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INTERNATIONAL RESPONSIBILITY FOR DOMESTIC ADJUDICATION: DENIAL OF JUSTICE DECONSTRUCTED

ZACHARY DOUGLAS*

Abstract This article revisits the core difficulties with the international delict known as a denial of justice and, drawing insights from philosophical writing on adjudication, offers novel solutions to three principal issues: (a) the scope of the acts and omissions that can form the predicate conduct for a denial of justice; (b) the proper threshold for liability in respect of those acts or omissions; (c) the relationship between denial of justice and other international norms impacting upon domestic adjudication. The article concludes with a restatement of the law of denial of justice.

Keywords: denial of justice, exhaustion of local remedies, international law, procedural rights, theory of adjudication.

I. INTRODUCTION: A DELICT IN SEARCH OF A JUSTIFICATION

The secondary rules of State responsibility do not differentiate among the three principal branches of constitutional power in the sense that an act of any State organ is attributable to the State on the international plane and thus can supply the predicate conduct for a breach of an international obligation.¹ No exception is made for the judiciary or the system for the ‘administration of justice’ more generally. And yet among the primary rules of international law there is a special form of delictual responsibility known as denial of justice. Why is that the case?

The leading writers on denial of justice are surprisingly reticent in identifying the *raison d’être* for a concept which they have devoted so much energy

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¹ Art 4(1), Responsibility of States for Internationally Wrongful Acts (2001) in *Yearbook of the International Law Commission*, 2001, vol II (Pt Two); C de Visscher, ‘Le déni de justice en droit international’ (1935) 52 *Recueil des Cours* 376–7; AV Freeman, *The International Responsibility of States for Denial of Justice* (Periodicals Service Co 1938) 28; EJ de Aréchaga, ‘International Law in the Past Third of a Century’ (1978) 159 *Recueil des Cours* 1, 278; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Advisory Opinion of 29 April 1999, (1999) ICJ Rep 62, para 63; *Gerhard Köbler v Republik Österreich*, ECJ Case No C-224/01, Judgment of 30 September 2003, para 41ff.

in expounding. A review of the principal treatises on the subject² permits the conclusion that ‘denial of justice’ is a useful label for the collection of various paradigmatic examples of international responsibility for acts and omissions relating loosely to the ‘administration of justice’³ as revealed through a close study of the historical jurisprudence. If this is as good as it gets in terms of a justification for the delict of denial of justice, then we would have to surmise that its days are numbered. It would be vulnerable to the next spring-cleaning of legal concepts relating to international responsibility towards foreign nationals⁴ because it is not self-evident why a singular notion of delictual responsibility in international law for the mistreatment of foreign nationals by any State organ could not subsume denial of justice. The international minimum standard in general international law might do the job within the realm of diplomatic protection,⁵ as might the rights to a fair trial or due process embedded in human rights treaties⁶ or the fair and equitable standard of treatment commonly found in investment treaties⁷ in the context of those more specialized regimes. Indeed, it is within those specialized regimes that the fate of denial of justice looks particularly uncertain. Litigants are motivated by pragmatism rather than fidelity to historical usage. Why plead a denial of justice, with its substantive requirement that the victim must have had recourse to local procedures to redress the putative injustice for the State’s responsibility to be consummated, when a range of other international obligations might be interpreted as also extending to the same acts or omissions relating to the administration of justice in the particular State? This pragmatic consideration is particularly forceful in the investment treaty regime because there is generally no procedural requirement to exhaust local remedies.⁸

What is strikingly absent from the leading texts on denial of justice is an argument of *principle* for the existence of a separate international delict for misfeasance or nonfeasance in respect of the ‘administration of justice’. And yet it is clear that unless the retention of ‘denial of justice’ is to be motivated for reasons of form, such as a tool of classification or as fidelity to historical usage,

² EM Borchard, *The Diplomatic Protection of Citizens Abroad* ([1919] WS Hein & Co Reprint 2003); CT Eustathiades, *La responsabilité internationale de l’État pour les actes des organes judiciaires* (Pedone 1936); Freeman (n 1); de Visscher (n 1); J Paulsson, *Denial of Justice in International Law* (CUP 2005).

³ Freeman (n 1) 1; de Visscher (n 1) 390; Paulsson (n 2) 4; F Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’ in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009).

⁴ The term ‘foreign nationals’ is intended to cover legal entities such as companies as well as individuals.

⁵ CF Amerasinghe, *Diplomatic Protection* (OUP 2008) 37.
⁶ Commentary on art 6 of the ECHR in MW Janis, RS Kay and AW Bradley (eds), *European Human Rights Law* (3rd edn, OUP 2008); R Clayton and H Tomlinson, *The Law of Human Rights* (2nd edn, OUP 2009) 823–98.

⁷ M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013).

⁸ Z Douglas, *The International Law of Investment Claims* (CUP 2009) paras 56–60.

then the continued vitality of the concept can only be assured by a justification of principle.

The logical starting point is whether there are unique normative consequences attaching to a denial of justice that do not pertain to other international wrongs relating to the treatment of foreign nationals, such as the international minimum standard in general international law.⁹ The answer appears to be straightforward: what distinguishes a denial of justice is that the State's responsibility is said to arise only at the point when the whole system for the administration of justice has spoken.¹⁰ A prejudicial decision from a court of first instance does not suffice: the foreign national must have sought redress against that decision by having recourse to the remedies provided by the State's system for the administration of justice.

If we were analysing species of the animal kingdom then we could stop there. We are now equipped to identify what is distinctive about denial of justice as an international delict and distinguish it from other grounds for delictual responsibility for wrongs to foreign nationals. But that is not enough for legal concepts: we are obliged to provide an argument of principle to justify why this rule on recourse to local remedies must be applied to certain acts or omissions of the State and not to others.

The thesis advanced here is that there is something special about the form of decision-making known as adjudication that justifies both the imposition of this additional burden for establishing liability in the form of the rule on recourse to local remedies as well as the existence of a separate delict relating to acts or omissions relating to an adjudicative process more generally. This thesis borrows heavily from Fuller's insights relating to the essential characteristics of adjudication, which he described as a 'device which gives formal and institutional expression to the influence of reasoned argument in human affairs'.¹¹ International law has in the past and should continue in the future to treat this most exacting and also most vulnerable form of decision-making in a special way through the delict of denial of justice.

Contrary to the received wisdom, it is not the identity of the State organ or the title of the office that counts; hence the debate as to whether denial of justice is confined to acts of the judicial organs or includes administrative

⁹ It should be remembered that it was once fashionable to characterize any international delict towards a foreign national as a denial of justice: Borchard (n 2) 336; Freeman (n 1) 97–8; *Neer (USA) v United Mexican States*, Mexico/USA General Claims Commission, Nielsen's Separate Opinion (1926) IV UNRIAA 62, 64; *Robert E. Brown (USA) v Great Britain* (1923) VI UNRIAA 120; *Claim of the Salvador Commercial Company ('El Triunfo Company')* (1902) XV UNRIAA 467–479.

¹⁰ *Ambatielos Claim (Greece v United Kingdom)* (1956) XII UNRIAA 83, 120; International Law Commission (Crawford) 'Second Report on State Responsibility' UN Doc A/Cn.4/498 (1999) para 75 ('An Aberrant decision by an official lower in hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act.').

¹¹ LL Fuller and KI Winston, 'The Forms and Limits of Adjudication' (1978) 92 HarvLRev 353, 367.

organs and so on,¹² which has never been resolved in the literature, can be left to one side. Instead what counts is whether the organ or official has committed itself to a process of adjudication. As a matter of form, that organ or official is likely in most nations to be part of the judiciary, but this is not dispositive.

In terms of the scope of acts or omissions attributable to the State that can provide the predicate conduct for a denial of justice, this is likely to be judged as a narrow conception as compared with the existing definitions offered by other writers. Cases of executive interference in a pending domestic trial, for instance, would not be treated as a denial of justice pursuant to the conception defended here. The president does not commit to a process of adjudication when the president decrees the removal of the judge assigned to a pending trial.¹³ As a result, in accordance with the thesis advanced in this study, international law should not accord any particular deference to the president's decision by making the State's liability contingent upon the subsequent failure of the system for the administration of justice to repair that interference. In the context of a claim for diplomatic protection, the president's interference would be actionable as a breach of the international minimum standard but not as a denial of justice.

If this thesis on the special nature of adjudication can be defended then the question of the *scope* of acts or omissions attributable to the State that can provide the predicate conduct for a denial of justice will be resolved. But that does not address the other fundamental problem that has preoccupied both judges and writers since time immemorial: what is the *threshold* for a denial of justice? Here the traditional preoccupation has been to ensure that the international tribunal does not act as a court of appeal on questions of national law. This concern has generated a keen interest in differentiating between the substantive and procedural aspects of the domestic adjudication and has led to a dogma that international law is not concerned with the substantive aspects of the judgment or decision in adjudication. This purely 'procedural' approach, however, is unsustainable as a matter of principle. The purpose of a system for the administration of justice is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question. A theory of procedural fairness must be linked to substantive rights and outcomes to have any explanatory force in terms of identifying the fundamental elements of procedural fairness.

Can a delay of five years in progressing a domestic adjudication, for instance, amount to a denial of justice? The answer must be that it depends on the substantive rights in play. Delay in proceedings to establish the criminal responsibility of a defendant who has been remanded in custody since the indictment is not the same as delay in proceedings to establish a defendant's civil responsibility to pay damages for a breach of contract. International law

¹² Freeman (n 1) 106; GG Fitzmaurice, 'The Meaning of the Term "Denial of Justice"' (1932) 13 BYBIL 93, 94.

¹³ Robert E Brown (n 9).

has traditionally imposed more exacting procedural standards upon a State in relation to proceedings in which an individual's right to liberty is at stake and for sound reasons.¹⁴ Such an approach is only possible if the requirements of procedural fairness are tied to substantive rights and outcomes.

The final question that must then be tackled is the relationship between the concept of denial of justice and other international norms that might potentially be implicated in a domestic adjudication. There is a line of international cases that supports the proposition that domestic adjudicative decisions can supply the predicate conduct for other forms of delictual responsibility to foreign nationals.¹⁵ The corollary of this approach, although it is hardly free from doubt, is that the rule relating to recourse to local remedies is not then applicable to this separate delict.¹⁶ Such a view has significant repercussions given the rapid expansion of international norms that place substantive demands upon the domestic adjudication of cases. If there is something special about a commitment to adjudication as a form of decision-making then the justification for imposing the additional burden for establishing a denial of justice applies to other types of delictual responsibility regardless of whether another international norm is implicated in that adjudication. This question has become critical in investment treaty arbitration as claimants have sought to opt out of the requirement to have recourse to local remedies in a substantive sense by characterizing their claims as anything but a denial of justice. The tribunal in *Loewen v USA* rejected this possibility,¹⁷ whereas the tribunal in *Saipem v Bangladesh* admitted it.¹⁸ Neither elaborated reasons for its decision on this point.

