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## Domestic Courts and the Generation of Norms in International Law

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# DOMESTIC COURTS AND THE GENERATION OF NORMS IN INTERNATIONAL LAW

Charles T. Kotuby, Jr.\*

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## INTRODUCTION

The omnipotent sovereign and the progressive development of the rule of law are often partners, but they are also frequent enemies—Hobbes’ *Leviathan* takes as many individual rights as it gives. This is what economists and political scientists call the “Gilgamesh problem.”<sup>1</sup> Four millennia ago the Sumerian King of Uruk was able to provide his people with prosperity and safety through authoritarian laws, but power without bounds came at the price of individual liberty.<sup>2</sup> According to Professors Acemoglu and Robinson in their 2019 book *The Narrow Corridor*, the answer to this “Janus-faced Leviathan” is a “Shackled Leviathan”—one restrained by an empowered and mobilized society to keep it in check.

Squeezed between the fear and repression wrought by despotic states and lawlessness that emerge in their absence is the narrow corridor to liberty. It is in the narrow corridor that the state and society balance each other out . . . compete [and] cooperate. This cooperation engenders greater capacity for the state to deliver the things that society wants and foments greater societal mobilization to monitor this capacity.<sup>3</sup>

This Article discusses some of the legal guardrails that line that “narrow corridor.” On one ankle, states are shackled and monitored by their own polities, and on the other by the Law of Nations. The former is frequently policed by domestic courts armed with written constitutions, regulating the constant struggle between the government and the governed. The latter is policed by executives and legislatures as they act and react to global events. Executives mold custom in their respective foreign affairs; legislatures enact domestic statutes that comprise the grist for general principles of law; and both play a role in negotiating and ratifying treaties. This covers the three primary sources of international law that compete and cooperate with sovereignty on the international stage.

But within this paradigm, the international guardrails take an ill-defined form. Beyond vague platitudes about fair and equitable treatment and human rights, custom and treaties do little to police the struggle between states and individuals, so the international side of the narrow corridor remain indistinct. International courts and

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<sup>1</sup> See DARON ACEMOGLU & JAMES A. ROBINSON, *THE NARROW CORRIDOR: STATES, SOCIETIES, AND THE FATE OF LIBERTY* xiii (Penguin Books 2020).

<sup>2</sup> *Id.* at xiii–xv.

<sup>3</sup> *Id.* at xvi.

tribunals have proliferated over the past century as a secondary source of international law,<sup>4</sup> but their jurisprudence is sometimes confidential, often scant in juridical reasoning, and vulnerable to sovereigns responding to adverse decisions by withdrawing their consent and walking away. Put simply, international judges and arbitrators have not proven themselves to be up to the task of elucidating international law. If we search for a place where global norms regulating sovereign conduct and international due process can be reliably subject to allegation, opposition, and articulation, we may need to look to the sovereigns themselves.

My contribution to this wonderful symposium on “Sovereignty, Humanity and the Law” will be to propose a more dynamic reality which elevates the importance of municipal *courts* as global actors in the generation and creation of international law. Judiciaries already police the narrow corridor of domestic liberty, so it is only fitting for courts to impose global limits on sovereign authority as well. “It is,” after all, “emphatically the . . . duty of the judicial department to say what the law is,”<sup>5</sup> and this should be true for international rules and norms as much as it is in domestic legal systems. The table is already set for this to happen. When domestic courts choose to apply one foreign law over another, when they pass on the recognition and enforcement of foreign judgments and arbitral awards, or when they decide human rights cases—they become the workshops creating global rules and norms. It is here where judiciaries judge other judiciaries, where they articulate the propriety of each other’s official acts, and in the process announce what precisely qualifies as “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”<sup>6</sup> This is a vibrant reaffirmation of Professor Harold Koh’s “transnational legal process,” where domestic courts, spurred by private litigants, determine and enforce more precise universal norms.<sup>7</sup>

Much has been already written on *whether* and *how* domestic courts make international law.<sup>8</sup> I plan to focus on a more fundamental question: *Why* it is

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<sup>4</sup> See Statute of the International Court of Justice, art. 38, ¶ 1(d), Oct. 24, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 [hereinafter ICJ Statute].

<sup>5</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>6</sup> Elihu Root, *The Basis for Protection to Citizens Residing Abroad*, 4 AM. J. INT’L L. 517, 521 (1910).

<sup>7</sup> See Harold Hongju Koh, *Transnational Legal Process Illuminated*, in TRANSNATIONAL LEGAL PROCESS: GLOBALISATION AND POWER DISPARITIES 327, 327 (Michael Likosky ed., 2002).

<sup>8</sup> See, e.g., Roger O’Keefe, *Domestic Courts as Agents of Development of the International Law of Jurisdiction*, 26 LEIDEN J. INT’L L. 541 (2013); Simon Olleson, *Internationally Wrongful Acts in the Domestic Courts: The Contribution of Domestic Courts to the Development of Customary International*

important—*perhaps even essential*—that domestic courts engage as global players. Unlike international tribunals, domestic courts provide sovereign imprimatur to proclamations on “international due process;” they typically deliver on a practice of careful jurisprudential reasoning; and they represent a forum less vulnerable to hasty political withdrawal. A state that wants its acts recognized beyond its borders cannot easily walk away from the purview of other municipal courts that comprise the community of nations. The bargain to avoiding pariah status is vulnerability to judgment from one’s equals, and the openness to do the same when called upon by individuals exercising international law rights. If international law is to strengthen its positive law footing with stickier norms that regulate sovereign conduct, then municipal courts must add texture and perspective to what those norms require. This is an important function of the unitary sovereign in the twenty-first century, and in improving the vertical relationship between individuals and states.

## I. THE SHACKLES OF POSITIVE LAW

International law was not always law. Principles of equity once directed interstate conduct to a greater degree than any positive law emanating from sovereign consent.<sup>9</sup> This served as the initial foundation of the law of nations at a time when there was little by way of shared ethos to provide otherwise.<sup>10</sup> Equity retained its importance even into the eighteenth and nineteenth centuries.<sup>11</sup> Under the 1794 Jay Treaty between the United States and Great Britain, for instance, claims were to be decided “according to the merits of . . . cases, and to justice, equity, and the law of nations.”<sup>12</sup> This same language was chosen upon the conclusion of negotiations between Spain and the United States over a 1795 commercial treaty and a related 1802 indemnification agreement.<sup>13</sup>

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*Law Relating to the Engagement of International Responsibility*, 26 LEIDEN J. INT’L L. 615 (2013); August Reinish, *To What Extent Can and Should National Courts ‘Fill the Accountability Gap’?*, 10 INT’L ORG. L. REV. 572 (2013).

<sup>9</sup> See CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS* 4 (2017).

<sup>10</sup> See *N. Am. Dredging Co. v. United Mexican States (Mex./U.S.)*, 4 R.I.A.A. 26, ¶ 12 (Mar. 31, 1926).

<sup>11</sup> See generally Louis B. Sohn & Russell Gabriel, *Equity in International Law*, 82 PROC. ANN. MEETING AM. SOC’Y INT’L L. 277 (1988).

<sup>12</sup> Ruth Lapidoth, *Equity in International Law*, 22 ISR. L. REV. 161, 167 (1987).

<sup>13</sup> ROBERT RENBERT WILSON, *THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES* 46–48 (1953).

