Introduction

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This book is aimed at celebrating the beginning of the works of the Department of International Law and Dispute Resolution of the Max Planck Institute (MPI) Luxembourg for Procedural Law and takes its title from an eponymous conference held in Luxembourg in 2015 for the launch of its activities.

This volume offers a fresh, integrated, and interdisciplinary approach to this new field of International Law – International Procedural Law – that the Department of International Law and Dispute Resolution is striving to construct epistemically. With contributions from twenty-five scholars, among renowned experts in the field as well as younger researchers working at the MPI, it sets out a research agenda on the topic of the specialty of the Department. The fundamental aim of the volume is to examine the increasingly notable theme of international dispute settlement from an innovative procedural perspective. Indeed, with the jurisdictionalization of international law that has taken place during the last thirty years, scholars, as well as practitioners, have shown an important and growing interest for international law litigation.[1] Yet, little attention has been paid to the procedural aspects thereof.[2]

In building upon scholarship analysing sub-fields of international litigation (general international law analysis, international economic law procedures, human rights or European law mechanisms), it will attempt at providing an up-to-date seminal picture of the evolution of the role of procedure across these domains as well as an overall illustration of the field.

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1 L. Boisson de Chazournes, Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach, 28(1) European Journal of International Law (2017), 13-72.

2 H. Ruiz Fabri, The WTO Appellate Body or Judicial Power Unleashed: Sketches from the Procedural Side of the Story, 27(4) European Journal of International Law (2016), 1075-1081.

I. *Towards a history of international procedural law: six authors in search of a field*

This preamble sets out to introduce the topic of international procedural law, focusing on the intellectual history of international dispute settlement. The leading idea is to take a picture of the major contributions to the reflection on international procedural law, starting from some milestone works which developed the basic ideas, the epistemic grounds of an international procedural law. It will particularly focus, chronologically, on six fundamental authors: B. Windscheid, M. Huber, N. Politis, G. Morelli, S. Rosenne and E. Lauterpacht.

Why six authors? First, the idea draws of course on the novel and play by Luigi Pirandello (*Sei personaggi in cerca di autore*[3]), where the novelist changed the perspective and tried to shed light on a different perspective (being the relationship between not only the characters, but also their link to the author and the different actors at play in a theatre). This shift of perspective suits perfectly the project of conceiving and identifying international procedural law: looking at practices, documents, postures that may be well known to international lawyers while unveiling a new perspective, focusing on what procedure actually is and means.

Second, as far as the identity of these characters goes, a disclaimer is needed. The first of these authors belongs to a different category from the others, not being an international lawyer. He was nevertheless the first to theorize the distinction between substance and procedure in depth. This differentiation took more time to find its place in international law. As far as this field is concerned, we need to look at those authors who have worked on international dispute settlement to find some reflection on procedure, sociological conflation that gave birth to an assimilation between international procedural law and international dispute settlement that is still largely ongoing but that should be deconstructed.

1. *Bernhard Windscheid (1817-1892)*

Our first author is not an international lawyer. Nevertheless, he is a fundamental mind in the reflection on what procedure is and what its logics are. Indeed, for a long time, reflection on procedure has been focusing on the

3 L. Pirandello, 'Six Characters in Search of an Author' (1921), available at https://www.ibiblio.org/eldritch/lp/six.htm. (last visited 22 November 2018).

idea of action, the instrument that Roman law has conceived in order to give a procedural body to a substantial right. However, substance and procedure have long been tied together intellectually. This was the result of the monist conception of Savigny, deeply rooted in the Roman theory of the *actio*: the procedural action would be simply the substantial right in motion.[4]

Windscheid distinguished the two ideas one from the other.[5] His dualist position strongly advocated for the autonomy of procedural law, as opposed to the substantial right at stake in the merits. He theorised a *Klagerecht*, a procedural right that had to be thought in clinical isolation from the substance.[6] Starting from the simple idea that there are rights without action (as in the case of natural obligations) and from the opposite assumption that there are actions not ontologically linked to subjective rights (as in criminal law), he started elaborating the self-standing dignity of procedural law.