In summary, this study will address three principal questions: (a) the scope of the acts and omissions that can form the predicate conduct for a denial of justice; (b) the proper threshold for liability in respect of those acts or omissions; (c) the relationship between denial of justice and other international norms impacting upon domestic adjudication. This study concludes with a restatement of denial of justice taking into account the conclusions reached in respect of each of these questions.

¹⁴ *BE Chattin (USA) v United Mexican States* (1927) IV UNRIAA 282.

¹⁵ *Saipem SPA v Bangladesh*, Award of 30 June 2009, ICSID Case No ARB/05/7, paras 128–131; *White Industries Australia Ltd v India*, Final Award of 30 November 2011, paras 10.4, 11.3–4; *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v The Republic of Ecuador*, Partial Award on the Merits, 30 March 2010, UNCITRAL, PCA Case No 34877, paras 242–244, 251, 275.

¹⁶ *Saipem*, *ibid*, paras 181–182; *White Industries*, *ibid*, para 181; or the application of a *lex finality* requirement in *Chevron*, *ibid*, paras 326–331.

¹⁷ *Loewen Group Incorporated and Loewen (Raymond L) v United States*, Award of 26 June 2003, ICSID Case No ARB(AF)98/3, para 14. ('The Claimants' reliance on Article 1110 [Expropriation] adds nothing to the claim on Article 1105 [Fair and Equitable Treatment]. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if *Loewen* establishes a denial of justice under Article 1105.')

¹⁸ *Saipem* (n 15) para 181. ('[The tribunal] tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.')

Before attempting to answer these three questions, however, it is necessary to set the scene by recalling two developments in modern international law that have already been alluded to in this introduction: the demise of the procedural requirement to exhaust local remedies within some specialized international regimes and the expansion of the corpus of international norms that regulate transnational legal relationships. The combined effect of these developments has made the quest for answers to these three questions more important than ever.

II. TWO MODERN DEVELOPMENTS

A. The Limited Demise of the Procedural Rule Requiring the Exhaustion of Local Remedies

There are two manifestations of the principle that an individual must have recourse to the remedies afforded by the domestic legal system. The first manifestation is a requirement for the jurisdiction of the court or tribunal or the admissibility of the claim at the international level. In this context it is a general requirement for the admissibility of a State's diplomatic interposition on behalf of its national in customary international law¹⁹ but it is also a common stipulation in modern human rights treaties that allow the right of individual petition.²⁰ Less frequently it is a condition precedent for the conferral of jurisdiction to tribunals constituted on the basis of investment treaties.²¹ The second manifestation is a substantive element for the responsibility of a State for a certain type of delictual conduct which has traditionally been described as denial of justice.²² A State is only responsible for the *final* result produced by its system for the 'administration of justice'.

These manifestations of the principle are so different in fundamental respects that to refer to them as a single concept is misleading and indeed it has been a source of confusion throughout the long history of engagement with the concept of denial of justice. In this article the term 'local remedies rule' will be

¹⁹ In diplomatic protection it is a rule of admissibility: *Interhandel Case*, Judgment of 21 March 1959 (1959) ICJ Rep 6, 28–29; *Elettronica Sicula SPA (ELSI)*, Judgment (1989) ICJ Rep 15, para 52; JES Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 BYBIL 457; de Visscher (n 1) 427; International Law Commission, *Articles on Diplomatic Protection* (2006), art 14(1).

²⁰ European Convention on Human Rights, art 35(1).

²¹ *Kılıç İnşaat İhale İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, Award of 2 July 2013, ICSID Case No ARB/10/1, paras 6.2.1–8.

²² *Loewen* (n 17) paras 151–154; *Jan De Nul NV and Dredging International NV v Egypt*, Award of 6 November 2008, ICSID Case No ARB/04/13, para 255; *Amto LLC v Ukraine*, Final Award of 26 March 2008, SCC Case No 080/2005, para 76. Paulsson (n 2) 8 with further references ('Exhaustion of local remedies in the context of denial of justice is . . . not a matter of procedure or admissibility, but an inherent material element of the delict.');

AAC Trindade, 'Denial of Justice and Its Relationship with the Exhaustion of Local Remedies in International Law' (1978) 53 *Philippine Law Journal* 404; International Law Commission (Dugard), Second Report on Diplomatic Protection, UN Doc A/CN.4/514 (2001) 6.

reserved for reference to the rule on jurisdiction or admissibility of claims at the international level, whereas the term ‘finality rule’ will denote the substantive requirement for international responsibility for a denial of justice.

Until quite recently, the impulse of international courts and writers to conflate the ‘local remedies rule’ and the ‘finality rule’ was irresistible for the simple reason that the distinction made little difference in practice. At least prior to World War II, the local remedies rule was virtually ubiquitous as a requirement for the admissibility of claims before international courts and tribunals.²³ Hence regardless of whether the impugned conduct of the respondent State related to its system for the administration of justice, it was incumbent upon the injured foreign national to exhaust the local remedies available before that national’s State could take up the claim by way of diplomatic protection. If the impugned conduct did relate to the administration of justice, then this necessity to discharge the local remedies rule simultaneously satisfied the finality rule. In other words, the local remedies rule did the work of the finality rule. So whilst a distinction was sometimes made in theory,²⁴ there does not appear to be a reported instance until *Loewen v United States* in 2004 where the finality rule was held to defeat a claim for denial of justice in circumstances where the local remedies rule was not applicable. In that case the Tribunal expressly recognized that the rules ‘serve two different purposes’.²⁵

In summary, the demise of the local remedies rule as a requirement for jurisdiction or the admissibility of claims in special regimes such as the Iran/US Claims Tribunal²⁶ and investment treaty arbitration²⁷ has cast a spotlight upon the role of the finality rule for denial of justice because in those domains where the local remedies rule no longer applies, it cannot do the work of the finality rule. This is particularly significant for investment treaty arbitration. By contrast, the importance of the next development that will be analysed—the collapse of dualism in the relationship between international and domestic law—transcends all instances for the international adjudication of claims.

B. The Collapse of Dualism

Modern international law is characterized by a heightened regulation of transnational activity among foreign nationals in areas that have always been justiciable before national courts such as extradition, custody of children, sale of goods, arbitration, corrupt practices, maritime safety and so on.

²³ AAC Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (CUP 1983).

²⁴ Freeman (n 1) 407, 441, 445–6.

²⁵ *Loewen* (n 17) para 159.

²⁶ GH Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal* (Clarendon Press 1996) 130.

²⁷ Douglas (n 9) para 59.

This means that domestic courts are adjudicating upon issues to which both domestic norms and international norms apply with ever increasing frequency. The extent to which domestic courts can give effect to those international norms through the medium of domestic litigation depends upon the constitutional law of the particular State.²⁸ But however the national constitution resolves this question, it remains the case that modern international law places demands upon vast areas of domestic regulation.

The old certainties about international law regulating sovereign relations between States and no one else have long vanished and with that the ability to differentiate sharply between the norms applicable in domestic proceedings and in international proceedings. This presents an obvious challenge to conceptualizing denial of justice: should a domestic court's failure to adhere to an international norm be characterized as a denial of justice or something else? Should the finality rule apply to those other types of violations?

There is a whole spectrum of views on this question of characterization. Some writers, such as Borchard, extended the concept of denial of justice to the violation of any international obligation towards an individual.²⁹ Conversely, Fitzmaurice thought that the concept would be deprived of utility unless confined to the administration of justice in which case it would have 'a definite value as describing a particular species of international wrong'.³⁰ Paulsson agreed: '[w]hen national courts misapply international law, they commit substantive violations which should not be called denial of justice'³¹ and then noted that, given the more extensive corpus of conventional norms directed to the treatment of foreign nationals today, 'denial of justice may lose currency as petitioners find it more convenient to invoke a breach of specific provisions of the relevant treaty'.³²

For these writers the debate can be reduced to a battle for correct terminological usage because they do not divine any normative consequences attaching to any particular characterization. This is an important oversight because there are principles at stake. There is first the question of when it is appropriate to condition responsibility for the breach of an international obligation upon the finality rule. The second question is whether there is something special about adjudication that requires international law to approach the question of responsibility differently to the activities of the other branches of State power. These problems must now be confronted.

²⁸ DS Shelton (ed), *International Law and Domestic Legal Systems* (OUP 2011).

²⁹ Borchard (n 2) 337–8; C Eagleton, 'Denial of Justice in International Law' (1928) 22 AJIL 538, 539; CC Hyde, *International Law Chiefly As Interpreted and Applied by the United States* (Little, Brown & Co 1922) 491–2; AO Adede, 'A Fresh Look at the Meaning of the Denial of Justice under International Law' (1976) 73 Canadian YBIL 82; OJ Lissitzyn, 'The Meaning of the Term Denial of Justice in International Law' (1936) 30 AJIL 632, 637.

³⁰ Fitzmaurice (n 12) 95.

³¹ Paulsson (n 2) 5, 69ff, 84ff.

³² Ibid 6.

III. THE QUESTION OF SCOPE: ACTS AND OMISSIONS RELATING TO DOMESTIC ADJUDICATION

A. In Search of a Justification of Principle

From the time a consensus formed on discarding the idea that a denial of justice denotes any violation of international law towards a foreign national, the debate shifted to the proper basis for limiting the scope of acts attributable to the State that might supply the predicate conduct for a denial of justice. This debate has never achieved a satisfactory resolution. The orthodox position is that only the final product of the domestic system for the administration of justice can be the object of a denial of justice. And yet it is generally accepted that the 'system for the administration of justice' is not synonymous with the judiciary as one of the three branches of constitutional authority under the doctrine of the separation of powers. Denial of justice, according to the prevailing view, extends to all acts associated with the 'administration of justice', whatever the source of the constitutional authority.³³ But the 'administration of justice' is not a term of art in comparative constitutional law, and international law contains no set of rules to determine what counts as the 'administration of justice' within a domestic legal system and what does not.³⁴

So how can we ascribe meaning to the term 'administration of justice'? If it *does not* simply denote whatever happens in a court room then it follows that it must be neutral as to source of constitutional authority exercised by the State organ or official in question. Who then can 'administer justice'? To administer justice is to commit to a certain set of ideals elaborated in political philosophy. To do justice is the ultimate purpose or end of a range of institutional activities within a State. And here lies the problem: we cannot define the scope of acts that might supply the predicate conduct for denial of justice by asking whether justice was actually done as a result of a particular institutional activity. That would be entirely circular; it would be akin to defining international responsibility as any act for which a State is internationally responsible. Unfortunately this is the essence of many accounts of denial of justice. In the words of one writer: 'the legal efficacy of a final judgment, from the point of view of international law, must depend... on the international obligation not to administer justice in a *notoriously unjust* manner'.³⁵ The arbitral commission in *Cotesworth & Powell* likewise held that 'nations are responsible to those of strangers ... for acts of notorious

³³ Most writers support the thesis that a denial of justice can be committed by any branch of power so long as it is directed to the administration of justice: de Visscher (n 1) 390–1; Fitzmaurice (n 12) 105; Eagleton (n 48) 547; Freeman (n 1) 149–50, 161; Paulsson, (n 2) 44ff.

