of the ICJ.

The ECtHR has held Turkey internationally responsible for what happened in the TRNC.[94] Turkey was understood to be in effective overall control of the terri-

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[90] PCIJ Rep, Ser A/B No. 44, p. 24.

[91] Which was integrated into Poland after 1945 losing its independent status defined in the Versailles Treaty of 1919 and has since been known as Gdansk.

[92] Para. 30 of the judgment.

[93] Para. 37 of the judgment.

[94] *Loizidou v Turkey* (Preliminary Objections, 23/03/1995; Application No. 40/1993/435/514) and more generally *Cyprus v Turkey* (Merits, 10/05/2001; Application No. 25781/94); *Xenides–Arestis v Turkey* (Admissibility Decision, 14/03/2005; Application No. 46347/99).

tory and given her responsibility all acts of the TRNC authorities were considered to be legally relevant internationally despite the non-recognition of the territory's independence. This is in line with judicial practice towards acts of non-recognised states; the hitherto non-recognised East Germany was accorded legal status before English courts in the 1960s as "an agency of the Soviet Union" which was considered internationally responsible for acts of the East German authorities.[95] The same rationale was applied later to the Ciskei, a former non-recognised South African homeland, by according its acts legal value by upholding the ultimate responsibility of South Africa for all Ciskei acts likening it to the then East Germany with the same result whereby South Africa was held internationally responsible for the legal acts of the Ciskei authorities.[96] This view does not leave legal black holes in international law but looks to the effective control exercised in a given territory. Particularly, it guarantees that international law is applicable irrespective of the status of a territory which is significant wherever troops act abroad and create legal uncertainty. Only the occupied Palestine territories, Iraq, Guantanamo Bay (Cuba), Diego Garcia (Maldives), Transdnistria (Moldova), Kosovo or Afghanistan need be mentioned in order to indicate how significant it is to have accepted international customary law allocating responsibility to those in power and defining the rules applicable in them when considering acts of expropriation.

Remarkably, the TRNC Constitutional Court accepts this view implicitly by applying international humanitarian law and with it recognising that the TRNC is "a territory under military control where private property cannot be appropriated by the invading belligerent."[97] This terminology clarifies that the Court did not just mean to refer to the 1st Add. Protocol of the ECHR as a human rights instrument but based its judgment on humanitarian law (*ius in bellum*) which it held to be primarily applicable. With this categorisation the Court implicitly admitted that the law of occupation applied in the TRNC, thereby admitting that Northern Cyprus was indeed occupied by Turkey and that the latter may be held responsible internationally. This distinction between the 1st Add. Protocol of the ECHR (human rights) and Article 46 of the Hague Convention IV (humanitarian) is very significant although the substantive content of both rules are identical in the given context; acts of expropriation must not be upheld. It may have been the ulterior motive of the TRNC authorities and their Constitutional Court to come to terms with the ECtHR and the human rights standards set out in the 1st Add. Protocol, however, the court relied rightly on humanitarian law as opposed to human rights. This is because the rules of humanitarian law when applicable may take precedence over all other laws normally applicable and may pre-empt any application

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95 *Carl Zeiss Stiftung v Rayner & Keller Ltd* [1967] 1 AC 853.

96 *Gur Corporation v Trust Bank of Africa* [1987] QB 599.

97 Para. 30 of the judgment.

of all the remaining laws including human rights if the necessities of occupational control and order so require.[98]

Both from the TRNC and from the international perspective the practice of returning property to dispossessed Greek Cypriot owners as confirmed in the decision must be considered to be state practice of Turkey and her "agent" the TRNC. The other component necessary to create customary international law according to Article 38.1.b of the Statute of the ICJ is that this state practice is accepted as law (*opinio iuris*). There is rarely a better way of expressing a state's acceptance of a practice as law than a final decision of its highest court. Therefore, the decision creates and confirms international customary law despite the fact that it was handed down by an internationally non-recognised state's court. Besides its role in creating and confirming international customary law this judicial decision may be defined as a subsidiary means for the determination of the rules of international law under Article 38.1.d of the Statute of the ICJ. The decision caries particular weight as it is handed down by a court of a country which exercises effective (occupational) control and would usually neither have an interest in allowing conflicts of this kind to be decided judicially nor advocate the application of stringent limits of international law as codified in the Hague Conventions to their executive government's activities. This suggests that it is self evident that the decisions will be followed and implemented so that they reflect state practice accepted as law. Therefore, they are indicative of and give evidence of current customary international law according to Article 38.1.b of the Statute of the ICJ. This is particularly relevant as the adherence to the rule now so resoundingly confirmed suffered some setbacks in the aftermath of World War II before courts of countries benefiting from confiscated property[99] until the decision in *Liechtenstein v Germany* before the ICJ.[100] The TRNC expropriation case before a national court may indeed hint that the international legal practice of courts concerning expropriation is developing.

6.2.3 Individuals and States

While traditionally states are considered to be the main subjects of international law the status of individuals relying on international law before both national and international courts is emerging. Primarily, it is in the field of human rights that numerous adjudicative bodies such as the IACtHR, the UNHRC or the ECtHR grant access to the individual plaintiff. In addition international rules not only

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[98] An excellent elaboration of this preponderance of humanitarian standards over human rights and related claims in tort and the fine distinction between both fields of law by Elias J may be found in *Bici v Minister of Defence* [2004] EWHC 786 (QB), particularly after para. 80 of the judgment.

[99] See *Hoffmann et al v US* cert. den. 125 S Ct 619 (No. 00-1131, Decided 2004) with very (water-) colourful background stories, or the well known *Van Zuylen* case before the ECJ implicitly sanctioning the expropriation of the German Café Haag brand.

[100] *Liechtenstein v Germany*, ICJ 10 February 2005, Case No. 123.

concerning human rights but relating to refugee protection, humanitarian standards in armed conflicts or free trade agreements often envisage a direct benefit for the individual. This distinguishes them from areas of international law such as the prohibition of the use of force in inter-state relations, which at first sight seems to protect the sovereignty and integrity of the state *qua* state only.

However, in the last analysis it is always the individual who is the ultimate subject of all law both national and international. Conventionally, we employ legal personalities to serve certain purposes; however, all such fictions may be broken down to the individuals behind the veil of such ideas, be it a company or a state if the exigencies of the situation require this to be done. In the case of failed states and their property, rights and duties, for example, Somalia and its embassies, bank accounts and debts abroad, such an intellectual breakdown is inevitable as in the winding up of a company according to some other rules. From a perspective of political philosophy, it is doubtful whether one can think of any other justification for the protection of the sovereignty and the integrity of the state except the necessity for the fulfilment of an essential task, namely to end the insecurity that the absence of a legal system gives rise to and to safeguard citizens' fundamental rights and interests by legally co-ordinating societal life in a way that enables the single individual to pursue his or her personal concept of "the good life".[101] As the former Secretary General of the United Nations said:

> "I have often recalled that the United Nations Charter begins with the words: "We the peoples". What is not always recognised is that "We the peoples" are made up of individuals whose claims to the most fundamental rights have too often been sacrificed in the supposed interests of the state or the nation … I have sought to place human beings at the centre of everything we do … real and lasting improvement in the lives of individual men and women is the measure of all we do …"[102]

If it is true that all substantive international law pursues individual well-being directly or indirectly it will be even more regrettable that international procedures, for example, employed by the ICJ not only lack classic enforcement powers but only under exceptional circumstances allow individuals on their own initiative to seek the judicial protection of international law provisions. Hence, the classical concept of international law as a legal order exclusively *inter nationes* may no longer be true in substance, but mostly still is in procedural terms as far as interna-

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[101] Fernando R. Tesón, "The Kantian Theory of International Law*"* (1992) 92 Col L Rev 53 esp. pp. 70-74 and passim, based on the Kantian political philosophy; For an examination of the social function of (international) law Phillip Allott, "The Concept of International Law" (1999) 10 EJIL 31.

[102] Kofi Annan, Nobel Peace Prize Lecture, 10 December 2001 visited at http://www.unhnhr.ch.

tional adjudication is concerned. It is therefore up to national courts to fill this gap by allowing for private enforcement of international law provisions.

When considering to what extent national courts lend their procedures to claims based on international law, three main categories may be distinguished. First, the individual may himself, relying on international law arguments, bring proceedings against the forum state – be it in order to protect the public interest by ensuring the compliance of the state with its inter-state obligations in the political sphere, to protect his own economic interests against the administration of the forum or to enforce (international) fundamental rights by judicial means.

Claims of individuals against states before national courts may, secondly, arise vis-à-vis foreign states. US jurisprudence based on the US Alien Tort Claim Act 1789 which provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[103] is an almost unique example thereof. Another is the increasing frequency with which a state appears as defendant in investment arbitration and related proceedings.

Finally, domestic courts may use international law when it comes to individual liability for torts or criminal offences as most famously genocide, war crimes and crimes against humanity are made part of national criminal codes in some countries. This is usually effected from some moral high ground which does not always stand the test of practice.[104]

In very different circumstances people may employ international law as a defence against prosecution, for example, as whistleblowers they would refer to an illegal act of the prosecuting state under international law. The court has then to consider whether violations of international law may be heard in the court proceedings as a valid defence.

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[103] 28 USC § 1350.

[104] For example, Germany introduced such Articles in its *Strafgesetzbuch* (Penal Code); however, during the first application of these laws, when some sought to have the former US Secretary of Defence (after his retirement from US government service which for the time being provided him with immunity from German prosecution) indicted before the German courts for an illegal invasion into Iraq, torture etc. the shortcomings of such highly politicised laws became more than obvious. Needless to say that Donald Rumsfeld was not prosecuted as such laws, as all involved in the US administration instinctively understood, are made for others. Reference is according to an AFP report of 14 November 2006, which was in almost all newspapers the following day: "Ein internationales Bündnis von Anwälten hat bei der Bundesanwaltschaft in Karlsruhe Anzeige gegen den früheren US-Verteidigungsminister Donald Rumsfeld wegen Kriegsverbrechen erstattet. Konkret werde Rumsfeld die Misshandlung von Gefangenen im Irak sowie im US-Gefangenenlager Guantánamo auf Kuba vorgeworfen, sagte einer der klagenden Anwälte, Hannes Honecker, in Berlin. Die 220 Seiten umfassende Strafanzeige sei bei Generalbundesanwältin Monika Harms hinterlegt worden."

6.2.4 Locus Standi of the Individual

Considering the traditional attitude that international law is law between states the crucial question is whether a non-state actor, an individual or a company, will be heard on the merits with a claim based on international law. Would a non-state actor pass the preliminary stage of national legal proceedings and be granted *locus standi*? How is this argued by the courts? The question is particularly relevant where the claim concerns the foreign policy decisions of the forum's executive government and other areas with a strong political context.

6.2.4.1 Political Contexts

The decision of the Irish High Court in *Horgan v An Taoiseach*[105] is relevant in this context. The plaintiff in *Horgan* was an Irish citizen and a retired officer in the Defence Forces. He asserted that the decision taken by the Irish government to allow aircraft of the United States of America to stop for the purposes of refuelling at Shannon Airport on the way to the combat in Iraq was violating Irish neutrality. It was claimed that this support of the US war efforts amounted to a breach of neutrality under customary international law (as Ireland, not having ratified the Neutrality Convention, lacked a formal treaty obligation to behave neutrally),[106] and that it involved participation by the state in the war in Iraq contrary to the generally recognised principles of international law.

The Irish government as defendant had no doubt about the plaintiff's *locus standi* and that the case should be heard on the merits: "The defendants accept that the plaintiff has *locus standi* in the sense that he may, qua citizen, bring declaratory proceedings for relief under the Constitution."[107]

As there is no further mention of the *locus standi* issue, it must be assumed that the court accepted the consensual submission of the plaintiff and the defendants to its jurisdiction and thus granted *Horgan* legal standing.

On the merits of the legality of the Iraq war the court outlined:

> "Thus, while the legality of the war in Iraq may well be, in the words of a recent article about these proceedings in an Irish national newspaper "the elephant in the room that is impossible to ignore", this case has proceeded in a manner where both sides have given that "elephant" a wide berth, a course which permits, indeed compels, this court to do likewise."[108]

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[105] [2003] 2 IR 468. On the question of *locus standi* in *Horgan,* see also Gernot Biehler, *International Law in Practice: An Irish Perspective* (Dublin, Thomson Round Hall, 2005) p. 198 *et seq.*

[106] On Irish neutrality in general, see Biehler "One Hundred Years On – The Hague Convention V on Neutrality and Irish Neutrality" (2007) 25 Irish Law Times 226.

[107] *Horgan v An Taoiseach* [2003] 2 IR 468, 494.

[108] *Ibid.* at 503.

Considering, *inter alia*, the thorough arguments on Irish neutrality under international law[109] there can be little doubt about the fact that Kearns J scrutinised the case on the merits, implicitly acknowledging the plaintiff's *locus standi*.[110] The holding on neutrality is the most substantial decision on the issue for decades in any country and represents the current state of international law in the area. Kearns J outlines:

> "Traditionally, as noted by Oppenheim Lauterpacht (International Law) 1952 at 675, there was a duty of impartiality on neutral States which comprised abstention from any active or passive co-operation with belligerents. At para. 316 the authors state:–
>
> > 'It has already been stated above that impartiality excludes such assistance and succour to one of the belligerents as is detrimental to the other, and, further, such injuries to one of the belligerents as benefit the other, and that it includes active measures on the part of the neutral for the purpose of preventing belligerents from making use of neutral territories and neutral resources for their military and naval purposes …'
>
> 1907 Hague Convention V is asserted to be declaratory of customary international law. The various texts relied upon by the plaintiff certainly tend to support such an interpretation. The defendants have argued that a more qualified or nuanced form of neutrality also exists, being one which has been practised by this State for many years, and indeed throughout the Second World War. However, it does not appear to me that even that form of neutrality is to be seen as including the notion that the granting of passage over its territory by a neutral State for large numbers of troops and munitions from one belligerent State only en route to a theatre of war with another is compatible with the status of neutrality in international law. No authority has been offered to the court by the defendants to support such a view. Nor can it be an answer to say that a small number of other states have done the same thing in recent times. Different questions and considerations may well arise

[109] *Ibid.* at 503 *et seq*.

[110] In *Eoin Dubsky v The Government of Ireland, The Minister for Foreign Affairs, The Minister for Transport, Ireland, Attorney General* [2007] 1 IR 63 the issue of the US overflights and fuel stops at Shannon Airport again became the subject of judicial review in light of Ireland's neutral status. Dubsky's claim was essentially the same as Horgan's. In *Dubsky*, however, the respondents actually contested the applicant's *locus standi* (see [2007] 1 IR 63, 65). The answer of the court however does not render the above interpretation – namely that the fact that individuals may not rely upon the generally recognised principles of international law is not a question of *locus standi*, but a question that has to be dealt with on the merits – implausible (see [2007] 1 IR 63, 103).

> where measures of collective security are carried out or led by the UN in conformity with the Charter: Article 2 (5) of the Charter obliges *all* members to assist the UN in any action it takes in accordance with the Charter.
>
> The court is prepared to hold therefore that there is an identifiable rule of customary law in relation to the status of neutrality whereunder a neutral state may not permit the movement of large numbers of troops or munitions of one belligerent State through its territory en route to a theatre of war with another."[111]

With this statement the Irish practice of helping the US in its war effort was found to be illegal under international law by the court. It is impressive how clearly this was phrased by a court which eventually concludes, as expected, that the question of neutrality is not to be adjudicated by it as international law may not directly be employed against the foreign policy of the government by individuals, relying on an earlier decision against any national effect of the UN Human Rights Committee to the benefit of the individual. [112]

Further, Kearns J argued that, even if the above argument proved to be incorrect, the generally recognised principles of international law could not be considered to be an "absolute restriction of the […] powers of the State" but (only) had to be accepted as a guide to relations with other states.[113] Article 29 of the Irish Constitution should be interpreted to be of "aspirational" rather than of strictly legally binding character.[114]

In *Association of Lawyers for Peace v Netherlands*[115] five private-law governed associations sought injunctive relief against upcoming Dutch participation in the military activities, or the threat thereof, against the Taliban and al Qaeda training camps in Afghanistan. The District Court answered the question of *locus standi* of private parties in relation to a claim against the forum state based on international law in the affirmative. This becomes clear as the court could not have argued the legality of Operation Enduring Freedom in Afghanistan as part of the merits stage without accepting the *locus standi* of the plaintiff organisations. The Dutch Supreme Court decision, however, does not explicitly mention the issue at all. In-

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[111] [2003] 2 IR 468, 504-505.

[112] *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

[113] [2003] 2 IR 468, 513 mainly relying on the Irish text of the Constitution, which was held to support this interpretation.

[114] *Ibid.*

[115] *Association of Lawyers for Peace, The Green Party, Women for Peace, Hague Platform for Peace, New Communist Party v State of the Netherlands* Nr C02/217HR, NJ 2004/329; also reported – including a translated summary of the judgement – in "International Law in Domestic Courts" (hereafter: ILDC) case No. 152 (internet service of Oxford University Press).

stead, referring to its own judgment of 29 November 2002[116] and affirming the reasoning of the Court of Appeal it denied the applicants the right to rely on the international law provisions invoked, as they were held not to have direct effect:

> "This prohibition of the use of force [Article 2(4) of the Charter of the United Nations] is intended to protect States. The provision therefore cannot be invoked by a citizen in his national court. The same applies to the closely related provisions of articles 42 and 51 of the Charter."
>
> "Dit geweldverbod strekt derhalve tot bescherming van staten en het hof heeft dan ook met juistheid geoordeeld dat een burger voor zijn nationale rechter geen beroep kan doen op deze bepaling en evenmin op de nauw hiermee samenhangende art. 42 en 51 van het Handvest ."[117]

The different approaches of the Court of Appeal which granted *locus standi* to the organisations and the Supreme Court which relied more on the traditional attitude of international law as directed only to states present the two lines of argument possible in this context. However, it shows that it is possible to discuss the issues of foreign policy on the merits before national courts.[118] The experience is comparable with the Irish High Court's treatment in *Horgan*.

The Israeli Supreme Court in December 2006 decided along the same lines proceeding to the merits stage but stopping short of compelling the government to specifically alter its policy.[119] The petitioners, two human rights organizations,

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[116] *Danikovic and 6 others v the State of the Netherlands* Supreme Court, 29 November 2002, *NJ* (2003) No. 35. This case concerned the application to the District Court of The Hague by seven Yugoslav military personnel for an interim injunction restraining the State of the Netherlands with immediate effect from engaging or participating in the further use of force in the Federal Republic of Yugoslavia; for an English translation of the judgment see (2004) 35 NYIL 522.

[117] ILDC 152, para. 3.4.

[118] Further commentaries on the case by Leonard F M Besselink, "The Constitutional Duty to Promote the Development of the International Legal Order: the Significance and Meaning of Article 90 of the Netherlands Constitution" (2003) 34 NYIL 133; J W A Fleuren, "De maximis non curat praetor? Over de plaats van de Nederlandse rechter in de nationale en de internationale rechtsorde" in P P T Bovend'Eert, P M van den Eijnden & C A J M Kortmann (eds.), *Grenzen aan de rechtspraak? Political question, acte de gouvernement en rechterlijk interventionisme* (Deventer: Kluwer, 2004) pp. 127 – 159; J W A Fleuren "Directe en indirecte toepassing van internationaal recht door de Nederlandse rechter", 131 Mededelingen van de Nederlandse Vereniging voor Internationaal Recht (2005) pp. 126- 131.

[119] *The Public Committee against Torture in Israel et al v The Government of Israel et al* HCJ 769/02 (judgment of 14 December 2006, Supreme Court sitting as the High Court of Justice); an official English translation which will be referred to here is reported in

challenged the policy of preventive strikes employed by Israel in the Gaza strip and the West Bank, by which it aimed to kill people who were allegedly involved in attacks against the occupying Israelis in these areas (so-called "targeted killings policy"). In the petitioners' view this policy violated the international rules on the use of force and on conduct in armed conflicts. They argued that Israel was not permitted to conduct military acts pursuant to the law of armed conflict as part of its struggle against the Palestinian terrorist organizations, as the right to take self defensive military action under Article 51 of the UN Charter only applies to conflicts between states. Alternatively they submitted that, even if the court held that the military actions pursued by Israel came within the scope of self-defence and thus triggered the application of the law of armed conflict, the targeted killing policy would be in breach of Israel's international obligations as it disregarded the protected status of civilians granted by the Geneva Conventions and the Additional Protocols. Accordingly, the relief sought by the applicants was an order forcing the Israeli government to cancel the targeted killing policy and to refrain from acting in accordance with it.

With regard to the legal standing of the applicants the practice of the Israeli Supreme Court conforms with the pattern of the Dutch Courts. The respondents did not object on the point of *locus standi*, nor did the court address the matter on its own initiative. Although some preliminary objections were in fact submitted and considered the issue of whether the petitioning organizations had the legal capacity to institute the proceedings was literally not raised.[120] Hence, the case was dismissed on the merits, however, not without the court expressing major concerns about and defining the legal limits of government policy. Specifically, three restricting principles had to be borne in mind:

> "[F]irst, well based information is needed before categorizing a civilian as falling into one of the discussed categories [i.e. considering him a combatant]. Innocent civilians are not to be harmed."[121]

In this regard the burden of proof is heavy and it is up to the army to ensure that enemy civilians are not attacked based on a mere suspicion of involvement in military attacks. Secondly the principle of proportionality applies so that

> "a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed"[122]

ILDC 597. For a critical assessment of the case, see Hilly Moodrick-Even Khen, "Case Note: Can We Now Tell What 'Direct Participation in Hostilities' Is? HCJ 769/02 the Public Committee Against Torture in Israel v The Government of Israel" (2007) 40 Israel Law Review 213.

[120] The preliminary objections submitted claimed institutional injusticiability of the matter, see ILDC 597, para. 9 and the court's answer at para. 47 *et seq*.

[121] ILDC 597, para. 40.

[122] *Ibid.*

> and that an "attack upon innocent civilians is not permitted if the collateral damage caused to them is not proportional to the military advantage (in protecting combatants and civilians)"[123].

If innocent civilians are harmed, compensation should be paid.[124] And finally the court held that:

> "[A]fter an attack on a civilian suspected of taking an active part, at such time, in hostilities, a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively)."[125]

Although, as in all the other cases considered above, the petition was not granted in its initial form, the decision is likely to have an impact on the political agenda. This is mainly due to the implied threat that judicial action against the individual targeted killings might well be successful unless the military conduct satisfies particular conditions. Moreover, it is apparent from the judgment that the judges had major concerns about the policy of targeted killings, most likely of both a moral and legal kind, and it might be suggested that it was this concern that led them not to try to take the easy way out. The Israeli Supreme Court not only neglects the question of *locus standi* but avoids the issue of whether the invoked rules of international law, namely Article 51 of the Charter of the United Nations and the Geneva Conventions, can be considered to have direct effect and can thus be relied upon by private parties without any direct connection to the events in question, without denying it explicitly.

All the reported cases employ a "yes and no" policy, stopping short of embarrassing governments with any direct advice. The merits stage is usually reached and some arguments on the substance of international law can be derived from decisions which may be in the public domain. This is all that can be hoped for by individual applicants given the present state of affairs promoting politically charged issues based on international law against their own governments before their own forums.

6.2.4.2 Economic Interests

There may also be a focus on economic interests when non-state actors sue before national courts relying on norms of international law. Usually such cases are not brought by a non governmental organisation which exists to promote peace like the *Association of Lawyers for Peace* before the Dutch courts or Edward Horgan who with his impressive personal background of UN peacekeeping from Congo to

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[123] ILDC 597, para. 45.

[124] *Ibid.* at para. 40.

[125] *Ibid.*

Lebanon and a degree from Trinity College, Dublin had all possible credibility as a citizen to ask the government before the High Court how its support for the US Iraq war efforts relates to Irish neutrality cherished so much on the green island. When economic interests are at stake companies are on the stage. From a procedural point of view these are not too different from the "political" cases where individuals or non governmental organisations sue; again the *locus standi* issue and the application of the relevant standards of international law against the decisions of national authorities of the forum state are under scrutiny. However, it is more an export/import issue or price fixing "market order" regulation executed by some national authority often itself informed by European Communities Regulations than a foreign policy issue. Needless to say the interests in these "market orders" are strong on either side. An economic analysis would reveal what economic effect any decision could possibly have.

In *International Fruit Company*[126] four fruit importing companies led by International Fruit Company applied to the competent Netherlands regulatory authority, the *Produktschaab voor Groenten en Fruit*, for certificates allowing them to import eating apples from non EC Member States into the Netherlands. The *Produktschaab voor Groenten en Fruit* refused to issue them with the certificates and informed the fruit importers that their application had to be rejected. International Fruit Company and its three co-plaintiffs challenged this decision before the Dutch courts, claiming it to be contrary to Art XI of the General Agreement on Tariffs and Trade (GATT 1994), which provides:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

As the decision of the *Produktschaab voor Groenten en Fruit* was based upon on a Community regulation the Dutch court asked the European Court of Justice for a preliminary ruling on the question of whether the validity of the underlying regulations of the Commission were invalid as being in breach of the Community's obligations under the GATT. The fact alone that the Dutch judiciary did not ask whether it was possible for an individual to claim the invalidity of Community legislative acts before domestic courts because of inconsistencies with the Community's international obligations but confined the question solely to the validity of the EC regulations – an issue that can only arise on the merits of the case – shows that the question of *locus standi* was not in any doubt. Even the question of direct effect of international agreements was only brought up by the ECJ ruling.

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[126] For the judgment of the ECJ on this matter see *International Fruit Company v Produktschab voor Groenten en Fruit* (Case 21-24/72); [1972] ECR 1219.

Whereas the ECJ did not comment on the former point, its decision on the latter became a landmark. It held that individuals may only rely on the Community's international agreements if they confer rights upon individuals. This was not the case in relation to the GATT. The ECJ considered the agreement to be insufficiently precise and unconditional, the provisions allowed for too great a degree of flexibility and the obligations included left too much room for modification.[127] By defining the criteria for direct effect, however, the ECJ acknowledged the possibility of direct effect and thus a possible invocation of international agreements before national courts in principle.

Van Parys,[128] a case heard before the Belgian *Raad van State*, concerned bananas in Belgium rather than apples in the Netherlands which, however, became a symbol and landmark for this kind of litigation in Europe. *Van Parys*, a Belgian company that imported bananas from Ecuador into the European Community requested *Belgisch Interventie-en Restitutiebureau* (BIRB) to issue it with import licences for bananas from Ecuador. The BRIB however refused to issue it with import licences for the full amount of bananas that *Van Parys* had applied for. *Van Parys* brought actions before the Belgian courts and submitted that the refusal of the BRIB was unlawful, as it was based on the EC regulations governing the import of bananas into the Community and the latter were in conflict with WTO rules – a fact that the WTO Dispute settlement body had already confirmed. The *Raad van State* stayed the proceedings and called upon the ECJ to give a preliminary ruling on the legality of the contested EC regulations.

Again as in *International Fruit Company* the question that the *Raad van State* submitted to the ECJ is proof enough of the granting of *locus standi* to the individual to defend its economic interests by international law means. The validity of the regulation only comes to the fore after the court has entered the merits of the case. From that it is clear that the applicant's legal standing was in no way problematic. Again, just as in *International Fruit Company*, it is only the ECJ that points to the necessity of assessing the ability of individuals to rely on the international agreements of the Community before domestic courts first. Recalling that WTO rules are because of their nature and their structure generally not capable of having direct effect, the ECJ seems to amend or even replace the criterion of rights-conferring provisions by the following:

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[127] ECJ *International Fruit Company v Produktschab voor Groenten en Fruit* (Case 21-24/72); [1972] ECR 1219, paras. 19-27; see also Paul Craig and Gráinne de Búrca, *EU Law* (4th ed., OUP, 2008) p. 208. For a criticism of this rationale Ernst-Ulrich Petersmann, *The GATT/WTO dispute settlement system: international law, international organizations, and dispute settlement* (London, The Hague: Kluwer Law International, 1997) p. 238.

[128] *Léon Van Parys NV v Belgisch Interventie- en Restitutiebureau,* ECJ (Case C-377/02); [2005] ECR I-1465.

> "It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules."[129]

This means international legal economic standards as determined by the WTO/GATT system would only be held to be effective when the ECJ holds that the Community wants them to be ("only where the Community has intended to implement a particular obligation assumed in the context of the WTO"). As the EU and all its member states are member states of the WTO/GATT this could have easily been assumed as EC law does not want to coerce the Community and its member states into violating WTO/GATT obligations. However, the opposite was the case before the ECJ and it is submitted that the decision was more informed by economic interests than legal insights. An effective protection of economic interests by international law standards failed when provisions of WTO agreements were invoked by the plaintiffs. Even though domestic courts show their willingness to give way to such international law claims by granting legal standing the ECJ is reluctant to allow for such a claim on the merits.[130] In light of the ECJ decision, individual economic interests cannot efficiently be protected through international law before national courts.

However, one case, *Kupferberg*,[131] which was referred to the ECJ by the German courts, hints in another direction. The German company Kupferberg imported port wine from Portugal, which at that time had not yet acceded to the European Community, and was charged a "monopoly equalization duty" (*Monopolausgleich*) levied by the German law on the (State) Monopoly in Spirits by the Hauptzollamt Mainz, a German customs and tax authority. This duty was equal in amount to the "spirits surcharge" that applied to domestically produced spirits. The latter however included a charge reduction scheme, provided certain conditions were met, that was not available to the imported spirits under the law on the (State) Monopoly in Spirits. Kupferberg brought proceedings before the Finance Court Rhineland-Palatinate (Finanzgericht Rheinland-Pfalz) and argued that this was a discriminatory distinction, illegal under Article 21(1) of the Agreement made on the 22 July 1972 between the EEC and the Portuguese Republic, which provides:

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[129] *Ibid.* at para. 40. These criteria were introduced by the ECJ in *Germany v Commission* (Case C-280/93); [1994] ECR I-79, a case that also concerned the EC regulations on the importation of bananas.

