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International Adjudication of Global Public Goods: The Intersection of Substance and Procedure

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Abstract

This article, based on the non-controversial proposition that the way and degree in which international courts can contribute to the protection of a public good depends, in part, on the procedural law of such courts, sets out to expose the plurality of connections between procedure and substance. Procedures can further the substantive values of public goods but can also serve interests of their own and can even work against such substantive values. This article articulates the normative choices that courts inevitably have to make and reflects on the question of whether, and to what extent, the shaping of these connections is properly part of the international judicial function, taking into account problems of legitimacy that may arise when judge-made procedures undo state-made substantive law.

1 Introduction

This article explores the plurality of connections between the procedural law of international adjudication and the substantive law that protects public goods. The article articulates choices that courts face and discusses whether shaping these connections is a proper part of the international judicial function, taking into account problems of legitimacy that may arise when judge-made procedures undo state-made substantive law.

The choice of this topic comes from the consideration that international adjudication is a small, but not irrelevant, component in the complex international

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governance structure through which states and other actors seek to deliver global public goods.[1] Some treaties grant international courts the authority to protect, express and shape values that reflect public goods. This holds in particular for relatively integrated regimes that are underpinned by common, hierarchically higher values. For instance, by adjudicating claims based on the European Convention on Human Rights (ECHR),[2] the European Court of Human Rights (ECtHR) can help produce the public good of human-rights protection. The roles of other human rights bodies, the Dispute Settlement Body of the World Trade Organization (WTO) and the International Criminal Court (ICC) are comparable.[3] Also outside such hierarchically structured contexts, international courts can adjudicate claims against states that undermine global public goods. If we accept the protection of whales as a global public good; Australia's claim before the International Court of Justice against Japan may help to produce that good.[4]

The potential role of international courts in the protection of public goods leads us to question whether the procedural law of courts is conducive to the protection of such goods. In one of the rare, albeit extremely short, discussions of the relation between international substantive and procedural law, Jenks noted that it is to be expected that procedural law follows substantive law, and vice versa:

> In every legal system law and procedure constantly react upon each other. Changes in the substantive law call for new procedures and remedies; new procedures and remedies make possible changes in the substantive law. So it is in international law; if we wish so to develop the law as to respond to the challenge of our times our procedures and remedies must be sufficiently varied and flexible for the purpose.[5]

It would follow that the procedural law of international courts should allow for adjudication of claims involving public goods and, where it does not do so, procedural law should be adjusted.

However, the relationship between international adjudication and the provision of public goods is more complex than this. While there are examples where the procedure for international adjudication allows for an efficient application of substantive law that embodies public goods, adjudication may also serve different interests and may even impede the realization of public goods. The classic objective of inter-state judicial procedure is the preservation of individual rights of states. Yet global public goods, and the community interests with which they are associated, cannot be reduced to

1 See for definition *infra* section 3.1.

2 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13–4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf.

3 In such cases, the role of international courts in the production of public goods is not incomparable to the one that John Rawls envisaged for domestic courts in the protection of 'the body of fundamental laws that embody a society's public values and conception of justice'. Rawls, 'The Idea of Public Reason', in J. Bohman and W. Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (1997) 93, at 110–111.

4 *Whaling in the Antarctic (Australia v. Japan)*, ICJ Reports (2010), available at http://www.icj-cij.org/docket/files/148/15951.pdf.

5 C. W. Jenks, *The Prospects of International Adjudication* (1964), at 184.

bilateral schemes.[6] In particular, in the International Court of Justice (ICJ) there is a tension between the collective, multilateral nature of substantive principles that the Court may be asked to litigate, and the bilateral nature of its procedures.[7]

Moreover, international adjudication itself may be seen as a public good that competes with other (substantive) public goods. The maintenance of an international court, as a trusted institution by relevant actors, sits uneasily with an assertive approach that may be necessary to protect global public goods.[8] Claims, based on international rules associated with public goods, rarely present themselves in black-and-white terms that allow courts to apply such rules without reflection on their role in the development of international law.[9]

The plurality of connections between particular procedural arrangements, on the one hand, and the substantive law protecting global public goods, on the other, raises fundamental questions.[10] What role should substantive law play in justifying procedural rules?[11] Is procedural law simply the handmaiden of substance; its only legitimate goal being the efficient application of substantive law? Or does procedure serve other values, independent of and perhaps even in opposition to the efficient application of substantive laws? If this is true, is it normatively desirable? Are courts the proper actors to make decisions on these questions, or should they be left to other actors?

While the question of whether international governance is generally capable of dealing with the provision of public goods has received some attention,[12] less consideration has been given to the challenges that public goods raise for dispute settlement.[13] The related distinction between the procedure and substance of international law is under-studied and under-theorized.[14] While textbooks commonly contain separate sections dealing with substantive and procedural law, respectively,[15] the question of where the dividing line lies, and how they are connected, is usually neglected.

[6] Benzing, 'Community Interests in the Procedure of International Courts and Tribunals', 5 *The Law and Practice of International Courts and Tribunals* (2006) 369, at 374. See for a comparable point in relation to multilateral disputes, Fisler Damrosch, 'Multilateral Disputes in The International Court of Justice', in L. Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads* (1987) 376.

[7] Fisler Damrosch, *supra* note 6, at 376. An example of the latter is the judgment of the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening) Judgement*, ICJ Reports (2012) see e.g. para. 100.

[8] See *infra* section 5.

[9] See, generally, von Bogdandy and Venzke, 'On the Democratic Legitimation of International Judicial Lawmaking', 12 *German Law Journal* (2011) 1341.

[10] Compare Martinez, 'Process and Substance in the "War on Terror"', 108 *Columbia Law Review* (2008) 1013, at 1020.

[11] Bone, 'Making Effective Rules: The Need for Procedure Theory', 61 *Oklahoma Law Review* (2008) 319, at 329.

[12] See e.g. I. Kaul *et al*. (eds), *Providing Global Public Goods: Managing Globalization* (2003); I. Kaul *et al*. (eds), *Global Public Goods: International Cooperation in the 21st Century* (1999).

[13] See for an exception K. E. Maskus and J. H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime* (2005).

[14] Even the otherwise comprehensive study by C. Biehler, *Procedures in International Law* (2008) does not discuss the topic.

[15] E.g., P. Sands, *Principles of International Environmental Law* (2003); P. Birnie *et al*., *International law & the Environment (2009);* D. Bogdansky *et al*., (eds), *The Oxford Handbook of International Environmental Law* (2008); D. Moeckli *et al*. (eds), *International Human Rights Law* (2010); J. Rehman, *International Human Rights Law* (2009).

This article aims to provide an analytical framework and to distinguish various ways in which procedures may guide and shape the application of substantive law. Its central argument is that there is no single or automatic relationship between substance and procedure, that this relationship reflects normative choices, and that our assessment of these choices also depends on whom we want to entrust with making them.

I will start with a brief discussion of the connection between substantive and procedural law (section 2). I will then identify procedural issues of international adjudication that are particularly relevant for the protection of public goods (section 3). I will next explore four functions of procedure in relation to the substantive goals of public goods: procedure as transmission, procedure as law-development, procedure as substance and procedure as neutralization (section 4). Finally, I will review the role of courts in shaping the procedural law in relation to the protection of global public goods (section 5).

2 The Substance – Procedure Interface in International Law

We can characterize the relationship between the protection of global public goods and international adjudication as a relationship between substance and procedure. The rules of international law that protect interests that are generally cited as global public goods (protection of the environment, peace, protection of human rights and so on) are rules of substantive law, whereas the rules of international adjudication are generally not of a substantive nature. If a rule is either substantive or procedural, with nothing in between, it would follow that rules of adjudication are procedural rules.