³⁴ Freeman (n 1) 148–9, 161.

³⁵ J Irizarry y Puente, 'The Concept of "Denial of Justice" in Latin America' (1944) 43 MichLRev 383, 406 (emphasis in original).

injustice',³⁶ whereas the Harvard Draft Convention on State Responsibility includes 'a manifestly unjust judgment'³⁷ in its typology for a denial of justice.

B. The Special Nature of Adjudication

The only way to approach this problem coherently is to ask what is special about a certain range of acts attributable to the State that justifies (a) the existence of a distinct cause of action for invoking international responsibility for such acts and (b) the application of the finality rule as a constituent element of that cause of action.

The thesis defended here is that there is something special about a State's commitment to adjudication as a form of decision-making. The special characteristics of adjudication have been identified by Fuller:

Adjudication is . . . a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.³⁸

It is this particular 'burden' of rationality inherent in decision-making through adjudication, coupled with the opportunity afforded to affected parties to present reasoned arguments during the course of that decision-making process,³⁹ that sets adjudication apart from other institutions of social ordering within the State. By virtue of this commitment to reasoned argument and to a special form of participation by affected parties, the process of adjudication gives rise to a moral obligation to comply with the decision resulting from that process which is independent of the coercive powers at the disposal of the State. The decision, in other words, is a legitimate source of authority in and of itself. But this 'higher responsibility toward rationality' identified by Fuller also explains the vulnerability of adjudication in the sense that a transparent set of justifications for a particular decision that claims to be the most rational is always exposed to being undermined by a better claim to rationality. Within a

³⁶ *Cotesworth & Powell (Great Britain) v Colombia*, Award of August 1875 (cited in B Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* [1898] 2050) 2083.

³⁷ Harvard Law School (EM Borchard), *Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (1929) 23 AJIL Spec Supp 133, 134.

³⁸ Fuller and Winston (n 11) 367.
³⁹ Fuller described this right of participation in the following terms: '[t]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.' Fuller and Winston (n 11) 364.

domestic judiciary this vulnerability is even institutionalized through a hierarchical court system affording rights of appeal.

This is the most compelling explanation for international law's special treatment of responsibility for domestic adjudication through the medium of denial of justice.⁴⁰ An authoritative determination of a claim of right or accusation of guilt by a domestic adjudicative body⁴¹ cannot be disturbed by an international court or tribunal simply on the basis that a more rational set of reasons was available to that domestic adjudicative body. That would be tantamount to exploiting the vulnerability of decisions produced through adjudication; a vulnerability caused by the very necessity of justifying decisions through a special discourse of argumentation appealing to rationality. International law is deferential to the particular virtues of adjudication by respecting the integrity of the process and the outcomes it produces. This deference is manifest in the finality rule and the idea that denial of justice focuses upon the procedural aspects of the adjudication rather than the substantive reasons for the decision.

C. The Proper Justification for the Finality Rule

As already noted, the judicial landscape at the international level now includes important domains where the writ of the local remedies rule does not run. Modern writers and international tribunals have yet to appreciate the full significance of this development for the law on the international review of domestic adjudication. It is no longer sufficient merely to identify the different functions of the local remedies rule and the finality rule. What is at stake is whether the finality rule should be applicable to the impugned conduct of the State as a matter of principle.

The finality rule can be justified by the particularities of adjudication as a decision-making process that have been examined above. There is no such thing as a perfect adjudicative process. International law does not recognize a right of any litigant to the best possible procedure in terms of the accuracy of the outcomes it produces. Nor does any domestic legal system endorse such a right. To a significant extent each State is entitled to construct its adjudicative

⁴⁰ International judges and writers have often expressed the sentiment that there is something special about adjudication or judicial proceedings in particular but without drawing any normative inferences from that sentiment. Paulsson (n 2) 228 ('there is something exceptionally emotive about challenges to national justice. they seem to strike at the heart of national pride'); de Aréchaga (n 1) 278; de Visscher (n 1) 381; Eustathiades (n 2) 308; Freeman (n 1) 33; Yuille, *Shorridge and Co Case* (1861) II Lapradelle and Politis Recueil 101, 103; *Croft (UK v Portugal)* (1856) II Lapradelle and Politis Recueil 22, 24; *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, *Second Phase*, ICJ, Separate Opinion of Judge Tanaka, (1970) ICJ Rep 114, 153–156; *Rosinvestco v The Russian Federation*, Final Award of 12 September 2010, SCC Arbitration (079/2005) para 274.

⁴¹ To paraphrase Fuller's statement on the province of adjudication: Fuller and Winston (n 11) 368.

procedures on the basis of a utilitarian calculation of the costs of maintaining those procedures to the community at large versus the benefits afforded to the litigants in any given case.⁴² Every adjudicative procedure for which the State is responsible is the embodiment of a compromise along these lines. The finality rule reflects the reality that this compromise can and does produce error at different stages of the adjudicative process. States have uniformly accepted the inevitability of such error by incorporating corrective mechanisms within their systems of adjudication and international law defers to such corrective mechanisms by making the finality rule a constituent element for responsibility in respect of misfeasance or nonfeasance in domestic adjudication.⁴³

The finality rule can also be justified by the purpose of an adjudicative process, which is to produce good or correct substantive outcomes. As will be explored in greater detail in Part IV, the proper approach to establishing the requisite threshold for a denial of justice is to link the procedural aspects of the adjudication with the substantive outcome it produces. A denial of justice can only be committed if the substantive right sought to be vindicated is denied in a procedurally unjust manner. That substantive right must have been definitively denied and this is ensured by the operation of the finality rule.

D. The Question of Scope Reformulated

The doctrine of jurisdiction in international law includes a tripartite classification for the exercise of sovereign powers: prescriptive, adjudicative and enforcement.⁴⁴ This classification transcends the constitutional doctrine of the separation of powers, which cannot dictate outcomes within the law of international responsibility, in the sense that a single judicial organ can, by way of example, exercise prescriptive, adjudicative and enforcement powers.

The thesis that has been defended is that denial of justice relates to the exercise of adjudicative power and this can be situated within this tripartite scheme. Having recourse to this taxonomy supplied by the doctrine of jurisdiction is not without certain benefits; the chief among them being that the descriptive labels for the three functions underlying the exercise of sovereign powers have a settled meaning in international law.

⁴² R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (OUP 1985).

⁴³ Some legal systems rely on appellate mechanisms more than others: PD Hansen, 'Stacking Appellate Dissents: Due Process in the Appellate Arena' (1983) 18 *ValULRev* 141, 144; JH Merryman, *The Civil Law Tradition* (2nd edn, Stanford University Press 1985) 120; MR Damaska, 'Structures of Authority and Comparative Criminal Law' (1975) 84 *YaleJIntL* 480.

⁴⁴ *Restatement (Third) Foreign Relations Law of the United States*, section 401; FA Mann, 'The Doctrine of Jurisdiction in International Law' in *Studies in International Law* (1973) 2–31; M Akehurst, 'Jurisdiction in International Law' (1974) 46 *BYBIL* 145, 170–7.

E. The Conclusions on the Scope of Denial of Justice Applied

All the major treatises on denial of justice set out a list of paradigmatic examples of a denial of justice by reference to the historic jurisprudence. In this section the foregoing conclusions on the proper scope of denial of justice will be applied to the taxonomy of examples suggested in the leading treatise by Freeman with illustrative reference to some of the cases he cites as well as to some more recent precedents.

1. Unlawful arrest, detention and harsh treatment during imprisonment⁴⁵

Such acts are an exercise of the State's enforcement power and should not be adjudged as a denial of justice. The prejudice suffered by a victim of unlawful arrest, detention and harsh treatment is immediate and there should be no question of the delict only being consummated upon an unsuccessful attempt to seek recourse through local remedies. In modern international law, these acts would be adjudged in accordance with the rules governing the fundamental right to liberty.

2. Refusal of access to court or its equivalent⁴⁶

It is important to distinguish between access to an adjudicatory process and access to justice within an adjudicatory process. A denial of access to an adjudicatory process will normally be based upon an exercise of enforcement power. For example, in *Golder v UK*,⁴⁷ the European Court of Human Rights for the first time interpreted the right to a fair hearing to include a right of access to a court or tribunal. The applicant was a prisoner who was prevented by the prison authority from consulting a solicitor in relation to a potential civil action against a guard who had accused the applicant of participating in a disturbance at the prison. This should not be considered as a denial of justice but as a separate delict encompassed by the international minimum standard. It would be absurd to apply the finality rule to an applicant in the circumstances of *Golder v UK*, who was said to be blocked by an exercise of enforcement power from gaining access to an adjudicatory process. The same would apply to a litigant that is detained by the security services to prevent that person's attendance at a trial.

Turning now to access to justice within an adjudicatory process, any decision by a State adjudicative body to the effect that it will not rule upon the merits of a dispute is capable of constituting a denial of justice. This would

⁴⁵ Freeman (n 1) ch VIII. Freeman acknowledged in propounding this category that there was a disagreement among the writers as to whether it constituted a denial of justice: Borchard thought it did, Durand, Rabasa and Eagleton disagreed and preferred to classify the international wrong differently. *Ibid* 213–14.

⁴⁷ ECHR Case No 4451/70, Judgment of 21 February 1975.

⁴⁶ *Ibid* ch IX.

include cases relating to the immunities afforded to a respondent State or State organ.⁴⁸ As decisions in such cases will themselves be the product of an adjudicative process, the application of the finality rule is justified.

