The Function of Procedural Justice in International Adjudication

The function of procedural justice in international adjudication

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Abstract

This article surveys the notion of procedural justice in international adjudication. The literature mostly focuses on the domestic intimations of procedural justice. Our primary concern is to retrace its essence and reposition the concept in the international legal order, stripped of the idiosyncrasies it derives from the contingencies of domestic adjudication. The article first frames the basic notion and function of procedural justice, drawing from legal theory and legal-psychological studies. It is explained how procedural principles – separately and in addition to fair substantive norms – are essential to preserve the justice of the legal system. Also, we describe the specific role that procedural fairness has of increasing the perceived legitimacy of the adjudication process and, in turn, the legal order and public authorities at large. The explanation follows of the intrinsic relativity of procedural principles, due to the contingent nature of justice in any given time and society. The two-way feedback between community values and prevailing procedural norms is described, to introduce the discussion of procedure in a specific community: the international legal order.

The function of procedural justice in the international system of adjudication requires distinguishing from domestic systems in at least four respects: the theory of sources, the function of procedural justice in a system of decentralised authority, the dual role of States as parties and rule-makers, the variation of procedural norms across international legal sub-regimes. These aspects are briefly explored to provide the basic coordinates of the study, and lay the foundation for further research.

Keywords: procedural justice; procedural fairness; international adjudication; sources of international law; inherent powers; general principles.

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A. INTRODUCTION

Law aims to achieve substantive outcomes through its application. Third-party resolution ensures that law's goals are secured, as originally designed or through substitutive remedies,[1] and dispute resolution is only credible if it delivers justice.[2] To preserve the utility of the process, rules must exist governing its accessibility, development and output.[3] These are the *adjective* or *procedural* (as opposed to substantive) rules, the subject of this article. Bentham characterised procedure accordingly:

> … 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. For this is not only a use of it, but the only use for it.[4]

Throughout this article, procedural fairness (or justice)[5] indicates the basic principles governing the judicial or arbitral process.[6] These principles guarantee the fairness of the proceedings as distinct from the justness of the decision.

In international law, the alignment between substantive norms and resolution procedures is patchy. The consensual paradigm shapes a legal order where much of substantive law is bereft of pre-determined processes for compulsory adjudication – something often cited to raise doubts about whether international law is law.[7]

This article does not define procedural fairness but rather describes it. It asks where procedure comes from, what its functions are and why it matters in international law. Part B

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[1] Thomas M. Franck, "Judicial Fairness: The International Court of Justice", 240 *Recueil des cours* (1993), 302, 304: "Yet, it is only when the rule-writers make provision for an institutional process to apply the rules to specific disputes that a rule takes on the gravity which distinguishes it from the verbal shields and swords of diplomatic combat".

[2] Hugh W.A. Thirlway, "Procedural Law and the International Court of Justice", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (2008), 389: "Procedure, by definition, is no more than a way of getting somewhere".

[3] John Rawls, *A Theory of Justice* (1999), 210.

[4] Jeremy Bentham, "Principles of Judicial Procedure, with the Outlines of a Procedure Code", in J. Bowring (ed.), *The Works of Jeremy Bentham, Published under the Superintendence of his Executor, John Bowring* (1838-1843), vol II, chapter 2, 11-15

[5] Here, the terms are interchangeable. See Eva Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", 35 *Human Rights Quarterly* (2015), 176, 177. See also John Rawls, "Justice as Fairness", 67 *The Philosophical Review* (1958), 164.

[6] Unless noted otherwise, all references to adjudication extend also to arbitration.

[7] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2006); John Tasioulas, "Human Rights, Legitimacy, and International Law", 58 *American Journal of Jurisprudence* (2013), 1, 13.

provides some theoretical coordinates of procedural fairness. Part C introduces procedure as a social construct, and highlights the resulting function of fairness. Part D discusses how procedure operates in international proceedings. It reflects on the sources of procedural law, as well as the conceptual dilemmas raised by States serving as parties in legal proceedings.

B. THE THEORY OF PROCEDURAL FAIRNESS

Procedural and substantive fairness are co-dependent but distinct, and studies show that humans conceive them separately.[8] Impartial execution of unjust laws can produce an unjust outcome.[9] Conversely, unfair or unwelcome outcomes are sometimes tolerable when they result from fair procedures;[10] likewise, just decisions reached through unfair processes can be resented.[11] Ultimately, that justice is done is insufficient for law to achieve social legitimacy and, in turn, authority and efficiency[12]: justice must also be *seen* to be done.[13]

Consider the recent incident tainting the PCA arbitration between Croatia and Slovenia.[14] It was revealed that the Slovenia-appointed arbitrator had secretly reassured a Slovenian agent that the award would be quite favourable to Slovenia. The arbitration seems to have collapsed under the scandal. The appearance of partiality was fatal: no subsequent decision could claim to possess the authority of justice, irrespective of its correctness on the merits.

The most public manifestation of justice is adjudication. As Franck wrote, referring to the International Court of Justice (ICJ), "[t]he object of the Court's [procedural] rules is to *manifest* to States the fairness of the judicial process in dispute resolution".[15] Essentially, law's legitimacy is a function, *inter alia*,[16] of the procedural format of its application. Increased

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[8] Tom R. Tyler, "Social Justice: Outcome and Procedure", 35 *International Journal of Psychology* (2010), 117.
[9] Bernard Gert, *Morality: Its Nature and Justification* (2005), 134-135.
[10] E.g., flipping a coin to assign sport awards, see Alexander Shaw and Kristina Olson, "Fairness as partiality aversion: the development of procedural justice", 119 *Journal of Experimental Child Psychology* (2014), 40, 41 and 49-50, see also Tom R. Tyler and Gregory Mitchell, "Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights", 43 *Duke Law Journal* (1993), 703, 752.
[11] This is why, for instance, art 53(2) of the Statute of the International Court of Justice refers to the ICJ's duty to determine its jurisdiction and that the claim is well-founded before ruling in favour of the claimant when the defendant does not appear. Gerald S. Leventhal, "What should be done with equity theory? New approaches to the study of fairness in social relationships", in K.J. Gergen, M.S. Greenberg and R.H. Willis (eds.), *Social exchange: Advances in theory and research* (1980), 27, 40 notes that self-interest matters in the perception of procedural fairness.
[12] Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions", 20 *Ethics & International Affairs* (2006), 405.
[13] *R v Sussex Justices*, Ex parte McCarthy [1923] All ER Rep 233.
[14] *Arbitration between the Republic of Croatia and the Republic of Slovenia*, PCA case no. 2012-04.
[15] Franck, *supra* note 1, 316, emphasis added.
[16] *Ibid*., 302 quoting from Morton Deutsch, *Distributive Justice: A Social-Psychological Perspective* (1985), 52: "An individual's conception of what he is entitled to is determined by at least five major kinds of influence: (1)