[130] See, *inter alia*, also *Portugal v Council,* ECJ (Case C-149/96), [1999] ECR I-8395; *Germany v Commission* (Case C-280/93), [1994] ECR I-79; *Polydor Ltd and RSO Records Inc v Harlequin Record Shops Ltd and Simons Records Ltd* (Case 270/80), [1982] ECR 329 (with regard to a free trade agreement between the Community and Portugal).

[131] *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG aA* (Case 104/81) [1982] ECR 3641.

> "The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party."[132]

Indeed, the court held in favour of Kupferberg. It applied the levy reduction originally only provided for the spirits surcharge to the monopoly equalization duty and based its reasoning to a considerable extent on the free-trade agreement with Portugal. Both *locus standi* and the direct effect of the treaty provision in question were accepted.[133]

In contrast to the European Community context where references to international agreements in the economic sector have been large in number and important in academic debate,[134] the amount of US case-law on both the direct effect of these treaties and the *locus standi* of private parties is comparatively small. However, whenever litigants challenged state action by referring to GATT provisions US courts seemed to be willing to give way to it.

When George E. Bardwill & Sons[135] challenged an import duty levied by the US Collector of Customs on an importation of banquet and luncheon sets from Portugal, the US Court of Customs and Patent Appeals faced the question of whether, as the plaintiff claimed, the withdrawal by the US President of the importation concession initially negotiated under the GATT system with the Peoples Republic of China was unlawful under Article XXVII GATT and if so, whether

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[132] Council Regulation 2844/72/EEC Concluding an Agreement between the European Economic Community and the Portuguese Republic, [Special Edition 1972] OJ Eur Comm (No. L 301/164) 166 (Dec. 19, 1972) p. 170.

[133] The Hauptzollamt Mainz appealed against this decision and the German Federal Court in fiscal matters (*Bundesfinanzhof*) submitted the case for a preliminary ruling to the ECJ. In its preliminary ruling the ECJ confirmed that private parties can directly rely upon the agreement between the EEC and Portugal. See *Hauptzollamt Mainz v CA Kupferberg & Cie KG aA,* ECJ (Case 104/81); [1982] ECR 3641 and the comment by G. Bebr, "Agreements Concluded by the Community and their Possible Direct Effect: From International Fruit Company to Kupferberg" (1983) 20 CML Rev 35.

[134] See, *e.g.,* Judson Osterhoudt Berkey, "The European Court of Justice and Direct Effect for the GATT: a Question Worth Revisiting" (1998) 9 European Journal of International Law 626; Axel Desmedt "ECJ Restricts Effect of WTO Agreements in the EC Legal Order" (2000) 3 J Int'l Econ Law 191 *et seq*.; Miguel Montana i Mora, "European Community Law – Legal Status of International Agreements within the Community Legal Order – General Agreement on Tariffs and Trade – Lome Conventions" (1997) 91 AJIL 152; Ernst-Ulrich Petersmann, "Application of GATT by the Court of Justice of the European Communities" (1983) 20 CML Rev 397; Joel P. Trachtman, "Bananas, Direct Effect, and Compliance" (1999) 10 EJIL 655; Geert Zonnekeyn, "The Direct Effect of GATT in Community Law: From International Fruit Company to the Banana Cases" (1996) 2 International Trade Law & Regulation 63.

[135] *George E Bardwill & Sons v US* 42 CCPA 118, 1955 WL 6831.

the concession still had to be granted by applying an accordingly reduced importation duty.[136] Without any mention at all of either direct effect or legal standing the US judges held against the plaintiff although not on grounds of *locus standi* or the admissibility of Bardwill's claim but, having scrutinized at length the GATT provisions in question, clearly on the merits: the conditions for the withdrawal of the concession were met.

Although in light of the more recent ECJ jurisprudence this reluctance to address the question of *locus standi* and direct effect may be surprising, subsequent US case law on the matter affirms this tendency: in many cases private applicants are granted *locus standi* to advance arguments grounded on principles of international economic law without further scrutiny by the courts.[137] The Uruguay Round Agreements Act of 1994 ended this series of GATT/WTO-friendly jurisprudence by explicitly denying the direct effect of the WTO Agreement. Thus it can no longer be applied by US courts.[138]

The comparision of the US and the European approach in cases of international economic interests is twofold; national courts (and the ECJ must be counted as such here too as it just informs the national courts of the member states according to Article 234 ECT on the interpretation of EC law) on either side of the Atlantic are slow to give effect to economic rights of individuals based on international law particularly WTO/GATT norms. While the ECJ focuses on the lack of purported direct effect of very precise WTO/DSU panel decisions against the parties to uphold particularly the Banana market order privileging certain importers over others against free trade ideas, the US courts go to the merits stage and apply international law but give room to US governmental interests in the field, a feature not unknown to US courts from other areas of the law. Neither court may be fully persuaded on the merits but at least the latter approach by the US courts allows for substantive discussion of international law norms without discarding them at the preliminary stage as non-applicable ("no direct effect"), which can hardly be persuasive in the case of WTO/GATT obligations where all concerned are members and agree to comply.

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[136] *Ibid.*

[137] See, *inter alia*, *Bercut-Vandervoort & Co v United States*, 151 F Supp 942 and *Texas Association of Steel Importers, et al v Texas Highway Commission* 364 SW 2d 749. On the treatment of the General Agreement of Tariffs and Trade by US Courts in general Ronald A. Brand, "The Status of the General Agreement of Tariffs and Trade in United States Domestic Law" (1989-1990) 26 Stan J Int'l L 479; Thomas William France, "The Domestic Legal Status of the GATT: The Need for Clarification" (1994) 51 Washington & Lee L Rev 1481.

[138] See Uruguay Round Agreements Act, H.R. 5110, 103d Cong, 2d Sess, became Pub L No 103-465, 108 Stat 4809 at Sec 102 (c) (1) (A) and (B).

6.2.4.3 Fundamental and Human Rights

Another area in which individuals rely on international law before national courts is the area of basic, fundamental or human rights which have recently become very prominent.[139] The effect of international human rights treaties and decisions of international human rights courts and committees on national law and the individual's capacity to invoke these rights and decisions before national courts is a recurrent issue in most of the participating countries' courts in relation to the two International Covenants of the United Nations and the European Convention of Human Rights (ECHR) but equally in the jurisprudence of the Inter American Court of Human Rights (IACHR) too.

An Irish case shows one side of the coin and one attitude regularly held by national courts when they are faced with international human rights adjudicated upon by the competent bodies. In *Kavanagh v Governor of Mountjoy Prison*[140] the national effect of a decision of the Human Rights Committee established under the International Covenant on Civil and Political Rights ("ICCPR") was addressed by the Irish Supreme Court. The applicant had been convicted in 1997 by three judges sitting without a jury in the Special Criminal Court, of offences of a scheduled nature including, *inter alia*, possession of a firearm with intent to commit an indictable offence and demanding money with menaces. When called upon by the applicant the Committee held that the State had failed to provide sufficient justification for denying the applicant his right to a jury trial and had thus infringed the applicant's rights under Article 26 of the ICCPR. Relying on this favourable conclusion of the United Nations Human Rights Committee Mr Kavanagh sought judicial review before the High Court. He argued that the national provisions that had led the Director of Public Prosecution to certify that he had to be tried before the Special Criminal Court were incompatible with the ICCPR and were thus repugnant to Articles 29.2 and 29.3 of the Irish Constitution. Given that the applicant had in earlier proceedings already unsuccessfully challenged the constitutionality of his trial before the Special Criminal Court, the incompatibility of his trial with the ICCPR was his only claim; accordingly, he only advanced international law arguments, but did he have *locus standi* to do so before Irish courts?

In the High Court, Finnegan J denied the applicant permission to extend his complaint to include seeking a declaration that the relevant section of the Offences Against the State Act 1939 pursuant to which he had been tried was unconstitutional as it was not in conformity with the ICCPR. Mainly this was because he had not put forward this argument before and thus not exhausted all available local

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[139] See for a comprehensive and comparative study on the subject Benedetto Conforti, Francesco Francioni (eds.), *Enforcing International Human Rights in Domestic Courts* (The Hague, Boston, London: Martinus Nijhoff Publishers, 1997), with articles on the judicial practice of Italy, the United Kingdom, France, Germany, Chile, Argentina, Austria, the United States, Israel, Japan, Canada and China.

[140] [2002] 3 IR 97, 106.

remedies. Moreover, international law was held to have as its subject the relations between States and not to confer rights upon individuals. Finnegan J stated as follows:

> "[T]hat Art 29 [of the Constitution] has as its subject the relation between states only and […] cannot affect the rights of individuals […] This proposition applies equally to international law whether created by treaty or by convention or the source of which is customary international law."[141]

Before the Supreme Court Finnegan J's refusal to give leave to seek judicial review was upheld. The rationale remained the same as stated by Fennelly J:

> "The obligation of Ireland to respect the invoked principles [namely the generally recognised principles of international law] is expressed only in the sense that it is to be "its rule of conduct in its relation with other States". It is patent that this provision confers no right on individuals. No single word in the section even arguably expresses an intention to confer rights capable of being invoked by individuals."[142]

From that it is obvious however, that the judicial response to Kavanagh's international law claim was not the principled denial of *locus standi* for claims exclusively based on international human rights instruments. The stumbling block for Kavanagh's complaint was an interpretation of a constitutional provision, Article 29.3 which is hardly persuasive. The provisions may refer to relations between states but nothing in its wording supports the extraordinary result that international law which is expressly meant to benefit the individual, as all human rights provisions are, may not be applied in Ireland. Such a conclusion is refuted by the fact that Irish courts apply international law also to the benefit of individuals[143] as do the courts of most other states.

In November 2005 the Dutch Council of State was given the opportunity to deal with the question of the effect which the ICCPR has in the legal order of the Netherlands.[144] The applicant A, an unaccompanied minor, had been denied asylum status by the Minister of Immigration and Integration of the Netherlands. Arguing that by refusing to grant asylum, the Minister had violated Article 24(1) of the ICCPR, which lays down the right of children to such protective measures as are required by their status as minors, A instituted proceedings which eventually

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[141] *Ibid.* at 106.

[142] *Ibid.* at 126.

[143] *ACT Shipping (PTE) Ltd v Minister of the Marine* [1995] 3 I R 406. See Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 19.

[144] *A v Minister of Immigration and Integration* Administrative appeal, 200505825/1 (Administrative Law Division); Jurisprudentie Vreemdelingenrecht (JV) 2006/23, 29 November 2005; reported with an English summary of the decision in ILDC 550.

ended up before the Council of State. There A's claim was dismissed. Although the court neither denied the applicant *locus standi* nor could in principle rule out the invocation of ICCPR provisions, the Council of State argued that Article 24(1) was not directly applicable by a national court:

> "Deze bepaling bevat, gelet op haar formulering, behoudens het daarin neergelegde discriminatieverbod, geen norm die zonder nadere uitwerking in nationale wet– en regelgeving door de rechter direct toepasbaar is."[145]

Applying the same line of reasoning the Second Public Law Chamber of the Swiss Federal Supreme Court dismissed the applicants' claim in *A and B v Government of the Canton Zurich*.[146] After the Government of the Canton of Zurich adopted a new Regulation on Tuition for Students of the Schools of Higher Education (Zürcher Fachhochschule) in September 1999, A and her son B challenged this regulation before the Swiss Federal Supreme Court. They claimed that this new Regulation, by introducing new registration and tuition fees, violated Article 13(2)(b) and (c) of the International Covenant on Economic, Social and Cultural Rights (ICESC). On the question of the legal standing of the applicants the court had no difficulties in noting that at least the son himself had *locus standi*, as the court outlined: "durch die angefochtene Gebührenregelung in seiner Rechtsstellung virtuell betroffen und daher zur staatsrechtlichen Beschwerde gegen die umstrittene Verordnung legitimiert"[147] and went on to add that "[m]it der staatsrechtlichen Beschwerde kann auch die Verletzung von Staatsverträgen gerügt werden".[148]

Under Swiss law this possibility is limited to treaties that are self-executing and are thus sufficiently clear and precise to be directly applicable by national judges. Referring to previous case law the court held that for the ICESC this was in principle not the case, as:

> "Die von der Schweiz mit diesem Pakt eingegangenen völkerrechtlichen Verpflichtungen haben […] programmatischen Charakter; die Vorschriften des Paktes richten sich – anders als die direkt anwendbaren Garantien des Internationalen Paktes vom 16. Dezember 1966 über bürgerliche und politische Rechte (UNO–Pakt II; SR 0.103.2), dem die Schweiz gleichzeitig ebenfalls beigetreten ist – nicht an den Einzelnen, sondern (primär) an die Gesetzgeber der Vertragsstaaten, welche sie als Richtlinien für ihre Tätigkeit zu beachten haben."[149]

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[145] ILDC 550, para. 2.2.2.

[146] *A and B v Government of the Canton of Zurich* Appeal judgment, Case No 2P.273/1999; partly published as BGE 126 I 242, 22 September 2000 (*A und B v Regierungsrat des Kantons Zürich*); English summary of the case at ILDC 350.

[147] ILDC 350, para. 1b.

[148] *Ibid.* at para. 2b.

[149] *Ibid.* at para. 2c.

Although the court acknowledged that exceptions to that rule were possible it denied that the case in question could justify such an exception. Previous cases had already decided on the matter, even in relation to the precise articles in question, and there was no reason for a deviation from that jurisprudence.[150] Accordingly the claim was unsuccessful.

In *Görgülü*[151] a custody battle before the German courts brought up similar questions to those raised by *Kavanagh*, with one difference: it was the relationship to decisions of the European Court of Human Rights and their binding force before domestic courts that was relied on by the applicant and disputed by the defendants. The applicant was the father of an illegitimate child. The mother of the child and the applicant lived apart and immediately after the child was born the mother decided to give him up for adoption. In a long series of proceedings before the German civil courts and eventually the German Federal Constitutional Court the applicant sought unsuccessfully to obtain access rights and custody of his son. Finally, he instituted proceedings before the European Court of Human Rights in Strasbourg arguing that by not granting him the right to custody and contact with his child Germany had, *inter alia*, violated his right to family life provided for in Article 8 of the European Convention of Human Rights. The court agreed and concluded: "In the case at hand this means making it possible for the applicant to at least have access to his child."[152] Armed with this holding he resumed his struggle before the German judiciary and the County Court (*Amtsgericht*) Wittenberg held in his favour. On appeal by the appointed guardian of the son the Higher Regional Court (*OLG*) Naumburg reversed the decision. Although it acknowledged that the decision of the ECtHR had shown the incompatibility with the European Convention, it argued that "dieser Urteilsspruch unmittelbar nur die Bundesrepublik Deutschland als Völkerrechtssubjekt [binde], nicht aber deren Organe oder Behörden und namentlich nicht die Gerichte als nach Article 97 Abs. 1 GG unabhängige Organe der Rechtsprechung."[153] For present purposes it must be emphasised that up to that point of the proceedings the material outcome of the decisions was highly dependent on the deciding court: whereas even before the judgment of the ECtHR the County Court always held in favour of the applicant, the Higher Regional Court used every opportunity to quash the decisions of the former. The *locus standi* of the applicant to invoke arguments based on the European Convention on Human Rights as an instrument of international human rights protection was not objected to at any stage of the proceedings.

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[150] *Ibid.* at para. 2d.

[151] *Görgülü v Germany* ECHR No. 74969/01, Judgment of 26 February 2004; [2004] 1 FLR 894.

[152] *Ibid.* at para. 64.

[153] *X v Y* OLG Naumburg, Beschluss v. 30.6.2004, 14 WF 64/04, reported in FamRZ 2004, 1510. Quotation at para. 24.

In a famous ruling which did not, however, escape hostile academic comment,[154] the Federal Constitutional Court found for the applicant and took a crucial step beyond merely granting applicants relying on the European Convention on Human Rights and the corresponding decisions of the Strasbourg court *locus standi*. Referring to § 359 No. 6 of the German Code on Criminal Procedures (StPO), which provides for the possibility of resuming proceedings before national courts if the ECtHR finds that the fundamental rights of a convicted applicant have been violated during criminal proceedings or by the application of criminal law,[155] the Federal Constitutional Court stated:

> "Dabei äußert das Gesetz die grundsätzliche Erwartung, dass das Gericht seine ursprüngliche – konventionswidrige – Entscheidung ändert, soweit diese auf der Verletzung beruht."[156]

Entirely in line with this intention of the legislature the Federal Constitutional Court felt obliged "to avoid and redress, as far as possible, violations of international public law, consisting in a deficient application of or non-compliance with obligations under international law by German courts". It considered itself to be "on indirect service for the enforcement of international public law" (in German: "steht damit mittelbar im dienst der Durchsetzung des Völkerrechts") and concluded accordingly: it must be possible to contest that German courts have disregarded or not considered the decisions of the ECtHR in an action before the Federal Constitutional Court. In the words of some commentators, it thus created a fundamental right to consideration of and respect for (in German: "Urteile des EGMR müssen berücksichtigt warden") the decisions of the ECtHR.[157] Surprisingly in the *dictum* of the Federal Constitutional Court this right to bring an action in cases of non-compliance with Strasbourg jurisprudence is not limited to decisions in which Germany has been the defendant. It is, however, far too early to say if this kind of national enforcement of international law against third states ("act

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[154] See, *inter alia*, Hans-Joachim Cremer, "Zur Bindungswirkung von EGMR-Urteilen" (2004) Europäische Grundrechte-Zeitschrift 683; Jochen Abr. Frowein, "Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte", in Klaus Dicke *et al* (eds.), *Weltinnenrecht – Liber amicorum Jost Delbrück* (Berlin, Duncker & Humblot, 2005) pp. 279 – 287; Eckart Klein, "Anmerkung zu BVerfG, Beschluss vom 14.10. 2004 (Görgülü)" (2004) Juristen Zeitung 1176.

[155] It is worth noting that as a reaction to the decision in question similar provision have been passed for proceedings concerning civil law (§ 580 Nr. 8 ZPO), labour law (§ 79 ArbGG), social law (§ 179 SGG), and administrative law (§ 153 VwGO), and for proceedings before the courts for fiscal matters (§ 134 FGO).

[156] BVerfG (2004) NJW 3407, 3410: "The law has normally the expectation that the (national German) Court would change its former decision as far as it relies on a violation of the European Convention".

[157] Breuer, Martin, "Karlsruhe und die Gretchenfrage: Wie hast du's mit Straßburg?" (2005) Neue Zeitschrift für Verwaltungsrecht 412.

of State") will prove useful, especially for this latter kind of case. In light of these developments it goes without saying that with regard to the ECtHR both the question of *locus standi* and the issue of direct effect have, as a matter of course, been answered in the affirmative by the German courts.[158]

6.2.4.4 Diplomatic Protection

When the individual's rights are violated by another state and he does not have a legal procedural remedy which allows him to bring a claim himself against the allegedly violating state, the state of which he is a citizen may bring his case to the attention of the other state and may seek a solution including a judicial settlement. Internationally, this agency called diplomatic protection in the interests of individuals is well settled before the ICJ as a result of *Barcelona Traction*.[159] Nationally, individuals in precarious situations caused by other states often try to persuade their own states to do something by bringing a case before the national courts. This will usually be based on human and fundamental rights arguments, but obviously goes into the realm of international relations between states. The underlying question is how far constitutional standards of fundamental rights (*e.g*. habeas corpus, property rights, access to court etc.) and international human rights mirroring these constitutional rights which may have been infringed by a third party state may be used to judicially coerce a government to pursue the individual's case in interstate relations. As can be easily predicted, courts are slow to grant such rights against the forum state's government as this would be a very indirect enforcement of the individual's rights which may concern the third party state's "acts of state" and certainly would interfere with the interstate relations between the forum state and the third party state. Nevertheless, the very precarious situation of British citizens in Guantanamo Bay, a case involving a former British prime minister's son who was interned in Zimbabwe to be extradited to Equatorial Guinea or the case of one of Hitler's former ministers without portfolio kept for more than forty years mostly in isolation set the scene for colourful litigation, where the procedural stage was passed and *locus standi* granted. Unlike in the case of human rights violations by

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[158] Although some applicants are granted *locus standi* even when relying on other international instruments of human rights protection, their claims often fail because the respective treaties are held not to directly confer rights on individuals which they can invoke in national procedures. See for the Convention on the Elimination of all Forms of Discrimination against Women *OVG Hamburg*, 1 Bs 535/04 of 21 December 2004, reported in (2005) Neue Zeitschrift für Verwaltungsrecht – Rechtsprechungsreport 258. In contrast however, for the International Covenant on Economic, Cultural and Social Rights – direct effect cannot in principle be ruled out – BVerwG, 6 C 13/03 of 3 December 2003, reported in Buchholz 421.2 Hochschulrecht no. 160 and for the protection of property under international law BVerfG, 2 BvR 955/00 of 26 October 2004, available at http://www.bundesverfassungsgericht.de/entscheidungen/rs20041026_2bvr095500.html para. 79 *et seq*.

[159] *Canada, Belgium v Spain* (Barcelona Traction) [1970] ICJ Rep 40.

the forum state where the issue is quite straightforward, if individuals suffer severe violations of internationally recognised human rights at the hands of foreign states, the question arises as to whether there is a duty on the home state to protect its citizens abroad and whether there is an enforceable corresponding right to diplomatic protection.

Abbasi[160] is probably now the leading case in the field of diplomatic protection before national courts. The English Court of Appeal departed from former precedent in *Buttes*,[161] and did not apply the doctrine of non-justiciability but granted judicial review of the government's refusal to grant diplomatic protection to the applicant, reaching the same result by a reasoning on the merits. A significant point is that an emerging right to diplomatic protection may be seen from the decision in *Abbasi*. Abbasi was a British citizen who had been captured by US military forces engaged in armed conflict in Afghanistan. In January 2002, Abbasi was flown to a US naval base in Guantanamo Bay, Cuba, where, by the time of the hearing, he had remained captive for eight months without charge, and without access to a court or other tribunal, or even to a lawyer. On learning of her son's situation, Abbasi's mother, the second claimant, made representations through lawyers to the UK Foreign and Commonwealth Office, asking it to assist in ensuring that the conditions of her son's detention were humane, and to obtain clarification from the US authorities as to her son's status: how long he was to be detained, whether he was to be charged and prosecuted, and, if so, whether before a military commission or court. As the UK government did not seem to be making any efforts to improve Abbasi's situation, the claimants applied for permission to seek judicial review, and ultimately sought an order to compel the UK government to make representations to the US government on Abbasi's behalf, or to take other appropriate action, or at least to explain why this had not been done.

The main question before the Court of Appeal, which gave final judgement in this case, was whether the UK Foreign Secretary owed Abbasi a duty to respond positively to his, and his mother's, request for diplomatic assistance. Referring to the *Barcelona Traction* case[162] the court started with a common proposition:

> "It is clear that international law has not yet recognised that a State is under a duty to intervene by diplomatic or other means to protect a citizen who is suffering or threatened with injury in a foreign State."[163]

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[160] *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 (CA); also reported in ILDC 246.

[161] *Buttes Gas and Oil Co. v Hammer (No 3)* [1982] AC 888 (HL).

[162] *Barcelona Traction, Light and Power Company Limited (Belgium v Spain)*, Second Phase [1970] ICJ Rep 3.

[163] ILDC 246, para. 69.

The European Convention of Human Rights in conjunction with the Human Rights Act was not capable of rendering the UK authorities liable for the situation Abbasi found himself in and thus imposing a duty to exercise diplomatic protection in his favour. As the main jurisdictional principle governing the Convention was the territoriality principle and as Abbasi was detained outside the UK his Convention argument failed.[164] However, the court was willing to help Abbasi out and introduced an argument that had not been submitted by the claimants. Referring to the doctrine of "legitimate expectations" the court held that "so long as [a governmental policy or state practice] remains unchanged, the subject is entitled to have it properly taken into account in considering his individual case".[165] Having examined several official statements it concluded:

> "What then is the nature of the expectation that a British subject in the position of Mr Abbasi can legitimately hold in relation to the response of the government to a request for assistance? The policy statements that we have cited underline the very limited nature of the expectation. They indicate that where certain criteria are satisfied, the government will 'consider' making representations. Whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State. […] [T]hat does not mean the whole process is immune from judicial scrutiny. The citizen's legitimate expectation is that his request will be 'considered', and that in that consideration all relevant factors will be thrown into the balance."[166]

As the government was able to prove that they had actually entered into official contact with the US government over the detainees at Guantanamo Bay, this standard was clearly met. Consequently, there was no more the court could do for Abbasi; his claim was dismissed.

The Federal Court of Australia also pronounced on the matter in *Hicks*.[167] Hicks was an Australian citizen who was captured by the Northern Alliance in Afghanistan in November 2001 and transferred into the custody of the United States in December 2001. He was accused of committing belligerent acts for the Taliban against the United States in the Afghan conflict in 2001 and was confined at Guantanamo Bay Naval Base by the US authorities in January 2002. In 2004 he was charged with terrorist offences and was to be tried by one of the military commissions established by the United States to try Guantanamo Bay detainees. Instead of undertaking diplomatic efforts in favour of Hicks the Australian government declined to make any request to the United States for his repatriation and

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[164] *Ibid.* at paras. 70-79.

[165] *Ibid.* at para. 82.

[166] *Ibid.* at para. 99.

[167] *Hicks v Ruddock* [2007] FCA 299; also reported in ILDC 746.

even supported the trial before the military tribunal as under Australian law Hicks could not have been tried before the Australian courts because of a lack of jurisdiction. In 2006 Hicks brought an application for judicial review of the Australian government's decision to refuse to exercise diplomatic protection on his behalf by requesting his release and repatriation to Australia. The Australian government applied for summary dismissal of Hicks' claim.

Tamberlin J in the Federal Court held in favour of Hicks and decided that he had a right to have his case tested on the merits as it was not "without any reasonable prospect of success". With regard to the *locus standi* of the applicant and the related question of the justiciability of the government's refusal to grant diplomatic protection, Tamberlin J relied heavily on the holding of Gummow J in *Re Ditford.*[168] In a crucial passage he noted that:

> "[Q]uestions as to the character and extent of the powers of the executive government in relation to the conduct of international relations may give rise to a matter which involves the interpretation of s 61 of the Constitution, and consequently will affect the interests of a plaintiff so as to afford him or her standing. Where this is so, there is subject matter for the exercise of federal jurisdiction and no question of non-justiciability will ordinarily arise."[169]

Thus Tamberlin J found a way to distinguish *Buttes*, the origin of the doctrine of non-justiciability. There Lord Wilberforce had argued that governmental practice in inter-state relations was non-justiciable as there were "no judicial or manageable standards by which to judge these issues" and "the court would be in a judicial no mans land".[170] Accordingly, in *Hicks* the Federal Court concluded:

> "[N]either the Act of State doctrine nor the principle of non–justiciability justify summary judgement at this stage of the proceeding."[171]

Tamberlin J did not make a final decision on the merits as the case only involved the respondent's claim to dismiss the action in a summary judgment. However, after having recourse to a number of precedents, he found that Hicks' allegation that the state had an albeit unenforceable diplomatic duty of protection and that this duty should lead to the exclusion of certain considerations on which the denial by the government was founded, could not be ruled out either by principle or authority. Therefore, he noted that "the case for Mr Hicks is in some respects diffi-

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[168] *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347.

[169] ILDC 746, para. 27.

[170] *Ibid.* at para 15 quoting from *Buttes Gas and Oil Co v Hammer (No 3)* [1982] AC 888, 938 (HL).

[171] ILDC 746, para. 34.

cult and novel, but it does not follow that it has no reasonable prospect of success."[172]

In *Kaunda*[173] the South African Constitutional Court was required to express its views on the issue of diplomatic protection. The applicants, 69 South African citizens, had been arrested in Zimbabwe on various charges. Shortly afterwards 15 other South Africans had been arrested in Equatorial Guinea and accused of plotting a coup against the President of that country. Fearing that the government of Equatorial Guinea might seek the extradition of the 69 applicants from Zimbabwe to Equatorial Guinea where they might face the death penalty in connection with the attempted coup, the 69 applicants petitioned the High Court of Pretoria for orders directing the Government of South Africa to ensure that they would not be extradited to Equatorial Guinea and that therefore the South African Government should seek their extradition. According to press reports the son of a former British Prime Minister Sir Mark Thatcher was involved. As the High Court dismissed the claim the proceedings ended up in the Constitutional Court where the applicants argued that there was a duty on states under international customary law to grant their citizens diplomatic protection and that many of their fundamental rights were being infringed in Zimbabwe and would be in Equatorial Guinea. The court dismissed the action, although it had no doubt in relation to the *locus standi* of the applicants. Every national had the right to have a request for diplomatic protection considered and responded to appropriately by the government. Where this did not happen the court would review the decision when called upon by the individual. Quite bluntly the court held:

> "The exercise of all public power is subject to constitutional control. […] This also applies to an allegation that government has failed to respond appropriately to a request for diplomatic protection."[174]

Accordingly it was on the merits that the applicants' claim failed. The court rejected their main argument and held that there was no international human right to diplomatic protection:

> "[T]here is no enforceable right to diplomatic protection, [but] South African citizens are entitled to request South Africa for protection under international law against wrongful acts of a foreign state."[175]

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[172] *Ibid.* at 92.

[173] *Kaunda v President of South Africa* 2005 (4) SA 235 (CC). The judgment is also reported in ILDC 89, which is taken as the basis of the following comment.

[174] ILDC 89, para. 78.

[175] *Ibid.* at para. 60.