It is rather abrupt to step from Windscheid to international lawyers having contributed to the construction of what we could call the branch of international procedural law. Indeed, procedure and procedural law have been intensively worked upon by legal theory scholars such as Hart,[7] Fuller[8] and Luhmann.[9] Nevertheless, their works have been scarcely used by international lawyers to think their use of procedure. This is one of the main reasons why to date there is no serious theorisation of international procedural law.

2. *Max Huber (1874-1960)*

If we now move to international law, the first lawyer who became actively engaged with procedural issues was almost certainly Max Huber.[10] After

4 F. C. Von Savigny, System des heutigen römischen Rechts (1841), vol. V, § 204.
5 B. Windscheid, Zur Lehre von der römischen Actio, dem heutigen Klagerecht, der Litiscontestation und der Singularsuccession in Obligationen (1969).
6 B. Windscheid, Die Actio des römischen Civilrechts, vom Standpunkte des heutigen Rechts (1856), § 23.
7 H. Hart, The Concept of Law (1994), 2nd ed., p. 96.
8 L. Fuller, The Morality of Law (1969), p. 162.
9 N. Luhmann, Legitimation durch Verfahren (1983).
10 O. Diggelmann, 'Max Huber', in B. Fassbender and A. Peters (eds.), The Oxford Handbook of the History of International Law (2012), p. 1156-1161; E. Stoppioni, 'Max Huber', Galerie des internationalistes, available at http://www.sfdi.org/internationalistes/huber/ (last visited 22 November 2018).

having been an important academic and worked on sociological perspectives on international law, he dedicated himself – starting from 1920 – to international dispute settlement. An arbitrator before the Permanent Court of Arbitration (PCA) in several landmark cases, he was judge then president of the Permanent Court of International Justice (PCIJ) between 1922 and 1930.

One cannot forget his milestone contribution to the development of international law in the cases he settled as an arbitrator: be it the clarification of the contours of the right of self-determination in the *Aaland* case of 1920,[11] the theory of international responsibility in the 1925 *British Claims in Morocco* award[12] or the idea of sovereignty put forward in the 1928 *Island of Palmas* case.[13] Similarly, his intellectual power profoundly influenced the first years of work of the PCIJ, as shown most notably by his dissenting opinion signed with Judge Anzilotti in the *Wimbledon* case.[14] Simply put, Max Huber showed how international dispute settlement could be used to foster the interests and the identity of international law.

3. *Nicholas Politis (1872-1942)*

Nicholas Politis was one of the first academics to theorise the functioning of international justice.[15] After having worked to the construction of the *Recueil des arbitrages internationaux* with A. de La Pradelle,[16] in 1924 Politis published a milestone contribution to the very concept of international justice: *La justice internationale.*[17]

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11 Aaland Islands Case, Advisory Opinion, International Committee of Jurists, Spec. Supplement 3 League of Nations Official Journal (1920).

12 British Claims in the Spanish Zone of Morocco, 2 RIAA 615 (1925).

13 Island of Palmas Case, Scott, Hague Court Reports 2d 83 (1932) (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

14 SS Wimbledon Case, Dissenting opinion of Judges Anzilotti and Huber, Publications of the Court, Series A, No. 1, pp. 35-36.

15 M. Papadaki, The 'Government Intellectuals': Nicolas Politis – An Intellectual Portrait, 23(1) EJIL (2012), pp. 221-231; R. Kolb, Politis and Sociological Jurisprudence of Inter-War International Law, 23(1) EJIL (2012), pp. 233-241; U. Özsu, Politis and the Limits of Legal Form, 23(1) EJIL (2012), pp. 243-253.

16 A. De la Pradelle and N. Politis, Affaire du canal de Suez et note doctrinale, in A. De la Pradelle and N. Politis, Recueil des Arbitrages Internationaux II, (1856-1872) (1924), 344-386.

17 N. Politis, La justice internationale (1924).

The central idea of the author is simple: there is a particularism of a sovereign subject being held responsible before a court, ie there is a particularism to such an application of the principle of legality at the international level. In order to encourage the international rule of law, the international legal order had to strictly regulate the use of force and to move towards the multiplication of non-judicial and judicial remedies for the application of international law. This would include facilitating the construction of direct means of the individual's access to international courts and tribunal. One cannot help but see here the prophecy of the evolution of international dispute settlement: based on the principle of consensual justice, transforming its framework with the prohibition of the use of force set out in the Charter and progressively developing towards the flourishing of not only inter-state but also of mixed instruments opposing directly individual to Sovereign States.