Salmond provides a useful starting point for conceptualizing the distinction between substantive and procedural law:

> The law of procedure may be defined as that branch of the law which governs the process of litigation … All the residue is substantive law, and relates not to the process of litigation, but to its purposes and subject-matter … Procedural law is concerned with affairs inside the courts of justice; substantive law deals with matters in the world outside.[16]

The question is whether this distinction holds in international law. Rosenne answers this question in the negative, observing that 'international law does not recognize a sharp distinction between substantive and adjectival law'.[17] While there is more than a grain of validity in this observation (I will return to it in section 4.3 below), it would needlessly complicate things if we were to throw out the distinction altogether. In many cases the dividing lines are clear and relevant, in particular when substance and procedure are subject to different applicable rules. This is clearly the case in private

[16] J. W. Salmond, *Jurisprudence: or the Theory of Law* (1902), at 577–578, cited in Risinger, '"Substance" and "Procedure", Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"', 30 *UCLA Law Review* (1982) 189, at 196–197.

[17] S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (1997), at 1063.

international law,[18] in commercial arbitration[19] and for international-law claims in domestic courts, where a substantive wrong may be determined by international law, but the procedure is decided by the law of the forum.[20] Immunity is an example of a procedural principle that is distinct from the substance of the law on which a claim is based.[21] A distinction between substance and procedure also can be identified in the procedural law of international tribunals. All international courts have a set of rules that they label as procedural and which govern the process of adjudication – not, at least not directly, the substance of the rights at issue. Rosenne, after questioning the existence of the distinction,[22] proceeds by writing several hundred pages on procedural issues that are governed by the Rules of Court, and it is hard to treat these rules as anything other than procedural.

However, the distinction between procedure and substance is not a binary one. It is a trite proposition that '[t]he assumption that categories of substance and procedure are mutually exclusive and exhaustive simply seems to defy reality.'[23] Some questions that present themselves in international adjudication cannot easily be reduced to questions of procedure (such as the time period for submitting a memorial) or substance (such as the right of a state to discharge mercury in a transboundary watercourse). Examples include the admissibility of a claim based on a multilateral treaty, or the standing of a state to bring such a claim. In many jurisdictions, and also in many textbooks, admissibility is treated as part of the procedures of courts.[24] The International Law Commission (ILC) treated the question as an aspect relating to the implementation of state responsibility.[25] Yet, the question of whether a claimant state is an injured state requires an assessment of whether the defaulting state owed an obligation towards the claimant state, which is a question of substantive law.[26] In

[18] In private international law the distinction between substance and procedure is 'important . . . since matters of substance are generally determined by the *lex causae* while matters of procedure are governed by . . . the law of the country to which the court where any legal proceedings are taken belongs'. G. Biehler, *Procedures in International Law* (2008), at 7.

[19] The distinction between substance and procedure is relevant since 'the arbitral process is independent of the system of law that regulates the rights and obligations of the parties in relation to their substantive agreement'. O. Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994), at 78.

[20] Alford, 'Apportioning Responsibility Among Joint Tortfeasors for International Law Violations', 38 *Pepperdine Law Review* (2011) 233, at 247.

[21] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Judgement, ICJ Reports (2002) 25, at para. 60; *Jurisdictional Immunities of the State (Germany v. Italy)*, para. 58.

[22] Rosenne, *supra* note 17, at 1063.

[23] Main, 'The Procedural Foundation of Substantive Law', 87 *Washington University Law Review* 801, at 816; See also Ailes, 'Substance and Procedure in the Conflict of Laws', 39 *Michigan Law Review* (1941) 392, at 404 *et seq*. (defining the dichotomy as a useful 'tool of thought' (at 407) rather than a clear distinction between mutually exclusive categories).

[24] E.g., M. Shaw, *International Law* (2008), at 319–320, 362–367, 342, 352, 360, 362, 380, 382, 393, 379–380, 413, 416–417; Simmons and Danner, 'The International Criminal Court', in D. Armstrong (ed.), *Routledge Handbook of International Law* (2009) 239, at 242.

[25] ILC, Responsibility of States for Internationally Wrongful Acts, Annex to GA Res. 83 (LVI), 12 December 2001, and corrected by UN Document A/56/49/Vol I/Corr 4 (2001), Article 42.

[26] J. Crawford, *Multilateral Rights and Obligations in International Law* 319 *RdC* (2006), at 421–422. See also Vázquez, 'Treaty-Based Rights and Remedies of Individuals', 92 *Columbia Law Review* (1992) 1082, at

any case, admissibility does not deal with the 'world inside the courts', as referred to by Salmond.

Questions of jurisdiction can also be treated either as questions of substance or as questions of procedure. In certain states, some jurisdictional questions appear to be treated as procedural.[27] For the ICJ, jurisdiction falls under Section II of the Statute, on the competence of the Court, whereas Section III deals with procedures. The Statute stipulates that the Court can adopt its own (procedural) rules for carrying out its function (Article 30), but this clearly does not empower the Court to change the basis of its own jurisdiction. Still, jurisdiction is quite separate from the substantive rules that define the rights and obligations of states.

Rules on such topics as admissibility and jurisdiction may be easier to classify if we resist the temptation to treat all rules that govern the process of international adjudication as part of one single category of procedural rules. It is useful to recognize a middle category that deals with the introduction of a claim and the jurisdiction of the court in regard to that claim. A rule of thumb for distinguishing these categories of procedural law is that procedure in the narrowest sense can be promulgated and changed by courts themselves,[28] while procedure relating to the introduction of claims is so tied up with the substance of adjudication that states generally reserve the power of development to themselves (though they may not be able to exclude a role of courts in interpreting such rules).[29]

Also for questions of responsibility and reparation, the distinction between substance and procedure is blurred. Reparation fits better in the category of substance than of procedure.[30] To define it in terms of procedure would be 'to confound the remedy with the process by which it is made available'.[31] The Articles on State Responsibility and the Articles on Responsibility of International Organizations, formulate reparation largely, though not entirely, in terms of substantive rather than procedural law.[32] However, several aspects of responsibility have substantive and procedural aspects,

1141(noting that the standing doctrine addresses the issue 'whether the duty imposed by the treaty gives rise to a correlative primary right of the litigant such that the litigant may enforce the rule in court.').

27 In the Netherlands, criminal jurisdiction is laid down in the law on Criminal Procedure. In the United States the Federal Rules of Civil Procedure contain some rules concerning the jurisdiction of courts (for example Rule 12(h)(3)). Similarly, with respect to criminal law, 18 U.S.C. ch. 211 (titled: Jurisdiction and Venue), is part of Part II of 18 U.S.C. (titled: Criminal Procedure).

28 Art. 30, Statute of the International Court of Justice, 18 April 1946; Art. 26 of the ECHR.

29 However, the distinction is not sharp, and in the ICC and the WTO for example, the political bodies retain oversight over all procedural rules; Art. 2 WTO DSU; Art. 51 ICC Statute.

30 Also Bentham interpreted the definition of the possible range of remedies that might be accorded for a violation of a right as being part of the substantive law, see Risinger, *supra* note 16, at 191, 196. See also ICJ, *Arrest Warrant* case, para. 60; *Jurisdictional Immunities of the State*, para. 100 (stating that 'whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation').

31 Salmond, *supra note* 16; *contra*, Alford, *supra* note 20, at 247 (remedy is procedure).

32 Responsibility of States for Internationally Wrongful Acts, *supra* note 25, Art. 31; 'Draft Articles on the Responsibility of International Organizations', in *Yearbook of the International Law Commission* (2011), Volume II, Part Two, Art. 31.

such as the principle of joint and several liability.[33] Also questions relating to the invocation of responsibility (such as the local remedies rule[34] and acquiescence in the lapse of a claim[35]) have both procedural and substantive aspects. Moreover, it is apparent from the differences in the way principles of reparation are applied differently in different courts, that there is a strong connection between the substance of principles of reparation and the procedures of the particular court in which they are applied.[36]

Even where the categories of substance and procedure can be distinguished in principle, substantive law can have procedural implications, and vice versa. For instance, the development of substantive law may affect the construction of rules of intervention whereas, conversely, rules on intervention may have implications for the construction of substantive law. It has rightly been said that, '[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights'.[37]

While slicing up rules into substance or procedure and putting them in boxes, with due recognition of grey zones in between, is intellectually satisfying,[38] the question is whether classifying some legal rules as 'substantive' and others as 'procedural' gives us some analytic or normative traction in addressing litigation over global public goods, that we would otherwise lack.[39] This article argues that it does; it allows us to identify different functions that procedural rules can play in regard to particular substantive values.