Even if a duty to actually grant diplomatic protection could be shown to exist in cases in which the human rights of the state's citizens were severely violated by other states, the government would have a wide room for manoeuvre:

> "What needs to be stressed, however, … is that government has a broad discretion in such matters [i.e. in matters of diplomatic protection] which must be respected by our courts.[176] A court cannot tell the government how to make diplomatic interventions for the protection of its nationals."[177]

However, there are limits. The court identified two of them and allowed for further restrictions:

> "Rationality and bad faith are illustrations of grounds on which a court may be persuaded to review a decision. There may possibly be other grounds as well and these illustrations should not be understood as a closed list."[178]

As the governmental decision satisfied these criteria the applicants' claim was dismissed.[179]

As in *Abbasi* there was a tendency to refuse *locus standi* but to embark on the issue on the merits observing standards which, however, did not embarrass the government. In 1980 the German Federal Constitutional Court faced these kinds of issues in the *Rudolf Hess*[180] case. The applicant was a former minister in Hitler's Cabinet but without portfolio or any operational authority. Interned by the British in 1941 he was later tried by the Nuremberg Tribunal. He was convicted of crimes against humanity, a crime developed after the war by the Allied Forces as a fall back option for cases where no actual operational involvement in other crimes could be argued. Hess claimed that his conviction by the Nuremberg Tribunal violated the principle *nullum crimen sine lege* because at the time of any alleged wrongdoing, the concept of crimes against humanity was unknown and undefined in law both national and international. Further it was maintained that peremptory norms of international law and fundamental human rights stood against his solitary confinement in the Berlin prison to which he was transferred from the Tower of London, where he happened to be the last prisoner. He asked the German government for help and demanded diplomatic protection. The government declared

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[176] *Ibid.* at para. 81.

[177] *Ibid.* at para. 73.

[178] *Ibid.* at para. 80.

[179] This judgment was more recently confirmed in a South African context by *Van Zyl v Government of the Republic of South Africa* 2005 (4) All SA 96 (T); also reported in ILDC 171.

[180] BVerfGE 55, 349.

that it supported Hess's cause, but was not able to deliver any result. The Federal Constitutional Court neither expressly granting nor expressly denying the applicant *locus standi*, held on the merits that Hess's action was "– its admissibility assumed – ill-founded".[181]

Although the government had, as the court held, a duty to protect its citizens and their interests against foreign states, it enjoyed a wide discretionary power when deciding on the means by which it exercised diplomatic protection:

> "Allein aus dem Umstand, daß die bisherigen Schritte der Bundesregierung die Freilassung des Beschwerdeführers nicht haben bewirken können, ergibt sich freilich noch nicht ohne weiteres die verfassungsrechtliche Pflicht der Bundesregierung, nunmehr bestimmte andere Maßnahmen von möglicherweise größerer Tragweite zu ergreifen. Es muß ihrer außenpolitischen Einschätzung und Abwägung überlassen bleiben, inwieweit sie andere Maßnahmen für geeignet und – gerade auch mit Rücksicht auf die Interessen des Beschwerdeführers selbst wie auf die Belange der Allgemeinheit – für angebracht hält."[182]
>
> "The sole fact that the steps of the Federal Government did not effect the release of the applicant does not cause any constitutional obligation of the Federal Government to envisage different steps of possibly enhanced efficiency. It must remain in its foreign policy discretion and weighing power how far it considers other means to be appropriate – particularly regarding the interests of the applicant himself but also the concerns of the public."

However, it could not be established that the governmental measures were "auch im Hinblick auf die für den Beschwerdeführer auf dem Spiel stehenden Verfassungsgüter unter keinem vernünftigen Gesichtspunkt mehr verständlich erschiene.", "actually totally inappropriate regarding the constitutional rights of the applicant considering the different aspects of the case."[183]

All cases reported here in the context of diplomatic protection grant access (*locus standi*) but there is a wide margin of appreciation granted to governments as to whether and how they decide to protect their citizens' rights against third party states.

6.2.4.5 Tort Claims Against States Before National Courts

The activities of the Israeli occupying powers in Gaza Strip and the West Bank have repeatedly given rise to such claims. Among those the *Jecir Palace Hotel*

[181] BVerfGE 55, 349 (364).

[182] BVerfGE 55, 349 (366).

[183] BVerfGE 55, 349 (368).

case seems particularly noteworthy.[184] The Jecir Palace Hotel served as a support point for the Israeli Army in the context of their occupational tasks. However, when the Israeli soldiers left the hotel, the owner found the interior completely destroyed. Based on the argument that the vandalising soldiers had disregarded the protection of private property under international humanitarian law, namely under Article 46 of the Hague Convention IV, he claimed compensation for the damage caused by the Israeli Army before the Israeli courts. While his – quite promising – claim was pending before an Israeli court, the Israeli parliament, the Knesset, promulgated a statute excluding claims for damage caused by the armed forces in the occupied territories and declared it retrospectively applicable. The applicant's response to this was to institute proceedings before the Supreme Court where he successfully challenged the constitutionality of the statute. The Supreme Court allowed him to further pursue his claim and, giving special weight to Article 46 of the Hague Convention IV, essentially followed the applicant's international humanitarian law line of argument.[185] Referring to precedent on the issue of the protection of property the Supreme Court stuck to a former decision that held that whenever

> "a person's property is harmed or expropriated illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations".[186]

Given the political circumstances this judicial stance is remarkable. It was clearly not in the interests of the government to lend international humanitarian law the procedures of the national courts and with them their respective enforcement mechanisms.

Quite differently, in *Distomo*[187] the German Federal Constitutional Court showed some reluctance to recognise tort claims based on violations of international law. Again it was international humanitarian law that had been violated, however the events in question dated back to 1944. In June 1944 members of an SS unit integrated into the German occupying troops in the Greek village of Distomo shot about a hundred selected inhabitants of the village as part of retribution measures for the ambush and killing of some German soldiers in proximity to the village by the Greek partisan army. The descendants of some of the Greek victims brought

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[184] For further comment on this case, see Biehler, Gernot, "Property Rights for Individuals under International Humanitarian Law" (2007) 45 *Archiv des Völkerrechts* 432, 438 *et seq*.

[185] Decision of the Supreme Court sitting as Constitutional Court of 12 December 2006, reporting all the history of the case and the prior cases. Unfortunately, this case is not available in an English translation so it must stay more in the narrative here.

[186] HCJ 606/78 *Oyeh v Minister of Defense* 33(2) PD 113, 124.

[187] BVerfG, 2 BvR 1476/03 of 15 February 2006; reported with an English summary in ILDC 390.

proceedings before the German courts in order to seek compensation for the material damage they had suffered due to the massacre. After several lower courts and finally the German Supreme Court (*Bundesgerichtshof)* had rejected the claim, the applicants instituted constitutional complaint proceedings before the Federal Constitutional Court where they argued that as the retribution measure carried out by the German SS unit had violated the Hague Convention IV, as the latter provided in its Article 3 that "[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation" and since these entitlements formed part of the applicants' property, the rejection of their claims by the lower courts was in violation of, *inter alia*, their constitutionally guaranteed right to property under Article 14 of the German Basic Law (*Grundgesetz*).

The Federal Constitutional Court dismissed the claim and held that in the present case the applicants could not base their claim for compensation on either Article 3 of the Hague Convention IV or on the German provisions on public liability (*Amtshaftung*). They also referred to the fact that Article 3 of the Hague Convention IV was not self-executing and to the finding that at the time of the events the individual was generally not recognised as a subject of international law and could not directly claim damages for violations of international humanitarian law as embodied in the Hague Convention on Land Warfare of 1907.[188] Interestingly, the *Areiopag*, the Greek Supreme Court, held differently.[189] However, the Greek decision could not be executed against Germany as Germany held immunity in respect of its official acts (acts of state).

Although it was clear that in principle the violation of international law could give rise to public liability under national constitutional law, this claim was also rejected by the Federal Constitutional Court. Only where the foreign state would have accepted similar claims from German citizens had they suffered violations under international law by the state agent of the respondent state, were foreign citizens entitled to claim damages on grounds of public liability. Since such a reciprocal arrangement did not exist, the claims of the applicants were deemed to fail.[190] This national requirement of reciprocity is a very interesting feature of German law in relation to international law claims before German national courts.

6.2.5 Proceedings by the Forum State

6.2.5.1 Criminal Prosecution

Individual responsibility under international law is a rather recent phenomenon. The number of international courts, hybrid courts and tribunals has been rising

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[188] ILDC 390, para. 20; BVerfG, 2 BvR 1476/03 of 15 February 2006.

[189] *Federal Republic of Germany v Prefecture of Voiotia*, Hellenic Supreme Court (*Areios Pagos*) (Plenary) 11/2000, 49 *Nomiko Vima* [Law Tribune] 2000, pp. 212—229.

[190] ILDC 390, para. 23 *et seq*.; BVerfG, 2 BvR 1476/03 of 15 February 2006.

enormously and in the academic realm international criminal law has become increasingly popular.[191] The globalisation of criminal law leaves its traces not only on an international level. From time to time national criminal prosecution is strongly influenced by the international criminal system, be it directly, when national courts apply provisions of international criminal law in the national forum, or indirectly, when international standards such as the ICC Statute pressure national prosecution authorities into actually charging potential or actual offenders even if this is politically inexpedient.

In *Paulov*[192] the Estonian Supreme Court dealt with a case in the former category. The accused in this case, Karl–Leonhard Paulov, was charged with having killed three members of a group resisting the Soviet occupying regime, the so-called "forest brothers", who hid in the forests and fought against the Soviet regime. Both the County Court and the Circuit Court held that Paulov had committed the alleged murders but that they did not constitute crimes against humanity as international agreements, especially the Nuremberg Charter and the Statute of the ICTY, did not regard killing a member of a group resisting an occupying regime with the intent of destroying that group as a crime against humanity. As the Supreme Court pointed out these holdings were flawed as a result of a misreading of the relevant clause 1 of section 611 of the Estonian Criminal Code. In its judgment the Supreme Court held

> "that 'a group initiating resistance against an occupying regime' as noted the composition of Section 611 of the Estonian Criminal Code, is a feature of an offence of genocide, not of a crime against humanity."

Hence in the, indeed confusingly worded, Section 611 of the Criminal Code only a short passage specifies crimes against humanity: "crimes against humanity […] as those are defined in the rules of international law". Having regard to these rules of international law the Supreme Court concluded that

> "depriving an individual of their right to life and to fair trial could be qualified as a crime against humanity as stipulated in Art 6(c) of the Charter the Nuremberg International Military Tribunal."[193]

Paulov's attempted justification, namely that he had acted in conformity with an order of a superior was rejected by the court, borrowing an argument from international criminal instruments:

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[191] Antonio Cassese, *International Criminal Law* (OUP, 2003).

[192] *Prosecutor v Paulov* Estonian Supreme Court judgment No 3–1–1–31–00 (Official Gazette Riigi Teataja—RT) Part III 2000, 11, 118; the English translation that was used for the following comment is reported in ILDC 198.

[193] ILDC 198 at para. 8.

> "Pursuant to Article 8 of the Charter of the Nuremberg International Military Tribunal, the accused is not freed from responsibility if he acted pursuant to the order of his Government or of a superior and therefore the application of the provisions of Section 611 with respect to the defendant is legitimate."[194]

Basically, the Supreme Court thus applied substantive international criminal law to the case. It must be noted that this is still quite exceptional reasoning, although informed by a current tendency to support international criminal law. Certainly, few courts would employ such reasoning and most would stick to the national guarantees of criminal procedure and law which, *inter alia*, exist to safeguard the rights of the accused. Although *Paulov* cannot escape the slight suspicion of political application of criminal law (would the court have acted in the same manner if he had killed Soviet soldiers in the same circumstances?) a feature not unknown to international criminal law, the case is a valid expression of state practice and the *opinio iuris* of Estonia under international law.

Similarly, in *Van Anraat*[195] the Dutch Court of Appeal in The Hague applied international criminal law as an auxiliary means of establishing whether the accused had had a sufficient degree of intent to be convicted of complicity in genocide. According to the charges, from 1985 until early 1988, Van Anraat supplied at least 1,100 tons of Thiodiglycol (TDG) to the Iraqi regime, which it allegedly used for the production of chemical weapons, which later on were used in attacks that formed part of a larger complex of actions carried out over years by the Saddam Hussein regime against the Kurds in the Northern Iraqi territory with the intention of destroying the Kurdish population in whole or in part. Hundreds of thousands of Kurdish civilians were chased from their homes and deported and tens of thousands of Kurds were killed. The charge was based on the Dutch Genocide Convention Implementation Act, although international criminal law jurisprudence was considered by the court. This was particularly so when examining the degree of intent required for a conviction on account of complicity in genocide. Here the court noted:

> "The international aspects of the case under consideration have given the Court cause for a focus on international criminal law, especially when answering the question whether the defendant had the legally required degree of intention in committing the offences that he has been charged with. In this respect the Court concludes that, especially regarding the question which degree of intention is required for a conviction on account of complicity in genocide, inter-

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[194] *Ibid.* at para. 4.

[195] *Public Prosecutor v Van Anraat* LJN: BA4676 (judgment of 9 May 2007, Court of Appeal, The Hague); the English translation that was used for this comment is reported in ILDC 753.

> national criminal law is still in a stage of development and does not seem to have crystallized out completely."[196]

As Van Anraat did not in any way have knowledge of the genocidal intent of the perpetrators themselves, he could not even satisfy possible minimal standards of intent and the question of which standards were to be considered appropriate for international law was purposely left open.[197] Accordingly the court acquitted him and concluded:

> "Seen that this criteria of intention, which is regarded as minimal, (also from an international criminal law point of view) has not been met, the Court believes that it has not been legally and convincingly proven that his intentional act, not even in a conditional way, was also targeted at the genocidal intention of the perpetrators."[198]

While in *Paulov* the influence of international rules operated against the interests of the accused and international provisions affected the interpretation of the *mens rea* requirements in *Van Anraat*, in *Massaba*[199] the Congolese Military Tribunal of Ituri based its charge entirely on the Rome Statute of the International Criminal Court. Blaise Massaba, a captain in the Congolese army, was accused of having ordered his soldiers to arrest and later shoot five pupils on the pretext that they were members of the armed militias in eastern Congo. It was exactly these armed militias that the Congolese army was fighting at that time. Criminal proceedings were instituted and Massaba was charged with war crimes as provided for in Articles 8(2)(b)(xvi) and 8(2)(a)(i), respectively, of the Rome Statute and the Congolese military penal code.[200] Although the latter included a definition of war crimes and related procedural rules in its Articles 173 to 175 it exhibited "une lacune criante en ne sanctionnant pas, en effet, le crime de guerre qui y est dépourvu de peine". Even though the Congolese Penal Code recognised the rule of *nulla poena sine lege* in Article 2 and the criminal code clearly lacked a rule providing for the punishment of war crimes, the military tribunal found a way to fill this gap. Arguing that "le législateur congolais n'avait nullement l'intention de laisser impuni ce crime atroce dont il a reconnu la haute gravité en ratifiant le Traité de Rome"[201]

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[196] ILDC 753, para. 7.

[197] *Ibid.*

[198] *Ibid.*

[199] *L'Auditeur Militaire v Bongi Massaba* Military Tribunal of Ituri, judgment of 24 March 2006, RP No 018/2006; also reported – accompanied by an English summary of the decision – in ILDC 387, which will be used for citations here.

[200] See "Loi No. 024/2002 du 18 Novembre 2002 portant code pénal militaire" in Journal Officiel – Numéro Spécial – 20 Mars 2003; also available at http://www.leganet.cd/legislation.htm#2002.

[201] ILDC 387, para. 67.

the judges held that "cette omission de la pénalité n'est en définitive qu'une erreur purement matérielle".[202]

They recalled that the Military Tribunal of Mbandaka had previously decided that in many respects the direct application of the Rome Statute was preferable to reliance on the domestic criminal code when it comes to crimes provided for in both: it provided the better mechanism for the protection of victims' rights, its rules were more precisely defined and it included less severe penalties, in particular it did not provide for the death penalty.[203] Accordingly, and in light of constitutional rules providing for the "superior authority" of ratified international agreements,[204] the tribunal in *Massaba* based the charge of war crimes directly on the Rome Statute itself and thus directly applied substantive international criminal law.

A similar situation arose in the proceedings against *Adolfo Scilingo*[205] before the Spanish High Court (*Audiencia Nacional*). Scilingo was an Argentine officer accused of having participated in the military operation for the removal of the constitutional President of Argentina, Maria Estela Martinez de Peron, and the elimination of the political opposition. The latter included a systematic criminal plan to kidnap, torture, cause the disappearance of, and finally physically eliminate persons who were reputed to be "subversive". The Spanish State prosecutor charged Scilingo with the crime of genocide in conjunction with several charges of purposeful homicide. Although the High Court in fact found that Scilingo was a member of the said operation and had participated in the killing of 30 people who had been considered incompatible with the envisaged social and political project because of their thinking, activities, or political affiliations, the judges argued for a narrow interpretation of the crime of genocide under Spanish law and held that Scilingo was liable under the prohibition of crimes against humanity. The international law perspective came to the fore as the Spanish criminal code did not penalize crimes against humanity until October 2004 and the acts had been committed in the late 1970s. In the High Court's opinion, however, a domestic legislative provision prohibiting the conduct at issue was not required for a conviction that satisfies the principles of legality and *nullum crimen sine lege*; an international law provision providing for the criminality of the acts at the time when the alleged crime was committed is sufficient: "even if we find ourselves in what appears to be a situation where the only applicable law is internal law this is not the case, since the conduct being prosecuted is also in breach of international criminal law."[206]

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[202] *Ibid.* at para. 68.

[203] *Ibid.* at para. 73.

[204] *Ibid.* at para. 72.

[205] *Graciela P de L v Scilingo* Judgment 16/2005; Appeal 139/1997; Reference Aranzadi JUR 2005/132318; ILDC 136. For a comprehensive discussion, see the contributions of Christian Tomuschat, Alicia Gil Gil and Giulia Pinzauti to the symposium on the *Scilingo* case in (2005) 3 Journal of International Criminal Justice 1074 *et seq*.

[206] ILDC 136, para. B 1.

In relation to Scilingo's offences the High Court was "in no doubt that there is an *opinio iuris cogentis* in relation to the imperative nature of the law that prohibits genocide, the slave trade, aggression or, in general, crimes against humanity"[207] and held that "regardless of what may occur on the internal policy front … there is no doubt that this type of international crime, which gives rise to individual criminal responsibility, has been in force in international law for decades".[208] Holding that these international customs are part of the Spanish legal order, the High Court sentenced Scilingo to a total of 640 years of imprisonment.[209]

In comparison to the two cases considered above the importance of international criminal law in *Scilingo* reaches a higher level. In *Paulov* the Estonian Criminal Code expressly referred to international rules on the matter so that it was essentially domestic law that ordered the application of international criminal provisions. In *Massaba*, too, the prohibition of the committed acts was apparent from the Congolese criminal code even though it did not provide for a penalty. However, in *Scilingo* international criminal rules were applied without any relation to national provisions referring to international law or providing for their application. The High Court applied international custom independently from national criminal law and the conviction of Scilingo was therefore exclusively based on international law.

Except for these cases decided on the basis of substantive international law, the manner in which international criminal law as embodied in the Rome statute of the International Criminal Court may affect national criminal procedures is rather indirect. As the case of the British Colonel Mendonca shows, international safeguards against impunity might pressure national prosecutors into charging possible offenders, even in the face of adverse reasons of political expediency.[210]

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[207] *Ibid.* para. B 2.

[208] *Ibid.* para. B 2.3.

[209] On 18 September 2001 a similar case was decided by the Dutch Supreme Court in *Bouterse (Appeal in cassation in the interests of the law)* No. HR 00749/01 CW 2323 LJN; AB1471, NJ 2002, 559; English translation at ILDC 80. Unlike the Spanish court in *Scilingo*, however, the Dutch judges held that international customary law could not justify a conviction where domestic law did not provide for the punishment of the offence in question.

[210] As Colonel Mendonca's court trial ended with an acquittal and this judgment has not been published anywhere the case was reconstructed mainly on the basis of different newspaper articles. See *inter alia*, Severin Carrell, "Army Colonel facing trial for war crimes" in *Independent on Sunday*, 22 May 2005, available at http://www.independent.co.uk/news/uk/crime/army-colonel-facing-trial-for-war-crimes-491655.html; Michael Evans, David Charter and Steve Bird, "Prosecutions will uphold Army integrity, says Reid" in *The Times*, 20 July 2005 available at http://www.timesonline.co.uk/tol/news/world/iraq/article545964.ece; Thomas Harding, Toby Helm, Joshua Rozenberg, "Blair and Goldsmith accused over court martial of Col Mendonca" in *The Daily Telegraph*, 21 July 2006, available at http://www.telegraph.co.uk/news/uknews/1503000/Blair-and-Goldsmith-accused-over-court-martial-of-Col-Mendonca.html; Duncan Hooper, "Colonel cleared over mistreatment of Iraqis" in *The Daily Telegraph*, 15 February 2007,

Jorge Mendonca was the commander of the Queen's Lancashire Regiment serving in Basra, Iraq in 2003. Several Iraqi civilians, who had been detained by the British Regiment during that time, claimed to have been assaulted, hooded, cuffed, deprived of sleep and beaten for failing to hold stress positions over a 36-hour period by British soldiers under the command of Mendonca. One of the detainees, Baha Da'oud Salim Musa, was killed by the British soldiers; it was stated that he "died as a result of the treatment", a phrase which indicates proximity to medical negligence cases. Although, these methods of treatment may constitute torture and with it a severe violation of international law, the British public and political debate tended to sympathise with the armed forces, essentially arguing that (international) criminal proceedings against the responsible servicemen would undermine the morale of the army and endanger its functioning. As Lord Hoyle, not a Law Lord but a member of the House of Lords, put it in a parliamentary debate on the subject:

> "If they charge the colonel or other soldiers under the International Criminal Court they will destroy the morale of all the soldiers, not just the Queen's Lancashire Regiment but soldiers serving in Iraq, Afghanistan or any other theatre of war."[211]

The provision of command responsibility in the Statute of the ICC (Article 28a) on which a charge against Colonel Mendonca would most likely have been based was especially criticised as "extremely wide-ranging" and as "a catch-all".[212] Although the public statements at the time were cautious enough not to state it in clear terms it seems rather unlikely that Colonel Mendonca would have faced criminal prosecution. However, as the United Kingdom had ratified the Rome Statute of the International Criminal Court without any reservations, the alleged offences fell within the jurisdiction of the ICC and – much to the indignation of the British – the accused were in danger of being prosecuted in The Hague:

> "What is now hanging over him and other soldiers is that the case may be referred to the International Criminal Court. That court was not set up for that purpose. It was set up to deal with cases of genocide and with war criminals. That that gallant officer could be in the

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available at http://www.telegraph.co.uk/news/uknews/1542618/Colonel-cleared-over-mistreatment-of-Iraqis.html and the article "Why soldiers had no case to answer" in *BBC News*, 13 March 2007, available at http://news.bbc.co.uk/2/hi/uk_news/6447717.stm.

[211] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1224.

[212] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1223; see also Thomas Harding, Toby Helm, Joshua Rozenberg, "Blair and Goldsmith accused over court martial of Col Mendonca" in *The Daily Telegraph* of 21 July 2006, available at http://www.telegraph.co.uk/news/uknews/1503000/Blair-and-Goldsmith-accused-over-court-martial-of-Col-Mendonca.html.

> same dock as that in which Milosevic has appeared must be wrong in itself."[213]

Lord Boyce in a similar capacity as a member of the House of Lords stated in the parliamentary debates at Westminster:

> "In this context I would mention the threat of being taken before the International Criminal Court. While I accept that it will be an extreme that sees the ICC gaining jurisdiction, the theoretical possibility does exist."[214]

As the ICC can only take up a case when the national judiciary is unwilling or unable to guarantee prosecution, Lord Drayson pointed to the solution: "We remain confident that UK authorities will always act properly. As long as they do, there will never be any basis for the ICC to exercise jurisdiction."[215] What followed was a charge of war crimes against Colonel Mendonca for having negligently failed to ensure that his men did not abuse prisoners in Basra. However, in February 2007 he was cleared of all charges and McKinnon J in Old Bailey ordered the Colonel's acquittal and held that Mendonca had "no case to answer".

6.2.5.2 International Law as a Defence Before National Courts

The reverse role of international law can be observed when it is employed as a defence in certain circumstances. The difference from the cases referred to above is well mirrored in the personalities and styles as well as public allegiances of Colonel Mendonca on the one hand and the other accused now to be introduced on the other hand.

In *DPP v Clancy* which was decided by the Dublin Circuit Criminal Court in 2006 international law provided a defence against prosecution.[216] Three women and two men entered Shannon Airport on an early morning in February 2003 and tried to make a stand against what they considered the clearly illegal and deadly UK/US war against the people of Iraq and rendered one US Navy plane incapable of flight as well as making a big show by beating planes with an inflatable hammer in an admitted attempt to raise public awareness. Next to the plane they left a written statement setting out that they felt obliged to act as they did for the protection of life and property and to avoid a breach of international law by US forces

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[213] Lord Hoyle, *House of Lords Hansard*, 14 July 2005, Column 1223.

[214] Lord Boyce, *House of Lords Hansard*, 14 July 2005, Column 1236.

[215] Lord Drayson, *House of Lords Hansard*, 14 July 2005, Column 1263.

[216] *DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* Circuit Criminal Court, 25 July 2006; for a brief analysis of the case, see Joe Noonan, "*DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* (the Pitstop Ploughshares Case)" (2006) 1 Irish Yearbook of International Law 337.

continuing the violence in Iraq. The police caught the offenders at the scene of the crime and charged them with criminal damage contrary to section 2(1) of the Criminal Damage Act 1991. In section 6(2)(c) the same Act provides for a "lawful excuse" on which the accused based their arguments. Under the Criminal Damage Act this excuse is dependent on different criteria. First, the offender has to act in order to protect himself or another, his or another's property or his or another's right or interest therein. If this is the case the act committed must prove to be objectively reasonable in the circumstances as the accused honestly believed them to be, given their understanding of the illegality of the use of force by the states engaged in the war against Iraq. To show that their belief was soundly based and could be honestly held the accused were allowed to present their own understanding of the legal situation under international law. An international law expert[217] heard on the matter reported on current academic opinion that was entirely in line with the submissions of the accused and showed that their view was one that could be honestly held. Although this was only one of the criteria that the accused had to satisfy in order to be lawfully excused[218] and although their defence was based on a statutory justification, international law played an important part. Reliance on the relevant provisions of international law governing the use of force was an essential part in the accused's defence and determined the outcome of the case. The Dublin Circuit Court found them to be not guilty following a jury verdict to this effect.

In the decision of the German Federal Administrative Court (*Bundesverwaltungsgericht*) in *Pfaff* international law served a similar purpose.[219] It was not a jury based decision of a lower court with a "no case to answer" holding which naturally stays unreasoned, but a decision of the highest court of a major player on the international plane and is thoroughly reasoned although exceptional.

The applicant was and is still a Major with the German Army (*Bundeswehr*) where he was involved in the realisation of an IT-programme for logistical purposes. As the applicant had considerable concerns about the legality of the war in Iraq and about the contribution which German military forces and he in particular was making thereto, a possibility which even his superior officer could not rule out, he refused to continue his work on the said IT-programme. His superior officer ordered him to resume his work but he disobeyed arguing that since he could not be sure whether the tasks he was supposed to perform in some way supported the unlawful war in Iraq he felt unable to and legally bound not to execute the orders. The applicant was tried before a military court (*Truppendienstgericht*) on disciplinary grounds. He was relegated to an inferior position within the armed

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[217] This was Jean Allain of Queen's University Belfast who was, as the author was in this case, called as an expert witness for the defence.

[218] See Noonan, "*DPP v Clancy, Dunlop, Fallon, Moran and O'Reilly* (the Pitstop Ploughshares Case)" (2006) 1 Irish Yearbook of International Law 344: "International was not the only factor, and perhaps not even the decisive factor, in the jury's decision to acquit."

[219] BVerwG, 2 WD 12/04 of 21 June 2005; reported in (2006) NJW 77 and with an English summary in ILDC 483.

forces and the court convicted him for his refusal to obey orders. The applicant appealed against this decision and the *Bundesverwaltungsgericht* held in his favour but avoided making a clear statement that the project the applicant was involved in was unlawful under international public law and that thus he was free to disobey the orders. Instead the *Bundesverwaltungsgericht* found other arguments that justified the soldier's disobedience, namely the constitutional guarantee of freedom of conscience:

> "Aus Art. 1 III GG sowie aus dem Wortlaut, der Entstehungsgeschichte und aus dem Regelungszusammenhang des Art. 4 I GG ergibt sich jedoch, dass ein militärischer Befehl jedenfalls dann als unzumutbar nicht befolgt zu werden braucht, wenn der betroffene Untergebene sich insoweit auf den Schutz des Grundrechts der Freiheit des Gewissens berufen kann."
>
> "The wording, the genesis and the context of Article 1.3. of the German Basic Law (Constitution) in relation to Article 4.1. indicate, however, that a military order may be not obeyed being an outrageous one if the subordinate can rely insofar on the safeguards of the freedom of conscience." [220]

With regard to the case in question the *Bundesverwaltungsgericht* held that at the time when the alleged violation of official duty had taken place the possibility that the project the applicant worked on would contribute to the war effort could not entirely be ruled out. In the court's opinion this constituted a sufficient basis for a constitutionally protected conscientious objection to the orders he had received.[221] The court thus vacated the conviction of the military court. The applicant was allowed to disobey the order, as he felt morally obliged not to perform it.

In effect, even though in a rather circuitous line of reasoning, the court accepted the applicant's international law defence, or rather accepted his constitutional defence based on international law evidence. As the court acknowledged that the possible or even likely illegality in terms of international public law of a military order might create a moral dilemma for the recipient whose right to make a conscientious decision is constitutionally protected, it paved the way for an international law defence against disciplinary action due to disobedience. In some parts the judgment even takes a step beyond this. Almost in passing and certainly in an *obiter* context, the *Bundesverwaltungsgericht* notes that a violation of the general rules of public international law as referred to in Article 25 of the German Constitution might also justify a refusal to execute an order.[222] Thus, in this case the applicant could alternatively have argued that the order to continue his work on the IT-programme demanded participation in or at least a contribution to a military attack that was illegal according to international customary law. Moreover, as the

[220] BVerwG (2006) NJW 77, 83.