4. Gaetano Morelli (1900-1990)

The beginning of a reflection on the theory of international litigation from a technical perspective, and therefore of a systematic study of the procedural aspects of international justice is undeniably linked to the name of the Italian Gaetano Morelli.[18] Having studied in Rome both with the great international lawyer Dionisio Anzilotti and with the father of Italian civil procedure, Giuseppe Chiovenda, in his works Morelli kept faith with the intellectual influence of these two masters.

His career in practice started with a landmark case of international procedural law when he pleaded for Italy in the *Monetary Gold* case, which still has an enormous impact on the theory of consent and of intervention. Judge at the International Court of Justice (ICJ) between 1961 and 1970, he reflected in his dissenting opinions on fundamental concepts of international dispute settlement such as the notion of dispute in the *Northern Ca-*

18 E. Cannizzaro, "Morelli, Gaetano", in Dizionario biografico degli italiani (Treccani) (2012), vol. 76; G. Gaja, "Gaetano Morelli", Rivista di diritto internazionale (1990), p. 114; E. Stoppioni, 'Gaetano Morelli', Galerie des internationalistes, available at http://www.sfdi.org/internationalistes/morelli/ (last visited 22 November 2018).

meroon case,[19] the regime of preliminary exceptions and of *locus standi* in his two opinions in the *Barcelona Traction* case.[20]

As an academic he profoundly shaped reflection on the law of international procedure. His principal contribution in this sense, his Hague Course *La théorie générale du procès international* on the concept of international decision[21] – seen as a legal fact and not as a legal act –remains a ground-breaking piece of scholarship.

5. Shabtai Rosenne (1917-2010)

Another founding father of the reflection on international dispute settlement is Shabtai Rosenne. A statesman who cooperated in the construction of the State of Israel, a diplomat serving at the International Law Commission (ILC) and at the *Institut du droit international*, he was also a passionate professor and dedicated much of his work to the functioning of the ICJ and of the International Tribunal of the Law of the Sea (ITLOS).

The 1997 *The Law and Practice of the International Court*,[22] as well as his 2005 *Provisional Measures in International Law: the International Court of Justice and the International Tribunal for the Law of the Sea*[23] and *Essays on International Law and Practice* of 2007 remain classics that are still used today to teach international dispute settlement and constantly quoted by international courts and tribunals.[24]

The work of Rosenne was not merely descriptive but aimed at theorising international dispute settlement, as demonstrated by his reflection on the function of the international judge.[25] Indeed, his production is really representative of the state of the art in international procedural law. Despite having intensively contributed to the refining and understanding of the categories of international dispute settlement and to the systematisa-

19 Northern Cameroons (Cameroon v. United Kingdom), Judgment, ICJ Reports 1963, Separate Opinion.
20 Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Preliminary Objections, Judgment, ICJ Reports 1964, Separate Opinion.
21 G. Morelli, La théorie générale du procès international, RCADI (1937), t. 61, pp. 253-373.
22 S. Rosenne, The law and practice of the International Court 1920-1996 (1997).
23 S. Rosenne, Provisional measures in international law: the International Court of Justice and the International Tribunal for the Law of the Sea (2005).
24 S. Rosenne, Essays on international law and practice (2007).
25 S. Rosenne, Sir Hersch Lauterpacht's Concept of the Task of the International Judge, *55*(4) AJIL (1961), pp. 825-862.

tion of international case law, this impressive work was conducted without stressing directly the idea of dealing with "procedure". Moreover, at that time the panorama of international courts and tribunals was quite different from the one we know today: the principal international jurisdictions that are considered as being the milestones and references are mainly inter-State courts, be it the ICJ or ITLOS. International procedural law has today gained a much more diversified ontology, its fabric having been considerably shaped by fragmentation. These changes brought about the need to find common trends, to frame the cross-fertilization between these different actors, the reasons for the diversity of solutions but, above all, to understand the functioning of this polymorphism of decision-making.