3 Public Goods and Issues of International Adjudication

Before examining the various procedural aspects of public goods (Section 3B), we first need to clarify the concept of global public goods (Section 3A).

A *Two Concepts of Public Goods*

The literature that deals with public goods from the perspective of international law advances two conceptualizations, one based on the substance of values that

[33] Noyes and Smith, 'State Responsibility and the Principle of Joint and Several Liability', 13 *Yale Journal of International Law* (1988) 225.

[34] Responsibility of States for Internationally Wrongful Acts, *supra* note 25, Art. 44(b). See on the procedure-substance debate in connection with the local remedies rule the position of Ago in ILC, *Yb ILC* (1977), Volume 2, Part Two, at 47 (local remedies as substance) versus the later work of the ILC on state responsibility (local remedies as procedure). See Report of the Drafting Committee, UN Doc. A/CN.4/SR.2662 (2000), at 25–26. The procedural approach has been confirmed in international case law, see e.g., *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, 42 *ILM* (Merits, 2003) 811, at para. 149.

[35] Responsibility of States for Internationally Wrongful Acts, *supra* note 25, Art. 45.

[36] See e.g., for the rather particular approach of the ECtHR on questions of reparation, Pellonpää, 'Individual Reparation Claims under the European Convention on Human Rights', in A. Randelzhofer and T. Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999) 109, at 112–125. See generally Gray, 'The Choice Between Restitution and Compensation', 10 *EJIL* (1999) 413, at 418, 422–423.

[37] Main, *supra* note 23, at 802.

[38] As observed by Main, it fits the lasting influence of the Enlightenment: 'The capacity to distinguish between and among things became an integral part of intelligibility', Main, *supra* note 23, at 809.

[39] Martinez, *supra* note 10, at 1020.

constitute the public good, and one that defines public goods in terms of their (under-) enforcement.

Most authors who use the term 'public goods' in international law discourse, use it to refer to values or interests that are considered to be good for the international community as a whole, often using the vocabulary of *erga omnes* norms.[40] They view both public goods and *erga omnes* norms as reflecting fundamental values of the international community.[41] The usual examples are the outlawing of acts of aggression and genocide, the protection of individuals from slavery and racial discrimination,[42] the right to self-determination[43] and perhaps the obligation to protect the global environment.[44] While not uncommon, the conceptualization of public goods in normative terms raises the question of what, if any, is the added conceptual value of the term 'public goods'.

The second conceptualization of 'public goods' has more analytical power. It is based on the fact that the protection of public goods raises a problem of collective action. Public goods present values that everyone has an interest in, yet individual states have insufficient incentives to protect them and tend to rely on the efforts of others.[45] In economic literature, this aspect of this concept of public goods is commonly defined in terms of the characteristics of non-rivalry (anyone can use a good without diminishing its availability to others) and non-excludability (no one can be excluded from using the good).[46]

Though based on a different starting point, the two approaches largely overlap. This overlap is obvious in the criterion of non-excludability: if a value is defined in terms of protection or prevention (such as protection of the global environment, or prevention of genocide), it is difficult to see how one could be excluded from benefiting from such a protection or prevention. As to the criterion of non-rivalry, some values protected by *erga omnes* obligations, are inherently non-rivalrous.[47] For example, one state's enjoyment of a clean environment will not disturb the enjoyment of that good by another state.[48]

[40] E.g. Benzing, *supra* note 6, 371.

[41] Delbrück, 'Laws in the Public Interest – Some Observations on the Foundations and Identification of erga omnes Norms', in V. Götz, P. Selmer and R. Wolfrum (eds), *Liber Amicorum Günther Jaenicke. Zum 85. Geburtstag* (1998) 17, at 18. For similar arguments see Villalpando, 'The Legal Dimension of the International Community: How Community Interests Are Protected in International Law', 21 *EJIL* (2010) 387, at 388.

[42] *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ Reports (1970) 3, at 33.

[43] *East Timor (Portugal v. Australia)*, ICJ Reports (1995) 90, at 102.

[44] Tol and Verheyen, 'State Responsibility and Compensation for Climate Change Damages – A Legal and Economic Assessment', 32 *Energy Policy* (2004) 1109, at 1113, para 2.1.4 and at 1115, para. 2.3.1.3; Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41, at 44 (noting that the 1972 Stockholm Declaration on the Human Environment proclaimed 'a commitment *erga omnes* to the protection of an international public good, rather than a reciprocal obligation between states').

[45] M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Revised edition ed.) (1971).

[46] Kaul *et al.* (1999), *supra* note 12, at 3-4. See also Petersmann, 'International Economic Law, "Public Reason" and Multilevel Governance of Interdependent Public Goods', 14 *Journal of International Economic Law* (2011) 23, at 33; Maskus and Reichman, 'The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods', 7 *Journal of International Economic Law* (2004) 279, at 284.

[47] Villalpando, *supra* note 41, at 392.

[48] Francioni, *supra* note 44, at 55; Maskus and Reichman, *supra* note 46, at 284.

However, while the conceptualizations overlap, their foundations differ. Assigning an *erga omnes* quality to certain norms is not based on the normative ambition to emphasize the foundations of the international community, but rather reflects a strategic choice to solve the problem of under-enforcement of norms that protect the public interest.[49] Though the concept of *erga omnes* is usually seen as an attribute of obligations, it is rather the reverse side of the coin that makes it a potentially powerful enforcement tool: the rights that all other states have *vis-à-vis* the state that acts in breach of an *erga omnes* obligation. This applies to multilateral treaties, which are the dominant vehicle for establishing public-interest regimes in international law, yet usually suffer from a lack of enforcement if the institutions established under such treaties are too weak.[50]

From any superficial glance at the practices within multilateral treaty regimes, it is clear that this asset has limited practical relevance. States have preferred weak supervisory authority of international institutions[51] over decentralized enforcement and have preferred not to make much use of the theoretical opening that the concept of *erga omnes (partes)* has offered. The virtual absence of inter-state claims in the ECtHR, and the very sparse amount of practice in the ILC Commentary to Article 48 of the Articles on State Responsibility illustrate this point.[52] The point is that creating a right of enforcement as such does not solve the problem of under-enforcement, but just shifts the collective action problem to the realm of enforcement.[53]

Nonetheless, this theoretical power of *erga omnes* norms to solve problems of under-enforcement makes the public goods concept relevant for our assessment of the relationship between substance and procedure, as it allows us to distinguish between procedural arrangements in terms of their ability to produce public goods.

B *Procedural Aspects of Public Goods*

Although many rules of procedural law are mostly neutral (i.e. their application to questions of public goods does not raise procedural questions that differ from those raised in litigation of non-public goods), some of them may apply differently to public goods than to non-public goods.

[49] Brilmayer and Tesfalidet, 'Third State Obligations and the Enforcement of International Law', 44 *NYU Journal of International Law and Politics* (2011) 1, at 12–13, 21; A. T. Guzman, *How International Law Works: A Rational Choice Theory* (2008), at 68; Posner, 'Erga Omnes Norms, Institutionalization, and Constitutionalism in International Law', 165 *Journal of Institutional and Theoretical Economics* (2009) 5, at 13; B. Simma, *From Bilateralism to Community Interest in International Law*, 250 *RdC* (1994) 217, at 295; Picone, 'The Distinction between *Jus Cogens* and Obligations *Erga Omnes*', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011) 411, 415.