[221] *Ibid*. at 93.

[222] *Ibid*. at 82.

court noted, an order may be ignored if it is not within the tasks that are constitutionally provided for the army. The constitutional task of the German military is "defence". In the definition that the *Bundesverwaltungsgericht* provides this includes everything

> "was nach dem geltenden Völkerrecht zum Selbstverteidigungsrecht nach Art. 51 der Charta der Vereinten Nationen (UN-Charta), der die Bundesrepublik Deutschland wirksam beigetreten ist, zu rechnen ist."
>
> "which according to current international law is part of the inherent right to self defence according to Article 52 of the UN Charter, of which the Federal Republic is a party."[223]

Could this remit be recommended to the Secretary of Defence? It could hardly have been clearer: where obedience entails a violation of international public law, disobedience may not be judged a violation of duty. This international law argument provides a valid defence against disciplinary or criminal enforcement actions.

The issue of whether violations of international law prior to the actual proceedings before the court have any impact was crucial to the English House of Lords' decision in *Bennett*.[224] Bennett was a New Zealand citizen who had purchased a helicopter in the UK. The monetary means for this purchase was raised by a series of false pretences and had not been paid back. The UK therefore wanted him in the country to subject him to criminal prosecution. As Bennett was in South Africa and no previous extradition agreements existed between the UK and South Africa the UK police convinced the South African authorities to arrest and forcibly return Bennett to the UK on the pretext of an extradition to New Zealand. The plane to New Zealand took a route via Heathrow airport where the British police got hold of Bennett, arrested him and tried him for his offences. The accused claimed an abuse of process and argued that the House of Lords lacked jurisdiction to try the case in as much as the return to England was in breach of international law. In a majority ruling[225] the court decided in favour of Bennett. Lord Griffiths stated that "if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it"[226] and relied mainly on an estoppel argument:

> "The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution."[227]

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[223] BVerwG (2006) NJW 77, 80 *et seq*.

[224] *R. v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 AC 42.

[225] 4:1, Lord Oliver of Aylmerton dissenting.

[226] [1994] 1 AC 42, 62.

[227] *Ibid*.

Lord Bridge of Harwich agreed and, explicitly referring to the international law violation, added a rule of law argument:

> "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance."[228]

Lord Lowry also emphasized the issue of an international law defence. Examining the limits of prosecution after formal extradition procedures, namely that the accused can only be charged with crimes that he has been extradited for, Lord Lowry pointed out that these limits could be circumvented if domestic courts accepted jurisdiction in the case of illegal abductions. However, he stated:

> "[I]t seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed, [i.e. formal extradition procedures had been followed]."[229]

It is by staying procedures in cases like this that courts can express disapproval; discourage similar executive behaviour in future cases and thus "maintain the purity of the stream of justice".[230] Overall, Bennett's defence was accepted, for the sake of the rule of law, whether national law or international law.[231]

Without expressly using the term it is nonetheless apparent that in *Bennett* the main issue was the applicability of the "fruit of the poisonous tree doctrine". As the decision of the German *Landgericht* (District Court) Frankfurt in *Gäfgen*[232] illustrates quite clearly this doctrine is not, at least not unconditionally, applied in German criminal proceedings. In a case that is currently pending before the ECtHR the accused claimed that his conviction violated the procedural guarantees of the European Convention of Human Rights.[233] Gäfgen had killed the 11 year

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[228] [1994] 1 AC 42, 67.

[229] *Ibid.* at 76.

[230] *Ibid.* at 77.

[231] Before South African courts a case almost identical to *Bennett* (in both facts and outcome) came up in *S v Ebrahim* 1991 (2) SA 553. In *Bennett* this case is frequently referred to.

[232] *Creditors of State Bonds v Argentina* Land-Gericht Frankfurt, 5/22 Ks 3490 Js 230118/02 of 9 April 2003, (2003) *Strafverteidiger* 325.

[233] For the decision on the admissibility of Gäfgen's complaint see *Magnus Gäfgen v Germany* ECHR, No. 22978/05, Judgment of 10 April 2007; German translation reported in

old son of a well-known banker's family and police arrested him when he tried to leave the country. Gäfgen pretended to the police that the boy was still alive and the vice president of the Frankfurt police, considering the life of the child to be in extreme danger, ordered that Gäfgen be questioned under the threat of the infliction of extreme pain to force him to reveal where the child was hidden. Gäfgen confessed to the crime. Although the *Landgericht* Frankfurt acknowledged that because of the clear violations of German procedural rules and Article 3 of the ECHR Gäfgen's confessions could not be used by the court, it refused to exclude the evidence that the police had obtained as a result of the confessions, such as the boy's body and his clothes and the money they had found in Gäfgen's apartment.[234] In the court's opinion the infringement of Gäfgen's fundamental rights could be outweighed by the severity of the alleged crime, so that the evidence was admissible and Gäfgen was convicted.[235] Gäfgen brought an action before the ECtHR which is still pending. Gäfgen argues that the criminal proceedings should have been stayed as the use of the evidence violated his right to a fair trial and made an effective defence impossible. In the decision on the admissibility of Gäfgen's claim the ECtHR stated that it was at least not manifestly ill-founded.[236] Even though any forecast of the outcome is highly hypothetical it may be worth considering how the proceedings might continue if the ECtHR indeed find a violation of Article 6 ECHR. As will be recalled, German courts must take into account the judgments of the ECtHR within the German legal order. As the German Code on Criminal Procedure (StPO) in § 359 Nr. 6 provides for the possibility of resuming proceedings after the ECtHR has found a violation of the Convention and the preceding decision of the national court can be held to be based on this violation, Gäfgen could have a valid defence by relying on international law. The violation of the fruit of the poisonous tree doctrine – if the ECtHR holds this to be a violation of the Convention – could be invoked before national courts and in so far as the domestic judgment rests upon this violation the decision may have to be reversed.[237]

(2007) NJW 2461; English judgment available at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=22978/05&sessionid=7915775&skin=hudoc-en.

[234] LG Frankfurt, 5/22 Ks 3490 Js 230118/02 of 9 April 2003, [2003] *Strafverteidiger* 325, para. 16 *et seq.*

[235] *Ibid.*

[236] *Magnus Gäfgen v Germany* ECHR, No. 22978/05, Judgment of 10 April 2007; (2007) NJW 2461, 2464.

[237] In *Rukundo v Federal Office of Justice* (Federal Supreme Court of Switzerland, decision of 3 September 2001, Cases No 1A.129/2001 and1A.130/2001) the Swiss courts, too, acknowledged the possibility of a ECHR based defence. At stake was the transferral of Emmanuel Rukundo to the International Criminal Tribunal for Rwanda (ICTR). Rukundo claimed that the procedures before the ICTR did not satisfy Article 6 ECHR and that Swiss authorities should therefore not co-operate with the tribunal and transfer him to the court. The Swiss Federal Supreme Court held that in principle this defence was valid, however, *in casu* they considered Rukundo's objection unsubstantiated.

In *Nguyen Tuong Van*[238] the Singapore Court of Appeals also had to face the question of whether in the light of clear international law violations evidence had to be excluded from the proceedings. More precisely *Nguyen Tuong Van* concerned the question of whether the accused in criminal proceedings might rely upon a violation of Article 36(1) of the Vienna Convention on Consular Relations (VCCR) to render statements used as evidence for his conviction inadmissible. Nguyen Tuong Van was an Australian national who was arrested in possession of two packets of heroin while in transit through Singapore's Changi Airport. The following day he made a statement in which he apologized for the inconvenience caused and revealed that there were other people involved in the attempted drug trafficking. The Court of Appeal classified this statement as a confession, as it clearly linked the accused to the offence.[239] Yet the arresting authority had not informed the Australian consular representation of Tuong Van's detention before his confession was recorded and Tuong Van submitted that this constituted a breach of Article 36 (1) VCCR that rendered the confession inadmissible in the criminal proceedings. The Court of Appeal held against Tuong Van and affirmed the decision of the High Court. Although Singapore was not a party to the Vienna Convention on Consular Relations the court considered itself bound by its rules through customary state practice.[240] Referring to the ICJ judgment in the *Avena* case,[241] the court held that in principle the recording of statements before the notification of the consular post of the arrested foreigner could not be considered a breach of Article 36 (1) VCCR as embodied in international customary law.[242] In an *obiter dictum* the judges stated that while the trial judge in the High Court had found that if a breach of the relevant VCCR provision had occurred and if there was a "resultant prejudice" the court might exclude the statements in question, this was incorrect as Article 36(2) VCCR subjected the rights created under the first paragraph to domestic legislation. Hence, it was according to the domestic procedural standards that the question of admissibility had to be decided. As the national rules ensured the "voluntariness with which statements are made and the reliability of confessions" these were sufficient.[243] In effect, the international law defence was rejected. Only where the violation of Article 36(1) VCCR led to a situation that did not satisfy the criteria that statements necessarily had to satisfy under domestic rules could the admissibility of the statement be challenged.

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[238] *Nguyen Tuong Van v Public Prosecutor* Singapore Court of Appeals, decision of 20 October 2004, [2004] SGCA 47; all references here refer to the text reported in ILDC 88.

[239] ILDC 88, para. 22.

[240] *Ibid.* at para. 24.

[241] *Avena and other Mexican nationals (Mexico v United States of America)* [2004] ICJ Rep 12.

[242] ILDC 88, para. 33.

[243] *Ibid.* at para. 35.

6.2.5.3 Extradition

6.2.5.3.1 The Political Offence Exception

Article 3 of the European Convention on Extradition 1957 provides that "[e]xtradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence". The rationale behind the so-called political offence exception was adverted to by Lord Diplock in the course of his judgment in *R v Governor of Pentonville Prison, ex p Cheng*[244] commenting on the provision in section 3(1) of the Extradition Act 1870 that: "A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character". In his view "to put it bluntly … the draftsman contemplated that a foreign government in its eagerness to revenge itself upon a political opponent might attempt to misuse an extradition treaty for this purpose".[245]

While Stephen J, writing extra-judicially, expressed the view in *The History of the Criminal Law of England*[246] that political offences were crimes which were "incidental to and formed part of political disturbances", it must be acknowledged that it is difficult to formulate a definition of "political offence" which is consistent and can take account of changing attitudes towards this type of activity. While the extensive discussion by Lord Radcliffe of the concept in his speech in *Schtraks v Government of Israel*[247] is useful, it has been suggested that "his reflections impel one, the more one ponders, to the conclusion that the formulation of a workable rule is impossible".[248] It is therefore interesting to examine the attempts of the judiciary in Ireland, a jurisdiction which had more reason than most to address this question as a result of paramilitary activity there particularly in the 1980s, to grapple with the definition of "political offence". While the judgments of the Supreme Court must be read against the specific background of Irish constitutional law, they nevertheless provide some useful insights into the area which might be employed in an international context.

Part III of the Extradition Act 1965, which related solely to extradition to the United Kingdom, while it lacked a number of the safeguards provided in Part II of the Act which made provision for extradition to all other countries, did provide that an extradition order would not be made where the offence to which the warrant related was, *inter alia*, a "political offence or an offence connected with a political offence". The attitude adopted by the Irish courts prior to the early 1980s is

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[244] [1973] AC 931.

[245] *Ibid*. at 944.

[246] (1883) Vol II, p. 70-71. See also *Re Castioni* [1891] 1 QB 149, 165 where Hawkins J stated that he would "adopt… absolutely" the interpretation of Stephen J, who also sat in the Court of Appeal in that case.

[247] [1962] 3 All ER 529.

[248] Shearer, *Extradition in International Law* (Manchester University Press, 1971) p. 178.

exemplified by that adopted in *McLaughlin v Attorney General*[249] where Finlay P in the High Court stated that "even murder … if carried out by or on behalf of an organisation which seeks to overthrow the government of its country by force is a political offence".[250] So in reality all politically motivated offenders could claim the benefit of the political offence exception.

However in the wake of the Supreme Court decision in *McGlinchey v Wren*[251] this defence was only available where the activity in question was one which "reasonable, civilised people would regard as political activity".[252] Subsequently, in *Russell v Fanning*[253] the Supreme Court further circumscribed the scope of the political offence exception and denied the benefit of it to all members of illegal paramilitary groups whose objectives included the unconstitutional subversion of the Irish State and the Constitution of Ireland.[254] This decision can be seen as an attempt to narrow the scope of the political offence exemption by examining the political motives of the perpetrators of paramilitary crime in the context of the constitutional imperatives which the Irish courts are bound to uphold. However, in some respects the decision of the Supreme Court in *Russell* marked the high watermark of judicial reasoning against the interests of those involved in paramilitary crime.

Subsequently, in *Finucane v McMahon*[255] the Supreme Court held that extradition should be refused where it would involve an infringement of the suspect's constitutional rights. Walsh J drew a distinction between what can properly be regarded as terrorism on the one hand and politically motivated offences on the other hand and said that "political offences" are defined as offences which usually, although not necessarily, consist of violent crime directed at securing a change in the political order. In his view, while the use of violence did not of itself rule out reliance on the political offence exception, certain forms of indiscriminate, violent activities should be more correctly classed as "terrorism" and should not come within the definition of "political offence". While the judgment of Walsh J provided little real guidance other than this about how the distinction between terrorism strictly so-called and political offences was to be drawn in future cases, it clearly went some way towards restoring the judicial attitude which had prevailed in the 1970s in cases such as *McLoughlin v Attorney-General*. It therefore meant that politically motivated offenders could once again claim the benefit of the political offence exception provided they were not involved in acts of indiscriminate violence.

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[249] High Court, 5 December 1974.

[250] *Ibid.* at 4-5.

[251] [1982] IR 154.

[252] *Ibid*. at 160 *per* O'Higgins CJ.

[253] [1988] IR 505.

[254] See also *Quinn v Wren* [1985] IR 322.

[255] [1990] 1 IR 165. See also *Clarke v McMahon* [1990] 1 IR 226; and *Carron v McMahon* [1990] 1 IR 239.

The Extradition (European Convention on the Suppression of Terrorism) Act 1987 was passed to give effect to the European Convention on the Suppression of Terrorism adopted in 1977 by most of the members of the Council of Europe, although it was not signed by Ireland until 1986. A number of criticisms were levelled at the legislation, in particular that it failed to give adequate effect to Article 2 of the European Convention on the Suppression of Terrorism which gave Ireland the option of providing by legislation that certain serious offences, such as murder and manslaughter, could not be regarded as political in nature. In addition, the failure of the Act to include within its ambit "possession" as opposed to "use" of a weapon and the fact that it did not extend to non-automatic firearms were omissions which greatly reduced its effectiveness.

The reasoning in *McGlinchey v Wren* to the effect that indiscriminate violence can never qualify as a political offence must still be regarded as good law. This seems clear from the decision of Kelly J in *Quinlivan v Conroy*,[256] where he held that the offences in respect of which the applicant was sought did not concern individuals with any direct or indirect involvement in political activity and consisted of violence which could result in indiscriminate death or serious injury to ordinary members of the public. He therefore held that they could not be classified as political offences or offences connected with a political offence.

The scope of the political offence exception has been reduced in a number of jurisdictions partly as a result of the growth in the commission of offences of a "terrorist" nature for political motives. In England, the Extradition Act 2003 removed the exception completely, although section 13 provides that a person's extradition shall be barred by reason of extraneous considerations if it appears that the warrant is in fact issued "for the purpose of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions".

Consideration was given to how these principles will be interpreted by Scott Baker LJ in *Hilali v Central Court of Criminal Proceedings Number 5 of the National Court of Madrid*.[257] He said that the burden is on the appellant to show a causal link between the issue of the warrant, his detention, prosecution, punishment or the prejudice which he asserts he will suffer and the extraneous consideration, whether it be race, religion or political opinion. Scott Baker LJ added that he does not have to prove on the balance of probabilities that the events described in the section will take place, but he must show that there is a "reasonable chance" or "reasonable grounds for thinking" or a "serious possibility" that these events will occur.[258] He also reiterated that in considering such matters the court is not bound by the ordinary rules of evidence and that the appellant may rely on any material to

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[256] [2000] 3 IR 154.

[257] [2006] EWHC 1239 (Admin).

[258] Referring to the *dicta* of Lord Diplock in *Fernandez v The Government of Singapore* [1971] 1 WLR 987, 994.

support a submission based on the provisions of section 13.[259] The interpretation of "political opinions" for this purpose was also considered by Collins J in *Gomez v Secretary of State for the Home Department*.[260] He expressed the view that a broad purposive construction should be given to this ground and that it is not necessary to establish that the prosecution's only motive is political persecution and that it is sufficient if political motivation forms part of the reason for acting.

6.2.5.3.2 The Rule Against Double Jeopardy

The rule against double jeopardy, sometimes referred to as the principle *non bis in idem,* operates in the context of extradition proceedings to prevent an individual being prosecuted for the same offence more than once in different jurisdictions. An example of this principle in extradition legislation is the provision set out in section 12 of the United Kingdom Extradition Act 2003 which provides:

> "A person's extradition to a category 1 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction on the assumption–
>
> (a) that the conduct constituting the extradition offence constituted an offence in the part of the United Kingdom where the judge exercises jurisdiction;
>
> (b) that the person were charged with the extradition offence in that part of the United Kingdom."

So, a defendant can rely on section 12 in circumstances where if he were charged in the United Kingdom with an offence for which his extradition is sought, he could plead the principles of *autrefois acquit* or *autrefois convict*.

The circumstances in which a person whose extradition is sought may seek to bar his extradition on this basis were considered in some detail recently by Auld LJ in the decision of the English High Court in *Fofana v Deputy Prosecutor Thubin Tribunal de Grande Instance de Meaux, France*.[261] The appellants had been prosecuted for fraud in criminal proceedings commenced shortly before the issue of the extradition warrant which were completed in Southwark Crown Court in November 2005 a few weeks before the extradition proceedings were heard and determined on 21 December 2005. The appellants argued that the indictment which they had faced was based on the same conduct, including the same alleged false documentation, relied upon by French authorities in the extradition warrants. Following an examination of the relevant English authorities, Auld LJ stated as follows:

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[259] See further *Schtraks v Government of Israel* [1964] AC 556.

[260] [2000] INLR 549.

[261] [2006] EWHC 744 (Admin).

> "In summary the authorities establish two circumstance in English law that offend the principle of double jeopardy:
>
> i) Following an acquittal or conviction for an offence, which is the same in fact and law – *autrefois acquit or convict;* and
>
> ii) following a trial for any offence which was founded on 'the same or substantially the same facts', where the court would normally consider it right to stay the prosecution as an abuse of process and/or unless the prosecution can show "special circumstances" why another trial should take place."[262]

He then considered the application of the two constituents of the double jeopardy principle to the facts of the case before him. He found that the first, the plea of *autrefois acquit or convict,* clearly did not arise, since the transactions identified in the warrant, considered separately or as part of a course of conduct, although covering some of the same facts in the Southwark Crown Court indictment, described wider criminality than the substantive offences charged in that indictment. Counsel for the respondent relied on the decision of the High Court in *Boudhiba v Central Examining Court No 5 of the National Court of Justice, Madrid, Spain*,[263] in which Smith LJ accepted that the Spanish authorities might prosecute the appellant for wide-ranging offences concerning the forgery of passports, despite his conviction in England for an offence of using a particular passport. She did not find it to be an abuse of process that the offences to be prosecuted in Spain were of a more serious nature, and observed that it would be appropriate for the evidence supporting the conviction in this country to be led in Spain in support of any prosecution there for the wider forgery offences. However, Auld LJ was satisfied that the facts in *Boudhiba* could be distinguished from those in the matter before him. He stated that the contrast in extent and seriousness between the two sets of proceedings was not so great and that a hypothetical attempt to prosecute the appellants again in England on a broader charge would, in his view, be vulnerable to the court directing a stay as an abuse of process. He held that although the extradition offence specified in the warrant was not based on exactly, was based only partly, on the same facts as those charged in the Southwark indictment, there was such a significant overlap between them as to have required the District Judge to stay the extradition proceedings as an abuse of process. Auld LJ concluded that in any event, given what was known, and the material available, to the Crown Prosecution Service when committing this matter to the Southwark Crown Court, extradition of the appellants would be an abuse of process and, on that account, would be barred by reason of the rule against double jeopardy.

However, it should be noted that a much narrower view was taken of the principle of double jeopardy in the context of extradition proceedings in *Bohning v*

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[262] *Ibid*. at para. 18.

[263] [2006] EWHC 167 (Admin).

Government of the United States of America,[264] which involved the interpretation of section 80 of the Extradition Act 2003, which concerns the application of the principle to so-called Category 2 Territories, such as the United States.[265] Newman J stated that he "would be very slow to introduce into extradition law principles applied in civil proceedings between private parties" and that "[e]xtradition proceedings bring the public interest of sovereign states in the criminal sphere into play."[266] He said that he was satisfied that the fundamental principle is that a person cannot be prosecuted twice for the same crime and that this does not extend to create a bar to prosecution for offences arising out of the same facts, or to offences which could have been but were not charged. While such circumstances could involve consideration of the principle of abuse of process, he was satisfied that the categories of misconduct, which are at the heart of an abuse of process allegation were already provided for by the scheme of the 2003 Act in the context of "extraneous circumstances". He added, quoting from the *dicta* of Rose LJ in *R. (Kashamu) v Governor of Brixton Prison* [267] that "… extradition contemplates trial in another jurisdiction according to the law there. It is there that questions of admissibility, adequacy of evidence and fairness of the trial itself will be addressed …" In the circumstances, Newman J concluded that there was no bar to the extradition on the basis of the double jeopardy principle.

It is submitted by Nicholls, Montgomery and Knowles[268] that the decision in *Forfana* provides a correct interpretation of the double jeopardy principles contained in sections 12 and 80 of the Extradition Act 2003. They point out that the broader interpretation is more consistent with the approach taken by the European Court of Justice in relation to Article 3(2) of the European Arrest Warrant Framework Decision of 13 June 2002 which is similar in terms to Article 54 of the Schengen Convention.[269]

The key issue in determining whether the principle against double jeopardy applies is whether further proceedings involve another prosecution or not and this is clear from the decision of Lord Woolf CJ in *Oncel v Governor of HM Prison Brixton*.[270] The applicant had been tried and acquitted by a military court in Turkey

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[264] [2005] EWHC 2613 (Admin).

[265] S.80 provides that "A person's extradition to a category 2 territory is barred by reason of the rule against double jeopardy if (and only if) it appears that he would be entitled to be discharged under any rule of law relating to previous acquittal or conviction if he were charged with the extradition offence in the part of the United Kingdom where the judge exercises his jurisdiction."

[266] [2005] EWHC 2613 (Admin) para. 20.

[267] [2002] QB 687.

[268] *The Law of Extradition and Mutual Assistance* (2nd ed., OUP, 2007) p. 74.

[269] See *Gozutok and Brugge* (Case C-87/01); [2003] ECR – I 5689; *Van Esbroeck,* ECJ (Case C-436/04) 9 March 2006.

[270] [2001] EWHC 1142 (Admin).

but this acquittal was set aside on appeal and a re-trial ordered. However, his argument that he should be entitled to apply to resist his extradition on the basis of the principle of *autrefois acquit* failed. Lord Woolf CJ stated that "[w]hat is critical is whether there is more than one prosecution involved".[271] He explained that in Turkey, as he understood the position, there was only one prosecution, but a prosecution process is not necessarily brought to an end as a result of an acquittal at first instance and could be followed by a retrial, as would happen in the applicant's case if he were returned to Turkey. In his view "[i]t is not right to regard the applicant as being in double jeopardy because he remained in jeopardy, even though he had been acquitted. He remained in jeopardy, as he was aware, because he knew that there was a right of appeal which was being initiated, and that that right of appeal could result in his being tried again."[272] In these circumstances he accepted the submission of counsel for the respondents that it is only when the prosecution process reaches an acquittal with finality that the plea put forward would be available.

6.2.5.3.3 The Rule of Specialty

The purpose of the rule of specialty is to ensure that a person is not tried in the requesting state in respect of any offence other than the one for which his extradition has been granted. Scott Baker LJ described the rationale behind the rule as being "the exercise and preservation of sovereignty of the requested state over the person who is returned to the requesting territory".[273] More recently there is evidence of a relaxing of a strict construction of the rule of specialty to allow a person to be tried for an offence other than the one in respect of which his extradition is granted provided this offence is disclosed by the facts upon which his surrender was based.

As with other bars to extradition, the burden lies on the person resisting it to establish circumstances which should prevent it. In *Hilali v Central Court of the Criminal Proceedings Number 5 of the National Court of Madrid*[274] the issue was whether there were practical and effective arrangements in Spain to ensure that the appellant would only be tried for the offence for which he was being extradited or others disclosed by the same facts. Scott Baker LJ stated that it seemed surprising to the court that a submission should be made that Spain was likely to act in breach of the international obligations which it had signed up to. In his view "there is no evidence before us that it has done so in the past and in these circumstances we would need compelling evidence that it is likely to do so in the future". The court concluded that there was no evidence to suggest that the Spanish gov-

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[271] *Ibid.* at para. 15.

[272] *Ibid.*

[273] *Hilali v Central Court of the Criminal Proceedings Number 5 of the National Court of Madrid* [2006] EWHC 1239 (Admin) para. 50.

[274] [2006] EWHC 1239 (Admin).

ernment was seeking the appellant's return for other than *bona fide* reasons or that they were asking for his return for other than the purpose requested. In the circumstances there was no reason why the appellant should not be extradited.

The issue of how the rule of specialty has been interpreted where extradition is sought from the United Kingdom to the United States was considered by Ouseley J in *Welsh v Secretary of State for the Home Department*.[275] The US Government sought the extradition of the appellants from the UK on a variety of conspiracy and substantive charges arising out of a complex advanced fee fraud, committed largely but not wholly in the US on US residents. The appellants submitted that the US would act in breach of the specialty rule, *inter alia*, by seeking, and on past experience obtaining, an indictment which superseded the one upon which the extradition request was based, and which in particular would contain counts relating to money laundering offences upon which the US accepted that it could not seek extradition because of the double criminality rule, and which might also contain counts relating to other frauds not based on the facts underlying the extradition request. They also contended that the rule of specialty would be breached if the US used the facts related to the money laundering to prove other fraud offences and to increase the sentences which the appellants would otherwise face for the wire and mail fraud offences on the grounds, *inter alia*, that they had fled the jurisdiction and then contested their extradition.

Ouseley J made it clear that the US had denied that either its executive exercising its prosecutorial function or the judiciary in its judicial capacity breached or would breach the specialty rule and said that they had instead asserted their adherence to it. The appellants had contended that US courts "routinely ignore" the specialty rule and Ouseley J stated that he did "not regard this general submission as remotely justified".[276] He said that if there had been a routine disregard of the specialty rule, he would have expected that over the decades of extradition to the US from the UK, the UK courts would have refused extradition where this was an available option. He also stated that the decision of the Supreme Court in *Johnson v Browne*[277] makes clear that the US Supreme Court adheres to the specialty rule and its decisions are binding on all lower courts and on the executive exercising its prosecutorial functions. In addition, he said that no decision had been cited to the court in which any US court expressed itself in a way which suggested or could support an allegation of disregard for the specialty rule as interpreted there. He continued by saying that the US courts treat the origin and purpose of the specialty rule as deriving from the state parties' interests in extradition, and regard adher-

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[275] [2006] EWHC 156 (Admin).

[276] *Ibid*. at para. 35. See also the comments of Laws LJ in *Ahmad v Government of the United States of America* [2006] EWHC 2927 (Admin) para. 75 that "[o]ver this continued and uninterrupted history of extradition relations there is no instance of any assurance given by the United States, as the requesting State in an extradition case, having been dishonoured".

[277] 205 US 309 (1907).

ence to it as a matter of international comity and respecting foreign relations embodied in the treaty arrangements. Their purpose is to protect the sending state against abuse of its discretionary act of extradition.[278] In his view the US applies the rule of specialty even where there is no treaty obligation requiring it to do so and this means that the position of the sending state is regarded as of the highest importance.

Ouseley J referred to a number of US authorities and concluded as follows:

> "The US Courts do not infer consent merely because there is silence. They do not turn a blind eye to what are obvious problems in the sending state's known attitude, whether from past extradition requests or from the particular case or Treaty involved. Rather, it seems clear to me, they adopt a realistic assessment of the sending state's attitude, in recognition of the specialty doctrine as a principle of international comity and out of respect for a foreign state's sovereignty. But the Courts do not treat it as a technical hurdle devised for the benefit of properly convicted criminals, enabling them to take points which truly belong to the sending state and which the Courts properly infer that the sending state does not take." .[279]

A further issue raised by the appellants was that the US Courts would permit the extradition offence to be proved by evidence relating to offences upon which extradition had been expressly refused. However, Ouseley J pointed out that the US Courts do not regard that as a breach of the specialty rule because the rule is not seen as regulating the manner in which the extradition offence is proved. He added that he had seen no UK authority which suggests that the specialty rule is breached in these circumstances and expressed the view that it does not limit the evidence which can be admitted to prove the extradition offence and that the rules which govern the admissibility of evidence are those of the trial state.

Another decision in which the manner in which specialty arrangements operate between the UK and US was examined is *R. (Bermingham) v Director of the Serious Fraud Office*,[280] which concerned a decision to extradite the appellants, the so-called Nat West 3, to the US from the UK for alleged fraud offences. The question arose as to whether the Secretary of State had correctly concluded that there were "speciality arrangements" with the United States within the meaning of section 95 of the Extradition Act 2003. Laws LJ expressed agreement with the views expressed by Ouseley J in *Welsh*. He said that while there was no doubt that "superseding indictments" are deployed in the United States for the trial of extradited defendants, that was not to say that such defendants were put on trial in breach of

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[278] *US v Paroutian* 299 F 2d 486 (2nd Cir 1962).

[279] *Welsh v Secretary of State for the Home Department* [2006] EWHC 1239 (Admin) para. 84.