*3. Unreasonable delay in administering justice*⁴⁹

There is no difficulty with this as a category of denial of justice, which must logically include nonfeasance as well as malfeasance in the adjudicative process. The complexity, of course, arises in the assessment of what is an ‘unreasonable delay’ and for that, as Freeman rightly noted, ‘the substance of the litigation must be known ... to determine whether there were justifiable causes for the delays complained of’.⁵⁰ This correlation between procedural justice and the substantive aspects of the adjudication is explored in Part IV.

*4. Irregularities in the conduct of the proceedings*⁵¹

This might be said to be the heart of the matter for denial of justice. The principal treatises on denial of justice collate a formidable number of examples in the historic jurisprudence; for present purposes it will suffice to note that cases involving executive interference with the adjudicative process⁵² would not, in accordance with the thesis defended here, fall to be considered as a denial of justice.

For instance, the case of *Robert E Brown*,⁵³ which is notorious by virtue of the President of South Africa’s decision to remove the Chief Justice of the High Court from office after the latter had rendered a judgment in favour of the US engineer, Mr Brown, should not be considered as a denial of justice case.⁵⁴ A proclamation was issued by the President allowing individuals to be issued with gold-prospecting licences over a property in South African known as Witfontein farm. Mr Brown then incurred substantial costs in pegging out the areas on that farm for which he intended to apply for such licenses. He duly made his application to the responsible official, who was mandated to grant it in accordance with the terms of the proclamation. Instead that official refused to do so and later informed Mr Brown that the proclamation had been revoked. The legislature subsequently enacted a law that denied anyone who had suffered damage from the revocation the right to seek compensation. The High Court struck down that law as unconstitutional and this is what led to the removal of the Chief Justice.

⁴⁸ eg *Fogarty v UK*, ECHR Case No 37112/97, Judgment of 21 October 2001; *Mondev International Limited v United States*, Award of 11 October 2002, ICSID Case No ARB(AF)/99/2.

⁴⁹ Freeman (n 1) ch X.

⁵⁰ Freeman (n 1) 246.

⁵¹ *Ibid* ch XI.

⁵² *ibid* 300–3.

⁵³ *Robert E Brown* (n 9).

⁵⁴ *Accord* Freeman (n 1) 101, 110; *Contra* Paulsson (n 2) 51.

The claim was submitted to an arbitral tribunal under clause 1 of the Special Agreement between Great Britain and the United States of 18 August 1910 ‘as a claim based on the denial in whole or in part of real property rights’.⁵⁵ In other words, the claim was treated in essence as a claim for expropriation even if the term ‘denial of justice’ was used. According to the Tribunal: ‘Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof, and that he was deprived of these rights’.⁵⁶ The wrong to Brown was consummated upon the revocation of the proclamation and there would be no reason of principle to apply the finality rule to this type of wrong. The executive interference in the adjudicative process in this case was indeed shocking, but it was irrelevant to the basic elements of the expropriation. It was, however, relevant to the local remedies rule, which applied as a procedural matter to arbitrations under the Special Agreement.

The Tribunal had no difficulty in concluding in the light of these facts that any further resort to local remedies would be futile. A denial of justice could have been constituted by the ultimate dismissal of Mr Brown’s case by the reconstituted High Court if, on analysis, he had suffered a procedural injustice in that context, but this was not the focus of the claim before the Tribunal.

By contrast, in *Petrobart v Kyrgyzstan*,⁵⁷ the executive inference in question was a letter sent by the Vice Prime Minister to the Chairman of the Bishkek Court requesting the suspension of the execution of the judgment in favour of Petrobart and contrary to the interest of a State enterprise. The issuance of such a letter caused no damage to Petrobart’s investment *per se*; it only caused damage when it was acted upon by the Bishkek Court in the context of an adjudicative procedure. The claim thus should be analysed as a claim for denial of justice.⁵⁸

*5. Responsibility arising from the content of the judgment*⁵⁹

The traditional accounts of denial of justice insist that only *procedural* misfeasance or nonfeasance is actionable. International law only intervenes if the authoritative determination of a domestic adjudicator was made in violation of the fundamental requirements of an adjudicative procedure. A central tenet of the orthodox position is that international courts and tribunals cannot exercise substantive review over determinations of domestic law. International responsibility cannot, therefore, arise from an erroneous application of domestic law by a domestic adjudicator.⁶⁰

⁵⁵ *Robert E Brown* (n 9) 128.

⁵⁶ *ibid.*

⁵⁷ *Petrobart Limited v Kyrgyzstan*, Award of 29 March 2005, SCC Case No 126/2003.

⁵⁸ *Amto* (n 22).

⁵⁹ Freeman (n 1) ch XII.

⁶⁰ *ibid* 317 (see also authorities listed in note at 318); D Anzilotti, ‘La responsabilité internationale des États à raison des dommages soufferts par des étrangers’ (1906) 13 *Revue*

In order to ring-fence the forbidden territory, international courts and writers have drawn a sharp distinction between the substantive determinations of a domestic court judgment and the procedure generating those determinations. International law, according to the orthodox position, is only concerned with the latter: ‘[d]enial of justice is always procedural’.⁶¹ If the focus of international review is purely procedural, so the theory goes, then the ring fence remains impenetrable; the international court is thereby disabled from second-guessing the application of domestic law by a domestic judge.

There has been sporadic dissent against this orthodox position in the context of the debate as to whether a domestic judgment tainted by some manifest or perverse error of domestic law should nonetheless attract international responsibility. Some international courts and writers have answered this question in the affirmative⁶² but the prevailing view is that judicial error in this context is simply evidence of a flawed procedure (such as bias or fraud on the part of the judge) such that the substantive determinations of domestic law, *as determinations of law*, remain shielded from substantive review by an international court.⁶³ According to this approach, substantive injustice only has evidential value in demonstrating a procedural injustice:

The relevance of the degree of injustice really lies only in its evidential value. An unjust judgment may and often does afford strong evidence that the court was dishonest, or rather it raises a strong presumption of dishonesty. It may even afford conclusive evidence, if the injustice be sufficiently flagrant, so that the judgment of a kind which no honest and competent court could possibly have given.⁶⁴

The theory at work here is that denial of justice is limited to instances of procedural injustice but that substantive injustice can provide conclusive or strong evidence of procedural injustice. The problem with this theory is that it is nothing more than semantic camouflage for what amounts to a review of the

générale de droit international public 285, 297; P Fauchille, *Traité de droit international public* (Rousseau 1921) vol 1, 533–4; de Visscher (n 1) 376 (‘jamais la seule violation du droit interne ne peut former la base d’une réclamation internationale fondée sur un déni de justice’); International Law Commission (Crawford), Second Report on State Responsibility, UN Doc A/CN.4/498 (1999) para 75; *SS Lotus (France v Turkey)*, 1927 PCIJ (Ser A) No 10 (Sept 7) 24; *Robert Azinian v Mexico*, Award on Jurisdiction and Merits of 1 November 1999, ICSID Case No ARB(AF)/97/2, 39, para 99; *Waste Management Incorporated v Mexico*, Award of 30 April 2004, ICSID Case No ARB(AF)/00/3 para 129; *Jan De Nul* (n 22) para 209; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, Partial Award on Jurisdiction and Liability of 2 September 2009, SCC Case No (064/2008) para 237; *Chevron* (n 15) para 247; *Rosinvest Co UK Ltd v Russian Federation*, Final Award of 12 September 2011, SCC Case No 075/2009, para 272; *Amtco* (n 22) para 80; *Iberdrola Energía SA v Guatemala*, Award of 17 August 2012, ICSID Case No ARB/09/5, paras 491, 502, 507; *Albert Jan Oostergetel Theodora Laurentius v Slovak Republic*, Final Award of 23 April 2012, UNCITRAL para 273; Fitzmaurice (n 12) 110; Harvard Law School (EM Borchard), Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners (1929) 23 AJIL Spec Supp 133, 134.

⁶¹ Paulsson (n 2) 98.

⁶³ Fitzmaurice (n 12) 110–11.

⁶² Freeman (n 1) 309–17.

⁶⁴ *Ibid* 112–13.

substantive outcome produced by the domestic court. An international court cannot draw inferences from an injustice caused by substantive error unless it has determined that there has actually been a substantive error through an assessment of the applicable domestic law and that it is a particularly grave error. There is simply no difference in principle between the statements: ‘the domestic court got the point hopelessly wrong’ and ‘no competent domestic court could have decided the point in that way’.⁶⁵ The latter statement is merely a reformulation of the first but perhaps with a different rhetorical sting.

The truth is that international courts and tribunals are compelled, in conducting their review of domestic adjudication, to assess the reasonableness of the substantive outcome of the procedure.⁶⁶ In some cases the impugned procedural conduct is so flagrant that the substantive outcome is relegated to the background of the review.⁶⁷ But even in those cases there would be no claim in the first place unless the substantive outcome was unfavourable to the foreign national. A theory of procedural justice cannot be divorced from substantive outcomes: this will be explored in some detail in Part IV.

*5. Inadequate measures to apprehend, prosecute and punish persons guilty of crimes against aliens*⁶⁸

Such measures are likely to result from the exercise of enforcement powers by prosecutorial authorities and hence would not fall within the concept of denial of justice defended here. Claims for misfeasance or nonfeasance in respect of the prosecutorial authorities are generally formulated as a breach of the obligation to accord full protection and security or fair and equitable treatment in international investment law rather than a denial of justice.⁶⁹ Modern international human rights law would not approach such measures in terms of a right to a fair trial or to due process either. The right to life in Article 2 of the European Convention on Human Rights, for instance, requires the State to have effective criminal laws in place to deter the commission of offences against the person which are ‘backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches’ of such laws.⁷⁰

⁶⁵ A distinction made by Fitzmaurice: *ibid* 113.

⁶⁶ Freeman (n 1) 171 (‘It is idle to suppose that the international body is not going to consider the substance of the national court’s judicial pronouncements but only the question of whether the state has complied with its international obligations. The gravamen of the complaint involved in many of these cases is whether the judicial proceedings were “regular”. How can an international tribunal decide this without reverting to the substance of the original cause of action giving rise to the claim?’).

⁶⁷ For reasons discussed below, such instances are not properly to be considered within the context of denial of justice.

⁶⁸ Freeman (n 1) ch XIII.
⁶⁹ Such claims were dismissed in: *GEA Group Aktiengesellschaft v Ukraine*, Award of 31 March 2011, ICSID Case No ARB/08/16, paras 322–323; *Frontier Petroleum Services Ltd v Czech Republic*, Final Award of 12 November 2010, PCA, paras 434–438.

⁷⁰ *Osman v UK*, ECHR Case 87/1997/871/1083, Judgment of 28 October 1998, para 90.