Notions of equity were tempered in these instances by the “law of nations,” which by this time was rooted in so-called general principles of law. This came in the guise of varying nomenclature. International courts and tribunals used the terms “traditional principles,”<sup>14</sup> “principle[s] generally accepted,”<sup>15</sup> and “well-known rule[s]”<sup>16</sup> when referring to an amorphous reserve of principles in the collective conscious of states. A tribunal sitting in 1872 applied “principles of universal jurisprudence,” specifically that of *actori incumbit [onus] probandi*, and felt justified in doing so because “the legislation of all nations” recognizes it.<sup>17</sup> The Permanent Court of Arbitration (“PCA”) in the *Russian Indemnity Case* held in 1912 that it was generally accepted that interest on a contract price forms part of compensatory relief when payment on that contract is delayed.<sup>18</sup> In the PCA’s words, this principle can be derived from “[a]ll the private legislation of the States forming the European concert . . . , [as well as] Roman law.”<sup>19</sup> This was among the first inklings of movement away from equity in international law, and onto something more concrete and rooted *in foro domestic*.

After the devastation wrought by two World Wars, the need for explicit sources of international law became acute; notions of equity and natural law were too malleable to form “a durable foundation” on which to promote international justice.<sup>20</sup> This made “positive international law, as recognized by nations and governments through their acts and statements,”<sup>21</sup> all the more important. This shift was evident in the enactment of Article 38 of the Permanent Court of International Justice (“PCIJ”) and International Court of Justice (“ICJ”) Statute. First promulgated in 1920, it defined “international law” as those rules emerging from (1) “international

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<sup>14</sup> Question of Jaworzina, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 8, ¶ 79 (Dec. 6).

<sup>15</sup> Factory at Chorzów (Ger. v. Pol.), Judgment, 1927 P.C.I.J. (ser. A) No. 8, ¶ 87 (July 26).

<sup>16</sup> Article 3, Paragraph 2, of Treaty of Lausanne, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, ¶ 95 (Nov. 21).

<sup>17</sup> FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 13 (2008) (citing *Sentence du 26 mars 1872 (Affaire du Queen)*, at 708 (Albert De la Pradelle & Nicolas Politis eds.)).

<sup>18</sup> *Id.* at 14; Russian Claim for Int. on Indems. (Russ. v. Turk.), Case No. 1910-02, Tribunal Award (Perm. Ct. Arb. 1912), [http://www.worldcourts.com/pca/eng/decisions/1912.11.11\\_Russia\\_v\\_Turkey.htm](http://www.worldcourts.com/pca/eng/decisions/1912.11.11_Russia_v_Turkey.htm) [<https://perma.cc/TF5U-VQQ6>].

<sup>19</sup> Russian Claim for Int. on Indems., Case No. 1920-02, at 11.

<sup>20</sup> N. Am. Dredging Co. v. United Mexican States (Mex./U.S.), 4 R.I.A.A. 26, ¶ 12 (Mar. 31, 1926).

<sup>21</sup> *Id.*

conventions,” and (2) “international custom,” in addition to (3) “the general principles of law recognized by civilized nations.”<sup>22</sup> As “subsidiary means for the determination of rules of law,” it also recognized “judicial decisions and the teachings of the most highly qualified publicists of the various nations” as part of the legal regime.<sup>23</sup>

Hence, international law was given a solid positive law footing. Treaties and conventions were a self-codification of limiting rules and principles. Custom is moored in the practice among states and—importantly—accepted by them as binding rules of law.<sup>24</sup> General principles derive from the positive laws promulgated *within* states; when a foundational principle is adopted, recognized, and applied as such within the vast majority of states, it will be deemed a general one and thereby applicable as law among them. In each case, the shackles imposed by law derived from self-limiting behavior of each sovereign. During the negotiating history of the Statute, the words “in the order following” (“*en ordre successif*”) in the introductory phrase of the draft article were deleted, thus eliminating hierarchy among these three sources of international law.<sup>25</sup>

The third is the most controversial as a source of positive international law, but its existence is hard to denounce. The underlying legitimacy of general principles

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<sup>22</sup> ICJ Statute, *supra* note 4, at (a)–(c).

<sup>23</sup> *Id.* at (d).

<sup>24</sup> See *N. Sea Cont’l Shelf (Ger./Den. & Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 56–57 (2014) (internal quotations marks and citations omitted) (explaining that customary international law typically requires “sufficient State practice (i.e. sufficient examples of consistent following of the alleged custom), and that this should have been accompanied by . . . the view (or conviction) that what is involved is (or, perhaps, should be) a requirement of the law, or of necessity”); Olufemi Elias & Chin Leng Lin, *General Principles of Law, ‘Soft Law’ and the Identification of International Law*, 28 NETH. Y.B. INT’L L. 3, 26 (1997).

<sup>25</sup> BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 20 (1953). As explained by Lord Phillimore during the drafting process, the sequencing of Article 38(1) reflects the “logical order in which these sources would occur to the mind of the [international] judge.” Permanent Court of International Justice: Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, June 16th–July 24th 1920, with Annexes*, at 333. “At the same time, general principles escaped classification as “subsidiary” sources of law alongside judicial decisions and scholarly opinions, which are modes of discerning, applying and explicating the law, not sources of law themselves.” KOTUBY & SOBOTA, *supra* note 9, at 9.

stems from their universal acceptance;<sup>26</sup> they “represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof.”<sup>27</sup> In this way, “every municipal law is a vehicle for the general principles of law” to be a source of international law.<sup>28</sup> In the words of (then-Judge and now-Justice) Kavanaugh:

[p]rivate [domestic] law, being in general more developed than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing . . . for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.<sup>29</sup>

With this grounding in domestic law, general principles possess “a degree of reasonableness and appropriateness,” such that “a State which acts in a contrary manner [will] have been conscious of a possibility that a rule of law might point in the opposite direction.”<sup>30</sup> Although general principles are not derived from *express* sovereign consent, they still carry the *imprimatur* of sovereignty by virtue of their universality *in foro domestic* and by their inclusion in Article 38 of the ICJ Statute—a treaty accepted by most states.<sup>31</sup>

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<sup>26</sup> Michelle Biddulph & Dwight Newman, *A Contextualized Account of General Principles of International Law*, 26 PACE INT’L L. REV. 286, 298–99 (2014) (opining that the “consent [of States] can be implied from the common existence of a principle in the domestic legal systems of a majority of the world’s states”).

<sup>27</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 453 (1964) (White, J., dissenting).

<sup>28</sup> *Texaco Overseas Petroleum Co. v. Gov’t of Libyan Arab Republic (U.S. v. Libya)*, Award, 17 I.L.M. 1, \*17–18 (1978).

<sup>29</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62–63 (6th ed. 1963)).

<sup>30</sup> Hugh Thirlway, *The Law and Procedure of the International Court of Justice: 1960–1989: Part Two*, 61 BRIT. Y.B. INT’L L. 1, 113 (1990).

<sup>31</sup> Robert Kolb, *Principles as Sources of International Law (with Special Reference to Good Faith)*, 53 NETH. INT’L L. REV. 1, 27 (2006). General principles have thus been likened to the “bees of law,” promoting “a great fluidity of the main legal ideas, which can be transported by way of analogy from one branch [of international law] to the other, from one legal system to the other.” *Id.* at 27. For a regime beset by fragmentation, cross-pollination is necessary to the proper functioning of the international system of justice.