[280] [2006] EWHC 200 (Admin).

the specialty rule. He referred to the following statement of Circuit Judge Garza in *LeBaron*,[281] taken from an earlier decision in *Andonian*:[282]

> "[T]he doctrine of specialty is concerned primarily with prosecution for different substantive offenses than those for which consent has been given, and not prosecution for additional or separate counts of the same offense. The appropriate test for a violation of specialty 'is whether the extraditing country would consider the acts for which the defendant was prosecuted as independent from those for which he was extradited'."

Laws LJ made reference to the fact that the US Department of Justice had offered an undertaking that the "US authorities will not seek a superseding indictment charging [the appellants] with offenses arising from conduct other than that conduct for which [they] have been extradited from the United Kingdom". He noted that no superseding indictment had been filed and in the circumstances Laws LJ was satisfied that the specialty rule had not been breached.

6.2.5.3.4 Appropriate Forum

The *Bermingham* or Nat West 3 case raised another interesting question, namely that of the most appropriate forum for trial where extradition is sought. Although the case related to the affairs of the American company, Enron Corporation, the defendants were not employees, officers or shareholders of that company and were at the material time employed in London by Greenwich NatWest, a division of National Westminster Bank plc. The defendants were British citizens, resident in the United Kingdom, and were part of a team responsible for a number of the bank's clients, including Enron, in the United States. They brought judicial review proceedings to challenge the failure of the Serious Fraud Office to prosecute them in the UK, and although these proceedings were unsuccessful, this raised questions about the appropriateness of a request to extradite UK citizens in respect of an alleged crime effectively committed in the UK.

Paragraph 3 of Schedule 13 to the Police and Justice Act 2006 inserted a new section 19B into the Extradition Act 2003, designed to provide a bar to extradition in circumstances where the UK would be a more appropriate forum for trial. Section 19B provides as follows:

> "(1) A person's extradition to a category 1 territory ('the requesting territory') is barred by reason of forum if (and only if) it appears that–
>
> (a) a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and

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[281] 156 F 3d 621 (5th Cir 1998).

[282] 29 F 3d 1432 (9th Cir 1994).

(b) in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.

(2) For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.

(3) This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence."

A similar provision, section 83A, was inserted for Category 2 Territories but paragraph 6 of Schedule 13 to the Police and Justice Act 2006 provided that an order bringing the provisions of this subsection into force should not be made within the 12 months of the passing of the legislation in November 2006 and they may never come into force.[283]

While the provisions of section 19B now provide a mechanism for barring extradition where it appears that a significant amount of the conduct alleged to constitute the offence has been committed in the UK in the case of Category 1 Territories, controversy remains about this issue in the case of Category 2 Territories such as the US. The Treaty on Extradition between the Government of the United States of America and the United Kingdom of Great Britain and Northern Ireland was signed on 31 March 2006 but not ratified by the US until 30 September 2006. In the course of his judgment in *R. (Norris) v Secretary of State for the Home Department*[284] the President of the Queen's Bench Division commented on the "lack of symmetry" in the transitional arrangements between the two countries pending ratification. However, the reality is that even following this there is a distinct lack of equality in the requirements imposed on the two states in relation to extradition proceedings as a result of Article 8 of the 2003 Treaty. Article 8(3)(c) provides that where the UK requests from the United States the extradition of a person sought for prosecution, the request shall be supported by "such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is requested". Therefore while the US is not required to supply evidence to the UK in order to secure extradition, the UK is required to supply this information to the US.

6.2.5.3.5 The European Arrest Warrant Procedure

On 13 June 2002, the EU Council of Ministers adopted a Framework Decision on the European arrest warrant and the surrender procedures between Member States of the European Union. The member states of the EU were then required to introduce legislation to bring the European arrest warrant procedures into force by

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[283] See the comment in Nicholls, Montgomery and Knowles *The Law of Extradition and Mutual Assistance* (2nd ed., OUP, 2007) p. 85, footnote 71.

[284] [2006] EWHC 280 (Admin) para. 34.

1 January 2004. By April 2005 all member states had transposed the Framework Decision into their national laws. However, this process did not go smoothly in all cases. In Germany the implementing legislation was struck down by the Federal Constitutional Court in a decision of 18 July 2005[285] as violating Articles 16II and 19IV of the *Grundgesetz*. New legislation which took effect on 25 January 2006 laid down the conditions under which German nationals and those with rights of residence in the country could be extradited and required that an assessment of the proportionality of the request be assessed in each case.

The EAW Framework Decision prescribes a form of arrest warrant which can be issued in one member state and executed in any other member state of the EU. Its purpose is to replace extradition proceedings between member states with a system of surrender between judicial authorities and it was designed to speed up and simplify the process of returning an individual to another state for trial.

A European arrest warrant may be issued by a national court for acts punishable by the law of the issuing state by a custodial sentence or detention order for a maximum period of at least 12 months or where the person has been sentenced, for sentences of at least four months.[286] The EAW Framework Decision also dispenses with the requirement of double criminality in respect of certain listed offences if these are punishable by a sentence of a maximum period of three years.[287] The State in which the person sought is required to return him to the State where the European arrest warrant was issued within a maximum period of 90 days of the arrest. If the person gives his consent to the surrender, the decision to return the person shall be taken within 10 days.

The judicial authority of a member state shall refuse to execute a European arrest warrant in three mandatory situations. First, if an amnesty covers the offence in its national legislation, secondly, where the *ne bis in idem* or double jeopardy principle applies, and thirdly where the person who is the subject of the warrant is a minor and has not reached the age of criminal responsibility under the national law of the executing state.[288] In addition, there are a number of optional grounds for refusing execution of a European arrest warrant, including violation of fundamental rights and that the offence in question is extra-territorial in nature.[289]

A considerable amount of domestic litigation has ensued in many of the member states concerning the interpretation of the procedural requirements in the Framework Decision and enacting legislation. However, the introduction of the system has undoubtedly gone some way towards achieving the aim of streamlining and speeding up the mechanism for the return of offenders. Perhaps most significantly under this new procedure the execution of warrants is now solely a matter for the national judicial authority and not part of any political process.

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[285] BVerfG 2 BvR 2236/04.

[286] Article 2(1) of the EAW Framework Decision.

[287] Article 2(2).

[288] Article 3.

[289] Article 4.

6.2.6 Suing Foreign States Before a National Forum

6.2.6.1 The US Alien Tort Claims Act 1789

"[T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[290] The US Congress enacted the US Alien Tort Claims Act (ATCA) as early as 1789. Based on the crucial passage of the ATCA just quoted the Act confers jurisdiction on US courts over violations of the law of nations irrespective of the nationality of the perpetrator. Having been neglected and almost forgotten for about two centuries, the US legal community witnessed the resurrection of the ATCA in *Filártiga*.[291]

The Filártigas were a family of political opponents of the military dictatorship that ruled Paraguay in the 1970s. Having been threatened several times by officials over the years, in 1976 their son, Joelito Filártiga, was tortured to death by America Pena-Irala, a high-ranking Paraguayan police officer and the neighbour of the Filártigas. Notwithstanding repeated appeals, the struggle to bring Pena-Irala to justice before Paraguayan courts proved unsuccessful. Subsequently, when the Filártigas learned that the officer was in the United States, Dolly Filártiga, the family's daughter followed and, advised by the American Centre of Constitutional Rights, sued Pena-Irala for a breach of international law, namely torture, under the Alien Tort Statute before the US courts. While the District Court held against Filártiga arguing that international law did not apply to a government's treatment of its own citizens, two years later Filártiga's appeal succeeded. The Court of Appeal rejected the District Court's argument, as it was based on an outdated concept of international law and instead stated: "[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[292] With regard to the prohibition of torture the court held, having extensively examined international state practice: "[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[293] It summed up its view in the following terms:

> "Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but impor-

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[290] 28 USC § 1350.

[291] *Filártiga v Pena-Irala* 630 F 2d 876 (2nd Cir 1980). Among the ATCA cases this is probably the one that the academic debate has paid most attention to, see, *e.g.*, the discussion in the Symposium on the case published in (2006) 37 Rutgers LJ 623 *et seq*.

[292] 630 F2d 876, 881 (2nd Cir 1980).

[293] *Ibid.* at 884.

> tant step in the fulfilment of the ageless dream to free all people from brutal violence."[294]

The Filártiga judgment found the torturer liable for violations of international law. In the aftermath of the Filártiga decision US courts reactivated the long neglected and rarely used Alien Tort Statute. Besides violations of the international law prohibition of torture, claims based on further human rights abuses, such as genocide, crimes against humanity, summary execution and disappearance have also been allowed.[295] In later cases it was not always the direct perpetrator who was held responsible, but also commanding officers, government officials or even private corporations.[296] However, the most recent case law seems to show a restriction both of the entities that can be held responsible and of the violations of international law that trigger civil liability under the Alien Tort Statute.

The US Supreme Court decision in *Sosa v Alvarez-Machain*[297] provides authority for the latter restriction. Humberto Alvarez-Machain was a Mexican doctor who was believed by the US government to have participated in the torture and murder of a Federal Drug Enforcement Administration agent in Mexico. In order to prosecute him the US sought the extradition of Alvarez-Machain to the United States. As the application failed the US hired a group of Mexicans, among them Jose Francisco Sosa, to kidnap the alleged offender and abduct him to the US. Alvarez-Machain was handed over to the US authorities, but when it came to the trial he was found innocent. In return Alvarez-Machain brought proceeding against the US under the Alien Tort Statute and the Federal Tort Claim Act for damages. He argued that the abduction constituted a violation of international law and that thus he should be entitled to compensation. The lower courts allowed his claims although the Supreme Court reversed the decisions and held that the claim for damages under the Alien Tort Statute was ill-founded. More clearly than in *Filártiga,* the US Supreme Court held that the Alien Tort Statute itself did not provide any cause of action and that its nature was merely "jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a

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[294] *Ibid.* at 890.

[295] See *e.g.*, *Arce v Garcia* 434 F 3d 1254 (11th Cir 2006) (torture); *Cabello v Fernandez-Larios* 402 F 3d 1148 (11th Cir 2005) (extrajudicial killing, torture, crimes against humanity, cruel, inhuman or degrading punishment); *Wiwa v Royal Dutch Petroleum Co* 226 F 3d 88 (2nd Cir 2000) (summary execution, torture, arbitrary detention); *Abebe-Jira v Negewo* 72 F 3d 844 (11th Cir 1996) (torture); *Hilao v Estate of Marcos* 103 F 3d 767 (9th Cir 1996) (summary execution, torture, disappearance); *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) (genocide, war crimes, summary execution, torture).

[296] See *e.g.*, *Wiwa v Royal Dutch Petroleum Co.* 226 F 3d 88 (2nd Cir 2000) (two private holding companies); *Martinez v City of Los Angeles* 141 F 3d 1373 (9th Cir 1998) (local government officials); *Hilao v Estate of Marcos* 103 F 3d 767 (9th Cir 1996) (former head of state); *Kadic v Karadzic* 70 F 3d 232 (2nd Cir 1995) (head of de facto state); *Jama v INS* 22 F Supp 2d 353 (DNJ 1998) (US officials and private corporation).

[297] 542 US 692 (2004).

certain subject."[298] The contrary claim of Alvarez-Machain, namely "that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law" was rejected as "implausible".[299] The necessary consequence was a narrowing of the possible bases for tort claims under the ATS. It was not simply every violation of international law that entitled the victim to damages, but it was only where "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability"[300] that an action would be successful. Based on the conviction that the ATS at the time it was enacted was intended to have practical effect, the court held that such common law causes of action existed, although were very limited in number: "violation of safe conducts, the infringement of the rights of ambassadors, and piracy".[301] Even under modern international law, the court argued, this limitation is reasonable:

> "Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th-century paradigms we have recognised. This requirement is fatal to Alvarez's claim."[302]

The claim was dismissed accordingly. For the private enforcement of international law this was a major set-back. After the encouraging holding in *Filártiga*, the Supreme Court limited the violations of international law that could be enforced against foreign states through the domestic courts considerably.

With the American military campaign in the Iraq theatre of war and the US torture in the Iraqi prison Abu Ghraib, the Alien Tort Statute gained new importance, both political and judicial, for the US itself. In two almost identical cases, *Saleh v Titan Corporation*[303] and *Ibrahim v Titan Corporation,*[304] the Columbia District Court narrowed the ATS's scope of application further, holding that, contrary to former rulings,[305] private actors cannot be held responsible under the Alien Tort

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[298] *Ibid.* at 714. However, even in *Filártiga* the court hinted at this conclusion see 630 F 2d 876, 889.

[299] *Ibid.* at 713.

[300] *Ibid.* at 724.

[301] *Ibid.*

[302] *Ibid.* at 725.

[303] 436 F Supp 2d 55.

[304] 391 F Supp 2d 10.

[305] See *e.g.*, *Wiwa v Royal Dutch Petroleum Co.* 226 F 3d 88 (2nd Cir 2000) (two private holding companies) and *Jama v INS* 22 F Supp 2d 353 (DNJ 1998) (U.S. officials and private corporation).

Statute.[306] In the earlier *Ibrahim* case the applicants, a number of Iraqi nationals who had been detained by the US military at the Abu Ghraib prison in Iraq, brought a tort claim, relying, *inter alia*, on the Alien Tort Statute. They alleged that they had been tortured, beaten, deprived of food, water and sleep, urinated on, exposed to extremely loud music and mistreated in various other ways. The proceedings were brought against two private government contractors which had provided interpreters and interrogators for the prison and it was alleged that by participating in the mistreatment they had violated the law of nations. With regard to the Alien Tort Statute, however, Judge Robertson in the District Court dismissed the claim. Acknowledging the landmark decision in *Filártiga* that torture, when committed by officials, is the subject of ATS liability, Judge Roberston distinguished *Filártiga* as the defendants were private contractors. Recalling the judgments in two other cases,[307] he held that actions of private contractors are "not actionable under the Alien Tort Statute's grant of jurisdiction, as a violation of the law of nations."[308]

Based on the same facts *Saleh* tried to claim damages shortly after *Ibrahim* had been decided. Arguing that Judge Edwards in *Tel-Oren*, one of the precedents Judge Robertson had cited for the exclusion of claims against private parties under the ATS, had conceded that private responsibility under the ATS might arise if the defendant acted "under the color of law" and thus was not "separate from any state authority or discretion" Saleh hoped to persuade Judge Robertson. However, he failed and Judge Robertson rejected the argument holding that there was "no middle ground between private action and government action, at least for purposes of the Alien Tort Statute".[309]

6.2.6.2 Tort and Torture

Outside the US there is little case law establishing that foreign states can be sued in tort proceedings. While eventually overruled by a House of Lords decision one interesting claim was granted by the English Court of Appeal in *Jones v Saudi Arabia*[310] against the Kingdom of Saudi Arabia. The applicant in this case, Mr Jones, claimed to have suffered severe, systematic and injurious torture by state agents of the Kingdom of Saudi Arabia in Riyadh's Ministry of the Interior. He

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[306] See 391 F Supp 2d 10, 14 *et seq*; 436 F Supp 2d 55, 57 *et seq*.

[307] Namely *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) and *Sanchez-Espinoza v Reagan* 770 F 2d 202 (DC Cir 1985).

[308] 391 F Supp 2d 10, 15.

[309] 436 F Supp 2d 55, 58.

[310] See *Jones v Ministry of the Interior of the Kingdom of Saudi-Arabia* [2004] EWCA Civ 1394; [2005] 2 WLR 808 (Court of Appeal); for the later House of Lords decision, see *Jones v Ministry of the Interior of the Kingdom of Saudi-Arabia* [2006] UKHL 26; [2007] 1 AC 270.

brought civil proceedings for damages against both the Kingdom of Saudi-Arabia itself as a state entity and against Colonel Abdul Aziz as a servant or agent of the Kingdom. The issue at the heart of these proceedings was whether service out of jurisdiction to the defendant officials of Saudi Arabia should be allowed or, as Lord Bingham put it at a later stage to the House of Lords,

> "whether the English court has jurisdiction to entertain proceedings brought here by claimants against a foreign state and its officials at whose hands the claimants say that they suffered systematic torture, in the territory of the foreign state."[311]

This in turn required the courts to address issues of state immunity for acts of torture, which led to a disagreement between the Court of Appeal and the House of Lords. In the Court of Appeal Mance LJ made an extraordinary distinction: in his opinion the acts of the Kingdom of Saudi Arabia enjoyed absolute immunity *ratione personae*, although the acts of defendant agents of the Ministry of the Interior who had allegedly tortured Jones were held not to be covered by immunity *ratione materiae*:

> "There are important distinctions between the considerations governing (a) a claim to immunity by a state in respect of itself and its serving head of state and diplomats and (b) a state's claim for immunity in respect of its ordinary officials or agents generally (including former heads of state and former diplomats)."[312]

Whereas the former were held to enjoy personal immunity because of their "very special status", with regard to the immunity of the latter it was held to "no longer be appropriate to give blanket effect to a foreign state's claim to state immunity *ratione materiae* in respect of a state official alleged to have committed acts of systematic torture."[313] The main reasons for this holding were threefold: first, as torture was an international crime, states were obliged to offer legal redress to the victims under Article 14 (1) of the Torture Convention. Secondly, mainly based on the reasoning in *ex parte Pinochet*,[314] it was argued that torture could not be treated as the exercise of a state function and thirdly, proceedings against the individual official were not capable of indirectly implicating the state as the torture was within the individual responsibility of the individuals.[315] Accordingly, Jones'

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[311] [2006] UKHL 26, para 1.

[312] [2005] 2 WLR 808, 823 *et seq*.

[313] *Ibid.* at 855.

[314] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.1)* [2000] 1 AC 61, 108 *per* Lord Nicholls of Birkenhead and at 115 *per* Lord Steyn; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.3)* [2000] 1 AC 147, 203 *et seq*. *per* Lord Browne Wilkinson, at 252 *et seq*. *per* Lord Hutton.

[315] See the summary of the holding at [2005] 2 WLR 808, 809 *et seq*.

claim seeking permission to serve proceedings out of jurisdiction was dismissed in relation to the Kingdom of Saudi-Arabia but it was allowed in as much as it concerned Colonel Aziz, the individual official who could not raise the preliminary objection of immunity.

The decision of the Court of Appeal caused hostile comment amongst academics[316] and from the House of Lords, where the judgment was reversed in June 2006. Considering the judgment of the lower court flawed by a misreading of the *Pinochet* case, the Law Lords applied a more conservative concept of immunity. According to the House of Lords there was "a wealth of authority" which revealed the distinction introduced by Mance LJ in the Court of Appeal as incorrect and instead suggested that "the foreign state is entitled to claim immunity for its servants as it could if sued itself. The foreign state's right to immunity cannot be circumvented by suing its servants or agents."[317] The opposing arguments put forward in the Court of Appeal were rejected altogether. On the one hand Article 14 of the Torture Convention was held not to provide for universal civil jurisdiction. What was, according to the House of Lords, required was rather a private right of action against acts of torture committed in the forum state. On the other hand Lord Bingham found it "difficult to accept that torture cannot be a governmental or official act, since under Article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity."[318] Given this reasoning it would have violated the sovereign immunity of Saudi Arabia and all its officials to allow for the proceedings to be served out of jurisdiction. Both the Kingdom of Saudi-Arabia and Colonel Aziz had a valid objection in their claim to immunity. Consequently, the Court of Appeal decision was reversed and Jones' tort claim dismissed

While the Court of Appeal, in the words of Lord Bingham, "asserted what was in effect a universal tort jurisdiction in cases of official torture"[319] and thus made way for an ATCA-like possibility of tort claims against foreign states under English common law, the House of Lords nipped this attempt in the bud. As the final decision in *Jones* clearly illustrates, there is no way under international law that foreign states can be sued before the courts of other countries unless the issue of immunity is ignored or purposely denied. Private enforcement of international obligations before domestic courts is thus limited to both the obligations of the forum state and sometimes, as was submitted above, even to the private citizens of

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[316] See *e.g.* Hazel Fox, "Where does the Bucket Stop? State Immunity From Civil Jurisdiction And Torture" (2005) 121 LQR 353; Xiaodang Yang, "Case and Comment – Universal Tort Jurisdiction Over Torture?" (2005) 64 CLJ 1; see for an assessment of both *Jones* decisions Ed Bates, "State Immunity for Torture" (2007) 7 Human Rights Law Review 651; Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 217 *et seq*.

[317] [2006] UKHL 26, para. 10.

[318] *Ibid.* at para. 19.

[319] *Ibid.* at para. 34.

the forum state. That tort claims for acts of torture committed by foreign states before a national forum are quite exceptional and face almost insurmountable hurdles is well-illustrated by the House of Lords judgment in *Jones* and by the fact that it is only in very exceptional cases that proceedings like this are possible under domestic law.

It was exactly this lack of civil remedies against foreign states under the Canadian legal order that the Ontario Court of Appeal had to discuss in *Bouzari v Islamic Republic of Islam*.[320] The applicant, Houshang Bouzari, was an Iranian citizen who secured a deal between a consortium of companies which were interested in participating in the development of the South Pars oil and gas field in Iran and the National Iranian Oil Company. Under this contract it was the obligation of the former to provide oil and gas exploration, offshore drilling, and platform and pipeline construction. When in November 1992 Bouzari went on a trip to Tehran, one of the sons of the Iranian President contacted him to offer Bouzari his father's help to guarantee the implementation of the South Pars contract. In return Bouzari was supposed to pay a commission of US$50 million. Even though this offer was repeated several times Bouzari continued to refuse. In June 1993 Iranian government agents broke into Bouzari's apartment, robbed him and abducted him to a place where he was held for several months without due process and was tortured repeatedly. About one year later Bouzari was released and managed to escape Iran by paying a ransom. After emigrating to Canada he instituted civil proceedings for damages against Iran which eventually ended up in the Ontario Court of Appeal. There he submitted, *inter alia*, that international custom and treaty law obliged Canada to provide a civil remedy for acts of torture committed abroad. Specifically, he argued that, if the prohibition of torture was to have meaning, it could not be considered a state function deserving of immunity. Goudge JA, who delivered the judgment in the Court of Appeal, dismissed the claim and rejected Bouzari's argument. Notwithstanding his view that the prohibition of torture was a rule of *ius cogens*, he had doubts about the exact scope of that prohibition and wondered: "In particular, does it extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state?"[321] Basically affirming what the judge in the lower court had found, the Court of Appeal advanced a twofold argument:

> "As a matter of *principle*, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition. The criminal prosecution of individual torturers who commit their acts abroad (which is expressly sanctioned by the Convention against Torture) gives some effect to the prohibition without damaging the principle of state sovereignty on which relations between

[320] *Bouzari v Iran (Islamic Republic)* (2004) 243 DLR (4th) 406; also reported in ILDC 175, which will be referred to here.

[321] ILDC 175, para. 87.

> nations are based.[322]…[A]s a matter of *practice*, states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant."[323]

The applicant's claim that where there is a right there must be a remedy failed accordingly on grounds of international law.

[322] *Ibid.* at para. 93 (italics added).

[323] *Ibid.* at para. 94 (italics added).

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.

Chapter 8

Alternative Methods of Dispute Resolution

International law can be determined through a great variety of procedures of which the main classes are both the national and the international adjudicative bodies discussed in the preceding chapters. In particular, in the context of international courts and tribunals the character of most interstate adjudication as a kind of arbitration agreed between the states concerned became visible. Traditional interstate adjudication provides the procedural means which the state parties consider appropriate to facilitate their desire to settle the issue in a flexible manner. Although the procedural authority lies generally with the international courts reflecting the national model of a fixed and unalterable *lex fori proceduralis* it is never authoritatively exercised against the state parties. The basic idea is to facilitate dispute settlement rather than executing and enforcing an overarching international legal order. One major reason for this character of international adjudication is the lack of authority granted to international courts reflected in the most meagre and rare submission of states to jurisdiction according to Article 36.2 of the ICJ Statute. No enforcement of judgments against the will of the judgment debtor may be expected. The other major reason is that international law's incoherent structure is more apt and ready to settle disputes than to enforce coherent doctrines rarely endorsed by the states as the ultimate standard of their international behaviour. Article 16 of the ICC Statute which subjects the decision to take a criminal prosecution to the political decision of a non judicial organ provides evidence of this. Settling disputes is rather seen as a desirable end in itself and is encouraged with great priority over implementing substantive law. On the occasion of these procedures international law is invoked, defined and determined making these judicial decisions a "subsidiary means for the determination of the rules of [both national and international] law".[1] This clarifies the fact that dispute settlement procedures on the international plane are not substantially different from international adjudication but just display different features according to their specific setting such as diplomatic negotiation, "good services" of a third party (an individual arbiter, for example, the Pope, the Spanish King, a Professor or the Secretary General of the UN to name those employed in practice; or a state or international organisation trying to achieve a solution as the OAS currently is between Colombia and Ecuador/Venezuela) or "agreed" retaliation (a means employed successfully to enforce

[1] Article 38.1.d of the ICJ Statute.

the WTO/DSU panel decisions). From this perspective they are all valid procedures in international law just as international adjudication is. Therefore, they may be treated here too.

8.1 The Means Listed in Article 33 of the UN Charter

The high regard for dispute settlement as the overall aim in international procedures is linked to the ultimate aim of the international legal order as embodied in the UN Charter to preserve peace. In this context adjudication and other dispute settlement methods are a means towards this end. The close link of the Security Council to all measures in Chapter VI of the UN Charter underlines this aim. The following means are described authoritatively with many examples by the Legal Adviser to the UN.[2]

The dispute settlement methods gain their special significance in relation to the prohibition on the use of force in international relations in Article 2.4 of the UN Charter. The necessary corollary of any adherence to this prohibition of self help is a working system of dispute settlement which naturally assumes some legal properties due to its procedural nature. Chapter VI of the UN Charter was originally understood as a prerequisite for the enforcement measures provided for in Chapter VII of the UN Charter. This tendency is strengthened by the latter part of Article 36.3 of the UN Charter, which provides that

> "… legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court."

Therefore, primarily states should settle their disputes by the means listed in Article 33.1 of the UN Charter and should be encouraged by the Security Council when this does not work out satisfactorily to refer the dispute to the ICJ. Only if this remains unsuccessful may the Security Council proceed beyond Chapter VI going beyond the scope of legal and accountable procedures towards the use of force.

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[2] UN Legal Affairs Office, *Handbook on the Peaceful Settlement of Disputes between States* (New York, 1992) UN Doc OLA/COD/2394; OLA/COD/2612; OLA/COD/2416; ISBN 92-1-133428-4; 92-1-233236-6; 92-1-333201-7. A more current bibliography is to be found in the Notes of Rama Mani "Peaceful Settlement of Disputes and Conflict Prevention" in Thomas Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (OUP, 2007) p. 300, 318 *et seq*.

8.2 Diplomatic Means as a Form of ADR in International Law

Diplomatic methods are probably the broadest category of interstate settlement procedures.[3] The list in Article 33.1 of the UN Charter refers to negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements and other peaceful means of the states' choice. This would include the above introduced adjudication by the ICJ ("judicial settlement") and arbitration already discussed. In view of the ultimate aim of interstate settlement common to both arbitration and adjudication the functional differences between the ICJ proceedings and interstate arbitration are minimal. The same may be said of the other means and methods mentioned in Article 33.1. International adjudication, arbitration and other diplomatic means are mainly distinguished by the flexibility of their procedures rather than their function in settling disputes procedurally or by any hierarchy. These different procedures attract different degrees of publicity but are designed to achieve the same objective. The interstate settlement procedures listed in Article 33 of the UN Charter are not substantially different; diplomatic methods are viewed as the broadest category, arbitration is slightly narrower as it is more defined by convention not least in the PCA context and especially in the light of the procedures followed by the ICJ enacted under Article 30 of its Statute. All procedures are aimed at settling the issues in a way which is acceptable to the state parties. This is the only criterion which distinguishes one procedure from another – some achieve this aim while others do not.

However, distinguishing between the terms and principles used in national procedural laws and their use in the international legal context may be helpful. ADR is probably the closest equivalent in the national legal context to "diplomatic methods". It includes arbitration, mediation, conciliation or resort to other arrangements such as are provided by national chambers of commerce. The term ADR under International Law has emerged.[4] In the national context the emphasis is on "Alternative" as this represents alternatives to compulsory adjudication by the national courts. They are not entirely separate from the ordinary courts, which may ultimately enforce a settlement reached in ADR. To use the term ADR to describe the methods in Article 33.1 of the UN Charter would suggest that these means are alternatives to any ordinary adjudication process in the international field as they are not in any functional connection or hierarchy to other dispute settlement methods particularly not to adjudication provided by the ICJ. This distinction between the seemingly related procedures in both national and international law was emphasised by the ICJ in the *Great Belt* case when it affirmed that international adjudi-

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[3] P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th ed., Routledge, London and New York, 1997) pp. 273-83.

[4] C. Chinkin "Alternative Dispute Resolution Under International Law" in M. Evans (ed.), *Remedies in International Law* (Hart, Oxford, 1998) p. 123.

cation before the ICJ is regarded as an alternative to settlement between the parties by other means.[5] This is the reverse of the position in the national context. Here again with ADR, it is the misleading use of terminology of national proceedings which suggests a substantial difference between diplomatic measures such as conciliation, arbitration, or resort to other arrangements and judicial settlement. As with adjudication by the ICJ and interstate arbitration their functional distinction is analogous to national law where indeed compulsory adjudication is the usual dispute settlement procedure and arbitration and all the other means like mediation and conciliation and so forth are further down the hierarchy. This is because in the national legal context all other means including ADR can rely on the ordinary courts for enforcement and if the settlement fails entirely may always be adjudicated in the ordinary courts. In short, the lack of compulsory adjudication at an international level leaves both arbitration and adjudication as mediation and conciliation to act virtually on the same level and distinguished in terminology only.

Therefore, the very close functional relationship or similarity which already exists between international arbitration and adjudication should be extended to other diplomatic methods such as negotiation, enquiry, mediation, conciliation or resort to agencies or arrangements. These further the objective of peaceful interstate settlement as do the ICJ or the Permanent Court of Arbitration. There is no hierarchy and their value for international law is based solely on how incisive the reasoning is. The states' performance on the basis of any of such proceedings would amount to state practice within the meaning of Article 38.1.b of the ICJ Statute while the judgment as such only acquires the status of subsidiary means for the determination of rules of law in accordance with Article 38.1.d.

