THE FACES OF PROCEDURE IN INTERNATIONAL ADJUDICATION: SERVANT, JUSTICE, AND POWER

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TABLE OF CONTENTS

I. INTRODUCTION

Practicing lawyers are chiefly concerned with matters of procedure: "if you don't like procedure, don't practice." This belief may in part explain why procedural matters are not extensively treated by academics. A disengagement seems all the more surprising since international courts and tribunals (ICTs) are largely self-regulated[1] and hold broad discretionary powers with regard to procedure.[2] As such, little consideration is given to what these institutions are actually engaged with in practice and what rituals, traditions, and procedural rules they adhere to. The resulting research gap indicates not only procedural law's lack of comprehensive analysis, but also its limits and possibilities. The perspective of procedural practice is rarely adopted in writings about ICTs.[3] The claim in this article is therefore that

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1. Jean-Marc Sorel & Lena Chercheneff, *International Courts and Tribunals, Procedure*, *in* MAX PLANCK ENCYCLOPEDIA PUBLIC INTERNATIONAL LAW ¶ 1 (Rüdiger Wolfrum ed., 2019).

2. CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 40 (2007); *see* GLEIDER I. HERNÁNDEZ, THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION 55–56 (2014) (explaining discretionary powers in the ICJ).

3. When procedure is discussed in its own right, it is done from the perspective of a specific institution, or a specific procedural issue. For information on the ICJ, see Gleider I. Hernández, *The Judicialization of International Law: Reflections on the Empirical Turn*, 25 EUR. J. INT'L L. 919 (2014); ROBERT KOLB, THE INTERNATIONAL COURT OF JUSTICE (2013); Fernando Lusa Bordin, *Procedural Developments at the International Court of Justice*, 16 LAW & PRAC. INT'L CTS. & TRIBUNALS 307 (2017). On evidence, see Anna Riddell, *Evidence, Fact-Finding, and Experts*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano et al., eds., 2013); Hugh Thirlway, *Evidence Before International Courts and Tribunals*, *in* ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolf Bernhardt & Peter Macalister-Smith eds., 1995).

the lens of procedural practice should have a place in the growing scholarship on international adjudication, not only because it is "what lawyers do," but because it also gives us information about the workings of these ICTs that we may be currently overlooking. Specifically, this article looks at how procedure is constructed as a benign object, in value-neutral terms, obscuring in the process elements of power that hide behind it.

This article situates itself as both an extension of and response to the growing field of literature on ICTs in the context of their continuing proliferation.[4] Most authors in the field subscribe to the notion that these institutions wield outside influence[5] and that there is a discernible effect of the existence of these institutions and of their decisions on the international legal order,[6] or on international relations.[7] Theoretical analysis has been centered on accounts of the functions of ICTs[8] and their legitimacy,[9] effectiveness,[10] and authority.[11] A common feature of the ICT scholarship is the centrality of the outcome, of the external, discussing substance over procedure. The resulting outcome-oriented approach to legitimacy, authority, and effectiveness leaves out an account of the way in which power is exercised by judicial elites[12] and what role procedural practice plays in this process.

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4. ARMAN SARVARIAN ET AL., PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS 2 (2015); *see* Karen J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 63–89 (Cesare P.R. Romano et al. eds., 2013) (explaining the increase of arbitral and judicial dispute settlement mechanisms). *See generally* Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, OXFORD HANDBOOK OF INT'L ADJUDICATION (Dec. 2013).

5. *See generally* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P.R. Romano et al. eds., 2013).

6. *See generally* ANDREAS FOLLESDAL & GEIR ULFSTEIN, THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING? (2018).

7. *See generally* INTERNATIONAL COURT AUTHORITY (Karen J. Alter et al. eds., 2018).

8. *See generally* Jose E. Alvarez, *What Are International Judges For? The Main Functions of International Adjudication*, (Cesare P. R. Romano, Karen J. Alter, and Yuval Shany eds., Oxford Handbook of International Adjudication 2013); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT'L L. 73 (2009); Dinah Shelton, *Form, Function, and the Powers of International Courts Symposium: International Judges*, 9 CHI. J. INT'L L. 537 (2008); Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49 (2013).

9. *See generally* LEGITIMACY AND INTERNATIONAL COURTS (Nienke Grossman et al. eds., 2018); THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS (Nubuo Hayashi & Cecilia Bailliet eds., 2017); THE LEGITIMACY OF INTERNATIONAL TRADE COURTS AND TRIBUNALS (Robert Howse et al. eds., 2018).

10. *See generally* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014).

11. *See generally* INTERNATIONAL COURT AUTHORITY, *supra* note 7.

12. *See* Hernández, *supra* note 3, at 927 (examining academic discourse on the procedure that regulates international adjudication). For a novel perspective on proliferation as a development lived from the perspective of international lawyers, see Charles N. Brower & Daniel Litwin, *Navigating the Judicialization of International Law in Troubled Waters: Some Reflections on a Generation of International Lawyers*, 37 BERKELEY J. INT'L L. 171 (2019).

This article argues for a deeper engagement with procedure in international adjudication in order to contribute to a richer understanding of the dynamics driving ICTs. This exercise requires questioning our basic assumptions about what procedure represents. To this end, the article is structured in two main parts. First, it explores how procedure is commonly defined and constructed in value-neutral and universalizing terms. Second, this article discusses how procedure is conceptualized, introducing in turn the "faces" of procedure. It invites the reader to consider procedure as an instrument of power in addition to its more common understandings as an instrument of service and justice.

Before moving on, an important caveat to add here is that this article is meant to be exploratory in nature, seeking to paint a different image of procedure in international adjudication, with a view to revealing novel ways of thinking about procedure and ICTs, their practices, and their actors. The argument explored in this article is that procedure may be reconceptualized as an instrument of power; this view is neither meant to be exclusive of or superior to other views.

II. WHAT IS PROCEDURE AND WHY DOES IT MATTER?

In searching to delineate the present object of study, procedure, the only certainty seems to be the fact that there is no comprehensive definition of what constitutes procedure in international adjudication.[13] This is not for lack of attempts, as many, scholars as well as practitioners, have been faced with the challenge of coming up with a working conception of procedure. One common way of defining procedure when speaking about ICTs is to look at procedure as that which governs the process of litigation,[14] or the "collection of rules to be followed for the regular conduct of a trial, from the original application until the decision."[15] Procedure as a distinct body of law governing the conduct of proceedings before ICTs follows the chronological life of a specific case brought before a court or tribunal, which is also reflected in the structure of written rules of procedure of ICTs.[16]

The written rules of procedure not only comprise the chronological events of the trial but also relates to those rules that organize the judiciary and the inner workings of the court. From here, one could also recognize a broader conception of procedure: procedure is defined as everything concerning what goes on inside the

13. MALCOLM N. SHAW, ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-2015 1047 (Malcolm N. Shaw ed., 5th ed. 2016); Hélène Ruiz Fabri & Edoardo Stoppioni, *Introduction*, *in* INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 5 (Hélène Ruiz Fabri ed., 2019); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, INTERNATIONAL JUDICIAL LAW, VOLUME IV 583 (1986).

14. Judicial procedure can be defined as "all rules and principles regulating the manner in which the proceedings . . . are conducted." Robert Kolb, *General Principles of Procedural Law*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 793, 796 (Andreas Zimmerman et al. eds., 2d ed. 2012) [hereinafter Kolb, *General Principles of Procedural Law*].

15. Kolb, *supra* note 3, at 953 (as translated from Jean Salmon, *Dictionnaire de Droit International Public* (Bruylant 2001) 887).

16. For example, in the *traveaux préparatoires* of the PCIJ this was indeed explicitly adopted as the appropriate and logical approach. See PCIJ, 'Series D - Preparation of the Rules of the Court' 448.

courts,[17] or as including all "matters which are connected to the functioning of a judicial institution."[18]

This definition, however, still leaves out a number of matters. Issues of admissibility for instance are generally treated as part of procedure in an international adjudication context,[19] yet usually are not included in the written rules of procedure of an ICT. Alternatively then, "procedure" could be defined as anything that requires judicial action.[20] In this sense, judicial procedure would pertain to those rules that regulate: (i) access to the process (jurisdiction and admissibility); (ii) procedural conduct (e.g., rules on evidence); and (iii) rules related to the outcome of the process (e.g., remedy and reparation).[21] These categories still reflect the chronological or temporal life of international adjudication. This approach is also reflected in scholarly contributions that seek to give a descriptive account of procedural law and practice.[22] While each of these different attempts at defining and categorizing procedure may be individually useful, it is also important to realize that they often are not mutually exclusive. For instance, rules concerning the inclusion and admission of amicus curiae briefs relate both to questions of who gets access to the procedure as well as to procedural conduct.

Another way of thinking about procedure is to define it in relation to substance. This relationship may be constructed as mutually exclusive, putting procedure in opposition to substantive law.[23] In this sense, rules of procedure regulate the conduct of proceedings, while "substantive rules will refer to rights and obligations that exist irrespective of the procedure of adjudication . . . ."[24] This presents a conceptual dichotomy,[25] with procedure defined as "not substance." Yet, in practice there is no

17. André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 EUR. J. INT'L L. 769, 772 (2012); D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 197 (1982).