effectiveness is not the only source of legitimacy of fair proceedings. Procedural fairness shapes the public's perceptions of the judiciary: fair treatment reinforces the feeling of institutional belonging (and well-being[17]) that feeds social obedience to laws and authorities.[18] Trust interacts with the experience and outcome of the process and determines the perceived fairness of an institution.[19] Procedure is an "instrument of power"[20] that can create or destroy substantive rights. Whether it is administered adequately will affect the fairness of the process. The next paragraphs explore, respectively, the inevitable relativity of procedural fairness, its theoretical foundations and psychological function.

1. The Relativity of Procedural Fairness

Justice is socially constructed:

> divergences in procedural arrangements are, to a considerable extent, related to larger divergences in the conception of the proper organization of authority characteristic of [a given society].[21]

This is the greatest obstacle to any attempt to extrapolate a universal notion of procedural fairness, especially in relation to international legal proceedings.[22] There exist, perhaps, some abstract "universals of all moral codes"[23] transcending social and cultural diversity, like impartiality (i.e., favouritism should not lead to different treatment of similar situations).[24] This

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the ideologies and myths about justice that are dominant and officially supported in his society, (2) his amount of exposure to ideologies and myths that conflict with those that are officially supported and are supportive of larger claims for him, (3) experienced changes in his satisfactions-dissatisfactions' as in the 'revolution of rising expectations', as well as (4) his knowledge of what others who are viewed as comparable to him are getting, and (5) his bargaining power". This quote refers to outcome rather than process, but its core message applies equally to process.

[17] Bruno S. Frey and Alois Stutzer, "Beyond outcomes: measuring procedural utility", 57 *Oxford Economic Papers* (2005), 90.

[18] Tom R. Tyler and Justin Sevier, "How do the courts create popular legitimacy?: The role of establishing the truth, punishing justly, and/or acting through just procedures", 77 *Albany Law Review* (2014), 1095, 1129.

[19] Emily C. Bianchi *at al*., "Trust in decision-making authorities dictates the form of the interactive relationship between outcome fairness and procedural fairness", 41 *Personality and Social Psychology Bulletin* (2015), 19, 31-32.

[20] Thomas O. Main, "The Procedural Foundation of Substantive Law", 87 *Washington University Law Review* (2009), 801, 802.

[21] Mirjan R. Damaška, "Structures of authority and comparative criminal procedure", 84 *Yale Law Journal* (1975), 480, 481.

[22] A project espoused by the American Law Institute explored this possibility in civil procedure, see Geoffry C. Hazard Jr and Michele Taruffo, "Transnational Rules of Civil Procedure Rules and Commentary" 30 *Cornell International Law Journal* (1997), 493.

[23] Richard A. Shweder, Manamoban Mahapatra and Joan G. Miller, "Culture and Moral Development", in J. Kagan and S. Lamb (eds.), *The Emergence of Morality in Young Children* (1987), 1, 70.

[24] Peter DeScioli and Robert Kurzban, "Mysteries of morality", 112 *Cognition* (2009), 281, 294.

universal is characterised by its evolutive function,[25] but is too thin to anticipate moral judgments in specific circumstances[26] and thus lacks a practical meaning. Likewise, it might be precarious to indicate the "universals" of procedural fairness. Even when some principles are commonly accepted (like impartiality, or the fair possibility for the parties to present their case[27]) they cannot solve normative problems.[28] Rather, it is possible to isolate some sub-principles, observe their operation in the practice and attempt a mapping.[29] This mapping considers the *genera* (e.g., equality of arms) and identifies the *species* (how equality of arms operates in each system). General principles unassisted by positive rules reflect the influence of non-legal factors over the judicial process. Their application is therefore a constructivist activity:

> The application of a principle is connected with the fulfilment of the judicial function through which the community's goals and values are transformed into an individual decision.[30]

Social consensus is critical. "[S]ome measure of agreement in conceptions of justice" is a prerequisite[31] not just to sustain the law of a community but also to maintain the viability of both law and community. Since relativity is inevitable in judgments of fairness, emancipating procedural fairness from history and society is hard. At the international level, relativism challenges the basic legitimacy of the adjudication process. The allegations of democratic deficit should be noted. First, international courts and tribunals often are entitled to create or integrate their own procedural rules, severing the link of accountability *vis-à-vis* the stakeholders. Second, it is questionable whether proceedings can or should "be understood as spaces in which democratic legitimacy may be generated,"[32] rather than merely respected or reflected. Some contend, for instance, that procedures enhance democratic legitimacy through

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[25] Peter DeScioli and Robert Kurzban, "A solution to the mysteries of morality", 139 *Psychological Bulletin* (2013), 477, 478.
[26] John M. Mikhail, "Universal moral grammar: Theory, evidence and the future", 11 *Trends in Cognitive Sciences* (2007), 143.
[27] On the basic principles of procedural fairness, see Kenneth J. Keith, "Fair Judicial Procedure at Home and Abroad", in A. Sarvarian *et al.* (eds.), *Procedural Fairness in International Courts and Tribunals* (2015), 39, 33.
[28] Martti Koskenniemi, "General Principles: Reflexions on Constructivist Thinking in International Law", 18 *Oikeustiede-Jurisprudentia* (1985), 117, 134.
[29] This endeavour exceeds the goals of this article. An attempt in that direction is made in Serge Guinchard *et al.*, *Droit processual* (2015). For a specific focus on international law, see A. Sarvarian *et al.*, *supra* note *.
[30] Koskenniemi, *supra* note 28, 136.
[31] Rawls, *supra* note 3.
[32] Armin Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification", 7 *European Journal of International Law* (2012), 25.

mechanisms allowing ample opportunities for the parties, including third parties, to bring their views in the process (e.g., through *amici curiae* and third party interventions).[33] However, even such adjustments would fail to mantle procedural fairness with a connotation of universalism. Instead, they would stretch fairness to second the needs, feels and values of the occasional *dêmos*, time and context. "Procedural democracy" in international adjudication would increase the legitimacy of the system but get the process off its hinges, subjecting it to contingency.

