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HAGUE INTERNATIONAL TRIBUNALS INTERNATIONAL COURT OF JUSTICE

Procedural Normative System of the International Court of Justice

SERGEY M. PUNZHIN*

Abstract

On the basis of a thorough empirical analysis, the article comes to a number of theoretical conclusions which have never previously been discussed in the literature. In particular, it demonstrates that the Court's procedure is governed not only by 'procedural law' but also by norms which are non-legal. Moreover, it clearly circumscribes which norms in the documents relating to the functioning of the Court are procedural and which lack this character. In their entirety, provisions governing the Court's procedure form a 'normative system', with the law being only one of its elements. The Court's procedural norms originate both from the traditional sources of international law as well as from sources which, according to the usual classification, do not necessarily belong to that category. The procedural norms that are derived from all of these sources, while not tending towards uniformity in terms of their characteristics and effect, nevertheless form a system which operates as a whole. The procedure of the International Court of Justice does not fit neatly within the general scheme of '*legal* versus *non-legal* norms'; neither can one readily apply the theory of traditional sources of international law to a procedural system which brings together heterogeneous elements and must therefore be explained keeping in mind its own logic and nature.

Key words

International Court of Justice; procedural law; procedural normative system; procedural norms; sources

1. INTRODUCTION

Traditionally, in both common and civil law systems, procedural law[1] is understood as a body of legal norms that are designed to organize and regulate the process of the enforcement of the legal rights and obligations of various actors. It is distinct from substantive law which determines the content of these rights and obligations. In practical terms, procedural law is composed of those rules which relate mostly to how law enforcement and judicial institutions function in a given country. One of

* First Secretary and Senior Legal Officer at the Registry of the International Court of Justice; PhD, Moscow State University [s.punzhin@icj-cij.org]. The views and opinions expressed are solely those of the author and do not necessarily represent the views and opinions of the above institution. The author wishes to thank Vladlen S. Vereshchetin, Judge at the International Court of Justice (1995–2006), and Nathalie Wiles, First Secretary of the Court, for their comments on the draft of this article.

1 Also called adjective or adjectival law.

the main features of procedural law is its secondary nature in relation to substantive law, therefore '[b]ecause procedural law is a means for enforcing substantive rules, there are different kinds of procedural law, corresponding to the various kinds of substantive law',[2] namely criminal procedural law, civil procedural law and administrative procedural law.

International procedural law is not much different in this regard. It comprises legal rules that provide the framework within which substantive international law is applied by an international court or arbitral tribunal or by an international quasi-judicial body. In this sense, as with procedural law in municipal legal orders, international procedural law establishes certain requirements of form which should be complied with in order for a settlement to be reached.[3] Although it has been noted that '[i]nternational law does not recognize a sharp distinction between the substantive law and adjectival law',[4] it is nevertheless widely accepted that procedural law exists within the international system as a distinct phenomenon.

The dividing line between international substantive and international procedural law is drawn according to that which relates to the rights of parties and that which relates to the organization of proceedings before a court.[5] For example, the International Court of Justice (ICJ or the Court) has stated that there can be no conflict between the rules of the law of armed conflict, even assuming they 'are rules of *jus cogens*', and the rules of state immunity, because the latter:

> are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[6]

Consequently, the nature of a particular provision is to be determined by reference to whether this provision governs the lawfulness or unlawfulness of particular conduct, or whether it concerns matters which are connected to the functioning of a judicial institution.

The procedure of international courts and tribunals 'presents a considerable degree of homogeneity', which is explained 'first by the way in which international judicial and arbitral bodies have developed over the last century, and secondly by the nature of the subject matter'. That is to say:

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2 Procedural Law, Britannica Online Encyclopedia, available at academic.eb.com/EBchecked/topic/477661/procedural-law.

3 International procedural law should be differentiated from the procedural rules regulating activities of international organizations and conferences (see E. Lauterpacht, 'Principles of Procedure in International Litigation', in *Académie de droit international. Recueil des cours, Vol. 345 (2009)*, (2011), at 403), which in general terms form part of the internal law of international organizations and are not related to international adjudication.

4 M. Shaw, *Rosenne's Law and Practice of the International Court. 1920–2015* (2016), 1047.

5 Ibid., at 1026.

6 *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 2012, 99, at 140, para. 93.

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> the nature of the judicial task itself – the establishment of legal rights and duties on the basis of admitted or ascertained facts – itself dictates to some extent the procedures to be followed, in that certain methods are demonstrably efficient and unarguably just.[7]

These elements have led certain authors to conclude that 'international courts often adopt common approaches to questions of procedure' and, in a more general way, that '[t]his practice is seeing the emergence of what might be called a "common law of international adjudication"'.[8] However, even the proponents of 'the common law of international adjudication' recognize that there are limitations that 'might curtail the further development of common practices in international adjudication'.[9] These limitations are significant and appear to outweigh the factors calling for the harmonization of procedural rules.

It is also commonly accepted that a distinction should be made between procedural rules in a way that reflects the separate branches of substantive law;[10] in addition, it is acknowledged that, at an international level, the differences between judicial institutions (for instance, between inter-state courts and international criminal tribunals) and the categories of disputes with which they deal, make it virtually impossible to talk about a common procedure, because 'each judicial institution operates, in point of fact, on the basis of its own rules of procedure'.[11]

International rules of procedure are not as consolidated as those in municipal legal systems and are organized differently. While it is true that, in an internal legal order, specific rules of procedure cover the functioning of all tribunals operating within a particular branch of law, the situation is different in the international legal system, because each judicial institution has its own procedure, even if such institutions may function within the same field. The distinction between the overall structure of internal procedural laws on the one hand and procedural laws which operate on an international plane on the other, can be explained by reference to the distinction between the organization of internal legal orders (centralized) and the international legal order (decentralized). International procedural law exists only insofar as there is an international judicial body whose functioning must be organized and regulated. In this sense, international procedural law is compartmentalized internally (i.e., within international society, the procedural law of one judicial or arbitral body is separate from the procedural law of another such body), in the same way as national procedural laws are compartmentalized externally (i.e., the procedural law of one sovereign state is separate from the procedural law of another sovereign state).

The predecessor of the ICJ, the Permanent Court of International Justice, which was the first permanent international court created for the resolution of international disputes between states, noted in one of its first judgments that '[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the

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7 H.W.A. Thirlway, 'Procedure of International Courts and Tribunals', in *Encyclopedia of Public International Law* (under the direction of R. Bernhardt) (1997), Vol. 3, at 1128.
8 C. Brown, *A Common Law of International Adjudication* (2007), 3.
9 Ibid., at 234–37.
10 See S. Guinchard et al., *Droit processuel: Droit fondamentaux du procès* (2015), 55–7.
11 Ibid., 1153–7.

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same degree of importance which they might possess in municipal law'.[12] This, however, does not signify that, in comparison to national courts, procedural aspects should be considered unimportant within the framework of the activities of the ICJ. On the contrary, it should be stressed that the whole of the Court's work is based on procedural rules, starting from the institution of a case and continuing through its various stages until the rendering of the Court's judgment and even beyond, in instances where an interpretation or a revision of a judgment is requested. In this sense, procedural rules underpin the Court's judicial edifice and permeate its entire judicial function. More than that, the procedural law of the ICJ, as was the case with the procedural law of the Permanent Court of International Justice, plays, in many respects, a leading role in what can loosely be termed as international procedural law.

The procedural law of the ICJ should be seen in the overall context described above. While applying certain common procedural principles, the ICJ, as an international court, is not bound by 'the various codes of procedure and the various legal terminologies' which are used in national legal systems and, in its functioning, does not need to ascertain the meaning of particular procedural concepts.[13] As was aptly stated by a leading authority, '[l]e droit procédural de la Cour internationale de Justice est un droit judiciaire qui lui est propre et qui, très délibérément, se veut tel'.[14] Moreover, as will be demonstrated below, the Court's procedural regulations are not confined to legal rules but also include non-legal provisions, with the effect that the procedural system of the Court goes beyond the limits of procedural *law* proper.