This assessment reflects the entitlement of sovereign states to embark on whatever settlement procedures they consider suitable. The practical value of the procedures available to states is the best measure of their success. This perspective serves both the academic analysis of the procedures and the practitioner and his client best.

Having clarified the difference between ADR and diplomatic measures their parallels should also be mentioned; the terminology of Article 33.1 of the UN Charter refers to mediation, conciliation, arbitration, enquiry and negotiation as the methods open to parties to ADR in the national context. It is cheaper, more flexible and allows for more privacy for the parties than litigation. These "means of their choice" (Article 33.1) allow the parties freedom to use third party facilitators and to draw upon technical or legal expertise and to bring together teams they consider to be balanced and appropriate. The consensual nature of the process is taken to encompass all stages of procedure which can remain unfettered by abstract litigation rules and formality. The parties' control over procedure and even the outcome is thought likely to produce a more acceptable settlement to the dispute than anything imposed by a third party. It may save the faces of the parties by avoiding contests typical of the adversarial nature of national court procedures

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[5] *Finland v Denmark* Provisional Measures, Order of 29 July 1991 [1991] ICJ Rep 12.

which in the light of political sensitivities represents a distinct advantage.[6] Finally, the public character of litigation is avoided leaving the parties free to keep parts of the settlement or indeed its existence confidential. For diplomats this confidentiality would seem the normal basis on which to proceed and is particularly useful when the financial means for meeting a legal responsibility is at issue between States.

8.3 The Institutional Background of Diplomatic Settlement of Disputes

Based on the work of both Hague Peace Conferences for the Peaceful Settlement of Disputes 1899 and 1907,[7] diplomatic measures were defined in Article 33 of the UN Charter and adopted by many multilateral treaties such as the Permanent Conciliation Commission,[8] the Permanent Court of Arbitration[9] or the Mixed Arbitral Tribunals.[10] Constant use of these procedures is encouraged by the prohibition of the use of force in Article 2.4 of the UN Charter and the states' commitment to peaceful settlement of disputes as in the General Act for the Pacific Settlement of International Disputes[11] or regional provisions.[12] It is this connection to the maintenance of international peace and security symbolised by the link between Article 2, paras. 3 and 4 as well as Chapter 6 and Chapter 7 of the UN Charter, which gives those procedures a profile in international relations beyond simply addressing the actual issue at settlement. "Consequently, many domestic debates about the function and efficacy of ADR processes are meaningless in the international context where all third party processes are peaceful alternatives to conflict."[13]

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[6] The Mediators (among them the former President of the ECtHR) in the *Austria v EU* case when addressing the question of whether the then conservative-liberal coalition would meet the basic democratic standards to terminate the sanctions of the then predominantly socialist led countries in the EU against Austria helped to bring an end to a hardly tenable situation without losing too much face.

[7] International Convention for the Pacific Settlement of Disputes, The Hague, 29 July 1899, 32 Stat 1779 (UK), *International Convention for the Pacific Settlement of Disputes*, The Hague, 18 October 1907; 3 Martens (3rd) 360, 36 Stat 2199.

[8] John G. Merrills, *International Dispute Settlement* (2nd ed., Grotius, Cambridge, 1991).

[9] See Articles 20 to 29 of the International Convention for the Pacific Settlement of Disputes, The Hague, 18 October 1899, slightly amended by the 1907 Convention.

[10] Articles 296, 304 of the Versailles Treaty of 28 June 1919; 11 Martens (3rd) 323. See more comprehensively *UN Handbook on the Peaceful Settlement of Disputes Between States* (UN, New York, 1992).

[11] 26 September 1928, 93 LNTS 343; revised on 28 April 1949, GA Res 268 (A/900).

[12] European Convention for the Peaceful Settlement of Disputes, 1957, 320 UNTS, 243; American Treaty on Pacific Settlement, 1948, 30 UNTS 55; Protocol of the Commission on Mediation and Arbitration of the Organisation of African Unity 1964, 3 ILM 1116.

[13] C. Chinkin, *Alternative Dispute Resolution under International Law*, *loc cit*. p. 126.

In this sense, if ADR/diplomatic measures are an alternative to anything in international law, it is to the use of armed force.

Therefore, the last resort in international law is self help, armed force or no dispute settlement at all, giving the advantage to the stronger nations or to those with the more effective executive. It is not only the *Fisheries* and the *Great Belt* cases which exemplify this primacy of the directly negotiating executive government over the administration of law in the interstate context. The endless banana dispute before the WTO Panels was terminated by the US and EC negotiators in 2001 without settling the legality of the protective EC banana market order leaving those countries most affected like Ecuador and Costa Rica without any effective remedy.

The last resort in national law, however, is the binding decision of the courts. It is this which gives all procedures, tribunals, arbitration panels or mediation their function and legal validity and places them in a hierarchy in national law, which is unknown to international legal procedures. The equality of procedures under international law distinguishes them from their national counterparts. Certain distinctions between procedures in adjudication before the ICJ and arbitration under PCA auspices should, however, be identified. Adjudication before the ICJ and arbitration under PCA auspices may be distinguished because of the total confidentiality which may be secured in PCA proceedings but is unavailable before the ICJ. This already mentioned distinguishing feature may shed a different light on both and may be relevant to the parties to a conflict and must be fully understood as must many other subtleties by those advising. Conciliation and mediation take on a very different character depending on who the parties enlist as mediator, for example, the Pope, the Secretary General of the United Nations or the British Monarch (advised by the Privy Council). The latter is more popular with Commonwealth countries, the former with catholic and the second with other countries not unified by religious tradition or belief in a specific way. Issues are compromised, such as when the Secretary General mediates and the General Assembly or the Security Council are involved in the same issue. The Red Cross or Switzerland, on the basis of their neutral position, perform the same function. Additional authority facilitating adherence to settlements comes with a price. It is useful to examine each method included in the term diplomatic measures.

8.4 Good Offices

"Good offices" is a term often used in the international context where third party conciliation or mediation would be the term used in national procedures. The distinguishing mark of good offices is that they are provided by a third party outside a conflict; therefore, this goes beyond negotiations between the parties and may come close to other third party procedures depending on the status and involvement of the person providing good offices. Although the term does not appear in Article 33.1 of the UN Charter it is understood to be included in the list by virtue

of its function as facilitating dispute settlement within the meaning of Chapter 6 of the Charter. It is described in An Agenda for Peace as an attempt to bring disputing parties to agreement through the named Charter processes.[14]

A number of situations demonstrate the efficacy of the method of good offices. The activities of the UN Secretary General in mediating between Turkish Northern Cyprus and the Greek portion of the island and in the "Rainbow Warrior" incident between New Zealand and France are useful examples as are the Algerian good offices between Iran and the US in respect of financial issues. They are distinguished by the role of the person or institution providing the good offices. The UN Secretary General in the Cyprus mediation had to take into consideration express policies of the UN not least the Security Council and two of its permanent members' vested interests in the light of the parties' inability to set the agenda themselves. By contrast, in the Rainbow Warrior mediation, the parties played the dominant role throughout the process securing success albeit of a limited nature.

8.4.1 The UN Secretary General in the Turkish Republic of Northern Cyprus

The Secretary General offered good offices to the Greek and Turkish Cypriot communities which they originally accepted in 1964 which was endorsed by the Security Council. In 1974 Turkey invaded the northern part of Cyprus and set up the "Turkish Republic of Northern Cyprus" which remains unrecognised by any State except Turkey. Special Representatives were appointed by the Secretary General and finally drafted a plan that was put to a referendum in 2004 but failed to win popular approval. The support for the plan by the Cypriot Government was lukewarm at best.[15] This is not to enter into political analysis but to highlight the extreme length and the ultimate failure of the process as it was unable to secure the consensus of those concerned. This is generally attributed to the Cypriot Government's lack of control of the process resulting in a view that the proposed solution was shaped by interests other than theirs and presented as a "take it or leave it" option.

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[14] An Agenda for Peace: Supplement, Preventive Diplomacy, Peacemaking and Peacekeeping, Report of the Secretary General Pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992 and 17 June 1992, UN Doc. A/47/277, paras. 34-45; see generally T. Franck "The Secretary General's Role in Conflict Resolution: Past Present and Pure Conjecture" 6 EJIL 360; T. Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995) pp. 173-217 with an account of the Good Offices of the Secretary General up to that date.

[15] Claire Palley, *An International Relations Debacle – The UN Secretary-General's Mission of Good Offices in Cyprus 1999-2004* (Hart Oxford, 2005) gives a possibly not impartial but thorough account of the kind of good offices rendered, see p. 218 *et seq*.

8.4.2 The UN Secretary General in the "Rainbow Warrior" Case

The Secretary General's good offices in the "Rainbow Warrior" case were quite different. When New Zealand found out that Greenpeace's "Rainbow Warrior" had been blown up by French secret agents in a New Zealand port it resolved to claim damages. As France wanted to repatriate its agents then in New Zealand custody, there were interests on both sides to be aligned. The initial deal of payment and an apology in return for the release of the agents was facilitated by the Secretary General's mediation. This case is of particular interest and may serve as an excellent example of the procedures employed by states short of resorting to traditional adjudication or the display of their unmitigated powers. It gives one of these rare insights into a not too rare kind of state practice of dealing with highly contentious issues now extremely well documented in several criminal law decisions, enquiry reports and a UN Secretary General Arbitral Award. It has some follow up procedures which may also be considered.

On 10 July 1985 the British registered Greenpeace ship "Rainbow Warrior" was sunk at her berth in Auckland Harbour, New Zealand by two explosive devices set by two French secret agents who were arrested and prosecuted on charges of manslaughter and wilful damage.[16] They were convicted and sentenced to ten years imprisonment by the then Chief Justice of New Zealand. The French agents Mafart and Prieur had been travelling in New Zealand as a married couple under the names of Alain and Sophie Turenge. Although they were originally charged with murder (as a Dutch citizen, Fernando Pereira, was drowned in the sinking of the ship) the Crown prosecution reduced the charge because of the difficulty of proving an intention to kill. Immunity for the French agents was neither claimed by France nor considered by the New Zealand court. The background was that initially France denied any involvement in the affair and even instituted a national enquiry by a former high ranking civil servant.[17]

The conflict only became visible when the French agents were imprisoned in New Zealand and France took steps to get them out. There were interests on both sides; New Zealand wanted to have compensation paid and sought an apology from France to ensure that this kind of state practice would not grow into customary international law and France wanted its agents to be returned to France. In June 1986 both sides agreed to submit the dispute to the Secretary General of the United Nations Peres de Cuellar for a binding ruling which was handed down on 6 July 1986.[18]

No other conditions such as France's agreement to keep the agents in prison for some years outside mainland France were honoured, highlighting the prob-

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[16] *R v Mafart and Prieur* (1987) 74 ILR 241.

[17] Bernard Tricot, whose report absolving France from any involvement in the affair can be found in C. Lecomte, *Coulez le Rainbow Warrior!* (Messidor: Editions sociales, Paris, 1985) pp. 151-168; ISBN-10**:** 2209057698, ISBN-13**:** 978-2209057696.

[18] Text of the Decision in 26 ILM 1346 (1987); 74 ILR 241.

lem of lack of enforcement. It is the other extreme of a UN facilitated settlement which was clearly driven by the parties making them the final arbiters of what the UN provided guaranteeing the success of the settlement but not the adherence to the text and principles drafted by the UN Secretary General. It required France to apologise to New Zealand for its violation of international law and to pay $7,000,000 in compensation. It was held that the French agents should be transferred from prison in New Zealand to French military authorities on the remote Pacific Island of Hao, where they would be required to spend three years in isolation. The decision also provided for the establishment of a tribunal to rule on any disagreement between the parties resulting from the implementation of the decision. The decision was confirmed in an exchange of diplomatic *notes verbales*.[19]

France did not conform to the agreement in relation to keeping the agents in Hao for three years. They were returned to mainland France before this period had expired for medical and family reasons. New Zealand was not satisfied and asked for the tribunal provided for in the Secretary General's decision to be established to decide on the issue. The relevant part of the Secretary General's holding reads:

> "… Major Mafart and Captain Prieur will be transferred to a French military facility on the island of Hao for a period of not less than three years. They will be prohibited from leaving the island for any reason, except with the mutual consent of the two Governments. They will be isolated during their assignment in Hao …"[20]

France suggested that it might deviate from the obligation to keep them in Hao because of distress.[21] Although the Tribunal held that this might have been so for a limited time, the failure to return the agents to Hao when the medical and family conditions justifying their removal ceased to exist constituted a material breach of the Secretary General's decision. However, the Tribunal did not order the return of the agents to Hao as requested by New Zealand. These obvious inconsistencies reflect the fine balancing of foreign policy interests in the case. The selection of the Secretary General as arbiter or judge in the case reflects the political nature of this kind of adjudication which applies international law as a tool to settle international conflicts. This focus of international dispute settlement using legal procedures is well evidenced in the "*Rainbow Warrior*".

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[19] See texts in NZTS 1987, No. 16.

[20] Decision of 6 July 1986, (1987) 26 ILM 1346; 74 ILR 241.

[21] See Article 32.1 of the ILC Draft Articles on State Responsiblilty (1989) Yearbook of the International Law Commission Vol. II Part II.

8.5 Arbitration and the Permanent Court of Arbitration in The Hague

The primary facilitator of interstate arbitration remains the Permanent Court of Arbitration. Established at the Peace Conferences of 1899 and 1907 at The Hague, the Permanent Court of Arbitration is even more of a political misnomer than the ICJ. Members of the delegations at the Conferences establishing the Court were eminent lawyers and all unreservedly supportive of the PCA but nonetheless outspoken on the false labelling of the Court. It is briefly restated here to exemplify the need for critical distinctions, which are decisive in international law but virtually unknown to those operating only in the national context:

> "Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable spectre, or to be more precise yet, it gave as a recorder with a list. (Asser) In a word, the Permanent Court is not permanent because it is not composed of permanent judges; it is not accessible because it has to be constituted for each case; it is not a court because it is not composed of judges (Brown Scott). What then, is this a court whose members do not even know one another? The Court of 1899 is but an idea which occasionally assumes shape and then again disappears (Martens)".[22]

Indeed, despite the title, what exists until today is a recorder with a list of four names of lawyers from each state appointed by the respective foreign ministries. Those put on the list by the states may be deemed suitable for selection as arbiters or may call themselves Judges of the Permanent Court of Arbitration although a sense of realism fortunately meant that the judges hesitated to do so as most of them would never sit in any case before that Court at all. A second function of the list is to provide nominees for election to the ICJ bench. As Article 4 of the ICJ Statute provides:

> "1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration in accordance with the following provisions."

In the case of Members of the United Nations, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes.

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[22] James Brown Scott (ed.), *The Proceedings of The Hague Peace Conferences: The Conference of 1907* (London, 1920-1) Vol. 1, pp. 334, 347 and Vol. 2, pp. 234, 319, 327, 596.

Beside the organisational links and inter-institutional relations the Permanent Court of Arbitration is scarcely more than a label which may lead to interstate arbitration. Arbitration is the classical means of interstate dispute settlement leaving the choice of judges, the time frame and the issues entirely to the parties and is usually successful as the holdings are generally followed by the parties. The variety of subject matter decided in arbitration is unmatched in any other form of dispute settlement.

Two kinds of arbitral awards may be distinguished. First, there are those which deal with the traditional interests of states focused on international law and secondly those which use international arbitration as a shield to protect private economic interests. While the former (older cases) are usually found in the Reports of International Arbitral Awards (RIAA) the latter are only reported in the context of the enforcement of the arbitral awards through national courts. However, both fall within the ambit of the PCA.

A more recent example of the latter is *AIG Capital Partners Inc v Republic of Kazakhstan*.[23] This category is distinguished from the former in that there is no real agreement to adhere to the arbitral award which is often obtained by default by the private investor against a state on the basis of this state's prior submission to arbitration in an investment contract. Therefore, questions of enforcement and state immunity are the regular issue to be addressed in the latter class of cases rather than substantive international law. At this point only classical interstate arbitration which is based on mutual agreement leaving no issues of jurisdiction to be decided shall be focused on here as arbitration without the consent of one party (here that party is the Republic of Kazakhstan) is not arbitration in the traditional sense of the word.

Arbitration is the prime interstate dispute settlement procedure. This is so because it is in keeping with the character of international relations; the states explicitly agree to settle and remain in charge of the procedures on how to achieve this. This generally takes the form of an agreement, usually known as *compromis*. Arbitration makes clear that the consent of parties to settlement must never be assumed and is to be given explicitly in each case. This avoids the jurisdiction disputes regularly seen before the ICJ, in which jurisdiction is found to exist without the defendant's actual and continuing consent.[24] Unlike before the ICJ non-adherence is simply not an issue in interstate arbitration although it regularly is in all other proceedings when jurisdiction is construed without the actual and continuing consent of the defendant state. It is a feature which helps to make the procedure the prime choice of states and is reflected in the volume of arbitration agreements and in the variety of subject matter.

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[23] [2006] 1 All ER 284.

[24] *Nicaragua v US* (preliminary objections); *LaGrand et al*.; the frustration kicking in at last when the respondent State ignores proceedings on the merits and does not adhere to a decision.

When classifying arbitral awards in terms of sources of international law within the meaning of Article 38.1 of the ICJ Statute they are seen to relate to all three principal sources of international law; the *compromis* as such is a treaty within the meaning of Article 38.1.a of the Statute and often a treaty is an element of an award. The agreement as condensed in the *compromis* and the adherence to the award by the state parties is state practice within the meaning of Article 38.1.b of the Statute. A large portion of arbitral awards await analysis in relation to their true contribution to the body of international law. Many issues of great importance in interstate relations will be found to have been already addressed in this context. When viewed in the light of general legal principles common to national and international law within the meaning of Article 38.1.c of the ICJ statute the awards are a most useful source of law. When Hersch Lauterpacht discussed his view on the national law sources of international law[25] he examined arbitral awards. Discussion of the ILC on State Responsibility is less useful than arbitral awards, which reveal the amount of compensation states agree to pay, how this is paid and how this compares to the sum which may have been recoverable in damages in these circumstances according to the national laws of states when determining what international law is.[26]

The ILC pronouncements on State Responsibility and the many international arbitral awards relating to responsibility or liability in international law complement and do not conflict with one another. In the best tradition of Blackstone's Commentaries or the various American restatements of law the ILC contributes to the development of international law. Holding firmly to state practice as expressed in numerous arbitral awards ensures that the articles would be considered as restating international law and do not transgress into the unduly vast realm of texts which state for extraneous reasons what they believe international law should be.

One feature distinguishes international arbitral awards not only from ICJ proceedings but also from national decisions in international law matters such as the House of Lords decision in *Pinochet*.[27] Public awareness of them is generally very low. This is despite the frequency with which such awards are made and the variety of issues they deal with. It is no coincidence that the ICJ and national courts command much higher public and political attention. This does not reflect a lesser significance of arbitral awards in international law. It rather indicates even a higher significance. Many if not the majority of arbitral awards administered by the PCA and beyond are confidential. The confidential nature of the process avoids public scrutiny and the risk that settlements will become political instru-

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[25] Hersch Lauterpacht, *Private Law Souces and Analogies of International Law* (Longmans, London, 1927); see Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 92 *et seq*.

[26] Christine Gray, *Judicial Remedies in International Law* (Clarendon, Oxford, 1990) p. 5 *et seq*. gives an overview of arbitral practice in relation to damages (punitive, nominal, interests, *restitutio in integrum*).

[27] *R v Bow Street Stipendiary Magistrate, ex p Pinochet Ugarte (No.3)* [2000] 1 AC 147.

ments. Only when the parties explicitly agree to publish the proceedings will they appear on the PCA website. It is introduced by the sentence: "The following list includes only those proceedings under PCA auspices that the parties have chosen to make wholly or partly public. The PCA will provide no information about proceedings other than that contained on this page." This practice runs counter to the principle that justice should be administered in public, which is a cornerstone of all national legal systems and may only be limited in rare circumstances when the judge is persuaded that very strong legal interests of privacy, state security or foreign relations militate against it. This is very different in international settlements. Although obviously unpublished agreements may not be discussed, a glance at the published cases of the PCA shows that this practice is on the wane. The publication of memorials and counter memorials and transcripts is very extensive in some cases and very limited in others. The national legal background of countries often reflects the degree of openness with regard to the settlement. However, full discretion remains with the parties involved.

The US Supreme Court has observed that an "agreement to arbitrate before a specialised tribunal is, in effect, a specialised kind of forum selection clause that posits not only the *situs* of the suit but also the procedure to be used in resolving the dispute."[28] The same could be said of international law cases. With any interstate arbitral agreement the forum and *locus* of the suit is rendered international and international/diplomatic practice and procedure applies as does international law.

[28] *Scherk v Alberto-Culver Co* 417 US 506 (1974). See also the US procedural rule in 6 C.J.S. Arbitration para. 1 (1975).

Chapter 9

Conflicts Between Adjudicators Applying International Law

9.1 An Emerging International Judicial System?

The proliferation of international adjudicating bodies and the increasing activities of national courts pronouncing on international law gives rise to the question of how to address potential conflicts between the jurisdiction of different courts, tribunals and panels. Certain rules exist in different contexts, for example, the ECJ's relationship to national courts of the EU member states is governed by Article 234 ECT as examined later in this chapter in the *Bosphorus*[1] case. However, how a WTO/DSU Panel decision in trade matters relates to a decision of the ECJ is less clear and the litigation around the EC "Banana Market Order" in *International Fruit*[2] gives rich evidence as to the lack of any applicable rule which goes beyond the EC or the WTO rules respectively. The question of competing jurisdictions of international courts and tribunals and the jurisdictional relations between national and international courts have recently been covered in excellent textbooks by one author and it is not intended to repeat here what is said there.[3] However, it is submitted that the usual techniques known from international procedural law and conflict of laws such as *lis pendens* or *forum non conveniens* may be the appropriate approaches. The recognition of foreign judgments by national courts outside the rules of the relevant Conventions and Regulations (which provide special regimes hardly acceptable in an unregulated global environment) provide ample guidance as to how to deal with competing jurisprudence in the international field.

This may be exemplified by the *Southern Tuna Dolphin*[4] Arbitration. In addition to this case by case evaluation recommended to bodies adjudicating in an in-

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1 *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).

2 *International Fruit Co. NV v Produktschap voor Groenten en Fruit* (Cases 21-24/72) [1972] ECR 1219.

3 Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003); Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007).

4 *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, 15 June 2001 (WT/DS58/R W).

ternational context to be practised along the lines known from national conflict laws the idea of a central court addressing such conflicts appeals to those who want a coherent overall structure on the global level. It is very much the system of Article 234 ECT for the ECJ which by some is considered to be extended. The former President of the ICJ Guillaume J argues as follows:

> "Courts and tribunals must … be very cautious in developing their case law, which must remain consonant with the jurisprudence of the ICJ, which, after all, is the 'principal judicial organ of the United Nations' and to which 'legal disputes should as a general rule be referred', under Article 36, paragraph 2 of the Charter."[5]

Certainly, if there should be a body deciding such conflicts the ICJ would have a privileged position and the global authority to be the relevant court. Indeed it had addressed such questions of jurisdictions in an appeal relating to the jurisdiction of the ICAO Council.[6] The same can be said for the Arbitral Award of 31 July 1989 by the ICJ.[7] However, this potential role of the ICJ or another body to authoritatively pronounce on questions of conflicts of other bodies' jurisdiction is dependent on the will of the states to give such competency to the ICJ. It would create an appeal system ensuring the coherent application of international law. This could only be established on the basis of the consent of the states to create such a system. However, such consent does not yet exist. Therefore, the questions will be addressed on a case by case basis with the potential of mutual ignorance of the competing judicial systems towards another, a feature not unknown from competing national jurisdictions. As the ECtHR formulated in relation to the ICJ:

> "The ICJ is a free standing international tribunal which has no links to a standard setting treaty such as the Convention [European Convention on Human Rights]."[8]

And, summing up, the ICTY correctly stated in relation the current international adjudicative system:

> "International Law, because it lacks a centralised structure, does not provide for an integrated judicial system operating in an orderly division of labour among a number of tribunals, where certain aspects or 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 (unless otherwise provided)."[9]

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5 Guillaume, Gilbert "The Future of International Judicial Institutions" (1995) 44 ICLQ 862.

6 [1972] ICJ Rep 46; on the basis of the Chicago Convention 1947 (ICAO) and the former ICJ Rules of 1978 in Article 87.

7 [1991] ICJ Rep 62.

8 *Loizidou v Turkey* (1995) 20 EHRR 99, 133.

9 *Prosecutor v Tadic* (Jurisdiction) 35 ILM 32, 39 (1996).

However, there is hope; Slaughter has commented that "[t]he underlying conceptual shift is from two systems – international and domestic – to one; from international and national judges to judges applying international law, national law, or a mixture of both."[10] She suggests that the institutional identity of courts is forged rather by their common function of resolving disputes than by differences in the law they apply and the parties before them and describes them as a "global community of courts". However, Slaughter has also pointed out that the activities of the many different types of courts involved in this process do not conform to a template of an emerging global legal system in which national and international courts play defined and co-ordinated roles.[11] While a desirable aim may be to "help the world's legal systems work together, in harmony, rather than at cross purposes",[12] the reality is a rather confused system in which hierarchies are unclear and regulation is decidedly lacking.

A further relevant factor in this area is that the growing expansion and diversification of transactions between international parties has resulted in a blurring of the distinction between state and non-state activities and between different methods of dispute settlement.[13] Schreuer has suggested that these factors have contributed to a situation in which it is becoming increasingly difficult to distinguish between international or inter-state litigation on the one hand and domestic or private judicial proceedings on the other hand.[14]

It has been suggested that the emerging international judicial system can serve three basic functions; provide an institutional framework for co-operation, promote compliance with international law and reinforce rights-respecting democracy at a national level.[15] There is a clear rationale behind promoting the development of a structured international judicial system; as has been stated, international courts "cannot behave as if the general state of the law in the international community … is none of their concern; to act on that blinkered view is to wield power divorced from responsibility".[16] However, while there is an established system for adjudicating on private international law disputes, there is less agreement about the role which various courts should play in resolving disputes in public international law. Henken has commented that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[17] However, this element of uncertainty about the extent to which principles of public

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[10] "A Global Community of Courts" (2003) Harv Int'l LJ 191, 192.

[11] "Judicial Globalisation" (1999-2000) 40 Va J Int'l L 1103, 1104.

[12] *Howe v Goldcorp Investments Ltd* 946 F 2d 944, 950 *per* Justice Breyer.

[13] Schreuer, "Concurrent Jurisdiction of National and International Tribunals" (1975-76) 13 Hus L Rev 508.

[14] *Ibid.*

[15] "Towards an International Judicial System"(2003-04) 56 Stan L Rev 429, 463.

[16] *Proseuctor v Semanza* ICTR-97-20-A, 31 May 2000 at 25.

[17] *How Nations Behave* (2nd ed., 1979) p. 47.

international law will be observed and enforced has also led to inconsistency in relation to the interaction between decisions made in this context by both domestic and international courts. It is proposed in this chapter to examine various examples of how this interaction between different judicial fora in the national and international context has been dealt with and then to assess whether increased regulation and consistency in this area is either possible or indeed desirable.

9.2 The Relationship Between National and International Law – an Introduction

National and international courts are often regarded as operating in different spheres and applying different laws. Traditionally two schools of thought have been applied to the relationship between them – monism and dualism. The latter approach presupposes that the two systems are separate, that they constitute two distinct legal orders that govern the courts in these spheres independently of each other. It is accurate to say that international courts have tended to adopt a dualist view of domestic courts and have viewed the application of national law in these courts as not relevant to their functions. However, dualism does not provide an exclusive conceptual framework for determining the relationship between national and international courts and it has been acknowledged that the two systems are often engaged in the common enterprise of settling disputes, particularly those which relate to international law issues. So while the role of national courts is primarily in the domestic arena they are increasingly being called upon to decide issues relating to international law and to this extent can be viewed as part of the international system. For this reason co-ordination between what have traditionally been regarded as two distinct legal orders is also increasingly important.

One of the key questions which must be addressed in this context is whether a hierarchical system determining the roles of various international and domestic courts is workable or beneficial. Shany has suggested a hierarchical approach may serve as a justification for the lack of co-ordination between proceedings.[18] He states as follows:

> "[L]ike dualism, vertical hierarchy downplays the relevance of the other set of proceedings and offers courts a clear and simple method to resolve potential jurisdictional conflicts. This approach, however, neither provides a method for the pragmatic resolution of incompatible claims of judicial supremacy nor offers the parties to a conflict a way out of such institutional 'locking of horns'. It is therefore not surprising that some commentators emphasize some of the horizontal features that characterize relations between national and in-

[18] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 7.

> ternational proceedings, and advocate inter-institutional deference and improved coordination between the involved courts."[19]

Undoubtedly a significant number of issues are now the subject of international regulation in a range of areas such as human rights law, environmental law and criminal law. As Francioni has commented "[t]oday international law pervades areas traditionally reserved to the domestic jurisdiction of states such as the human rights of nationals, criminal law, trade and use of natural resources, the management and conservation of the environment, and even the conservation of cultural heritage".[20] Particularly in the field of human rights, there is a growing tendency for supra-national courts, such as the European Court of Human Rights in a European context, to apply international norms in parallel with the activities of national courts applying domestic law. There has also been an increase in the number of international courts and an extension in their judicial powers and jurisdictional reach.[21] As Shany has commented "the continued penetration of international legal standards into the domestic realm and the growing influence of international norms and institutions on domestic decision makers and broader constituencies have rendered the separation of international law from domestic law less and less tenable."[22] An example of this increasing reliance on international law principles before domestic courts is the decision of the English Court of Appeal in *R. (Al-Jedda) v Secretary of State for the Home Department*,[23] in which the court relied on a UN Security Council Resolution and the Hague Regulations 1907 in upholding a decision to detain the claimant, who had dual British and Iraqi nationality, in Iraq.