Emerging shared solutions in the administration of international justice might signal a shift towards unity. This trend apparently counters the stigma of self-containment that international jurisdictions bear,[34] with some self-serving awareness.[35] The progression towards universalism, however, hardly exceeds the achievement of generic prototypes, especially in international adjudication. The irreversible fragmentation of procedures reflects the functional differentiation of substantive international law. International courts operate in epistemic environments with specific coordinates and values and their procedural rules emerge and develop accordingly.[36]

2. The Theory of Procedural Justice

Rawls provided the most influential modern theorisation of procedural justice. He investigated the distinction between distributive and procedural justice, their interplay and how society influences both. Procedural rules fall into three categories, each contributing to justice in a different way: *perfect*, *imperfect* and *pure* procedural justice.

Perfect procedural justice implies the recognition of shared ideas of what is just. The procedure, deriving effectiveness from its close adherence to social conventions, is designed to achieve the realisation of those ideas.[37] For example, procedural rules according conclusive evidentiary weight to in-court confessions build on the intuition that, in our society, rational subjects rarely act against their own interests.[38] The rule reflects social conventions (which

[33] *Ibid*.
[34] Chester Brown, "The Cross Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals", 30 *Loyola of Los Angeles International and Comparative Law Review* (2008), 219, 220.
[35] *Prosecutor v Dusko Tadić*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-AR72, 35 I.L.M. 32, 39, para. 11 (1996) (decided 2 October 1995): "[i]n International Law, every tribunal is a self-contained system (unless otherwise provided)".
[36] Brown, *supra* note 34, 241.
[37] Rawls, *supra* note 3, 85. His example is a procedure to share a cake fairly: one person divides it and all others choose before him.
[38] Saul M. Kassin, "Why confessions trump innocence", 67 *American Psychologist* (2012), 431.

might not be universal): it presupposes and turns into a rule the notion that the culprit's confession relieves the victim from the standard evidentiary burden.

Imperfect procedural justice points to a shared standard of justice without laying down the rules to achieve it. The norm that criminal sentencing should abide by the standard of "beyond a reasonable doubt" incarnates imperfect procedural justice. It codifies the social convention that it is fair to presume innocence and minimise the risk of mistaken convictions. However, the principle alone cannot secure the goal it sets without implementing rules.

Pure procedural justice, instead, simply seeks to produce agreeable outcomes (or impede unjust ones) through process, without validating a pre-existing notion of justice. It relies on neutral conventions that produce fairness without a direct ethical criterion. The attribution of resources and responsibility based on coin-flipping or agreed codes (traffic lights) serves fairness through impartiality. Agreements reached through genuine bargaining are made just by the process; if sportsmen play by the agreed rules, game results are inherently fair.[39] Similarly, rules regarding certain logistical matters of court proceedings (e.g., deadlines for document submissions, formalities of power of attorney) seek to ensure fairness through procedural conventions, which are fair because they are set in law, not *vice versa*.

Pure procedural justice can be framed as a process by which collective acquiescence generates the perception of justice: "[t]he justice of the outcome stems from [the parties'] joint acquiescence together with their right to acquiesce in the procedure".[40] It is self-evident that this link between fairness and consent (that is, the free exercise of a right) pervades the field of international adjudication. Part D, below, reflects on the difficulty to qualify this special acquiescence at the international level.

3. The Psychology of Procedural Justice

Since the 1970s, studies have examined the social psychology of procedural justice.[41] Scholars started measuring the psychological reaction to procedural arrangements disconnected from substantive outcomes. Without providing a recipe for fairness, these studies identified some reliable correlations. Dispute resolution is considered fair in proportion to elements such as the

[39] William Nelson, "The very idea of pure procedural justice", 90 *Ethics* (1980), 502, 504.
[40] *Ibid*., 505.
[41] John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (1975); E. Allan Lind and Tom R. Tyler, *The social psychology of procedural justice* (1988); for a literature review, see Tom R. Tyler, "Procedural Justice", in A. Sarat (ed.), *The Blackwell Companion to Law and Society* (2008), 435.

quality of the process of decision-making, the parties' control thereon and the dignity and respect that authorities afford to them.[42] Matters of participation and authorities' trustworthiness combine; for instance, people value their right to be heard only insofar as the authorities appear to take their views into serious consideration.[43] The correlation between these elements and perceived fairness is constant across societies.[44] However, their generality makes it impossible to derive from them viable standards, let alone precise rules.

Legal proceedings require self-reflexive regulation to ensure that the goal (the equitable application of law) is not frustrated by the process. This remedial aspect connotes, for example, the availability of provisional measures[45] and the notion of abuse of process.[46] The admissibility and evaluation of evidence is another field where the court's conduct, whether dictated by positive rules or *ad hoc* discretion, affects both the functionality of the process and its compliance with justice.[47] Yet, procedural rules might be incomplete or too vague (i.e, imperfect procedural justice) to indicate clear outcomes. The undercurrent theme of the interplay between norms and practice in the field of procedural law is that whereas norms must be designed *not to hinder* fairness, the actual *achievement* of fairness is not secured by the norms, but by their application in specific cases.[48] Conflicting principles can clash in the interpretation of procedural standards, and judges must prioritise between them (e.g., between completeness and practical fairness,[49] or between expertise and impartiality).