18. Sergey M. Punzhin, *Procedural Normative System of the International Court of Justice*, 30 LEIDEN J. INT'L L. 661, 662 (2017).

19. Nollkaemper, *supra* note 17, at 773.

20. J.C. WITENBERG, L'ORGANISATION JUDICIAIRE, LA PROCÉDURE ET LA SENTENCE INTERNATIONALS: TRAITÉ PRATIQUE [INTERNATIONAL JUDICIAL ORGANIZATION, PROCEDURE, AND AWARD: PRACTICE TREATY] 110 (1937) (Fr.) (observing that procedure is the set of rules that govern international legal action).

21. *See* Filippo Fontanelli & Paolo Busco, *The Function of Procedural Justice in International Adjudication*, 15 L. & PRAC. INT'L CTS. & TRIBUNALS 1, 16 (2016) (explaining the effect of procedure in fair adjudication and assessment of remedy); JOHN RAWLS, A THEORY OF JUSTICE 210 (rev. ed.1999) (discussing the multifaceted role of procedure in regulating process).

22. *See generally* INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (Göran Sluiter et al. eds., 1st ed. 2013); Kolb, *General Principles of Procedural Law*, *supra* note 14.

23. Procedure concerns "the relations between the parties and the court or tribunal before which a dispute is brought," as opposed to "the rights of the parties." SHAW, *supra* note 13, at 1027, 1053.

24. Matina Papadaki, *Substantive and Procedural Rules in International Adjudication: Exploring Their Interaction in Intervention Before the International Court of Justice*, *in* INTERNATIONAL LAW AND LITIGATION: A LOOK INTO PROCEDURE 37, 38 (Hélène Ruiz Fabri ed., 2019).

25. *See generally* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87

clear dividing line between the two.[26] An inquiry into the procedure of ICTs could thus also be reformulated as an inquiry into an ICT's construction of the procedure-substance interface,[27] as the content of both procedure and substance strongly influence and overlap with each other.[28] For example, we mostly think of the rules on state responsibility as part of substantive international law. At the same time, the rules prescribe that a state must be injured in order to be able to claim the responsibility of another state. This is a matter of admissibility before an international court, commonly treated as procedural in nature.[29]

Despite the porosity between these two categories, a doctrinal dichotomy persists.[30] It is illustrated eloquently in textbooks where substance and procedure form separate sections.[31] This separation is presented as self-evident or self-explanatory. This binary thinking is also present in case law. For example, in *Jurisdictional Immunities of State*, the International Court of Justice (ICJ) found that the rules on jurisdictional immunities for states are of a procedural nature since they pertain to jurisdiction and the ability to bring a case against a state.[32] The substance of the case, therefore, was brushed aside.[33] The ICJ has been criticized for presenting its construction of the procedure-substance binary as "self-evident and unproblematic."[34] In the Court's analysis, the binary construction is put forward

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WASH. U. L. REV. 801 (2010).

26. Within and across domestic jurisdictions there is no clear line between what is part of procedural law and what is part of substantive law. *See, e.g.*, BROWN, *supra* note 2, at 7; Robert G. Bone, *Making Effective Rules: The Need for Procedure Theory*, 61 OKLA. L. REV. 319, 329 (2008); Mauro Cappelletti & Bryant G. Garth, *Introduction—Policies, Trends and Ideas in Civil Procedure*, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE 14 (Ulrich Drobnig & Konrad Zweigert eds., 1987). This is no difference for public international law, where the distinction between procedure and substance is just as elusive and understudied. Nollkaemper, *supra* note 17, at 771. One could even say that such a distinction simply does not exist. SHAW, *supra* note 13, at 1049–50.

27. *See* Nollkaemper, *supra* note 17, at 787 (questioning who creates the intersection between procedure and substance, and how).

28. Bone, *supra* note 26, at 329.

29. Nollkaemper, *supra* note 17, at 773; *see* Papadaki, *supra* note 24, at 43 (discussing the relationship between substantive rights and procedural law, including how one's access to substantive rights depends on procedural mechanisms such as jurisdiction and standing).

30. *See, e.g.*, Papadaki, *supra* note 24, at 38 ("Our analysis will assume a clear-cut distinction between the two sets of rules of procedure on the one hand and of substance on the other so as to pinpoint their interactions.").

31. Nollkaemper, *supra* note 17, at 771 (citing PHILLIPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2d. 2003); PATRICIA BIRNIE ET AL., INTERNATIONAL LAW & THE ENVIRONMENT (2002); THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bogdansky et al. eds., 2007); INTERNATIONAL HUMAN RIGHTS LAW (Daniel Moeckli et al. eds, 2010); J. REHMAN, INTERNATIONAL HUMAN RIGHTS LAW (2009)).

32. (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶¶ 58, 82, 93 (Feb. 3).

33. The rules on state immunity form a procedural barrier for bringing a case to the ICJ. The Court found that this holds even when the rules allegedly breached are of a *jus cogens* nature. This presents yet another binary: ordinary norms vs *jus cogens* norms. *Id.* ¶ 93.

34. Zoi Aliozi et al., *Germany v Italy*, *in* FEMINIST JUDGMENTS IN INTERNATIONAL LAW 117, 124 (Loveday Hodson & Troy Lavers eds., 2019); *see* Kimberley N. Trapp & Alex Mills, *Smooth*

almost "as a matter of *principle*" as an a priori assessment on the basis of the procedure-substance divide.[35] Such an approach presents several limitations, such as the exclusion of a careful balancing of competing values.[36]

The value of these sophisticated categorization efforts merits investigation.[37] Are they anything more than—if even—intellectually satisfying? Do these distinctions give us information that we would otherwise lack?[38] At the very least it can be argued that framing something as procedure rather than substance has practical consequences. For instance, as described earlier in relation to matters of jurisdiction, framing a matter as procedural can be used as an avoidance technique, avoiding ruling on the merits.[39] In addition, the distinction may also present conceptual consequences. To put something in the "procedure" box is to signal that it is not "substance." It is something apolitical, objective, technocratic, and all the other representations that arise with the way procedure is constructed in the collective imaginary of international lawyers. Thus, the label of "procedure" can be instrumentalized to neutralize or render apolitical substantive rules.[40]

Furthermore, the conceptual dichotomy between procedure and substance regularly implies a hierarchy between the two.[41] Procedure is constructed as something lesser than substance, as substance's "handmaid," as it has been referred to in domestic law.[42] This view is largely repeated in international law and may be one of the reasons why there is a lack of theorization of both procedure in general

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Runs the Water where the Brook Is Deep: The Obscured Complexities of Germany v Italy, 1 CAMBRIDGE J. INT'L & COMP. L. 153, 161 (2012) ("It is obviously true that the ICJ need not link substance and procedure merely because states have done so in an international convention.").

35. Trapp & Mills, *supra* note 34, at 161, 163.

36. *Id.* at 163.

37. *See generally* Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L. J. 333, 358 (1933).

38. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1020 (2008) ("And, is it even worthwhile to make the distinction—that is, does correctly classifying some legal rules as substantive and others as procedural give us some analytic or normative traction that we would otherwise lack?"). John Hart Ely certainly seems to suggest so: "We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts . . . need not imply that they can have no meaning at all." John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 724 (1974).

39. On procedure as avoidance technique, see Martinez, *supra* note 38, at 1082–83.

40. *See* Nollkaemper, *supra* note 17, at 784–87 (suggesting that the application of procedure to substantive law can have the effect of neutralizing the substantive law).

41. *See* Aliozi et al., *supra* note 34, at 124 ("Each binary implies an actual or potential hierarchy."); ELIZABETH GROSZ, VOLATILE BODIES: TOWARD A CORPOREAL FEMINISM 3 (1994) ("Dichotomous thinking necessarily hierarchizes and ranks two polarized terms so that one becomes the privileged term and the other its suppressed, subordinated, negative counterpart."); RAIA PROKHOVNIK, RATIONAL WOMAN: A FEMINIST CRITIQUE OF DICHOTOMY 25–28 (1999) (discussing the functions of a hierarchical structure); Main, *supra* note 25, at 811 ("Indeed, the inferiority of procedure to substance is a familiar refrain.").

42. *See* Main, *supra* note 25, at 811 (citing Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 297 (1938) ("That substance and procedure are frequently defined with metaphors may be some evidence that the terms lack innate definition.").

and of the policies, principles, and values that inform and justify procedural rules.[43]

The literature that focuses explicitly on procedure is largely descriptive, as it seeks to bring clarity into the procedural practice of specific courts or tribunals.[44] The most important work to date on describing procedure in a cross-cutting manner is by Chester Brown, which describes the emergence of a "common law of international adjudication."[45] The book gives a descriptive account of converging (and sometimes diverging) procedural practices of ICTs. The question that remains unanswered, however, is why these practices converge (or diverge). What are the conditions that inform these choices? And what is the expressive value of such choices? The safety of description and systematization implies that procedural practice is something to be found and not to be constructed, leaving out its conditions of construction.