While the notion of equity was specifically excluded as a freestanding source of international law, it continued to exist. The ICJ has referred to “considerations of equity” when it was tasked with applying the law of diplomatic protection “reasonably” in the *Barcelona Traction*,<sup>32</sup> incorporating “equitable principles” into its determination of maritime boundaries in the *North Sea Continental Shelf* cases,<sup>33</sup> and searching for an “equitable solution derived from the applicable law” in the *Fisheries Jurisdiction* cases.<sup>34</sup> But the unbridled and *sua sponte* exercise of equity, untethered to consent and definite metrics, started to fall away. As Judge André Gros wrote in his *Gulf of Maine* dissent, “[c]ontrolled equity as a procedure for applying the law would contribute to the proper functioning of international justice[,] . . . [but] I doubt that international justice can long survive an equity measured by the judge’s eye.”<sup>35</sup> Thus, under Article 38(2), a case may be decided “*ex aequo et bono*” only “if the parties agree thereto.”<sup>36</sup> By contrast, an international court or tribunal duly seised of jurisdiction requires no special consent from the parties in order to apply “international law,” which is expressly defined in Article 38 to include “the general principles of law recognized by civilized nations.”<sup>37</sup> Again, even here, the root of the international legal regime is the consent of the governed—that is, affirmative acts undertaken by individual sovereign states.

## II. THE EMERGENCE OF INDIVIDUAL RIGHTS

Through the latter half of the twentieth century, the expanded need for positive law to regulate inter-state affairs was matched by the broadening of international law to cover new persons. Once a system for sovereign states alone, “it was the epoch of the First World War and the Versailles Treaty which sounded the massive entry of

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<sup>32</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, ¶ 93 (Feb. 5).

<sup>33</sup> *N. Sea Cont’l Shelf (Ger./Den. & Ger./Neth.)*, Judgment, 1969 I.C.J. 3, ¶¶ 47, 55, 85, 88, 90, 98 (Feb. 20).

<sup>34</sup> *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1974 I.C.J. 3, ¶ 78 (July 25).

<sup>35</sup> *Delimitation of Mar. Boundary in Gulf of Maine Area (Can./U.S.)*, Judgment, 1984 I.C.J. 246, 386 (Oct. 12) (dissenting opinion of Judge Gros).

<sup>36</sup> THIRLWAY, *supra* note 24, at 104–05 (“[T]he text [of Article 38(2)] is generally understood as meaning that the Court would decide simply on the basis of what it thought was fair in the circumstances, however much the solution so arrived at might depart from what would have resulted from the application of law. While a decision so given would be a judicial one, it would by definition not be a legal one, in the sense of based on law, and in no sense therefore can paragraph 2 of Article 38 be regarded as indicating a source of international law.”).

<sup>37</sup> Lapidoth, *supra* note 12, at 170.

private interests into the field of international law.”<sup>38</sup> With this development, the vertical relationship between states and their subjects became almost as important (and in some ways more important) than the horizontal inter-state relationship that had dominated international law for centuries.

This new relationship manifested with two contemporaneous developments. *First*, states and state entities shed their absolute immunity and became exposed to liability for their commercial and proprietary acts—and, in some instances, for their sovereign acts as well.<sup>39</sup> Domestic courts and international tribunals began to hear claims filed against foreign sovereigns by private persons for everything from contract breaches to expropriations and violations of fundamental human rights. *Second*, the notion that international law mandates a minimum standard of treatment for aliens—primarily procedural treatment but in some contexts substantive treatment as well—became enshrined in the notion of “international due process.”<sup>40</sup> Divined from the experience and practice of domestic courts, elevated onto the international plane as general principles, and adopted into a few multilateral conventions, this loose code of process came to define the very essence of “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”<sup>41</sup>

Domestically or internationally, the guarantee of “due process” places external restraints on the arbitrary exercise of governmental power, as it seeks to “reduce the power of the [S]tate to a comprehensible, rational, and principled order.”<sup>42</sup> Although this inquiry may raise normative questions of reasonableness and proportionality, the very notion that there exists a conceptual limit on government power “invites—indeed, requires” one to “take seriously the idea that there are real answers to such normative questions.”<sup>43</sup> The fact that adjectival principles tend to be broad and contextual does not diminish their importance or necessity. “[L]aw and arbitrary command . . . genuinely differ,” and the notion of due process “depends on

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<sup>38</sup> *Texaco Overseas Petroleum Co. v. Gov’t of Libyan Arab Republic (U.S. v. Libya)*, Award, 17 I.L.M. 1, \*14 (1978).

<sup>39</sup> *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a).

<sup>40</sup> KOTUBY & SOBOTA, *supra* note 9, at 69. *See also* *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>41</sup> Root, *supra* note 6.

<sup>42</sup> Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J. L. & PUB. POL’Y 283, 285 (2012).

<sup>43</sup> *Id.*

recognizing that difference.”<sup>44</sup> Wherever this difference exists, moreover, it is almost uniformly the power of *courts* to police it.

As explained in my monograph, the *General Principles of Law and International Due Process*,<sup>45</sup> the notion that minimum procedural standards exist has been the gradual realization of a millennium. Starting with the *Lex Duodecim Tabularum* (Law of the Twelve Tables) codified Roman law in 450 B.C., through the Magna Carta in 1215 and the issuance of *Livro de las Legies* (Book of the Laws) by King Alfonso X of Castilla, Leon, and Galicia circa 1265—the legal conscious of civilization has marched steadily toward a core set of procedural minimum standards that states owe to their citizenry. Over the last 100 years, this idea has marched into the corpus of international law, too. While Rome, Medieval England, and monarchical Spain may vary in the specific procedures they guarantee to citizens before the law, understanding those differences reveals a core of foundational precepts which define a minimum threshold of process that must be obtained in every legal system, and from which no State can deviate. This is the process that is due to foreigners before domestic courts, at the very least, as a matter of international law.<sup>46</sup>

Explications of these international minimum standards began in the claims commissions in the late nineteenth century. These *ad hoc* international tribunals were forced to grapple with domestic courts that were “not independent;” “judges [who were] removable at will [and] not superior, as they ought to be, to local prejudices and passions;” and judicial systems that failed to “afford to the foreigner the same

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<sup>44</sup> *Id.*

<sup>45</sup> KOTUBY & SOBOTA, *supra* note 9, at Chapter I.B.1.

<sup>46</sup> This notion, too, was not a new one. Roman law developed two millennia prior to provide a specific and distinctly positive legal framework to manage the influx of peregrine, or non-Romans, into the capital:

There was no positive law which could be applied to legal disputes between foreigners of different nationalities or between *peregrini* and Roman citizens. In such cases the Praetor Peregrinus had thus to decide *ex aequo et bono*. But as more and more people came to Rome from abroad so that the application of foreign legal principles became an everyday matter, it became increasingly evident that certain basic ideas and principles of law were common to all people. In due course, these generally accepted principles developed into a system of law which was initially quite independent of the civil law, but in the later days of the Empire was merged into one single system.

HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 137 (1980). This aspect of *ius gentium*, with its origin in private law and its focus on common legal principles, bears obvious similarities to today’s general principles, and Article 38(1)(c) marks a similar maturation of modern international law. See generally KOTUBY & SOBOTA, *supra* note 9, at 21–22.

degree of impartiality which is accorded to citizens of the country, or which is required by the common standard of justice obtaining throughout the civilized world.”<sup>47</sup> It was understood by these tribunals that the “due process” required in this context was a burgeoning international concept, and not any single domestic one. As explained in my book:

In *The Affaire du Capitaine Thomas Melville White*, for instance, the British government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal under standards of English law.<sup>48</sup> The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there,” and not those half a world away.<sup>49</sup> Despite the fact that rules of procedure may differ between the common and civil law, however, the tribunal was quick to note that the *idea* of due process was universal—or at least “not alien to that code which survived the Roman Empire as the foundation of modern civilization” in Continental Europe, Latin America and much of the world.<sup>50</sup>

As humanity emerged from the Second World War, the distinction between domestic due process and international due process—and the fact that *both* may be enforceable *by* individuals *against* a state and in different fora—became palpable.<sup>51</sup> The “due process” required in Friendship, Commerce, and Navigation treaties signed by the United States was deemed to be “not the due process of the United States Constitution, but the due process required by international law.”<sup>52</sup> This reflected the simple “reality that the ‘twist[s] and turn[s]’ and ‘idiosyncratic jurisprudence’ of

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<sup>47</sup> Root, *supra* note 6, at 25.

<sup>48</sup> HENRI LA FONTAINE, *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in PASICRISIE INTERNATIONALE, 1794–1900, HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX 48 (1902).

<sup>49</sup> *Id.*

<sup>50</sup> KOTUBY & SOBOTA, *supra* note 9, at 71 (internal citations omitted).

<sup>51</sup> See generally GIACINTO DELLA CANANEA, *DUE PROCESS OF LAW BEYOND THE STATE* 2–4 (2016).

<sup>52</sup> ROBERT R. WILSON, *UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW* 113–15 (1960) (“[T]he standard of ‘due process of law,’ whether procedural or substantive, of one of the parties is not controlling and does not necessarily reflect international law.”).

Anglo-American due process are not shared in all legal systems around the world,”<sup>53</sup> just as other parochial procedural nuances need not be followed here. The next generation of protection for individuals under international law was bilateral investment treaties, and their promise of “fair and equitable treatment,” “full protection and security,” and “effective means of asserting claims and enforcing rights.”<sup>54</sup> Here, the notion of state liability for judicial wrongdoing took root, with tribunals regularly condemning judicial acts that were the product of “corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure;” where the winner was “dictated by the executive;” or where the resolution was “so manifestly unjust that no court which was both competent and honest could have given it.”<sup>55</sup> Unfortunately, such decisions are not a relic of our (relatively more undemocratic) past; they are still common in today’s world.<sup>56</sup>

During the same period, the standards of *international* due process descended to the domestic plane. They emerge when courts of one nation are asked to recognize and enforce the judgment of another. Today, as it has always been, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts.”<sup>57</sup> In the United States, recognition of a foreign money judgment is only granted “[w]here there has been opportunity for a full and fair trial before a court of competent jurisdiction, . . . after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice, . . . and there is nothing to show either prejudice in the court . . . or fraud in

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<sup>53</sup> KOTUBY & SOBOTA, *supra* note 9, at 71 (citing *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 476–77 (7th Cir. 2000)).

<sup>54</sup> 2012 U.S. Model Bilateral Treaty pmbL, art. 5.1, <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [<https://perma.cc/6ST5-NC8M>].

<sup>55</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, Judgment, 1970 I.C.J. 3, at 155–56 (Feb. 5) (separate opinion of Judge Tanaka); *see also* Harvard Law School, *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. 133, 173, 180–81 (1929). *See generally* JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW (2005) [hereinafter PAULSSON, DENIAL OF JUSTICE].

<sup>56</sup> JAN PAULSSON, THE IDEA OF ARBITRATION 257 (2014) [hereinafter PAULSSON, IDEA]; Jan Paulsson, Speech at the Rule of Law Conference at the University of Richmond: Enclaves of Justice (Apr. 12, 2007), [https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/media012254618965440speech-richmond\\_\\_enclaves\\_of\\_justice.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012254618965440speech-richmond__enclaves_of_justice.pdf) [<https://perma.cc/QM7Q-XZLC>] (“The error is to think that injustice is abnormal. It may be more realistic to think and act on the assumption that justice is a surprising anomaly. . . . The rule of law is pure illusion for most of our fellow travelers on this planet . . . .”) [hereinafter Paulsson, Enclaves of Justice].

<sup>57</sup> *Bank Mellī Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995).

procuring the judgment.”<sup>58</sup> Conversely, recognition of foreign judgments will be denied where the court lacked jurisdiction; where “trials [were not] held in public;” where the case was “highly politicized;” where the judge could not “be expected to be completely impartial toward [foreign] citizens;” and where the judgment debtor was denied the ability to appear personally, to “obtain proper legal representation,” and to obtain witnesses on its behalf.<sup>59</sup> The enforcement of a foreign judgment thus turns on whether “it was obtained in a manner that did not accord with the basics of due process,”<sup>60</sup> but not “every jot and tittle of American due process.”<sup>61</sup> U.S. courts “content [themselves] with requiring foreign conformity to the *international* concept of due process.”<sup>62</sup> This is not a distinctive feature of U.S. law; similar approaches exist throughout the world.<sup>63</sup>

The enforcement of arbitral awards can also turn upon principles of international due process. A state can refuse recognition and enforcement of a foreign arbitral award where the parties had no notice of the proceedings, an inequality in the opportunity to present their case, or a tribunal acting in excess of its jurisdiction.<sup>64</sup> The New York Convention also states that a foreign arbitral award may be refused recognition if the award is “contrary to the public policy of [the forum] country.”<sup>65</sup> In some states, this provision is understood to refer to supranational, not domestic, public policies, such that only those values essential to the international legal order constitute a basis to deny enforcement.<sup>66</sup> To read the public policy defense as “a

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<sup>58</sup> *Hilton v. Guyot*, 159 U.S. 113, 123 (1895).

<sup>59</sup> *Bank Melli Iran*, 58 F.3d at 1412, 1413.

<sup>60</sup> *Id.* at 1410.

<sup>61</sup> *Soc’y of Lloyd’s v. Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000).

<sup>62</sup> *Id.* (emphasis added).

<sup>63</sup> *See, e.g.*, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards art. 2(f), May 8, 1979, O.A.S.T.S. No. 51 (requiring that the defense of the parties has been guaranteed prior to recognition of foreign judgments); CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [Civil and Commercial Procedure Code] art. 517(2) (Arg.) (requiring same); CODE CIVIL [C. CIV.] [CIVIL CODE] § 13(d) (Bangl.) (offering no recognition of foreign judgment based upon proceedings “opposed to natural justice”).

<sup>64</sup> *See, e.g.*, INT’L COUNCIL FOR COM. ARB., ICCA’S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION 104 (2011) [hereinafter ICCA GUIDE].