*6. Non-execution of the judgment*⁷¹

A judgment or arbitral award is a chose-in-action and thus a form of intangible property. As intangible property, a judgment or award can be expropriated by the State. Such was the case, for instance, in the leading decision of the European Court of Human Rights in *Stran Greek Refineries and Stratis Andreadis v Greece*.⁷² The Court characterized an arbitral award rendered in Greece as a ‘debt ... that was sufficiently established to be enforceable’ because it was subject to no further appeal or challenge under the applicable law. It was thus a ‘possession’ with the meaning of Article 1 of Protocol 1 of the European Convention on Human Rights. The applicant had been deprived of that possession by virtue of a government decree that rendered unenforceable any arbitral award arising out of a contract that had been concluded by the military junta that ruled Greece between 1967 and 1974. This was an executive act outside the framework of adjudication and thus should not be adjudged as a denial of justice in accordance with the thesis defended here.⁷³

By way of contrast, the complaint in *Kin-Stib and Majkić v Serbia* would be characterized as a case of denial of justice because the issue of the enforceability of the arbitral award was the subject of an adjudicatory procedure in the Serbian courts that had been tainted by excessive delay.⁷⁴

IV. THE QUESTION OF THRESHOLD: A THEORY OF PROCEDURAL RIGHTS

A. Defining the Problem

The essential basis of a denial of justice is that an individual has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right.⁷⁵

What, then, is the threshold for a procedural injustice? What, in other words, are the minimum standards that international law imposes upon a domestic adjudicative procedure? In the course of answering this question, international courts and tribunals have resorted to two techniques. The first is to supplement the concept of procedural fairness with an appropriate adverb to formulate a threshold for responsibility such as ‘gross procedural unfairness’ or ‘fundamental procedural unfairness’. The poverty of this technique, as well

⁷¹ Freeman (n 1) Ch XIV.

⁷² ECHR Case No 13427/87, Judgment of 9 December 1994.

⁷³ It should be noted that the ECtHR held that the Hellenic Government’s acts constituted a violation of the right to a fair trial in art 6 as well as a deprivation of a possession under art 1 of Protocol 1 (A1P1) of ECHR.

⁷⁴ This is not the way the European court approached the matter: the court found that there had been a breach of A1P1 and this rendered the claim for breach of art 6 moot. *Regent Company v Ukraine*, ECHR Case No 773/03, 29 September 2008; *GEA Group* (n 69); *White Industries* (n 15).

⁷⁵ By this I do not mean that only claimants can suffer a denial of justice: a defendant in criminal proceedings has a substantive right not to be subjected to a criminal sanction if he is innocent.

as its propensity to generate arbitrary decisions, does not require further elaboration.⁷⁶

The second technique is to draw upon a list of paradigmatic examples of serious procedural irregularities, whether inductively from past decisions or otherwise, that generate international responsibility for something akin to a denial of justice. The problem with this approach is that whilst it might identify the common types of grievances leading to responsibility as a matter of the historic record, it provides precious little by way of normative guidance.

It is asserted, for example, that gross delay is a classic instance of a denial of justice. But a delay of ten years in the adjudication of a damages claim for breach of contract is not the same as a delay of ten years in disposing of a charge of murder where the accused is incarcerated pending the outcome of the trial. Can the problem be resolved simply by adding the caveat that whether or not delay in domestic adjudication has been ‘gross’ depends upon the circumstances of the particular case? The answer is no because an international judge cannot determine *which* circumstances are relevant to this assessment unless the judge has a theory for *why* delay is productive of unfairness.

Suppose that substantively-correct decisions were ultimately rendered after a delay of ten years in both the breach of contract case and the murder trial: liability for breach of contract was correctly found and compensation for the expected benefits under the contract together with interest was assessed with complete accuracy; so too in the murder trial the accused was properly acquitted after an exhaustive examination of all the evidence. Has there been a denial of justice in either (or both) cases? One approach might be to adjudge the fairness of a procedure purely by reference to the quality of the outcomes it generates. The value of participation in an adjudicative procedure might be justified instrumentally in terms of facilitating sound judicial reasoning and, particularly in common law systems, good law-making.⁷⁷ In line with this approach, the impeccable results produced by the domestic adjudication would be a complete defence to the denial of justice claims in both cases. But this fails to capture what intuitively at least seems to be an important distinction between the cases: the delay was likely to have caused more harm to the accused in the criminal proceedings, who was deprived of the right to liberty for ten years, than to the claimant in the breach of contract case, who was awarded the value of its contractual benefit in today’s terms by virtue of a retrospective account of interest.

Another approach might recognize that there is an inherent value in participating in an adjudicative process, in terms of respect for human dignity and autonomy, and procedural fairness must be tested by reference to the way

⁷⁶ A criticism can be found in Freeman (n 1) 327–8.

⁷⁷ Fuller defended this ‘outcome-based’ theory: Fuller and Winston (n 11) 364; See generally RG Bone, ‘Lon Fuller’s Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation’ (1995) 75 BULRev 1273.

in which litigants are treated within that process, independently of the outcome it produces.⁷⁸ This appeals to our sense that there is a fundamental distinction between losing and being treated unfairly,⁷⁹ and perhaps following that approach it might be concluded that the delay of ten years is productive of a denial of justice in both cases. This theory, however, fails to provide any real guidance as to what specific elements must be guaranteed by a procedure to satisfy a general right of adequate participation.⁸⁰ Why must an oral hearing be afforded to an accused instead of merely an opportunity to present a written pleading? In a critique of Ely's process-based constitutional theory,⁸¹ Tribe argued that the 'process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values'.⁸² He was right for US constitutional law and equally correct for denial of justice in international law.

Another problem is that such a theory assumes that a distinct harm is inflicted upon a party who is denied adequate participation in a procedure. But is it really possible to separate the harm occasioned by inadequate participation from the harm of an erroneous decision?⁸³ Can there be an institutional value in guaranteeing participation beyond what is required for an accurate decision?⁸⁴ In the words of one writer: 'ones does not often hear stories of individuals who win complaining that they did not get their day in court'.⁸⁵

The purpose of a system of adjudication is to decide cases and generate good outcomes. The merits of an outcome are inexorably linked to the substantive law governing the rights and obligations in question. The procedural aspects of an adjudication are important because they impact upon the magnitude of the risk of error and hence the quality of the substantive outcome in the adjudication. A theory of procedural justice is required to identify the normative

⁷⁸ DJ Galligan, *Discretionary Powers* (Clarendon Press 1986) 335; OM Fiss, 'The Allure of Individualism' (1993) 78 *IowaLRev* 965, 978 ('participation has a value in its own right, manifesting a public commitment to the dignity and worth of the individual'). By linking participation with the legitimacy of the decision itself such a theory can also provide a justification for an obligation to comply with a decision that is known to be substantively wrong: LB Solum, 'Procedural Justice' (2004) 78 *SCalLRev* 181, 190.

⁷⁹ JL Mashaw, *Due Process in the Administrative State* (Yale University Press 1985) 162–3.

⁸⁰ Galligan (n 78) 333.

⁸¹ JH Ely, *Democracy and Distrust* (Harvard University Press 1980).

⁸² LH Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *YaleLJ* 1063, 1064. In the same article he said: 'even the constitution's most procedural prescriptions cannot be adequately understood, much less applied, in the absence of a developed theory of fundamental rights that are secured to persons against the state—a theory whose derivation demands . . . controversial substantive choices. . .' *Ibid* 1067. Also RG Bone, 'Making Effective Rules: The Need for Procedure Theory' (2008) 61 *OklaLRev* 319, 329, 334.

⁸³ Dworkin (n 61) 101–3.

⁸⁴ RG Bone, 'Rethinking the "Day in Court" Ideal and Nonparty Preclusion' (1992) 68 *NYULR* 193, 282.

⁸⁵ L Kaplow, 'The Value of Accuracy in Adjudication: An Economic Analysis' (1994) 23 *JLS* 307, 390 n 249.

constraints on the distribution of this risk in the design and application of procedural rules.

We can draw some preliminary conclusions from the foregoing observations. First, the international obligation to uphold minimum standards within a domestic adjudicative procedure cannot be framed as an obligation to entrench the most accurate procedures for ascertaining the merits of a claim of a substantive right that can possibly be devised regardless of their cost to society.⁸⁶ All States are entitled to balance the interests of litigants resorting to their systems for the administration of justice and the interests of the community of taxpayers. No one has a right to a perfect or infallible procedure in any legal system.

Second, the international obligation cannot be formulated as an obligation to have reached the correct substantive outcome in the particular case. This would be tantamount to elevating the substantive rights in question to rights protected by international law.⁸⁷ And yet a denial of justice may occur if the vindication of a contractual right in a private agreement is frustrated in the domestic courts even though international law is entirely neutral on whether this substantive right should be recognized and protected within the domestic legal system.

Third, the international obligation must nevertheless be linked in some way to the substantive outcomes produced by the domestic adjudication given that the purpose of a system of adjudication is to decide cases and generate good outcomes.⁸⁸

Fourth, the obligation cannot simply require that the correct procedures are followed in domestic law because that would eliminate the objectivity of the minimum standards.⁸⁹ No doubt a breach of the rules establishing the domestic procedures may be an important factor in adjudging a denial of justice in accordance with an international standard, but it cannot be definitive. It cannot be right, for example, to conclude that a judge's *ultra vires* decision to admit hearsay evidence must, *ipso facto*, amount to a denial of justice.

⁸⁶ Galligan (n 78) 327.

⁸⁷ Formulated differently, the international obligation cannot guarantee the content of any substantive right in domestic law. This principle has been reinforced on many occasions in relation to art 6 of the European Convention on Human Rights: *H v Belgium*, ECHR Case No 8950/80, Judgment of 30 November 1987; *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42 (in relation to civil rights); *R v G* [2008] 1 WLR 1379 (in relation to the criminal law).

⁸⁸ Bone (n 77) 332.

⁸⁹ Freeman (n 1) 264, 292–3, 299. It should be noted that even if the standard is to ensure that domestic procedural rules are followed then this has value in upholding the principle of legality. If the standard is to impose limitations on the possible range of procedures that can be prescribed by legislatures then obviously this goes further than securing the principle of legality. The expansive interpretation is favoured by the US Supreme Court in respect of the due process clause: *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US (18 How) 272 (1856). See generally on substantive due process: RG Dixon, 'The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon' (1976) BYULRev 43, 84; LH Tribe, 'Substantive Due Process' in L Levy (ed), *Encyclopedia of American Constitutional Law* (1986).