C. THE FUNCTIONS AND DYSFUNCTIONS OF PROCEDURAL FAIRNESS

Procedural fairness ensures the effectiveness of legal proceedings, increases their perceived legitimacy and signals their accuracy and acceptability. Adjudicators rely on rules and principles but inevitably enjoy significant discretion in interpreting and applying them; they are ultimately responsible for achieving fairness. Procedural fairness, in spite of its constant

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[42] Lind and Tyler, *supra* note 41, 216.
[43] Tyler, *supra* note 41, 446.
[44] Kwok Leung and Michael W. Morris, "Justice through the Lens of Culture and Ethnicity", in J. Sanders and V. Lee Hamilton (eds.), *Handbook of Justice Research in Law* (2000), 343, 358.
[45] Augusto A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the case-law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* (2003), 162.
[46] Hervé Ascensio, "Abuse of Process in International Investment Arbitration", 13 *Chinese Journal of International Law* (2014), 763; Eric de Brabandere, "'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims", 3 *Journal of International Dispute Settlement* (2012), 609.
[47] Franck, *supra* note 1, 326: "Nothing a court does so clearly affects the public perception of its fairness" as does assessing evidence.
[48] Shabtai Rosenne, *The Law and Practice of the International Court* (1985), 557.
[49] For instance, consider the ICJ's approach towards the parties' practice to provide folders of documents to the judges during oral hearings, in Practice Direction IX*ter*: "The Court invites parties to exercise restraint in this regard".

function, takes different forms across legal orders. Moreover, the assessment of its goals varies and depends on the social context. Whether proceedings are fair (and, therefore, functional) depends on the values of the community of reference: "there is contingency at the heart of value".[50]

A. The Social Function of Procedural Fairness

There is no original procedural model, a historically plausible departure point for all subsequent evolutions. Legal proceedings of all times share roughly the function of replacing violence in conflict resolution. The relationship between the law and its social function hinges on the law's ability to reach its goals. Koskenniemi proposed a "policy approach" to the critique of international law: international law is relevant if it furthers the goals that societies, including the international society, have set for it.[51]

The typical goal of procedure is to support the principled application of the law. This function is arguably a corollary of the rule of law[52]: the notion that public authorities follow procedure has a discrete value, as it promises adjudicatory efficiency and constraint of public powers. Indeed, effectiveness and social validation depend on each other:

> For efficacy to deliver legitimacy, therefore, an actor must be effective in delivering outcomes deemed appropriate, and judgments about the appropriateness of effectively delivered outcomes are, like those of material might, made in relation to prevailing social norms.[53]

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[50] Joseph Raz, *The Practice of Value* (2003), 59.

[51] Martti Koskenniemi, "The Politics of International Law", 1 *European Journal of International Law* (1990), 4, 8. Shany uses a similarly-worded approach, investigating international courts' effectiveness: "effective international courts are courts that attain, within a predefined amount of time, the goals set for them by their relevant constituencies", Yuval Shany, *Assessing the Effectiveness of International Courts* (2014), 6.

[52] On the similar function of procedural justice and the rule of law, see Rebecca Hollander-Blumoff and Tom R. Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution", 1 *Journal of Dispute Resolution* (2011), 1, 2-19.

[53] Chris Reus-Smit, "International Crises of Legitimacy", 44 *International Politics* (2007), 165. Legitimacy and effectiveness are among the typical goals of international courts, which Shany summarises as follow: "supporting norms, resolving international disputes and problems, supporting regimes, and legitimizing public authority", see Shany, *supra* note 51, 1-48. Institutional legitimacy does not depend only on the decisions' content, but also on *who* takes them and *how*, see Daniel Mügge, "Limits of legitimacy and the primacy of politics in financial governance", 18 *Review of International Political Economy* (2011), 54. Jan A. Scholte, "Towards greater legitimacy in global governance", 18 *Review of International Political Economy* (2011), 117, lists five sources of legitimacy: "efficiency, legality, democracy, morality and charisma".

Even when justice is administered primitively, through oracular discretion of unaccountable individuals, recognisable rules govern their appointment.[54] Compliance with these rules is critical to provide the requisite authority to their acts.[55]

This study postulates the minimal requirement of impartial and consistent administration of justice. In a hypothetical state of nature (Rawls's "original position"), individuals behind the veil of ignorance would agree to equality as the founding principle of justice. The ideas of justice and impartiality are inseparable; popular iconography proves this link conspicuously.[56] Accepting this notion (a premise which betrays a preference for liberal democracies' values[57]), the semantic blur between justice and fairness becomes acceptable.

Fairness is the concretisation of justice in a viable society. Justice as fairness supports society as "a cooperative venture for mutual advantage".[58] The downside to this plausible simplification is circularity: fairness cannot afford an objective definition, because there is no external "ideal observer".[59] Validation for law and fairness come from within the community,[60] since "[t]he fairness of adjudication is often measured by the system's ability to promote goals the society sees as important".[61] In return, perception of fair procedural treatment increases the feeling of belonging to a community and, resultantly, the prospect of abidance to laws and decisions.[62] Procedural fairness, in short, increases the accuracy and acceptability of the judicial function. A third ("heuristic") function exists, when no information is available to gauge the correctness and favourability of a decision (for instance, there is no comparator or precedent).

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[54] Oscar G. Chase, *Law, Culture and Ritual: Disputing Systems in Cross-cultural Context* (2005) 22-25. Jeremy Beckett, "Elections in a small Melanesian community", 6 *Ethnology* (1967), 332. Bruce M. Knauft, "Reconsidering violence in simple human societies: Homicide among the Gebusi of New Guinea", 28 *Current Anthropology* (1987), 457.

[55] Edward E. Evans-Pritchard and Eva Gillies, *Witchcraft, oracles and magic among the Azande* (1976), 343-344. See also the studies cited in Brems and Lavrysen, *supra* note 5, 178-180.

[56] Dennis E. Curtis and Judith Resnik, "Images of justice", 96 *Yale Law Journal* (1987), 1727; Leung and Morris, *supra* note 44, 343.

[57] Phlip Pettit, "A theory of justice?", 4 *Theory and Decision* (1974), 311. On the fallacy of drawing conclusions from analysis of Westernised samples, Joseph Heinrich, Steven J. Heine and Ara Norenzayan, "Most people are not WEIRD", 466 *Nature* (2010), 29.

[58] Rawls, *supra* note 3, 74.

[59] Roderick Firth, "Absolutism and the Ideal Observer", 12 *Philosophy and Phenomenological Research* (1952), 317.