However, the most problematic feature of the developments referred to above is that it is now increasingly common to bring proceedings before international courts which tend to overlap with those taken before national courts. This inevitably gives rise to issues of priority and superiority and the lack of a consistent approach towards these questions poses a growing problem. It is now proposed to examine some examples of these clashes in jurisdictions and then to consider some potential solutions in this area.

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[19] *Ibid*.

[20] "International Law as a Common Language for National Courts" (2001) 36 Tex Int'l LJ 587, 588.

[21] See generally Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, 2003) pp. 3 -7.

[22] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 12.

[23] [2006] EWCA Civ 327. However, as Martinez notes (2003-04) 56 Stan L Rev 429, 494, the record of the US is particularly mixed as regards the use of international decisions as precedents.

9.3 Examples of Jurisdictional Conflicts

9.3.1 The Attitude of Domestic Courts in the US

The failure of the US authorities to inform detained foreign nationals of their entitlement to consular assistance as required by Article 36(1)(b) of the Vienna Convention on Consular Relations 1963 has given rise to a considerable amount of litigation in recent years. In *Breard v Greene*[24] a Paraguayan national brought proceedings before domestic courts in the US challenging the imposition of the death penalty on the basis that the US authorities had failed to inform him following his arrest of his entitlement to consular assistance pursuant to the Vienna Convention. The state of Paraguay also brought unsuccessful proceedings before the US courts[25] and then before the ICJ, where it alleged that the US had violated the Vienna Convention at the time of Breard's arrest and was successful in its provisional measures motion requesting the US not to execute him pending a final decision in the proceedings before the ICJ.[26] However, the US Supreme Court rejected Breard's argument in the following terms:

> "First, while we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State … This proposition is embodied in the Vienna Convention itself, which provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Article 36(2), [1970] 21 U.S. T., at 101. It is the rule in this country that assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas … By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review.[27]

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[24] 523 US 371 (1998).

[25] *Paraguay v Allen* 134 F 3d 622 (1998).

[26] *Paraguay v US* [1998] ICJ Rep 248.

[27] 523 US 371, 375-376 (1998).

The majority of the court stated that although treaties are recognised by the Constitution as the supreme law of the land, that status also attaches to the Constitution itself, to which rules of procedural default apply. Even if Breard's Vienna Convention claim had been properly raised and proved, it was extremely doubtful that the violation could result in the overturning of a final judgment of conviction without some evidence that the violation had had an effect on the trial. In relation to the suits brought by Paraguay, the majority took the view that neither the text nor the history of the Vienna Convention clearly provided a foreign national with a private right of action in US courts to set aside a criminal conviction and sentence for violation of consular notification provisions. In addition, the Eleventh Amendment to the US Constitution provided a further reason why the state's suit might not succeed and that Amendment's "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them … by a foreign State" had been clearly laid down.[28] The court added that it was unfortunate that the matter came before it while proceedings were pending before the ICJ that might have been brought to that court earlier. However, it stated that the Supreme Court must decide questions presented to it on the basis of law. Earlier in the judgment reference was made to the fact that proceedings had been instituted nearly five years after Breard's convictions became final. Yet there was no sign of any willingness on the part of the US courts to attach significance to the clear request made by the ICJ and the decision of the majority undoubtedly displays a somewhat dismissive attitude to the ruling by that court.

A similar attitude was adopted by the majority of the US Supreme Court in *Federal Republic of Germany v Unites States*[29] which concerned almost identical circumstances. In his dissenting judgment Justice Breyer made reference to the Solicitor General's submission that the Vienna Convention did not furnish a basis for the Supreme Court grating a stay of execution and that "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief".[30] Reference was subsequently made to this view by the ICJ in the *Le Grand* case in which the court made it clear that in its view the decision of the majority of the Supreme Court had failed to give effect to the order the ICJ which was of a legally binding nature.[31]

Other relevant litigation in this context is that in the *Avena* case, in which the Mexican authorities brought proceedings against the US seeking to prevent the execution of a number of Mexican nationals. In *Torres v Mullin*[32] the majority of the Supreme Court again refused to quash the death penalty despite provisional

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[28] *Principality of Monaco v Mississippi* 292 US 313, 329-330 (1934).

[29] 526 US 111 (1999).

[30] *Ibid.* at 113.

[31] [2001] ICJ Rep 466.

[32] 540 US 1035 (2003).

measures granted by the ICJ requesting that the execution should not take place.[33] Once again Justice Breyer questioned this in a dissenting judgment. He referred to a brief filed by the State in opposition in two related cases then pending before the court[34] in which it argued, *inter alia*, that "the ICJ does not exercise any judicial power of the United States, which is vested exclusively by the Constitution in the United States federal courts." He said that while this was undeniably correct as a general matter, it failed to address the question of whether the ICJ had been granted the authority, by means of treaties to which the United States was a party, to interpret the rights conferred by the Vienna Convention.

Following the *Avena* decision, the President, George W. Bush, determined through a Memorandum to the Attorney General that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision."[35] However, this memorandum did not seem to have any real effect on the attitude adopted by the majority of the Supreme Court towards this issue. Yet it should be noted that a number of dissenting justices questioned the lack of deference shown to the decision of the ICJ in the subsequent US Supreme Court case of *Medellín v Dretke*.[36] Justice O'Connor referred to the fact that the Vienna Convention is a self-executing treaty and that its guarantees are susceptible to judicial enforcement in the same way as the provisions of a statute would be.

Subsequently, in *Sanchez-Llamas v Oregon*[37] this issue was revisited with Chief Justice Roberts speaking for the majority stating that although the ICJ's interpretation required "respectful consideration"[38] he concluded that this did not compel the court to reconsider its understanding of the Vienna Convention as expressed by it in *Breard*. 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

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33 42 ILM 309 (2003).

34 *Ortiz v United States*, No. 02-11188 and *Sinisterra v United States*, No. 03-5286.

35 Memorandum to the Attorney General of 28 February 2005 (App. to Pet. for Cert. 187a).

36 544 US 660 (2005).

37 548 US 331 (2006).

38 Referring to *Breard v Greene* 523 US 371, 375 (1998).

> 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*."

Shany refers to the fact that the majority in *Sanchez-Llamas* alluded to the interstate nature of ICJ proceedings and enforcement procedures.[39] He commented that "[t]hese elements of the decision, together with the majority's reference to the limited history of US court reliance on ICJ judgments and the tradition of attributing great weight to executive branch interpretations of the treaties it negotiates cast serious doubt on whether the Supreme Court would have been willing to apply an ICJ judgment … in the event that such a judgment was issued in the very same case pending before the Supreme Court."[40]

The most recent case in this area which confirms the US Supreme Court's view on the issue is *Medellín v Texas*.[41] The petitioner filed a second Texas state-court habeas application challenging his state capital murder conviction and death sentence on the ground that he had not been informed of his Vienna Convention rights. The Texas Court of Criminal Appeals dismissed his application as an abuse of the writ, concluding that neither the decision of the US Supreme Court in *Avena* nor the President's Memorandum was binding federal law that could displace the State's limitations on filing successive habeas applications. On appeal to the Supreme Court the majority held that the decision of the International Court of Justice in *Avena* that United States had violated the Vienna Convention by failing to inform 51 named Mexican nationals including the petitioner of their Vienna Convention rights was not directly enforceable domestic federal law that preempted state limitations on filing of successive habeas petitions. The Supreme Court further held that the President's Memorandum to the Attorney General that the United States would discharge its international obligations under *Avena* by having state courts give effect to the decision, did not independently require states to provide reconsideration and review of named Mexican nationals' claims without regard to state procedural default rules.

The questions raised for consideration by the court were first, was the ICJ's judgment in *Avena* directly enforceable as domestic law in a state court in the US?

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[39] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 52.

[40] *Ibid*.

[41] 128 S Ct 1346, 25 March 2008.

In addition, it had to consider whether the President's Memorandum independently required the States to provide review and reconsideration of the claims of the Mexican nationals named in the *Avena* case without regard to state procedural default rules. Chief Justice Roberts, speaking for the majority, stated that no one disputed that the *Avena* decision, which flowed from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes, constituted an international law obligation on the part of the US. However, in his view not all international law obligations automatically constituted binding federal law enforceable in US courts. The question which the court had to confront was whether the *Avena* judgment had automatic domestic legal effect so that the judgment of its own force applied in state and federal courts.

Chief Justice Roberts expressed the opinion that the Statute of the ICJ, incorporated into the UN Charter, provided supporting evidence that the ICJ's judgment in *Avena* did not automatically constitute federal law judicially enforceable in US courts. He added that the pertinent international agreements did not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and that "where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own."[42] He said that the conclusion of the majority was further supported by general principles of interpretation. Given that ICJ judgments might interfere with state procedural rules, in his view he would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended. Here there was no statement in the Optional Protocol,[43] the UN Charter, or the ICJ Statute that supported the notion that ICJ judgments displace state procedural rules.

However, the approach taken by the majority can be criticised as unduly restrictive and rather dismissive of the effect of the principles of international law and in many respects the reasoning of the minority is to be preferred. Justice Breyer again disagreed with the position taken by Chief Justice Roberts and his views merit attention. He stated that the US had signed and ratified a series of treaties obliging it to comply with ICJ judgments in cases in which it has given its consent to the exercise of the ICJ's adjudicatory authority. Specifically, he said that the US had agreed to submit, in a case of this kind, to the ICJ's "compulsory jurisdiction"

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[42] Referring to the decision of the US Supreme Court in *Sanchez-Llamas v Oregon* 548 US 331, 347 (2006).

[43] The Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention (Optional Protocol or Protocol), 24 April 1963. The Optional Protocol provided a venue for the resolution of disputes arising out of the interpretation or application of the Vienna Convetion (Article I, 21 UST at 326) According to the Protocol, such disputes "shall lie within the compulsory jurisdiction of the International Court of Justice" and "may accordingly be brought before the [ICJ] … by any party to the dispute being a Party to the present Protocol."

for purposes of "compulsory settlement." [44] Further it had been agreed that the ICJ's judgments would have "binding force … between the parties and in respect of [a] particular case."[45]

Justice Breyer also expressed the opinion that President Bush had determined that domestic courts should enforce this particular ICJ judgment.[46] He added that the President had correctly determined that Congress need not enact additional legislation. In his view the majority had placed too much weight on treaty language that said little about the matter. As he stated:

> "The words "undertak[e] to comply," for example, do not tell us whether an ICJ judgment rendered pursuant to the parties' consent to compulsory ICJ jurisdiction does, or does not, automatically become part of our domestic law. To answer that question we must look instead to our own domestic law, in particular, to the many treaty-related cases interpreting the Supremacy Clause. Those cases, including some written by Justices well aware of the Founders' original intent, lead to the conclusion that the ICJ judgment before us is enforceable as a matter of domestic law without further legislation."[47]

Justice Breyer concluded that he found the relevant treaty provisions self-executing as applied to the ICJ judgment before the court for a number of reasons. First, the language of the relevant treaties strongly supported direct judicial enforceability, at least of judgments of the kind at issue in this case. Secondly, the Optional Protocol applied to a dispute about the meaning of a Vienna Convention provision that was itself self-executing and judicially enforceable. Thirdly, logic suggested that a treaty provision providing for "final" and "binding" judgments that "settl[e]" treaty-based disputes was self-executing in so far as the judgment in question concerned the meaning of an underlying treaty provision that was itself self-executing. Fourthly, the majority's very different approach had seriously negative practical implications as the US had entered into numerous treaties that contained provisions for ICJ dispute settlement similar to those in the Protocol. Fifthly, other factors related to the judgment at issue made it well suited to direct judicial enforcement. Sixthly, to find the treaty obligations of the US self-executing as applied to the ICJ judgment, and consequently to find that judgment enforceable, did not threaten constitutional conflict with other branches of the state. Finally, neither the President nor Congress had expressed concern about direct judicial enforcement of the ICJ decision; to the contrary, it appeared that the President favoured enforcement of the judgment. Justice Breyer concluded as follows:

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[44] See Article 1 of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention 1963.

[45] United Nations Charter, Article 59, 59 Stat 1062, TS No. 993 (1945).

[46] Referring to the Memorandum to the Attorney General of 28 February 2005 (App. to Pet. for Cert. 187a).

[47] 128 S Ct 1346, 1377 (2008).

> "For these seven reasons, I would find that the United States' treaty obligation to comply with the ICJ judgment in *Avena* is enforceable in court in this case without further congressional action beyond Senate ratification of the relevant treaties. The majority reaches a different conclusion because it looks for the wrong thing (explicit textual expression about self-execution) using the wrong standard (clarity) in the wrong place (the treaty language). Hunting for what the text cannot contain, it takes a wrong turn. It threatens to deprive individuals, including businesses, property owners, testamentary beneficiaries, consular officials, and others, of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction."[48]

It is submitted that the approach adopted by Justice Breyer in his dissenting judgment in *Medellín v Texas* contains more convincing reasoning than that of the majority and it is certainly the more favourable one from the perspective of international law. However, the type of approach adopted by the majority is all too familiar in domestic jurisprudence[49] and does not augur well for the effective enforcement of the principles of international law in a national forum.

9.3.2 Conflicts Between Treaty Provision and Contracts

Another area in which a conflict has arisen between the jurisdiction of international and national courts is in relation to arbitration cases decided by the ICSID (the International Centre for Settlement of Investment Disputes). These cases raise issues of priority as between claims based on international investment protection treaties which provide for the settlement of disputes in an international judicial context and claims based in private law which fall to be resolved before domestic courts, tribunals or arbitration panels. As Shany has commented these cases "are more than indicative of the growing interaction between national and international courts; they also demonstrate the level of doctrinal and practical confusion surrounding attempts to regulate the complicated relations woven between parallel procedures involving formerly different, yet substantially similar applicable laws."[50]

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[48] *Ibid*. at 1389.

[49] See also the approach adopted by the Irish High Court in *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97. This decision is considered in detail in Biehler, *International Law in Practice* (Thomson Round Hall, 2005).

[50] Yuval Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 63.

In *Vivendi I*[51] the respondent sought to argue that an ICSID arbitral tribunal should not hear a case because submission to its jurisdiction violated a clause in the contract between the parties which referred contractual disputes to domestic administrative tribunals. The ICSID arbitral tribunal upheld this objection to jurisdiction and dismissed the claim. The tribunal found that the nature of the facts supporting most of the claims put forward in the case made it impossible for it to distinguish or separate violations of the bilateral investment treaty from breaches of the concession contract without first interpreting and applying the detailed provisions of the agreement. It stated that it was apparent that the actions of the Argentinian province, with which the claimant had contracted and on which it had relied were closely linked to the performance or non-performance of the parties under the concession contract. The tribunal therefore concluded that all of the issues relevant to the legal basis for these claims against the respondent arose from disputes between the claimants and the province concerning performance and non-performance under the contract. It addressed the relationship between the terms of the contract, in particular the forum selection provision, and the alleged international legal responsibility of Argentina under the bilateral investment treaty with respect to the previously outlined actions of officials and agencies of the province. The tribunal continued:

> "In this regard the tribunal holds that, because of the crucial connection in this case between the terms of the concession contract and these alleged violations of the BIT, the Argentine Republic cannot be held liable unless and until Claimants have, as Article 16.4 of the concession contract requires, asserted their rights in proceedings before the contentious administrative courts of [the province] and have been denied their rights, either procedurally or substantively."[52]

The tribunal concluded that it was not possible for it to determine which actions of the province had been taken in exercise of its sovereign authority and which in the exercise of its rights as a party to the concession contract, particularly considering that much of the evidence in the case had involved detailed issues of performance under the contract. It stated that the claimants should first have challenged the actions of the provincial authorities in its administrative courts. In addition, any claim against Argentina could arise only if the claimants were denied access to the courts of the province to pursue their remedy or if the claimants were treated unfairly in those courts or if their judgments were substantially unfair or otherwise denied rights guaranteed under the bilateral investment treaty by Argentina. However, since the claimants had failed to seek relief from the province's administrative courts and since there was no evidence before the tribunal that these courts would deny the claimants procedural or substantive justice, there was no basis on which to hold Argentina liable under the bilateral investment treaty.

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[51] *Vivendi I; Compania de Aguas del Aconquija SA v Argentine Republic* 40 ILM 426 (2001).

[52] *Ibid*. at 443.

As Shany comments "the arbitral tribunal construed the jurisdictional relations established by the contract and the BIT as a horizontal regime in which national and international jurisdictions serve as legal alternatives to one another".[53] However, in subsequent proceedings, known as *Vivendi II*[54] an ICSID annulment committee set aside the tribunal's award on the basis that it had exceeded its powers. The committee stated that the relevant articles of the bilateral investment treaty did not relate directly to breach of a contract but rather set an independent standard. The committee said that a state may breach a treaty without breaching a contract, and vice versa, and this is certainly true of the provisions of the bilateral investment treaty. The committee continued as follows:

> "In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law – in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the law of [the province]."[55]

The committee concluded that it was not open to an ICSID tribunal with jurisdiction under a bilateral investment treaty in relation to a claim based on a substantive provision of that treaty to dismiss the claim on the grounds that it could or should have been dealt with by a national court. In the view of the committee the inquiry which the tribunal was required to undertake was one governed by the ICSID Convention, by the bilateral investment treaty and by applicable international law. Such an inquiry was not in principle determined or precluded by any issue of domestic law, including any agreement between the parties. Although the committee conceded that where "the essential basis of a claim brought before an international tribunal is a breach of contract", the tribunal will give effect to any valid choice of forum clause in the contract, it found that this requirement was not met in the case before it. On the other hand, it stated that where the fundamental basis of the claim was a treaty laying down an independent standard by which the conduct of the parties was to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and respondent state could not operate as a bar to the application of the treaty standard.

Similar issues arose in *SGS v Pakistan*,[56] which concerned a dispute relating to a contract between a Swiss corporation and Pakistan which contained an exclusive

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[53] *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 66.

[54] 41 ILM 1135 (2002).

[55] *Ibid.* at 1154.

[56] 42 ILM 1290 (2003).

jurisdiction clause requiring such disputes to be referred to arbitration in Pakistan. The corporation instituted proceedings against Pakistan on the basis of a bilateral investment treaty between that country and Switzerland, which provided that all disputes should be referred to an ICSID arbitral tribunal. Pakistan also brought arbitration proceedings pursuant to the exclusive jurisdiction clause. The ICSID arbitral tribunal concluded that it had jurisdiction to determine the claims of violation of provisions of the bilateral investment treaty raised by the claimant. However, it also concluded that it had no jurisdiction in relation to claims based on alleged breaches of the agreement between the parties which did not also amount to breaches of the substantive standards of the bilateral investment treaty. The approach taken has been characterised as "simple and elegant"[57] and it has been suggested that it offers "greater doctrinal clarity and ease of application than the more nuanced tests offered in the two stages of the *Vivendi* litigation … since the two jurisdiction-regulating clauses apply to parallel legal universes the tribunal is released from the need to coordinate between them".[58] However, it has also been acknowledged that this reasoning encourages parallel proceedings over the same factual issues before different judicial fora which may involve the application of comparable legal standards.[59]

Very similar jurisdictional issues were raised subsequently in *SGS v The Philippines*,[60] although a different approach was taken by the ICSID arbitral tribunal in resolving them. As in the *Pakistan* case, a contractual forum selection clause provided that disputes under the agreement would be subject to the exclusive jurisdiction of the domestic courts in the Philippines. As in the earlier cases, the respondent state objected to the ICSID tribunal exercising jurisdiction in the matter and claimed that any dispute was governed by the forum selection clause in the contract. However, the claimant relied on a bilateral investment treaty concluded between Switzerland and the Philippines and made the argument that in cases where jurisdiction overlapped the jurisdiction of the international arbitral tribunal should take priority over that of domestic courts. The tribunal concluded that Article VIII of the bilateral investment treaty which provided for the settlement of disputes in relation to investments between a contracting party and an investor of the other contracting party gave it jurisdiction to adjudicate on the matter. It noted that a different view on this issue had been taken by the ICSID Tribunal in *SGS v Pakistan*. However, the majority of the tribunal concluded as follows:

> "The present tribunal agrees with the concern that the general provisions of BITs should not, unless clearly expressed to do so, override

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[57] Shany, *Regulating Jurisdictional Relations between National and International Courts* (OUP, 2007) p. 70.

[58] *Ibid.*

[59] *Ibid.*

[60] ICSID Case No. ARB/02/6, 29 January 2004.

> specific and exclusive dispute settlement arrangements made in the investment contract itself. On the view put forward by SGS it will have become impossible for investors validly to agree to an exclusive jurisdiction clause in their contracts; they will always have the hidden capacity to bring contractual claims to BIT arbitration, even in breach of the contract, and it is hard to believe that this result was contemplated by States in concluding generic investment protection agreements. But there are two different questions here: the interpretation of the general phrase 'disputes with respect to investments' in BITs, and the impact on the jurisdiction of BIT tribunals over contract claims (or, more precisely, the admissibility of those claims) when there is an exclusive jurisdiction clause in the contract. It is not plausible to suggest that general language in BITs dealing with all investment disputes should be limited because in some investment contracts the parties stipulate exclusively for different dispute settlement arrangements. As will be seen, it is possible for BIT tribunals to give effect to the parties' contracts while respecting the general language of BIT dispute settlement provisions."[61]

Shany points out that the arbitral tribunal's findings on jurisdiction and applicable law created a direct jurisdictional conflict between the ICSID proceedings and the domestic proceedings in the Philippines, as contract claims fell within the concurrent jurisdiction of both *fora*. He suggests that this facilitated the possibility of applying the jurisdiction-regulating rule, in other words the exclusive jurisdiction arrangement found in the contractual forum-selection clause to the parallel jurisdiction of the domestic court and the ICSID over contract claims. Shany expresses the view that the decision of the arbitral tribunal in the *Philippines* case is instructive as it illustrates the potential for jurisdictional interaction between national and international courts when both sets of procedures address the same subject matter and apply the same law. He suggests that the decision can be viewed as dismissive of the notion that there is an inherent hierarchy between national and international courts. Instead it applied horizontal rules to ascertain the respective jurisdiction between itself and domestic courts in relation to the parallel claims in contract.

The decision of the ICSID arbitral tribunal in *SGS v The Philippines* appears to represent a middle ground approach somewhere in the centre of the spectrum between that taken by the tribunals in *Vivendi I* and *SGS v Pakistan*. These decisions illustrate just how inconsistent the approach towards the interaction of international and national proceedings may be, even in cases heard by the same international body.

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[61] *Ibid*. at para. 134.

9.4 A Disintegrationist Approach

9.4.1 The MOX Litigation

Courts involved in resolving disputes which are within the remit of more than one international regime have traditionally been faced with two approaches. One is that of disintegrationism which involves breaking the dispute up into different claims governed by separate legal regimes and only dealing with those aspects of it that are governed by the relevant regime. The other approach is termed integrationism and involves integrating the related claims into one dispute by co-ordinating all applicable procedures and substantive legal principles in a manner which reflects a unified international legal system. While disintegrationism discourages courts in one regime from considering the effect of legal principles which may operate in another regime, integrationism encourages co-ordination of parallel jurisdictions.

While a disintegrationist approach involves splitting up different legal claims into those which will be dealt with by different regimes, it does not necessarily involve the application of distinct principles. An example of this approach is that taken by the International Tribunal for the Law of the Sea in the *Mox Plant* case,[62] where it was made clear that the dispute settlement process under the OSPAR Convention[63] and the EC and Euratom Treaties deal with disputes in relation to the interpretation and application of those agreements and not with disputes arising under the UNCLOS Convention.[64] The tribunal stated that even if the OSPAR Convention and the EC and Euratom Treaties contain rights and obligations which are similar to or identical with the rights or obligation set out in the UNCLOS Convention, the rights and obligations under the former agreements have a separate existence from those under the latter convention.[65]

This approach was also adopted by an OSPAR arbitration tribunal in parallel proceedings in which Ireland challenged the UK's refusal to provide information requested in relation to reports prepared as part of the approval process for the commissioning of the MOX nuclear processing plant at Sellafield in England.[66] Despite Ireland's submissions to the contrary, the majority of the tribunal took a narrow view that "the competence of a tribunal established under the OSPAR Convention was not intended to extend to obligations the Parties might have under other instruments (unless, of course, parts of the OSPAR Convention included a direct renvoi to such other instruments)."[67] It expressed the view that to interpret

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[62] *Ireland v United Kingdom* 41 ILM 405 (2002).

[63] The Convention for the Protection of the Marine Environment of the North-East Atlantic 1992. See 32 ILM 1069 (2002).

[64] United Nations Convention on the Law of the Sea 1982. See 21 ILM 1261 (1982).

[65] 41 ILM 405 (2002) para. 50. See also the *Southern Bluefin Tuna case* (*Australia and New Zealand v Japan*) 38 ILM 1624 , 1632 (1999).

[66] *Mox Plant Case* 42 ILM 1118 (2003).

[67] *Ibid*. at 1136.

the relevant provisions of the OSPAR Convention otherwise would transform it into an unqualified and comprehensive jurisdictional regime in which there would be no limit *ratione materiae* to the jurisdiction of a tribunal established under the OSPAR Convention. The majority of the tribunal concluded that there was no indication that the parties to the OSPAR Convention had submitted themselves to such a comprehensive jurisdictional regime in relation to any other international tribunal and that it was not reasonable to assume that they would have accepted such a jurisdictional regime through the vehicle of the OSPAR Convention. The majority also quoted from the rejoinder submitted on behalf of the UK that "[t]he application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux preparatoires*".[68] The tribunal also made it clear that the OSPAR Convention and the relevant EU Directive[69] were independent legal sources that established a distinct legal regime and provided for different legal remedies. It stated that the similar language of the two instruments did not limit a contracting party's choice of legal forum to only one of the two available, namely the ECJ or an OSPAR tribunal. In its view the primary purpose of employing similar language was to create uniform and consistent legal standards in the field of the protection of the marine environment and not to create precedence of one set of legal remedies over the other.

However, it should be noted that the dissenting member of the tribunal, Gavan Griffith QC, took a much less disintegrationist approach than the majority. He stated that he disagreed with the reasons for the restrictive interpretation of applicable law adopted by the majority and its rejection of the normative value of various international instruments invoked by Ireland to support its position. In his view other international legal sources had direct relevance to the subject matter of the arbitration and the tribunal could not be confined to international conventional law or the language of the OSPAR Convention exclusively. He concluded that he would depart from the majority's rejection of the normative value and applicability of the various international instruments invoked by Ireland and in particular its rejection of the relevance of the Aarhus Convention and EC legislative proposals to inform the meaning of the relevant article of the OSPAR Convention.

The advantage of a disintegrationist approach is that there will be no need to regulate the parallel jurisdiction of different courts which address discrete aspects of a dispute. However, the reality is that jurisdictional overlap is difficult to avoid in practice and a disintegrationist approach while it may be theoretically appealing is also fraught with potential practical difficulties. It may, as the next stage in the Sellafield litigation discussed below shows, also be difficult for certain supranational courts such as the ECJ to resist adopting an approach which suggests that it alone has the competence to resolve a dispute.

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[68] Para. 51 of the Rejoinder.

[69] Directive 90/313.

In *Commission v Ireland*[70] the European Court of Justice prohibited Ireland from suing the United Kingdom before the International Tribunal of the Law of the Sea in Hamburg in further proceedings claiming that it was polluting the Irish Sea with nuclear waste. Ireland was therefore effectively barred from seeking redress before the court which the State thought was the most appropriate to put an end to the nuclear pollution originating from the British Nuclear Fuel Plant in Sellafield considered by many to pose a threat. The Luxembourg judges held that Ireland should not bring any issue before an international court or tribunal which the ECJ itself could deal with.

In a statement on the matter the Minister for the Environment, Dick Roche, noted that the judgment placed the ECJ in a powerful position as it expected to apply not only EC law but also international law which protects Ireland from dangerous pollution in the Irish Sea. He added that enforcement of a wide range of international agreements, particularly in the environmental field, were now within the competence of the ECJ. In essence the Minister said that if the Luxembourg judges would not allow Ireland to sue the United Kingdom before the competent Hamburg court applying the relevant international law, then the ECJ must do the job itself and hold the British government responsible for its actions.

Therefore the question to be asked was this: was Ireland to be left in the lurch? Could it just disregard the Luxembourg decision and go ahead with fighting dangerous British nuclear waste with whatever means it considered appropriate or would the ECJ itself do the job? As time has shown, it may have been too much to expect that the ECJ would start applying international law which is not part of European law, because the court is not competent to do so. Ireland may only ask it to declare that the United Kingdom has not complied with its obligations under European law. However, it is relying primarily on the rules of international law according to the United Nations Convention on the Law of the Sea.

Ireland asked the Law of the Sea Tribunal to declare that the United Kingdom had breached its obligations under various articles of the United Nations Convention on the Law of the Sea in relation to the authorisation of the MOX plant, including by failing to take the necessary measures to prevent, reduce and control pollution of the marine environment of the Irish Sea from intended discharges of radioactive materials and international movements associated with the MOX plant or resulting from terrorist acts. Although European law provides some environmental protection, it does not provide it to the same degree as the United Nations Convention on the Law of the Sea. The European Union would not be competent to provide Ireland with the protection of this latter international legal standard which applies to the Sellafield pollution.

However, the European Court of Justice concluded that the provisions of the Convention relied on by Ireland in the dispute relating to the MOX plant and submitted to the arbitral tribunal were rules which formed part of the Community

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[70] (Case C-459/03) [2006] ECR – I 4635.

legal order and that the jurisdiction of the ECJ in the matter was exclusive. It continued as follows:

> "The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraph 35, and Opinion 1/00 [2002] ECR I-3493, paragraphs 11 and 12) … It follows from all of the foregoing that Articles 220 EC and 292 EC precluded Ireland from initiating proceedings before the Arbitral Tribunal with a view to resolving the dispute concerning the MOX plant."[71]

Following this decision the other option for Ireland, which was simply to disregard the ECJ ruling and proceed to seek judicial redress with the competent United Nations judicial body, is not as bizarre as it sounds. To disregard a court ruling in a national legal order is not an option. However, as we have seen in the field of international law it is much more common to encounter several courts with competing jurisdictions This is exactly what the decision of the ECJ is about. It does not pronounce on the merits of whether the United Kingdom has indeed illegally polluted and dumped nuclear waste in contravention of international and European law, but simply states that it does not wish Ireland to apply to the Law of the Sea Tribunal which is competent in this case.