All these conclusions are consistent with the approach taken by the US Supreme Court towards the due process protection in the Fifth Amendment of the Constitution. In a case about whether a person's social security benefits could be terminated without a hearing, the Court said:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁹⁰

Elsewhere the Court has confirmed that compliance with the standing rules of procedure is not dispositive of compliance with the due process requirements of the Constitution.⁹¹

B. A Theory of Procedural Rights

We have defined the outer contours of the international obligation but are still a long way from elucidating its core. The immediate difficulty is that there is no clear conception of what fundamental procedural standards must be protected in the design and application of procedural rules within the domestic legal systems themselves. The orthodox view is simply that a balance must be struck between the interests of the individual litigant and in the interests of the political community as a whole. That is merely restating the problem.

The only way out of this conundrum is for international law to adopt a theory of procedural *rights* as the object of international protection through the delict of denial of justice. The concept of 'rights' is important in this context for it carves out a space within which a respondent State is not permitted to argue that the alleged procedural injustice was the product of a legitimate cost-benefit analysis in the design or application of the procedural rules in question. A right in the sense used here is the repository of an argument that must prevail over all others in adjudication, including the utilitarian argument that the costs to the community embodied in procedural rules conducive of greater accuracy of substantive outcomes outweighs the benefits to individual litigants. What should be obvious from the foregoing discussion is that the concept of procedural rights upon which international protection depends must be tailored to the *content* of the substantive right being adjudicated within the national legal system.

⁹⁰ *Mathews v Eldridge*, 424 US 319, 334–335 (1976). The Court decided that a hearing was not required based on these three factors.

⁹¹ *Murray's Lessee v Hoboken Land & Improvement Co*, 59 US (18 How) 272 (1856).

We must have a theory of procedural rights that is linked to substantive outcomes. The most compelling articulation of such a theory has come from the pen of Dworkin,⁹² who conceptualizes procedural rights as normative constraints upon the acceptable level of risk of substantive error in adjudicative procedures. Every person has a procedural right to a level of risk that reflects equal concern and respect for the importance of the moral harm that might be inflicted by a substantive error in an adjudicative procedure.⁹³ The theory can be summarized as three propositions, which will be elaborated by reference to the task facing an international tribunal with competence over a denial of justice claim.

First, there is a special kind of injustice that occurs when an adjudicative body erroneously finds against an individual's right in substantive law.⁹⁴ This is characterized as 'moral harm' in contradistinction to other types of harm in the form of economic loss or physical suffering that might result from an erroneous decision that is referred to as 'bare harm'. Moral harm is a 'distinct kind of harm against which people must be specially protected'⁹⁵ by the State.

Suppose the constitution of a particular State enshrines an absolute right not to be convicted of a crime unless proven guilty in a court of law. The constitution is silent, however, on the procedural aspects of a criminal trial. The State's legislature designs a code of procedural rules in criminal cases by engaging in a type of balancing exercise: it quantifies the estimated suffering of those that would be mistakenly convicted if a procedural rule were adopted against the cost to taxpayers in maintaining that rule in the criminal justice system. If a different procedural rule would reduce the risk of someone being mistakenly convicted without imposing additional costs on taxpayers, then that rule should be preferred.⁹⁶ Has the State's legislature discharged its obligation to respect the substantive right in the constitution?

The answer is no. There is a contradiction in adhering to an absolute right not to be convicted if innocent without recognizing that there is something special about the violation of that right, which cannot be captured in a utilitarian cost-benefit analysis that can only take into account bare harm.⁹⁷ What is special is that a person wrongly convicted of a crime suffers moral harm and the State has a particular duty to ensure that people within its jurisdiction do not suffer moral harm:⁹⁸ '[t]he utilitarian approach ignores the special moral value that make the substantive right a *right*'.⁹⁹

⁹² R Dworkin, 'Principle, Policy, Procedure' in *A Matter of Principle* (1985).

⁹³ Ibid 84-5; RG Bone, 'Procedure, Participation, Rights' (2010) 90 BULRev 1011, 1019.

⁹⁴ Dworkin (n 92) 80. ⁹⁵ Ibid 81. ⁹⁶ Ibid 81.

⁹⁷ The classic exposition of such an approach is: RA Posner, 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 JLS 399.

⁹⁸ Dworkin (n 92) 81.

⁹⁹ RG Bone (n 93) 1011, 1015.

Second, people have a right to adjudicative procedures that attach an appropriate level of importance to the risk of moral harm.¹⁰⁰ If the foundation of the denial of justice claim is the moral harm produced by the content of the procedural rules themselves, an international tribunal would have to assess the risk of moral harm associated with an erroneous decision on the substantive right in question in the domestic proceedings and determine whether the impugned procedural rule attaches an appropriate weight to the risk of that moral harm. Dworkin's stark example of a procedure that would violate this first right is a rule to the effect that criminal cases would be decided by flipping a coin.¹⁰¹

In mature legal systems a consensus will emerge on the elements of an adjudicative procedure that are particularly valuable in minimizing the risk of moral harm. Such elements might be described as basic requirements of due process or the right to a fair trial.¹⁰²

Third, people have a right to a 'consistent weighting of the importance of moral harm'¹⁰³ in an adjudicative procedure. This second right is particularly important if the question of whether a procedural rule has been designed to give appropriate weight to the risk of moral harm is controversial such that reasonable people might disagree.¹⁰⁴ It allows the claimant in a denial of justice claim to demonstrate that even if the weight given to the risk of moral harm in the design of the rule is within the margin of appreciation given to States, the application of the rule is nevertheless inconsistent with 'the community's own evaluation of moral harm embedded in the law as a whole'.¹⁰⁵ The claimant has a right to equal treatment in relation to that evaluation. Dworkin gives the example of the number of jurors in a criminal trial.¹⁰⁶ It would be difficult to postulate that only a jury of twelve rather than six members is consistent with giving appropriate weight to the risk of moral harm occasioned by a false conviction. There would be no violation of the first right. But if the practice in a given State over hundreds of years has been to empanel twelve members for a criminal trial, but in the case of a particular accused only six members were empanelled, this would be a violation of the second right. The community's law has evaluated the risk of moral harm as requiring a jury of twelve members and the accused is entitled to equal treatment in that evaluation.

Dworkin had in mind the national community in question and that should certainly be the starting point in an international tribunal's assessment as well.

¹⁰⁰ Dworkin (n 92) 89. Dworkin formulates the right as to procedures that attach the 'correct importance' to the risk of moral harm. For present purposes the right is formulated as the 'appropriate level of importance' to reflect the margin of appreciation that must be afforded by an international tribunal to its assessment of domestic laws.¹⁰¹ *ibid.*

¹⁰² A classic description of which can be found in: T Bingham, 'The Rule of Law' (2007) 66 *CLJ* 67, 80.

¹⁰⁴ *Ibid* 89.

¹⁰⁵ *ibid.*

¹⁰³ Dworkin (n 92) 89.

¹⁰⁶ *ibid* 90-1.

But international law, and in particular its treatment of fundamental rights, must supplement this analysis.

C. The Theory of Procedural Rights Applied

In *Chevron v Ecuador* the Tribunal found that delays of 13 to 15 years in respect of seven claims for breach of contract before the Ecuadorian courts violated the obligation to provide 'effective means' to enforce rights in the USA/Ecuador bilateral investment treaty.¹⁰⁷ At the time of the Tribunal's award, the appellate process had been completed in two cases thus yielding final judgments subject to no further recourse. In two other cases appeals in respect of first instance judgments were still pending. In two further cases there had been judgments at first instance and in the final case there had been no judgment at all.¹⁰⁸ The Tribunal nonetheless found that all such judgments were a nullity as a matter of international law due to the actionable delay that had been consummated by the time that Chevron had filed its notice of arbitration. In accordance with the Tribunal's logic, it followed that it could ignore the substantive findings of the Ecuadorian courts and decide the questions of Ecuadorian law for itself in assessing the damages that would have been awarded by (hypothetical) Ecuadorian courts had they adjudicated the claims in a timely manner.

Suppose the Tribunal was comprised of three arbitrators, each adhering to one of the three theories of procedural fairness outlined above. The first arbitrator, who is concerned only with substantive outcomes, might conclude that in those cases in which the Ecuadorian courts have rendered decisions, there could be no violation of international law in respect of the delay. In those cases in which no decisions had been rendered and thus there were no substantive outcomes at all, the first arbitrator might be prepared to accept a violation of international law so long as the delay attained a particular threshold.

The second arbitrator, who is concerned about the independent value of participating in an adjudicatory procedure, might conclude that inordinate delay in all the cases could amount to a violation of international law regardless of whether decisions had been rendered in individual cases.¹⁰⁹

The third arbitrator, armed with Dworkin's theory of procedural rights, would approach the cases in the following way. All the seven cases concerned the vindication of Chevron's alleged contractual rights to recover damages from its counterparty. As there was no allegation of impropriety concerning the actual judgments rendered in some of those cases it follows that Chevron's substantive rights had not been denied in those cases. A denial of justice arises when the alleged victim has suffered a procedural injustice, according to the

¹⁰⁷ *Chevron* (n 15) para 270.

¹⁰⁸ *ibid* para 149.

¹⁰⁹ The second arbitrator might be said to adhere to a 'pure' theory of procedural justice in the sense articulated by Rawls: J Rawls, *A Theory of Justice* (Harvard University Press 1971) 86.

standards of international law, in seeking to vindicate a substantive right. In those cases in which judgments had been rendered, there could be no denial of justice unless the delay had somehow undermined the substantive right.¹¹⁰ This might be the case in a criminal trial but unlikely to pertain to a case for contractual damages, especially if interest is awarded on the amount in dispute.

In relation to the cases in which no judgment had been rendered after 13 to 15 years it is clear that Chevron had not been able to vindicate its substantive right to contractual damages for procedural reasons. The unjustified denial of a substantive right is productive of moral harm. In this case it was not that the procedural rules in question were defective in failing to give appropriate weight to that risk of moral harm, but instead it was the application of those procedures in the particular cases that may have violated Chevron's procedural right to the consistent weighting of the importance of moral harm as disclosed by the best interpretation of how Ecuadorian law and international law as a whole assigns relative importance to different types of moral harm. In approaching this analysis it would be critical to ascertain the weight given by those legal systems to the risk of the type of moral harm suffered by Chevron. That moral harm could be described as the unjustified denial of an economic benefit. The best interpretation of Ecuadorian law and international law is likely to reveal that the avoidance of such moral harm is not at the apex of the legal system's concern as compared with the moral harm associated with, for instance, an unjustified criminal conviction. It would also be important to investigate the average length of proceedings in other cases involving claims for contractual damages in Ecuador to ascertain whether the Ecuadorian legal system has given consistent weight to the risk of moral harm in respect of the seven contractual claims involving Chevron.

