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## General principles of procedural law

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# General Principles of Procedural Law

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## A. Introduction

- 1 The existence of general principles of procedural law in the sphere of activity of international tribunals has sometimes been disputed.<sup>1</sup> However, there is no doubt that since the Jay Arbitrations at the end of the eighteenth century, there has been a growing body of judicial case law which progressively established a series of rules and general propositions about the arbitral or judicial handling of disputes. Thus, for example, the extent to which a decision has to state the reasons upon which it is based is a point on which no rule existed at the inception; since the Hague Convention on the Pacific Settlement of International Disputes of 1907, however, the rule has been undisputed.<sup>2</sup> At this juncture, two issues arise: the distinctive features of 'general principles' of procedure with respect to simple juridical rules and maxims pertaining to that field need to be addressed; moreover, the notion of 'procedure' must to some degree be clarified. On these definitional points, there is no general consensus. Neither the true nature of principles, nor the proper scope of the notion of 'procedure' (with respect to jurisdiction and to substance) have ever been completely defined. Indeed, it is not possible to reach any clear-cut definition, since both concepts, 'principles' and 'procedure', are open-ended notions of an overarching nature. They are replete with so many subtle ramifications permeating the whole body of law that any 'isolation' of them (such an 'isolation' being a precondition for a clear-cut definition) proves elusive if not useless. However, a general idea of these concepts can and must be given.

### I. 'Principles' and 'Rules'

- 2 A 'principle' of law is a general normative proposition considered to be expressive of the ratio of a series of more detailed rules.<sup>3</sup> The principle is thus a sort of 'constitutional' proposition of a legal order: it expresses an important or general legal value; or it is the hallmark of a legal idea that permeates different questions of law. It covers an important or even unlimited segment of the legal reality, without however spelling out in a precise

<sup>1</sup> On this point, cf. Thirlway, H., 'Procedure of International Courts and Tribunals', *EPIL* III, pp. 1128–1133, p. 1128. <sup>2</sup> Cf. Delbez, L., *Les principes généraux du contentieux international* (1962), p. 124.

<sup>3</sup> For a more detailed discussion cf. Kolb, R., 'Les maximes juridiques en droit international public: principes et théorèmes', *RRDI* 32 (1999), pp. 407–434.

way the conditions of its application or its legal effects. A series of 'concretizations' of a principle can ordinarily be grouped around it; they are treated as its derivatives or otherwise as related concepts. Hence, the principle of good faith can be broken down into further principles or rules such as, e.g., *pacta sunt servanda*, estoppel, 'normative acquiescence' (*qui tacet consentire videtur si loqui potuisset ac debuisset*), nobody can reap advantages from his own wrong (*nemo ex propria turpitudine commodum capere potest*), prohibition of abuse of rights, abuse of discretion, abuse of procedure, responsibility for appearances deliberately created. Principles, not being cast into limits as precise as rules proper, display distinctive functions in the legal system. They have an important role in smoothening the application of the law in a given case and have a sort of adapting or equitable function. Moreover, they play a major role in the development of the law, sometimes by allowing new rules to be shaped.<sup>4</sup> A simple 'rule' of law does not possess such a constitutional role. It is narrower, more limited in its reach; its scope of application and its effects are spelled out much more clearly.

As can be grasped, there is no clear-cut distinction between principles and rules, but at least a grey area: a rule can be quite general and thus eventually qualify as a principle; a principle can be narrow, but qualify on account of its importance. Thus, e.g., the proposition *audiatur et altera pars in judicio* can be seen either as a rule or as a principle; on account of its constitutive procedural value it is more properly considered as a principle.

## II. The Notion of 'Procedure'

The proper definition of 'procedure' is another difficult matter. In its widest and generic sense, the term covers (i) all devices devoted to the enforcement of the rules of substantive law and (ii) the rules determining the organization, the competence and the functioning of the organs existing to achieve that goal. In the context of judicial proceedings,<sup>5</sup> the term 'procedure' *lato sensu* covers all rules relating to international judicial action. These include 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.

<sup>4</sup> One could envision principles of law, especially the great principles, as filled with normative energy, constituting a middle-ground category between norms and sources: they are 'norm-sources'. That is to say that they are not simple rules, where the element of application prevails quite neatly, nor simple 'legal ideas', where the legislative element is predominant, but a combination of both. Their specific role in the formative stage of new rules (at the legislative level) and their dynamic function in the application of the law indeed permits to look at them as a type of source of law which goes far beyond the idea of a subsidiary filling of *lacunae*, as envisaged, at the time of the drafting of the Statute of the PCIJ, in Art. 38, para. 1 (c), (or para. 3, as it then was). Each of these great principles is thus in itself (and not only in the formal category as 'general principle of law') a type of source of the law, i.e. a 'norm-source': it does not essentially deal with the *fixed* meaning of rules to be applied, but with the *adaptation* of rules to constitutional necessities, to new developments and needs, to conformity with basic value-ideas, namely to justice, etc. General principles first and foremost concern legal dynamics. Their function is constitutional, and not administrative; and that very fact endows them with an element of source-power. For example: when a need to that effect was felt, the principle of good faith has been broadened from the simple notion of 'bindingness' of a previously agreed word (*pacta sunt servanda* and *fides cum hostis servanda est*) to encompass the idea that all legitimate expectations, relevant in a legal relationship, should be protected (a form of 'inductive accretion' to the principle). Thus, when in 1974 the ICJ was faced with the necessity to justify the binding nature of unilateral declarations, it found support in the concept of legitimate expectations. In order to ground this concept in the legal order, the Court had recourse to the principle of good faith: cf. *Nuclear Tests cases* (Australia/France), ICJ Reports (1974), pp. 253, 268 (para. 46). This is a form of deductive reasoning from the principle, developing the reach of international law.

<sup>5</sup> Cf. Witenberg, J.C./Desrioux J., *L'organisation judiciaire, la procédure et la sentence internationales* (1937), p. 110.

In its narrowest sense, the term 'judicial procedure' relates only to that last element. It then comprises all rules and principles regulating the manner in which the proceedings (le procès) are conducted. Procedure in this narrow sense concerns the way by which the parties' requests are dealt with by the court, from the institution of proceedings until the moment of the final decision (and including subsequent requests for the interpretation or revision of judgments, etc.). It will be noted that the term 'rules of procedure' can thus have a multiplicity of meanings. Therefore, *e.g.*, rules relating to the election of ICJ judges (Arts. 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.

4 As far as the ICJ is concerned, five spheres of legal action can be distinguished.

- First, there are the rules of organization of the Court itself (composition, seat, deliberation of judges, etc.), which are independent of any specific proceedings.
- Second, there are rules touching upon the jurisdiction of the Court (existence of a dispute of legal nature, actuality of the dispute, existence of a consensual bond, etc.).
- Third, there are rules on admissibility of a particular request (*e.g.* time-bar, litispendence, absence of *locus standi in iudicio*, absence of conditions such as exhaustion of local remedies, etc.). In extremely simplified terms, the rules on jurisdiction concern defaults as to the propriety of the organ seized, whereas rules on admissibility concern defaults as to the propriety of the particular request.
- Fourth, there are rules as to the merits of the case, if the Court proceeds to the substance of the dispute.
- Fifth, there are rules of procedure, *e.g.* rules governing the handling of all questions arising in the four previously mentioned phases, and especially in the phases of establishment of jurisdiction, of admissibility and of the merits. These also include the different incidental proceedings, such as for example the indication of provisional measures in accordance with Art. 41. Rules of procedure thus extend over all phases of judicial action mentioned above.

Finally, what has been said about the five spheres of legal action applies equally to contentious and to advisory cases. Simply, in advisory proceedings the questions of competence and admissibility are as yet somewhat less developed than in contentious cases.

5 The distinction between procedure in the narrow sense and questions of jurisdiction or admissibility is not always simple. To the same extent that the merits and the competence are often interwoven, so that a question of substance can be addressed at the preliminary stage of competence (or the reverse),<sup>6</sup> a series of questions can also be viewed as relating to either competence or procedure. As one example, one may refer to the maxim *ne ultra petita* (*ne eat iudex ultra petita partium*), which will be addressed more fully below.<sup>7</sup> According to that principle, the judge cannot exceed what the parties in their submissions have asked for. The principle can be viewed as one of procedure: to the extent that the court proceeds to the merits, it will have to take account of that limitation when it grants some remedy, relief or compensation. Thus, to the same extent that it may not refuse to hear the other party because of the procedural principle *audi et altera pars*, it will not be

<sup>6</sup> There is in most cases no neat distinction between jurisdiction and merits. The question is one of judicial convenience, *e.g.* of the transfer of some questions to a provisional stage in order to realize some procedural economy. On the proximity of jurisdictional questions and merits, *cf.* the case law reported in Thirlway, 'Law

entitled to exceed the limits of the parties' submissions. However, the rule *ne ultra petita* can also be seen as having a jurisdictional aspect: according to that view, the principle is a direct consequence of the consent requirement for establishing jurisdiction.<sup>8</sup> Hence, following this understanding, the correct view would be to say that the court lacks jurisdiction to grant any remedy, relief or compensation not covered by the submissions of the parties. According to the first approach, the principle is seen as a modality of what the court must do (or refrain from doing) when awarding rights and titles in the *dispositif*. According to the second, it is seen as a limit on the jurisdictional competence of the Court, thereby assuming a higher level of eminence. Both views can be defended.

### III. General Principles

The present comment addresses 'general principles of procedural law'. Such principles exist at different levels of generality, and thus something must be said about the level that will be chosen here. In the most generic sense, the notion of 'general principles of procedural law' in the context of adjudication covers all types of judicial, arbitral and possibly also quasi-judicial proceedings. The principles common to the ICJ, international arbitrations (inter-State and possibly also commercial), standing international tribunals (e.g. the ITLOS, the ECHR, etc.) and possibly also bodies such as the Human Rights Committee under the International Covenant on Civil and Political Rights, could qualify. The present comment will, however, refer only to the general principles of procedure applicable in proceedings before the ICJ. It is not thereby suggested that the principles to be discussed do not apply also to proceedings before the other bodies mentioned, but they do not necessarily apply exactly to the same extent. Indeed, there are some important differences between the different forms of adjudication, especially between *ad hoc* arbitration on the one hand, and institutionalized adjudication before the ICJ. As a consequence, there may be a series of more or less concentric circles of general principles of procedural law, which do not have necessarily the same scope and extent. Being the most institutionalized form of international adjudication, the ICJ (together with such bodies as the ECHR) can be expected to possess a body of procedural principles that is among the most developed. Thus, the principles to be discussed in the present comment do not necessarily lend themselves to automatic extension to other tribunals or bodies.

### IV. Adjudication and Arbitration

The main difference between *ad hoc* (non-institutionalized) arbitration and institutionalized adjudication lies in the extent to which the proceedings defer to the will of the parties in dispute.<sup>9</sup> In *ad hoc* arbitration, the parties are the unlimited masters of the proceedings; they are *domini negotii*. Thus, they decide about the object of the dispute, they select the arbitrators, they decide on the procedure as they see fit and further determine all questions pertaining to the handling of the case. The arbitrator(s) is (are) nothing more than their common agent(s); he decides in their name and not in the name

<sup>8</sup> Cf. e.g. Fitzmaurice, *Law and Procedure*, vol. II, pp. 524, 529.

<sup>9</sup> Cf. Kolb, *Ius Cogens*, pp. 212 et seq. As Abi-Saab has rightly observed: 'le rôle prédominant des parties qui contrôlent la composition de l'organe arbitral et le déroulement du processus du début jusqu'à la fin, se réservant des échappatoires qu'elles peuvent utiliser à n'importe quel moment' ('Cours général de droit international public', *Rec. des Cours* 207 (1987-VII), pp. 9-464, p. 246).

of any collectivity; he exists uniquely because of the consent of the individual parties and acquires no independence with respect to them.<sup>10</sup>

Conversely, the judge elected in an institutional framework such as that of the ICJ, being the principal judicial organ of the United Nations, is not the common agent of the litigant parties. He does not decide in their name, but applies a set of objective rules laid down in the constitutive instrument of the Court.<sup>11</sup> These rules are at the disposal only of all the parties to that instrument (through a revision of it) and not of the litigants.<sup>12</sup> There is thus a much greater autonomy of the judge with respect to the States in dispute. It is manifest in the fact that the Court may, and sometimes will, bring to the fore considerations concerning general interests of the entire conventional community (and of the international community at large). Consequently, it will e.g. introduce considerations as to the 'proper administration of justice' ('bonne administration de la justice'), rather alien to the *ad hoc* arbitrator.

In short, the *ad hoc* arbitrator exclusively pursues a *utilitas singulorum* of the parties electing him as their agent, whereas the ICJ also, and sometimes mainly, pursues a *utilitas publica* pertaining to the whole community of parties to the Statute. From the objective nature of the judicial function just described flow a series of imperative rules of procedure, which are binding on the Court by virtue of the Statute—whereas such rules do not exist, at least as mandatory rules, for the arbitrator. This does not mean that an arbitrator will avoid following the same procedural principles as are applied by the ICJ: States most often take no exception to them, nor do they ordinarily reject them. However, it may be easier to affirm some principles of objective law in the Court's *utilitas publica* context than in the *ad hoc* arbitration's *utilitas singulorum* context.

## V. Survey of the Procedural Principles Addressed

8 At this point, it may be useful to give a general overview of the procedural principles at the level of the ICJ.<sup>13</sup> They are grouped into three circles.

- First, there are structural and constitutional principles, such as (i) the equality of the parties (including the principle *audiatur et altera pars*), or (ii) the principle of the proper administration of justice.

<sup>10</sup> As a consequence, the special agreement to arbitrate has been called the 'loi de l'arbitrage' or the 'charter' of the arbitrator: *ibid.*, p. 215.

<sup>11</sup> In the words of Borel, E., *Les problèmes actuels dans le domaine du développement de la justice internationale* (1928), p. 12: '[La juridiction permanente] n'est plus l'œuvre des Parties comparaisant devant elle; elle n'est plus un simple organe créé par les Etats en litige. Elle est, par excellence, le pouvoir judiciaire international institué par la communauté juridique des Etats réunis dans la Société des Nations. ... Par sa constitution, elle est placée virtuellement en dehors des Parties.'

<sup>12</sup> Cf. Schwarzenberger, *International Judicial Law*, p. 723: '[I]ndividual parties to cases before the Court have but a limited choice: they may take the Statute as they find it or leave it'. For a similar observation cf. de Bustamante, A., *La Cour permanente de justice internationale* (1925), p. 152. '[L]e juge ou le tribunal, établi d'avance, [est] soumis à des règles... antérieures et supérieures à la volonté de chaque plaideur.... Le judiciaire n'est pas la création concrète et spéciale de tous les plaideurs, mais il existe avant eux et au-dessus d'eux et s'exerce de haut en bas....' From the jurisprudence, cf. also *Nottebohm case*, Preliminary Objections, ICJ Reports (1953), pp. 111, 118–119; the *Serbian Loans case*, Diss.Op. Pessôa, PCIJ, Series A, No. 20/21, pp. 62, 65; Diss. Op. Novacovitch, *ibid.*, pp. 76, 80; Judge Pessôa's observation appended to the order in the *Free Zones case*, PCIJ, Series A, No. 22, pp. 48, 49; or Judge Kellogg's observation appended to the judgment of the *Free Zones case*, PCIJ, Series A, No. 24, pp. 29, 32–33.

<sup>13</sup> Cf. also the list given by Sereni, *Diritto*, p. 1714.

- Second, there are procedural principles *stricto sensu*: these relate to the division of work between the parties and the Court. They regulate questions such as 'who does what' and 'who must do what', or 'what is the matter for the judge, what is the matter for the parties'. The principles at stake are the burden of proof, *iura novit curia*, free choice of evidence presented, *ne ultra petita*, free assessment of the evidence by the judge.
- Third, there are substantive principles relating to the proceedings. In this respect, two sub-circles can be distinguished. Some principles of substance directly concern the pronouncements of the Court, such as, e.g., the principle of *res judicata* and the duty to state the reasons upon which the decision is based. In addition, there are some substantive principles of general international law applicable also to procedural aspects. These principles describe the fundamental behaviour expected from the parties. They are founded upon the principle of loyalty between the parties and include, e.g., the prohibition of abuse of procedure, estoppel, *nemo commodum capere potest de sua propria injuria*. These principles flow out of the general duty of good faith the parties owe to one another when engaging in judicial proceedings.

## B. Structural and Constitutional Principles

### I. Equality of the Parties<sup>14</sup>

#### 1. General Considerations

The principle of equality of the parties is a fundamental principle of judicial proceedings. 9 It is not confined to the procedure before the ICJ but is of universal reach, applying to all types of judicial and arbitral proceedings. It defines the structure of the proceedings, which must be adversarial (equality of arms): the same rights must be granted to all parties, and there must be a constant drive to equalize eventual unevenness among the parties to the extent that it may influence the possibility of a fair outcome of the trial. This equality is inherent in judicial proceedings, but it also flows from general international law, from the sovereign equality of States and from the principle of free consent to jurisdiction of which it is a particular reflection. The principle of equality is also substantive, not only structural. It is rooted in the fundamental aim of material justice. In effect, conceptual reflection as well as practical experience show that no fair outcome can be expected from a trial where the two parties did not have the same possibilities to plead and present their case. The principle of equality *in judicio* is so evident and indispensable for modern legal thinking that it could well be termed a principle of 'natural law of judicial proceedings'.