The literature presents a "schizophrenic attitude of international procedural law."[46] This schizophrenia is described as, on the one hand, the idea that procedure is rooted in general and universal ideals or ideas and, on the other hand, as the functioning of procedure that "in no way reflects the idea of neutrality and universality that is generally put forward."[47] If we look into the vast general literature on ICTs that seeks to (critically) analyze these institutions, we find that accounts of procedure are mostly absent. When they do exist, they perpetuate the state of schizophrenia and subscribe to the conceptual dichotomy between procedure and substance. For example, much academic work has been focused on the different functions of ICTs and of international adjudication as such,[48] often foregoing a discussion of what this means in terms of procedure. The dichotomy and hierarchy between procedure and substance persists, starting from the perspective of the assertion of substantive rights or values, with procedure seen as a tool to secure them.[49] In their work, Armin Von Bogdandy and Ingo Venzke focus on the function of ICTs in exercising public authority. They notice the element of procedural law-making and procedural cross-fertilization and point to how developments in this area relate to ICTs public authority function.[50] They point, for instance, to the use of

43. Papadaki, *supra* note 24, at 43; Nollkaemper, *supra* note 17, at 771. For a similar argument in the United States domestic context, see Bone, *supra* note 26.

44. Descriptive is meant in the sense of writing down and systematizing the rules of procedure.

45. *See generally* BROWN, *supra* note 2, at 15–34.

46. Ruiz Fabri & Stoppioni, *supra* note 13, at 12.

47. *Id*.

48. *See, e.g.*, SHANY, *supra* note 10, at 123, 126–27 (adding the functions of norm support, regime support, and legitimation); Shelton, *supra* note 8, at 539 (distinguishing dispute settlement, compliance, assessment, enforcement, and legal advice through advisory opinions as the function of a court); Alvarez, *supra* note 8, at 176 (listing dispute settlement, fact-finding, law-making, and governance); von Bogdandy & Venzke, *supra* note 8, at 52–59 (distinguishing settling disputes, stabilizing normative expectations, making law, and controlling and legitimating public authority). *See generally* ASIL1906, *The Fifth Annual Charles N. Brower Lecture on International Dispute Resolution*, YOUTUBE (Apr. 14, 2017), https://www.youtube.com/watch?v=jbvNsfRqElg&feature=youtu.be.

49. *See* Papadaki, *supra* note 24, at 42 (discussing the interactions between substantive and procedural laws).

50. *See generally* Armin von Bogdandy & Ingo Venzke, *The Spell of Precedents: Lawmaking*

amicus curiae as a procedural strategy to legitimize international judicial law-making. A more overt assertion of a similar sentiment is offered by André Nollkaemper, who sees international adjudication as a vehicle for the protection of public goods, emphasizing the importance of procedure to fulfil this function.[51]

What is thus necessary is to move beyond an account of procedure that is descriptive and adjunctive in nature towards a more theoretical or conceptual engagement that puts procedure at the heart of the inquiry. Efforts to move beyond the descriptive account have been made, for instance, by Filippo Fontanelli and Paolo Busco who discuss procedural fairness in international adjudication, zooming in on procedure as an instrument of justice.[52] They emphasize the importance of conceptualizing procedural justice at the international level, based on the insight that its features are such that an inquiry distinct from the domestic context is necessary.[53]

The general technocratic narrative of procedure presented in much of the literature, as well as its basis in the dichotomous procedure-substance interface, seems rather unsatisfactory both on an analytical and a conceptual level. As an analytical matter, it is unsatisfactory because the dichotomy is unstable, if not illusory. The lack of a clear distinction between procedure and substance is a testament to the fact that such binary thinking is not reflective of reality.[54] The strong interaction and overlap between what is qualified as procedure and what is substance means that procedure may hold just as much power as substance.[55] As a conceptual matter, there are different and more fruitful ways of understanding procedure, which will be explored in the next section of this article.

III. THE DIFFERENT FACES OF PROCEDURE

The construction of the distinctive categories of "procedure" and "substance" orders the way in which we think about international adjudication and ascribes different meanings to these concepts. Therefore, there exist different conceptions of procedure and how they relate to other concepts, such as substance, justice, and power. This section explores the different ways in which procedure is conceptualized, or, in other words, the different faces of procedure. The first one is

by International Courts and Tribunals, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 503 (Cesare P.R. Romano et al. eds., 2013).

51. Nollkaemper, *supra* note 17, at 775–79. *See generally* Markus Benzing, *Community Interests in the Procedure of International Courts and Tribunals*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 369 (2006).

52. *See generally* Fontanelli & Busco, *supra* note 21.

53. *Id*. at 20.

54. Nollkaemper, *supra* note 17, at 773 (citing Main, *supra* note 25, at 816); *see* Niklas Luhmann, *The Third Question: The Creative Use of Paradoxes in Law and Legal History*, 15 J. L. & SOC'Y 153, 156 (1988) (pointing to the inherent faults of legal regulation of society due to the misaligned nature of law (systematized, binary, fixed, formulated in abstract and general terms) and society (stochastic, diverse, arranged over continua, mutating, comprised of specific and all too practical elements)); Fontanelli & Busco, *supra* note 21, at 11 (explaining how procedural rules may endanger fairness and result in injustices).

55. *See* Main, *supra* note 25, at 804–11, 818 (explaining the roots of the doctrinal procedure-substance dichotomy in Anglo-American law and argues that this is a false dichotomy).

"procedure as servant".[56] This builds on the previous section, which showed the relationship and hierarchy between procedure and substance and indicated that procedure is regularly seen as subordinate to substance and assumed to be of a (purely) instrumental nature. Not all the literature nor what happens in practice sees procedure in this way. Opening up to the intrinsic value of procedure,[57] the second conception, "procedure as justice" is explored. [58] Procedure then becomes central to the idea of justice, legitimized through procedure's claims to objectivity, neutrality, and universality. This in turn clothes adjudicatory bodies with a sense of impartiality and neutrality, which they are supposed to represent.[59]

However, the first two faces of procedure do not paint a complete picture. For example, at the heart of these inquiries lies a fervent belief in the need for further positivized judicial procedure. This fits squarely with an idea that formalized procedure will result in more impartial or fairer judgment of the substance.[60] Sticking to this hegemonic conception, the literature fundamentally fails to address the alleged political and instrumental nature of procedure, which remains chronically underestimated.[61] This is one of the reasons why this article proposes that procedure could be seen as an instrument of power, to complement our understanding on the nature of procedure in international adjudication. This part of the article will now turn to explore, in turn, three facets of the concept of procedure: procedure as servant, procedure as justice, and procedure as power.

A. Procedure as Servant

The first face of procedure can be framed as "procedure as servant." In this

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56. See *infra* Part III.A for a discussion of the view that procedure exists merely to give effect to substance.

57. *See*, *e.g.*, Roozbeh B. Baker & Arman Sarvarian, *Procedural Fairness and the Institutional Dynamic: Where We Are and Where We Should Be Going*, *in* PROCEDURAL FAIRNESS IN INTERNATIONAL COURTS AND TRIBUNALS 381 (Arman Sarvarian et al. eds., 2015) (exploring the importance of procedure in ICTs, without regard to substance).

58. See *infra* Part III.B for a discussion on the inherent value of procedure in achieving justice.

59. Another way of symbolically legitimizing these processes is through the spaces in which they take place. *See* Daniel Litwin, *International Lawyers and the City*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CITIES (Helmut Aust & Janne Nijman eds.) (forthcoming) (exploring the link between the clinical, laboratory-like, neutral offices as the spaces of arbitration and the claim to science and neutrality of the field, drawing inspiration from the work of critical geographers).

60. *See* Jean-Marc Sorel, *Procéduralisation et transformation de l'idée de justice* [*Proceduralization and Transformation of the Idea of Justice*], *in* INTERNATIONAL LAW AND LITIGATION 19, 33 (Hélène Ruiz Fabri ed., 2019) (portraying procedure as the vehicle through which justice can be achieved and suggesting that procedure is in fact what legitimates the law).

61. It has been suggested that one way of uncovering the political dimensions is offered through looking at the difficulties in procedural cross-fertilization processes: "the chronic underestimation of the political dimension of procedure might facilitate cross-fertilization, and explain why these issues remain under-investigated. However, it might also be that processes of cross-fertilization reveal this political dimension of procedure, and therefore some stakes of power, and that such processes are not as smooth as one could expect . . . ." Hélène Ruiz Fabri & Joshua Paine, *The Procedural Cross-Fertilization Pull*, MAX PLANCK INST. LUX. FOR PROC. L. RES. PAPER SERIES 6 (2019).

view of procedure, procedural rules are hierarchically lower than rules of substance and act in their service.[62] This view of procedure as "housekeeping"[63] is realized through pursuing process values of efficiency and accuracy.[64] In this sense, procedure is there simply to give effect to substantive values.[65] This fits with what is described as a utilitarian perspective on procedure,[66] where procedure should serve nothing more than to facilitate the implementation of substantive law.[67] From this perspective, the entire judicial process is seen as almost exclusively outcome oriented.