2. Regulating texts and practices

The norms[15] which may, *prima facie*, be relevant to the Court's procedure can be derived from various sources, to wit: (1) international treaties between states (the United Nations Charter and the Statute of the Court); (2) texts adopted by the Court itself (the Rules of Court, Practice Directions, the Resolution concerning the Internal Judicial Practice of the Court and freestanding decisions on procedural issues); (3) the Court's jurisprudence in matters of procedure; (4) general principles of procedural law; (5) agreements concluded by the Court; and (6) resolutions of the General Assembly and the Security Council as well as their rules of procedure.

In order to determine whether all of these sources are indeed the sources of the norms regulating the Court's procedure and what the nature and effect of these norms are, it is necessary to undertake an empirical and theoretical examination of the pertinent texts and practices.

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[12] *Mavrommatis Palestine Concessions*, Objection to the Jurisdiction of the Court, Judgment No. 2, 30 August 1924, PCIJ Rep., Series A, No. 2, at 34.

[13] Ibid., at 10; *Certain German Interests in Polish Upper Silesia, Jurisdiction*, Preliminary Objections, Judgment No. 6, 25 August 1925, PCIJ Rep. Series A, No. 6, at 19.

[14] C. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice* (1966), 7.

[15] For the purposes of the present article, the word 'norm' will be used as a generic term denominating any kind of a standard of behaviour while the word 'rule' will denominate a legally binding norm.

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2.1. Charter of the United Nations

The United Nations Charter created the ICJ and lays down certain basic legally binding principles which are essential for its existence and functioning. However, the Charter in and of itself was not intended to cover all aspects of the Court's 'life'. The Court is referred to in a limited number of provisions thereof, such as Article 7, paragraph 1 (the structure of the United Nations), Article 36, paragraph 3 (the Security Council should take into consideration that legal disputes should be referred by the parties to the Court), and Chapter XIV of the Charter.[16] Moreover, not all of the Charter's provisions in which the Court is mentioned relate to the Court's procedure, as is evident from their individual content and purpose – for example, Article 7, paragraph 1, and Article 36, paragraph 3, set out norms which belong to the internal law of the Organization, and Articles 94 and 95 determine rights and obligations of states outside their relations with the Court.

2.2. Statute of the Court

Unlike the system of the League of Nations, where the Permanent Court of International Justice was not an organ of the League, and indeed was established on the basis of a treaty which was distinct from the Covenant of the League,[17] the founders of the United Nations envisaged an international court which would formally be a part of the organization as one of its 'principal organs'. A corollary of this conception was the status of the Court's basic document as 'an integral part of the Charter',[18] i.e., for all practical purposes, the Statute's provisions are, from a legal point of view, indistinguishable from the Charter; they have the same legal force and are *legally* binding on the states parties thereto, as well as on the Court. Moreover, as has been cogently stated by Kolb, 'the Statute is, for litigating states, imperative law', in other words, it has a 'peremptory character, i.e. [the Statute] contains rules from which the parties cannot derogate by mutual agreement'.[19] However, it was not considered expedient to incorporate the text of the Statute in the Charter itself. This fact could be explained by the desire to underline the judicial independence of the Court[20] and by reference to 'drafting convenience'.[21]

The Statute comprises four main groups of regulations that give shape to the Court in terms of organizing its composition and functioning, namely the rules concerning (i) its organization (including the procedure for the election of Members of the Court by the General Assembly and the Security Council and provisions regulating their personal status, i.e., privileges and immunities etc.); (ii) its jurisdiction; (iii) the conduct of contentious and advisory proceedings; and (iv) the manner in which the Statute can be amended.

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16 This charter contains provisions regarding the position of the Court within the Organization, its principal function and normative basis (Art. 92); the participation of states in the Statute of the Court (Art. 93); rights and obligations of states in the post-adjudicative phase (Art. 94); the right of member states to use any tribunal in order to settle their disputes (Art. 95) and the advisory function of the Court (Art. 96).

17 A. Zimmermann et al., *The Statute of the International Court of Justice. A Commentary* (2012), 164

18 Ibid., at 168.

19 R. Kolb, *The International Court of Justice* (2013), 82–3.

20 Shaw, *supra* note 4, at 103–4.

21 Ibid., at 108.

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2.3. Rules of Court

The Rules of Court are adopted by the Court by virtue of the Court's power explicitly provided for in Article 30, paragraph 1, of its Statute, which is an expression of a generally recognized principle that international courts and tribunals have an inherent right to regulate their own procedure. The Rules develop the basic principles embodied in the Charter and the Statute[22] and lay down detailed provisions which the Court should abide by in fulfilling its functions and which should be followed by states parties involved in disputes being adjudicated by the Court or participating in an advisory procedure.

In spite of the fact that the Rules are a document emanating from the Court itself and, in that sense, have an 'internal' rather than intergovernmental character, the provisions contained therein are *legally* binding not only on the Court (which is easily explained by the power of a body to adopt rules by which it shall abide) but also on its clients, i.e., states which are parties to cases before it, as well as international intergovernmental organizations within the framework of advisory proceedings. The reason why the Court's internal document is binding on states rests on the axiom that, in deciding to come before the Court, the former are held to have accepted as binding any rules which the Court adopts in order to regulate its judicial proceedings. In this regard, it is sometimes stated that the Rules of Court 'are part of conventional law', in the sense that, by submitting to the jurisdiction of a court, the parties are deemed to have agreed with its rules – a proposition which has been expounded upon by Rosenne with reference to the *Interpretation of the Treaty of Lausanne* advisory opinion.[23]

Although the Rules of Court are a text adopted by the Court and the latter can change them at any given time,[24] this does not mean that the Rules are in a constant state of flux and that amendments can be used opportunistically in order to resolve a particular procedural issue. This is confirmed, in particular, by the following elements: first, if and when justified by the nature of the provision, amendments to a Rule are announced in advance of their entry into force; secondly, they do not apply retroactively; and, thirdly, if and when necessary, it is specifically stated that the previous version of a particular provision shall continue to apply to cases submitted to the Court prior to the entry into force of the amendment.[25] For example, amendments to Article 79 (preliminary objections) and Article 80 (counter-claims),

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[22] It should be noted that the Preamble to the Rules refers both to Chapter XIV of the Charter and to the Statute.

[23] Shaw, *supra* note 4, at 1055–6. The relevant text of the advisory opinion reads as follows: 'Unless a contrary intention has been expressed, the interested Parties are in such cases [i.e. "where the Parties have had recourse to a body already constituted and having its own rules of organization and procedure"] held to have accepted such rules' (*Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne 1925*, Advisory Opinion of 21 November 1925, PCIJ Rep. Series B, No. 12, at 31)

[24] This is the reason why Kolb states that the Rules are binding on the Court 'to some extent' (Kolb, *supra* note 19, at 101). However, the power of a body to amend a rule and its obligation to abide by this rule are distinct categories which are not interdependent. This power does not mean that the rule in question is less- or non-binding on this body.

[25] Footnote 1 to the title of the Rules reads as follows: 'Any amendments to the Rules of Court, following their adoption by the Court, are now posted on the Court's website, with an indication of the date of their entry into force and a note of any temporal reservations relating to their applicability (for example, whether the application of the amended rule is limited to cases instituted after the date of entry into force of the amendment); they are also published in the Court's *Yearbook*.'