<sup>65</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

<sup>66</sup> *See generally* James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE J. INT’L L. 81 (2009). Although the majority of national arbitration laws provide that courts may refuse enforcement based on the public policy of the forum, *id.*

parochial device protective of national political interests would,” explained one U.S. court, “seriously undermine the Convention’s utility.”<sup>67</sup>

Notwithstanding their wide acceptance in both the international and domestic legal orders, and the importance of the rule of law to international discourse, the requirements of due process established in these contexts are still quite minimal. And, despite the clear mandate to do so, there is still a marked hesitancy by municipal and international bodies alike to sit in judgment of another country’s judicial system. As an international tribunal wrote in 1927, “it is a matter of the greatest political and international delicacy for one country to disacknowledge the decision of a court of another country.”<sup>68</sup> As a result, almost all reviewing courts indulge the presumption that justice has been fairly and regularly meted out. This hesitancy is motivated in part by notions of comity, including that the mutual recognition of legal rights, judgments, and awards depends in large measure upon a “spirit of cooperation” among sovereigns.<sup>69</sup> Translated into practice, successful challenges to municipal judgments and arbitral awards rarely succeed on procedural grounds, and vindicating international due process in a particular case remains challenging.

### III. SOVEREIGNTY AND THE GENERATION OF UNIVERSAL NORMS

After a century and a half of rapid development, a few hard truths have become apparent.

*First, left to their own devices and unbounded by law, states will always prefer to remain unshackled, immune and unaccountable; concessions of sovereignty are hard won and relatively easy to retract.* This preference for unassailability is perhaps a function of the sad state of our global polity. As vividly described by Professor Jan Paulsson in 2007 and still true today, the notion that states are committed to providing justice even for their own citizenry is “an illusion”<sup>70</sup>—“[w]orse, it is a

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at 95–96, a number of states expressly cabin this defense to violations of international public policy (or, to the French, *ordre public international*). *Id.* at 96–97.

<sup>67</sup> *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

<sup>68</sup> *B.E. Chattin v. United Mexican States (Mex./U.S.)*, 4 R.I.A.A. 282, 288 (July 23, 1927) (internal quotation marks and citation omitted).

<sup>69</sup> *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 543 n.27 (1987).

<sup>70</sup> Paulsson, *Enclaves of Justice*, *supra* note 56.

fraud.”<sup>71</sup> Even though most of the world’s sovereigns are shackled with the constitutional commitment to be *un Estado de derecho*, the reality behind these paper declarations is that “[t]he more dictatorial the regime, the more surrealistically gorgeous its constitution.”<sup>72</sup> They are designed to be “short and obscure,” according to Minister Talleyrand,<sup>73</sup> and perhaps the only meaningful consensus we can claim today is “the Fraudulent Consensus” of each sovereign’s self-description that we live in a glorious world governed by the rule of law.<sup>74</sup>

And it is not just inaction that pervades this fraudulent consensus. The current state of the Investor-State Dispute Settlement regime is a dose of realism for those who think that states will accede to accountability by hook or crook. In more than 3,500 treaties over the last fifty years, states have agreed to the relatively benign promise to provide “fair and equitable treatment” to foreign investors, and they have nothing to fear from investor claims and potential liability if they simply aspire to provide the bare minimum of good governance and due process to persons within their territorial jurisdiction.<sup>75</sup> But after a mere two decades of practice and the exposure of their shortcomings by adverse awards, developing and developed states alike are withdrawing their promises at an alarming rate,<sup>76</sup> and are otherwise challenging the legitimacy of a system that dares to hold them accountable.<sup>77</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> PIERRE LOUIS ROEDERER, *OEUVRES DU COMTE* 428 (1854).

<sup>74</sup> Paulsson, *Enclaves of Justice*, *supra* note 56.

<sup>75</sup> See Wolfgang Alschner, Manfred Elsig & Rodrigo Polanco, *Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use*, 30 *WORLD TRADE REV.* 73, 73–74 (2021).

<sup>76</sup> For instance, in January 2012, the Bolivarian Republic of Venezuela denounced the ICSID Convention, becoming the third country—after Bolivia and Ecuador—to do so. In March 2014, Indonesia announced it would allow all 67 of its BITs to expire, including those with the Netherlands, Australia, China, Singapore, and the United Kingdom. In May 2016, Ecuador unilaterally withdrew from its remaining bilateral investment treaties, thereby marking the termination of its 26 BITs. In July 2016, India sent notices to 58 countries announcing its intention to terminate (or not renew) its various BITs. On May 5, 2020, and further to the decision of the Court of Justice of the European Union, Case C-284/16, *Slowakische Republik v. Achmea B.V.*, ECLI:EU:C:2018:158 (Mar. 6, 2018), 23 EU Member States signed an Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. Only Austria, Finland, Ireland and Sweden did not sign the Agreement.

<sup>77</sup> See, e.g., Comm’n on Int’l Trade L., Rep. of Working Group III on the Work of Its Thirty-Fifth Session, ¶ 36, U.N. Doc. A/CN.9/935 (Apr. 23–27, 2018) (noting “significant concerns with the existing ISDS system”); S.I. Strong, *Truth in a Post-Truth Society: How Sticky Defaults, Status Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration*, 2018 *U. ILL. L.*



*Second, if meaningful limitations on state conduct are to advance, it will come from sustained effort by private parties to vindicate their rights vis-à-vis the sovereign.* Important questions like, what constitutes adequate notice of proceedings, when a litigant can be deemed to have had a meaningful opportunity to be heard, and when a judge can be called unbiased and independent, are best answered when private persons seek to vindicate their rights vis-à-vis the sovereign authority purporting to administer impartial and effective justice. Self-limiting treaties are not enough; the promise of “fair and equitable treatment” in investment treaties hardly provides a solid foundation on which to base normative guidance,<sup>78</sup> and the promise of “life, liberty and security of person” in human rights treaties does not fare much better.<sup>79</sup> Let us take for instance the U.S.-Germany Treaty of Friendship and Commerce of 1925, in which Germany guaranteed “the most constant protection and security for . . . persons and property, . . . [and] that degree of protection that is required by international law [such that] property shall not be taken without due process of law and without payment of just compensation.”<sup>80</sup> Without a mechanism to enforce these empty promises before a competent court or tribunal, are we surprised to see how well they worked?

Nor will strictly inter-state affairs lead to the adequate development of normative solutions; if we await the International Court of Justice to have the opportunity to explain what constitutes a “standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a

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REV. 533 (2018) [hereinafter Strong, *Truth*]. As Professor Paulsson has rightly noted, “[the] audience excitedly point[ing] to esoteric inconsistencies in the reasoning of [investment arbitration] tribunals as evidence of a ‘legitimacy crisis’ . . . , [g]iven the horrific failings of much of what passes for a judiciary around the world,” are a bit like seamen “telling passengers in the freezing water that they should not enter the lifeboats because the seats have not been equipped with regulation cushions.” Paulsson, *Enclaves of Justice*, *supra* note 56.

<sup>78</sup> See Charles H. Brower II, *Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105*, 46 VA. J. INT’L L. 347, 350 (2006) (noting how “vague [treaty] text quickly raised interpretive questions, which the investor-driven, uncoordinated dispute settlement process could not resolve to the [State] Parties’ satisfaction,” which led to efforts by the States to “restrict” the text under the guise of authoritative post hoc interpretations “as the vehicle to preempt further losses”).