As discussed earlier, the bulk of the literature on ICTs, deliberately or not, follows this perspective. The rules on evidence and fact-finding may be taken as an example to illustrate the conception of procedure as servant and its potential shortcomings. Most often these rules are presented in utilitarian terms, centered around accounts of accuracy and efficiency.[68] One might even say that this utilitarian perspective is inherent to the very notion of evidence in adjudication: There is a substantive legal argument to be made and we look for evidence to support the argument. There is a general lack of formalization of the rules on evidence, yet the established practice has been extensively described,[69] and there is a common

62. *See* Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 637 (2006) (noting that international criminal procedure is not able to keep up with the changes in substantive law); Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. FOREIGN AFF. 77, 82 (2009) (stating that international criminal procedure is seen as secondary to substantive international criminal law); Kolb, *supra* note 3, at 953 ("[T]he function of procedure is an accessory one. It operates in such a way as to set the substantive law to work and give effect to it. Procedure is thus not an end in itself, but a service function.").

63. For a commentary on the gendered language in procedure (e.g., "housekeeping," "handmaiden") as a routine, something secondary, unimportant, see Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).

64. Martinez, *supra* note 38, at 1020 n.144.

65. Ohlin, *supra* note 62, at 82; *see, e.g.*, Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.) 1932 P.C.I.J. (ser. A/B) No. 46, at 155 (June 7) ("[T]he decision of an international dispute of the present order should not depend mainly on a point of procedure.").

66. *See* Martinez, *supra* note 38, at 1080–84 (describing the utilitarian relationship between procedural law and substantive law).

67. *See* Nollkamper, *supra* note 17, at 779 (describing how the procedural rules giving effect to substantive values acts as a transmission).

68. *See, e.g.*, Arman Sarvarian, *Procedural Economy at the International Court of Justice*, 18 LAW & PRAC. INT'L CT. & TRIBUNALS 74 (2019) (discussing rules of evidence in context of procedural efficiency).

69. For a discussion on the use of evidence in ICTs, see Jean D'Aspremont & Makane Moïse Mbengue, *Strategies of Engagement with Scientific Fact-Finding in International Adjudication*, 5 J. INT'L DISP. SETTLEMENT 240 (2014); CHITTHARANJAN FELIX AMERASINGHE, EVIDENCE IN INTERNATIONAL LITIGATION (2005); Giorgio Gaja, *Assessing Expert Evidence in the ICJ*, 15 LAW PRAC. INT'L CTS. & TRIBUNALS 409 (2016); JAMES GERARD DEVANEY, FACT-FINDING BEFORE THE INTERNATIONAL COURT OF JUSTICE (2016); ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (2009); Riddell, *supra* note 3; Shabtai Rosenne, *Fact-Finding Before the International Court of Justice*, *in* ESSAYS ON INTERNATIONAL LAW AND PRACTICE 235–50 (2007); DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS (rev. ed., 1975); Thirlway, *supra* note 3; Peter Tomka & Vincent-Joël Proulx, *The Evidentiary Practice of the World Court* (Natl. Univ. Sing., Working Paper No. 2015/010, 2015).

practice that has emerged across ICTs.[70] This common set of rules should, as Brown describes, facilitate the proper administration of justice.[71]

At the same time, rules on evidence and fact-finding, just as rules of procedure more generally, often remain vague and quite general. Much deference is given to the courts and tribunals, with little to no restriction on the admissibility or consideration of evidence proposed.[72] Most contributors when looking at practice indeed subscribe to this idea of a general principle of free consideration of evidence, leading one commentator to state that "no rule of evidence thus finds more frequent statement in the cases than the one that international tribunals are not bound to adhere to strict rules of evidence."[73] Coming back to the "schizophrenic attitude of procedure,"[74] such freedom and indeterminacy, seem to stand in stark contrast with the universalizing and objective narrative of procedure. This already exposes some limitations to framing procedure as a technique serving substance. Notably, to reinforce the objective narrative, the academic response to practice takes the form of critiques on this flexibility and informality of rules on evidence in international litigation,[75] reflected in a plea for more active and formalized ways of fact-finding.[76]

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70. SANDIFER, *supra* note 69, at 457.

71. These cover admissibility of evidence, examining their probative value, burden and standard of proof, and the powers of courts and tribunals to undertake evidence gathering *proprio motu*. *See* BROWN, *supra* note 2, at 84–85, 101–18.

72. CAROLINE E. FOSTER, SCIENCE AND THE PRECAUTIONARY PRINCIPLE IN INTERNATIONAL COURTS AND TRIBUNALS: EXPERT EVIDENCE, BURDEN OF PROOF AND FINALITY 4 (2011). *See generally* G.A. Res. 31/98 (Dec. 15, 1976); SANDIFER, *supra* note 69; International Center for Settlement of International Disputes, *Rules of Procedure*, Rule 33(1).

73. SANDIFER, *supra* note 69, at 6. In an older contribution Hersch Lauterpacht argued that in international proceedings, "the importance of the interests at stake precludes excessive or decisive reliance upon formal and technical rules." HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 366 (1958). Sandifer even goes so far as to say that in the practice of international procedure "technicalities are taboo." SANDIFER, *supra* note 69, at 5.

74. Ruiz Fabri & Stoppioni, *supra* note 13, at 12.

75. *See generally* Riddell, *supra* note 3.

76. *Id*. at 852; *see* Simon de Smet, *Evidence Before the International Court of Justice by Anna Riddell and Brendan Plant*, 68 CAMBRIDGE L. J. 664, 666–67 (2009) (criticizing the common formalization of fact-finding procedures); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep 14, ¶¶ 24, 29, 62, 109 (June 27) (describing the standard of proof as convincing evidence); Application of The Convention on Prevention and Punishment of The Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep 43, ¶ 209 (describing the standard of proof as needing fully conclusive evidence); Ireland v. United Kingdom, Eur. Ct. H.R. (ser. A), No. 25, 65, ¶ 161 (1978) (describing the standard of proof as requiring proof beyond a reasonable doubt); Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 36, ¶ 115 (adopting the evidentiary standard of beyond a reasonable doubt used in Ireland v. United Kingdom). *See generally* RIDDELL & PLANT, *supra* note 69; Charles N. Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 INT'L LAW. 47 (1994); Caroline E. Foster, *International Adjudication – Standard of Review and Burden of Proof: Australia-Apples and Whaling in the Antarctic*, 21 REV. EUR. COMMUNITY & INT'L ENVTL. L. 80 (2012); Jean d'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 21 (Thomas Schultz & Federico Ortino eds., 2020).

The need for formalization has been justified as a way to avoid factual errors,[77] appealing to greater efficiency and accuracy in substantiating the substantive claims under dispute.

The above discussion indicates that the idea of procedure as servant does not give us a full picture of the role of the rules of evidence. Relying on expert evidence, for instance,[78] could also be justified merely as a matter of legitimacy, unrelated to accuracy concerns if we would observe that in practice the expert report is not used. A similar argument has been made in relation to site visits as a fact-finding mechanism.[79]

There is more to rules of procedure than merely serving the substantive legal argument. Its realization through process-values of efficiency and accuracy does not explain how procedure is used in practice, nor does it account for what part of 'substance' 'procedure' is meant to prioritize. The argument has for instance been made that rules of evidence should reflect the role of courts in writing certain histories.[80] While this may still be justified as a function in service of broader substantive values, the procedure itself also reflects a certain legitimacy, authority, or sense of fairness, regardless of the specific argument in dispute. This reflects a different conception of procedure, one of procedure as justice.

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77. *See, e.g.*, RIDDELL & PLANT, *supra* note 69, at 348 (discussing the factual errors made in Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), 2002 I.C.J. Rep 303); Clive Shofield & Chris Carleton, *Technical Considerations in Law of the Sea Dispute Resolution, in* OCEANS MANAGEMENT IN THE 21ST CENTURY 239–49 (Alex G. Oude Elferink & Donald R. Rothwell eds., 2004) (describing how the lack of technical expertise by the International Court of Justice led to factual errors in the Land and Maritime Boundary between Cameroon and Nigeria case).

78. *See, e.g.*, Makane Moïse Mbengue & Rukmini Das, *Rules Governing the Use of Experts in International Disputes*, 17 LAW & PRAC. INT'L CTS. & TRIBUNALS 415 (2018) (discussing the use of expert evidence in ICTs); Sophie Schiettekatte, *Building the Bridge Between Science and Law at the International Court of Justice: From Ex Parte to Ex Curia Experts*, SSRN ELECTRONIC J. (May 7, 2017), http://www.ssrn.com/abstract=2964246.