[60] According to the institutionalist theory of Santi Romano law and society are one and the same, see Santi Romano, *L'Ordinamento Giuridico* (1917); Filippo Fontanelli, "Santi Romano and *L'Ordinamento Giuridico*: The Relevance of a Forgotten Masterpiece for Contemporary International, Transnational and Global Legal Relations", 2 *Transnational Legal Theory* (2011), 67.

[61] Ellen E. Sward, "Values, Ideology and the Evolution of the Adversary System", 64 *Indiana Law Journal* (1989), 301, 306.

[62] Raymond Paternoster *et al.*, "Do Fair Procedures Matter?", 31 *Law and Society Review* (1997), 163; Tom R. Tyler, *Why People Obey The Law* (Princeton University Press 2006); Tyler and Sevier, *supra* note 18, 1111-1112.

Due process is then a powerful proxy for the outcome's overall "goodness" and averts contestation.[63]

2. Summum (procedural) Ius, Summa Iniuria

The social imprint of procedural rules might promote acceptance but endanger actual fairness. Socially accepted standards can aggravate unfairly the procedural chances of the *a*-social party. Barthes, observing a criminal trial, remarked the substantive injustice of the prosecutor and the accused – a peasant – conversing in what only appeared to be the same language, French. He defined language's universality and transparency a fiction, "a myth" abused by official authorities: "[t]hese are in actual fact two particular uses of language which confront each other. But one of them has honours, law and force on its side".[64] An accepted procedural rule (French is the procedural language or, better, French citizens need no translator) caused unintended injustice. The accused fought an unfair battle, barely understanding the meaning of the prosecutor's questions.

The story exemplifies three issues. First, like language, procedure is not only a medium but also a message in itself, often channelling the message of the powerful (*in casu*, jurists). Second, adjudication can have unfair consequences and affect the course of justice for reasons unrelated to the facts disputed or substantive norms applied. The task of procedural rules is, among other things, to prevent this mishap and protect the process from itself. Third, Barthes's story incarnates the adage *summum jus summa injuria*: uncompromising application of procedural law can cause injustice.[65]

3. The Social Answer to the Third Question

Laws designed to ensure fairness can sometimes frustrate it. This follows from one recurring paradox of law. Luhmann theorised that the legal regulation of human societies is an inherently faulty project, owing to the misaligned natures of law (systematised, binary, fixed, formulated in abstract and general terms) and society (stochastic, diverse, arranged over *continua*, mutating, comprised of specific and all too practical elements).[66] To cure or normalise

[63] Kees V. Boss *et al.*, "How Do I Judge My Outcome When I Do not Know the Outcome of Others: The Psychology of the Fair Process Effect", 72 *Journal of Personality and Social Psychology* (1997), 1034.
[64] Roland Barthes, "Dominici or the Triumph of Literature", in *Id.*, *Mythologies* (1973), 44.
[65] Gabriel Tarde, "Evolution of Procedure", in A. Kocourek and J.H. Wigmore (eds.), *Primitive and Ancient Legal Institutions* (1915), vol. 2, 691, 700 provides other instances.
[66] Niklas Luhmann, "The third question: the creative use of paradoxes in law and legal history", 15 *Journal of Law and Society* (1988), 153.

paradoxes, law needs distinctions and exceptions. An instance of a distinguishing (exceptional) fix to a legal impasse is the principle of confidentiality of information covered by the "priest-penitent" privilege. The obligation of non-disclosure imposed by the Church on priests has been mirrored by a procedural privilege granted by the secular authorities, for centuries.[67] When religious doctrines shaped the public sphere, evidence obtained by priests during confession was inadmissible. Today, the rule's currency is debated;[68] procedural principles evolve (and dissolve). Bentham, in his treatise on evidence,[69] associates an essential feature of society (religion) with the currency of peremptory procedural principles:

> In a political state, in which this most extensively adopted modification of the Christian religion is established upon a footing either of equality or preference, the necessity of the exclusion demanded on this ground will probably appear too imperious to admit of dispute.

Bentham's assessment of this procedural institution does not hinge on an attempt to measure "any comparative estimate of the bad and good effects flowing from [it]".[70] The starting assumption, and the inevitable conclusion, is that this principle safeguards the sacrament of confession and "catholic religion is not to be suppressed by force".[71] From the historical advocate of utilitarianism, this conclusion is revealing. Procedural law, for its pretence of neutrality, is not an exact science[72] and reflects the idiosyncrasies of the community to which it applies. The next section discusses the idiosyncrasies of international law and considers their effects on procedural fairness in international adjudication.

D. CONCEPTUAL CROSSROADS – INTERNATIONAL LAW

[67] Robert J. Araujo, "International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the Priest-Penitent Privilege under International Law", 15 *American University International Law Review* (1999), 639, 648.
[68] R. Michael Cassidy, "Sharing Sacred Secrets: Is It (Past) Time for a Dangerous Person Exception to the Clergy-Penitent Privilege?", 44 *William & Mary Law Review* (2003),1627; Rena Durrant, "Where There's Smoke, There's Fire (and Brimstone): Is It Time to Abandon the Clergy-Penitent Privilege", 39 *Loyola Law Review* (2006), 1339.
[69] Jeremy Bentham, "Exclusion of the Evidence of a Catholic Priest, Respecting the Confessions Intrusted to Him, Proper", in Bowring, *supra* note 4, vol 7, Book IX, part II, chapter VI, 366.
[70] *Ibid*., 367.
[71] *Ibid*., 367.
[72] The parallel is tempting, see Bruno Latour, "Scientific Objects and Legal Objectivity", in A. Pottage and M. Mundy (eds.), *Law, Anthropology, and the Constitution of the Social* (2004), 73, 94.

If procedural fairness is a necessary feature of law and adjudication,[73] can necessity be a sufficient source for procedural norms? If not, what sources exist and how do they interact, especially at the international level? Given the individual-centred narrative of due process and its traditional reference to State-managed compulsory adjudication, what adjustments are needed to read its core principles into the system of international law?