The third arbitrator might not dissent from the Tribunal's ultimate ruling that, in respect of the cases in which no judgment had been rendered, a delay of 13 to 15 years constituted a denial of justice. But the third arbitrator would be concerned by the absence of any account of the nature of the harm suffered by the claimant as a result of that delay in the Tribunal's formulation of the threshold for a denial of justice, in contrast with the approach taken by other international courts.¹¹¹ Nor was there an analysis of the length of proceedings

¹¹⁰ This has been the approach of courts interpreting art 6 of the ECHR when there has been excessive delay in rendering a judgment: the judgment will only be quashed if, apart from the excessive delay, it is not safe and it would be unfair to allow it to stand: *Cobham v Frett* [2001] 1 WLR 1775, 1783–1784 (PC); *Bangs v Connex South Eastern Ltd* [2005] 2 All ER 316 (CA).

¹¹¹ For instance, the ECHR considers that the threshold for unreasonable delay for the purposes of art 6 of the ECHR is lower in criminal proceedings: *Kalashnikov v Russia*, ECHR Case No 27095/99, Judgment of 12 May 2002, para 132. It has also taken into account the fact that the defendant was detained in custody during the proceedings: *Abdoella v Netherlands*, ECHR Case No 12728/87, 25 November 1992, paras 18–25. In civil cases involving the important substantive rights such as the custody of children, the ECHR has also lowered the threshold for a violation of art 6: *Nuutinen v Finland*, ECHR Case No 32842/96, 27 June 2000. The importance of expediency in criminal proceedings was mentioned in investment cases: *White Industries* (n 15) para 10.4.14; *Roussalis v Romania*, Award of 7 December 2011, ICSID Case No ARB/06/1, para 602.

in like cases in Ecuador. Instead, apart from the length of the delay itself, the Tribunal only took into account the complexity of the cases and whether the claimant's own conduct contributed to the delay.¹¹²

V. THE RELATIONSHIP BETWEEN DENIAL OF JUSTICE AND OTHER INTERNATIONAL
NORMS IN RESPECT OF THE ADJUDICATIVE PROCESS

Now that the contours of denial of justice have been defined, the problem of the relationship between denial of justice and other norms of international law that may be relevant to a domestic adjudication can be addressed. There are two issues. First, are there other forms of international delictual responsibility towards foreign nationals other than denial of justice that can apply to acts and omissions associated with a domestic adjudicative process? Can, for instance, a first instance court decision be attacked as an expropriation rather than a denial of justice, such that there would be no need to adhere to the finality rule? The second issue is the significance that should attach to the transgression of an international legal norm within the context of a domestic adjudication. Is such a transgression actionable as a denial of justice or through some other form of delictual responsibility towards foreign nationals? To give a topical example, is a domestic court decision that is inconsistent with the State's obligations under the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards capable of amounting to a denial of justice or some other form of delictual responsibility towards foreign nationals?

*A. Is Denial of Justice the Exclusive Form of Delictual Responsibility
towards Foreign Nationals for Acts or Omissions Associated with a
Domestic Adjudicative Process?*

A constituent element of all forms of delictual responsibility toward foreign nationals in international law is damage.¹¹³ This is the case for delictual responsibility under general international law¹¹⁴ and for the special regime of delictual responsibility established by investment treaties.¹¹⁵ It is also a

¹¹² *Chevron* (n 15) paras 253–254.

¹¹³ It is different, of course, in respect of international responsibility vis-à-vis States, which is why the ILC's Articles on State Responsibility are neutral on this point: Commentary to art 2, para 9 in J Crawford, *The International Law Commission's Articles on State Responsibility* (2002) 84.

¹¹⁴ The invocation of responsibility by diplomatic protection is contingent upon an 'injury'. Art 1 of the ILC's Draft Articles reads: 'For the purposes of the present draft articles, diplomatic protection consists of the invocation by a state, through diplomatic action or other means of peaceful settlement, of the responsibility of another state for an injury caused by an internationally wrongful act of that state to a natural or legal person that is a national of the former state with a view to the implementation of such responsibility.'

¹¹⁵ Z Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in P-M Dupuy and J Viñuales (eds), *Harnessing Foreign Investment to Promote Environmental Protection* (CUP 2013); *Merrill & Ring Forestry LP v Canada*, Award of 31 March 2010, UNCITRAL, para 245. There is an express provision to that effect in some treaties: art 24(1)(A)(II)

requirement, although possibly less stringent, for the special regimes established by human rights treaties.¹¹⁶ The element of damage will, however, arise at different times depending on the delict. In respect of forms of delictual responsibility for acts and omissions relating to the exercise of enforcement powers, such as for unlawful expropriation, or breach of the international minimum standard or failure to accord full protection and security, the damage occurs simultaneously with the misfeasance or nonfeasance in question. The situation is different in respect of acts or omissions in the context of an adjudicative procedure. An adjudicative procedure that fails to respect the foreign national's fundamental procedural rights causes damage to that national when the substantive rights sought to be vindicated in that process are finally denied.¹¹⁷ A first instance court decision cannot, therefore, generate the predicate conduct for delictual responsibility towards a foreign national in international law because at that point in the adjudicative process there is no cognizable damage to that national or its interests produced by the adjudicative process. The decision may be reversed on appeal and with the result that the national's substantive rights are vindicated. Another way of putting the point is that international responsibility towards foreign nationals for acts and omissions associated with an adjudicative procedure can only arise at the point at which the adjudication has produced its final result; it is only at that point that a constituent element of that responsibility has been satisfied, which is the existence of damage to the foreign national.

It can be seen from this analysis that the finality rule for denial of justice works in tandem with the requirement of damage as a constituent element of delictual responsibility towards foreign nationals. Damage can only occur when the adjudicative process reaches its final conclusion. The finality rule places the onus on the foreign national to ensure that the adjudicative process has reached its final conclusion.

With these initial observations in mind, the essence of the problem under review can be revealed through a simple hypothetical. In an investment treaty arbitration, can an investor elect not to seek the reversal of a first instance court decision, which has failed to uphold its putative substantive rights, and claim

of US Model BIT; art 82(1) of 2002 Japan/Singapore FTA. There would be no requirement for damage, however, in any State/State proceedings under the investment treaty.

¹¹⁶ Under art 34 of the ECHR the claimant must be the 'victim of a violation . . . of one of the rights set forth in [the] convention'. *Klass v Germany*, ECHR Case No 5029/71, Judgment of 6 September 1978, para 33 ('Article [34] requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article [34] does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice an individual applicant to claim that the mere existence of a law violate his rights under the Convention; it is necessary to show that the law should have been applied to his detriment.')

¹¹⁷ See Part IV above linking procedural rights with substantive outcomes; Freeman (n 1) 269 ('[t]he act of misconduct complained of must be such as to prejudice materially the alien's defense or espousal of his rights. only then will it amount to a denial of justice.')

that, as a result of that decision becoming final and binding, it has suffered damage, and that the host State should be liable to pay compensation for that damage because the court decision amounts to an expropriation or some other violation of the investment treaty? Can the investor avoid the application of the finality rule in this way?

These questions must be answered in the negative if the integrity of domestic adjudication is to be preserved. All national legal systems rely upon corrective mechanisms to alleviate the risk of substantive error in adjudicative procedures. All national legal systems accept by the very architecture of the institutions created for adjudicative procedures that substantive errors do routinely occur at the first level of the institutional hierarchy. Some national legal systems even accept a greater risk of substantive error at the first level of the hierarchy by design as a trade-off for securing more efficient and less costly adjudicative procedures at that first level. This is generally the position in civil law countries and the trade-off is perfectly legitimate because it is premised upon a wider access to appellate procedures at the second level of the court hierarchy than would be the case in common law systems, which generally seek to achieve greater accuracy at the first level of the court hierarchy but with the less efficiency and greater costs that entails. Civil law countries thus tend to afford the right to a *de novo* appeal in respect of first-level judicial decisions, a right which is far more circumscribed in common law countries.¹¹⁸ This distribution of the risk of substantive error within the different levels of the hierarchical system for the administration of justice is an ubiquitous feature of every legal system and it must be respected by international law.¹¹⁹

These universal features of national adjudicative systems have traditionally been acknowledged by international law through the finality rule and the margin of appreciation afforded to domestic adjudicative decisions reflected in the principle that mere substantive error cannot provide the predicate conduct for a denial of justice. Delictual responsibility towards foreign nationals within specialized regimes such as investment treaty arbitration must continue to be shaped through deference to these universal features of national adjudicative systems.

The conclusion must be that acts or omissions attributable to the State within the context of a domestic adjudicative procedure can only supply the predicate conduct for a denial of justice and not for any other form of delictual responsibility towards foreign nationals. The national does not suffer damage until its substantive rights have finally been denied as a result of the breach of its procedural rights. This constituent element of the delict only occurs when the domestic adjudicative procedure has reached its final conclusion and the finality rule obliges the national to pursue the adjudicative procedure to its final conclusion. To answer the hypothetical question: a claim for

¹¹⁸ MR Damaska, 'Structures of Authority and Comparative Criminal Law' (1975) 84 *YaleJIntL* 480.

¹¹⁹ Eustathiades (n 2) 202.

expropriation in respect of a first instance court decision is inadmissible. A claim for denial of justice would have to be made through the medium of the fair and equitable standard of treatment.

B. Can the Transgression of an International Legal Norm within the Context of a Domestic Adjudicative Procedure Supply the Predicate Conduct for Delictual Responsibility towards Foreign Nationals?

A decision of a national adjudicatory body that is simply inconsistent with a rule or norm of international law does not, without more, entail the international responsibility of the State in question. International responsibility is contingent upon a breach of an international obligation of the State owed to another State or States or indeed to the community of States. An obligation is not the same as a rule or norm and for this reason the former term of art was deliberately chosen over the latter by the International Law Commission during the course of elaborating its Articles on State Responsibility.¹²⁰ In explaining the reference to an ‘obligation’ in Article 2 of those Articles, the Commission notes: ‘[w]hat matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State’.¹²¹ The breach of an international norm only has a delictual character in classical international law if the norm constitutes an obligation on the part of a State towards another State.¹²² By way of example, a national court may fail to apply a choice of law rule prescribed in a treaty for the harmonization of private international law. That failure is a breach of an international norm; but whether it is also a breach of an international obligation to a particular State will require a separate analysis.¹²³

When we shift from classical international law as regulating relations between States to modern international law which places specific demands on domestic regulation, there is a further element requiring analysis: can non-compliance with a particular international norm within the context of a domestic adjudicative procedure form the predicate conduct for delictual responsibility towards foreign nationals? As this question reveals, a link between a breach of an international norm and delictual responsibility to an

¹²⁰ R Ago, ‘Second Report on State Responsibility—The Origin of International Responsibility’ (1970) A/CN.4/233, II Yearbook of the ILC, para 45.