<sup>79</sup> See G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948); see also S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PA. ST. L. REV. 347 (2018) (explaining how treaties concerning cross-border litigation and human rights “by themselves, cannot provide a comprehensive understanding of requisite procedural norms” and the “content of international due process”) [hereinafter Strong, *General Principles*].

<sup>80</sup> Treaty of Friendship, Commerce and Consular Rights, Ger.-U.S., Dec. 8, 1923, 44 Stat. 2132, 52 U.N.T.S. 1254.

part of the international law of the world,”<sup>81</sup> we may be waiting a very long time. Like self-imposed limitations and paper declarations, “[c]hecks and balances parachuted from above” have proven equally impotent in promoting sovereign restraint.<sup>82</sup> “Liberty needs the state and the laws,” but it also needs individuals armed with procedural rights vis-à-vis the State “so that it protects and promotes people’s liberty rather than quashing it.”<sup>83</sup>

*Third, the permanence of these developing norms will depend upon their grounding in positive law and the quality of their explication.* The nuanced contours of the above standards are the grist of most investment treaty claims, but international law can hardly depend on a system of justice wedded to the confidentiality of its awards and a lack of precedent to advance answers of important normative questions. What is more, the awards that do see daylight are often beset by an absence of satisfactory legal reasoning and decisions made on artificially narrow grounds.<sup>84</sup> While “there is no contradiction between the task of deciding an individual case—in principle the sole duty of [arbitral] tribunals—and consciousness of contributing to the accretion of international norms,”<sup>85</sup> the reality is that the latter is often a slave to the former. In this my experience, after a decade and a half of practice, the average ICSID award will include hundreds of pages of recitation of the parties’ respective positions, followed by a paragraph or two of legal conclusions, with little or nothing of substance in between. Not so with domestic courts. As explained by Lord Bingham of Cornhill in his 1988 Freshfields Lecture, it is a basic function of judges not only to resolve disputes, but also to explain to each party why it has won or lost.<sup>86</sup> This has become a fundamental and often requisite feature of most judicial judgments—as a safeguard against arbitrariness, a guide to future conduct, and

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<sup>81</sup> Root, *supra* note 6, at 21.

<sup>82</sup> ACEMOGLU & ROBINSON, *supra* note 1, at xv.

<sup>83</sup> *Id.*

<sup>84</sup> Charles T. Kotuby, Jr. & Luke A. Sobota, *Practical Suggestions to Promote the Legitimacy and Vitality of International Investment Arbitration*, 28 ICSID REV. 454, 454–56 (2013); Toby Landau, *Reasons for Reasons: The Tribunal’s Duty in Investor-State Arbitration*, in 14 ICCA CONG. SERIES 187–205 (Albert Jan van den Berg ed., 2009). See generally Pierre Lalive, *On the Reasoning of International Arbitral Awards*, 1 J. INT’L DISP. SETTLEMENT 55 (2010).

<sup>85</sup> Jan Paulsson, *The Role of Precedent in Investment Arbitration*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 699, 718 (Katia Yannaca-Small ed., 2010).

<sup>86</sup> Lord Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitral Award*, 4 ARB. INT’L 141, 141 (1988).

enabling the proper review of reversible errors.<sup>87</sup> “[J]udges are experts on law,”<sup>88</sup> after all; they can read it for themselves, and apply it with a view toward an interpretation that sustains its compliance with party equality, future disputes, and basic perceptions of individual justice.

The practical result of these truths is the thesis of this Article: *that acts of the sovereign are essential to restrict the sovereign, and judicial acts of domestic courts are perhaps the most promising engines to generate international norms.* Put differently and in (probably unnecessary) legal nomenclature, ‘private international law’ deserves an equal role to ‘public international law’ in explicating Elihu Root’s standard of universal justice.<sup>89</sup> If we acknowledge this, a few clear paths illuminate; they are paved with *inter-system conflict* and *inter-system judgment*, and give definition to the narrow corridor and the global rule of law.

As noted above, domestic courts regularly engage as global actors when asked to recognize foreign judgments. Here, private litigants press the claim that a foreign sovereign judiciary did, or did not, act in accordance with international due process. From there, courts sit in judgment of foreign judicial acts (and sometimes foreign judicial systems *writ large*), applying and articulating that standard before giving those acts a stamp of internal faith, credit, and enforceability. Multilateral efforts to “facilitate the effective recognition and enforcement of [foreign] judgments”<sup>90</sup> are laudable, but even those efforts recognize that recognition may be refused where it “would be manifestly incompatible with the public policy of the requested State [or] where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.”<sup>91</sup> While rare, this

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<sup>87</sup> *Id.*

<sup>88</sup> *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

<sup>89</sup> Root, *supra* note 6.

<sup>90</sup> Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, intro., July 2, 2019, <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> [<https://perma.cc/LGJ5-PFLW>].

<sup>91</sup> *Id.* at art. 7(1)(c). While the text of this Convention chooses to ground the objection to recognition on the “fundamental principles of procedural fairness of [the requested] State” rather than principles of *universal* fairness, this need not preclude courts from explicating and articulating the latter. To be sure, “fundamental principles” of any state should edge close to being “fundamental principles” anywhere, and similar parochial language in the New York Convention has not discouraged the courts of signatory states from interpreting it to cover only universal and international shortcomings of policy and procedure. See ICCA GUIDE, *supra* note 64 (noting that, although the majority of national arbitration laws provide that

happens when a judgment is based on an “irrefutable presumption of causation,”<sup>92</sup> or where a litigant is “unable to attend the [foreign] proceedings . . . [and] unable to obtain counsel to represent him in those proceedings.”<sup>93</sup> When grounded in universal principles, these sorts of decisions lead to a positive incentive: municipal courts are on notice that they need to do better to earn foreign sovereign enforcement of their own judicial acts by the community of sister courts around the world.

Useful articulation of the same principles can come from domestic conflict with the regime of international arbitration as well. For example, on January 20, 2021, the Singapore Court of Appeal set aside an arbitral award due to an arbitrator’s decision to prohibit the parties from presenting any witness evidence at a hearing.<sup>94</sup> The Court affirmed that the parties’ right to be heard in legal proceedings is not just a rule of Singaporean law but “*a fundamental rule of natural justice.*”<sup>95</sup> While increased judicial scrutiny over arbitral awards would hardly be a welcome development for global commerce and dispute resolution, when courts are faced with legitimate challenges to due process in the arbitral setting, they would serve the institution well by expressly grounding their reasoning in positive universal norms and general principles of procedural law, rather than vague platitudes like “natural justice.”

Domestic courts also make sporadic value judgments as global actors when deciding whether to apply (and how to interpret) foreign laws. Take, for example, a case which turns on ownership of certain moveable property in a foreign jurisdiction. The *lex situs* would almost certainly dictate the result if we were concerned only with the relative interests of the implicated sovereigns and the effectuation of those interests in the choice of law. But, let us now assume that the ownership of that property has been affected by a *lex situs* that is discriminatory on its face; that is based on religious, racial, or nationalistic preference; or that constitutes a flagrant breach of international law. Under most content-free and conventional methodologies for choice of law, the municipal judge points parties to the right court and the right law, “[b]ut [he or she] says no more.”<sup>96</sup> But is this how courts actually

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courts may refuse enforcement based on the public policy of the forum, a number of states expressly cabin this defense to violations of international public policy).