1. The Sources of Procedural Law

The sources of procedural rules are manifold. In domestic systems, procedural rules flow from constitutional law, statutory law, sub-legislative acts and the inherent jurisdiction of courts.[74] With specific reference to the latter, judges have the powers to steer, manage and moderate the process to avoid abuse, even in the absence of positive provisions.[75] A court must be "armed with the power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute".[76]

This source is subsidiary to statutory and higher-ranked provisions. It fills the gap they leave open, and cannot override them. The precise extent of the powers that inherent jurisdiction encompasses is debated. A restrictive notion only includes the powers ensuring the *existence* and *viability* of proceedings, whereas an expansive view would aim to the guarantee of specific standards of fairness. Arguably, integrating the two approaches is possible if fairness is considered a condition for a process's meaningful existence (an unfair trial is a trial only in name). At least, the inherent powers should equip a court against the risk that procedure itself (or the lack of procedural rules) hinder its mandate to ensure the process's fairness.[77]

At the international level, the constituent instruments of an international judicial body, or its statute, contain the procedural rules. Sometimes, the framers entrust the body to set its own procedural rules. The exact operation of these sources in specific cases is determined through

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[73] "It would be nonsense to speak of the permissibility of an unfair trial", Patrick Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY", 3 *Berkeley Journal of International Law* (2009), 1.

[74] Stuart Sime *et al.*, *Blackstone's Civil Practice 2013: The Commentary* (2013), 37.

[75] Martin S. Dockray, "The Inherent Jurisdiction to Regulate Civil Proceedings", 113 *Law Quarterly Review* (1997), 120.

[76] *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp.* [1981] AC 909 (HL), (Lord Diplock) 979.

[77] *R v Davis* [2008] UKHL 36 (HL), (Lord Bingham). In Hugh Thirlway, "Dilemma or Chimera?—Admissibility of Illegally Obtained Evidence in International Adjudication", 78 *American Journal of International Law* (1984), 622, 640, it is noted that the ICJ was keen to lighten the burden of proof when the proof was in the exclusive possession of the party against whose interest it was invoked, see *Corfu Channel (UK v Albania)* [1949] ICJ Reports 4 (Merits); and *United States Diplomatic and Consular Staff in Tehran* (*US v Iran*) [1980] ICJ Reports 3.

interpretation, which can integrate or complement their *prima facie* normative scope (for instance, by reference to the concepts of effectiveness, or to the context and purpose of the interpreted instruments).[78] Besides treaty law, the sources of procedural fairness are the inherent jurisdictional powers as well as the common law of the international regime – customs and general principles, especially in its human rights avatars of due process and fair trial.[79] These unwritten sources – inherent powers and general norms of international law – lie at each end of the normative spectrum (from general to specific). Both seek, in different ways, to fill normative gaps drawing from shared models. Tribunals exercising inherent powers are likely to borrow from the practice of other tribunals in similar circumstances.[80] When they resort to general principles, they assess the national consensus over specific procedural rules. In both cases, procedural convergence across international jurisdictions ensues,[81] mirroring the features of domestic systems.[82]

Despite the conceptual uncertainties outlined, the existence of general procedural principles in international litigation is well-established.[83] Among them are the principles of impartiality of adjudicators, the right to having one's views heard, the authority of *res judicata*, the default allocation of the *onus probandi*, the notion that *jura novit curia*. It is difficult to distinguish them clearly from customary norms. Whilst certainly inspired by national practice – as prescribed by Art. 38(1)(c) of the ICJ Statute – these principles are largely established at the international level and therefore reflect a consistent body of practice accepted by States too (Art. 38(1)(b) ICJ Statute).

The inherent jurisdiction of courts and tribunals, at least in its narrower usage, is also generally accepted.[84] The ICJ noted:

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[78] Chester Brown, *A Common Law of International Adjudication* (2009), 41-53.
[79] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989), 134-135; Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", 12 *Australian Yearbook of International Law* (1988-1989), 82; Thirlway, *supra* note 77, 623-624. It is sometimes suggested that the right to fair trial is *jus cogens*, but its derogability under the ICCPR strongly suggests otherwise.
[80] Brown, *supra* note 78, 230.
[81] *Ibid*., 226-234, Brown explores twelve reasons supporting this convergence, and the hindrances thereto.
[82] Thirlway, *supra* note 77, 627.
[83] Kenneth S. Carlston, *The Process of International Arbitration* (1946); V.S. Mani, *International Adjudication: Procedural Aspects* (1980) 36; Bin Cheng, *General Principles of Law As Applied by International Courts and Tribunals* (1987); Brown, *supra* note 78; Robert 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.
[84] Chester Brown, "The Inherent Powers of International Courts and Tribunals", 76 *British Yearbook of International Law* (2006), 195; Malcolm N. Shaw, "The International Court of Justice: A Practical Perspective", 46 *International and Comparative Law Quarterly* (1997), 831; Elihu Lauterpacht, "Partial judgments and the

> the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character' … Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.[85]

A court's inherent powers should include at least the power to interpret and decode the claims, rule on their admissibility and its own competence, regulate the operation of the proceedings[86] and apply (or integrate) procedural rules.[87] Further powers (or specific instances of implementation of the above) might be controversial, especially in arbitration, where the process supposedly flows from the parties' *fiat* and implicit powers affecting the parties' interests are harder to justify.[88]

Alternatively, courts' power to govern the fairness of the proceedings through law-making might be considered to flow from the *implied* powers[89] of their framing institutions. In

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inherent jurisdiction of the International Court of Justice", in V. Lowe and M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice* (1996), 465; Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 447-448; Anthony Arnull, "Does the Court of Justice have inherent jurisdiction?", 27 *Common Market Law Review* (1990), 683; Andrew D. Mitchell and David Heaton, "Inherent Jurisdiction of WTO Tribunals: The Select Application of Public International Law Required by the Judicial Function", 31 *Michigan Journal of International Law* (2009), 559.

[85] *Nuclear Tests (Australia v France)* 1974 ICJ 253, 259-60 (20 December 1974). See also *Northern Cameroons (Cameroon v UK)* 1963 ICJ 15, 103 (20 December 1963) (separate opinion), where Judge Fitzmaurice describes the inherent jurisdiction of the ICJ as a condition for it to "be […] able to function at all".

[86] For instance, to prevent and police irregular behaviour, see Abba Kolo, "Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal", 26 *Arbitration International* (201), 43.