That, however, does not mean that the principle is necessarily to be considered 10 peremptory in all its aspects. Some inequality may be acceptable to the extent that the parties have expressly and clearly provided for it in a special agreement freely entered into. However, in this respect there may be some difference depending on the organ seized. An arbitrator would be more inclined to accept such an agreement, whereas the

<sup>14</sup> Cf. Sereni, *Principi*, pp. 67 *et seq.*; Del Vecchio, pp. 173 *et seq.*; Rosenne, *Law and Practice*, vol. III, pp. 1092–1096; Thirlway, 'Law and Procedure, Part Eleven', pp. 128 *et seq.*; and further Cheng, pp. 290 *et seq.* For specific treatments of the maxim '*audi alteram partem*' cf. Mani, V.S., '*Audi et alteram partem*', *IJIL* 9 (1969), pp. 381–411; Hamacher, P., *Die Maxime audiatur et altera pars im Völkerrecht* (1986); Ruiz-Fabri H./Sorel, J.M. (eds.), *Le principe du contradictoire devant les juridictions internationales* (2004).



ICJ, having regard to its Statute and the integrity of its proceedings, would be more reluctant to accept such terms. It could be expected that the ICJ considers the principle of equality to a much larger extent as being *jus cogens*, and that it would thus strike down contrary agreements. The problem just described has so far not arisen in any contentious case, but some elements of it appear in the jurisprudence and will be referred to in due course. It may at this juncture be recalled what the Court said in the advisory opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, where it observed that 'the principle of equality of the parties follows from the requirements of good administration of justice'.<sup>15</sup> This finding was repeated in the *Nicaragua case* (1986)<sup>16</sup> in the context of non-appearance of one party. In addition, it was stated that 'the equality of the parties to the dispute must remain the basic principle for the Court'.<sup>17</sup> Moreover, Art. 35, para. 2, dealing with the conditions under which the Court shall be open to States not parties to the Statute, puts a strongly worded limit on the (to some extent, discretionary) conditions the Security Council may set. The provision clarifies that 'in no case shall such conditions place the parties in a position of inequality before the Court'.<sup>18</sup> The words 'in no case' show that the limitation was considered to be peremptory. Equality before the Court is therefore of an objective character, and the Court could not ignore it or impeach on its distinctive content. The exact point at which an alteration of the relative positions of the parties becomes a sanctionable inequality is a matter on which no abstract answer can be given; the point is one of axiological interpretation, under the guise of the principle of 'proper administration of justice'.

- 11 As to its content, the principle of equality can be split into three main aspects. First, the principle provides for equal opportunities within the proceedings. Second, the principle has a more fundamental constitutional aspect, sometimes requiring a departure from, or softening of, specific provisions in order to ensure equality. Third, the principle also covers relative equality, implemented notably through the mechanisms of reciprocity.

## 2. Equality as a Principle of Procedure

- 12 First, the principle has a procedural aspect. It requires that the same remedies be available equally to both parties; for example that both parties are given the same time to elaborate their written pleadings (memorials, counter-memorials, rejoinders, etc.),<sup>19</sup> that they are given the possibility to present the same number of written or oral pleadings, or that any new argument gives rise to the grant of a proper time for responding. The law does not require that each party avail itself of these possibilities. In this respect, equality is formal only in the sense the parties are given equal opportunities, but they are free to renounce filing a counter-memorial, or not to exhaust the whole speaking-time allotted to them. Several provisions of the Statute and of the Rules give expression to such procedural equality: cf. e.g. Arts. 31 (judges *ad hoc*), 36, para. 2 (reciprocity), 40 (communications to the parties), 42 (representation by agents), 43 (communication of the written pleadings) of the Statute; and many provisions of the Rules (especially Arts. 32 *et seq.*).

<sup>15</sup> ICJ Reports (1956), pp. 77, 86.

<sup>16</sup> ICJ Reports (1986), pp. 14, 39–40 (para. 59).

<sup>17</sup> ICJ Reports (1986), p. 14, 26 (para. 31).

<sup>18</sup> For a more detailed interpretation of the provision cf. Zimmermann on Art. 35 MN 44–80.

<sup>19</sup> For further details on the time-limits cf. Talmon on Art. 43 MN 44 *et seq.*

In practice, this aspect of the principle does not normally give rise to severe problems. 13  
The distribution of speaking time and the order of written pleadings are ordinarily agreed between the parties and the Court in pre-trial meetings, following Art. 31 of the Rules. There, the Court, through its president, will be anxious to secure equal opportunities. Thus, in the *Nuclear Tests (Request for Examination)* case, the Court said that:

[I]t was agreed [in a meeting with the President of the Court] that the Court would hold three public sittings on the above-mentioned question, each State being allotted equal speaking time and the opportunity to present a brief reply.<sup>20</sup>

The Court will seek to enforce respect of the rules of debate in order to prevent parties from obtaining any improper advantage. Thus, in an order of 15 August 1929 in the *River Oder* case, the PCIJ enforced the procedural equality principle as against an inequality from the point of view of the timing. The Polish Government had not substantively developed all its contentions in its Counter-Memorial, simply reserving a series of points for later stages. Thus, an inequality could ensue, the opponent parties not being able to address at that stage the Polish arguments. The Court addressed this matter in the following terms:

Whereas, however, in a case submitted to the Court by Special Agreement and in which therefore there is neither Applicant nor Respondent, the Parties must have an equal opportunity reciprocally to discuss their respective contentions; as this is the reason for the provision laying down that in cases submitted in this way, the written documents are to be filed simultaneously by both Parties; Whereas, accordingly, the Six Governments must be enabled to discuss, in their first oral argument and not only in their reply, any alternative submissions made by the Polish Government; Invites the Agent of the Polish Government to file with the Registry by midday on Saturday, August 17th at latest, any alternative submissions as to the second of the two questions submitted to the Court.<sup>21</sup>

Thus, it can be seen that the Court possesses (and has applied) the power, which is in any case to be implied, to give a proper sanction to the principle of procedural equality. It has not only the power, but also a duty, to do so. If to no other norm, this power/duty can be attached directly to the principle of equality, or, alternatively, to that of the proper administration of justice.

In the stage of provisional measures, the Court has shown somewhat more leniency. 14  
Thus, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Further Request for the Indication of Provisional Measures), the Court accepted a series of documents filed by Bosnia-Herzegovina at a late stage of proceedings. Taking into account the urgency of the matter and 'other particular circumstances' (which were not spelled out) the Court decided to receive the filed documents as 'observations' relating to the indication of the measures. On the other hand, the Court acknowledged that the late filing of the documents 'is difficult to reconcile with an orderly progress of the procedure before the Court, and with respect for the principle of equality of the Parties'.<sup>22</sup> This exceptional course is replete with dangers, even at the provisional measures stage. It thus should be used by the Court only with utmost care, in situations of real urgency, especially when the delay in filing was hardly avoidable. By accepting such late filing the Court in effect curtails the factual possibility of the other party to respond properly to the documents so filed, and infringes

<sup>20</sup> ICJ Reports (1995), pp. 288, 296 (para. 28).

<sup>21</sup> PCIJ, Series A, No. 23, pp. 45–46.

<sup>22</sup> ICJ Reports (1993), pp. 325, 336–337 (para. 21). For a more general treatment of the late production of evidence cf. Tams/Rau on Art. 52 MN 4 *et seq.*

the principle of procedural equality. Furthermore, the Court has also shown some leniency where the additions did not contain anything else than developments of previously stated points, as the judgment in the *Nuclear Test cases* shows.<sup>23</sup>

There are other fields where the principle of procedural equality is relevant. Thus, if more than one party brings a case against another State (e.g. three related applicants against one defendant), particular problems of equality may arise, concerning, for example, the composition of the bench with respect to the role of the national judges, the election of judges *ad hoc*,<sup>24</sup> the proper balancing of the written pleadings allowed and of the time of oral presentations.<sup>25</sup> The *Kosovo cases* brought by Yugoslavia against ten NATO States are an example of such problems.<sup>26</sup> These proceedings show that the relevant law is not yet sufficiently developed or assured.

- 15 To the foregoing it can be added that the application of the procedural rules of the Statute and of the Court's Rules smoothes, and progressively neutralizes, any possible disadvantage of a party at any given time. Consequently, not only must the rules be enforced *vis-à-vis* the parties when they depart from them; but the application of the rules themselves will in any case tend to produce the result of equality desired. Thus, at the preliminary objections stage of the *Barcelona Traction case*, the Court allowed Belgium to file a claim which it had previously discontinued in order to take up direct negotiations with Spain. When the negotiations failed and Belgium brought its claim again, Spain objected to that course. It considered itself disadvantaged to the extent that Belgium had already had cognizance of the Spanish arguments and could thus frame its request with that knowledge. The Court considered that disadvantage to be too slight. In any case, Belgium could have modified its conclusions, even in the original proceedings, in order to meet the Spanish arguments. Moreover, Spain could still raise all of its preliminary objections in the new proceedings. The Court added: 'The scope of the Court's process is however such as, in the long run, to neutralise any initial advantage that might be obtained by either side'.<sup>27</sup> There is here some prophylactic virtue of the rules of the Court and that is quite understandable, since the very existence of rules applicable equally to all parties tends to foster equality at the cost of arbitrariness.

### 3. Equality as a Constitutional Principle

- 16 Second, the principle of equality of the parties is a constitutional principle of procedure. It is not limited to the question of enforcement of procedural rules providing equal opportunities. Sometimes, it may indeed require so much as a departure from (or a softening of) the rules contained in the constitutive instruments, which would, if applied formally, create an improper inequality and affect the fairness of proceedings. In this sense, the principle of equality is overriding and hierarchically superior. It is so fundamental that it must also be enforced against specific provisions. These provisions

<sup>23</sup> ICJ Reports (1974), pp. 253, 265 (para. 33): 'Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed in the course of the proceedings, statements with which the Applicant must be familiar'.

<sup>24</sup> For comment cf. Kooijmans on Art. 31 MN 23 *et seq.*

<sup>25</sup> Cf. Talmon on Art. 43 MN 18, 88–89 and 92.

<sup>26</sup> Cf. Puoti, P., 'Causa comune e principio di uguaglianza processuale delle parti nei casi relativi alla liceità dell'uso della forza', *Commun. e Stud.* 22 (2002), pp. 801 *et seq.*

will obviously not be abrogated generally, for the Court has no such power and the requirements of justice do not warrant such a general abrogation; but the provisions at stake will not be applied in the given situation, with the result that there is legally a suspension in the context of a single case. The best example of such a course is to be found in the 'appeals' cases from the judgments of the administrative tribunals (ILOAT and UNAT).<sup>28</sup>

The issue first arose in the advisory opinion on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*.<sup>29</sup> In that opinion, the Court began by recalling that the essential modalities of its functioning in advisory cases are analogous to those in contentious cases. In particular, the Court 'is a judicial body', which, in the exercise of its advisory functions 'is bound to remain faithful to the requirements of its judicial character'.<sup>30</sup> The Court found that the situations presented to it suffered from an inequality between the parties. Only the organization (ILO) could have recourse to the Court by requesting an advisory opinion, not the other party, the civil servant. Moreover, there was no equality among the parties as to their ability to present their case to the Court, since the organization could appear to address the judges directly whereas the civil servants could not. This course was contrary to the fundamental principle of equality of the parties. However, the Court found that the service it could give by answering the questions posed to it was greater than the service it would give by declining to answer: it balanced the interests protected by the principle of equality with those of rendering a legal opinion settling the matter. It thus continued by saying that the inequality is more theoretical than practical, the civil servants having won their case and being thus in a stronger position. Besides, as to the possibility to submit their arguments, it was true that the civil servants could not address the Court directly, whereas the opposing party, the organization, could do so. But UNESCO, without any interference on substance, had transmitted the views of the servants, and the servants did not raise any objection to that course. The Court finally recalled that the principle of equality was paramount and flowed from the principle of proper administration of justice. However, in actual fact, the equality of the parties had not been sufficiently affected for the Court to be compelled to decline to render the advisory opinion. By choosing that course, the Court could strike down the arguments presented against the administrative judgments and affirm their validity to the benefit of the civil servants.

But the Court also gave a more direct sanction to the principle of equality. It in effect refused to grant the organization the possibility of presenting oral arguments, to which it would ordinarily have been entitled under Art. 66 and the related provisions of the Rules.<sup>31</sup> By refusing to hear the organization,<sup>32</sup> it re-established some equilibrium between the parties: not 'positively', by adding to the rights of the servants (which it could not do because of the peremptory limits of its Statute), but 'negatively', by taking away

<sup>28</sup> For a long time, an international organization or an international civil servant dissatisfied with the judgment rendered by the UNAT or the ILOAT could apply for leave to 'appeal' to the ICJ. As there was no direct possibility of appeal, the problem was solved by way of a request of an advisory opinion by the organisation concerned (e.g. the ILO) or by a specially created Committee on Applications for Review of Administrative Tribunal Judgments. The civil servant could apply to this body to 'appeal' to the ICJ. Cf. Thirlway, 'Law and Procedure, Part Eleven', pp. 128 *et seq.*; as well as Frowein/Oellers-Frahm on Art. 65 MN 46-48 for comment on the subsequent abolition of the review procedure.

<sup>29</sup> ICJ Reports (1956), pp. 77, 84 *et seq.*

<sup>30</sup> *Ibid.*, p. 84.

<sup>31</sup> For an analysis of the right of international organizations to appear before the Court in advisory proceedings cf. Paulus on Art. 66 MN 14-16.

<sup>32</sup> ICJ Reports (1956), pp. 77, 80, 86.

some rights of the organization. The principle of equality thus played a truly constitutional role, limiting the reach of specific provisions of the Statute and of the Rules.

As can be seen, the Court upheld and underlined the fundamental nature of the principle of equality, while showing some flexibility in order to accommodate precisely those to whose benefit the principle worked. Moreover, it is due to the criticism of the Court on the point of equality that the Committee on Applications for Review of Administrative Tribunal Judgments was finally created. The opinion of the Court thus had a seminal function, leading to legislative action.

- 18 The issue reemerged in the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (the *Fasla case*);<sup>33</sup> and in the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal* (the *Mortished case*).<sup>34</sup> In the latter, the Court insisted that what mattered was not theoretical equality or inequality (which could not be satisfied in such appeal cases) but whether the proceedings ensured effective equality. Such effective equality must be secured by the Court, e.g. by renouncing oral proceedings, notwithstanding their utility on the plane of information. Thus, the same 'constitutional approach' was upheld until the abolition of these appeals cases. One of the reasons for the reform was precisely the dissatisfaction of the Court in being confronted with cases in which the equality could not be perfectly secured. The principle of equality produced a constant pressure for legislative reform, e.g. for the abolition of a procedure considered to be, *inter alia*, not entirely compatible with its requirements. These considerations testify to the powerfulness of the principle of equality as a constitutional principle.

#### 4. Equality as Reciprocity

- 19 Third, the principle of equality presents itself as relative equality: it then takes the form of reciprocity. Examples of reciprocity can be found in rules of procedural law *stricto sensu*.<sup>35</sup> Thus, if the time for filing a memorial is prolonged for one party, the other will be entitled to benefit from the same amount of prorogation.<sup>36</sup> But the main field of application of reciprocity is that of the jurisdiction of the Court. As this aspect is commented upon elsewhere,<sup>37</sup> only some brief remarks will be made here.
- 20 When a State brings a contentious case to the Court under the optional clause system, the defendant is allowed to raise any reservation contained in the declaration of the plaintiff even if it does not appear in its own declaration. That State then raises the reservation by way of reciprocity. The effect of this reciprocity is to equalize the relative position of the parties; it thus flows from the principle of equality. If there was no reciprocity, each State could rely only on the reservations made in its own declaration; the State having made more reservations could strike down jurisdiction on more matters than the State having entered fewer reservations.<sup>38</sup> If the plaintiff (A), having made more reservations, files a claim against a defendant (B) having entered fewer reservations, the defendant would be bound to accept the jurisdiction of the Court on all matters on which he did not himself reserve, but on which the plaintiff reserved. But if the former

<sup>33</sup> ICJ Reports (1973), pp. 166, 178 *et seq.* (paras. 32 *et seq.*).

<sup>34</sup> ICJ Reports (1982), pp. 325, 332 *et seq.* (paras. 17 *et seq.*).

<sup>35</sup> On the use of terminology *cf. supra*, MN 3-5.

<sup>36</sup> On the practice of the Court *cf. Guyomar, Commentaire*, pp. 290 *et seq.*

<sup>37</sup> *Cf. Tomuschat on Art. 36, especially MN 27-28 and 61 et seq.*

<sup>38</sup> For more on this aspect of *ibid.* MN 27.

defendant State (B) decided to bring a case against the former plaintiff (A) on the same matter, the Court would not have competence precisely because the former plaintiff could raise the broader reservations contained in its declaration. The consequence would be an imbalance. Thus, the State having carved out from the jurisdiction of the Court a greater number of questions and matters would benefit from that course, whereas the State having accepted the jurisdiction of the Court in a broader way would be penalized. This would be contrary to the essential aim of the optional clause system. It is upon this policy reason (not to incite States to make more reservations, contrary to the essential aim of the optional clause) and the principle of equality that the principle of reciprocity is based.