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which entered into force on 1 February 2001, were adopted by the Court on 5 December 2000 and announced to the general public on 12 January 2001.[26] It should also be noted that in the period following the adoption of these latter amendments, in instances of cases instituted before 1 February 2001, the Court often specified in its relevant decision which version of the Rules was applicable. That clarification was made whenever it was 'necessary to avoid a misunderstanding' – a common example being any reference to Article 79 because of the substantial difference in time limits for the submission of preliminary objections before and after the amendments.[27] This practice was only abandoned after the judgment of 3 February 2015 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, by which time there were no further cases on the Court's docket instituted before 2001[28] that could have been affected by those amendments.

There is no information as to the date of adoption of the amendments to Articles 52 and 43 of the Rules. These amended Articles entered into force on 14 April 2005 and 29 September 2005, respectively, on the day of their public announcement. The gap between the announcement of the adoption of the amendments to Articles 79 and 80 and their entry into force and the lack of any such gap with regard to Article 52 (requirements for a properly submitted pleading) and Article 43 (notifications to states or international organizations concerned when the construction of a convention may be in question) can be easily explained. In the first instance, these provisions involved the substantive rights of states in proceedings before the Court: it would therefore not have been in conformity with the principles of procedural justice for states already participating in proceedings to be caught by surprise by certain changes to the Rules which could potentially affect the use of such important procedural instruments as preliminary objections and counter-claims. In the second instance, there existed no such potentially prejudicial impact on states appearing before the Court: the amendment to Article 43 concerned mostly the Court's own obligations and envisaged additional procedural rights for international organizations; the amendment to Article 52, although providing instructions to states, in essence concerned only technical matters regarding the filing of written pleadings in the Registry.

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[26] See Press Release 2001/1 of 12 January 2001, available at www.icj-cij.org/presscom/index.php?pr=611&pt=&p1=6&p2=1.

[27] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Counter-Claims, Order of 29 November 2001, [2001] ICJ Rep. 660, at 676, para. 27; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Order of 14 November 2002, [2002] ICJ Rep. 610, at 611; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, [2007] ICJ Rep. 582, at 587, para. 5; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, at 415–16, para. 9; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, at 15, para. 7; *Certain Property (Liechtenstein v. Germany)*, Preliminary Objections, Judgment of 10 February 2005, [2005] ICJ Rep. 6, at 10, para. 3; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 13 December 2007, [2007] ICJ Rep. 832, at 837, para. 6; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, [2011] ICJ Rep. 70, at 77, para. 11.

[28] The *Croatia v. Serbia* case was instituted on 2 July 1999.

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2.4. Practice Directions

In October 2001,[29] by analogy with procedural instruments used by some other international tribunals, the Court decided to adopt Practice Directions in order to give additional guidance to litigating states in matters of procedure. The first set of Practice Directions was based on the recommendations, initially introduced in 1998, that were sent to parties following the institution of a case before the Court. In particular, by Press Release 98/14[30] of 6 April 1998, the Court announced that 'a Note [containing these recommendations] will be given to the agents representing the Parties to new cases at their first meeting with the Registrar'; the text of that Note was attached to the Press Release and included five procedural recommendations. In 2001, an additional recommendation was inserted in the Note as a corollary to the amendment to Article 79 of the Rules.[31] According to that amendment, in order to expedite the proceedings on preliminary objections, the time limit for raising preliminary objections as set out in paragraph 1 of this Article was shortened.[32] However, the time limit for the presentation of a written statement by the other party of its observations and submissions on the preliminary objections as provided for in paragraph 5 of Article 79 remained unspecified, which was not in harmony with the purpose of the amendment. Thus, the new recommendation stipulated that this time limit 'should generally not exceed four months'.[33]

These recommendations to parties were converted into Practice Directions with small textual changes. When announcing the adoption of Practice Directions, the Court specified that '[t]hose Practice Directions involve no alteration to the Rules of Court, but are additional thereto'. Since then, the Court has amended some of the original Practice Directions and has added a number of new ones to the list. Whenever necessary, and in the same manner as per the amendments to the Rules of Court, a new Practice Direction or an amended Practice Direction may be accompanied by a temporal reservation relating to its applicability.[34]

Given that the purpose of Practice Directions is to provide clarity when salient questions of procedure arise, it follows that they are not organized according to a pre-established subject-related structure. They are a less formal and more flexible instrument than the Rules and are drafted with the aim of furnishing a swift response to a particular procedural situation. Paragraph 1 of *Practice Direction I* expresses the Court's 'wish to discourage' a certain practice.[35] Paragraphs 2 and 3 make a direct reference to Article 46 of the Rules, in essence paraphrasing its requirements.

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[29] Press Release 2001/32 of 31 October 2001, available at www.icj-cij.org/presscom/index.php?pr=110&pt=&p1=6&p2=1.

[30] Press Release 1998/14 of 6 April 1998, available at www.icj-cij.org/presscom/index.php?pr=618&pt=&p1=6&p2=1.

[31] They were both announced in the same Press Release 2001/1.

[32] From 'within the time-limit fixed for the delivery of the Counter-Memorial' to 'not later than three months after the delivery of the Memorial'.

[33] It was subsequently further specified that 'this period runs from the date of the filing of the preliminary objections' (see Press Release 2004/30 of 30 July 2004, available at www.icj-cij.org/presscom/index.php?pr=94&pt=1&p1=6&p2=1&PHPSESSID=5c407).

[34] Only Practice Directions VII and VIII (both relating to certain situations of incompatibility regarding judges *ad hoc* and agents, counsel or advocates) contain such reservations.

[35] Namely 'the practice of simultaneous deposit of pleadings in cases brought by special agreement'.

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Practice Direction II specifies what is required in terms of the content of written pleadings. *Practice Direction III* 'strongly urges' parties to limit the volume of annexes to pleadings. *Practice Direction IV* states that, in the event that a party has at its disposal a translation of its own pleadings, these translations 'should' be passed to the Registry. *Practice Direction V* establishes a time limit for the presentation of written observations on preliminary objections. *Practice Directions VI* and *XI* impose limits on the content of oral pleadings, in particular with reference to incidental proceedings in the context of preliminary objections and provisional measures, respectively. *Practice Directions VII* and *VIII* establish a regime of incompatibility with regard to the current or previous functions of judges *ad hoc* as well as of agents, counsel and advocates. That regime seeks to deter parties to cases before the Court from appointing certain categories of persons in the above-mentioned capacities. *Practice Directions IX* to *IXquater* clarify the manner in which Article 56 of the Rules should be applied. *Practice Directions X* and *XIII* establish certain modalities in the implementation of Article 31 of the Rules. *Practice Direction XII* concerns the treatment by the Court of written statements or documents submitted by international non-governmental organizations.

Under Article 30 of the Statute, the Court has the power to formulate and define the procedural rules necessary 'for carrying out its function' and these do not specifically mention Practice Directions. However, the language of this article should not be interpreted restrictively. Thirlway notes that:

> [t]here is no provision in the Statute and the Rules for the existence of directions of this kind; but it can hardly be questioned that they are a valid exercise of the rule-making power conferred on the Court by Article 30 of the Statute.[36]

It has never been contested that an international tribunal has the authority to regulate its own procedure in the manner it deems fit, provided that these secondary[37] instruments do not contradict its basic constitutive documents. The Practice Directions fall under the category of such secondary instruments.[38]

No objections were raised by states or by specialists to the use by the Court of Practice Directions in order to deal with certain procedural issues, however, their legal value and effects did raise a number of questions in the literature. Thus, it has been noted that 'the interaction between the Statute and Rules on the one hand, and the new Practice Directions on the other, [is] unclear', in large part because the latter have an impact on the rights of states, for example regarding the choice of judges *ad hoc*.[39] In this regard, a number of questions have arisen: what is the legal nature of

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[36] H.W.A. Thirlway, 'The Law and Procedure of the International Court of Justice. 1960–1989. Supplement, 2011', (2011) 82 BYIL, at 8; see also H.W.A. Thirlway, *The Sources of International Law* (2014), 123.