[50] Crawford, *supra* note 26, at 426. But see critically, Blum, 'Bilateralism, Multilateralism, and the Architecture of International Law', 49 *Harvard International Law Journal* (2008) 323, at 361.

[51] See generally on such institutions T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009).

[52] The same holds for the WTO; see Chi Carmody, 'Of Substantial Interest: Third Parties under Gatt', 18 *Mich J Int'l L* (1997) 615, 656.

[53] Posner, *supra* note 49, at 12 *et seq.*

A few examples will illustrate this point. The construction of rules of standing is the archetypical example of a (mixed procedural/substantive) question that is affected by the public goods nature of the values in question and that, in turn, can shape the content and protection of public goods.[54] While public goods are, by definition, not at the disposition of individual parties, principles of standing generally require individualization. A second example relates to the role of multiple responsible parties. In some cases a procedure against one state may provide a public good. This holds in particular for 'weakest-link' public goods.[55] If one state fails to contribute, the public good may not be provided at all, despite the efforts of other states. Examples include endemic diseases and nuclear weapons. However, other public goods ('aggregate-effort' goods) require action by all actors involved,[56] for instance, climate change and protection against the over-fishing of tuna. The implication for procedural relevance is that enforcement against one state may not suffice to provide the good. If true, the contribution of international adjudication to the delivery of the good depends on the authority of international courts to adjudicate claims against multiple responsible parties.

Other procedural issues that may raise particular questions in cases of public goods litigation include: 'intervention in the public interest',[57] where arguably relaxed admissibility requirements should apply in cases of protection of public goods;[58] participation of non-state actors as *amici curiae*, who may also contribute to the protection of community interests;[59] fact-finding powers of international courts;[60] the standard and burden of proof [61] and the powers of international courts to obtain evidence of co-responsible parties who are not a party to the dispute before the court.[62]

[54] See generally C. Tams, *Enforcing Obligations Erga Omnes in International Law* (2010), at 25 *et seq.*

[55] Hirshleifer, 'From Weakest-link to Best-shot: The Voluntary Provision of Public Goods', 41 *Public Choice* (1983) 371, at372; S. Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (2007) at 47.

[56] Barrett, *supra* note 55, at 74; Hirshleifer calls this category 'summation public goods', since the outcome is determined by the sum of the efforts of the participants; Hirshleifer, *supra* note 55, at 372.

[57] Palchetti, 'Opening the International Court of Justice to Third States: Intervention and Beyond', 6 *Max Planck UNYB* (2002) 139.

[58] Benzing, *supra* note 6, at 398 *et seq.* (arguing that in cases involving *erga omnes* obligations, the protection of community interests should be a sufficient interest for the purpose of Art. 62 ICJ Statute).

[59] Palchetti, *supra* note 57, at 165; Benzing, *supra* note 6, at 401; Kolb, 'General Principles of Procedural Law', in A. Zimmermann, C. Tomuschat and K. Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 793; Gruner, 'Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform', 41 *Columbia Journal of Transnational Law* (2003), 923, at 924; Spain, 'Beyond Adjudication: Resolving International Resource Disputes in an Era of Climate Change', 30 *Stanford Environmental Law Journal* (2011) 343, at 358; Spain, 'Integration Matters: Rethinking the Architecture of International Dispute Resolution', 32 *University of Pennsylvania J Int'l Law* (2010) 1.

[60] Benzing, *supra* note 6, at 383; V. S. Mani, *International Adjudication: Procedural Aspects* (1980), at 194; Teitelbaum, 'Recent Fact-Finding Developments at the International Court of Justice', 6/1 *The Law and Practice of International Courts and Tribunals* (2007) 119; Leach *et al.*, 'Human Rights Fact-finding: The European Court of Human Rights at a Crossroads', 28 *Netherlands Quarterly of Human Rights* (2010) 41; Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case', 21 *Yale J Int'l L.* (1996) 305, at 329.

[61] Benzing, *supra* note 6, at 389; Mani, *supra* note 60, at 202 *et seq.*; C.E. Foster, *Science and the Precautionary Principle in International Courts and Tribunals. Expert Evidence, Burden of Proof and Finality* (2011); M. Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals* (1996).

[62] Benzing, *supra* note 6, at 384; Lachs, 'Evidence in the procedure of the International Court of Justice: Role of the Court', in E. G. Bello and B. A. Ajibola (eds), *Essays in Honour of Judge Taslim Olawale Elias* (1993), at 205 *et seq.*

In sum, the focus on the protection of public goods allows us to identify procedural rules that may, and as a normative matter arguably should, operate differently in cases of public goods than in cases of non-public goods. Against this background, we can examine how procedural law may or may not facilitate the protection of public goods.

4 The Substance – Procedure Distinction Applied to Public Goods: Four Perspectives

We can distinguish four different functions of procedure that operate in relation to substance. I define them as: procedure as transmission (Section 4A), procedure as law-development (Section 4B), procedure as substance (Section 4C) and procedure as neutralization (Section 4D).[63]

A *Procedure as Transmission*

The first perspective is that procedural rules transmit and give effect to the substantive values of global public goods.[64] From a normative viewpoint, the construction of these procedures fits with an instrumentalist perspective on the substance–procedure interface. The task of procedure is to facilitate the implementation of substantive law: 'whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law'.[65] Bentham advanced the idea that the 'course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws.'[66] Likewise, Pound critiqued lawyers who had made adjective law an 'agency for defeating or delaying substantive law and justice instead of one for enforcing and speeding them.'[67]

Given the specific nature of public goods, which calls for a legal arrangement that allows for enforcement of the relevant substantive rules, one might argue that, precisely in the context of public goods, procedure should follow substance.[68] This view explains part of the practice of international adjudication.

First of all, this is true for those cases where disputes over global public goods can be 'debundled' into bilateral disputes. This will be the case when, even though all states benefit from a public good, one state will be hit in particular – for example, the victim state of aggression, or the state where oil spilled on the high seas eventually washes up ashore.[69] Such debundling is also possible in the case of interdependent obligations[70]; the *Whaling*

[63] The typology is in part based on Martinez, *supra* note 10.

[64] Ohlin, 'Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law', 14 *UCLA Journal of International Law and Foreign Affairs* (2009) 77, at 82; L. May, *Global Justice and Due Process* (2011), at 52.

[65] Bone, *supra* note 11.

[66] Bentham, 'Principles of Judicial Procedure with the Outlines of a Procedure Code', in J. Bowring (ed.) *The Works of Jeremy Bentham Vol. 2* (1843) 1, at 6, cited in Martinez, *supra* note 10, at 1022.

[67] Pound, 'Mechanical Jurisprudence', 8 *Columbia Law Review* (1908) 605, at 617 cited in Martinez, *supra* note 10, at 1023.

[68] Brilmayer, *supra* note 49; A. T. Guzman, *supra* note 49, at 68–69.

[69] Art. 42(b)(i) of the Articles on State Responsibility, *supra* note 25.

[70] Art. 42(b)(ii) of the Articles on State Responsibility, *supra* note 25; Tams, *supra* note 54, at 80.

case may be an example.[71] Procedures for bilateral claims can also be relevant to the protection of global public goods, if they can be qualified as weakest-links public goods. Claims can be individualized, and no procedural problems of aggregate-effort public goods need to arise. The *Nuclear Test* cases serve as an example.[72] If we assume that peace is a global public good, the various cases brought before the ICJ over the armed conflict involving Congo, Uganda and Rwanda are other examples.[73]

However, even where claims cannot be 'bilateralized', procedural law may transmit substantive values. Its procedural law allows the ECtHR to give effect to the public goods enshrined in the Convention. Article 34 of the ECHR allows a victim to lodge a complaint against two or more contracting states. Moreover, the Court can order the joinder of applications, if they involve different respondent states, or decide to conduct proceedings in applications against different states simultaneously, if, for example, the applications concern the same factual circumstances.[74] The WTO dispute resolution procedure also has various possibilities to take community interests into account, for instance: it can allow a relatively wide range of states to bring a claim for any alleged violation that undermines a public good protected under the WTO treaties. Also, panels have a 'right to seek information' that expressly extends to WTO members who are not parties to the particular dispute.[75] In these respects, procedural law may allow for the transmission of the substantive law that enshrines public goods.