The principle of reciprocity in the context of jurisdiction has been constantly applied. 21 A classical example is the *Norwegian Loans case* where Norway invoked a 'domestic jurisdiction clause' of a self-judging nature contained in its opponent's declaration, namely in the French declaration.<sup>39</sup> In the *Nicaragua case*, the ICJ clarified the reach of the reciprocity principle further. It limited its scope by saying that reciprocity applied only to the scope and substance of the commitments entered into and not to the formal conditions of their creation, duration or extinction.<sup>40</sup> In this case, the United States of America had relied on Nicaragua's purported right to denounce its jurisdictional commitment at any time. The US declaration, on the contrary, contained a six-month notice clause for denunciation. The United States thus claimed to be able to avail itself of the Nicaraguan declaration and to denounce its commitments with immediate effect.<sup>41</sup> The Court declined to widen the scope of reciprocity to such situations. It recalled that reciprocity applied at the moment of the seisin of the Court and not to pre-seisin matters such as denunciation of the declaration.<sup>42</sup> And it made the above-mentioned statement limiting reciprocity to substantive matters. The Court moreover recalled an important principle which it had stated in a previous case:

[R]eciprocity enables the State which has made the wider acceptance of the jurisdiction of the Court to rely upon the reservations to the acceptance laid down by the other party. There the effect of reciprocity ends. It cannot justify a State, in this instance, the United States, in relying upon a restriction which the other party, Switzerland, has not included in its own declaration.<sup>43</sup>

This statement shows that the matter is controlled by the principle of equality, and by the policy principle of not putting at any disadvantage the State having shown more deference to the compulsory jurisdiction of the Court. Finally, it can be stressed that the distinction between substantive matters regarding commitments and formal conditions of creation, duration or extinction of the declaration is not always easy to draw. Thus, for example, if a reservation contains a resolutive condition for the jurisdiction of the Court, e.g. a condition linked to the occurrence of a specific fact, would that be analyzed as partaking of the substance of the obligation, or is it a formal condition of duration?

<sup>39</sup> ICJ Reports (1957), pp. 9, 22 *et seq.*, p. 24. Cf. Tomuschat on Art. 36 MN 28 and (with respect to the reservation in question) MN 87–88; for general perspectives on reciprocity cf. also Spatafora, E., *La reciprocità nella giurisdizione obbligatoria della Corte internazionale di Giustizia* (2001).

<sup>40</sup> ICJ Reports (1984), pp. 392, 419 (para. 62). For further details on issues of reciprocity arising in the *Nicaragua case* cf. Tomuschat on Art. 36 MN 66–69 and 77–78.

<sup>41</sup> The Court did not accept that the Nicaraguan declaration gave a right of termination of the declaration with immediate effect. Quite on the contrary, it applied to it the principle of a reasonable time of notice: ICJ Reports (1984), pp. 392, 420 (para. 63).

<sup>42</sup> *Ibid.*, p. 420 (para. 64).

<sup>43</sup> *Interhandel case*, ICJ Reports (1959), pp. 6, 23; and cf. *Nicaragua case*, ICJ Reports (1984), pp. 392, 419 (para. 62).

It seems that in case of doubt the question must be regarded as one of substance open to reciprocity. Much depends also on the procedural situation, *e.g.* on whether the State invoking that reservation is the one having made the wider acceptance of the jurisdiction or not.

## II. The Principle of Proper Administration of Justice

- 22 The Court often repeats, in differing contexts, that it is bound to ensure a 'proper administration of justice', a 'good administration of justice', or a 'better administration of justice' ('une bonne administration de la justice'). So far, this principle seems not to have been the object of doctrinal analysis. Often, the Court mentions this principle in parallel with the consideration that it has to ensure the equality of the parties to the proceedings. Thus, in the opinion on the *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO*, the Court said that 'the principle of equality of the parties follows from the requirements of good administration of justice'.<sup>44</sup> That statement was repeated in the other administrative tribunal cases.<sup>45</sup> The principle was emphatically restated in the context of proceedings with non-appearance of one party in the *Nicaragua case*:

The provisions of the Statute and Rules of Court concerning the presentation of the pleadings and evidence are designed to secure a proper administration of justice and a fair and equal opportunity for each party to comment on its opponent's contentions. The treatment to be given by the Court to communications or material emanating from the absent party must be determined by the weight to be given to these different considerations, and is not susceptible of rigid definition in the form of a precise general rule. The vigilance which the Court can exercise when aided by the presence of both parties to the proceedings has a counterpart in the special care it has to devote to the proper administration of justice in a case in which only one party is present.<sup>46</sup>

- 23 In addition, the Court has invoked this principle in many other contexts. Thus, the PCIJ referred to it when it had to decide on the joinder of a preliminary objection to the merits of the case. In an order in the *Panevezys-Saldutiskis Railway case*, the Court said that '[it] may order the joinder of preliminary objections to the merits, whenever the interests of the good administration of justice require it'.<sup>47</sup> This statement was recalled and endorsed by the present Court in the *Barcelona Traction case*.<sup>48</sup> In this latter instance, it added that in such cases there is a potential conflict within the principle of the proper administration of justice. In order to have all the elements of decision at its disposal, it might be wise for the Court to join the objections to the merits, but in such a case, the respondent may be obliged to defend a case on the merits although the Court may not possess jurisdiction over it. The Court thus stressed that it must equally safeguard the rights of the respondent State, this being also 'an essential part of the proper administration of justice'.<sup>49</sup>

<sup>44</sup> ICJ Reports (1956), pp. 77, 86.

<sup>45</sup> Cf. *e.g.* *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, ICJ Reports (1982), pp. 325, 334 (para. 23) ('requirements of the judicial process', 'exigences d'une bonne justice'). Cf. also *Barcelona Traction case*, Preliminary Objections, Diss. Op. Armand-Ugon, ICJ Reports (1964), pp. 116, 122.

<sup>46</sup> ICJ Reports (1986), pp. 14, 26 (para. 31).

<sup>47</sup> PCIJ, Series A/B, No. 75, pp. 52, 56.

<sup>48</sup> ICJ Reports (1964), pp. 6, 42. Cf. also Sep.Op. Wellington Koo, *ibid.*, pp. 51, 53-54.

The Court again had recourse to the principle in the context of counter-claims. In this context, it has to strike a balance between the interests of procedural economy, and the (initial) applicant's right to have its claims decided, when appreciating the connection between claim and counter-claim. Such a 'direct connection' is required for admitting a counter-claim. When such a connection is admitted, the Court is able to hear the whole case in a single set of proceedings and to balance the respective claims better.<sup>50</sup> This is in the interest of expeditious proceedings<sup>51</sup> and also of a proper administration of justice. Thus, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that counter-claims as incidental proceedings serve the 'better administration of justice', the idea being 'essentially to achieve a procedural economy whilst enabling the Court to have an overview of the respective claims of the parties and to decide them more consistently'.<sup>52</sup> Conversely, the party bringing a counter-claim does not have complete discretion to force its counter-claims on the initial applicant, since this would risk 'infringing the Applicant's rights and of compromising the proper administration of justice';<sup>53</sup> therefore, precisely, a link of connexity is required by the Statute. In 1998, the Court recalled these principles in its order in the *Oil Platforms case*.<sup>54</sup> In other contexts, the Court has gone far towards the application of the principle, but without mentioning it expressly: cf. e.g. the *Northern Cameroons case* (1963)<sup>55</sup> or the *Nuclear Test cases* (1974).<sup>56</sup>

It must then be asked what is the essential content of the principle. First, it must be noted that it is one of the flexible standards of which no legal order can divest itself. It leaves a certain margin of discretion to the Court and lends itself to application in the most different matters of procedural law. This ubiquity of the principle is essential to its function, which is to perform the task of a flexible 'fire-brigade' which the judge can invoke whenever he feels it is necessary, because he finds no specific rule in the applicable instruments, namely the Statute and the Rules. The content of the principle is general: it is essentially linked to the related concepts of 'judicial propriety' or the 'judicial integrity of the Court'.<sup>57</sup> There is a negative and a positive aspect of the matter.

First, there are (negative) limitations on the action the Court may take.<sup>58</sup> The ICJ is a court of justice, not an omni-competent constituent or political organ. Thus, there are certain limitations upon what it may do, even if there is a joint request of the parties. Strictly speaking, this is not a matter of discretion. The Court must decline to act in a certain way if it finds that its judicial integrity is incompatible with the course of action requested. Conversely, there is a certain margin of appreciation as to the proper interpretation of the concept of 'judicial propriety'. At this point, there is indeed room for

<sup>50</sup> Cf. Salerno, F., 'La demande reconventionnelle dans la procédure de la Cour internationale de Justice', *RGDIP* 103 (1999), pp. 360 *et seq.* as well as Yee on Art. 40 MN 137 *et seq.*

<sup>51</sup> The principle of procedural economy is a further general principle of procedure (Sereni, *Principi*, p. 89). It can be taken as a part of the more general principle of the proper administration of justice.

<sup>52</sup> ICJ Reports (1997), pp. 243, 257 (para. 30).

<sup>53</sup> *Ibid.*, pp. 243, 257-258 (para. 31).

<sup>54</sup> ICJ Reports (1998), pp. 190, 203 (para. 33); p. 205 (para. 43) (where it is said that the Court must not lose sight of the interest of the applicant to have its claims decided within a reasonable period of time, a risk that is increased as soon as a counter-claim is admitted).

<sup>55</sup> In a context where a real dispute (as opposed to a moot question) existed: ICJ Reports (1963), pp. 15, 29-30.

<sup>56</sup> In the context of an objective determination of the existence and of the scope of a dispute: ICJ Reports (1974), pp. 253, 259 *et seq.* (paras. 23 *et seq.*), pp. 457, 463 *et seq.* (paras. 23 *et seq.*).

<sup>57</sup> A field which an eminent author has discussed partially under the title 'la recevabilité générale d'une demande': cf. Abi-Saab, *Les exceptions*, pp. 146 *et seq.*

<sup>58</sup> Cf. *ibid.* and further Kolb, *Ius Cogens*, pp. 211 *et seq.*



interpretation, allowing the Court constantly to adapt its procedural law and its action in general to the changing needs of international society. There are different limitations acknowledged by the Court. The ICJ is *e.g.* debarred from answering moot questions, not having practical and actual legal consequences.<sup>59</sup> Outside advisory proceedings, it is debarred from giving a non-executory opinion to States, other than a binding judgment or an order.<sup>60</sup> It is furthermore debarred from engaging in a course of action which would entail an (excessive) inequality of the parties, according to what has been discussed previously.<sup>61</sup> The best formulation of such 'inherent' limitations is to be found in the *Northern Cameroons case* (1963). The Court there explained that:

There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.<sup>62</sup>

Consequently, because of its nature as a judicial body representing a community of States parties to the Statute, the Court is limited in its field of actions. In other words, the nature of such a judicial body entails a series of limitations or incompatibilities, precisely because such actions would not represent a 'proper administration of justice'. This last principle, in the context discussed, is nothing more than a sanction of the general requirement to respect the judicial integrity of the Court.

26 Second, there are (positive) duties which the Court faces under the guise of the principle of the 'proper administration of justice'. That principle allows (and requires) the Court to seek a constantly novel and constantly readjusted balance between the rights of the parties and the interests of justice. Thus, when joining preliminary matters to the merits (or declaring that a matter is not exclusively preliminary in nature), or when allowing a counter-claim, to limit the discussion to some examples already given, the Court is faced with competing interests. On the one hand there is the interest to handle a case more rationally, *e.g.* by postponing a point which is difficult to be decided at a certain stage because of lack of the full range of possible arguments, which are to come in later stages, especially at the merits stage; or to bundle different questions by hearing them in a coordinated and concentrated way instead of having them separated in different proceedings. On the other hand, there are opposing interests of justice, *e.g.* that a defendant should not have to face a costly and undesired defence on the merits when the Court finally (possibly or probably) lacks jurisdiction; that a proceeding should not be protracted on points joined with the merits when the case then is still doomed to fail;<sup>63</sup> or, in the case of counter-claims, that the original applicant should not have to face a significant delay in the handling of his case because a counter-claim is admitted. The Court constantly has to strike a balance between these competing interests, so as to find the most convenient equilibrium. The polar star of that balancing exercise<sup>64</sup> are the

<sup>59</sup> Cf. the *Northern Cameroons case* (Cameroon/United Kingdom), ICJ Reports (1963), pp. 15, 31 *et seq.*

<sup>60</sup> Cf. the *Interpretation of the Greco-Bulgarian Agreement of 9 December 1927 case*, PCIJ, Series A/B, No. 45, pp. 68, 87.

<sup>62</sup> ICJ Reports (1963), pp. 15, 29.

<sup>63</sup> A problem illustrated *e.g.* by the fate of the *Barcelona Traction case* (1964–1970).

<sup>64</sup> The balancing of competing interests is a typical function of bodies applying public law prescriptions, notably national constitutional law or administrative law. It is most visible in areas such as human rights law. On the process of balancing cf. Schlink, B., *Abwägung im Verfassungsrecht* (1976); Ladeur, K.-H., *'Abwägung'—Ein neues Paradigma des Verwaltungsrechts* (1984). Aleinikoff, T.A., 'Constitutional Law in the Age of

<sup>61</sup> Cf. *supra*, MN 9 *et seq.*

requirements of justice, of propriety, and of efficacy. It is for that very reason that the differing considerations which may be taken into account are conveniently captured under the general heading of the 'proper administration of justice'. They cannot be described in a more detailed way once and for ever. The category remains open-ended in order to serve the constantly evolving needs and situations with which the Court is faced and which require it to give a proper answer in solving conflicts of interests of procedure and of justice.

## C. Procedural Principles *stricto sensu*

### I. General Considerations

An important field of general principles of procedure relates to the proper sharing of 27 work between the Court and the parties. There are in this area two ideal types of judicial proceedings. One is the 'private law' type of process; the other is the 'public law' type of process. The words employed should not mislead. A private law type of process can perfectly be used in the area of public law questions, such as some criminal procedures where only minor private interests are at stake and where the proceedings are largely adversarial; and a public law type of process could perfectly be used in some private law matters, such as *e.g.* some questions of family law such as the fate of children at the moment of divorce. Moreover, the two types of process must not be realized purely in any concrete proceeding. They are ideal types which can be mixed and thus give rise to a series of intermediary types.

The private law type of process is devoted to questions of private interest (*utilitas 28 singulorum*, 'Privatautonomie'). It is based on the pre-eminence of the litigating parties in a double sense. First, it is the parties which shape and determine the object of the dispute. They define the object to be decided and decide on the extent to which they recognize the claim of the counterpart or to which they abandon their own claim ('Dispositionsmaxime'). Second, it is up to the parties to bring before the Court the relevant evidence. It is the parties alone which possess the relevant information about their dealings, which the judge is not bound to know of. Thus, it is up to them to bring to his knowledge all the facts (and eventually also some relevant particular law) he needs in order to be able to decide the case ('Verhandlungsmaxime', 'burden of evidence'). The prototype of such proceedings is the private law litigation on contracts or any other private matter.

The public law type of process is devoted to questions of public, or collective, interest 29 (*utilitas publica*, 'öffentliches Interesse'). It is based on the pre-eminence of the judge as the agent of the State. Thus, first, the disposal on the object of the proceedings is taken away from the parties and vested with some public organ. It is this organ which will act *ex officio* and objectively, when the conditions set up in the law for putting in motion its action are met ('Offizialmaxime'). Second, it is not up to the parties to prove the relevant facts. This task is entrusted to a public organ, which has to collect and to present the facts to the judge ('Untersuchungsmaxime'). The prototype of this category is the inquisitorial criminal proceedings in civil law jurisdictions.

Balancing', *Yale Law Journal* 96 (1987), pp. 943 *et seq.*; Enderlein, W., *Abwägung in Recht und Moral* (1992); Buergisser, M., *La pesée des intérêts comme méthode: bref aperçu historique* (1996); Leisner, W., *Der Abwägungsstaar: Verhältnismäßigkeit als Gerechtigkeit?* (1997). In the field of international law cf. Hector, P., *Das völkerrechtliche Abwägungsgebot* (1992).

- 30 The proceedings of the ICJ deal substantively with public law matters, international law being to a large extent what Montesquieu called 'la loi politique des nations'.<sup>65</sup> However, the procedure of the Court is largely of a private law type: the States confront themselves on a plane of equality, reflecting their 'sovereign equality'<sup>66</sup> and there is a requirement of consent in order to establish jurisdiction. The States can be largely compared to private citizens confronting a civil judge. It is the States parties to a dispute which, to an overwhelming extent, decide on the object of the dispute, on its maintenance or on its discontinuance, on the degree on which the judge will decide on the matter. It is their submissions which shape the object of dispute. Moreover, it is up to the parties to prove the relevant facts, the judge being expected only to know the general norms of international law. These aspects need some further refinement.

## II. The Definition of the Object of the Dispute:

### The Rule '*ne eat iudex ultra petita partium*'

#### 1. Content and Scope of the Principle

- 31 The principle *ne ultra petita* was applied for a long time in the arbitral practice of the nineteenth and twentieth centuries. The sanction for any trespass of the principle by the judge was the voidness of the award for 'excès de pouvoir'.<sup>67</sup> The arbitrator being nothing more than the common organ of the parties in dispute, a particularly strict application of the principle was warranted: *extra compromissum, arbiter nihil facere potest*. This rule of private type litigation was maintained by the World Court, at the time it was founded. The ICJ affirmed it in eloquent terms in the *Asylum case* (Request for Interpretation): '[O]ne must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions'.<sup>68</sup> The principle was reaffirmed in the *Continental Shelf case* (Libya/Malta): 'The Court must not exceed the jurisdiction conferred upon it by the Parties, but it must . . . exercise that jurisdiction to its full extent'.<sup>69</sup>
- 32 The principle *ne ultra petita* means that the object of the dispute on which the judge can award executory rights is limited by the submissions of the plaintiff (maximum) and of the defendant (minimum). The plaintiff can demand less than he would be entitled to. In this case, the judge will not be allowed to award more than was asked for (even if he had been prepared to do so) and cannot award anything different from what was demanded either. This means that the plaintiff is *dominus negotii* and that he is perfectly entitled to claim only the partial satisfaction of his rights. Conversely, the judge cannot award less than has been conceded by the defendant either. Moreover, to the extent that the defendant concedes more than the plaintiff asks for, it is the lesser object claimed by the applicant which becomes controlling. The principle thus works both ways: it is relevant for the request of the plaintiff, but also for that of the defendant. If a case is brought to the Court by special agreement (*compromis*), and there is thus no plaintiff or

<sup>65</sup> Cf. *De l'Esprit des lois* (1748), book X, chap. I.