Although a certain superiority of EC jurisdiction is generally accepted inside the European Union, difficulties will arise if this results in barring the proper applicable law on the merits. Recently, the European Court of Justice has been in focus for not allowing the proper application of human rights standards by applying its superior jurisdiction. This contradicts the legal premise that where there is a wrong there is a remedy. If the ECJ cannot deliver what it implicitly promises by concentrating all competences to itself, Ireland would be free to seek the legal remedy where it finds it. The rules on ECJ competency may not be misused to deprive Ireland of the benefits of the applicable international law protecting it from the perils of illegal nuclear waste.

The judgment of the ECJ is also weak on other grounds. The European Community is itself a member of the United Nations Convention on the Law of the Sea and has agreed that member states would apply to the tribunal as provided for in this convention. Therefore, to seek to rely exclusively on EC law to prevent Ireland doing this disregards the rules of international law governing conflicting assertion of jurisdictions. The Vienna Convention on the Law of Treaties provides

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[71] *Ibid.* at paras 123 and 133.

that the more specific and later treaty pre-empts the more general and earlier treaty. In relation to nuclear waste in the marine environment, the UN Convention is a more specific and later treaty than the EC Treaty and must be applied.

This decision reminded Ireland that it is not easy to stand up for its rights against powerful neighbours. However, the judicial setback in the Sellafield struggle was effected by a procedural trick, which resulted in the European Commission fighting for its exclusive competencies. The case is not yet lost on the merits. The Irish Government would be well advised to now act to obtain a judicial decision on nuclear pollution of the Irish Sea, as opposed to one on conflicting judicial competencies.

9.4.2 The Bosphorous Litigation

Consecutive decisions of the High Court and the Supreme Court in the same matter are a normal judicial feature; there is no issue in relation to which pre-empts the other; it is clear which decision must ultimately be applied. Where an additional decision of the Luxembourg European Court of Justice comes into play the matter becomes rather more complicated but is nevertheless still relatively clear. However, when after judgments by those courts, the Strasbourg European Court of Human Rights rules on a matter which has been dealt with in a quasi judicial manner by the United Nations Security Council Sanctions Committee purporting to act with legally binding force, it certainly becomes more difficult to decide which of the potentially conflicting decisions will take priority. International lawyers are accustomed to one organ of the United Nations adopting sanctions, for example, against Iraq, and another organ pronouncing that those very sanctions in themselves gravely violate human rights.[72] Such conflicting holdings would not be of such great concern if it were not for the fact that they may be pronounced by judicial bodies which are seen as the final arbiters in their field with the power to authoritatively decide an issue before them. In the international realm increasing legal guarantees in the field of human rights and European and international integration have resulted in more and more international litigation. Even the relationship between different international *fora* and national courts dealing with the same subject matter is far from clear.[73] Matters become yet more complicated when different international *fora* are called upon to potentially deal with the same issue.[74]

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[72] It is not so much the recently disputed "Oil for Food" Programme itself as the sanctions it was supposed to soften which led the Economic and Social Council of the UN to condemn them on human rights grounds (Special Rapporteur Marc Bossuyt).

[73] *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97.

[74] The International Court of Justice has only once indirectly pronounced on this issue in the *Lockerbie* case [1992] ICJ Rep 3. It was held that the potential national adjudication according to the UN Terrorist Convention of Montreal against the hijacking of aircraft had to give way to the ICJ ruling itself; however, the feature of confirming the domestic court's superiority against other courts is typical for the non-integrated international

There have not yet been too many opportunities to develop a "conflict of courts" law and no one would expect Ireland to be so heavily involved in international litigation as to lead in this field. So it came as something of a surprise that all conceivable layers of litigation, both national and international, were employed in the *Bosphorus* cases which exemplify the relevant courts and the governments' practices. The cases indeed provide some valuable insights into how different levels of law and judicial review may interact. They are particularly interesting because the question of formal validity of different international decisions on the same issue is combined with the much debated issue of how far individual fundamental and human rights may be limited by public international programmes to fight the evil posed by terrorism, rogue states etc. The question is how much civilian pain must be suffered for what political gain?

The international legal obligation of states to adhere to UN sanctions[75] even when these affect the rights of individuals and the legal redress of those prejudiced has only recently come before the courts and has now been considered in its first full judicial cycle. Obviously, the hierarchy of rules originating from national, European and international sources is at issue as is whether to allow the benefit of the doubt to the innocent individual concerned or to give it to those states and organisations which act in the name of the public good.

Bosphorus was a company, incorporated under Turkish law, in which all shares were held by Turkish nationals. By a lease agreement made in April 1992, Yugoslav Airlines (JAT) leased two of its aircraft to Bosphorus which were then registered in the Turkish Register of Civil Aviation, thus rendering them Turkish without affecting JAT's ownership. One of the planes arrived in Dublin in April 1993 for the carrying out of maintenance work. The Irish government issued instructions in May 1993 that "the aircraft was to be stopped" according to EC Regulation 990/93 of the same year which incorporated the United Nations Security Council Resolution 820/1993 prohibiting trade with what was then Yugoslavia according to Article 41 of the United Nations Charter. The New York UN Sanctions Committee notified Ireland that the aircraft fell within the terms of these provisions. The High Court held that while the United Nations resolutions did not form part of Irish domestic law, the Security Council Resolution provided the genesis for Article 8 of European Council Regulation. However, in the absence of any judicial or academic commentary on its terms "the unexplained conclusion of the United Nations Sanctions Committee was of no value to the court." Although Article 8 of the EC Regulation failed to distinguish between the nature, as opposed to the degree or percentage, of the interest held by the Yugoslav person or undertaking in the asset, the relevant "interest" was the possession or the right to enjoy, control or regulate the use of the asset, rather than the right to any income derived

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structure (see the equivalent provision in Article 27 of the Vienna Convention on the Law of Treaties). The United Nations assertion of supremacy is contained in Article 103 of the UN Charter.

[75] According to Article 25 of the United Nations Charter.

from it. The majority and controlling interest in the aircraft was held by the applicant alone and so Murphy J held that the Minister was not empowered to impound the aircraft in the circumstances.

However, in view of its desire to formally comply with the sanctions requirements from an international perspective[76] the government appealed against the release of the plane to the Supreme Court[77] which in turn according to Article 234 EC referred the question to the ECJ of whether Article 8 of the EC Regulation was to be construed as applying to an aircraft which is owned by an undertaking, the majority or controlling interest in which is held by Yugoslavia where such aircraft has been leased to an undertaking, the majority or controlling interest in which is not held by a person or undertaking in or operating from Yugoslavia. The ECJ answered this question in the affirmative, considering itself bound in this decision by the Security Council Sanction Committee's decision to the same effect.

After October 1994 the UN sanctions were relaxed so that all Yugoslavian aircraft could fly freely;[78] however, the Bosphorus run plane – which was actually the only impounded aircraft under the sanctions regime – remained so impounded. Bosphorus questioned what possible justification on the merits the impoundment could still have given the heavy private losses it was suffering and the fact that the sanctions had by this time been lifted and covered no more than this single non-Yugoslav run plane.

This gave rise to the second phase operation whereby the High Court and Supreme Court quashed the decision of the Minister to detain the aircraft further. It had by then been detained for more than three years at Dublin Airport partly due to the delayed reasoning on another potentially violated EC Regulation put forward by the Minister. It is noteworthy that the Supreme Court commented that the Minister's notice of appeal was framed in the most general of terms, merely stating that the learned High Court Judge was wrong in law in making his finding but there was no attempt to particularise how he could possibly have been wrong,[79] which may have contributed to the outcome. At this stage the aircraft was free to leave; however, a few days later the ECJ decided the question posed by the Supreme Court seventeen months earlier, with the effect that the original EC Regulation which led to the impounding was to be applied to the aircraft. The Minister then immediately re-instated the impounding order.

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[76] The written submissions in the Strasbourg case lead us to assume that the owner of Bosphorus, Mr Ozbay had considerably alienated part of the government so that it would not agree that he was a *bona fide* applicant in the matter although the court subsequently confirmed him to be such.

[77] The facts are represented here in a slightly simplified manner as there had been not one but two High Court and two Supreme Court decisions and to distinguish them would not contribute to the issue dealt with here.

[78] UNSC Resolution 943/1994.

[79] *Per* O'Flaherty J in *Bosphorus v Minister of Transport* [1997] 2 IR 1, 19.

A final application to the Strasbourg Court wound up this saga of litigation in which Bosphorus's allegation that its property rights had been violated by the impoundment were refuted by the argument that the ECJ had provided equivalent human rights (property rights) protection which left Ireland free to comply in an uninhibited manner with international sanctions and obviated the need to treat the allegations on the merits. Neither the ECJ nor the ECtHR actually weighed the concrete alleged human rights violations and exorbitant losses against the public international legal obligations of Ireland to formally adhere to sanctions. It should be pointed out that these sanctions had at the material time been lifted and the court limited itself to short statements made in the abstract which balanced the public good against individual claims and prioritised the former.

Conflicting sets of rules in international law may be assumed to be valid and to be applied. Human rights law as such does not allow other fields of law to call its applicability into question nor does the law governing international sanctions allow for such qualification. As a result the relevant courts, the ICJ, ECJ and ECtHR, generally assume that their decisions are final and binding. It is only in some rather remote fields such as international economic law in the context of the World Trade Organisation's General Agreement on Traffic and Trade that some allowances are made to balance conflicting international legal aims such as free trade and environmental protection in a structured way.[80] In the more central area of conflicting human rights and international sanctions no rules exist to balance these absolute claims properly nor is there any agreed way in which decisions of the Luxembourg, Strasbourg and national courts should be brought into line if this proves necessary.

It is possible to identify two approaches; either a forum treats itself and its set of rules in an absolute manner and does not accommodate conflicting principles or a decision is made on the basis of balancing different sets of rules irrespective of what forum is deciding the matter. A corresponding attitude to the former approach is to yield jurisdiction to another forum. Accepting for example, ECJ decisions or Security Council Sanctions Committee Resolutions as binding and denying any further judicial discretion on the merits is typical of the former approach. The latter, however, is less concerned with status and abstract structure but rather is an actual balancing process on the merits which potentially disregards claims of abstract legal superiority. It is interesting to see how both attitudes may be observed in the proceedings under consideration.

Murphy J in the first Irish High Court decision in 1994 approached the issues with refreshing clarity when stating that "the UN resolutions do not form part of Irish domestic law and, accordingly, would not of themselves justify the minister in impounding the aircraft".[81] In relation to the advice received from the Security

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[80] The GATT 1947/1994 expressly provides for this institutionalised balancing, see however, the rather frustrating "close the market for protection" attitude in *Portugal v Council* (Case 149/1996) [1999] ECR I-8395.

[81] [1994] 2 ILRM 551, 557.

Council on the issue of impounding the aircraft he commented that: "I am afraid I do not feel that the unexplained conclusion of the Chairman of the Security Council Committee is of any value to me in the performance of my function." Finally in view of the EC Regulation endorsing the UN Resolution he concluded that "[t]o impound … simply because another party has a theoretical right to receive a nominal rent in respect thereof must be absurd."[82]

This attitude puts the conflicting foreign policy interests of international sanctions categorically into a different status in relation to the individual's property rights. This robust national perspective on Ireland's obligation in the light of EC and UN law was not upheld by the ECJ, the latter being more concerned with the supremacy of EC law. The Court went on to outline that the balance between the rights of the individual and the purposes pursued by the EC/UN must be resolved in favour of the latter. The ECJ decision avoids a proper discussion of the facts and the merits in the case. What it does say, however, is worth restating as it addresses itself with impressive clarity to the core issue in the *Bosphorus* case, the balancing of sanctions and individual property rights:

> "Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions. Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators."[83]

There is no sign of balancing the extreme losses suffered by Bosphorus bearing in mind the fact that the sanctions had already lost any conceivable meaning at the material time nor is there any evidence to indicate that the ECJ ruled properly on the issues in the case other than in the abstract.[84] There is nothing to show that the court actually evaluated the issues and instead it confined itself to general pronouncements on balancing the issue of sanctions and conflicting human rights. The Supreme Court subsequently decided to apply this decision,[85] believing that it did not have any discretion to do otherwise because of the assumed supremacy of EC law[86] despite its earlier carefully balanced holding to the contrary on the merits. Its decision is in marked contrast to its previous judgment on the matter in which it reached the opposite conclusion on the merits in the course of which it

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[82] *Ibid*. at 559.

[83] (Case 84/95) [1996] ECR I-3953, paras 22 and 23.

[84] This being said it must be admitted that a restatement of the facts and the parties' submissions is contained in the decision.

[85] 29 November 1996 (SC).

[86] Biehler, *International Law in Practice* (Thomson Round Hall, 2005) p. 352; see ECtHR in *Bosphorus* (2006) 42 EHRR 1, para. 147.

balanced conflicting issues on sanctions and the applicant's property rights. This reasoning of the ECJ also forms the basis for the decision of the ECtHR which maintained that equivalent human rights protection was provided to the individual, justifying the Court not going into the merits of balancing sanctions and human rights in the given case. The relevant passage of the ECtHR decision is equally short, unambiguous and clear; the structure of the Court's decision helps to explain its reasoning. It answers the question "whether the impoundment was justified"[87] by elaborating a "general approach".[88] The ECtHR did not intend to "absolve Contracting States completely from their Convention responsibilities;"[89] however, compliance with EC law gives a presumption of Convention compliance.[90] This presumption is truly exceptional; political and economic sanctions are necessarily by their very nature in conflict with individual rights as the ECJ rightly notes and the ECtHR is exclusively designed to safeguard individual rights. To presume that by complying with sanctions imposed by both the UN and the EC there is conformity with the European Convention on Human Rights is remarkable. It would in fact be reasonable to make the opposite assumption – namely that adherence to sanctions law would indicate interference with individual rights whether justified or not. This presumption, developed in the abstract, relieves the ECtHR from scrutinising the merits of any human rights violation by the sanctions put in place. Having made such an extraordinary presumption and virtually yielding its own jurisdiction to the ECJ, it is not really unexpected that the Court thought fit to answer its question "has the presumption been rebutted in the present case?" in one short paragraph as abstract as the ECJ treatment of the same issue. It may be quoted as follows:

> "The Court has had regard to the nature of the interference, to the general interest pursued by the impoundment and by the sanctions regime and to the ruling of the ECJ (in the light of the opinion of the AG), a ruling with which the Supreme Court was obliged to and did comply. It considers it clear that there was no dysfunction of the mechanism of control of the observance of Convention rights. In the Court's view, therefore, it cannot be said that the protection of the applicant's Convention rights was manifestly deficient with the consequence that the relevant presumption of Convention compliance by the respondent State has not been rebutted."[91]

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87 *Ibid.* para. 149.

88 *Ibid*. paras. 149-158.

89 *Ibid.* para. 154.

90 *Ibid.* paras. 159-165.

91 *Ibid.* para. 166.

Interestingly the ECtHR[92] did not evaluate the public interest of the UN sanctions against Yugoslavia against the individual rights of Bosphorus. It was concerned with status and concepts of legal supremacy and procedure, not the balancing of the conflicting interests on the merits. Particularly after the softening of sanctions in 1994, no political reason could any longer be identified to uphold them against Bosphorus. The sanctions imposed at this stage formally applied only to this Bosphorus aircraft; all other Yugoslav airplanes could by then fly freely, and the Yugoslav government negotiated in Rambouillet with the world leaders. The ECtHR nevertheless chose to elaborate extensively on the "need to secure the proper functioning of international organisations" in the abstract, notably "a supranational organisation such as the EC", explicitly referring to the supremacy of EC law as seen by the ECJ[93] over national and other spheres of law, rather than the individual's rights under the Convention. The court concluded that compliance with EC law justifies interference with the individual's human rights as the EC "is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance in a manner which can be considered at least comparable to that for which the Convention provides".

However, this assumption of equivalent protection must lead to doubts. The EC Treaty does not contain provisions for the protection of human or fundamental rights. Although the ECJ has repeatedly stated in general terms that it is to be guided by such rights and Article 6 of the Treaty establishing the European Union made reference to the European Convention on Human Rights, it does not provide any remedy to the individual for breach of those rights. While the individual may sue an EC member state for not fulfilling its obligations under EC law there is no access to the ECJ for individuals who seek to establish that the fulfilment of EC law violates their fundamental rights. The ECtHR seems to accept that "access of individuals to the ECJ under these provisions is limited; they have no *locus standi* under (former) Articles 169 and 170; their right to initiate actions under Articles 173 and 175 is restricted as is, consequently, their rights under Article 184; and they have no right to take an action against another individual." However, the ECtHR went astray when it stated that: "The parties to the domestic proceedings have the right to put their case to the ECJ during the Article 177 process", as evidently the individual is not party to the proceedings before the ECJ according to Article 177. The court concluded that equivalent protection of human and fundamental rights is provided by the EC, so that compliance with EC law apparently outweighs any ECHR rights which the individual might possibly have. Although damages in tort may be recovered from the ECJ under Articles 235 and 288 of the EC Treaty, the prospects for the individual of recovering damages are extremely unlikely. The ECJ has made clear that it is not prepared to award damages for losses incurred on the basis of EC Regulations implementing UN sanctions: "the

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[92] All following quotes from para. 143 *et seq.*

[93] *Costa v ENEL* (Case 6/64) [1964] ECR 585 and see Biehler, *op. cit*., p. 352.

alleged damage can be attributed not to the adoption of [EC] Regulation No. 2340/90 but only to the United Nations Security Council Resolution 661 (1990) which imposed the embargo".[94] Needless to say from the perspective of the individual suffering the outcome this will be seen as a *deni de justice.* From the perspective of the legal personalities involved, the State, EC or ECtHR, it is in the words of the latter "no dysfunction of the mechanism of control"[95] to leave sanctions unscrutinised.

This latter categorical approach pleases institutional interests. It left Bosphorus with millions of euros worth of losses as a result of the impounding of an aircraft which the national courts considered on the merits to be illegal and for which no possible public interest in terms of UN sanctions could be seen for most of the material time. The decisions of the High Court and the Supreme Court of 1997 – in stark contrast to those of the ECJ and ECtHR – balance the conflicting interests on the merits, deciding the matter on the basis of facts rather than pre-empting it with legal concepts.

An unprecedented judicial saga involving every possible level of judicial review, from international to national, of UN Security Council sanctions implemented by EC regulations came to an end when the ECtHR decided to let those measures pass virtually unscrutinised. Is it possible to escape human rights standards by internationalising or Europeanising certain measures? In short, may states collectively infringe individual rights to an extent which their own laws would not allow? The answer to both questions seems to be an obvious "no"; however, for the first time, a resounding "yes" has been uttered by an international court – much to the delight of governments and the European Commission, and probably less welcome to those affected by these measures.

While international law will be applied carefully by national courts to the extent to which it is considered to be part of the body of national law – thus keeping intact the constitutional and human rights guarantees contained therein – the outlook will be different if certain measures are endorsed by European regulations. These are widely believed to be supreme over all other types of law and not subject to any judicial scrutiny before the ECJ on the application of an individual on the grounds of a breach of fundamental or human rights. When the EC adopted Regulation 990/93 giving effect to the UN Security Council's sanctions against what was then called Yugoslavia, the Irish Supreme Court felt unable to rule on the merits but referred the question to the ECJ which, unsurprisingly, confirmed that by virtue of the special character of EC law the UN/EC sanction must be given effect to and individual rights must be subordinated to it. As Irish courts felt bound by the ECJ and there was no judicial remedy against the ECJ ruling on behalf of the individual, the ECtHR decision on the issue was expected to give guid-

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[94] *Dorsch Consult Ingenieurgesellschaft mbH v Council and Commission* (Case C-237/98) [2002] 1 CMLR 41, 74, applying the ECJ decision in *Bosphorus.*

[95] ECtHR in *Bosphorus* (2006) 42 EHRR 1, para. 166.

ance. However, what resulted may be seen from the individual's perspective as a *deni de justice.*

It is noteworthy that the Supreme Court and the High Court sought to achieve a balance between the general public interest and that of the individual company concerned. It is submitted that these decisions would have done the cause of UN sanctions and the EC a better service had they not been pre-empted by the ECJ decision. Such pre-emption shows a disregard for the need to address the conflict between human rights and sanctions.

Such regrettable consequences may to a great extent be attributed to the assumed supremacy of EC law. It is this level of law which more than any other purports to categorically pre-empt all others. To give too much credence to this uncompromising perspective leads to the results seen in the *Bosphorus* case. The careful balancing of conflicting legal interests of which human rights and international sanctions form a prime example should not be jeopardised in this manner.

9.5 Methods of Regulating the Interaction Between International and National Courts

Yuval Shany in his book *Regulating Jurisdictional Relations Between National and International Courts*[96] has examined in detail the interaction between proceedings conducted in national and international *fora* and explored ways of seeking to regulate this jurisdictional interaction. What follows is an attempt to summarise these principles with a view to assessing whether greater regulation of this relationship is possible or desirable.

Shany has commented that dualism and hierarchy do not always provide satisfactory or realistic answers to the problems associated with the jurisdictional interaction between national and international courts. As he has stated:

> "While they can provide national and international courts with the easy to apply rules of exclusion or jurisdictional primacy, such solutions are often artificial and incompatible with the problem-solving role of the judiciary, the interests of all parties participating in multiple litigation and general considerations of judicial economy and normative coherence."[97]

While regulation of the exercise of different jurisdictions may be required in either a horizontal or vertical context, it is clearly necessary to establish the nature of the interaction between the different courts and the extent to which the relationship between them is hierarchical in nature. Factors relevant in determining this will include power to judicially review a decision of another court, the requirement to

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[96] (OUP, 2007).

[97] *Ibid*. p. 125.

exhaust local remedies and any reference or preliminary ruling procedure which may be provided for. The presence of the latter two factors in particular is likely to indicate the nature of any hierarchical structure between a national and international court. However, it may also be possible to identify factors which suggest that no hierarchy between courts is intended, as for example, a so-called "fork in the road" provision in a bilateral investment treaty which provides for the resolution of a dispute by either a national or international court. As Shany comments "ascertainment of the nature of the relations between national and international courts in the absence of clear hierarchy signifiers remains controversial and dependent on how the relationship between national and international law is conceptualized (e.g. monism v dualism, ascending v descending authority, centralised v decentralised international order)."[98] As he points out, the inconsistent practice of national and international courts on the matter is indicative of the prevailing state of uncertainty in this regard.

9.5.1 Same Issues and Same Parties

A further significant factor in developing principles which may help to regulate the jurisdiction of national and international courts in a given matter is the degree of overlap between the proceedings which may have been instituted in different fora. Principles such as *lis pendens* and *res judicata* operate to prevent the same dispute being litigated on more than one occasion and there are strong policy reasons for seeking to prevent overlapping proceedings been conducted in parallel before national and international courts. However, a forum selection clause or exclusive jurisdiction treaty provision can only operate to confer jurisdiction on either a national or international court provided the issues involved are the same. Often, as an examination of the case law relating to the ICSID decisions above has shown, one party will seek to have a matter determined before a domestic court while the other will argue that an international forum is preferable. In this context the traditional principles which regulate parallel proceedings in private international law will almost inevitably be insufficient to resolve the matter. Yet the basic questions of the same parties and the same issues are clearly also significant in any system of national/international jurisdiction regulation and must be examined.

The way in which the test of the same parties is applied in this context will, as Shany points out, depend on the amount of formality applied in determining the degree of "sameness" required. An overly formal test requiring the same legal status of a litigant in both sets of proceedings may be more difficult to satisfy where proceedings are conducted before national and international courts. So, while a state or international organisation may represent a party in an international fora, they may be acting on behalf of a private litigant who would take proceedings before the domestic fora. Conversely, a party may sue an individual such as a

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[98] *Ibid.* p. 129.

state official in proceedings before a domestic court when faced with the prospect that the state which it wishes to sue would claim sovereign immunity.

In his dissenting judgment in *Medellín v Texas*,[99] Justice Breyer referred to the fact that Mexico, rather than the petitioner Medellín himself, had presented his claims to the ICJ. As he put it Mexico had brought the case partly in the exercise of its right of diplomatic protection of its nationals and he pointed out that such derivative claims were a well-established feature of international law. As Justice Breyer stated they are treated in relevant respects as the claims of the represented individuals themselves and can give rise to remedies, tailored to the individual, that bind the nation against whom the claims are brought.[100]

The factors referred to above have led Shany to comment that "these *locus standi* differences mean that instances of absolute identity of parties before national and international courts are bound to be rare" and both Schreuer[101] and Shany[102] have advocated a liberal application of the "same parties" test to ensure that parallel claims involving what are effectively the same parties are recognised as such.

Similar difficulties arise in applying a "same issues" test to proceedings before national and international courts. There has been a marked lack of consistency in deciding whether to adopt a formal or flexible approach to this question as the decisions of the ICSID arbitral tribunals in *Viviendi I*[103] and *SGS v Pakistan*[104] illustrate. However, it may be necessary to recognise the reality that claims brought before different types of courts may still be viewed as essentially the same. This reasoning recognises that international law is a "common language"[105] which may be applied to proceedings whether of a domestic or international nature. However, Shany has suggested that even adopting a flexible approach to the "same claims" test, there may not be a sufficient overlap between proceedings taken before domestic and international courts which may be asked to resolve different aspects of the same case.[106] As he states "even where international law norms can be invoked before domestic courts, the domestic law prism under which they are applied is likely to have a distorting effect on their contents".[107]

Provided that the difficulties relating to satisfying the "same parties" and "same issues" test can be overcome in the context of parallel national and international

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[99] 128 S Ct 1346 (2008).

[100] *Ibid*. at 1387.

[101] *Decisions of International Institutions before Domestic Courts* (1981) p. 330.

[102] *The Competing Jurisdictions of International Courts and Tribunals* (2003) pp. 24-25.

[103] *Compania de Aguas del Aconquija SA v Argentine Republic* 40 ILM 426 (2001).

[104] 42 ILM 1290 (2003).

[105] See Francioni "International Law as a Common Language for National Courts (2001) 36 Tex Int'l LJ 587.

[106] See *e.g. SGS v Pakistan* 42 ILM 1290 (2003).

[107] *Regulating Jurisdictional Relations Between National and International Courts* (OUP, 2007) p. 143.

proceedings, Shany suggests that consideration may be given to applying such jurisdiction regulating principles such as *lis pendens* and *res judicata* to any overlapping litigation. However, he acknowledges that application of the former principle may only be justified if domestic courts are viewed as integral to the international legal system when applying international law and even then its applicability may be questioned on the grounds that it will constitute a form of interaction between different systems applying norms grounded in different legal regimes. He concludes that "[t]he inconclusive nature of the theory and practice underlying the application of the *lis alibi pendens* rule to parallel national and international proceedings invites the conclusion that no hard and fast rule in international law on the matter appears to exist."[108] As regards the applicability of the principle of *res judicata* in this context, Shany comments that while there is little question that it is applied by both national and international courts, the scope of its application may be circumscribed by the degree of flexibility with which the "same parties" and "same issues" tests are applied.

9.5.2 Choice of Forum Provisions

As a general principle exclusive choice of forum agreements will be enforced both by national courts and by those in the international arena. However, certainly in the latter sphere disputes may arise about whether such forum selection agreements should be interpreted as being exclusive in nature.[109] In addition, as a result of questions which may arise in relation to the "same parties" and "same issues" requirements set out above, it may be difficult to resolve a situation where, for example, parallel proceedings are brought pursuant to a contractual forum selection clause and an exclusive jurisdiction clause in a treaty. For this reason such measures may often be an unsatisfactory way of determining the appropriate forum for proceedings as between a domestic and international court and cannot really be relied upon in this regard.

9.5.3 A Possible Future Model for Jurisdiction-Regulating Rules

It seems clear that given the inherent difficulties in satisfying the "same parties" or "same issues" requirements in the context of parallel proceedings before national and international courts necessary to invoke traditional jurisdiction regulating rules such as *lis pendens* or *res judicata*, a broader alternative method of regulation must be sought. Shany suggests that the concepts of comity and *abus de droit* could be employed to regulate related proceedings which might not meet the "sameness" criteria required and also vertical jurisdictional interactions.[110]

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[108] *Ibid*. p. 159.

[109] See *Lanco International Inc. v Argentina* 40 ILM 457 (2001).

[110] *Regulating Jurisdictional Relations Between National and International Courts* (OUP, 2007) p. 165.

Shany argues that the flexibility which the discretionary nature of judicial comity affords to courts has an advantage over the rigidity of traditional jurisdiction-regulating rules. While he acknowledges that the "respectful consideration" suggested in decisions of the US Supreme Court towards decisions of the ICJ[111] is an indication of only token deference to the decision of the international court, this may even be an exaggeration and it can be argued that the decisions in this area are indicative of a total lack of deference or judicial comity. To this extent while Shany is correct in suggesting that comity might provide a practical solution to issues relating to the regulation of jurisdiction between national and international courts, unless and until domestic courts are more willing to give real effect to the proper meaning of the word, mutual respect and deference and a more consistent system of interaction may remain an aspiration rather than become a reality.

[111] *Breard v Greene* 523 US 371 (1998) 375; *Sanchez-Llamas v Oregon* 548 US 331 (2006). See also the references by the Israeli Supreme Court in *Mara'abe v Prime Minister of Israel* HCJ 7957/04 15 September 2005, para. 56 to giving the "full appropriate weight" to the decision of the ICJ in related proceedings (see 43 ILM 1009 (2004)). However, the Supreme Court, by rejecting the factual findings made by the ICJ, found a way to reach a different conclusion on the merits in the case.

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