The procedural law of the ICJ offers less on these points but is not entirely powerless. The Court, in some cases, specifically shaped procedural rules with the goal of giving effect to underlying substantive values. The decision of the ICJ in *Armed Activities on the Territory of the Congo*[76] not to follow the ruling in the *Monetary Gold* case, but rather to follow *Certain Phosphate Lands in Nauru*, may have been influenced by the fact that norms of *ius cogens* (public goods at least in the normative sense) were involved. In his separate opinion in *Armed Activities*, Dugard argued that where there is freedom of decision, states should be influenced by the degree to which norms reflect global public goods.[77] While he did not think that this would actually allow the Court to find jurisdiction in this case, five judges thought that given the gravity of the matter, a different outcome might well be justified. While the gravity argument seems to rely on the

[71] *Whaling in the Antarctic (Australia v. Japan)*, ICJ Pending Case since 13 July 2010 (2010).

[72] *Nuclear Tests (New Zealand v. France)*, ICJ Reports (1974) 457; *Nuclear Tests (Australia v. France)*, ICJ Reports (1974) 253.

[73] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports (2006) 6; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports (2005) 168; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, removed from the list (1999); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)*, removed from the list (1999).

[74] ECHR, Rules of the Court, July 2009, Rule 42 (1) and (2). Examples: *Behrami and Behrami v. France*, ECHR (2007); *Serbia/Montenegro; Northern Ireland cases v. Ireland and UK*.

[75] Article 13 WTO DSU; see also WT/DS70/AB/R Canada – Aircraft, at para. 185.

[76] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, *supra* note 73, at 237–238, para. 203.

[77] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment*, Separate Opinion of Judge Ad Hoc Dugard, ICJ Reports (2006) 86.

normative dimension of public goods, there was a hint of an economic concept: given that the Genocide Convention had put the task of enforcement of the prohibition on genocide in the hands of states, the five judges noted that it was not self-evident that reservations about the jurisdiction of the Court could not be regarded as incompatible with the object and purpose of the Convention.[78]

The idea that procedure should be shaped and applied in order to give effect to community interests has found favourable reception in scholarship, with many writers arguing that in cases involving *erga omnes* obligations, community interests should guide the interpretation and development of rules on standing and intervention.[79]

The instrumentalist perspective has the virtue of simplicity and provides courts with a seemingly clear signpost. Yet, even apart from the three competing normative considerations discussed below, it is limited in one major respect. It offers little guidance for dealing with competition between public goods. In the case of competition between human rights and the environment, the question arises as to which substantive laws or values should procedural rules seek to advance in a particular situation? Is the Australian attempt to save whales more of a public good than the Japanese claim to have the liberty to use the ocean's resources? Is the claim of the United States to protect dolphins more of a public good than another state's interests in catching tuna?[80] The instrumentalist perspective does not answer these questions. Except for those public good values that are enshrined in norms of *ius cogens*, the instrumentalist perspective does not even provide a solution for conflicts of competition between public and non-public goods. The concept of procedure as transmission 'is insufficient on its own to help us normatively evaluate all the interactions between substantive and procedural law'.[81]

B *Procedure as Law-Development*

The second perspective is that procedures serve to determine what the substance is. It is overly simplistic to see procedure only as a set of rules that allows the transmission of substance – it is relevant to understanding what the aim and scope of such rules of substance are in the first place. Procedure, and the voices that can be heard through procedure, are part of the process for identifying what a public good is, how to interpret it and how to strike balances when it comes to conflict with other public goods.

[78] *Armed Activities, supra* note 77, Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, Simma; see also Dissenting Opinion Koroma para. 13.

[79] Chinkin, 'Presentation by Professor Christine Chinkin', in C. Peck and R.S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 43, at 50, 56; Also Knox, 'A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission', 28 *Ecology Law Quarterly* (2001) 1. This position also seems to underlie Fisler Damrosch, *supra* note 6.

[80] United States – Restrictions on Imports of Tuna, *Report of the Panel (DS21/R – 39S/155);* see, on that matter, Knox, 'The Judicial Resolution of Conflicts Between Trade and Environment', 28/1 *Harvard Environmental Law Review* (2004) 1; Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict', 12 *Georgetown International Environmental Law Review* 1.

[81] Martinez, *supra* note 10, at 1084.

It is a trite observation that international courts do not just settle disputes but can contribute to the shaping of international law.[82] This applies both to the very qualifications of particular norms in terms of 'public goods' norms (or rather, *erga omnes* obligations) and to the substance of such obligations and their relationship with competing normative claims.

It is more likely than not that the protection of public goods will either conflict with other public goods (environment-human rights, tuna-dolphin etc.), or with non-public goods, and courts will need to shape the balance. Moreover, we have to take into account that many public goods will be 'impure' public goods. For instance, the public good of protection of human rights is not necessarily non-rivalrous, since protection of one particular human right might lead to a transgression of other human rights.[83] The real question then is not whether a public good is protected, but which good is protected. Courts have a critical role in shaping the balance, and the function of procedure is to determine who makes use of the courts and who frames the arguments.[84] Therefore, the rules on access to a court, intervention and the role of *amici curiae* are relevant to this perspective.

C *Procedure as Substance*

The third perspective on the substance–procedure interface emphasizes the intrinsic values of procedure. Courts can decline to give effect to public goods claims, not because they embrace different substantive values, but because they are tied to procedural rules with different aims and logic. In international criminal law it is commonplace that procedure does not merely enforce substance, but represents its own values that are not reducible to its instrumental value.[85] This function is also relevant in other areas of international law. We can recall Franck's distinction between the substantive and procedural aspects of fairness, which 'may not always pull in the same direction.'[86] Procedural fairness, informed by equality of the parties, may conflict with what may be necessary for the protection of global public goods.

The 'procedure-as-substance' perspective can be divided into three separate procedural grounds on which courts can refrain from giving effect to substantive values. The first ground relates to due-process considerations in a narrow sense. The interests of international adjudication in resolving international disputes are protected by procedural arrangements. Examples relate to the burden of proof, the hearing of evidence and written proceedings. Each one of such rules has to reflect the fundamental principle of the equality of the parties and ensure due process in international

[82] Von Bogdandy and Venzke, 'Democratic Legitimation', *supra* note 9.

[83] See e.g. Petersen, 'International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism', 1 *Asian Journal of International Law* (2011) 149, at 153.

[84] See for a discussion in the context of WTO: G Shaffer, 'Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides? The Case of Trips and Pharmaceutical Patent Protection', 7 *J Int'l Econ L* (2004) 459.

[85] Ohlin, *supra* note 64, at 82.

[86] T.M. Franck, *Fairness in the International Legal and Institutional System: General Course on Public International Law*, 240 *RdC* (1993-III), revised and reprinted as *Fairness in International Law and Institutions* (1995) at 7.

litigation.[87] They have intrinsic interests in themselves, separate from the substantive values that may be at issue in a particular litigation.

The second ground relates to what I earlier referred to as 'procedure in the broad sense' as related to the introduction of claims. Prime considerations here are the values represented by sovereign equality and consent, which feed into the rules on jurisdiction and admissibility.