<sup>66</sup> It may be said that international law is rather unique precisely because it combines a public character as far as its substance is concerned (political, public interest questions) with a private character with respect to structure (sovereign equality of its main subjects).

<sup>67</sup> Cf. Castberg, F., 'L'excès de pouvoir dans la justice internationale', *Rec. des Cours* 35 (1931-I), pp. 353-472.

<sup>68</sup> ICJ Reports (1985), no. 13, 23 (para. 19).

<sup>69</sup> ICJ Reports (1950), pp. 395, 402.

defendant in the formal sense, the rule applies to the joint submission of the parties. The *Minquiers and Ecrehos case*<sup>70</sup> illustrates the position.<sup>71</sup> The principle thus fixes in advance the limits or the bounds of the judgment to be rendered.<sup>72</sup> It has already been stated that the principle can be envisioned either as a procedural rule or as a jurisdictional rule;<sup>73</sup> in effect, to some extent it is both at the same time.<sup>74</sup>

The *ne ultra petita* principle leans towards a concept of formal justice (justice as discretionarily demanded) rather than towards a concept of material justice (justice according to the full extent of the law). An excellent example of what has been said can be found in the award of compensation in the *Corfu Channel case*. The United Kingdom had claimed a total sum of damages of £843,947 from Albania, which had been found internationally responsible by the Court.<sup>75</sup> The Court nominated an expert in order to assess the damages independently from the submissions of the United Kingdom. The expert appointed came to the conclusion that the true damage suffered was higher than had been claimed by the United Kingdom. He was ready to admit some supplementary £16,000. The Court, however, responded that it 'cannot award more than the amount claimed in the submissions of the United Kingdom Government'.<sup>76</sup> The point was restated in the *Barcelona Traction case* (1970), albeit in a context where some more doubts<sup>77</sup> may arise:

The Court has noted from the Application, and from the reply given by Counsel on 8 July 1969, that the Belgian Government did not base its claim on an infringement of the direct rights of the shareholders. Thus it is not open to the Court to go beyond the claims as formulated by the Belgian Government and it will not pursue its examination of this point any further.<sup>78</sup>

The principle *ne ultra petita* applies both to contentious and advisory proceedings.<sup>79</sup> Thus, in the *Application for Review of Judgement No. 158 of the UNAT case* (1973), the ICJ stated that it will control and eventually annul a decision of the UNAT only to the extent that there is a 'plea of the aggrieved party for rescission of the contested decision and a specific allegation by that party that that decision has been inspired by improper or extraneous motivation'.<sup>80</sup> It then recalled the statement made in the *Asylum case* on the limitation of its function by the final submission of the parties.<sup>81</sup> This is yet another application of the general principle set out in Art. 68 of the Statute and Art. 102 of the Rules, pursuant to which advisory proceedings before the Court are governed, to the full extent possible, by the rules governing contentious cases.<sup>82</sup>

## 2. Limitations on the Principle<sup>83</sup>

It remains to be seen, however, what are the limitations of the principle and what is its proper scope of application. First of all, according to the overwhelming view held in the literature, the principle applies only to the submissions of the parties, *i.e.* to the

<sup>70</sup> ICJ Reports (1953), pp. 4 *et seq.*

<sup>71</sup> Cf. Fitzmaurice, *Law and Procedure*, vol. II, pp. 525 *et seq.*

<sup>72</sup> *Ibid.*, p. 579.

<sup>73</sup> *Supra*, MN 5.

<sup>74</sup> Cf. Rosenne, *Law and Practice*, vol. II, p. 595.

<sup>75</sup> ICJ Reports (1949), pp. 4, 36 (point one of the *dispositif*)

<sup>76</sup> ICJ Reports (1949), pp. 244, 249. Cf. also Rosenne, *Law and Practice*, vol. II, p. 594.

<sup>77</sup> These doubts concerned the question whether the aspect dealt with was a true submission in itself or merely an argument made to sustain the principal submission (of Spain's responsibility).

<sup>78</sup> ICJ Reports (1970), pp. 3, 37 (para. 49).

<sup>79</sup> Cf. Shihata, p. 220.

<sup>80</sup> ICJ Reports (1973), pp. 166, 207 (para. 85).

<sup>81</sup> *Ibid.*, pp. 207–208 (para. 87).

<sup>82</sup> For a discussion of this general principle, and the exceptions to it, cf. Cot on Art. 68 MN 13–41.

<sup>83</sup> Cf. Fitzmaurice, *Law and Procedure*, vol. II, pp. 529–531; Kazazi, pp. 42 *et seq.*

determination of the object of the dispute. It does not apply to the arguments of the parties, to questions of evidence, or to aspects of jurisdiction.<sup>84</sup>

36 It is accepted that the Court is free to base its decision on whatever legal and factual grounds it chooses.<sup>85</sup> It is not bound by the legal arguments of the parties: *jura novit curia*; the law is the matter of the Court. In effect, the Court has sometimes had recourse to arguments quite different from those proposed in order to resolve the case. An example of this is furnished by the *North Sea Continental Shelf cases*,<sup>86</sup> where the Court shaped a doctrine on the legal handling of continental shelf delimitations which went largely beyond what the parties had in effect pleaded. Moreover, the Court may in any case take points of fact or of law on the merits *proprio motu*. By the same token, the judge is not bound by the evidence furnished by the parties, but can inquire further, nominate an expert, or make a 'descente sur les lieux'.<sup>87</sup>

37 Moreover, the principle does not apply to jurisdictional matters and to admissibility. There, the proper administration of justice is objectively at stake, since the Court can act on the merits only if certain objective and peremptory conditions are met. It therefore has to ascertain itself whether the required conditions are met.<sup>88</sup> These represent inherent limitations upon its field of action, limitations of which the Court alone is the guardian. Thus, the Court must, for example, objectively satisfy itself that there is a dispute, that this dispute is not moot and that it is legal in nature, that the parties appearing are only States (as required by Art. 34) and that there is no litispendence.<sup>89</sup> These questions do not depend on the consent of the States parties to the dispute, but on objective conditions of the Statute ('objektive Prozessvoraussetzungen'). In the words of McNair, the Court 'cannot regard a question of jurisdiction solely as a question *inter partes*'.<sup>90</sup> There are inherent limitations of the type discussed in the *Northern Cameroons case*;<sup>91</sup> and hence, the submissions of the parties and the principle of consent cannot determine the action of the Court in that field. As the Court very aptly recalled, the 'seising of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules.'<sup>92</sup> Consent and party autonomy govern the first, compulsory rules on the functioning of the Court govern the second. The Court, in its practice, has always acted on that basis. It departed from the submissions and pleadings of the parties in a great series of jurisdictional decisions, such as, *inter alia*, the

<sup>84</sup> Cf. Fitzmaurice, *Law and Procedure*, vol. II, pp. 529 *et seq.* Conversely, Shihata, p. 219 seems prepared to apply the principle to matters of jurisdiction.

<sup>85</sup> Cf. Sereni, *Diritto*, p. 1714 with fn. 3; Fitzmaurice, *Law and Procedure*, vol. II, p. 531. As to the case law, cf. para. 46 of the Court's judgment of 15 December in the *Legality of Use of Force case* (Serbia and Montenegro/Belgium), available at <http://www.icj-cij.org>, para. 46 (with further references).

<sup>86</sup> ICJ Reports (1969), pp. 3 *et seq.* For brief comment on the Court's decision cf. Jennings, Introduction MN 66-69.

<sup>87</sup> For more details on the Court's power to obtain evidence cf. Tams on Art. 50, especially MN 1-6; and Walter on Art. 44 MN 6-24 respectively. On site visits cf. further Bedjaoui, M., 'La "descente sur les lieux" dans la pratique de la Cour internationale de Justice et de sa devancière', in *Liber Amicorum, Professor Ignaz Seidl-Hohenveldern in Honour of his 80th Birthday* (1998), pp. 1 *et seq.*; Rosenne, S., 'Visit to the Site by the International Court', in: *Liber Amicorum Judge M. Bedjaoui* (1999), pp. 461 *et seq.*

<sup>88</sup> For more on this point cf. Tomuschat on Art. 36 MN 29-31.

<sup>89</sup> This point was clearly affirmed in paras. 33 *et seq.* of the judgment in the *Kosovo case* (*supra*, fn. 86). In that case, the Court also clearly affirmed that, even if the parties happened to agree, it was not bound by their views on the matter (*ibid.*, para. 36).

<sup>90</sup> *Anglo-Iranian Oil Company case* (United Kingdom/Iran), Sep. Op McNair, ICJ Reports (1952), p. 116.

<sup>91</sup> ICJ Reports (1963), pp. 15 *et seq.*; and cf. *supra*, MN 25.

<sup>92</sup> *Nottebohm case* (Liechtenstein/Guatemala), Preliminary Objections, ICJ Reports (1953), pp. 111, 122.

*Monetary Gold*, *Nottebohm*, or *Aerial Incident* (Israel/Bulgaria) cases,<sup>93</sup> as well as the *Barcelona Traction*, *Nuclear Tests* or *Nicaragua* cases. The *Nuclear Tests* cases offer a telling example. There, the French government declined to appear and argued that the Court manifestly lacked jurisdiction. Conversely, the applicant States took the view that the Court was competent and (on the basis of different arguments) that France had breached international law. The applicants did not raise the issue of the binding nature of the French unilateral declarations, but rather denied it. However, the Court spoke of an 'inherent power' to assess the true scope of the dispute and to raise a 'question which it finds essentially preliminary, namely the existence of a dispute'.<sup>94</sup> It then interpreted the submissions of the applicants<sup>95</sup> as primarily aimed at securing the cessation of the atmospheric nuclear tests, putting aside claims of reparation for the injuries suffered.<sup>96</sup> On the basis of this interpretation, the Court felt free to find that the application had already been satisfied by various declarations of the French government whereby it had engaged itself (according to the Court through binding unilateral declarations) not to continue such atmospheric tests. As a consequence, there was no dispute subsisting at the moment of the decision. Consequently, the claim no longer had any object.<sup>97</sup> This chain of reasoning, however, completely departed from the submissions of the parties. The Court did not do less or more than had been requested; it did something different from what had been requested. Thus, neither France nor the applicants had ever considered that the unilateral declarations at stake were legally binding; and yet, the Court based its findings essentially on that holding. It is not suggested that this course of conduct violated the *ne ultra petita* principle. For that principle precisely does not apply to jurisdictional matters.

However, it should be inquired whether the exclusion of jurisdictional points from the reach of the *ne ultra petita* rule is absolute. It could indeed be argued that the exclusion must cover all the inherent jurisdictional limitations, of which the Court is the sole guardian (*i.e.* the Statute's *jus cogens* as described earlier).<sup>98</sup> Conversely, it could be said that the exclusion need not necessarily cover all the other jurisdictional points, where the consent of the parties is paramount and where we are thrown back on a private law type of relation. The exclusion thus certainly covers all the above-mentioned objective conditions of the proceedings ('objektive Prozessvoraussetzungen'), conditions which the Statute puts beyond the disposal of the parties.<sup>99</sup> But other aspects of jurisdiction are indeed left to the parties. Such is the case for the existence of consent necessary to establish the competence of the Court. It is well-known that the Court will not necessarily search for such consent to the extent that the defendant does not raise the matter in the form of an objection, whether formal or informal (*forum prorogatum*).<sup>100</sup> If there is no further (objective) problem of jurisdiction, the Court will not be entitled to decline its competence on account of the fact that, formally, consent had not been given in a

<sup>93</sup> On the cases thus quoted *cf.* Shihata, *Power*, pp. 221–222.

<sup>94</sup> ICJ Reports (1974), p. 253, 260 (para. 24).

<sup>95</sup> *Ibid.*, p. 262 (para. 29): 'It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions'.

<sup>96</sup> *Ibid.*, paras. 25 *et seq.* For the opposite solution *cf.* the convincing Joint Diss. Op. Onyeama, Dillard, Jiménez de Aréchaga, and Waldock, *ibid.*, pp. 312 *et seq.*

<sup>97</sup> *Ibid.*, pp. 270–272.

<sup>98</sup> *Cf. supra*, MN 10.

<sup>99</sup> *Cf. supra*, MN 37.

<sup>100</sup> On *forum prorogatum* *cf.* Tomuschat on Art. 36 MN 38 and Lee on Art. 40 MN 116–134; and further Rosenne, *Law and Practice*, vol. ii, pp. 695 *et seq.*; *id.* *Law and Procedure of the International Court*, vol. I (1965), pp. 344 *et seq.*; Kolb, *La bonne foi*, pp. 628 *et seq.* (with further references).

perfect way, although materially it had to be held to have been given. The procedure at the Court is not formalistic, and the maxim *boni judicis est ampliare jurisdictionem* applies. But is the point truly relevant for the *ne ultra petita* principle? As far as the *forum prorogatum* rule is concerned, the point is merely one of possessing jurisdiction or not. One party necessarily argues that the Court has jurisdiction over a point or a dispute in general. With respect to such a submission, the Court cannot in any way accord an *aliud*: the *forum prorogatum* principle allows it only to affirm jurisdiction and nothing more; thus, it will necessarily stay within the realm of the submission of the applicant.<sup>101</sup> The principle will therefore not be infringed in any case. Consequently, even in such non-preemptory matters of jurisdiction, the *ne ultra petita* rule remains relevant, but in another sense: it is inherently respected.

39 As a second limitation of the *ne ultra petita* principle, it must be stressed that the principle does not apply to incidental proceedings. Thus, in the area of provisional measures according to Art. 41, the Court has stressed on many occasions that it can indicate such measures *proprio motu*.<sup>102</sup> Provisional measures indicated independently by the Court may go beyond what the applicant had demanded. The aim of the *proprio motu* measures is indeed different from the measures requested by one party. If the applicant State requests provisional measures, it will normally do so in order to protect and safeguard its own, private, rights from being irreparably infringed by the other party. Conversely, when the Court leans towards indicating provisional measures *proprio motu*, it aims at preventing any escalation of the dispute which would be prejudicial to the efficacy of the peaceful settlement and to keeping proper relations among the parties.<sup>103</sup> The perspective is thus broader and the aim searched for is more akin to a public interest. Hence, in this area of independent judicial action, the submissions of the parties cannot limit the autonomy of the Court. Indicating provisional measures *proprio motu* is an inherent right of the Court which is part of its general power to ensure a proper handling of proceedings and to safeguard the integrity of the judicial function.

40 There is a third practically important and theoretically inherent 'limitation' of the *ne ultra petita* rule. Indeed, the Court first has to ascertain what is the true *petitum* of the parties, for it is not necessarily clear. The principle *ne ultra petita* supposes the *petitum* to be established, but in practice it must thus first be ascertained. This first step is to be taken through an interpretation of the submissions.<sup>104</sup> The Court has affirmed its right to interpret the submissions of the parties in order to discover their true scope. Thus, in the *Nuclear Test cases*, it bluntly affirmed that '[i]t has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions'.<sup>105</sup> The Court had recourse to an elaborated interpretation of the *compromis* in the *Minquiers and Ecrehos case*.<sup>106</sup> It has gone into more or less extensive interpretations of the special agreements in practically all cases concerning territorial and maritime delimitations, which involve difficult points in

<sup>101</sup> Or exceptionally the defendant: cf. the *Monetary Gold case*, ICJ Reports (1954), pp. 19 *et seq.*

<sup>102</sup> On the case law cf. Oellers-Frahm on Art. 41 MN 56–58 as well as Thirlway, 'Law and Procedure, Part Twelve', pp. 107 *et seq.* From the Court's jurisprudence cf. notably *Land and Maritime Boundary between Cameroon and Nigeria*, Provisional Measures, ICJ Reports (1996), pp. 13, 22–23 (para. 41); *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo/Uganda), Provisional Measures, ICJ Reports (2000), p. 111, 128 (para. 44).

<sup>103</sup> Cf. further Oellers-Frahm on Art. 41 MN 18 *et seq.*, especially MN 22.

<sup>105</sup> ICJ Reports (1974), pp. 253, 262 (para. 29).

<sup>106</sup> Cf. Fitzmaurice, *Law and Procedure*, vol. II, p. 528–529.

<sup>104</sup> Cf. Shihata, p. 219.

the interplay between the submissions of the parties and the application of the law. One may recall the difficulties encountered in the *Gulf of Maine case* (1984).<sup>107</sup> To some extent, the interpretation performed by the Court is always a creative act, since there is no understanding of a text without some elements of legal creativeness. Therefore, the Court, through the device of interpretation, may in some way reshape the *petitum* of the parties more or less infinitesimally, or indeed depart from the 'true' (and hypothetical) *petitum*. There is no harm in such a judicial action; it is inherent in the application of legal norms through a third person.<sup>108</sup> Obviously, the interpretation should not be so bold as to engage openly in a revision of the text. But to the extent it does not go that far, the course is perfectly proper and qualifies the true scope of the *ne ultra petita* principle.

The principle *ne ultra petita* is not a peremptory norm. It can be derogated from by 41 common consent of the parties. Thus, the parties can give the Court the freedom to award rights *ultra petita*. The possibility of a true derogation can obviously be questioned on the basis of logic. Indeed, to some extent, by granting to the Court discretion on what it will award, the parties already agree to receive whatever the Court decides, and therefore include this point in their *petitum*. Technically, it could thus be said that what the Court will award will by definition be within the scope of the *petitum*. Moreover, the principle *ne ultra petita* understood in this way could be called non-derogable logically, because by purportedly derogating from it, one indeed applies it in a larger way. Thus, for example, if the United Kingdom in the already quoted *Corfu Channel case*<sup>109</sup> had not claimed a specific sum of damages but asked the Court to award damages as it would see fit, the Court could have taken up that claim. The Statute does not oblige a party to claim a specific amount of damages. And in any event, the *petitum* would have covered any sum awarded.