[37] Or 'derivative', following the terminology of R. Kolb (see Kolb, *supra* note 19, at 96).

[38] Kolb notes that 'the Court does have the legislative powers necessary for the effective carrying out of the judicial functions assigned to it. Those legislative powers arise both under Article 30 of the Statute, and from the general principle applicable to all international bodies, namely the principle of implied powers'. And further: 'Given the purpose of the Practice Directions, the Court's authority to issue them is directly derived from Article 30 of the Statute as well as from its implied powers', see Kolb, *supra* note 19, at 103–4.

[39] A. Watts, 'New Practice Directions of the International Court of Justice', (2002) 1 *The Law and Practice of International Courts and Tribunals* 247, at 255.

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Practice Directions? Are they binding procedural rules, are they recommendations or guidelines, or do they possess something of a hybrid nature?[40]

There are no simple answers to these questions, however, it follows from the text and the circumstances of their adoption that the Practice Directions were not initially intended to be binding on parties to proceedings before the Court. Nevertheless, they 'make clear the Court's position on the practical handling of different procedural matters' and either consolidate 'existing practices'[41] or seek to establish new ones. In light of this, the validity of the statement that an 'action by a party contrary to the terms of a Practice Direction, but not to any Rule, could not be penalised'[42] may be up for question. Fifteen years after the introduction of the Practice Directions, experience tells us that they are generally respected by states. It has already been noted that, '[a]s a matter of course, States parties simply take for granted that the Practice Directions are to be followed and take great pains to conform their procedural actions to what is provided in them'.[43] A doctrinal analysis of the Court's Practice Directions is complicated by the fact that some of them are formulated in a manner characteristic of legal texts while the language of others is more reminiscent of non-legal documents. Moreover, a number of provisions in the Practice Directions repeat, sometimes word for word, the text of Articles of the Rules and therefore have no independent effect of their own.

In point of fact, given that the effect of Practice Directions depends on their specific content and formulation, the question as to whether or not they are binding can only be addressed following an examination of the text of each Practice Direction and the practice with respect to their application. Practice Directions I, III and IV are framed as 'wishes' expressed by the Court – as such, they cannot even be characterized as 'guidelines'. These Directions are exhortatory in nature and their breach would not, in reality, result in any real consequences. Practice Directions II, VI and XI, which relate to the content of pleadings, could be considered as imposing obligations; by and large, the prescriptions contained in them have been duly followed by parties before the Court. Practice Directions V, IX to IX*quater*, X and XIII give the Court's own interpretation of its Rules and are therefore supposed to be strictly applied by the Court and respected by the parties.[44] Parties accept the need to comply with

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[40] A. Pellet, 'Remarks on Proceedings before the International Court of Justice', (2006) 5 *The Law and Practice of International Courts and Tribunals* 163, at 178.

[41] S. Rosenne, 'International Court of Justice: Practice Directions on Judges Ad Hoc; Agents, Counsel and Advocates; and Submission of New Documents', (2002) 1 *The Law and Practice of International Courts and Tribunals* 223, at 224; J.J. Quintana, *Litigation at the International Court of Justice* (2015), 174.

[42] Thirlway, *supra* note 36(a), at 9.

[43] Quintana, *supra* note 41 at 174.

[44] As can be seen by looking at the application in practice of Practice Direction V ('With the aim of accelerating proceedings on preliminary objections made by one party under Article 79, paragraph 1, of the Rules of Court, the time-limit for the presentation by the other party of a written statement of its observations and submissions under Article 79, paragraph 5, shall generally not exceed four months from the date of the filing of the preliminary objections'), the Court's position in this regard has evolved with time. Initially, following the adoption of this Practice Direction (which had 'immediate effect'), there were no references to it in the respective Orders for the fixing of time limits for the filing of written observations on preliminary objections. Moreover, the time limits fixed in 2002 varied and were not always in conformity with the requirements of Practice Direction V (the relevant time limits, from the date of the filing of preliminary objections, were as follows: *Certain Property (Liechtenstein v. Germany)* – 4.5 months; *Ahmadou Sadio Diallo (Republic of Guinea v.*

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Practice Directions VII and VIII, both of which refer to the sound administration of justice. Practice Direction XII only concerns the Court itself; it is akin to an Article of the Rules and is mandatory for the Court as an internal rule.

2.5. The Resolution concerning the internal judicial practice of the Court

Article 19 of the Rules provides that the Court's 'internal judicial practice' is to be governed by a special resolution. The Resolution concerning the internal judicial practice of the Court which is now in force, was adopted by the Court on 12 April 1976. It describes the procedure followed by the Court in reaching its decision in a case without any distinction being made between contentious and advisory proceedings.[45] The Resolution deals exclusively with the internal working methods of the Court and has no bearing on the rights or duties of parties to cases. Therefore, the question of whether it is binding on the parties does not arise. Moreover, the Resolution was not intended to be either legally binding or binding in any other manner on the Court itself. As a matter of practice, the Court usually[46] follows its provisions to the letter in the course of the preparation of its judgments and advisory opinions. However, as provided for in the Resolution, '[t]he Court remains entirely free to depart from the present resolution, or any part of it, in a given case, if it considers that the circumstances justify that course', without the need to change its text. For example, since the end of the 1990s, contrary to what is stated in Article 4 of the Resolution – requiring preparation of a written note by each judge – the Court, in instances where there is a preliminary objections phase in a case, has conducted its deliberation on the issues raised without written notes being prepared by the judges.[47]

Democratic Republic of the Congo) – 9 months; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* – 7.5 months. In the 2003 Order in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, the time limit was six months (although four months from the date of the Order). The next time preliminary objections were raised was in 2009 in the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* case. The relevant time limit in this case was four months from date of the filing of the objections (however, still without reference to Practice Direction V and with a mention of the agreement of the parties). Finally, it appears that in 2014 the Court decided to affirm the need for strict compliance with Practice Direction V, and a modern practice which is in full conformity with that provision began with the *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* case. In this case, the Order of 15 July 2014 fixing the time limit specifically relied on Practice Direction V and fixed a time limit of four months. The same approach was followed in similar Orders in the cases *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (19 December 2014), *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)* (19 June 2015), and *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (9 October 2015). There is only one exception in the recent case law. In the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, the relevant time limit was four months from the date of the Order. However, this deviation is explained by an unusual procedural situation in the case wherein preliminary objections were raised by the respondent before the filing of a Memorial by the applicant.

45 This is explicitly stated in Art. 10 of the Resolution.

46 A confirmation of this can be found in an address of President Bedjaoui given to the meeting of Legal Advisers to the Ministries of Foreign Affairs of States Members of the United Nations on 4 November 1996 (M. Bedjaoui, 'The "Manufacture" of Judgments at the International Court of Justice' (1991) *I.C.J. Yearbook 1996–1997*, 238–40).

47 See *supra* note 30 and Press Release 2002/12 of 4 April 2002, available at www.icj-cij.org/presscom/index.php?pr=1026&pt=&p1=6&p2=1.

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It should also be noted that, from the text of the Resolution, it can be deduced that the provisions contained therein are intended to govern the preparation of judgments and advisory opinions rather than the Court's orders. The latter can be divided into two groups – (a) substantive orders (e.g., on provisional measures, counter-claims, etc.), and (b) procedural orders (e.g., time limits, formation of a chamber, discontinuance, etc.). The Court applies only some elements from the Resolution when adopting the first category of orders and virtually none for the second category. Furthermore, a number of procedural orders are adopted by the President of the Court by virtue of his/her powers under the Rules of Court;[48] this procedure, while being 'internal judicial practice', is completely outside the scope of the Resolution.