79. *See* Michael A. Becker & Cecily Rose, *Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication*, 8 J. INT'L DISP. SETTLEMENT 219, 239–40, 248–49 (2017) (reasoning that, while site visits have not proven to be outcome-determinative, they may function as confidence-building measures that increase the likelihood that a judgment or award will be successfully implemented and may therefore promote the inclusion of fairness and equity considerations in the decision-making calculations of international courts and tribunals).

80. *See* Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law*, 73 NORDIC J. INT'L L. 461, 463 (2004) (explaining that the historical function of trials may require that international courts and tribunals provide greater flexibility with respect to the admissibility of evidence); Moshe Hirsch, *The Role of International Tribunals in the Development of Historical Narratives*, 20 J. HIST. INT'L L. 391, 393–94, 416 (2018) (arguing that while international courts and tribunals may play a role in constructing historical narratives, the manner in which they can present those narratives is limited by the rules of evidence they utilize); Christian J. Tams, *World Courts as Guardians of Peace?*, 15 GLOBAL COOPERATION RES. PAPERS 1, 23–25 (2016) (discussing how the parties to various armed conflicts have utilized international courts and tribunals to advance their own narratives on armed conflicts in which they are engaged, and how the limited jurisdiction of those international bodies in any one particular case has influenced the narratives of those conflicts).

B. Procedure as Justice

Procedure not only serves the substance of the specific case at hand, it also serves specific values attached to the process of adjudication, such as principles of equality, fairness and considerations of dignity. The second conceptualization of procedure as justice complements the first conception of procedure as servant in that it takes into account the intrinsic value of procedure.[81] Rather than outcome-oriented, this conception is process-oriented. Fair procedure is then an outcome in itself. Procedure as justice focuses on those principles and rules that have a legitimating effect beyond the 'procedure-as-efficient-application-of-substantive-law' theory.[82]

In the context of international criminal law, it has been argued that beyond procedure as adjectival to substantive law, it also has a role in "vindicat[ing] the Rule of Law," making the procedures ends themselves.[83] More generally, the equal participation of litigants not only serves the efficiency of the process in the form of more accurate substantive outcomes, but also provides value by increasing the perceived legitimacy of the process and satisfaction with the outcome by the parties.[84] This means that for the parties, the legal process may seem more legitimate if the rules of procedure are fair.

Elements that legitimate the process further include ensuring independence and impartiality of the decision-maker, giving equal and meaningful voice to the parties to the dispute, and beyond that, giving voice to different stakeholders.[85]

When we construct procedure as fairness or justice, often the purpose of the process is to aspire for dignity or legitimacy.[86] For example, the practice of allowing victims, non-governmental organizations (NGOs), and others to testify, such as at the Inter-American Court of Human Rights, is an expression of dignitarian values giving voice to relevant stakeholders. Likewise, in international criminal law this trend is exemplified by victim participation, as enshrined in the Rome Statute of the International Criminal Court (ICC).[87] Additionally, opening up procedures to

81. *See* Ohlin, *supra* note 62, at 82–83 (expounding upon the rule-of-law-based understanding of international criminal procedure, which values international criminal procedure for its intrinsic functions).

82. Martinez, *supra* note 38, at 1084.

83. *See* Ohlin, *supra* note 62, at 106.

84. *See* Fontanelli & Busco, *supra* note 21, at 3–4, 8 (explaining that procedural fairness ensures that legal proceedings are perceived as effective, accurate, and acceptable); Nollkaemper, *supra* note 17, at 782–83 (indicating that certain procedural arrangements reflect the principle of equality between the parties to a dispute); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284–85 (2003) (discussing psychological literature that demonstrates a relationship between individuals' compliance with the law and their subjective views of the fairness of the legal procedures to which they are subjected).

85. Nollkaemper, *supra* note 17, at 782–83.

86. Martinez, *supra* note 38, at 1084–87.

87. *See* Carolyn Hoyle & Leila Ullrich, *New Court, New Justice?: The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court*, 12 J. INT'L CRIM. JUST. 681, 688–89 (2014) (explaining that the role of victim participation in ICC proceedings, codified in the Rome Statute, is predicated upon considerations of restorative justice); Valentina Spiga, *No Redress Without Justice: Victims and International Criminal Law*, 10 J. INT'L CRIM. JUST. 1377,

amicus curiae and making use of expert evidence demonstrate that procedural rules have a value themselves. Beyond increasing efficiency and accuracy, these tools create the perception of a fair procedure that includes interests of relevant, affected stakeholders.

A danger lies in this conception of procedure when the focus becomes only on a "fair" process, distracting from unfair substance.[88] Moreover, on the international plane, the rules of procedure are incomplete and vague, and general principles such as procedural "fairness" lack practical content.[89] Procedural arrangements are constructed against their social context and are thus contingent upon time and society reflecting community values,[90] which are notoriously difficult to coherently discern in the international context.[91] There is, for instance, fierce criticism on the use of NGOs as representatives of objective or universal moral values, which the ICT may nevertheless use as a way of enhancing its legitimacy.[92]

The conception of 'procedure as justice' and its potential shortcomings can be illustrated through a discussion of the rules and practice on the admission of amicus curiae. This serves as an example of a procedural practice that reflects the idea of procedure as justice by opening up the process to relevant stakeholders. Often, rules of procedure are silent on amicus briefs, let alone on the conditions that guide their consideration in a specific case. The ICTs themselves play an important role in shaping these procedures by adopting a certain procedural practice. The example par excellence here might be seen in the World Trade Organization's (WTO) Dispute Settlement practice. The rules do not provide for the submission and consideration of amicus curiae briefs, yet the WTO Appellate Body (AB) found a creative way to take these briefs into account.[93] This development raised concerns that there would

1389–91 (2012) (identifying a shift in ICC jurisprudence towards greater victim participation in ICC proceedings, motivated by a need to safeguard both the fairness and efficiency of those proceedings).

88. Martinez, *supra* note 38, at 1087; *see* Fontanelli & Busco, *supra* note 21, at 13 (explaining that the objective of procedure is to facilitate the principled application of substantive law).

89. *See* Fontanelli & Busco, *supra* note 21, at 4–6 (indicating the concept of procedural fairness has no universal meaning, and thus lacks practical meaning in an international context).

90. *See* Martti Koskenniemi, *General Principles: Reflexions on Constructivist Thinking in International Law*, *in* SOURCES OF INTERNATIONAL LAW 359, 365, 375 (Martti Koskenniemi ed., 2017) (discussing socialist theory, which holds that general principles develop into norms of conduct based on the goals and values of the international community, which are reflective of social reality); Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 481 (1975) ("These concepts are intended to suggest that divergences in procedural arrangements are, to a considerable extent, related to larger divergences in the conception of the proper organization of authority characteristic of the Continent and the English-speaking world.").

91. *See* Fontanelli & Busco, *supra* note 21, at 4–5 (reasoning that it is difficult to determine the content of universal moral judgments and principles in the international community).

92. *See*, *e.g.*, Kjersti Lohne, *Global Civil Society, the ICC, and Legitimacy in International Criminal Justice*, *in* THE LEGITIMACY OF INTERNATIONAL CRIMINAL TRIBUNALS 449, 457, 463–64, 469 (Nobuo Hayashi & Cecilia M. Bailliet eds., 2017) (arguing that NGOs cannot properly articulate universal moral principles on behalf of the international community, because they are not representative of that community).

93. The turning point for the WTO with regards to taking amicus curiae briefs into account occurred during *Import Prohibitions of Certain Shrimp and Shrimp Products*, where the WTO

be an abuse of this procedural tool by self-interested actors[94] that have stakes in the outcome of a case.[95] The response then of the AB has been to establish a practice with a list of rules surrounding the admission and consideration of amicus curiae.[96] In a way, this is the adjudicator complying with the concerns voiced (mainly by the state parties), by establishing a more technical and more restrictive practice that would block out the kind of self-interested amicus briefs that would overload the court. Again, this practice was met with criticism (from outside the treaty framework) on the grounds that the consideration of amicus curiae briefs has become far too restrictive and does not give room for certain forms of (necessary) participation. The development of this practice presents a push and pull between different ideas of the role and function of procedure. Procedure either merely to serves the specific case or it acts as a form of justice in its own right that gives a voice to relevant stakeholders, potentially boosting the Court's legitimacy and efficacy.[97]

From the perspective of procedure as justice, it can be deemed a victory for actors not party to the dispute that their views *can* be taken into account. What is, of course, important as well is whether they *are* being taken into account and under what *conditions*, which remain a matter of discretion. It is not difficult to imagine that these decisions could be influenced by strategic considerations by the adjudicators, who are mindful of the complex political contexts in which they operate.[98] Recent research has argued that in the WTO Dispute Settlement

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Appellate Body determined that WTO panels could take into account amicus curiae briefs based upon a broad—according to some, an "activist"—interpretation of Dispute Settlement Understanding (DSU) Article 13 (regarding the right to seek information). Appellate Body Report, *United States — Import Prohibitions of Certain Shrimp and Shrimp Products*, ¶¶ 99–110, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998). The Appellate Body later determined that it could consider amicus curiae briefs as well, in accordance with Article 17.9 of the DSU, which allows the Appellate Body to set up its own working procedures. Appellate Body Report, *United States – – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶¶ 36–49, WTO Doc. DS138/AB/R (adopted May 10, 2000).