[87] Dinah L. Shelton, "Form, Function, and the Powers of International Court", 9 *Chinese Journal of Internaitonal Law* (2009), 537, 545, drawing on Pauwelyn, *supra* note 84.

[88] E.g., the power to regulate or sanction counsel's behaviour. Arman Sarvarian, *Professional Ethics at the International Bar* (2013), 182. See *Hrvatska Elektroprivreda dd v Slovenia* ICSID Case No ARB/05/24, order of 6 May 2008, para 33.

[89] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174 (Advisory Opinion of 11 April) 182: "powers which…are conferred upon it by necessary implication as being essential to the performance

carrying out their institutional mandate to solve disputes, international judicial bodies enjoy the powers granted to their establishing organization, limitedly to the task. In other words, when their actions are appropriate for the fulfilment of the institutional purposes of their regime, they are presumed not to be *ultra vires*.[90] Thirlway provided a slightly different reading of implied powers, suggesting that they arise as a matter of interpretation of treaties. By using words like "court" or "tribunal", the parties must have meant to endow such entities, even *implicitly*, with the powers commonly attributed to domestic courts.[91]

Appearance of partiality, for instance, is unsettling insofar as the concept of adjudication implicitly requires impartiality.[92] Thus, the exercise of inherent powers and unwritten principles is a delicate endeavour: one party will resent the effect of actions that are not grounded in black-letter law and question their lawfulness. The World Trade Organisation Appellate Body held that unsolicited *amicus curiae* briefs were admissible in panel proceedings[93]; an International Centre for Settlement of Investment Disputes (ICSID) tribunal admitted a claim brought collectively by more than 60,000 investors[94]; the European Court of Human Rights dispensed the applicant from the admissibility requirement to exhaust local remedies[95]; in all these cases, one party obtained a procedural advantage in the dispute. These judge-made determinations probe the distinction between interpretation and law-making.

2. Procedural Fairness in a System without Centralised Authority

Equality, sovereignty, self-defense and *pacta sunt servanda* are normally considered the canons of international legal fairness.[96] Inherent and unquestionable equality between States is a

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of its duties". The distinction between inherent and implied powers is blurred. However, as noted by Sands in her chapter in this volume, the latter rely on some textual provision whereas the former can arise in the absence of it.

[90] *Certain expenses of the UN*, 1962 I.C.J. 151 (Advisory Opinion of 20 July) 168.

[91] Thirlway, *supra* note 77, 626: "whereas the rules are not transferred as such, the concept of court is, which has implicit connotations".

[92] For instance, the European Court of Human Rights' suggestion that shari'a law is incompatible with democracy and human rights attracted accusations of partiality (and ignorance) to the court. See *Refah Partisi (The Welfare Party) v Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Eur. Ct. H.R. para 72 (2003), and account in Brems and Lavrysen, *supra* note 5, 187. The implicit features of courts are recalled by the ECtHR in *Belilos v Switzerland*, App. No. 10328/83 10 EHRR 466 (1988), para 64. See Shany, *supra* note 51, 37.

[93] *US–Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body of 12 October 1998, WT/DS58/AB/R, para 108.

[94] *Abaclat and Others*, ICSID Case No. ARB/07/S, Decision on Jurisdiction and Admissibility of 4 August 2011, paras 500 and 551.

[95] Art 35(1) of the European Convention of Human Rights, which is interpreted flexibly, in line with the corresponding customary principle of law. See *Ringeisen v Austria*, judgment of 16 July 1971, Series A no. 13, para 89; *Lehtinen v Finland* (dec.), no. 39076/97, ECHR 1999-VII.

[96] Rawls, *supra* note 3, 331-332. A full-blown study is the later John Rawls, *The Law of Peoples* (1999).

commonplace echoing the intrinsic equality between humans.[97] Similar parallels are simplistic, and raise more questions than they answer.[98] Ultimately, "no juridical institution is to be regarded as a prototype of others".[99] Even when some rules are taken as a model, the recipient institution develops autonomously and takes ownership of them.[100]

Adjudication is an ill-fitted *milieu* for transplants across the domestic/international divide. Traditionally, international law was rightly (but roughly) considered "private law 'writ large'".[101] However, this analogy is only valid when two conditions are satisfied: 1) the relationship between individuals can be meaningfully replicated between international law subjects, and 2) international law fails to regulate a given matter.[102] This means, among other things, that conventional law must not exist to rule out analogies with domestic law.[103] This is unlikely in the field of adjudication, since States must register their consent to adjudication in specific instruments which normally lay down procedural rules.

Domestic adjudication is the armed hand of state law, and partakes its superior authority over the parties. In international law, instead, the principle of consent approximates dispute settlement to a transactional affair.[104] Domestic standards cannot be used "lock stock and barrel" in international proceedings.[105] States afford less deference than individuals to courts and their judgments, and the function and nature of procedural standards mutate accordingly. Procedure inevitably reflects the privileged position of States, with the potential ensuing

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[97] Jeremy Waldron, *One Another's Equals: The Basis of Human Equality* (Gifford Lectures, University of Edinburgh, 2015) <http://www.ed.ac.uk/schools-departments/humanities-soc-sci/news-events/lectures/gifford-lectures/jeremy-waldron/overview>.

[98] Anthony D'Amato, "International Law and Rawls' Theory of Justice", 5 *Denver Journal of International Law and Policy* (1975), 525.

[99] Giorgio Del Vecchio, "Universal Comparative Law", in Kocourek and Wigmore, *supra* note 65, 61, 63.

[100] René Barents, "EU procedural law and effective legal protection", 51 *Common Market Law Review* (2014), 1437 (where the modelling of the rules of the Court of Justice of the EU upon those of the French administrative proceedings and the ICJ is mentioned as a mere curiosity, in the framework of a study of the specific "aim of EU procedural law"). See Jean L'Huillier, "Une conquête du droit administratif français: Le contentieux de la CECA", *Dalloz Chronique* (1953), 63; Richard Plender, "Rules of procedure in the International Court and the European Court", 2 *European Journal of International Law* (1991), 1.

[101] Thomas E. Holland, *Studies in International Law and Diplomacy* (1898), 152. This view was supported by Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), 81.