2.6. Judicial practice

Shabtai Rosenne observed that '[i]t sometimes appears that the Rules have deliberately been left incomplete … presumably to avoid much rigidity'.[49] Therefore, whenever necessary, the '*lacunae*' in the procedure are filled in by the jurisprudence. In general terms, judicial practice concerning matters of procedure comprises particular solutions to procedural issues arising in the course of proceedings and which are not covered by the governing texts. Such a solution finds its expression in the Court's judgments, orders and advisory opinions or sometimes in a President's statement as reflected in the verbatim record of a public sitting. It is widely recognized that, in the absence of a procedural rule derived from an existing source and applicable to a specific situation, the Court is at liberty to fill in any *lacunae* at its discretion. The Permanent Court took the opportunity to clarify this discretionary power when dealing for the first time with preliminary objections to its jurisdiction; in particular, it stated that:

> [n]either the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken *in limine litis* to the Court's jurisdiction. The Court therefore is entitled to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.[50]

The Court's procedural rules (over which the Court, of course, has full control) evolve on the basis of its case law. As was noted by Charles De Visscher many years ago, the foundations and conditions of application of the Court's procedural law '*ne se découvrent que progressivement au contact d'expériences renouvelées*'.[51] These developments are reflected in the successive revisions of the texts of the Rules of both the Permanent Court and the present Court. One of the most recent examples concerns the situation where issues of jurisdiction or admissibility are clearly apparent following the institution of proceedings. The Court accordingly codified its practice

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[48] For example, Art. 44, para. 4 (filing of written pleadings); Art. 79, para. 5 (time limits); Art. 88, para. 3; Art. 89, para. 3 (discontinuance); and Art. 105, para. 2 (organization of advisory procedure).

[49] Shaw, *supra* note 4, at 1057.

[50] *Mavrommatis Palestine Concessions*, *supra* note 12, at 16.

[51] De Visscher, *supra* note 14, at 7.

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so as to allow it to decide these issues as a matter of priority in a separate phase, without needing to wait until the submission of any preliminary objections after the filing of the memorial. This practice began with six cases in the 1970s in which the respondents did not appear[52] and continued subsequently in 'normal' cases where the respondents did appear (at least for questions of jurisdiction and admissibility)[53] until it was codified in 2000 (the relevant amendment[54] was introduced in the Rules on 5 December 2000 and entered into force on 1 February 2001).

However, this formalization of the Court's practice does not always occur. Thus, a number of procedural rules developed in the case law have never become part of a particular text and have continued in existence as elements of the Court's judicial practice in procedural matters.

The Court's judicial practice in procedural matters, by virtue of its evolutionary and discretionary character, does not follow a structured pattern and covers a wide spectrum of procedural rules. By way of illustration, one may refer to a number of instances of judicial practice relating to questions of procedure. Article 86 of the Rules provides that, in intervention proceedings under Article 63 of the Statute, the intervening state is entitled 'to submit its written observations on the subject-matter of the intervention' and then to make oral observations in the course of the hearings. However, in spite of this clear two-step procedure, in the case concerning *Whaling in the Antarctic (Australia* v. *Japan: New Zealand intervening)*, upon Japan's request, the Court authorized the parties to file additional written observations on the written observations made by New Zealand under Article 86, paragraph 1, of the Rules.[55] Another example is the provision in the Statute and Rules for the calling of witnesses and experts by the parties, including the basic principles for their examination. In particular, under Article 65 of the Rules:

> 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. Before testifying, witnesses shall remain out of court.[56]

A detailed procedure for the examination of witnesses and experts, elaborating on that mentioned in the above Article, has developed in the Court's practice, starting with the *Corfu Channel* and continuing up to the most recent cases.[57] A further example is the practice of the Court in terms of deciding the order in which parties to a case instituted by a special agreement should be heard: in the absence of a specific

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52 *Fisheries Jurisdiction*, *Nuclear Tests*, *Trial of Pakistani Prisoners of War* and *Aegean Sea Continental Shelf*.

53 *Military and Paramilitary Activities in and against Nicaragua*, *Border and Transborder Armed Actions*, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, *Fisheries Jurisdiction*, *Aerial Incident of 10 August 1999* and *Armed Activities on the Territory of the Congo*.

54 A provision (new para. 2) was added to Art. 79 to the effect that 'following the submission of the application and after the President has met and consulted with the parties, the Court may decide that any questions of jurisdiction and admissibility shall be determined separately'.

55 *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention by New Zealand, Order of 6 February 2013, [2013] ICJ Rep. 3, at 9–10, paras. 22, 23.

56 See also Arts. 43(5) and 51 of the Statute.

57 See, for example, *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Merits, Judgment of 16 December 2015, at 14, para. 34; and Verbatim Record of the Public Sitting in these cases held on 14 April 2015 (CR 2015/3, at 20–21).

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rule on the matter, the Court determined that this order should be established by drawing lots.[58] Finally, the Court had to resolve what was meant by the verb 'hear' which is used in a number of articles of the Rules, i.e., whether this required an actual oral hearing or whether it equated to 'ascertaining the views' of the parties in any form. As the use of the verb 'hear' in the Rules occurs in various contexts, the Court determined its meaning by reference to the way in which the provision in question has been applied in practice. Thus, for the purposes of a decision on counter-claims, the Court has consistently been satisfied with the written observations of the parties, which means that the expression 'after hearing the parties' in Article 80, paragraph 3, of the Rules, does not necessarily require the Court to hold oral proceedings. By contrast, in cases of intervention, when an objection to intervention is raised, the stipulation under Article 84, paragraph 2, of the Rules, that 'the Court shall hear the State seeking to intervene and the parties before deciding', is usually interpreted as requiring that oral proceedings should be held.

The value of the Court's judicial practice in matters of procedure should not be underestimated. With regard to the findings of law made by the Court in its previous decisions (judgments or orders), the Court's consistent position has been that, 'while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so'.[59] This dictum applies *mutatis mutandis*, and with even greater force, to any decision of the Court regarding procedural issues as displayed in its judicial practice. Indeed, any such ruling creates, in point of fact, a precedent which most likely will be followed if and when a similar procedural issue arises. Thus, it has been forcefully argued that, whenever the Court establishes a particular procedural requirement, the latter has 'the precedential value of judicial decisions'.[60]

2.7. Resolutions of the General Assembly and the Security Council

General Assembly and Security Council resolutions do not have any bearing on the conduct of the Court's proceedings, however they are not without effect with regard to the Court's functioning (although, in view of historical developments, some of these resolutions have since become without object).

The first observation to be made with regard to those UN resolutions that are of relevance is that they regulate access to the Court by certain categories of states. Under Article 93, paragraph 2, of the Charter, a non-member state of the United Nations may become a party to the Court's Statute 'on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council'. Accordingly, a number of resolutions have been adopted by the General Assembly in order to allow certain states that were not at the time members of

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58 *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, at 20, para. 9.

59 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 18 November 2008, *supra* note 27, at 428, para. 53.

60 Shaw, *supra* note 4, at 1031.

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the United Nations to become parties to the Court's Statute.[61] In turn, Article 35, paragraph 2, of the Statute provides that the Security Council is empowered to lay down conditions under which the Court is open to states which are not parties to the Statute. Such conditions were established by Security Council resolution 9 (1946) of 15 October 1946.[62]

Secondly, there are two General Assembly resolutions on the rights of states that are not United Nations members but parties to the Statute: Resolution 24(III) of 8 October 1948 on the participation of States parties to the Statute but not members of the United Nations in the election of Members of the Court and Resolution 2520(XXIV) of 4 December 1969 regarding participation of the same category of states in the procedure for amendments of the Statute.

Thirdly, the General Assembly adopted two resolutions regarding privileges and immunities of the Court. The first (Resolution 22 C (I) of 13 February 1946) contained a short-term transitional arrangement which the General Assembly recommended to member states. The second (Resolution 90 (I) of 11 December 1946) approved the agreement between the Court and the Netherlands regarding privileges and immunities of members and staff of the Court as well as persons participating in the proceedings, and also recommended that certain privileges and immunities should be enjoyed by members and staff of the Court in countries other than the Netherlands and that the privileges and immunities of agents, counsel and advocates as well as witnesses and experts should be determined by reference to the Convention on the Privileges and Immunities of the United Nations.