6. *Elihu Lauterpacht (1928-2017)*

Last in time, but not least, one cannot but mention the contribution of Elihu Lauterpacht to the field. Son of Hersch Lauterpacht and founder of the Lauterpacht Centre at Cambridge University, he was one of the leading figures of litigation before international courts and tribunals. Having begun with the 1953 *Nottebohm* case (ICJ) and having most notably defended the claim of New Zealand against the French nuclear testing, he was part of the small pool of lawyers appearing regularly before the ICJ and in inter-state arbitration.[26] As a judge, he strived for a paradigm change in our conception of the system, convinced that we had to recognise that individuals and not States are the "ultimate beneficiaries of the legal system".

As an academic he worked hard to disseminate knowledge on international dispute settlement. Editor of the *International Law Reports* since 1960, he started the *Iran-United States Claims Tribunal Reports* in 1983 and the *ICSID Reports* in 1993.

An emblematic figure for international procedural law, by focusing on the nature of decision-making in dispute settlement and international institutional law, he contributed to making international procedural law a field in itself. This is shown most notably in his 1976 book *The Development of the Law of International Organizations by the Decisions of International Tribunals*[27] and in his 1991 *Aspects of the Administration of International*

26 See 'Sir Elihu Lauterpacht Obituary', available at https://www.theguardian.com/law/2017/feb/10/sir-elihu-lauterpacht-obituary (last visited 22 November 2018).

27 E. Lauterpacht, The development of the law of international organization by the decisions of international tribunals (1976).

Justice.[28] Of course, one must mention his Hague Course, delivering one of the first comprehensive conceptualisation of the role of procedure in international law.

The present work remains within the more traditional area of international procedural law, questioning mainly the functioning of international dispute settlement. Nevertheless, as it is shown most notably in the works of Elihu Lauterphacht, international procedural law has a wider spectrum: it requires consideration of the phenomenology of decision-making, not only within international courts and tribunals but also in international institutions. It also involves understanding what Luhmann called the duality of procedural law (*Verfahrensrecht*) and procedure (*Verfahren*).

II. International Procedural Law: between Unity and Diversity

After this journey, one cannot but be puzzled by an oscillation inhabiting the field. Generally, procedure is presented as having the capacity to level the playing field and being stimulated by strong fundamental ideas that are universal. Indeed, on the one hand and from the perspective of sources, it is the domain of election of general principles. On the other hand, from the point of view of the content of procedure, international procedural law is presented as being animated by general and universal ideas (such as *due process of law* or *equality of parties*) that seem to rely on a widely-accepted idea of moral symmetry, conceptualized by Kant.

This vision certainly needs to be challenged. Indeed, with the anxieties raised by the fragmentation of international law and the proliferation of international courts and tribunals, one may wonder if there is still so much unity in international dispute settlement. Moreover, the way in which the procedural system functions in no way reflects the idea of neutrality and universality that is generally put forward. As well as the general principles, there are indeed different ways of conducting proceedings and those who master these ways have an important advantage within the system. Some today talk of the Americanization of international procedural law, an idea that takes us far away from the concept of universality.

This volume has therefore decided to take this schizophrenic attitude of international procedural law seriously. It is divided into two substantive sections, each of which consists of a thematically focused set of essays. As

28 E. Lauterpacht, Aspects of the administration of international justice (1991).

the two titles suggest, the aim of the book is to show the diversity that is consubstantially linked to international procedural law.

The first part of the volume, entitled "*Diverse tools for conceiving international procedural law*", theorizes the very notion of international procedural law in tandem with a host of conceptual tools necessary to construct this epistemic field: the substance vs procedure divide, the decisional outcome, the comparative methodology and history. The diversity here reflects the need for a multiperspective approach towards the topic.

The second part, entitled "*Diverse fields for international procedural law*", examines at close quarters some of the most significant contexts in which international procedural law has developed. This part is structured thematically. It begins with an analysis of some topical evolutions in international economic law dispute settlement, deals with procedures in international organizations and then finishes with some hot procedural topics concerning justice in Europe (be they relevant for the law of the European Union or the law of the European Convention of Human Rights).

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