<sup>92</sup> *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1345–47 (S.D. Fla. 2009).

<sup>93</sup> *DeJoria v. Maghreb Petroleum Expl., S.A.*, 935 F.3d 381, 387 (5th Cir. 2019).

<sup>94</sup> *CBS v. CBP*, [2021] SGCA 4.

<sup>95</sup> *Id.* ¶ 50 (emphasis added).

<sup>96</sup> PETER M. NORTH ET AL., *PRIVATE INTERNATIONAL LAW* 8–9 (13th ed. 1999).

behave? Scholars who have studied the question say no: “While the operational mechanics and normative basis of [conflict] methodologies is indifferent to the substantive merits of the applied laws, they still incorporate a limited version of the better-law approach as an inherent component of their choice-of-law process.”<sup>97</sup> Whether by employing the safety valve of public policy, the Doctrine of *Renvoi*, or adjusting the line between procedure and substance, courts are not always oblivious to the outcome of cases before them when choosing to apply a particular law.<sup>98</sup> The same goes for interpreting the chosen law, and the widely-accepted practice of doing so to ensure harmony between the domestic and international legal orders.<sup>99</sup> When all of this happens, judges have the opportunity to grasp the nettle and become the surveyors and purveyors of general principles.

While fewer and further between, some domestic courts are specifically empowered to adjudicate their own states’ (and even other states’) compliance with international law and render judgments in favor of private parties in the process. There is a rich history of private parties litigating claims under Friendship, Commerce, and Navigation treaties against the United States in its own courts.<sup>100</sup> Modern Bilateral Investment Treaties also typically allow aggrieved investors to bring treaty claims in the national courts of the investment host state in lieu of international arbitration (though, for practical reasons, this avenue is rarely pursued).<sup>101</sup> Some courts have imposed international law constraints on their own

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<sup>97</sup> SAGI PEARI, *THE FOUNDATION OF CHOICE OF LAW* 22 (2018).

<sup>98</sup> *See, e.g.*, *Kuwait Airways Corp. v. Iraqi Airways*, [2002] UKHL 19, ¶¶ 16–17 (U.K.) (citing *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (1918)) (“[A] provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice . . . [That is,] when it ‘would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.’”). *See generally* PEARI, *supra* note 97.

<sup>99</sup> *See* ANTONIOS TZANAKOPOULOS, *INT’L L. ASS’N, PRELIMINARY REPORT: PRINCIPLES ON THE ENGAGEMENT OF DOMESTIC COURTS WITH INTERNATIONAL LAW* 8 n.17 (2013) (tracing the principle through various international systems).

<sup>100</sup> *See, e.g.*, *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 187–88 (1982) (“The purpose of the [FCN] Treaties [is to assure foreign corporations] the right to conduct business on an equal basis [as domestic corporations] without suffering discrimination based on their alienage.”); *Kolovrat v. Oregon*, 366 U.S. 187, 191 (1961) (finding that Yugoslavian claimants who were denied inheritance under Oregon law were entitled to inherit personal property pursuant to an 1881 Treaty of Friendship, Navigation, and Commerce between the United States and Serbia); *Clark v. Allen*, 331 U.S. 503, 507 (1947) (finding that the right to inherit real property granted to German aliens under the Treaty of Friendship, Commerce, and Consular Rights with Germany prevailed over California law); *Asakura v. Seattle*, 265 U.S. 332, 340–43 (1924) (invalidating state legislation under the U.S.-Japan FCN).

<sup>101</sup> *See* ANDRÉ NOLLKAEMPER, *NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW* 6 (2011) (observing that, even in states with “a rule-of-law tradition, in all too many instances national courts have

administrative state even without a treaty obligation to do so.<sup>102</sup> There is also the rare circumstance where domestic law allows international law claims to proceed against *foreign* sovereigns. The United States is unique in this regard as it permits U.S. courts to exercise jurisdiction over a foreign sovereign in any case “in which rights in property taken in violation of international law are in issue” provided that there is a territorial nexus between the taken property and the United States.<sup>103</sup> This Statute “is unique; no other country has adopted a comparable limitation on sovereign immunity.”<sup>104</sup> That is unfortunate, because such cases provide the opportunity for domestic courts to grapple with the development and contours of international law.<sup>105</sup>

Where would greater activity and rigor of municipal courts fit within the construct of international law as defined by Article 38 of the Statute of the ICJ? After all, the Statute is clear that “judicial decisions” are only “subsidiary means for the determination of rules of law.”<sup>106</sup> But the acts of domestic courts can still be evidence of state practice of *opinio juris* that contributes to the creation of customary international law.<sup>107</sup> When called upon to consider and apply the principles and rules of international law, they express their views on what those rules and principles

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sided with their government and refused to review acts by governments against the standards of international law”).

<sup>102</sup> See DELLA CANANEA, *supra* note 51, at 50–51 (discussing cases where national courts have used “transnational requirements of due process as a remedy for the problems caused by recalcitrant legislators and governments unwilling to respect the ordinary process of the law”).

<sup>103</sup> 28 U.S.C. § 1605(a)(3).

<sup>104</sup> Fed. Republic of Ger. v. Philipp, 141 S. Ct. 703, 713 (2021) (citing RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 455, reporters’ note 15 (AM. L. INST. 2017)). See generally Olleson, *supra* note 8, at 624 (listing immunity as an “obstacle to domestic courts being able to play an active role in the development of customary international law”).

<sup>105</sup> There are other examples of judicial interaction with international law too. See, e.g., ODILE AMMANN, DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW 142–48 (2020) (addressing the shaping of subsequent state practice for treaty interpretation); Harmen van der Wilt, *Domestic Courts’ Contribution to the Development of International Criminal Law*, 46 ISR. L. REV. 207 (2013) (discussing the specialized field of international criminal law). Courts have had a real impact on the contours of international law in both instances. See also TZANAKOPOULOS, *supra* note 99, at 11 (noting the instances of domestic judicial treaty interpretations affecting the approach of treaty partners and supranational courts).

<sup>106</sup> ICJ Statute, *supra* note 4.

<sup>107</sup> See *Draft Conclusions on the Identification of Customary International Law*, [2018] 6(2), 10(2) & 13, 2 Y.B. INT’L L. COMM’N, U.N. Doc. A/73/10; see AMMANN, *supra* note 105, at 149 (noting that the PCIJ, the ICJ, the ICTR and ICTY have referred to domestic rulings *qua* state practice and/or *opinio juris*).

are.<sup>108</sup> And while some will argue that domestic judicial decisions “count” only when their views are accepted (or at least not rejected) by the executive or legislative branches,<sup>109</sup> this is perhaps exactly backwards. In a world of increasingly *inward-looking* international obligations (i.e., obligations that regulate a State’s relationship with its constituents rather than one another), should we not provide more weight to expressions of *opinio juris* based on reasoned legal considerations rather than strategic or political ones?<sup>110</sup> In this regard, scholars have referred to domestic courts as the “agents of development” of international law<sup>111</sup> on behalf of their constituent states.