94. Especially industry groups who would be able to hide behind a neutral façade. *See* Jared B. Cawley, *Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Institutions*, 23 PENN ST. INT'L L. REV. 47, 49–52 (2004).

95. *See id.* at 68–69, 71–72 (expounding upon the views of those WTO member states that were concerned that the Appellate Body's jurisprudence with respect to amicus curiae briefs would allow industry special interests to impose their views on WTO decisions).

96. Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 5.8, 8.12–13 WTO Doc. DS135/AB/R (adopted Mar. 12, 2001).

97. *See* Theresa Squatrito, *Amicus Curiae Briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?*, 17 WORLD TRADE REV. 65, 68–69 (2018) (explaining that the debate over the proper role of amicus curiae briefs in WTO disputes concerns considerations of efficiency and legitimacy—proponents argue that amicus curiae access provides non-state stakeholders with representation in WTO processes, while opponents suggest that such access frustrates WTO decision-making in a particular dispute).

98. James McCall Smith, *WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings*, 2 WORLD TRADE REV. 65, 74–80 (2003); Squatrito, *supra* note 97, at 73; Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 257 (2004).

Mechanism (DSM), the consideration of amicus curiae briefs is conditioned upon the endorsement of (one of) the disputing parties.[99] Admitting amicus curiae briefs beyond that is merely of symbolic value and has little to no influence on the substance of a dispute.[100] In this sense, the objectivity veil of formal procedural rules set up to admit amicus curiae briefs—opening up a procedure to ensure effective representation of all arguments and to promote fairness—is pierced by the political context of how this plays out in practice. Neither the frames of procedure as servant nor procedure as justice are sufficient to show what role procedure has in practice. The example of the WTO further shows that indeterminate rules have the potential to be turned into procedural tools that may be used or abused, furthering self-interested, political, or other goals.

C. Procedure as Power?

The first two faces of procedure discussed above fail to fully explain what happens in practice. This section illustrates and highlights some consequences and limits of these basic conceptions already hinted at in the previous sections. It starts by giving an example of a case in which both conceptions have been used to justify two opposing decisions on the same procedural issue, namely, the ICC Prosecutor's request to open investigations into the situation in Afghanistan. Then, it further highlights additional ways in which procedure is used that cannot be explained through the basic conceptions and thereby suggests a third face of procedure, one that reveals its nature as an instrument of power, to complement our understanding of how procedure works in practice.

1. Illustrating the limits of the first two faces of procedure: Investigating in the 'interests of justice'

The different faces of procedure in practice can be illustrated by examining the competing decisions of the Pre-Trial Chamber and Appeals Chamber of the ICC on the opening of an investigation into the situation in Afghanistan by the ICC Prosecutor. This example seeks to show the limits of the first two faces of procedure and act as an introduction to 'procedure as power'.

In the case of Afghanistan, the Prosecutor decided to open an investigation into the situation *proprio motu*, meaning on her own initiative and not at the request of one of the state parties to the Rome Statute nor by virtue of a UN Security Council referral. In accordance with Rule 48 of the Rules of Procedure and Evidence ("RPE"), the Prosecutor should, when investigating *proprio motu*, consider several factors that are formulated in Article 53(1) of the Rome Statute.[101] Additionally,

99. Squatrito, *supra* note 97, at 85.

100. ASTRID WIIK, AMICUS CURIAE BEFORE INTERNATIONAL COURTS AND TRIBUNALS 467–68 (2018).

101. Rome Statute of the International Criminal Court art. 53(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being

under Article 53(1)(c), the Prosecutor must consider "whether there are substantial reasons to believe that an investigation would not serve the interests of justice." Pursuant to another procedural rule an investigation *proprio motu* can be opened only upon approval by the Pre-Trial Chamber ("PTC"). The RPE here require the PTC to consider "that there is a reasonable basis to proceed with an investigation and that the case appears to fall within the jurisdiction of the Court."[102]

In the case of the situation in Afghanistan, the Pre-Trial Chamber (PTC) initially reached the controversial decision not to open investigations.[103] Later the Appeals Chamber ("AC") reviewed and reversed the decision almost entirely. The development of this process forms an interesting example of how the interpretation of vague procedural rules reveals different understandings of what procedure is or ought to be, since here we are presented with two Chambers of the same Court reaching diametrically opposite conclusions and expressing very different priorities or values.

The PTC claimed to interpret the interests of justice in light of "the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities."[104] The PTC focused on one word in particular, "effective" prosecution, framing the goal of the process so as to ensure an effective outcome in an expedient manner.[105] This interpretation signals that indeed, the process—the decision to open the investigation—must be evaluated in light of how well the process can reach substantive results in an efficient and accurate manner, embodying procedure as servant. A limit of the concept of procedure as servant that became salient in this decision is that it does not account for solutions when dealing with competing substantive goals.[106] As applied to the ICC Afghanistan decision, procedure is not only there to facilitate "effective prosecution," but also, as the PTC noted, to

committed; (b) The case is or would be admissible under article 17; and (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

102. *Id.* at art. 15(4) (in conjunction with Rules of Procedure and Evidence, r. 50(5) ICC-ASP/1/3)).

103. *See generally* Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Apr. 12, 2019).

104. *Id.* ¶ 89.

105. *Id.* (stating that the PTC found "an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame."). Thereon it determines that due to the lack of cooperation by the parties thus far—and the likelihood of that lack of cooperation remaining the case in the foreseeable future—the complex political landscape, and the lack of resources available to the Court, it would not serve the interests of justice to open an investigation into the situation in Afghanistan. *Id.* ¶¶ 91–96.

106. *See* Martinez, *supra* note 38, at 1081–84 (explaining that the view of procedure as the efficient application of substantive law does not indicate which substantive values should be advanced by procedural rules); Nollkaemper, *supra* note 17, at 779–81 (reasoning that procedure as transmission, which views procedure as giving effect to substantive norms, cannot in of itself make determinations regarding the relative value of competing norms).

facilitate the "fight against impunity."[107] Yet, the choice was made to focus on the first goal. The criticism raised then also focuses on the fact that the fight against impunity implies the necessity to also, if not especially, address difficult cases.[108] In this sense, the process itself is a substantive goal,[109] fitting into the second conception of procedure as justice.

In this case, however, the ICC PTC decision focused on managerial objectives and values of efficiency and expediency.[110] By adopting this lens, the PTC framed and underscored its own function and the function of procedure, as the servant of the interests of justice, which in its own interpretation is best served in a cost-efficient and expedient manner. This highlights the expressive function and power that comes with the interpretation of procedure—expressive of a certain view of the function of the court and the functions of its procedures. The PTC decision faced extensive criticism for this.[111] What is, for instance, left out of consideration in the decision is the fact that this reasoning could encourage non-cooperation as a way of escaping court jurisdiction and thereby further increase powerful states' already elevated leeway, enforcing the structural power imbalances that already exist and thereby harming the Court's legitimacy and authority. One could further speculate that broader political pressure influenced the procedural course of action.[112]

The Appeals Chamber subsequently reversed the PTC decision and allowed the

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107. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 89 (indicating the importance of both objectives).

108. *See* Sergey Vasiliev, *Not Just Another "Crisis": Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part II)*, EJIL: TALK! (Apr. 20, 2019), https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-ii/ (explaining that the Afghanistan case was exactly the kind of case for which the ICC was created).

109. *See* Ohlin, *supra* note 62, at 82–83 (discussing the importance of procedure as a means of attaining the intrinsic value of subjecting international criminal activity to the rule of law).

110. For an account of the implications of an overt reliance by the PTC on pragmatic and (political) expediency concerns, which it brought in through the backdoor of the "interests of justice" concept, for the credibility of the ICC as a judicial institution, *see* Vasiliev, *supra* note 108.

111. *See* Dov Jacobs, *ICC Pre-Trial Chamber Rejects OTP Request to Open an Investigation in Afghanistan: Some Preliminary Thoughts on an Ultra Vires Decision*, SPREADING THE JAM (Apr. 12, 2019), https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/ (criticizing the Pre-Trial Chamber's decision as going beyond the Court's jurisdiction); *see* Vasiliev, *supra* note 108 (arguing that the ICC's Afghanistan decision involved the Pre-Trial Chamber's normative acceptance of the practical and political limitations on its authority).

112. Here, what bears remembering is the U.S. backlash against the ICC, revoking the Prosecutor's visa and threatening to impose sanctions. Unsurprisingly, the Trump Administration celebrated this decision and framed it as a victory. It is not difficult to imagine that there may be (perceived) concerns about this procedural interpretation. While sticking to a language of managerialism, these concerns are undeniably inspired by considerations that are less "housekeeping" than an overt politicization of the Court. Patrick Wintour et al., *US Revokes ICC Prosecutor's Visa Over Afghanistan Inquiry*, GUARDIAN (Apr. 5, 2019, 12:56 PM), https://www.theguardian.com/law/2019/apr/05/us-revokes-visa-of-international-criminal-courts-top-prosecutor.