The first two categories of resolutions of the General Assembly and of the Security Council (regarding certain rights of states that are non-United Nations members and/or non-parties to the Court's Statute) are binding not only on the organs adopting them but, in more general terms, on all member states of the United Nations within the system of peaceful settlement of disputes through the ICJ. The third category (GA resolutions on relevant privileges and immunities) contains only recommendations, however, in practice these are routinely followed and have come to constitute something akin to a *legal* regime.

It is also noteworthy that the rules of procedure of the General Assembly and of the Security Council each include an identical provision dealing with the election of Members of the Court. These dual provisions stipulate that:

> [a]ny meeting of the [General Assembly][Security Council] held in pursuance of the Statute of the International Court of Justice for the purpose of [electing][the election] of Members of the Court shall continue until as many candidates as are required for all the seats to be filled have obtained in one or more ballots an absolute majority of votes.[63]

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61 Resolutions 91(I) of 11 December 1946 (Switzerland), 363(IV) of 1 December 1949 (Liechtenstein), 805(VIII) of 9 December 1953 (Japan), 806(VIII) of 9 December 1953 (San Marino), and 42/41 of 18 November 1987 (Nauru).

62 Declarations under this resolution were made by Albania (1947), Cambodia (1952), Ceylon (1952), Finland (1953, 1954), the Federal Republic of Germany (1955, 1956, 1961, 1965, 1971), Italy (1953, 1955), Japan (1951), Laos (1952), and the Republic of Vietnam (1952).

63 Rule 151 of the Rules of Procedure of the General Assembly; Rule 61 of the Provisional Rules of Procedure of the Security Council.

These provisions are complementary to Article 11 of the Statute and provide an interpretation as to the correlation between the terms 'meeting' and 'ballot'[64] used in the Statute and the UN resolutions, respectively. In this manner, these provisions have the same practical effect as the provisions of the Statute dealing with the procedure in these United Nations organs for the election of Members of the Court.

2.8. Decisions on certain procedural matters

In one instance the Court turned to a very particular method, which has never been used since, to supplement its procedural regulations. On 4 April 2002, the Court announced that it had decided to take a number of measures in order to expedite its procedure.[65] Five such measures, which may be called decisions on procedural matters, were envisaged: (1) Referring to Article 45 of the Rules, the Court decided that 'a single round of written pleadings is to be considered as the norm in cases begun by means of an application'; (2) The Court also 'encourage[d] parties' to cases instituted by the notification of a special agreement to ensure that the number and order of pleadings 'conform with the spirit of measure No. 1 above'; (3) The Court requested that parties 'conscientiously observe' Article 60, paragraph 1, of the Rules of Court, and decided that 'dates for oral arguments in a case will be fixed having regard to what is reasonably required by the parties, in order to avoid unnecessarily protracted oral arguments' and that 'a second round of oral arguments, if any, should be brief'; (4) The Court expressed its intention 'to make greater use' of Article 61, paragraph 1, of the Rules of Court and Article 1, paragraphs (i) and (ii) of the Resolution concerning the Internal Judicial Practice of the Court in order 'to give specific indications to the parties of areas of focus in the oral proceedings, and particularly in any second round of oral arguments'; and (5) The Court finally decided, 'in a preliminary phase of a case', to continue the practice of dispensing with written Notes prepared by the judges for the purposes of deliberation.

In contradistinction to Practice Directions, the Court has never since referred to these decisions or expressly reminded the world of their existence. This may be explained by the fact that these decisions are predominantly addressed to the Court itself. Except for decision no. 5 which institutionalized a previous practice which had been in use since 1998 on an 'experimental basis',[66] the other decisions were and remain in the nature of indications or guidelines, even when the tenor of the language used presupposed a mandatory provision (e.g., 'is to be considered as the norm').

2.9. General principles of procedural law

It is argued that 'since most procedural questions are regulated in advance in treaties and rules of court, there is only a very limited field in which a residual general procedural law could operate'.[67] Nevertheless, the existence of general principles

64 See B. Fassbender, 'Article 11', in Zimmermann et al., *supra* note 17, 330, at 331; Shaw, *supra* note 4, at 385.
65 *Supra* note 47.
66 *Supra* note 30.
67 Thirlway, *supra* note 7, at 1128.

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of procedural law and their applicability to the functioning of the Court has been recognized by a Chamber of the Court. In its Judgment on Nicaragua's Application for permission to intervene in the case between El Salvador and Honduras, the Chamber stated that a non-party intervener 'does not acquire the rights, or become subject to the obligations, which attach to the status of a party, under the Statute and Rules of Court, or *the general principles of procedural law* (emphasis added)',[68] thereby implying that the status of a party before the ICJ is regulated not only by the Statute and Rules of Court but also by the general principles of procedural law.

It should also be recalled that in the Judgment in the *South West Africa* cases, the Court referred to 'a universal and necessary, but yet almost elementary principle of procedural law' and applied it to the analysis of the cases at hand. The principle in question was:

> that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim, – and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court.[69]

According to the Court, in the cases under consideration, 'that subject-matter include[d] the question whether the Applicants possess any legal right to require the performance of the "conduct" provisions of the Mandate'. The Court came to the conclusion, in particular, that this question was outside the scope of Article 7, paragraph 2, of the Mandate for South West Africa providing for the jurisdiction of the Permanent Court of International Justice. In the Court's view, Article 7, paragraph 2, was a 'common-form' jurisdictional clause and:

> [t]he Court [could] see nothing in it that would take the clause outside the normal rule that, in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it, — and must therefore be established *aliunde vel aliter.* Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal.[70]

Among more specific examples of general principles of procedural law referred to and applied by the Court[71] are, for example, the principles *jura novit curia*,[72] *non ultra*

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68 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment of 13 September 1990, [1990] ICJ Rep. 92 at 136, para. 102.

69 *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, [1966] ICJ Rep. 6, at 39, para. 64.

70 Ibid., para. 65.

71 For the overview see R. Kolb, 'General Principles of Procedural Law', in Zimmermann et al., *supra* note 17, 871, at 876 et seq.

72 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, at 24, para. 29 (referring to *The Case of the S.S. Lotus (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Rep., Series A, No. 10, at 31 and *Fisheries Jurisdiction (United Kingdom v. Iceland) (Federal Republic of Germany v. Iceland)*, Merits, Judgments of 25 July 1974, [1974] ICJ Rep. 175, at 9, para. 17; at 181, para. 18).

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petita,[73] *onus probandi incumbit actori*,[74] and *audi alteram partem*.[75] These principles have the same character as general principles of law within the meaning of Article 38, paragraph 1(c), of the Statute and are accordingly a source of procedural law applied by the Court.

2.10. Agreements concluded by the Court

Article 19 of the Statute stipulates that members of the Court shall enjoy 'diplomatic' privileges and immunities, and Article 42 stipulates that representatives of the parties shall enjoy privileges and immunities 'necessary to the independent exercise of their duties'. In order to implement these provisions in the territory of the host country, the Court in 1946 concluded an agreement with the Netherlands regarding privileges and immunities of members of the Court, the Registrar, officials of the Court and persons appearing in proceedings before the Court (Exchange of Letters between the President of the International Court of Justice and the Minister for Foreign Affairs of the Netherlands of 26 June 1946[76]). Subsequently, the Court concluded three more international agreements (in the form of an exchanges of letters or diplomatic notes) with the Netherlands. They concerned questions of precedence with regard to the order of protocol of the President and members of the Court in the Netherlands (Exchange of an aide-memoire from the President of the Court dated 15 June 1970 and a letter from the Minister for Foreign Affairs of the Netherlands dated 26 February 1971[77]), employment opportunities in the Netherlands for members of the family of members of the Court, the Registrar and officials of the Court (Exchange of Notes dated 18 and 19 February 2002[78]) and the status of the Court's trainees in the Netherlands (Exchange of Notes dated 14 October 2004[79]). All these texts are international treaties and consequently are legally binding, however, it remains to be seen whether they fall within the sphere of the Court's procedural regulations. It should be noted that the same question also arises with regard to some of the norms contained in the other sources presented above.