Is the Court free to take up such an invitation of the parties? If there is nothing in the request which contravenes the judicial integrity of the Court, the answer must be in the affirmative. In effect, the Court could perfectly well go beyond specific *petita*, if the parties so wish, without infringing its role of being a court of justice. The Court will not be able to award extra-legal positions. But the objective law applicable furnishes a sufficient array of remedies to which the Court could stick in such cases. It could thus (at its discretion) award the full legal consequences attached by the applicable legal norms to the facts it has established to its satisfaction. Indeed, if the Court is allowed to adjudicate *ex aequo et bono* on the wish of the parties<sup>110</sup>—e.g. outside the strict law (but not contrary to justice)—it must all the more be able to adjudicate in strict law but with some discretion as to the rights awarded. This aspect constitutes a further limitation on the material reach of the *ne ultra petita* principle. The submissions can accordingly be generic and indeed quite unlimited, allowing the judge to award legal remedies and rights with a certain degree of discretion.

<sup>107</sup> Cf. ICJ Reports (1984), pp. 246, 252 *et seq.* (especially with respect to the triangle in which, according to the wishes of the parties, the final boundary point was to be located). For further analysis cf. also Kolb, *Ius Cogens*, pp. 282 *et seq.*

<sup>108</sup> This has been shown by modern legal hermeneutics. Cf. e.g. Kriele, M., *Theorie der Rechtsgewinnung* (1967), pp. 67 *et seq.*; Esser, J., *Vorverständnis und Methodenwahl in der Rechtsfindung* (1970); Perelman, C., *Justice, Law and Argument* (1980), pp. 125 *et seq.*; Hassemer, W. (ed.), *Dimensionen der Hermeneutik* (1984); Larenz, K., *Methodenlehre der Rechtswissenschaft*, (6th edn., 1991), pp. 11 *et seq.*, 283 *et seq.*, 312 *et seq.*, 366 *et seq.*; Kaufmann, A., *Beiträge zur juristischen Hermeneutik* (2nd edn., 1993). <sup>109</sup> Cf. *supra*, MN 33.

<sup>110</sup> Cf. Art. 38, para. 2; and Pellet on Art. 38 MN 152–170 for comment.



### 3. Action *infra petita*

42 Lastly, it needs to be assessed whether the Court may decide *infra petita* or whether in some cases, it has to remain *infra petita*. It is obvious that the Court may decide *infra petita* if it finds that the submissions of a party are not entirely proved or not entirely justifiable in law. The Court is not obliged to grant either the full amount of rights claimed or nothing at all; it can grant less (but not something different) than demanded. It will then still be within the reach of the submission. However, there are cases where the Court may be obliged (and not simply entitled) to refuse to grant the full *petitum*. This is the case when the rights of third States are affected to the extent that they are made the very object of the submissions of the parties. Here, the so-called *Monetary Gold* principle applies.<sup>111</sup> The Court will decline to exercise jurisdiction properly conferred if it must thereby assess and adjudge, preliminarily, the rights of third States that have not consented to the Court's jurisdiction.<sup>112</sup> In its more recent jurisprudence, the Court has distinguished from this case situations where the determination of the rights of the litigating parties logically implies that the position of a third State will simultaneously (or consequently) be affected, e.g. because of a solidarity of rights. Here, the rights of the third State need not be scrutinized before the Court is able to assess those of the parties. In such a case, the Court will not decline to exercise its jurisdiction and to adjudge the rights of the parties to the full extent of the *petitum*, if it finds this to be warranted.<sup>113</sup>

<sup>111</sup> For a more detailed treatment cf. Tomuschat on Art. 36 MN 20–24; Bernhardt on Art. 59 MN 67–72 and Chinkin on Art. 62 MN 15–16.

<sup>112</sup> Cf. the *Monetary Gold* case, ICJ Reports (1954), pp. 19, 32: 'The first Submission in the Application centres around a claim by Italy against Albania, a claim to indemnification for an alleged wrong. Italy believes that she possesses a right against Albania for the redress of an international wrong which, according to Italy, Albania has committed against her. In order, therefore, to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of 13 January 1945, was contrary to international law. In the determination of these questions—questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy—only two States, Italy and Albania, are directly interested. To go into the merits of such questions would be to decide a dispute between Italy and Albania. The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

<sup>113</sup> Cf. the *Phosphate Lands in Nauru* case, ICJ Reports (1992), pp. 240, 260–261 (para. 55): In the present case, the interests of New Zealand and the United Kingdom do not constitute the very subject-matter of the judgment to be rendered on the merits of Nauru's Application and the situation is in that respect different from that with which the Court had to deal in the *Monetary Gold* case. In the latter case, the determination of Albania's responsibility was a prerequisite for a decision to be taken on Italy's claims. In the present case, the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. Australia, moreover, recognises that in this case there would not be a determination of the possible responsibility of New Zealand and the United Kingdom *previous* to the determination of Australia's responsibility. It nonetheless asserts that there would be a *simultaneous* determination of the responsibility of all three States and argues that, so far as concerns New Zealand and the United Kingdom, such a determination would be equally precluded by the fundamental reasons underlying the *Monetary Gold* decision. The Court cannot accept this contention. In the *Monetary Gold* case the link between, on the one hand, the necessary findings regarding Albania's alleged responsibility and, on the other, the decision requested of the Court regarding the allocation of the gold, was not purely temporal but also logical; as the Court explained,

'In order . . . to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her' (ICJ Reports (1954), p. 32.)

Furthermore, some intervention cases also prompt interesting insights into the question of the relevant *petitum* and the rights of third States. For a long time, the Court has been very deferent to the rights of consent of the main parties to the proceedings and has refrained from forcing upon them any type of intervention by a third State against their wishes.<sup>114</sup> Thus, in the *Continental Shelf case* (Libya/Malta), Italy asked for leave to intervene pursuant to Art. 62 in order to safeguard its legal interests. The Court refused to allow the intervention since it found that such an intervention would have required the consent of Libya and Malta, which however declined to give it.<sup>115</sup> When the case came to the merits stage, the Court found it impossible to delimit the continental shelf in all areas covered by the *petitum* of the parties as formulated in their special agreement. It held that the special agreement had to be interpreted as meaning that the parties wanted the Court to adjudge only areas that would definitively belong to one of the two parties. Thus, it should exclude all the areas in which a third State could claim rights, since such areas could not be definitively adjudged in the absence of the concerned third State to the proceedings. Hence the Court limited itself to a small area where Italy claimed no rights.<sup>116</sup> This course can be seen as a simple question of interpretation of the special agreement. It may be said that the *petitum* of the parties was indeed so limited. But a more realistic approach cannot by any stretch of imagination hold that the parties had contemplated such a truncation of the area to be delimited. Rather, it was the interest of protecting the rights of the third party which eventually prevailed—albeit in a flawed way.<sup>117</sup> The Court thus in effect ruled *infra petita*, by reason of third parties rights or interests. The Court chose an analogous course of conduct in the more recent *Land and Maritime Boundary case* (Cameroon/Nigeria).<sup>118</sup>

Conversely, the Court is not bound to decline to exercise the full range of its powers if that exercise may have implications or consequences on another case which is pending in front of it. This aspect was affirmed clearly in the eight *Legality of Use of Force cases* between Yugoslavia and NATO member States.<sup>119</sup>

### III. Matters of Evidence and Burden of Proof<sup>120</sup>

#### 1. General Considerations

The questions of evidence and of burden of proof are extremely rich and complex, so that only a series of points can be made here, without venturing into a monographic

In the present case, a finding by the Court regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction.<sup>7</sup>

<sup>114</sup> Cf. further Chinkin on Art. 62, especially at MN 12–19. It should be noted that the Court changed its jurisprudence in the *Case Concerning the Land, Island and Maritime Frontier Dispute (Application by Nicaragua for Permission to Intervene)*: ICJ Reports (1990), pp. 92, 131 *et seq.* (paras. 93 *et seq.*).

<sup>115</sup> Cf. ICJ Reports (1984), pp. 1, 18 *et seq.* (paras. 28 *et seq.*) and the much more convincing dissent by Judge Schwebel, *ibid.*, pp. 131 *et seq.* (paras. 3 *et seq.*).

<sup>116</sup> ICJ Reports (1985), pp. 13, 25–28 (paras. 21–23).

<sup>117</sup> Cf. again the Diss. Op. Schwebel, *ibid.*, pp. 172 *et seq.*

<sup>118</sup> Cf. ICJ Reports (2002), pp. 303, 421 (para. 238).

<sup>119</sup> Cf. e.g. para. 40 of the judgment of 15 December 2004 in the *Kosovo case* (*supra*, fn. 86).

<sup>120</sup> The legal literature in this field is quite vast: cf. Fitzmaurice, *Law and Procedure*, vol. II, pp. 575 *et seq.*; Rosenne, *Law and Practice*, vol. III, pp. 1083 *et seq.*; and further: Amerasinghe, pp. 156 *et seq.*; Kazazi, *passim*; Thirlway, H., 'Evidence before International Courts and Tribunals', *EPIL* II (1995), pp. 302 *et seq.*; Mawdsley, A., 'Evidence before the International Court of Justice', in: *Essays in Honour of W. Teyja* (Macdonald, R.St.J.),

treatment. The private law type of litigation at the Court entails that the 'burden of evidence' ('Verhandlungsmaxime') lies with the parties. This means that it is up to the parties to bring to the cognizance of the judge, in the forms prescribed by the Statute and the Rules, all the facts that may be relevant for the application of the legal norms at stake. The Court may engage in some additional fact finding, but it is not obliged to do so. The truth obtained by such a private type of litigation is a formal truth, not a material one: the Court will not try to find out what really happened. It will to a large extent limit itself to the facts presented by the parties. This is to some extent unavoidable, since the Court has no investigating organs<sup>121</sup> backing its work and able to furnish it with facts researched *ex officio*.

## 2. The Principle of Free Assessment of Evidence

- 44 The first rule in the field of evidence is that the international judge has a wide discretion in the assessment of the evidence. Like in all modern systems, but unlike the position in the Middle Ages,<sup>122</sup> there are no formal rules on the assessment and on the weight to be given to the evidence by the ICJ. The Court possesses a wide margin of discretion, and is bound legally only by the prohibition of arbitrary action. This principle ('libertà di apprezzamento', 'freie Beweiswürdigung') has been recognized in the literature<sup>123</sup> and by the Court itself. Thus, in the *Nicaragua case*, the Court said that within the limits of its Statute and Rules '[it] has freedom in estimating the value of the various elements of evidence.'<sup>124</sup> This general principle of procedure cannot be doubted and needs no further elaboration.

## 3. The Burden of Proof

- 45 The question of the burden of proof covers a huge area. Two main issues need to be distinguished. First, there is the question of who must establish a specific fact. Second, there is the question of the repartition of the risk among the parties (who bears the risk?) if the fact has not been established to the satisfaction of the judge. The answer to the

ed., 1994), pp. 533 *et seq.*; Lachs, M., 'Evidence in the Procedure of the ICJ: Role of the Court', in *Essays in Honour of Judge T.O. Elias*, (Bello and Ajibola, eds., 1992), vol. I, pp. 265 *et seq.*; Niyunguko, *La preuve devant les juridictions internationales*, 2 vols. (1988); Chang, Y., 'Legal Presumptions and Admissibility of Evidence in International Adjudication', *Annals of the Chinese Society of International Law* 1966, pp. 1 *et seq.*; Sandifer, D.V., *Evidence before International Tribunals* (1975); Ferrari Bravo, L., *La prova nel processo internazionale* (1958). Evensen, J., 'Evidence Before International Courts', *Acta Scandinavica Juris Gentium*, vol. 25 (1955), pp. 44 *et seq.*; Cheng, B., 'Burden of Proof Before the ICJ', *ICLQ* 2 (1953), pp. 595 *et seq.*; Lalive, J. F., 'Quelques remarques sur la preuve devant la Cour permanente et la Cour internationale de Justice', *ASDI* 7 (1950), pp. 77 *et seq.*; Witenberg, J. C., 'La théorie des preuves devant les juridictions internationales', *Rec. des Cours* 56 (1936-II), pp. 5 *et seq.*

For further details on experts and fact-finding *cf.* the commentaries by Tams on Arts. 49–51 and further White, G.M., *The Use of Experts by International Tribunals* (1965); Foster, W.F., 'Fact Finding and the World Court', *CYL* (1969), pp. 150 *et seq.*; White, G.M., 'The Use of Experts by the International Court', in *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (Lowe and Fitzmaurice, eds., 1996), pp. 528 *et seq.*; Jacob, S., 'Fact Finding in Inter-State Adjudication', *Modern Law Review* 59 (1996), pp. 207 *et seq.*; Rosenne, S.T., 'Fact-Finding before the International Court of Justice', in *International Law and The Hague's 750<sup>th</sup> Anniversary* (Heere, W., ed., 1999), pp. 45 *et seq.*

<sup>121</sup> But it may nominate experts on specific points in order to assess the evidence or to carry out an enquiry: *cf.* Tams on Art. 50, especially MN 7–8 for a review of the Court's practice; as well as the literature on experts referred to in the last footnote.

<sup>122</sup> For the evolution of the law in the Middle Ages, *cf.* van Caenegem, R.C., 'La preuve au Moyen Age occidental', in: *La Preuve II, Recueil Jean Bodin XVII* (1965), pp. 691–753.

<sup>123</sup> *Cf.* Sereni, *Diritto*, p. 1714.

<sup>124</sup> ICJ Reports (1986), pp. 14, 40 (para. 60).

second question flows from the answer to the first and is consequential: the party who must establish the fact bears the risk of its non-establishment.

The general rule in this field is formulated in the famous maxim *onus probandi incumbit actori*.<sup>125</sup> The point is not who is applicant and who is defendant in the proceedings in general, e.g. who institutes the proceedings and who defends them. The crucial question is rather who puts forward a concrete contention within the proceedings. This party then is the actor (or applicant) with respect to that contention and bears the burden of establishing it. The maxim *affirmanti incumbit probatio*<sup>126</sup> expresses the true concept very precisely. Thus, if the defendant advances certain defence pleas, he will carry the burden of establishing their truth. This happened in the *Rights of United States Nationals in Morocco case*. In this case, France instituted proceedings against the United States: formally, it was the plaintiff and the United States the defendant. However, on substance, the United States claimed special rights and privileges in the French zone of Morocco. The Court placed the burden of proof on the United States and rejected its claims to the extent that treaties on which the United States was entitled to rely did not support them.<sup>127</sup> With respect to these rights, the United States was the 'actor'; and thus, the burden of proof lay on it. Thus, the danger sometimes noticed that the substantive outcome of a case could be largely determined by a party managing to manoeuvre itself in the position of a defendant<sup>128</sup> becomes somewhat less urgent, although it does not disappear.<sup>129</sup> To some extent, the Court can correct such anomalies by scrutinizing closely the structure of the contentions and by putting the burden on the party who is the 'actor' in the concrete situation.<sup>130</sup> The Court must be attentive to that situation because it is part of the proper administration of justice. The case law of the Court shows that it is attentive to these aspects, as the *Rights in Morocco case* showed. In addition, the *Temple of Preah Vihear case*<sup>131</sup> can also be referred to.

If the foregoing is true, there is no major difficulty when the case is brought by special agreement (*compromis*) rather than by unilateral application. In such a case, there is formally no defendant and no applicant. Thus, on the formal plane, the parties are in a position of equality with regard to the burden of proof. If in the course of the proceedings one party claims a specific fact, the ordinary burden of proof rule will apply, since it will then be the actor. Simply, to the extent that there is no general applicant and defendant, the whole case cannot be put under the general risk of one party rather than the other. Thus, as the *Minquiers and Ecrehos case* (1953) shows, the Court may ask each party 'to prove its alleged title and the facts upon which it relies'.<sup>132</sup> This is particularly

<sup>125</sup> The principle had already applied in the Roman Law procedure of *apud iudicem*: cf. Kaser, M., *Römisches Privatrecht* (14th edn., 1986), p. 373. For comment on the position under international law cf. Kazazi, pp. 53 *et seq.*, pp. 221–223, p. 224 *et seq.*

<sup>126</sup> This term was used in the Middle Ages: cf. e.g. the gloss 'Ei incumbit' *ad Dig.*, 22, 3, 2.

<sup>127</sup> ICJ Reports (1952), pp. 176, 191 *et seq.* Cf. Amerasinghe, Evidence, pp. 178–179.

<sup>128</sup> Cf. Fitzmaurice, *Law and Procedure*, vol. II, p. 576: 'Attention was drawn to the advantages of the defensive, and the fact that in the present state of international law, this may, on account of the burden of proof, make the whole difference between winning and losing the case'.

<sup>129</sup> Thus, the exact formulation of the question in the *Lotus case* (France/Turkey) made it possible for the Court to hold that international law imposed no limitations on the freedom to criminal prosecutions, such limitations having not been proved by France. Had the question been phrased in another way, i.e. had Turkey brought the case, asking the Court to find that international law allowed her to take prosecution, the unsettled state of international law would perhaps have produced an opposite substantive result. Cf. PCIJ, Series A, No. 10, pp. 3, 5 (the question put to the Court being: 'Has Turkey... acted in conflict with the principles of international law?').

<sup>130</sup> Cf. Amerasinghe, p. 178.

<sup>131</sup> ICJ Reports (1962), pp. 6, 15–16.