Prosecutor to formally open investigations into the situation in Afghanistan.[113] The AC found that the PTC had overstepped its discretion and erred in interpreting the Statute and Rules. In the AC's view, the PTC should not have considered the factors in Article 53(1)(a) to (c).[114] The AC came to the conclusion that "the Pre-Trial Chamber erred in deciding that 'an investigation into the situation in Afghanistan at this stage would not serve the interests of justice'. It f[ound] that the Pre-Trial Chamber's decision under article 15(4) of the Statute should have addressed only whether there is a reasonable factual basis for the Prosecutor to proceed with an investigation, in the sense of whether crimes have been committed, and whether the potential case(s) arising from such investigation would appear to fall within the Court's jurisdiction."[115] Based on this conclusion the AC did not find it necessary to additionally consider what the interests of justice might mean.

While it remains unclear what is meant by "the interests of justice," the AC did indicate that it is up to the Prosecutor to decide on this element and that the considerations presented by the PTC were indeed an abuse of discretion and were 'cursory' and 'speculative'.[116] The PTC put its focus on time and resources, maybe understanding the interests of justice as pursuing a costly and time-consuming investigation to imply not pursuing justice in other perhaps more fruitful situations.[117] The AC gave no further indication on this, since it did not focus on clarifying the concept of "interests of justice," but adopted the more pragmatic approach of assigning who gets to decide these interests of justice (the Prosecutor). There is no indication, for example, on whether the Prosecutor should take into account resource allocation as part of the interests of justice determination.[118] Perhaps we might never know as the AC also indicated that the Prosecutor is not called to provide reasoning as to the interests of justice to the PTC to accompany a request to open investigations. One commentator suggested that there are competing ideas of interests of justice at play, one that focuses on individual situations and one that takes into account the entire mission of the Court.[119]

The differences in reasoning can also be explained along the lines of the different conceptions of procedure. The issue centered around a procedural decision, to open investigations or not. In its decision the PTC expressed, through its interpretation of procedural rules, normative claims about the function of the Court and resource allocation by the prosecutor. It prioritizes questions of efficiency; it seemed the case is not worthwhile when it is not likely to yield results. This aligns with an instrumental view of procedure as servant. On the other hand, the AC,

113. *See generally* Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020).

114. *Id.* ¶ 35.

115. *Id.* ¶ 46.

116. *Id.* ¶ 49.

117. *See* David Luban, *The "Interests of Justice" at the ICC: A Continuing Mystery*, JUST SECURITY (Mar. 17, 2020), https://www.justsecurity.org/69188/the-interests-of-justice-at-the-icc-a-continuing-mystery/.

118. *Id.*

119. *Id.*

reversing this decision, (implicitly) recognized the intrinsic value of the process, leaning towards procedure as justice. What our concepts of procedure however omit to account for are the political pressures at play behind the scenes.

2. Introducing procedure as power

The previous example highlighted some ways in which the first two conceptions of procedure fail to fully explain what happens in practice. Indeed, practice shows that procedure may also for instance be used as "avoidance", that is, deliberately using procedure to not resolve or delay resolving substantive questions put to the ICT's attention.[120] Procedure could also be used to escape ruling on the merits,[121] or as "signaling" where the court slips in its view on the merits by procedure without ruling on the substance;[122] often substantive decisions are disguised as procedure, too.[123] So while we can, for instance, admit that the involvement of amicus curiae may be a sign of efficiency and fairness, looking deeper into the practice it seems equally probable that this is only a cover or theatrics. Behind the scenes, we find the system may be just as closed as before.[124] Moreover, for all its claims of neutrality and objectivity, procedure is also a medium that itself often reflects the language and the message of the powerful.[125]

This article invites the reader to engage with and explore the concept of

120. Martinez, *supra* note 38, at 1082. *See also* Jed Odermatt, *Patterns of Avoidance: Political Questions Before International Courts*, 14 INT'L J. L. CONTEXT 221, 234 (2018) (explaining that international courts tend to utilize procedural rules to avoid deciding cases, rather than explicitly classifying those controversies as political questions).

121. This was accomplished by way of rejecting jurisdiction. *Id.* at 227. Andrea Bianchi, for instance, heavily criticized the ICJ's decision in the Marshall Islands case—and the academic debates on that decision—for arguing solely about issues of "technique." Andrea Bianchi, *Choice and (the Awareness of) Its Consequences: The ICJ's Structural Bias Strikes Again in the Marshall Islands Case*, 111 AM. J. INT'L L. UNBOUND 81, 82 (2017).

122. For instance, in *Oil Platforms*, the ICJ played with the interpretations of the provisions for its jurisdiction in order to construct a decision that allowed it to present its view on a matter concerning the international law on the use of force, while eventually finding that it lacked jurisdiction. *See generally*, Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6). This approach has been criticized by scholars. *See, e.g.*, William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE L. INT'L J. 295, 306 (2004) (arguing that the decision was regrettable as a formalistic matter).

123. Martinez, *supra* note 38, at 1017. In the international context, an example is the jurisprudence of the ICJ in *Jurisdictional Immunities of the State*, where it construed the law on state immunity as a procedural matter, thereby avoiding the issue of having to resolve the normative conflict between two jus cogens norms. *See* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Dissenting Opinion of Judge Yusuf, 2012 I.C.J. 291, ¶ 30 (Feb. 3) (reasoning that it was not possible, contrary to what the majority had decided, to make a determination on the issue of state immunity without taking into account the general principles underlying human rights law and international humanitarian law, nor to interpret state immunity in a manner conflicting with those norms).

124. *See* WIIK, *supra* note 100, at 467–68 (indicating that the use of amicus curiae briefs in WTO proceedings has not altered the outcome of the disputes adjudicated by those bodies and suggesting that the Appellate Body's allowance of those materials instead merely serves a public relations role).

125. Fontanelli & Busco, *supra* note 21, at 11.

procedure beyond these more traditional understandings and look beneath their claims to universality and neutrality. One way of doing this is to argue that in addition to the conceptions of procedure as servant and procedure as justice, procedure has intimate connections to questions of power, too, and we might therefore speak of "procedure as power."

What ICTs do in practice is, however, generally not analyzed through the lens of "procedure as power." Even when admitting that procedure is reflective of certain values, the normative claim remains that procedural rules should be there to protect the process from itself, that to cure the paradoxes between the "objective" procedure and the "subjective" society,[126] we need "distinctions and exceptions,"[127] in other words, more "objective" rules. Indeed, indeterminate rules are considered problematic; where there is lack of technicality, this is almost equated with lack of proper procedure. This is reinforced by the idea that procedure represents a technique, linking it to the scientification—or at least technification—of the field.[128] The calls for more detailed rules on evidence form an example of this.

The reliance on formal rules brings with it the idea that the substance will, as a consequence, be judged more impartially, more fairly.[129] Sticking to this hegemonic conception, the literature fundamentally fails to address the alleged political and instrumental nature of procedure. Furthermore, this push for formalization may be justified along the different models of how procedure is being used, but mainly it is a way of constraining judicial discretion. In other words, it is a way of avoiding an unregulated exercise of power. In this sense, the call for further formalization may actually reflect that there is power in procedure, while at the same time projecting the myth, and this may well be a necessary one, that there is something neutral and universal about procedure. Our idea of what courts are and what judges should be—independent, impartial, neutral bastions of justice—have painted our perception of what they do in value-neutral colors.

What is currently lacking is a comprehensive concept of procedure at ICTs that accounts for the many unforeseen or deliberately suppressed functions that procedure takes on in practice. "Procedure as power" is but one proposal to this end.

It needs acknowledging here that the choice of the concept "power" is deliberate and brings with it a politicization of the issue at stake[130]—here, procedure.

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126. Niklas Luhmann, *The Third Question: The Creative Use of Paradoxes in Law and Legal History*, 15 J. L. & SOC'Y 153, 155 (1988).

127. Fontanelli & Busco, *supra* note 21, at 12.

128. Sorel, *supra* note 60, at 33. Sorel suggests that this increased proceduralization represents a loss of trust in what the law is in its origin, and therefore, the loss of trust in justice in the field that interests us. He suggests that we notice a shift in the idea of justice towards procedural justice, or procedure as the vehicle that can reinstall our trust in the justice in international law. *Id.* at 33–35. For recent contributions to the idea of international law as a science, see Jean d'Aspremont, *The Professionalisation of International Law*, *in* INTERNATIONAL LAW AS A PROFESSION 19 (2017); Anne Orford, *Scientific Reason and the Discipline of International Law*, *in* INTERNATIONAL LAW AS A PROFESSION 93 (2017).

129. Sorel, *supra* note 60, at 21. Sorel further suggests that procedure is in fact what legitimates the law. *Id.* at 33.