¹²¹ Commentary to art 2 in J Crawford, *The International Law Commission’s Articles on State Responsibility* (CUP 2002) 85.

¹²² This appears to have been overlooked by Fitzmaurice (n 12) 110 (‘[I]t is generally admitted, and there is ample authority for the view, that the judgments of municipal courts applying international law will, if they misapply international law, *ipso facto* involve the responsibility of the state (at any rate if acted upon) even though rendered in perfect good faith by an honest and competent court’).

¹²³ Suppose the court proceedings involved a national of a State not party to the treaty in which the harmonized choice of law rule is prescribed. [*Application of the Convention of 1902 Governing the Guardianship of Infant (The Netherlands v Sweden)*, Judgment of 28 November 1958, (1958) ICJ Rep 55, 64.]

individual must be established separately from the position that would pertain as between States on the international plane.

This issue has arisen with recent frequency before international courts and tribunals in respect of international norms for the recognition and enforcement of foreign arbitral awards.¹²⁴ In *Frontier v Czech Republic*,¹²⁵ the foreign arbitral award in question was rendered in favour of Frontier Petroleum in a dispute with a Czech State-owned company ('LET') by an arbitral tribunal with its seat in Stockholm. While those arbitration proceedings were pending, LET was declared to be insolvent by the Czech courts. When Frontier Petroleum later sought to enforce the award in the Czech Republic, and in particular the orders directing the bankruptcy trustees to grant a first secured charge against the assets of LET, the Czech courts refused by reference to the public policy exception in Article V(2)(b) of the New York Convention on the basis that such enforcement would be inconsistent with the Czech insolvency regime requiring the equality of creditors and the equitable and orderly distribution of assets. An international tribunal was constituted to determine whether this refusal to enforce amounted to a breach of the fair and equitable standard of treatment under the applicable investment treaty. That Tribunal formulated the threshold of liability under that standard as follows: 'whether the conclusion reached by the Czech courts applied a plausible interpretation of the public policy ground in Article V(2)(b) of the New York Convention'.¹²⁶

It is generally accepted that no delictual responsibility towards foreign nationals can arise from an 'implausible interpretation' of national law by national courts. So what is special about Article V(2)(b) of the New York Convention such that an implausible interpretation of that provision can, without more, lead to delictual responsibility towards a foreign national through a breach of the fair and equitable standard of treatment? This question was not addressed in the Tribunal's reasoning and yet it is surely the crux of the matter.

Is the public policy exception in Article V(2)(b) of the New York Convention special simply because it is an international norm? Such an argument is untenable and yet it appears to have been implicitly accepted by the international tribunals that have considered the matter. It is untenable because it fails to recognize the difference between a court decision that is inconsistent with an international norm and a court decision that provides the predicate conduct for delictual responsibility towards a foreign national under

¹²⁴ In assessing this chaotic jurisprudence, it is first important to exclude those cases that are not concerned with delictual responsibility in relation to domestic adjudicative processes as peripheral to the specific problem under investigation. Once an arbitral award is final and binding and not subject to further judicial review, it is a chose-in-action (intangible property) that is capable of being expropriated by the exercise of the State's enforcement powers. Thus, in accordance with the thesis on the scope of denial of justice presented here, such cases would not fall to be considered as denial of justice cases. This applies to *Stran Greek Refineries* (n 72), concerning legislation rendering an arbitration award a nullity.

¹²⁵ *Frontier* (n 69).
¹²⁶ *ibid* para 527. In the next sentence that Tribunal elaborated: 'put another way, was the decision by the Czech courts reasonably tenable and made in good faith?'

international law. When a driver exceeds the speed limit and collides with another vehicle and thereby injures a passenger in that other vehicle, the driver has violated a legal norm contained in the rules of the road. But that violation does not, *ipso facto*, conclude the matter in respect of the victim's entitlement to compensation. To get compensation, the victim has to establish the delictual responsibility of the driver through the tort of negligence. The driver's violation of the rules of the road will no doubt be relevant to the question of whether there was a breach of the standard of care, but it will not be dispositive and it will also not discharge the victim's burden of establishing the other elements of negligence. In the context of the New York Convention, a national court decision inconsistent with an international norm prescribed by that convention may give rise to international responsibility on the part of the State in question vis-à-vis the other State parties. But for the same national court decision to give rise to delictual responsibility in international law to a foreign national, inconsistency with a New York Convention norm is not sufficient. The source of delictual responsibility in this instance is not the New York Convention but instead the fair and equitable standard of treatment under the investment treaty, which can be usefully compared to cause of action in tort in domestic law.¹²⁷

How, then, must an international tribunal approach a claim to the effect that a domestic court decision, which is alleged to be inconsistent with an international norm contained in the New York Convention, constitutes a breach of the fair and equitable standard of treatment? The answer is that it must be approached as a denial of justice claim. If the petitioner has been finally denied a substantive right to the enforcement of a foreign arbitral award by an adjudicative procedure that has failed to respect the petitioner's fundamental procedural rights, then delictual responsibility will be established. The finality rule must apply. Delictual responsibility cannot result from a first instance decision that fails to uphold the petitioner's substantive right to the enforcement of an award.

There is no valid distinction in respect of substantive outcomes resting upon a domestic court's interpretation of international norms and substantive outcomes resting upon a domestic court's interpretation of domestic norms. When the cause of action at the international level is for delictual responsibility to a foreign national, the focus of the inquiry at the international level cannot be whether the domestic court arrived at a 'plausible interpretation' of an international norm; instead the focus must be on whether the domestic court denied the national's substantive rights (whether their source is international law or domestic law) in a manner that was violative of that national's procedural rights as protected by international law. This is not to say that a court decision, independently of constituting a denial of justice, might also constitute an

¹²⁷ Z Douglas, 'The Enforcement of Environmental Norms in Investment Treaty Arbitration' in Dupuy and Viñuales (n 115) 418–24.

international wrong to another State by virtue of the court's transgression of an international norm. But the focus here is on a State's delictual responsibility to foreign nationals and the only route to such responsibility is through denial of justice.

Any other approach would serve to vest international tribunals with appellate jurisdiction over the substantive outcomes in domestic adjudicative procedures. This can be demonstrated in *Frontier* by the Tribunal's reasoning directed to confirming the 'plausibility' of the decision of the Czech courts on Article V(2)(b) of the New York Convention. First, the Tribunal noted that national courts in other countries have reached similar decisions by invoking the principle of the equality of creditors in insolvency proceedings to deny the enforcement of a foreign arbitral award. Then the Tribunal continued:

In the present case, Claimant's central claim was that it should receive preferential treatment (a first secured charge) on the strength of the Stockholm Award. This would have given it preference over other creditors who had participated and complied with a broad scheme which ensured the equal treatment of creditors. Inevitably, this would have worked to the detriment of the other creditors in the bankruptcy proceedings. In fact, it would have defeated the right of all the other creditors given the size of Claimant's claim and the limited assets available. The full enforcement of the Stockholm Award would have seriously affected the position of the other creditors who had no part in the Stockholm proceedings and had never consented to them. The Tribunal considers that this consideration helps to support the point that the Czech courts' interpretation of the notion of 'public policy' under the New York Convention was not unreasonable or impossible.¹²⁸

In this passage, the Tribunal provides (unimpeachable) reasons to agree with the substantive outcome of the adjudicative process before the Czech courts as it related to the interpretation of Article V(2)(b) of the New York Convention. It is a passage that would have added sophistication to an appellate decision, save perhaps for the final sentence in which the Tribunal, unsurprising in light of what preceded, sought to disavow its role as an arbiter of substantive correctness. But it is not a passage that is directed to the proper issues arising in the adjudication of international delictual responsibility for the results of domestic adjudication.

Foreign nationals do not have a general right to reparation for damage caused when States do not comply with their international obligations to other States. The obligations to accord various minimum standards of treatment to foreign nationals in general international law and investment treaties do not operationalize such a general right. An exercise of enforcement power that is inconsistent with an international norm may give rise to delictual responsibility to a foreign national in different forms. But an exercise of adjudicative power can only do so through the medium of a denial of justice. International

¹²⁸ *Frontier* (n 69) para 530.

norms enter the domestic adjudicative process through their judicial interpretation and application to a set of facts. Some international tribunals, such as the European Court of Human Rights, have the competence to adjudicate the correct interpretation or application of international norms by a domestic court. They have thus been delegated the power to substitute their conception of the most rational interpretation and application of those norms for that of the domestic court. But no such right is conferred upon international tribunals with competence to adjudicate the delictual responsibility to foreign nationals that might result from the domestic court's decision. That is the position of tribunals established by investments treaties and the Iran/US Claims Tribunal.

VI. DENIAL OF JUSTICE: A RESTATEMENT

The principal conclusions in this article will now be set out in the form of a restatement of denial of justice.

1. The essential basis of a denial of justice is that a foreign national has suffered a procedural injustice, according to the standards of international law, in seeking to vindicate a substantive right within an adjudicative procedure for which the State is responsible in international law.
2. The acts or omissions of the State must be an exercise of adjudicative power rather than prescriptive or enforcement power.
3. The source of the substantive right can be domestic law or international law.
4. A denial of justice is not consummated until the foreign national's substantive right has been finally denied within the adjudicative procedure. The onus is on the national to resort to all the available remedies afforded by that adjudicative procedure provided that resort to such remedies would not be futile.
5. A foreign national suffers a procedural injustice in seeking to vindicate a substantive right if the adjudicative procedure does not attach an appropriate level of importance to the risk of moral harm that could be inflicted upon the national by an erroneous decision on the substantive right in question or if the adjudicative procedure does not reflect a consistent weighting of the importance of the moral harm as reflected in the State's own evaluation of moral harm embedded in the law as a whole.
6. Denial of justice is the sole form of international delictual responsibility towards foreign nationals for acts or omissions within an adjudicative procedure for which the State is responsible.
7. A decision produced by an adjudicative procedure for which the State is responsible is not a denial of justice merely because it is inconsistent with an international norm binding upon the State. International delictual responsibility to foreign nationals is not the same as international responsibility towards States for the violation of the treaty establishing the international norm.