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73 *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 11 November 2013, [2013] ICJ Rep. 281, at 307, para. 71 (referring to the previous case law); *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013, [2013] ICJ Rep. 44, at 78, para. 74. On this principle, see also: Kolb, *supra* note 71, at 893–903.

74 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, [2010] ICJ Rep. 14, at 71, para. 162 (referring to the previous case law); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, at 73, paras. 172–3.

75 *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the* Land and Maritime Boundary between Cameroon and Nigeria (Cameroon *v.* Nigeria), Preliminary Objections *(Nigeria v. Cameroon)*, Judgment of 21 October 1999, [1999] ICJ Rep. 31, at 38, para. 15. See also *Nuclear Tests (Australia v. France) (New Zealand v. France)*, Judgments, [1974] ICJ Rep., at 265, para. 33; at 469, para. 34. On this principle, see also Kolb, *supra* note 71, at 877–84.

76 Available at www.icj-cij.org/documents/index.php?p1=4&p2=5&p3=3.

77 Ibid.

78 2326 UNTS 89–93.

79 2368 UNTS 325–31.

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3. Nature and scope

In referring to procedural law, it is understood that the set of rules that it comprises are legally binding upon the relevant subjects. However, the above analysis has demonstrated that the norms[80] which regulate the Court's functioning are not homogeneous in terms of their nature and/or their regulatory effect. In particular, they include legal and non-legal norms and, within the category of non-legal norms, include binding and non-binding procedural norms. Therefore, the idea of procedural *law* does not encompass all of the elements involved in the regulation of the Court's procedure. A wider category is necessary in order to cover the whole range of procedural norms. It is suggested that this category could be termed a 'procedural normative system'. Thus, the procedural normative system of the Court can be defined as a body of norms which gives shape to the process that enables the Court to fulfil its functions; these norms comprise legally binding rules – i.e., the rules that underpin procedural law proper and which, as such, constitute the core element of that law – complemented by binding or non-binding non-legal norms.

In order to ascertain the precise limits of this procedural normative system, it is necessary to determine which subject areas should be considered as entering within the ambit of the Court's procedure. Kolb, for example, distinguishes between procedure in a broad sense, meaning 'all rules relating to international judicial action' (e.g., 'the rules governing the composition of the court, questions of competence and admissibility, the objective and subjective conditions for bringing a claim, as well as the modalities according to which the case will be dealt with'), and procedure in a narrow sense, meaning 'the way in which the parties' requests are dealt with by the court, from the institution of proceedings until the moment of the final decision'.[81] Thus, according to him:

> rules relating to the election of ICJ judges (Articles 2 *et seq.*) are rules of procedure; but these rules do not refer to proceedings in a contentious case (*procès*) and are consequently not included in the rules of the procedure in that narrowest sense just described.[82]

There is no doubt that the norms relating, first, to the interaction of the Court with those entities having access to the Court's machinery and, secondly, to the latter's internal working, belong to the realm of procedure. However, one cannot stop here as it is widely accepted that questions of 'procedure' include not only the conduct of proceedings proper 'but also the constitution of international tribunals, and questions relating to their jurisdiction'.[83] Therefore, these two elements should similarly be considered as forming part of the norms relating to the Court's procedure. There is, however, another opinion, according to which, 'questions of jurisdiction do not really belong to the realm of procedure'.[84] This view is difficult to sustain though:

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80 It is recalled that the distinction between 'rules' and 'norms', made for the purposes of the present article, has been explained in *supra* note 15.
81 Kolb, *supra* note 71, at 873.
82 Ibid., at 874.
83 Brown, *supra* note 8.
84 Quintana, *supra* note 41, at 40.

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the jurisdiction of a tribunal is not a matter of substantive law because it does not relate to the substantive rights of the parties. Jurisdiction is, rather, a determinative factor which allows a state to use an international court for dispute resolution and, from that point of view, is relevant to its functioning and ipso facto to matters of procedure.

Thus, for the sake of argument, from the point of view of subject areas, rather than speaking about procedure in a wide and in a narrow sense, the structure of the Court's procedural normative system may be presented as consisting of three strata of norms. The first includes norms relating to the Court's jurisdiction (quality of a party to a case[85] and rules governing jurisdiction). The second comprises norms relating to the conduct of the proceedings (institution of case, written and oral proceedings, evidence, provisional measures and other incidental proceedings, interpretation and revision, proceedings before chambers and advisory procedure). Finally, the third stratum consists of norms which deal with the organization of the Court (election of members of the Court, choice of judges *ad hoc*, formation of chambers, appointment of assessors, Presidency) and its Registry, as well as its modalities of functioning and its internal judicial practices (mode of functioning, judicial vacations, quorum, character of deliberations and decision-making).

This structure may also be presented in the form of concentric circles, with jurisdiction being placed within the core circle, the conduct of proceedings within the middle circle, and the Court's organization within the outer circle. A confirmation, to a degree, of this structure may be found in Article 30, paragraph 1, of the Statute – a provision which makes a clear distinction between, on the one hand, the 'rules for carrying out [the Court's] functions' as a general category, and on the other, the 'rules of procedure' as their core element.[86]

As provided for in Article 1 of the Statute, this instrument governs the constitution and the functioning of the Court. Therefore, as both sets of rules are undeniably procedural in nature, they should *prima facie* be treated as forming part of the procedural law of the Court. However, the question remains as to whether all of the provisions included in Chapter 1 'Organization of the Court' fall within the category of the *Court's* procedure. It is not easy to give a straightforward answer to this question. In particular, Articles 4 to 12 (paragraphs 1 and 2) regulate the activities of bodies external to the Court but which perform certain functions within the framework of the nomination and election procedure for Members of the Court. The provisions contained therein prescribe the mode of action of the national groups

[85] In 2004 Judgments, the Court made a distinction between access to the Court and jurisdiction (*Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 295, para. 36; at 299, para. 46). However, in its 2007 and 2008 Judgments, its position became more nuanced. In particular, the Court stated that the question of access to the Court 'can be regarded either as an issue relating to the Court's jurisdiction *ratione personae* or as an issue preliminary to the examination of jurisdiction' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, [2008] ICJ Rep. 412, at 432, para. 66; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43, at 94, para. 122; at 100, para. 136).

[86] 'The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.' This distinction is even clearer in French: 'La Cour détermine par un règlement le mode suivant lequel elle exerce ses attributions. Elle règle notamment sa procédure.'

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in the Permanent Court of Arbitration and of the United Nations Secretary-General, General Assembly and Security Council. While these provisions clearly relate to the Court, as they determine the selection process by which its composition is decided, the Court as such is not however an addressee of the rules contained in the above-mentioned Articles.