Thirdly, the procedure-as-substance argument relates to the position of the court as an institution. Indeed, it can be argued that international courts, themselves, constitute a public good.[88] Although courts are certainly of a different nature than more traditional global public goods, such as protection of the environment, peace or protection of human rights, which can be qualified as 'final public goods'. However, courts can be categorized as an intermediate public good, which contributes towards the provision of final global public goods.[89] The implication is that courts themselves are a good that is worth protecting.[90]

This third perspective might explain the reluctance of some courts to give effect or develop the substantive law of public values. This holds in particular for the ICJ: the Court may value its own continued authority over the just outcomes of individual cases. If the Court allowed the concept of obligations *erga omnes* (or *ius cogens*) to challenge the principle of its consensual jurisdiction, it would scare away respondent states and would undermine the Court's role in the protection of public goods.[91] Courts, moreover, may have an interest in using a restricted standing doctrine to prevent a flood of cases that would endanger the effective functioning of a court, as has happened with the ECtHR. These considerations lead to the paradox that preserving the value of an intermediate good may undermine its contribution to the final public good.[92]

The *Monetary Gold* principle illustrates each of these three arguments.[93] A case in point is the *East Timor* case, where the ICJ found that it could not exercise jurisdiction over Australia because Indonesia had not consented to the jurisdiction of the Court, unbothered by the right of self-determination that was at issue.[94] The Court subjected the *erga omnes* concept

[87] Rosenne, *supra* note 17, at 1092.

[88] Kaul *et al.*, 'Defining Global Public Goods', in I. Kaul *et al.*, (1999) *supra* note 12, at 13–14.

[89] *Ibid.*

[90] Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication: Developing Standards of Participation in WTO Law', 12 *German Law Journal* (2011) 1175, at 1178.

[91] Villalpando, supra note 41, at 415. See (critically, because any such effect is speculative and 'is not conducive to the development of international law') Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case', 21 *Yale J Int'l L.* (1996) 305, at 346.

[92] Note that the fact that Courts seek to ensure that they have the support of states may not have any connection with public goods, but rather with the tendency of all organizations to see themselves as indispensable. See Suchman 'Managing Legitimacy: Strategic and Institutional Approaches', 20/3 *Academy of Management Review* (1995) 571.

[93] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, ICJ Reports (1954) 19; Orakhelashvili, 'The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from *Monetary Gold* to *East Timor* and Beyond', 2 *Journal of International Dispute Settlement* (2011) 373.

[94] *East Timor*, *supra* note 43.

to 'the procedural rigors of traditional bilateralism'[95] and had to excuse itself from duty of the protection of the good of self-determination. Another example is the *Case Concerning the Delimitation of Maritime Areas* between Canada and France, in which the Court of Arbitration declined to address the delimitation of the continental shelf beyond 200 nautical miles, stating that this would have involved international organs entrusted with the administration and protection of the Area which were not represented in the proceedings.[96]

Another example of the bilateralizing effect of procedural rules are the rules on provisional measures, which likewise can disaggregate complex public goods cases.[97] In the *Application of the Genocide Convention* case,[98] Bosnia requested several provisional measures, which were addressed to states or entities not party to the dispute. Three were addressed to all the parties to the Genocide Convention, and one provisional measure was addressed to the United Nations Peacekeeping forces in Bosnia (UNPROFOR). The Court rejected these requests[99] and had to reduce a situation with potentially multiple responsible parties into a bilateral structure. The goal of protecting the values of procedure prevailed over the goal of protecting the public good.

D Procedure as Neutralization

The fourth perspective takes the 'procedure as substance' perspective one step further. Procedural rules not only serve an end in themselves, but they, or rather their application, may feed back on substantive rules themselves. According to this perspective, the fact that the recognition of community interests has not resulted in a right to protection, which any state could invoke in the general interest,[100] casts doubt on the status and meaning of the substantive rules themselves, if only because conduct contravening the public good is validated.[101] The notion of 'public interest standing' in areas

[95] Simma, *supra* note 49, at 298.

[96] *Delimitation of Maritime Areas*, 31 International Legal Materials (1992) 1145, at paras. 78–79; Wolfrum, 'Enforcing Community Interests Through International Dispute Settlement: Reality or Utopia?', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 1132, at 1142–1143.

[97] Benzing, *supra* note 6, at 378; Kempen and He, 'The Practice of the International Court of Justice on Provisional Measures: The Recent Development', 69/4 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2009) 919; S. Rosenne, *Provisional Measures in International Law* (2005); Haeck and Burbano Herrera, 'Interim Measures in the Case Law of the European Court of Human Rights', 21/4 *Netherlands Quarterly of Human Rights* (2003) 625.

[98] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Order, Further Request for the Indication of Provisional Measures, ICJ Reports (1993) 325.

[99] *Ibid*, para. 40 (stating that the 'Court may, for the preservation of [disputed] rights, indicate provisional measures to be taken by the parties, but not by third States or other entities who would not be bound by the eventual judgment to recognize and respect those rights'). The Court added that this meant that it also could not, in the exercise of its power to indicate provisional measures, indicate 'by way of "clarification" that those States or entities should take, or refrain from, specific action in relation to the acts of genocide which the Applicant alleges are being committed in Bosnia–Herzegovina'.

[100] Wolfrum, 'Enforcing Community Interests Through International Dispute Settlement', *supra* note 96, at 1137.

[101] E.g. A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), at 69 (noting that if a court decides not to decide a case on the merits without providing a principled explanation, the court indirectly validates the government's action).

which involve multilateral rights and obligations remains undeveloped.[102] Although the ICJ has established the *erga omnes* principle,[103] it has not established a mechanism to enforce it by means of international dispute settlements.[104] General international law has not solved the tension between the bilateral structure of dispute settlement, on the one hand, and the recognition of community interests, on the other.[105] This point is well expressed by Simma:

> ... the observer is frequently torn between feelings of satisfaction because international law is finally being invested with some of the social accountability long developed in domestic law, and fears that the still primitive, still essentially bilateralist infrastructure upon which the new, more progressive edifices rest will turn out to be too weak to come to terms with the implications of such community interest.[106]

The fact that procedures have not been attuned, may not be simply a time-lag but may reflect the continuing impact of bilateral structures, which are based on individual rather than community interests.[107]

This perspective requires us to revisit the distinction between procedure and substance. Procedure is not only the transmitter of substance, or protecter of intrinsic procedural rights, but is co-determinative of what the law is in the first place. Holmes said that substantive and procedural law were both indispensable as tools for predicting when the force of government would be brought to bear.[108] This position is relevant to international law as well.[109] We can recall Rosenne's position that 'international law does not recognize a sharp distinction between substantive and adjectival law'.[110] And he observed that the fact that the international legal system consists of equal and sovereign states, 'shapes the system and erases the distinction between adjectival and substantive law.'[111]

Indeed, substantive law is never entirely a-procedural, but rather it 'is constructed with a specific procedural apparatus in mind to vindicate the rights created or the responsibilities assigned by that substantive law'.[112] The construction of substantive law is informed by expectations about the availability of procedures.[113]

All of this is particularly relevant to global public goods. After all, the *raison d'être* and defining feature of public goods, in legal terms, lie in the need to provide for

[102] Crawford, *supra* note 26, at 421–422.

[103] ICJ, *Barcelona Traction, Light and Power Company, supra* note 42, at 32, para. 31.

[104] Wolfrum, *supra* note 96, at 1132.

[105] Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 *AJIL* (2002) 798; C. Tams, *supra* note 54, at 342.

[106] Simma, *supra* note 49, at 249.

[107] Villalpando, *supra* note 41, at 414.

[108] Holmes, 'Natural Law', 32 *Harvard Law Review* (1919) 40, at 42. The same argument was made by Cook in, '"Substance" and "Procedure" in the Conflict of Laws', 42/3 *Yale Law Journal* (1933) 333, at 348; see also Solum, 'Procedural Justice', 78 *Southern California Law Review* (2004) 181, 320 ('substance cannot effectively guide primary conduct without the aid of procedure').

[109] Reisman, 'A Hard Look at Soft Law', *Faculty Scholarship Series. Paper 750* (1988); J. Alvarez, *International Organizations as Law-makers* (2006).

[110] Rosenne, *supra* note 17, at 1063.