<sup>132</sup> ICJ Reports (1953), pp. 47, 52.

true of territorial disputes, where each party relies on a set of facts in order to strengthen the relative weight of its case, or of its title to territory. In such cases, it may moreover happen that the rejection of one factual argument does not necessarily lead to the upholding of the contrary argument.<sup>133</sup> Then, further intricate problems arise, but these must be discussed separately.<sup>134</sup>

48 As there are no formal parties in advisory proceedings, there is no claim in the proper sense, which the Court could uphold or reject. Hence, there is also no burden of proof in advisory proceedings—except that any statement made on behalf of the Court will bear more weight if it is well documented, but that is a truism. Thus, in the *Western Sahara case* (1975), the Court said: 'In advisory proceedings there are properly speaking no parties obliged to furnish the necessary evidence, and the ordinary rules concerning the burden of proof can hardly be applied.'<sup>135</sup>

49 The Court has often formulated the general rule on the burden of proof,<sup>136</sup> namely *onus probandi incumbit actori*. In its judgment on jurisdiction and admissibility in the *Nicaragua case*, it stated very clearly: 'Ultimately, . . . it is the litigant seeking to establish a fact who bears the burden of proving it.'<sup>137</sup> This principle had already been applied in an exemplary manner in the *Asylum case*, where the Court found that the onus of proving that a certain person had been accused or convicted for common crimes before the grant of asylum rested on the party asserting it, *i.e.* on Peru.<sup>138</sup>

#### 4. Limitations on the Burden of Proof

##### a) *Jura novit curia*

50 There are several quite intricate aspects to be discussed under the heading of limitations to the burden of proof principle. The first is the *jura novit curia* rule, whose content has been summarized as follows:

First, the burden of proof rule is not applicable to questions of law; it is limited to questions of fact. The law is not a matter the parties must prove. The Court knows the law of itself and must administer it independently from the views of the parties: *iura novit curia*.<sup>139</sup> The rule is thus that the Court 'knows and will apply the law', whatever the parties say, or omit to say.<sup>140</sup>

The Court affirmed the *jura novit curia* rule on different occasions. In the *Fisheries Jurisdiction cases*, it stated that:

The Court, however, as an international judicial organ, is deemed to take judicial notice of international law and . . . to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. . . . [T]he burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.<sup>141</sup>

Conversely, the *jura novit curia* rule also means that the Court is not dependent upon the arguments of the parties to establish the legal position; it keeps its total independence

<sup>133</sup> Cf. e.g. the *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986), pp. 554, 588 (para. 65).

<sup>134</sup> Cf. *infra*, MN 52.

<sup>135</sup> ICJ Reports (1975), pp. 12, 28 (para. 44). Obviously, the lack of proper evidence may prompt the Court to decline to respond to the advisory request, under the guise of its 'judicial propriety' to give or to refuse a response (cf. *ibid.*, p. 29, para. 46). For further discussion cf. also Frowein/Oellers-Frahm on Art. 65 MN 21 *et seq.*

<sup>136</sup> On the Court's practice cf. Amerasinghe, pp. 180 *et seq.*

<sup>137</sup> ICJ Reports (1984), pp. 392, 437 (para. 101).

<sup>138</sup> ICJ Reports (1950), pp. 266, 281.

<sup>139</sup> Cf. Cheng, pp. 299–301.

<sup>140</sup> Fitzmaurice, *Law and Procedure*, vol. II, p. 531.

<sup>141</sup> ICJ Reports (1974), pp. 3, 9 (para. 17); *ibid.*, p. 181 (para. 18). The Court made these statements in the context of the application of Art. 53 of the Statute (non-appearance of a State).

in that regard. As the Court explained at the merits stage of the *Nicaragua case*: 'the principle *jura novit curia* signifies that the Court is not solely dependent upon the argument of the parties before it with respect to the applicable law.'<sup>142</sup>

Consequently, for example, the burden of proof rule does not apply to the establishment of the jurisdiction of the Court.<sup>143</sup> The point of jurisdiction is a point of law. Moreover, the Court must objectively ascertain that the conditions for proceeding on the merits are met. That is a matter for scrutiny by the Court alone, it being sole guardian of its judicial integrity. It is outside the realm of questions left to the disposal of the parties. One therefore understands that the Court stated the following, in the *Fisheries Jurisdiction case* (Spain/Canada): 'there is no burden of proof to be discharged in the matter of jurisdiction.'<sup>144</sup> In the *Border and Transborder Armed Actions case* (Nicaragua/Honduras) (Jurisdiction and Admissibility), it had expressed itself as follows: 'The existence of jurisdiction of the Court in a given case is however not a question of fact, but a question of law to be resolved in the light of all the relevant facts'.<sup>145</sup>

The Court is not bound to know all the rules of law to an equal extent. It is certainly 51 bound to know and to administer general international law. The concept of 'general international law' has to be understood in a rather broad sense in this field: it covers all the general customary rules, but also the general principles of law and the major multilateral conventions, especially those of a codifying nature. These sources the Court must know. Conversely, the Court cannot be expected to research independently all the special sources of law which may be applicable in a specific case. Thus, the Court does not need to be aware of bilateral conventions or regional customary rules. That is even more true of still more particular situations, such as estoppel or informal agreements by silence (acquiescence). The Court could research them, and the rule *jura novit curia* allows it. But it is not equipped to do so, for that research would require a large number of civil servants; and it is not really a matter for the Court to bring to the fore such particular sources, which lie exclusively in the interest of individual parties. To that extent, such questions are treated as being questions of fact.

Thus, in the *Asylum case* (1950), the Court said that the party insisting on a regional custom 'must prove that this custom is established in such a manner that it has become binding on the other party'.<sup>146</sup> Moreover, the municipal law of States is treated by the court as being a fact.<sup>147</sup> The presence or absence, and the content, of municipal law rules is thus a point subjected to the burden of proof.<sup>148</sup> The PCIJ thus said very clearly: 'the Court, which is a tribunal of international law, . . . which, in this capacity, is deemed itself to know what this law is, is not obliged also to know the municipal law of the various countries'.<sup>149</sup>

The distinction between questions of law and of fact is thus seemingly simple, but as all lawyers know, it may become extremely intricate in particular contexts. As has been

<sup>142</sup> ICJ Reports (1986), pp. 14, 24 (para. 29), quoting the *Lotus case* (1927), PCIJ, Series A, No. 10, pp. 3, 31.

<sup>143</sup> Shihata, pp. 221-223. Cf. e.g. the *South West Africa case*, Preliminary Objections, ICJ Reports (1962), pp. 319, 395, where the Court did not rely on any burden of proof with respect to the establishment of the existence of a dispute.

<sup>145</sup> ICJ Reports (1988), pp. 69, 76 (para. 16).

<sup>144</sup> ICJ Reports (1998), pp. 432, 450 (para. 38).

<sup>146</sup> ICJ Reports (1950), pp. 266, 270.

<sup>147</sup> A classical statement, made in general terms (and thus sometimes criticized) is to be found in the *Polish Upper Silesia case* (Germany/Poland), PCIJ, Series A, No. 7, pp. 3, 19: 'from the point of view of international law and of the Court which is its organ, municipal laws are merely facts'.

<sup>148</sup> Cf. the thorough analysis by Cassese, A., *Il diritto interno nel processo internazionale* (1962), pp. 169 et seq.

<sup>149</sup> *Brazilian Loans case* (France/Brazil), PCIJ, Series A, No. 21, pp. 4, 124.

shown, questions of law (particular legal sources) are considered to be questions of fact in the context of the burden of proof rule. There, the problem of delimitation between 'general' and 'particular' sources of law may arise. Moreover, some aspects of a dispute can be of mixed legal and factual nature, or otherwise so intimately connected, that any separation is difficult. By way of example, it is possible to refer to the various factors which the jurisprudence has taken into account for drawing an equitable maritime boundary.<sup>150</sup> Here, law and fact tend to merge into one another under the general polar star of equity.

#### b) Particular Forms of Evidence

- 52 Second, the burden of proof rule *ratione materiae* does not apply to certain types of evidence. Thus, there is no burden of proof with respect to notorious facts<sup>151</sup> or to undisputed facts.<sup>152</sup> There are moreover cases where the burden of proof is difficult to apply on the account of the structure of the facts at stake. If the non-establishment of a fact automatically entails the admission of another fact, *e.g.* the contrary one, then the distribution of the burden of proof is simple. If fact 'a' is not established, the Court will be entitled to assume the consequence flowing from 'non-a' ( $\bar{a}$ ). The conclusion is the following:  $F = a \rightarrow \bar{a}$ . Thus, for example, if one assumes that there are no *lacunae* in international law, it becomes possible to say that if a prohibition of a certain conduct is not established by a prohibitive rule, then the conduct is *a contrario* allowed by international law. This, in substance, was done by the PCIJ in the *Lotus case* (1927).<sup>153</sup> But it may also be assumed that the non-establishment of fact 'a' does not automatically yield a certain conclusion as to the fact to be considered as established. The equation would here be:  $F = a \rightarrow$  possibly b, c, d, e, f... The Court had in mind such a situation when, in the *Frontier Dispute* (Burkina Faso/Mali), it expressed itself in the following terms:

The question concerning the burden of proof is not relevant in this specific case, because the rejection of any particular argument on the ground that the factual allegations on which it is based have not been proved is not sufficient to warrant upholding the contrary argument.<sup>154</sup>

This is especially true in territorial disputes. Each party has to advance its own titles, effectivités, or other evidence. If the Court starts from one party, State A (the choice of which is arbitrary in the case of a special agreement rather than one opposing a claimant and a defendant), it could reject all its claims as being not sustained by sufficient evidence. But that would not mean that it could automatically accept the arguments of the other party (State B), since it could have rejected them as well as insufficiently proved if it had started with that State. Hence, the question cannot be resolved on the basis of a burden of proof rule. Each party must bring forward its own evidence and the Court

<sup>150</sup> For a general account *cf.* Kolb, R., *Case Law on Equitable Maritime Delimitation, Digest and Commentaries* (2003).

<sup>151</sup> *Cf.* the *United States Diplomatic and Consular Staff in Tehran case* (United States of America/Iran), ICJ Reports (1980), pp. 3, 9–10 (para. 12). For historical perspectives on the maxim *notorium non eget probatione* *cf.* the gloss 'Quia manifestum fuit' *ad Dig.*, 19, 1, 11, para. 12 (Accursius).

<sup>152</sup> *Cf.* the *Border and Transborder Armed Actions case* (Nicaragua/Honduras), Jurisdiction and Admissibility, ICJ Reports (1988), pp. 69, 76 (para. 16): 'The determination of the facts may raise questions of proof. However, the facts in the present case... are not in dispute.' The Court deduced from the foregoing that there was no burden of proof to be applied; *cf.* Amerasinghe, p. 197.

<sup>153</sup> No criticism of that position shall be presented here, as this discussion only concerns the logical structure of the argument. For further remarks *cf.* Kolb, R., 'La règle résiduelle de liberté en droit international public ("tout ce qui n'est pas interdit est permis")', *RBDI* 34 (2001), pp. 100 *et seq.*

<sup>154</sup> ICJ Reports (1986), pp. 554, 588 (para. 65).

must weigh it up in order to discover, eventually, the relatively better title. The Court has done so, e.g., in the aforementioned *Frontier Dispute* case, or, more recently, in the *Pulau Ligitan and Pulau Sipadan* case.<sup>155</sup> Consequently, in such cases, because of the structure of argument, the burden of proof rule is inapplicable.

### c) The Role of Presumptions

Third, the burden of proof rule is limited by so-called presumptions established by the substantive law itself.<sup>156</sup> Three types of presumptions must be distinguished. 53

- First, there are ordinary presumptions of law (*praesumptiones juris*). In this context, a legal norm supposes (automatically) that certain facts are established in a given situation. Thus, if a certain factual situation arises, certain facts, which are linked to it, are considered to exist, by the law, without any necessity to prove them. The logical chain is: if fact 'a' exists, then we shall suppose that fact 'b' also exists. In this sense it can be said that presumptions are 'conclusions of facts drawn from known facts.'<sup>157</sup> To take an example from the sphere of family law, accepted in many national legal systems, if a man and a woman are married, the child born by the wife is presumed to be that of the husband. The law grants such presumptions in order to respond to demands of justice. In some situations, it is most frequent that certain facts exist, so that it becomes straightforward to suppose their existence in order to realize an economy of procedure. Or, it may be exceedingly burdensome for a party to prove certain facts in a given case (e.g. negative facts), and thus the attainment of justice would be jeopardized if the general rule on the burden of proof was applied. The consequence of the operation of a presumption is to facilitate the administration of the law by shifting the burden of proof<sup>158</sup> to the other party, where the law considers that it should more conveniently lie. Consequently, the applicant must show only the existence of the factual basis of the presumption (in our example given above, that there is a marriage between both persons). As far as the consequential facts are concerned, the burden of proof is shifted; it is up to the opponent party to disprove the presumption, e.g. to prove the contrary (in our example, that the child is not that of the husband). In international law, the presumption that all acts done by a State (e.g. in its municipal law, such as the granting of a nationality) are correct and legal can be mentioned: *omnia acta praesumuntur esse rita*.<sup>159</sup> There are many special rules having the same effect, such as the duty of a party to prove that a term contained in a treaty provision has a special meaning, departing from its usual, common sense, meaning.<sup>160</sup>

<sup>155</sup> ICJ Reports (2002), pp. 625, 682 *et seq.* (paras. 134 *et seq.*).

<sup>156</sup> As to such presumptions in international law, cf. Grossen, J.M., *Les présomptions en droit international public* (1954); Amerasinghe, pp. 272 *et seq.*; Kazazi, pp. 239 *et seq.* It has been disputed that such presumptions exist in international law (cf. e.g. Delbez, *supra*, fn. 2, p. 115), but the answer has to be in the affirmative.

<sup>157</sup> Amerasinghe, p. 272. Cf. also De Visscher, C., *Problèmes d'interprétation judiciaire en droit international public* (1963), pp. 36–37: '[La présomption] est un procédé de raisonnement logique utilisé à des fins probatoires et que caractérise un déplacement de l'objet de la preuve: de l'existence ou de l'inexistence d'un fait connu, non destiné en soi à faire preuve, mais temporellement voisin... ou expérimentalement connexe au fait à prouver, on induit l'existence de ce dernier.'

<sup>158</sup> But contrast Amerasinghe, p. 277.

<sup>159</sup> Cf. Grossen, *supra*, fn. 157, pp. 60 *et seq.*

<sup>160</sup> Cf. Art. 31, para. 4 VCLT; and further the *Eastern Greenland* case (Denmark/Norway), where the PCIJ applied the rule in question by presuming that the ordinary geographical sense of the word 'Greenland' had to prevail over divergent pleas: PCIJ, Series A/B, No. 53, pp. 21, 49. Cf. also the *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1992), pp. 351, 585 (para. 377), where Honduras had argued for a special meaning of the terms 'determine the legal situation of the... maritime spaces' and



Sometimes, a shift of the burden of proof is advanced in most general terms, e.g. under the principle of precaution in matters on environmental law.<sup>161</sup>

- Second, there are so-called legal fictions or non-rebuttable presumptions (*praesumptiones juris et de jure*). In this case, the proof of the contrary is not allowed. The question is not treated as one of fact, but one of law: a certain conduct is absolutely required, independently from the facts. An example is: *ignorantia juris nocet*, knowledge of the law is required. Real non-knowledge of the norms is no excuse (except in special cases provided for by the law). Thus, it is not open to a party to show that it in effect did not know about a legal duty. The law itself imputes the fact of having knowledge.
- Third, there are so-called inferences or presumptions of fact (*praesumptiones hominis*). These are not true presumptions. An inference is nothing more than a matter of appreciation of the evidence and of interpretation thereof. Such a 'presumption' is indeed nothing more than an inference from established facts towards other facts drawn by the judge according to his or her experience of life and cognizance of things. In such situations, the burden of proof does not shift. There is nothing more than a risk of adverse inference, which can be countered by argument. Such inferences are mostly drawn from circumstantial rather than from direct evidence.<sup>162</sup> The *Corfu Channel case* can be quoted to that effect.<sup>163</sup>

#### d) Negative Facts and Related Issues

- 54 The treatment of negative facts (absence of a fact) in evidence has given rise to much legal elaboration. In Roman Law, the difficult position of the actor claiming a negative fact was already acknowledged. Thus, the rule *negativa non sunt probanda* or *negantis nulla probatio*<sup>164</sup> was shaped. It meant that the actor was freed in most cases of the duty to establish the absence of a fact and that the burden of proof was placed on the opponent to show the presence of the fact.<sup>165</sup> The rule does not apply generally today, either in municipal law, or in international law. But the Court has a certain margin of discretion, under the heading of the proper administration of justice, to shift or to soften the burden of proof. Thus, in the *Nicaragua case*, it stated that '[t]he evidence or material offered by Nicaragua in connection with the allegation of arms supply has to be assessed bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative.'<sup>166</sup> This suggests at least that the assessment of evidence can be more relaxed and give rise to some inferences, but within the limits of a proper ascertainment of facts

suggested that it included their delimitation. The Court responded: 'The onus is therefore on Honduras to establish that such [a special understanding of the terms] was the case'.

<sup>161</sup> Cf. e.g. the *Nuclear Tests (Request for Examination) case*, Diss. Op. Weeramantry, ICJ Reports (1995), pp. 317, 348: 'The second approach is to apply the principle of environmental law under which, where environmental damage of any sort is threatened, the burden of proving that it will not produce the damaging consequences complained of is placed upon the author of that damage. . . . The second approach is sufficiently well established in international law for the Court to act upon it.'

<sup>162</sup> Amerasinghe, p. 281.  
<sup>163</sup> ICJ Reports (1949), pp. 4, 18. The point to be established was the knowledge, of the Albanian government, of the existence of a minefield. The ICJ admitted circumstantial evidence and inferences drawn therefrom.

<sup>164</sup> *Dig.*, 22, 3, 2 (Paulus); *Dig.*, 22, 3, 21 (Marcian). Cf. also the gloss '*Ei incumbit*', ad *Dig.*, 22, 3, 2; *Codex Justinianus*, 4, 19, 23 and 4, 30, 10. The rule is also formulated as '*ei incumbit probatio qui dicit, non qui negat*'. On the evolution of the maxim, cf. Musielak, H.-J., *Die Grundlagen der Beweislast im Zivilprozess* (1975), pp. 259 et seq.