The same question (namely whether the norms in question belong to the field of procedure) arises with regard to the norms which deal with what can be described as 'the personal status' of persons associated with the Court. The texts relating to the organization and functioning of the Court contain a number of provisions concerning the status of Members of the Court (incompatibilities, privileges and immunities, salaries, allowances, compensations and pensions), the Registrar and staff of the Registry (privileges and immunities), representatives of the parties (privileges and immunities of agents, counsel and advocates), as well as witnesses and experts. These provisions deal with substantive issues rather than with procedure – it being understood as machinery which puts into motion the process of dispute resolution, as described earlier. While procedural rules may be characterized as 'dynamic', in the sense that they ensure the unfolding of a certain process and regulate the interaction between its elements, 'personal status' rules are 'static' because they describe the attributes of an individual, in this case the prerogatives, rights and obligations of judges. To apply an analogy, the rules on diplomatic and consular privileges and immunities in international law are considered to be substantive, not procedural. Although immunity as such is a procedural concept,[87] the rule granting such immunity to a person is substantive in character. In other words, for example, when paragraph 1 of Article 31 of the 1961 Vienna Convention on Diplomatic Relations states that a diplomatic agent 'shall enjoy' immunities from the criminal, civil and administrative jurisdiction of the receiving states, it gives diplomatic agents certain facilities and entitlements and in that sense it is substantive. On the other hand, when it is applied, the jurisdictional immunity of a diplomat, as stipulated in the above provision, operates as a procedural rule barring any form of legal process[88] against this diplomat in the receiving state. On balance, it would seem that the 'personal status' rules remain outside of the scope of the Court's procedural normative system.

Another example of procedural rules which are contained in the Statute of the Court but which are nevertheless excluded from the procedural normative system, is Chapter V of the Statute. This Chapter sets out the way in which the Statute can be amended (Art. 69) and the modalities regarding how the Court may take part in this process (Art. 70). As is apparent from their content, these two provisions deal with questions relating to the law of treaties rather than with the Court's judicial functioning. Therefore, they fall outside of any definition of the Court's procedure be that wide, narrow or otherwise. The same logic applies to the General Assembly

[87] In the Judgment of 14 February 2002 in the case concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Rep. 3, at 25, para. 60, the Court stated that 'jurisdictional immunity is procedural in nature'.

[88] There are exceptions as far as civil and administrative jurisdiction is concerned but they are without consequence for the present analysis.

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Resolution regarding the participation by states parties to the Statute that are not members of the United Nations in the procedure for the amendments to the Statute.

4. Conclusion

In the 1990s, Thirlway noted that '[t]he law governing international judicial procedure has not been a subject of wide general interest' and that 'there is no fully developed general theory of international procedural law, defining its sources, for example'.[89] Since that time, international judicial procedure has attracted more scholarly attention, however in terms of its sources, the doctrine does not go further than stating that the sources of international procedural law including the procedural law of the Court are those listed in Article 38, paragraph 1, of the Statute of the ICJ.[90] While this statement is patently not wrong, the truth remains that this close textual approach does not get us very far in terms of understanding the realities of procedure. In terms of sources, procedural regulations have a number of peculiarities which the provisions of Article 38 do not reflect because of the latter's general nature. Moreover, the approach to the sources of procedural norms should be specific and court-oriented. While a number of these sources may be of the same nature in various judicial institutions (e.g., constitutive instruments and the rules of court or their equivalents), others may differ.

Speaking of procedural law proper, while international conventions and general principles of law are undoubtedly sources of this law, international custom and 'subsidiary means for the determination of rules of law' do not play the same role with regard to procedural law as they do vis-à-vis substantive international law. For example, there is no source of procedural law equivalent to 'international custom, as evidence of a general practice accepted as law'.[91] Instead, a 'local custom' of a particular court or tribunal in procedural matters can have the effect of transforming 'judicial decisions' within the meaning of subparagraph 1(d) of Article 38 from a subsidiary source into a primary source. It should also be added that one of the principal, if not the most important, sources of procedural law of various courts and tribunals is their rules of procedure which do not fall under any of the Article 38 categories.

The interpretation given by international courts to their constitutive instruments and their inherent powers to regulate their own procedure[92] are sometimes referred

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89 H.W.A. Thirlway, 'Procedural Law and the International Court of Justice', in V. Lowe and M. Fitzmaurice (eds.), *Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings* (1996), at 389; Thirlway, *supra* note 7, at 1128.

90 Brown, *supra* note 8, at 36–7; Quintana, *supra* note 41, at 139

91 Although in the doctrine, with reference to scholarly opinions and international jurisprudence, it has been argued that 'customary international law can represent a source of procedural law, even though it is usually thought to be generated by the practice of states and their expressions of *opinion juris*, and not the practice of international courts and tribunals' (Brown, *supra* note 8, at 53). However, from the three examples given by that author in support of this proposition, one does not refer to actual procedural law (obligation to make full reparation) and the two others simply refer to the practice of various international courts and tribunals – so, overall, the evidence clearly falls short of demonstrating the existence of a customary rule of law in the absence of *opinio juris* of states.

92 Watts, *supra* note 39, at 255; Brown, *supra* note 8 at, 41.

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to as sources of procedural law, in particular when international courts are faced with lacunae in their constitutive instruments. However, neither can be defined as a source of law. International courts do interpret provisions regulating their procedure and inherent powers may and probably do exist,[93] but neither can be defined as a source of law; they are, rather, 'powers' enabling a court to act in a certain manner and with a certain purpose.

In relation to the ICJ, as has been demonstrated above, its procedure is governed not only by procedural 'law' but also by other norms; in their entirety, these provisions form a procedural 'normative system', with the law being only one of its elements (albeit the most important and most authoritative). Therefore, it would be more accurate to speak of the sources of the procedural normative system of the ICJ. These sources are ranked at different levels, and have a certain hierarchy:[94] they can be distinguished by reference to their juridical or non-juridical nature. The procedural norms that are derived from all of these sources, while in consequence not tending towards uniformity in terms of their characteristics and effect, nevertheless form a system which operates as a whole.

Hence, the Court's procedural norms originate both from the traditional sources of international law (with regard to the procedural *law* element, namely legally binding rules), as well as from sources which, according to the usual classification, do not necessarily belong to that category. It follows from this statement that some of these norms are legally binding whereas some do not possess legal force, even though the latter can still be binding or can merely constitute guidelines. The procedure of the ICJ does not fit neatly within the general scheme of '*legal* versus *non-legal* norms'; neither can one readily apply the theory of traditional sources of international law to a procedural system which brings together heterogeneous elements and must therefore be explained keeping in mind its own logic and nature.

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93 See, for example, *Mavrommatis Palestine Concessions*, *supra* note 12, at 16; *Nuclear Tests (Australia v. France) (New Zealand v. France)*, Judgments, *supra* note 75, at 259–60, para. 23; at 463, para. 23.

94 It is noted in the literature that, for instance, the Court 'cannot derogate from the Statute, as well as from the Rules whose content reflects a provision in the Statute'. However, it can derogate from the other provisions in the Rules, provided that this derogation is not 'at variance with the fundamental principles of procedural law' and can be 'justified in the light of the need to ensure the proper conduct of case' (D. Amoroso, 'The Judicial Activity of the International Court of Justice in 2013: Procedural Law Issues before the ICJ', (2013) XXIII *The Italian Yearbook of International law*, at 328).
Kolb observes, however, that the normative structure regulating the Court's functioning 'does correspond, at all points, to a strict legal hierarchy'. While '[t]he Charter and the Statute are placed on a footing of equality' and therefore their 'relative juridical ranking … is thus very clear', '[t]he relative ranking of Rules and Practice Directions is somewhat more nuanced'. He explains this nuance as follows: 'The Rules have to conform to the Statute … Practice Directions, in turn, have to be kept within the framework permitted by the Rules … Nevertheless, contrary to the position as regards the Statute, as regards the Rules, the Court is in exclusive control. At any time, it can modify the Rules in order to enable a Practice Direction to be issued or subsist'. He also adds that '[t]he Rules of Court are subordinate to the Statute … [t]here is a clear hierarchy between the two texts'. In spite of all these nuances, Kolb finally concludes that '[t]here is a triple hierarchy of sources: Statute – Rules – Practice Directions. The Rules themselves, however, can be modified by the Court unilaterally. So, if the Court wished to issue a Practice direction that was incompatible with the Rules, it could alter them first' (Kolb, *supra* note 19, at 78, 101, 105).