[111] *Ibid.*

[112] Main, *supra* note 23, at 822.

[113] Main, *supra* note 23, at 802.

enforcement that cannot otherwise be provided.[114] Seen in this light, the fact that the ICJ in the *Barcelona Traction* case did not recognize rights that would correlate with *erga omnes* obligations,[115] 'might suggest that existing conditions of admissibility of claims (including the nationality of claims) would continue to apply to breaches of obligations *erga omnes*. Such an interpretation would deprive the Court's earlier pronouncement of much of its significance.'[116]

Two comments are in order. First, it would obviously be too much of a stretch to say that international substantive rules that are not matched by procedure do not fulfil any relevant function. Substantive law in any case serves expressive functions[117] and moreover can exercise a compliance pull on relevant actors, quite apart from its application through procedural law. The fact that the ICJ in the *Barcelona Traction* case did not match the *erga omnes* obligations with a corresponding remedy does not preclude that these obligations have had legal impacts on such fields as immunities of state officials and the effect of international law before national courts.[118]

Second, international proceedings are only one way of enforcing substantive values relating to public goods.[119] The concept of global public goods does not indicate which means are the most appropriate. Given the public nature of public goods, it stands to reason that enforcement is left primarily to political institutions rather than to courts. Therefore, the absence of procedures that allow for proper litigation of substantive values, cannot in itself be determinative of the (lack of) normative effect of such values but is at best co-determinative, requiring a contextual analysis in conjunction with other modes of enforcement.

However, it needs to be emphasized that though the task of enforcement in a public goods scheme is usually entrusted to other actors, courts do play a central role in regard to public goods, in particular in normatively integrated regimes, such as that of the ICC in respect to the value of ending impunity for international crimes, the WTO in respect to economic welfare and human rights courts in respect to the protection of human rights.[120] It is in these areas that the role of courts is not limited to incidental claims, but is based on a compulsory jurisdiction that allows them to provide a sustained contribution to the shaping and development of public goods.[121] The potential

[114] Posner, *supra* note 49, at 11–12.

[115] Crawford, *supra* note 26, at 425.

[116] Scobbie, 'Assumptions and Presuppositions: State Responsibility for System Crimes', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (2009) 290–293. But see Tams, *supra* note 54, at 196 (critiquing the restrictive interpretation of para. 33–34 of the Judgement in *Barcelona Traction*).

[117] Geisinger and Stein, 'A Theory of Expressive International Law', 60 *Vanderbilt Law Review* (2007) 77.

[118] Reisman, 'The Enforcement of International Judgments', 63 *AJIL* (1969) 1, at 5–7. See generally Shelton, 'Normative Hierarchy in International Law', 77 *AJIL* (1983) 291 and M. Ragazzi, *The Concept of International Obligations Erga Omnes* (2000).

[119] Barrett, *supra* note 55, at 81. See for a broader disucssions of mechanism for the enforcement of erga omnes obligations: Zemanek, 'New Trends in the Enforcement of *erga omnes* Obligations', in J. A. Frowein and R. Wolfrum (eds), 4 *Max Planck Yearbook of United Nations Law* (2000) 1–52.

[120] Von Bogdandy and Venzke, 'Democratic Legitimation', *supra* note 9, at 1342.

[121] *Ibid.*

judicial contribution to the law pertaining to global public goods is particularly significant as it injects and strengthens a public dimension in an otherwise decentralized system.[122]

5 The Dynamics of the Substance – Procedure Interface

The four categories presented above not only show alternative perspectives for understanding and assessing the connection between substance and procedure but also offer choices for relevant actors. There is nothing automatic or given about the intersection between procedure and substance. Rather, it can be construed by relevant actors in ways that support, compete with or neutralize substantive values.

This leads us to the question of actors. Who construes the interface? Is the development of procedural norms and their interaction with substantive norms different from the development of substantive norms themselves?

The starting point for this analysis is that the shaping of procedural law is a two-tiered process involving both states and courts.[123] At the first level, states determine the extent to which procedure furthers substance, or whether it protects other interests or even curtails apparent developments in procedural law. The differences in the procedural aspects of the ECtHR, the WTO DSU, and the ICJ Statute, respectively, illustrate how states that negotiated these texts opted for different procedural arrangements, particularly on aspects of admissibility and jurisdiction, which have had different effects on the implementation of substantive law applied by these courts.

However, the controlling power of these statutes on the procedural law is relatively limited. Apart from the fact that each of these texts leaves leeway to courts to develop and adjust their procedural law; statutes are quickly bypassed by developments in substantive law. The Statute of the ICJ predates by many years the development of substantive law pertaining to the protection of public goods and can hardly be expected to be tailored to the furtherance of such substantive law.

Therefore, at the second level, the courts themselves can affect the substance–procedure interface. They can further shape and develop the procedural law in individual decisions.[124] Courts are active agents that do not just serve as handmaidens of a pre-determined relationship between substance and procedure, but can actively shape that relationship and can influence the development and actual protection of public goods. Although the Statute and Rules of the ICJ do not 'anticipate the many

[122] See for the link between international courts and public authority Von Bogdandy and Venzke, 'In Whose Name? An Investigation of International Court's Public Authority and its Democratic Justification', 23 *EJIL* (2012) 7. See the public law dimensions of international responsibility Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility', 16 *Indiana Journal of Global Legal Studies* (2009) 535.

[123] Jenks, *supra* note 5, at 184.

[124] Dugard, *supra* note 77, at 86, para. 10 (noting that: 'The judicial decision is essentially an exercise in choice. Where authorities are divided, or different general principles compete for priority, or different rules of interpretation lead to different conclusions, or State practices conflict, the judge is required to make a choice'. This observation would seem to be relevant both for substantive and procedural law).

potential complexities of multiparty litigation',[125] many of the procedural rules can in their application be adjusted and tailored for multiparty aspects. The question then becomes whether the courts will see themselves as being in a position to interpret and use such principles, specifically with a view to the protection of public goods, and how they 'exercise their choice'.[126]

The element of choice is particularly relevant when substantive values are contested – which, given the feeble balance between the horizontal and the public law model, is currently bound to remain the case in situations of public-goods litigation. Practice shows many examples where courts have shaped procedural law and, through that, have strengthened the enforcement of particular obligations and, to some extent, their status and contents. One example is the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) on Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area.[127] The Chamber stated that 'joint and several liability' arises 'where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them.'[128] This is an element of interpretation which influences procedure and, through that, substance. However, there are also examples that demonstrate the opposite. One example is the *East Timor* case,[129] in which the Court declined to apply its decision from the *Certain Phosphate Lands* case[130] and instead relied on its decision from the *Monetary Gold* case,[131] despite the fact that the case could have been a contribution to the protection of the public good of self-determination.

The question of what is the proper role of courts in shaping the substance-procedure interface can be approached from three levels: in terms of the judicial function, in terms of the limits set by international law, and in terms of an interpretative process.

First, the degree and way in which courts shape the procedure–substance interface come down to the question of how courts regard the nature and scope of their judicial function.[132] Article 30 of the Statute of the ICJ vests the Court with the power to 'frame rules for carrying out its functions'. The question, then, is what the functions of the court are in relation to connecting the procedure to the developments

[125] Fisler Damrosch, *supra* note 6 at 379.

[126] Dugard, *supra* note 77, at 86, para. 10.

[127] Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law Of the Sea on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (1 February 2011).

[128] *Ibid.*, para 201.

[129] *East Timor, supra* note 43.

[130] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment,* ICJ Reports (1992) 240, at 261–262.

[131] *Case of the monetary gold removed from Rome in 1943 Italy* v. *France, United Kingdom of Great Britain and Northern Ireland and United States of America),* ICJ Reports (1954), 19.