130. Stefano Guzzini, *The Concept of Power: A Constructivist Analysis*, 33 MILLENIUM: J.

This is in line with an attempt to diffuse idealized binary characterizations of international law and international relations.[131]

Claiming that procedure is an instrument of power brings with it the question of what "power" might mean. In light of the current scope of this article, which situates itself as exploratory in nature as to the questions of the relations between the concepts of power and procedure, this is not the place to offer a comprehensive account of the disputed concept of power and all its facets. Rather, it is an invitation to engage with procedure and its relationship to the different facets of power.

One specific and common understanding of power is that it is equated with government and authority,[132] which subsumes an element of conscious intention behind the exercise of power. This conceptualization has also been used by international lawyers.[133] Procedure being instrumentalized to cater to the whims of powerful states can be placed in this understanding of power. One could explore the link between procedure and the structural biases inherent in ICT systems and conclude that the positions favor powerful states.[134] The refusal of the ICC PTC to allow an investigation into the crimes committed in Afghanistan, even though it was later overturned by the Appeal Chamber, is a fitting illustration in this regard.[135] With its pragmatic language, the managerial approach adopted in the decision perfectly fed into the longstanding criticism of the Court, that it only investigates and prosecutes international crimes committed in and facilitated by less powerful states.

A slightly broader conception of power accepts an indirect exercise of power as well as a direct one. The argument is to see that there are different, intertwined forms of power at play.[136] A procedural decision most often has direct, mostly uncontested,[137] implications for the parties. These direct implications may include,

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INT'L STUD. 495, 497 (2005) (citing WILLIAM CONNOLLY, THE TERMS OF POLITICAL DISCOURSE (3d ed. 1993)).

131. *See* Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 370 (2005) ("[I]nternational law often appears as the sphere of equality, in which reason and justice prevail, whereas power asymmetries are relegated to the sphere of politics where the law of the jungle seems to reign.").

132. *See* Stefano Guzzini, *Power*, *in* CONCEPTS IN WORLD POLITICS 23, 26 (Felix Berenskoetter ed., 2016) (describing the typical association of the concepts of power and government).

133. *See generally* Krisch, *supra* note 131; MARK KLAMBERG, POWER AND LAW IN INTERNATIONAL SOCIETY: INTERNATIONAL RELATIONS AS THE SOCIOLOGY OF INTERNATIONAL LAW (2015).

134. *See, e.g.*, Bianchi, *supra* note 121, at 85 (explaining how the composition of the ICJ has a bearing on outcomes).

135. While this example still displays the interests and considerations of the ICC, a subsequent decision by the Appeals Chamber reversed the PTC's decision, thus authorizing an investigation into international crimes in Afghanistan. *See generally* Situation in the Islamic Republic of Afghanistan, ICC-02/17 OA4, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020).

136. Michael Barnett & Raymond Duvall, *Power in International Politics*, 59 INT'L ORG. 39, 68 (2005).

137. These decisions are uncontested in the sense that they are assumed to be part and parcel of adjudication.

for instance, whether the Court accepts jurisdiction, whether the process will be opened up to stakeholders beyond the parties, as is the case with amicus curiae, or whether the Court chooses to scrutinize the parties' claims by using court-appointed experts.

Additionally, the procedural practice may reveal something about underlying values. The control over definitional categories, or control over knowledge, implies an element of (indirect) power.[138] In this sense, ICTs are engaged in exercising power through knowledge production. For instance, in the practice on fact-finding, the Court plays an important role in constructing a specific social reality through the process.[139] More broadly, ICTs also have decisive influence on what belongs to the category of "substance" and "procedure." Indeed, "procedure" and "substance" have different expressive functions in the collective imaginary of international lawyers.[140] The very act of calling something 'procedure' mobilizes a particular function and imaginary. Characterizing procedure as value-neutral depoliticizes issues at stake. ICTs form a space of control over this knowledge and its categories. They, in terms of procedure, also inform a literature that largely follows this meaning of procedure, leaving out a perspective of power.

IV. CONCLUSION

Accounts of the different faces of procedure reveal its "schizophrenic" nature.[141] The majority of activity at ICTs is in fact concerned with matters of a procedural nature, and in practice there is a lot of discretion being used and procedure being interpreted, creatively applied, or invented. At the same time, the majority of the literature, as described above, presents a technical or objective narrative about procedure. Therefore, the argument has been made for a reinvigorated and thoughtful debate and critical engagement with the concept of procedure. The literature heavily emphasizes the substantive outcome of ICTs;[142] it is interested in the products but not the process. This presents conceptual and practical limits.[143] This article offers a critique of the portrayal of procedure as value-neutral and objective and the absence of it being seen as a means of analyzing the

138. *See* Jean d'Aspremont, *The Control Over Knowledge by International Courts and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Oxford University Press, forthcoming 2020). For more on (international) law's definitional impact as a form of power, see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 837–38 (1987); Nikolas M. Rajkovic, *Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule*, 27 LEIDEN J. INT'L L. 331, 341 (2014).

139. d'Aspremont, *supra* note 138, at 19–20.

140. This relates to what Barnett and Duvall call "productive power." *See* Barnett & Duvall, *supra* note 136, at 55 (defining productive power).

141. Ruiz Fabri & Paine, *supra* note 62, at 12.

142. *See, e.g.*, Bianchi, *supra* note 121, at 84 (summarizing scholarly opinions concerning the ICJ's approaches to reaching resolutions).

143. On legitimacy, for example, it has been said that "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." J.H.H. Weiler, *The Geology of International Law – Governance, Democracy and Legitimacy*, 64 HEIDELBERG J. INT'L L. 547, 562 (2004).

institution of international adjudication.[144] In analogy to Barthes' depiction of the mythical character of language's universality in a criminal procedure,[145] this article argues that procedures' perceived objectivity, universality, and transparency is just as mythical and prone to furthering power imbalance.[146] In this sense, the discussion has revealed that in addition to an understanding of procedure as both servant and justice, there is room for a third conception, procedure as power, which completes the picture. This stretches from direct forms of power, through structural biases in favor of the powerful present in the fabric of procedure, to indirect forms of power, through the construction of legal categories such as "procedure" and "substance."

This article, in its exploratory nature, concludes by suggesting a research agenda analyzing a broad range of challenging questions and alternative ways of engaging with the study of ICTs, keeping in mind the different forms of power and how they relate to each other. We can, for instance, use procedure to analyze the different actors involved. Who is using procedure as power, and who is consciously or unconsciously subordinate to this power? Another way of using this concept is to see how it relates to other forms of power. Does procedure further power imbalances? Can it be—or is it—used as a corrective for these imbalances?[147] How does this open up our ways of thinking normatively about procedure, what is it we want to achieve, what are the tools to achieve it, what message do they carry? This is relevant especially in the context of procedural reform or the establishment of new courts today:[148] what are the justifications for the procedural setup? Further, we can also place the conceptualization of "procedure as power" in the recent "turn to practice."[149] Court proceedings can be seen as an aggregate of practices,[150] each representing an exercise of power.[151] Practice theory can be used to look at procedure at both a macro and micro level, combining the discourse and materiality,

144. *See* Bruno Latour, *Scientific Objects and Legal Objectivity*, *in* LAW, ANTHROPOLOGY, AND THE CONSTITUTION OF THE SOCIAL 73, 94 (2004) (applying a similar analysis to the French Conseil d'Etat (the French Administrative Supreme Court) and its reliance on procedures to attempt to reach objective results).

145. *See* ROLAND BARTHES, *Dominici, or the Triumph of Literature*, *in* MYTHOLOGIES 43, 44 (Annette Lavers trans., 2d ed., Hill & Wang 2013) (1957).

146. Fontanelli & Busco, *supra* note 21, at 11 ("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.").

147. *See* Barnett & Duvall, *supra* note 136, at 68 (citing EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS, 1919-1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (2d ed. 1946)) (relating Carr's view that international organizations institutionalize the interests of the powerful, as opposed to idealists' view claiming that these institutions are antidotes to power).

148. For a discussion on efficiency as the benchmark for procedural reform, see Sarvarian, *supra* note 68, at 98–99.

149. *See* Emanuel Adler & Vincent Pouliot, *International Practices*, *in* INTERNATIONAL PRACTICES 1, 1 (2011); Jeffrey L. Dunoff & Mark A. Pollack, *Practice Theory and International Law*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (2018); *see generally* Nicolas Lamp, *The "Practice Turn" in International Law: Insights from the Theory of Structuration*, *in* RESEARCH HANDBOOK ON THE SOCIOLOGY OF INTERNATIONAL LAW (2018).

150. *See* Adler & Pouliot, *supra* note 149.

151. *Id.* at 25.

procedure in and outside the courtroom, and procedure as the everyday life of the international lawyer. The very act of calling something 'procedure' mobilizes a particular function and imaginary. In this sense we can also look at the person of the international lawyer in a different way, remembering that she is not a benign technician or expert,[152] but that she is called to play with an instrument of power.

152. *See* Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 1 (2007) (arguing against reducing international law to a mechanism intended only to achieve certain practical outcomes).