<sup>165</sup> ICJ Reports (1986) pp. 14, 80 (para. 147).

<sup>166</sup> Cf. Kaser, *supra*, fn. 126, p. 373.

(especially in a case of non-appearance under Art. 53).<sup>167</sup> It may be recalled that even within the application of the law, when a negative custom (e.g. a duty to abstain) was at stake, the Court often relied more heavily on the *opinio iuris* element than on the element of actual practice. The latter is in effect much more difficult to establish in such cases. The Court thus strengthened the *opinio* element (as compared to the element of practice) especially in the *Nicaragua case* and in the *Nuclear Weapons* advisory opinion.<sup>168</sup>

This relaxation of the burden of proof in the context of negative facts has also been accepted in arbitral practice. Thus, in the *Mexico City Bombardment Claims* (United States/Mexico Claims Commission), the problem was solved by reference to the duty of the parties to cooperate in establishing the proof. On the part of the claimant, the standard of proof was relaxed to a mere *prima facie* showing, while the defendant was asked to bring forward contrary evidence as to action taken by the authorities.<sup>169</sup> This approach corresponds to a partial shifting of the burden of proof. In the *Bowerman case*, decided on the same day by the same Commission (15 February 1930), this approach was reaffirmed.<sup>170</sup> Consequently, if the (partial) shifting of the burden of proof is accepted by consolidated arbitral practice,<sup>171</sup> other types of relaxation in the burden of proof are also acceptable, especially in view of the general principle of *in maiore minus inest* (who can do more may also do less).

To the foregoing, it can be added that various international tribunals have lowered the standard, or even modified the burden of proof in certain cases, taking account of particular difficulties of the actor in establishing certain facts.<sup>172</sup> Thus, in the *Sola Tiles case* decided by the Iran-United States Claims Tribunal, it was held that due to the difficulties of the plaintiff to obtain evidence of documents located on Iranian territory (which he had left), the standard of proof could be somewhat lowered.<sup>173</sup> Moreover, in the *Parker case*, the principle of cooperation of the parties was affirmed by the Claims Commission (United States/Mexico) precisely because certain facts linked with the Mexican territory were much more easy to prove by Mexico, the defendant, than by the United States, the plaintiff.<sup>174</sup> Finally, in the *Corfu Channel case*, the Court allowed recourse to indirect evidence for the same reason, namely that the United Kingdom

<sup>167</sup> For more on this point cf. von Mangoldt/Zimmermann on Art. 53 MN 56–59.

<sup>168</sup> Cf. ICJ Reports (1986), pp. 14, 99–100 (paras. 188–190). ICJ Reports (1996), pp. 226, 253–255 (paras. 65–73). On the whole question, cf. also Kolb, R. 'Selected Problems in the Theory of Customary International Law', *NILR* 50 (2003), pp. 119–150 (with further references on p. 129).

<sup>169</sup> *RIAA*, V, p. 80: 'In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realises that the evidence of negative facts can hardly ever be given in an absolutely convincing manner.'

<sup>170</sup> *Ibid.*, p. 106: 'With regard to the responsibility of the Mexican Government for the acts of these forces or brigands, the majority of the Commission would refer to the principles laid down in the opinion of the President [in the Mexico City Bombardment Claims]. Reference is there made to the difficulty of imposing on the British Government the duty of proving a negative fact such as an omission on the part of the Mexican Government to take reasonable measures, and it is stated that whenever an event causing loss or damage is proved to have been brought to the knowledge of the Mexican authorities or is of such public notoriety that it must be assumed that they had knowledge of it, and it is not shown by the Mexican Agency that the authorities took any steps to suppress the acts or to punish those responsible for the same, the Commission is at liberty to assume that strong *prima facie* evidence exists of a fault on the part of the authorities.'

<sup>171</sup> It is accepted also in doctrine: cf. Witenberg, J.C., *L'organisation judiciaire, la procédure et la sentence internationale* (1937), p. 235.

<sup>173</sup> *Iran-United States Claims Tribunal Reports*, vol. 14, p. 238 (para. 52).

<sup>174</sup> Cf. *RIAA*, vol. IV, p. 39 (para. 6).

<sup>172</sup> Cf. Kazazi, pp. 352 *et seq.*

could not secure sufficient evidence because the relevant facts were within the territorial sphere of Albania, to which it had no access.<sup>175</sup>

It may be added that the post World War I mixed arbitral tribunals accepted in many cases a liberalization of the burden of proof in order to take account of difficulties in establishing evidence which could be encountered by a plaintiff in a post-war situation. According to the case law of these tribunals, it was necessary to make some allowances as to the burden and as to the standard of proof in order to avoid degenerating into a *probatio diabolica*.<sup>176</sup>

This practice shows that the *ratio* inherent in the rules of proof for negative facts applies more generally to all cases where the actor faces particular problems of establishing the evidence, provided such problems are beyond its reach and no fault is imputable to it. The point is to take account of the true position of the parties in order not to impose undue hardship, and ultimately injustice.

#### e) Further Issues

- 56 Lastly, it may be asked whether the facts established by the Court in a previous case need to be proved again, or whether a party can rely upon them as having a sort of *res judicata* status (*res judicata pro veritate habetur*). In principle, only legal considerations of the Court can assume a *res judicata* status, namely those contained in the dispositif; and this effect is limited to the parties to a specific case (Art. 59).<sup>177</sup> That does not mean, obviously, that the legal statements of the Court are not of a general precedential value. The Court will depart from them only for cogent reasons. According to Art. 38, the Court bases its decisions on international law. Therefore its findings are expressive of international law. To the extent that the law upon which the Court expresses is general international law, there is an indirect *erga omnes* effect of the judgment in the sense that the Court establishes the content of general international law which binds all the States.<sup>178</sup> Exceptions to this only apply if the Court bases its findings on particular international law (conventions, regional custom, bilateral titles). In this case, indirect effects of its findings apply only to the parties to the convention, or the States belonging to the region in question, etc.

No *res judicata* status accrues to the findings of fact; these are purely relative, applying only to a certain case. It may be recalled that the proceeding at the ICJ is of a private law type and that the Court will thus be satisfied by the formal truth of the evidence presented by the parties.<sup>179</sup> It will not venture into a search for the material truth as it could do in a public law type of process. To some extent this difference may be softened by the presence of reports by other UN organs, by fact-finding commissions, or by action of the Security Council. But this does not ensure that the truth will be established

<sup>175</sup> ICJ Reports (1949), pp. 4, 18.

<sup>176</sup> Cf. e.g. the *Compagnie des Chemins de fer d'Ouglin* case (1926), *Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix*, vol. VI, p. 509; or the *Banque d'Orient v. Gouvernement turc* case *ibid.*, vol. VII, pp. 973–974.

<sup>177</sup> Cf. further Bernhardt on Art. 59 MN 25–36 and 34–44 as well as Shahabuddeen, M., *Precedent in the World Court* (1996); De Visscher, C., 'La chose jugée devant la Cour internationale de Justice', *RBDI* 1 (1965), pp. 5 *et seq.*; Grisel, A., 'Res judicata: l'autorité de la chose jugée en droit international', in *Mélanges Georges Perrin* (Dutoit, B., and Grisel, E., eds., 1984), pp. 139 *et seq.*; Scobbie, I., 'Res judicata, Precedent and the International Court', *Australian YIL* 20 (1999), pp. 299 *et seq.*

<sup>178</sup> For a consideration of these issues cf. also Bernhardt on Art. 59 MN 26.

<sup>179</sup> Cf. *supra* MN 27–30.

objectively either; for example, the Security Council itself does not always act on the basis of facts clearly established.<sup>180</sup> This situation may produce grave problems in judicial cases involving a very high degree of public interest, notably when the use of force is at stake (e.g. in the *Kosovo cases*). But it is an unavoidable corollary of the Court type of proceedings.

This does not mean that facts previously established by the Court (in another case) are of no relevance. True, one party may not rely on such facts as expressing a final truth, but it may rely on them as a probable truth, thus shifting the burden of proof to the other party to show that the facts previously admitted are not true. The formal endorsement of the Court in a previous case does at least establish the provisional truth or validity of a fact.

In practice, the Court has not often been confronted with the problem at stake in this regard. Some overlapping of facts took place in the various *Upper Silesia cases* before the PCIJ.<sup>181</sup> But this overlap did not give rise to difficulties in the proceedings. The problem was also addressed by the Court in the *Border and Transborder Armed Actions case* (Nicaragua/Honduras), where some facts ascertained in the *Nicaragua case* were also relevant. The Court said:

Nor can it be accepted that once the Court has given judgement in a case involving certain allegations of fact, and made findings in that respect, no new procedure can be commenced in which those, as well as other, facts might have to be considered. In any event, it is for the Parties to establish the facts in the present case taking account of the usual rules of evidence, without it being possible to rely on considerations of *res judicata* in another case not involving the same parties.<sup>182</sup>

It may be added that such facts would even not be binding in the formal sense if the parties were the same: *res judicata* applies only to the law, not to the facts.

Lastly, it may be added that the problem seems to arise again in the various proceedings concerning the break-up of the former Yugoslavia: the proceedings in the *Genocide case* have brought about certain determinations which could be relevant to the *Kosovo cases*, and *vice versa*. It may be added that determinations of fact made by other international tribunals (e.g. the ICTY) may be brought in evidence, but do not, obviously, bind the Court.

It has already been said that the Court can take up facts *proprio motu* at any stage of the proceedings,<sup>183</sup> e.g. by ordering an inquiry<sup>184</sup> or a site visit. The Court thus does not depend exclusively on the factual picture which the parties choose to lay before it. Especially in cases where some public interest is at stake, the judgment of the Court should not seem to depart, to the outside observer, from the requirements of a proper administration of justice. To that effect, the facts presented by the parties may seem to the Court too remote, too weak, too partial, insufficient, or otherwise inadequate. It may then, by using its discretion, decide to go further into the matter, departing from exclusive reliance upon the parties for establishing the facts. Here, a certain degree of the public type of procedure may enter into the law of the Court. But the extent to which the Court can investigate such matters, due to its financial and staff shortages, should not be exaggerated. The Court may also ask the parties to provide it with further information

<sup>180</sup> Cf. Brownlie, I., 'International Law at the Fiftieth Anniversary of the United Nations—General Course on Public International Law', *Rec. des Cours* 255 (1995), pp. 9–228, pp. 225–226.

<sup>181</sup> Cf. PCIJ, Series A, Nos. 6, 7, 8, 11, 12, 13; Series B, Nos. 6, 7 and Series A/B, No. 40.

<sup>182</sup> ICJ Reports (1988), pp. 69, 91–92 (para. 54).

<sup>183</sup> Cf. *supra*, MN 36, as well as Amerasinghe, pp. 219 *et seq.*, p. 223; Sereni, *Diritto*, p. 1713.

<sup>184</sup> Cf. the *Nicaragua case*, ICJ Reports (1986), pp. 14, 40 (para. 61).

or with additional of evidence.<sup>185</sup> It can then freely assess any failure to do so by one or by both parties.

- 58 Most of the rules on the production of evidence—and especially the principle on the burden of proof—are not of a *jus cogens* nature. By special agreement the parties can fix particular rules and standards which will prevail as *lex specialis*.<sup>186</sup> Before the Court, no case is known where the parties attempted to modify the rules on the burden of proof. When agreeing on a specific procedure, they have reserved the ordinary rules on the assessment of evidence: an example is the *Frontier Dispute* (Burkina Faso/Mali).<sup>187</sup> The Court will not interpret a special agreement to depart from the ordinary rules; the will to derogate from them must thus be clearly expressed or must be otherwise clearly determinable.

Not all the rules on evidence are, however, of a *jus dispositivum* character. Thus, the principle that the judge may freely assess the evidence ('freie Beweiswürdigung') cannot be derogated from; it is a *jus cogens* rule of judicial procedure. Moreover, a series of concrete procedural rules as enshrined in the Statute or in the Rules cannot be departed from, since the Court is not free to ignore them.<sup>188</sup> Hence, in the *Nicaragua case*, the Court considered itself 'bound by the relevant provisions of its Statute and its Rules relating to the system of evidence, provisions devised to guarantee the sound administration of justice, while respecting the equality of the parties.'<sup>189</sup> The difference between the Court and an *ad hoc* arbitration body is most obvious in this area: the arbitrator may depart much more flexibly from rules of procedure (which the parties may freely choose) than the Court, being a public organ integrated into the system of the United Nations.<sup>190</sup>

### 5. The Principle of Cooperation of the Parties with the Court in Establishing the Relevant Facts

- 59 The application of the burden of proof rule is especially important in cases in which doubts remain as to the existence of a fact. It is then that the burden of proof as a burden of risk rule is important in order to reach a definite judicial conclusion. But the burden of proof is not the only general principle governing the law of evidence. Before the Court, there is not only competition for establishing the evidence; there is also room for cooperation in the establishment of the facts.<sup>191</sup> There is indeed a general principle requiring the parties to cooperate in presenting the evidence. This principle flows from the general duty of the parties to act in good faith when engaging in a judicial procedure.<sup>192</sup> Disputes that States bring before the Court are of a complex nature; they often concern highly important and sensitive international matters. The facts of these disputes are unique and often spread over prolonged periods of time. They are embedded in the power-equilibrium of international relations. The fulfilment of the object and purpose of the judicial procedure in such a delicate and intricate context is dependent to a large extent upon some form of cooperation of the parties. It is understandable that public communities (notably States) appearing before the Court, even more than private parties

<sup>185</sup> Art. 49 of the Statute; and cf. Tams on Art. 49, especially MN 4–16; Delbez, *supra*, fn. 2, p. 113; and Amerasinghe, p. 230 (with further references).

<sup>186</sup> Amerasinghe, p. 270.

<sup>187</sup> ICJ Reports (1986), pp. 554, 588.

<sup>188</sup> ICJ Reports (1986), pp. 14, 39 (para. 59).

<sup>189</sup> For more details cf. Kolb, *Ius Cogens*, pp. 209 et seq.

<sup>190</sup> Cf. *supra*, MN 7, and further Amerasinghe, p. 160; Delbez, *supra*, fn. 2, pp. 111–112.

<sup>191</sup> Cf. Amerasinghe, pp. 172, 204 et seq., 230, 242, 247; Kazazi, pp. 119 et seq., 275 et seq.; Rosenne, *Law and Practice*, vol. III, p. 1091.

<sup>192</sup> Cf. *infra*, MN 64 et seq.

in a municipal law litigation, are expected to help the Court in the task of a proper administration of justice and to provide the Court with adequate information—at least to a minimum extent. It is only if this cooperation is given that the highly specialized proceedings before the Court can succeed.

The principle stated is limited by its aim, which is to allow the fulfilment of the object and purpose of the proceedings, that is, a proper administration of justice. It obviously does not extend as far as to ask the parties to share information or to compromise their ‘egoistic’ interests as opposing parties. For this would again be incompatible with the object and purpose of the proceedings, which is litigation from the standpoint of contrary interests (‘adversarial proceedings’).

The principle of cooperation qualifies the principle on the burden of proof. As has been observed by one commentator:

The principle of collaboration complements the principle *actori incumbit onus probandi*, and in cases where the application of the latter principle may cause unreasonable consequences or hamper due process in the proceedings, the principle of collaboration plays an important and balancing role.<sup>193</sup>

One of the consequences of the principle is that any party is obliged to provide the Court with relevant documents, which only it possesses.<sup>194</sup> Another consequence of the principle is that in certain types of disputes the burden of proof must be shared. As has already been stated, this is especially true in territorial disputes, where each party has to prove the facts sustaining its title in order to enable the Court, if necessary, to establish the relatively better title.<sup>195</sup> Third, the principle allows the Court to ask the parties to submit further evidence or supply information.<sup>196</sup> Fourth, the principle condemns any abuse of procedure. This principle is rich in further actual or potential developments.<sup>197</sup> It can be invoked by the Court in different contexts, in order to improve the administration of justice.

## 6. The Standard of Proof<sup>198</sup>

There is a last question to be addressed: what is the standard of proof in order to satisfy the Court? It must be asked which degree of probability has to be shown: that a fact is to be considered established beyond reasonable doubt; that there is a preponderance of evidence in its favour; or that there is a *prima facie* possibility that the fact is true? As the practice of the Court shows, there is no single standard of proof for all types of judicial facts. All depends on the norms at stake. In cases where the responsibility of a State is the object of the dispute, the Court has shown itself quite demanding, requiring a high degree of certainty (*Corfu Channel case*).<sup>199</sup> The same can be said of the treatment of facts in the *Nicaragua case*, where even the question of attribution of acts to the United States—a legal question—gave rise to the restrictive concept of effective control.<sup>200</sup> At the other end of the spectrum lie provisional measures cases, where it must only be shown that there is a *prima facie* case for competence of the Court on the merits.<sup>201</sup> The issue of competence is obviously a point of law, but at the provisional measure stage, it is

<sup>193</sup> Amerasinghe, p. 205.

<sup>194</sup> *Ibid.*, p. 213.

<sup>195</sup> Cf. *supra*, MN 52.

<sup>196</sup> Art. 49. For comment on the scope and limits of the Court's power cf. Tams on Art. 49 MN 4 *et seq.*

<sup>197</sup> Cf. further *infra*, MN 65 *et seq.*

<sup>198</sup> Amerasinghe, pp. 288 *et seq.*; Kazazi, pp. 323 *et seq.*

<sup>199</sup> ICJ Reports (1949), pp. 4, 16–17.

<sup>200</sup> ICJ Reports (1986), pp. 14, 53 *et seq.* (paras. 93 *et seq.*), (para. 115).