Domestic judicial acts contribute especially to the identification of “general principles of law” as a primary source of international law. When a municipal court is given the authority to apply a certain law to a transnational case, its authority is plenary; it can discern and apply the whole law, including its foundational *principles*.<sup>112</sup> In the common law tradition, judicial discretion to resort to general principles to decide a transnational case before it is relatively unfettered.<sup>113</sup> In the civil law tradition, that discretion—though exceptionally exercised—is commonly enshrined in a Code.<sup>114</sup> These principles are, by definition, borne from municipal law—or in the least the distillation of underlying legal norms that give shape to the positive law—and again, by definition, they stem from *international consensus in foro domestic*.<sup>115</sup> One could thus argue that this source of international law is the one that is best designed for private international cases, and best suited to domestic judicial discernment. It is, after all, the only source that derives from the world’s many municipal codes, which themselves are designed to apply to the conduct of private relationships and through the authority of the domestic judge. The result is a

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<sup>108</sup> See Olleson, *supra* note 8, at 617–18.

<sup>109</sup> See AMMANN, *supra* note 105, at 151.

<sup>110</sup> *Id.* at 150–51 (citing Ingrid Wuerth, *International Law in Domestic Courts and the Jurisdictional Immunities of the State Case*, 13 MELBOURNE J. INT’L L. 819, 837 (2012)).

<sup>111</sup> *Id.* at 143 (citing, *inter alia*, TZANAKOPOULOS, *supra* note 99, at 13).

<sup>112</sup> See Jan Paulsson, *Arbitration in Three Dimensions* (LSE L., Soc’y, & Econ., Working Paper No. 2/2010, 2010).

<sup>113</sup> KOTUBY & SOBOTA, *supra* note 9, at 51.

<sup>114</sup> *Id.* at 50.

<sup>115</sup> Charles T. Kotuby, Jr., *General Principles of Law, International Due Process, and the Modern Role of Private International Law*, 23 DUKE J. COMPAR. & INT’L L. 411, 412 (2013).

sort of “procedural *jus cogens*” that operate as “constitutional principles of international law” geared towards individual rights.<sup>116</sup>

It would be a welcome development if judges would make greater use of general principles in transnational cases and, perhaps more importantly, articulate the comparative process undertaken to identify their basis and universality as the truncated reasoning of international jurists has long stunted their development. When international tribunals identify and apply a general principle of law, they typically do so without any justification. Rather than explain their comparative process in divining the principle, they typically assert, *ipse dixit*, that the principle is “admitted in all systems of law”<sup>117</sup> or that it is “widely accepted as having been assimilated into the catalogue of general principles of law.”<sup>118</sup> If domestic courts performed this task with greater rigor and regularity, the courts of “civilized nations” may prove to be the best forum for the “general principles of law recognized by civilized nations” to take hold.<sup>119</sup> If decisions identify these principles with clarity and persuasion, comparative support can serve as “beacons” for other courts and tribunals, international and domestic. While not precedential *per se*, the good ones will illuminate paths through the forest for future decision-makers, while the bad ones will “flicker and die near-instant deaths.”<sup>120</sup> In the least, these decisions—from the world’s sovereigns themselves—can contribute to the body of work that international courts and arbitral tribunals have thus far failed to develop fully.

#### IV. CONCLUSION

These sentiments should not be overstated. Domestic courts are no panacea for complex global disputes, even in the few national enclaves that regularly dispense impartial justice. International arbitration has thus rightly become a virtual monopoly

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<sup>116</sup> Strong, *General Principles*, *supra* note 79, at 391.

<sup>117</sup> *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 18 (Apr. 9).

<sup>118</sup> *Sea-Land Serv., Inc. v. Iran*, 6 Iran-U.S. Cl. Trib. Rep. 149, 168 (1984).

<sup>119</sup> ICJ Statute, *supra* note 4.

<sup>120</sup> Alain Pellet & Daniel Müller, *Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 947 (Andreas Zimmermann et al. eds., 3d ed. 2019); *see also* Int’l L. Comm’n, Memorandum by the Secretariat on Its Sixty-Eighth Session, ¶ 56, U.N. Doc. A/CN.4/691 (Feb. 9, 2016) [hereinafter Secretariat Memorandum] (“[A]uthority of a statement made in a decision of a national court as a subsidiary means for the determination of a rule of law resides essentially in the quality of the reasoning and its relevance to international law.”).



for the vast majority of international cases.<sup>121</sup> The offshoring of dispute resolution away from the sovereign interests of competing states has facilitated the advancement of global discourse as much as any other innovation, and the decision to place investment arbitration within the construct of arbitration and not any international or domestic court is what gives the regime its temerity to adjudicate state responsibility. This ground lost by the world's sovereigns is itself a shackle on their authority; the ground gained by the governed within the narrow corridor should not be ceded back to municipal courts.<sup>122</sup> At its core, "[t]he idea of arbitration is one of liberty" and a "form of self-governance."<sup>123</sup>

But at the same time, the international *l'ordre public* "is unlikely to function very long with 'good arbitration' and 'bad courts.'"<sup>124</sup> Without functioning judiciaries to force compliance with arbitration agreements and enforce arbitral awards, the benefits of arbitration are an illusion. The "nobler objective" may indeed be good courts<sup>125</sup> as an end in itself (to the extent it is realistically achievable in our lifetimes) and as a buttress for good arbitration in the meantime. This parallel development should be the goal of international lawyers, judges, arbitrators and policymakers.

And to that end, a more precise code of procedural *jus cogens* would benefit the entire international *l'ordre public* and reinforce the narrow corridor of individual rights within it. This will take a similar sustained effort from all quarters, and we are naïve to think that arbitral tribunals can serve as the primary engines behind this task. Like obscure domestic constitutions and vague international treaties, most have proven themselves unable or unwilling to grasp the nettle of normative development

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<sup>121</sup> See Jan Paulsson, *International Arbitration is Not Arbitration*, 2 STOCKHOLM INT'L ARB. REV. 1, 1–5, 16 (2008). Although accurate statistics are near-impossible to obtain, some reports suggest that up to 90% of all international commercial contracts include an arbitration provision instead of a choice of a domestic court, which leads to over 5,000 international arbitrations filed each year. See Strong, *Truth*, *supra* note 77, at 534.

<sup>122</sup> See Gary Born, Partner & Chair Int'l Arb. Prac. Grp., Wilmer Hale, Keynote Speech at the European Federation for Investment Law and Arbitration Annual Conference: A Multilateral Investment Court: History Repeated? (Jan. 14, 2021) (comparing current efforts to stifle investment arbitration to the German Nazi efforts in 1933 to forbid arbitration because, "from a state policy point of view . . . an extension of arbitration ultimately presents a disturbance to the trust enjoyed by state courts and the state itself").

<sup>123</sup> PAULSSON, IDEA, *supra* note 56, at 256, 259.

<sup>124</sup> *Id.* at 265.

<sup>125</sup> *Id.* at 24–27.

or otherwise act as reliable checks on the Janus-Faced Leviathans of the world. We would be better served to look *within* the states and their judicial institutions to more “emphatically . . . say what the law is,”<sup>126</sup> as an international as much as a domestic matter, and thereby arm international tribunals with positive law to apply as they carry out their task of adjudicating and identifying state responsibility.<sup>127</sup> These are the sorts of checks and balances that are more likely to stick.

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<sup>126</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>127</sup> *See Secretariat Memorandum*, *supra* note 120, ¶ 5 (“The present memorandum only addresses explicit references to decisions of national courts in the decisions of international courts and tribunals applying or referring to customary international law.”).