[132] See H. Lauterpacht, *The Function of Law in the International Community* (1933), reprint 2000 (Lawbook Exchange), in particular part II. See for a recent discussion of the concept: 'The International Judicial Function: Discussion' in James Crawford and Margaret Young (eds), *The Function of Law in the International Community: An Anniversary Symposium* (2008), Proceedings of the 25th Anniversary Conference of the Lauterpacht Centre for International Law, available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php.

in substantive law: should they ensure the effective application of substantive law, in particular when public goods are at issue, and for that purpose assume broader powers?[133] Should courts safeguard competing procedural principles; reflecting sovereign equality? Or are they to recognize that where states have not granted them full powers to adjudicate claims on public goods, the development of substantive law has stopped half-way? The notion of the judicial function does not indicate clear choices between the four perspectives discussed in the previous section. However, two comments can be made. First, it would seem that in the case of a conflict, the prime function of courts is to protect the procedural rights that are intrinsic to international adjudication. Second, it would seem to be incompatible with the judicial function to resort to what has been labelled as 'procedure as avoidance': 'the deliberate manipulation of procedural rules to avoid or delay the accurate enforcement of substantive law'.[134] Courts should not refrain from giving effect to particular substantive values because they disagree with the result imposed by substantive law and seek to impose their own preference instead, under the guise of procedure.

While there are, at a broad level, commonalities in the judicial function in general, and in regard to the substance–procedure interface in particular, the perception of such functions differs between courts. The extent to which states have recognized public goods in substantive law and have provided for procedures that allow for the adjudication of claims relating to such goods (as is the case in the ECtHR), provides a context that differs radically from that of the ICJ, where the general substantive law is much less settled, and where states have curtailed the powers of the Court to a far greater extent.

Second, international law sets some limits on this judicial role of shaping the substance–procedure interface. These limits differ between various procedural aspects, in particular in terms of their being subject to judicial amendment. Courts can properly set rules on time limits for memorials, for the production of evidence, and so on. Moreover, the Advisory Opinion of the Seabed Disputes Chamber suggests that in drafting Advisory Opinions, courts, freed from the constraining role of consent, may go further in interpreting procedural law (which in turn may have effects on substance).

In contentious proceedings, rules on jurisdiction and admissibility are generally beyond the scope of judicial rule-making, and the power to modify them is limited by the treaties and statutes. This, in principle, is not different when public goods are at issue. Even the fact that a dispute relates to compliance with an *ius cogens* norm cannot set aside that limit, as confirmed by the ICJ in its judgment in *DRC-Rwanda*.[135] The decision of the Court in *Jurisdictional Immunities of the State* is based on similar considerations; the Court held that the procedural law of immunities blocked the Italian courts from considering the substance of the claims, regardless of whether or not it was based on violations of norms of *ius cogens*.[136]

[133] See the references in *supra* note 79.

[134] Martinez, *supra* note 10, at 1082.

[135] *Armed Activities*, *supra* note 73/77, para. 64. See also *East Timor (Portugal v. Australia), Judgment*, ICJ Reports (1995) 102, at para. 29.

[136] *Jurisdictional Immunities of the State (Germany v. Italy)*, *supra* note 7.

Third, jurisdictional principles and other procedural aspects are open to, and subject to judicial interpretation.[137] It can be argued that procedural norms should be interpreted according to the applicable substantive law. The ICJ's holding that 'an international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation'[138] can be extended to procedural rules. Even though in certain situations this assessment may not provide sufficient basis for setting aside jurisdictional limitations (since, there is no obvious interpretative space), it may be different for other procedural rules. Thus, it has been argued in regard to the fact-finding powers of courts that 'if norms giving expression to community interests are at issue the international court should more actively make use of its fact-finding powers'.[139]

Because of its possible impact on substantive law and the inevitability of choice, either between competing public goods, or between public goods and non-public, goods, the exercise of judicial powers to develop and apply procedural law inevitably raises concerns about legitimacy. Whereas judicial decisions that faithfully transmit substance or that faithfully protect procedural values may seem neutral, they also imply a choice not to neutralize substantive law. Conversely, decisions where procedure is used to neutralize substance imply a choice against instrumentalism.

Above everything else, the articulation of reasoning seems to be of key importance in legitimizing the role of courts to choose between the different functions of procedural law in relation to substance. More generally, transparency of judicial proceedings is of major importance in this respect. The relatively limited nature in which these are realized raises profound questions of legitimacy.[140] In practice we have seen only few signs of a rejection by states, and other relevant actors, of the way in which international courts and tribunals have shaped procedural law and its interface with substance; suggesting that courts have utilized their powers to extend procedure beyond the mandate given to them in a way that extended the substantive law in a modest way.[141] However, the criticism of the DSB on the decision of the Appellate Body to accept *amici curiae* briefs, as well as the critique on the case law on interim measures in the ICJ and the ECtHR, indicate that states will carefully scrutinize judicial activism, even when based on the logic of public goods.[142]

[137] See Orakhelashvili, 'The Concept of International Judicial Jurisdiction: A Reappraisal', 3 *Law and Practice of International Courts and Tribunals* (2003) 501, at 518–533.

[138] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, ICJ Reports (1980) 73, at 76.

[139] Benzing, *supra* note 6, at 385.

[140] See also Von Bogdandy and Venzke, *supra* note 122, at 8; Ioannidis, 'A Procedural Approach to the Legitimacy of International Adjudication', *supra* note 90; Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law', 115 *Yale Law Journal* (2006) 1490.

[141] That certainly is true for the ICJ, see McWhinney, 'The International Court of Justice and International Law-making: The Judicial Activism/Self-Restraint Antinomy', 5 *Chinese Journal of International Law* (2006) 3.

[142] See Lim, 'The *Amicus* Brief Issue at the WTO', 4 *Chinese Journal of International Law* (2005) 85.

6 Concluding Observations

A few observations conclude the article. First, substance and procedure must be distinguished to make analytical and normative sense, but at the same time they must be seen in conjunction to understand the protection of global public goods in international law.

Second, not all procedural questions have the same relationship to substantive values. Whereas questions of standing have a direct relevance to substantive values and to global public goods in particular, for many procedural rules, such as time limits, no such link exists. Therefore, in applying the above analytical scheme, we thus need to differentiate.

Third, the development of substantive principles for the protection of common interests has so far gone unmatched with the development of procedural rules; even though the normal rules of procedure allow some leeway to cater for the procedural aspects of public goods. Generally, procedure forces a disaggregation and a fragmentation of litigation efforts, which sits uneasily with the nature of global public goods.

The differences between international courts in the degree and way in which they shape international law are substantial, particularly in terms of the extent to which states have indeed recognized public goods in substantive law, and they have provided for procedures that allow adjudication of claims relating to such goods. As yet, the move towards recognition of global public goods does not appear to have had many ramifications at the level of general principles of procedure that relate to the protection of such public goods.[143] We do see, however, certain patterns that seem to be driven by the same considerations that underlie the development of substantive public goods, notably recognition of community interests that can be consumed by all states but that, without changes in legal arrangements, may go unprotected as not all states have an interest in actively enforcing such norms.

Fourth, international adjudication plays a marginal role in the protection of global public goods. The potential of the *Whaling* case[144] and the Advisory Opinion of the Seabed Disputes Chamber of ITLOS[145] shows that they are not irrelevant, in fact energy should be equally spent in thinking about other decentralized approaches; such as countermeasures[146] and, in particular, public order mechanisms that are better able to grasp the complex and collective nature of conduct that can endanger or protect global public goods.[147]

[143] Whether there are general principles at all is contested, see Kolb, *supra* note 59, at 793.

[144] *Whaling* case, *supra* note 4.

[145] Advisory Opinion of the Seabed Disputes Chamber of ITLOS, *supra* note 127.

[146] See E. K. Proukaki, *The Problem of Enforcement in International Law. Countermeasures, the Non-injured State and the Idea of International Community* (2010) at 90 *et seq*; Tams, *supra* note 54, at 198.

[147] Petersmann, *supra* note 46.