<sup>201</sup> Cf. Oellers-Frahm on Art. 41 MN 26–37.

to some extent treated as a point of fact, for it is the applicant who must satisfy the Court of its probable existence (burden of proof). Between these two standards lie all the other matters to which the Court has applied, mostly without any rational consideration devoted to that matter, very different standards of proof. This form of flexible appraisal is covered legally by the principle of the free assessment of evidence.<sup>202</sup> Thus, in the field of territorial claims, the Court has applied a more relaxed standard of proof than in the responsibility cases. In the context of the establishment of the *uti possidetis* line, the Court recognized that it is often extremely difficult to produce all the (often quite old) titles, such as legislative enactments, going back to the eighteenth and nineteenth centuries. It has satisfied itself with some credible evidence as to their existence, a standard much lower than that applied to cases of responsibility of the State.<sup>203</sup> But there is no room here to go further into that matter, on which a monograph would be highly welcome.

## D. Substantive Principles Related to the Proceedings

### I. General Classification

- 63 There are two different types of substantive principles relevant for the procedural law of international tribunals such as the ICJ. The first class comprises principles of substance directly linked to the pronouncements of the Court, namely the principle of *res judicata* and the duty to state the reasons of the decision. These principles are the object of specific provisions of the Statute (Arts. 59 and 56 respectively) and will be addressed in the contributions dealing with these provisions.<sup>204</sup> The second class of substantive principles flows from the principle of loyalty between the parties; it includes the prohibition of abuse of procedure, estoppel, and the maxim *nemo commodum capere potest de sua propria injuria*. All these principles rest upon the general principle of good faith.

### II. The General Duty of Loyalty Between the Parties (Principle of Good Faith)

- 64 The most fundamental principle of substantive law applicable to judicial proceedings in general is the proposition that, by engaging in proceedings before an international tribunal, the parties enter into a legal relationship characterized by mutual trust and confidence. Thus, the parties are bound by a general commitment of loyalty among themselves and towards the Court.<sup>205</sup> This duty flows from the principle of good faith recognized in general international law and stipulated also in Art. 2, para. 2 UN Charter as a general duty of the member States. The principle of good faith has a series of 'concretizations' in the field of procedural law.<sup>206</sup>

First, it requires the parties not to undertake any action which could frustrate or substantially adversely affect the proper functioning of the procedure chosen, the point being to protect the object and purpose of the proceedings. As has already been said, the proceedings are also characterized by their adversarial nature and the opposing claims of

<sup>202</sup> *Supra*, MN 44.

<sup>203</sup> Cf. Sánchez Rodríguez, L.I., 'L'*uti possidetis* et les effectivités dans les contentieux territoriaux et frontaliers', *Rec. des Cours* 263 (1997), pp. 149–382, pp. 295 *et seq.* and 299 *et seq.*

<sup>204</sup> Cf. Bernhardt on Art. 59 MN 25 *et seq.*, and Damrosch on Art. 56 MN 1–26 respectively.

<sup>205</sup> Cf. Sereni, *Diritto*, p. 1714.

<sup>206</sup> Cf. the detailed analysis in Kolb, *La bonne foi*, pp. 579 *et seq.*

the parties. Thus, it is perfectly open to a party to further its own interests even at the expense of the other party. But this selfishness has some limits. It cannot disregard requirements of a proper functioning of the procedure as such.<sup>207</sup> Thus, a party may not deliberately present false or forged pieces of evidence. It may not impede the production of evidence by the other party by having recourse to pressure or any other equivalent device. Second, the principle forms the basis of the more specific rule on the prohibition of abuse of procedure.<sup>208</sup> Third, it is the basis for the application of procedural estoppel, or of the maxim *nemo commodum capere potest de sua propria turpitudine*. The last two propositions can be applied to evidentiary issues. To that extent, they can be said to govern the proceedings of international tribunals. It is proposed to focus here on the three aspects of abuse of procedure, estoppel and *nemo commodum*.

### 1. The Prohibition of Abuse of Procedure

Abuse of procedure is a special application of the prohibition of abuse of rights, which is a general principle applicable in international law as well as in municipal law.<sup>209</sup> It consists of the use of procedural instruments or rights by one or more parties for purposes that are alien to those for which the procedural rights were established, especially for a fraudulent, procrastinatory or frivolous purpose, for the purpose of causing harm or obtaining an illegitimate advantage, for the purpose of reducing or removing the effectiveness of some other available process or for purposes of pure propaganda. To these situations, action with a malevolent intent or with bad faith can be added. The existence of such an abuse is not easily to be assumed; it must be rigorously proven. The concept cannot completely be caught in the abstract, since it can relate to a variety of different situations.

The case law of the ICJ is replete with instances where the principle of abuse of procedure has been invoked. The Court however has never found the conditions for an application of the principle to be fulfilled. But it did not reject the concept as such; it merely affirmed that its application was not warranted in the cases under consideration. In each case, its analysis seems to have been correct.

The contentious cases in which the principle has so far been invoked are the following:<sup>210</sup>

- *Ambatielos* (claim of abuse of procedure by excessive delay in presentation of a claim);<sup>211</sup>
- *Right of Passage over Indian Territory* (claim of abuse of procedure by application in too short a time-span after deposit of an optional declaration, 'surprise attack');<sup>212</sup>
- *Barcelona Traction* (claim of abuse of procedure by a new application with the same arguments after having discontinued a case);<sup>213</sup>
- *Nicaragua* (claim of futility and political propaganda intent by request of provisional measures);<sup>214</sup>
- *Border and Transborder Armed Actions* (claim of abuse of procedure by institution of judicial proceedings in parallel with the Contadora Process; claim of abuse by the political inspiration of the request and by its artificiality);<sup>215</sup>

<sup>207</sup> Cf. *ibid.*, pp. 587 *et seq.* (in the context of negotiation).

<sup>208</sup> Cf. *infra*, MN 65 *et seq.*

<sup>209</sup> Kolb, *La bonne loi*, pp. 429 *et seq.* There is no room here to venture into a description of the various contents of the principle. Such an analysis will be found in the work referred to in the footnotes.

<sup>210</sup> Cf. *ibid.*, pp. 640 *et seq.*

<sup>211</sup> ICJ Reports (1953), pp. 10, 23.

<sup>212</sup> ICJ Reports (1957), pp. 125, 146–147.

<sup>213</sup> ICJ Reports (1964), pp. 6, 24–25.

<sup>214</sup> ICJ Reports (1984), pp. 169, 178–179 (paras. 21–25).

<sup>215</sup> ICJ Reports (1988), pp. 69, 91–92 (paras. 51 *et seq.*), pp. 105–106 (para. 94).



- *Arbitral Award of 31 July 1989* (claim of abuse of procedure by invoking a declaration of the president of the arbitral tribunal in order to cast doubt on the validity of the award);<sup>216</sup>
- *Phosphate Lands in Nauru* (claim of abuse of procedure to the extent that Nauru demanded from the defendant an attitude which it did itself not display);<sup>217</sup>
- *Application of the Genocide Convention* (claim of abuse of procedure by the request of provisional measures due to political motives and repetition of the request);<sup>218</sup>
- *Aerial Incident of 10 August 1999* (claim of abuse of procedure by invocation of a reservation to an optional declaration whose content was purportedly directed only against Pakistan, thus being discriminatory);<sup>219</sup>
- *Avena* (claim of abuse of procedure by delay in the presentation of the request).<sup>220</sup>

The conclusion to be drawn from these precedents is not that abuse of procedure is an unrecognized principle, for it has been applied by other international tribunals. It is rather that the threshold for admitting an abuse is quite high, and possibly exacting. Moreover, in most cases, the claims that there had been an abuse of procedure were mostly made in a rather unconvincing way, as an appendix to other, more compelling arguments.

67 An interesting situation possibly giving rise to an abuse of procedure would present itself if a State that had lost a case before the ICJ were to move to the political organs of the United Nations in order to evade or to delay the execution of the judgment. Since the competences of political and judicial organs are different, there is no reason to conclude automatically that there has been an abuse of procedure if a political organ is seized after a judicial procedure.<sup>221</sup> For there may be many valid reasons to seek a better or more complete solution of the dispute than the one offered by a judicial institution when important political aspects are at stake. But if there was evidence suggesting that the State in question merely sought to delay the execution of the judgment, or to escape the obligations flowing from it, the political organ could find *in limine* that the abuse of procedure had been established and that the case thus could not be heard.<sup>222</sup> This aspect obviously does not relate directly to the procedure of the Court; but it indirectly touches upon it, since it concerns the efficacy of the Court's rulings. Many other instances of abuses of procedure could be envisaged, such as, *e.g.*, the 'flooding' of the Court with procedural objections of any type, in order to frustrate the efficacy of the proceedings; the late invocation of bases of competence if there is a disadvantage to the other party;<sup>223</sup> the raising of a new request in the course of proceedings if it is prejudicial to the procedural position (equality) of the other party (*alternativa petitio non est audienda*).<sup>224</sup> Often, such questions are addressed by the constitutive texts of the tribunals. Thus the

<sup>216</sup> ICJ Reports (1991), pp. 53, 63 (paras. 26–27).

<sup>217</sup> ICJ Reports (1992), pp. 240, 255 (paras. 37–38).

<sup>218</sup> ICJ Reports (1993), pp. 325, 336 (para. 19); ICJ Reports (1996), pp. 595, 622 (para. 46).

<sup>219</sup> ICJ Reports (2000), pp. 12, 30 (para. 40). <sup>220</sup> ICJ Reports (2004), pp. 12, 37–38 (para. 44).

<sup>221</sup> For a more general treatment of the inter-relation between the Court and the political organs of the United Nations cf. Gowlland-Debbas on Art. 7 UN Charter MN 27–66.

<sup>222</sup> Cf. already Salvioi, G., 'Les règles générales de la paix', *Rec. des Cours* 46 (1933-IV), pp. 9–163, pp. 138–139. Cf. also the more reserved position of Ciobanu, D., *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs* (1975), p. 139.

<sup>223</sup> Cf. paras. 42–44 of the interim orders in the *Legality of Use of Force* cases brought against the Netherlands and Belgium, ICJ Reports (1999), pp. 124 *et seq.* and 542 *et seq.* respectively

<sup>224</sup> Cf. Kolb, *La bonne foi*, pp. 646–649.

Statute and the Rules of Court provide for the timing in the presentation of arguments.<sup>225</sup> The content of these provisions can also be read as a sanction of the principle on prohibition of abuse of procedure, for it is for that reason that they have essentially been drafted.

## 2. The Principle of Estoppel<sup>226</sup>

The principle of estoppel (or of the prohibition of *venire contra factum proprium*) 68 'operates on the assumption that one party has been induced to act in reliance on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position'.<sup>227</sup> Thus, under certain restrictive conditions,<sup>228</sup> the law does not permit the first party to change its position to the detriment of the second; or, if it changes its position, it will become liable for the damage caused thereby to the second party. The first party is bound by the confidence (or the appearance) it deliberately created.

In international law, there are two slightly different applications of the principle of 69 estoppel. The principle can operate on the level of substantive law, but it can also operate procedurally. Substantive estoppel governs the creation, modification, and extinction of subjective rights; it is a source of obligations. Thus, if a party by conduct creates a legitimate expectation of renunciation to a certain part of territory, it will not be able to claim that part of territory in court in a delimitation or territorial dispute. In this situation, the loss of the right concerns the merits of the dispute: it is the territory at stake which is forfeited. Estoppel thereby governs the extinction of the title, not simply the evidence which may or may not be presented.<sup>229</sup> Such a form of estoppel would be applicable also outside a judicial proceeding. On the other hand, there can also be a procedural form of estoppel. If a party has created a legitimate expectation of the other party about certain facts, it may not be able to raise contrary facts in evidence in legal proceedings. The rule of estoppel here concerns matters of the evidence: if a certain state of fact was represented, the party liable for it will be debarred from proving the material truth or an otherwise divergent state of affairs to the judge, because it will be bound by the principle of procedural estoppel. If it chooses to do so, the judge will ignore the evidence presented on account of estoppel.<sup>230</sup>

This form of estoppel has appeared quite often in international proceedings, arbitral and judicial.<sup>231</sup> It may be added that the principle of procedural estoppel (in contrast to

<sup>225</sup> Cf. e.g. Arts. 48 *et seq.* of the Rules.

<sup>226</sup> On this principle cf. Kolb, *La bonne foi*, pp. 357 *et seq.* (with many references), and also McGibbon, I.C., 'Estoppel in International Law', *ICLQ* 7 (1958), pp. 468 *et seq.*; Martin, A., *L'estoppel en droit international public* (1979).

<sup>227</sup> Mosler, H., 'General Course on Public International Law', *Rec. des Cours* 140 (1974-IV), pp. 1-320, p. 147.

<sup>228</sup> These conditions would seem to be the following: (1) a free, clear and unequivocal initial conduct by one party, legally imputable to it; (2) an effective and *bona fide* reliance by another party on that conduct, inciting it to take a certain conduct on its part; (3) damage suffered by that second party resulting from its reliance on the position taken by the first party (provided that that first party was free to change its position), or a relative change in the position of the parties, the first party improving its position (detrimental reliance). For a more detailed analysis cf. Kolb, *La bonne foi*, pp. 359 *et seq.*

<sup>229</sup> Cf. e.g. the *Preah Vihear case*, ICJ Reports (1962), pp. 6, 32.

<sup>230</sup> Cf. Martin, *supra*, fn. 227, p. 306: '[L]'estoppel est une règle de la procédure probatoire en vertu de laquelle une Partie qui a déterminé chez son adversaire une certaine conception des faits ne peut ensuite administrer la preuve que ces faits ont une matérialité différente, est juridiquement empêchée d'essayer d'établir une "vérité" différente'.

<sup>231</sup> For an extremely thorough review of the case law until the 1970s cf. Martin, *supra*, fn. 230, pp. 65 *et seq.*

the principle of substantive estoppel) can operate independently from any specific damage (detrimental reliance) suffered by the other party. Alternatively, it could be said that the damage would result automatically from the admissibility of the piece of evidence in opposition to previous conduct or assurances. And hence, the piece of evidence shall not be admissible.

- 70 The question remains whether the principle of procedural estoppel may also apply to a point of law (possibly only if that point must be raised by one party in order to be taken up by the Court). The question came to the fore in the *River Oder case*: there, the six governments facing Poland argued that Poland, after the conclusion of the written pleadings, could not raise an argument relating to the ratification of a Convention that had not been produced in the Memorial and Counter-Memorial, but was then taken up at the stage of oral proceedings. However, the Court rejected the plea by affirming first that 'the matter is purely one of law such as the Court could and should examine *ex officio*'.<sup>232</sup> Moreover, Poland had apparently never expressed its intention to abandon the argument in question, and the six applicant governments thus could not rely on any representation of such an abandonment by Poland.<sup>233</sup> This second argument goes to the conditions under which procedural estoppel may be invoked, which in the view of the Court had not been fulfilled *in casu*. The first argument concerns the question as to whether estoppel is applicable to a question of law at all, when this question must be examined *ex officio* by the Court. The Court affirmed that it is not: the objective and peremptory conditions of the Statute governing the proceedings take precedence over the principle of estoppel which is concerned only with the purely bilateral adjustment of rights between the parties.

### 3. *The Maxim nemo ex propria turpitudine commodum capere potest*<sup>234</sup>

- 71 The Maxim *nemo ex propria turpitudine commodum capere potest* flows from the re-elaboration of Roman Law in the Middle Ages; it operates, similarly to the principle of estoppel, either on the level of substantive law or on the level of procedural law. In this last area, it is close to the principle of estoppel. It indeed applies along the same lines: a party claiming a certain fact or a certain legal point will not be admitted to benefit from it because of a previous fault committed in the context of the argument in question. A particular damage need not be shown, since the point is essentially to sanction a fault by not allowing a party to reap the benefits of its previous misconduct. The fault relevant to our maxim ordinarily involves an illegal act, but sometimes it simply consists of a morally reprehensible conduct, or of negligence.
- 72 The maxim has been applied in a wide array of situations in international law, and it has also loomed quite largely in the procedure of international tribunals. A classical application is to be found in the *Factory at Chorzów case*:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has,

<sup>232</sup> PCIJ, Series A, No. 23, pp. 4, 19.

<sup>233</sup> *Ibid.*

<sup>234</sup> On this maxim, cf. Kolb, *La bonne foi*, pp. 487 *et seq.* (with further references); as well as *id.*, 'La maxime "nemo ex propria turpitudine commodum capere potest" (nul ne peut profiter de son propre tort) en droit international public', *RBDI* 33 (2000), pp. 84-136; Cheng, pp. 149 *et seq.*

by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.<sup>235</sup>

The effect of the principle is that the Court will *in limine* put aside the plea thus vitiated.

Another application of the maxim in question is to be found in the *Jurisdiction of the Courts of Danzig* case. In that case, the Court recalled that Poland could not be heard when invoking the incompetence of its municipal tribunals if this incompetence resulted from Poland's failure diligently to transform the provisions of an international treaty into internal law. The point is that a State cannot plead an objection, which would be tantamount to pleading the non-execution of one of its international obligations. The Court expressed itself in the following terms:

[T]he Court would have to observe that, at any rate, Poland could not avail herself of an objection which, according to the construction placed upon the Beamtenabkommen by the Court, would amount to relying upon the non-fulfillment of an obligation imposed upon her by an international agreement.<sup>236</sup>

The foregoing analysis shows that the maxim is a principle applicable to procedural law. It lends itself to a rich array of applications, and is characterized by a form of flexibility that is inherent in the general principles and maxims of the law.

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<sup>235</sup> PCIJ, Series A, No. 9, pp. 3, 31. That principle was taken up again in the *Interpretation of Peace Treaties* case (1950) by Judge Read: ICJ Reports (1950), pp. 221, 244; cf. also Diss. Op. Azevedo, *ibid.*, pp. 248, 252-254.

<sup>236</sup> PCIJ, Series B, No. 15, pp. 3, 26-27.