[102] Lauterpacht himself noted that "there would be no need to have recourse to general jurisprudence, if there were an international rule ready at hand", see Hersch Lauterpacht, "Private Law Sources and Analogies of International Law", in E. Lauterpacht (ed.), *International Law: Being the Collected Papers of Hersch Lauterpacht* (1975), vol II, 173, 206.

[103] See the debate on the inclusion of general principles in the Statute of the Permanent Court of International Justice, hinging on their ambiguity (natural law or emanation of domestic practices): PCIJ, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 16 June to 24 July 1920 (1920) 335, 345.

[104] Tasioulas, *supra* note 7, 13: "[treaty law] is not as such a matter of obligation grounded in the right to rule".

[105] *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 128, 148 (Judge Mc Nair, dissenting).

shortcomings in efficiency, expedience and even impartiality (if non-State parties are also involved). Consider the quintessential principle of fairness embodied by the autonomy and impartiality of the judge. Whereas it is undisputable in the domestic setting,[106] the simple fact that adjudication depends on States' consent at the international level is enough to challenge it.[107]

For instance, the ICJ's practice in indicating provisional measures betrays awareness, even in matters of procedure, of non-compliance risks.[108] The NAFTA award in *Loewen*, an archetype of substantive injustice through procedural pedantry,[109] openly invoked the viability of NAFTA against justice-laden activism.[110] No international jurisdiction can light-heartedly expose its rulings to probable non-compliance, lest its fragile legitimacy be undermined. The reinforcing feedback between legitimacy and effectiveness in domestic adjudication can easily become a vicious circle at the international level, with procedural law in the middle. As Weiler noted:

> … in the international sphere as elsewhere the end can justify the means only so far. [A] legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes none at all.[111]

It does not help that fairness is perceived as a recessive value in disputes between parties of different social groups.[112] International law proceedings are, almost by definition, inter-group litigation. Therefore the parties – assuming that psychological patterns extend to States and legal entities – tend to value the fairness of the process less than the outcome's convenience.

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[106] Martin H. Redish and Lawrence C. Marshall, "Adjudicatory Independence and the Values of Procedural Due Process", 95 *Yale Law Journal* (1986), 455.
[107] Karen J. Alter, "Agents or trustees? International courts in their political context", 14 *European Journal of International Relations* (2008), 33.
[108] John G. Merrills, "Interim measures of protection in the recent jurisprudence of the International Court of Justice", 44 *International and Comparative Law Quarterly* (1995), 90, 140; see Franck, *supra* note 1, 324: discussing the "tactical" use of parsimony and interference in the indication of provisional measures.
[109] Noah Rubins, "Loewen v. United States: The Burial of an Investor-State Arbitration Claim", 21 *Arbitration International* (2005), 1.
[110] *Loewen Group, Inc. and Raymond L. Loewen v USA*, ICSID Case No. ARB(AF)/98/3, para 242.
[111] Joseph H.H. Weiler, "The Geology of International Law—Governance Democracy and Legitimacy", 64 *Heidelberg Journal of International Law* (2004), 562.
[112] Tom R. Tyler *et al*., "Conflict with outsiders: Disputing within and across group boundaries", 24 *Personality and Social Psychology Bulletin* (1998), 137.

Relative to domestic proceedings, the autonomy of international courts to shape and manage procedure is reduced, even if the regulatory gaps might be wider and more frequent. The State, which acts as party in the adjudication process, is after all the ultimate paragon (through sovereignty and consent) of international institutions' lawfulness and effectiveness. Hence, procedures must carefully adapt to the somewhat intractable dimension of sovereign States.[113] The contingent arrangement of every procedural setup is ultimately a function of how much the international dispute settlement process emancipates itself from the States.[114] One aphorism illustrates the delicate management of this self-destructive yearning:

> Leopards break into the temple and drink the sacrificial pitchers dry; this repeats over and over again; finally it can be calculated in advance and becomes part of the ceremony.[115]

The celebrants (international judges) are restrained in their celebration of the rituals (international proceedings), because they cannot bother the leopards (the States). Procedure tiptoes around sovereignty to a point where it is not clear whether its features are determined by the goals or the risks, according to a principled plan or in reaction to the circumstances. Procedure is adaptive and, as such, serves several goals. The procedural order arranges itself around the facts, actors and goals of the process: "*l'ordre, à la longue, se met de lui-même autour des choses*".[116]

CONCLUSION

Even in the presence of obvious similarities across the various regimes, procedural rules are ultimately the deliberate choice of the framers of each.[117] For all the efforts to depict a universal model of fair trial,[118] a warning sounds true: "No one can describe the Procedure of the

[113] This obviously challenges the genuine independence of international tribunals. Eric A. Posner and John C. Yoo, "Judicial independence in international tribunals", 93 *California Law Review* (2005), 1, 7: "Tribunals are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute".
[114] Rosalyn Higgins, "Respecting Sovereign States and Running a Tight Courtroom", 50 *International and Comparative Law Quarterly* (2001), 121, 129: "[the ICJ's] general thrust of policy [should be] a greater control over our procedures, and a somewhat tougher attitude to sovereign States".
[115] Franz Kafka, *The Zürau aphorisms* [1946] (2006), 20 (our translation).
[116] Raymond Radiguet, *Le Diable au Corps* (1923), 238.
[117] Elijah O. Okebukola, "A universal procedural framework for war crimes tribunals", 14 *International Community Law Review* (2012), 85, 94. Brown, *supra* note 34, 226-227, notes that the identification of a "common law" of procedural law in international adjudication is largely a matter of treaty convergence and circulation of models.
[118] Guinchard, *supra* note 29.

Future".[119] It is, however, possible to conceptualise procedural law at the international level as an autonomous discipline, which shares the feature of its domestic counterpart only to a qualified extent, and grows apart from it. Our task was to explain how little of the general notion of procedural justice can translate as such into the international legal system. This is the first necessary step stone for the study of a field which is under-theorised and currently monopolised by practitioners. A theoretical effort is indispensable to move beyond the current state of the scholarship; the ultimate goal should be to rely on doctrine to reform (rather than report) the practice, to increase the fairness of international legal proceedings.

[119] Tarde, *supra* note 65, 704.