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S. I. Strong

University of Missouri School of Law, strongsi@missouri.edu

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General Principles of Procedural Law and Procedural *Jus Cogens*

S.I. Strong*

ABSTRACT

General principles of law have long been central to the practice and scholarship of both public and private international law. However, the vast majority of commentary focuses on substantive rather than procedural concerns. This Article reverses that trend through a unique and innovative analysis that provides judges, practitioners, and academics from around the world with a new perspective on international procedural law.

The Article begins by considering how general principles of procedural law (international due process) are developed under both contemporary and classic models and evaluates the propriety of relying on materials generated from international arbitration when seeking to identify the nature, scope, and content of general principles of procedural law. The analysis adopts both a forward-looking, jurisprudential perspective as well as a backward-looking, content-based one and compares sources and standards generated by international arbitration to those derived from other fields, including transnational litigation, international human rights, and the rule of law.

The Article then tackles the novel question of whether general principles of procedural law can be used to develop a procedural form of *jus cogens* (peremptory norms). Although commentators have hinted at the possible existence of a procedural aspect of *jus cogens*, no one has yet focused on that precise issue. However, recent events, including those at the International Court of Justice and in various domestic settings, have demonstrated the vital importance of this inquiry.

* D.Phil., University of Oxford (U.K.); Ph.D. (law), University of Cambridge (U.K.); J.D., Duke University; M.P.W., University of Southern California; B.A., University of California, Davis. The author, who is admitted to practice as an attorney in New York, Illinois, and Missouri and as a solicitor in Ireland and in England and Wales, is the Manley O. Hudson Professor of Law at the University of Missouri and Adjunct Professor at Georgetown Law Center. The author would like to thank Petra Butler, Kevin Clermont, Evan Criddle, Rick Marcus, and Maya Steinitz for insights provided during the drafting of this Article. All errors remain with the author.

The Article concludes by considering future developments in international procedural law and identifying the various ways that both international and domestic courts can rely on and apply the principles discussed herein. In so doing, this analysis provides significant practical and theoretical assistance to judges, academics, and practitioners in the United States and abroad and offers groundbreaking insights into the nature of international procedural rights.

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I. INTRODUCTION

“General principles of law” have long been central to the development and practice of both public and private international law.¹ For example, state parties have consented to the application of general principles of substantive and procedural law in matters submitted to the International Court of Justice since 1945,² while private parties have

1. See Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 2007 I.C.J. Acts & Docs. No. 6 at 75. The International Court of Justice was founded in 1945 as part of the United Nations. See U.N. Charter art. 92.

2. The Statute for the International Court of Justice states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- international custom, as evidence of a general practice accepted as law;

routinely relied on general principles of commercial law (traditionally referred to as *lex mercatoria* and now largely codified in the UNIDROIT Principles of International Commercial Contracts) to resolve their business disputes.³

As enduring and accepted as these practices may be, problems nevertheless exist. For example, most discussions about the content and use of general principles of law focus on matters of substance rather than procedure, even though “[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights.”⁴ Furthermore, the usefulness of those procedural analyses that do exist is often diluted due to vague, varied, and variable terminology, which can encompass everything from “international due process,” “procedural fairness,” and “natural justice” to “*lex proceduralia*” (the procedural equivalent of *lex mercatoria*) and the all-encompassing phrase, “general principles of law.”⁵

Some of these difficulties can be explained by the fact that procedural due process, “unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances,”⁶ but is instead a flexible concept that “calls for such procedural protections as the particular situation demands.”⁷ As a result, “theories of procedural justice are,” as both Robert Bone and Lawrence Solum have argued, “thinly developed,” even though “[q]uestions about

- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, *supra* note 1, art. 38(1)(c).

3. See INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2016), <http://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>; 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2660 (2d ed. 2014). See generally KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE NEW LEX MERCATORIA (2d ed. 2010); ORSOLYA TOTH, THE LEX MERCATORIA IN THEORY AND PRACTICE (2017); Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT’L 59 (2001).

4. Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010).

5. See MATTI S. KURKELA & HANNES SNELLMAN, DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (1st ed. 2005); MATTI S. KURKELA, SANTTU TURUNEN & CONFLICT MGMT. INST., DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 11 (2d ed. 2010); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT’L L. 1313, 1321–22 (2003).

6. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

7. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

procedural justice are remarkably persistent.”⁸ Concerns about under-theorization are particularly pronounced in the area of international procedure.⁹

The longstanding neglect of international procedural law does not mean that such matters are unimportant.¹⁰ To the contrary, recent events suggest a heightened need to reconsider the place of procedure in the pantheon of international law. For example, the International Court of Justice’s decision in *Germany v. Italy*¹¹ recently triggered a widespread international debate about the connection between state immunity (commonly characterized as a procedural matter) and various substantive norms of international law.¹²

Few people would question the relevance of international procedural law to international judicial proceedings. However, international procedural law may also have a role to play in certain types of national court proceedings.¹³

8. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 182–83 (2004) (writing in the domestic context); see also Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 488–89 (2003). Procedural due process has long been considered a critical component of U.S. constitutional law. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 547 (3d ed. 2006) (“The concept of procedural due process has never been controversial.”); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 140 (2011) (defining procedural due process as “a bedrock feature of [the U.S.] legal system” and claiming that it refers to “the appropriate level of procedural safeguards that must be in place to ensure a fair legal process” (citations omitted)); Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1044 (1984) (suggesting that procedural due process is the oldest of the various civil rights).

9. Scholarly analysis of international procedural law is extremely uneven. See, e.g., Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 416 (1999) (“Compared with choice of law and jurisdiction, the recognition of judgments is a scholarly desert.”). U.S. legal scholarship in this field is particularly lacking. See Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524, 530 (2006) (discussing “the parochialism that so affects U.S. procedure”); John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 546 (1995); Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 709 (2005) (“American proceduralists have not been comparativists.”); *id.* at 740 (“The problem in the U.S. is that comparative procedure is barely on the map.”).

10. See Solum, *supra* note 8, at 182–83.

11. *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

12. See *id.* paras. 45–47; Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. U. J. INT’L HUM. RTS. 149, 154–56 (2011); Alexander Orakhelashvili, *The Classification of International Legal Rules: A Reply to Stefan Talmon*, 26 LEIDEN J. INT’L L. 89, 89–90 (2013); Stefan Talmon, *Jus Cogens After Germany v. Italy: Substantive and Procedural Rules Distinguished*, 25 LEIDEN J. INT’L L. 979, 979–80 (2012).

13. See Jenny S. Martinez, *Who’s Afraid of International and Foreign Law?*, 104 CALIF. L. REV. 1579, 1584 (2016).

This latter assertion may appear contrary to the “strain of isolationism [that] runs deep” in certain national political systems.¹⁴ However, Jenny Martinez has recognized that “[e]ven the late Justice Antonin Scalia, who argued so vociferously against the use of foreign law in interpreting the U.S. Constitution, agreed that consideration of foreign sources was relevant to the interpretation of multilateral treaties and to conflict-of-law questions.”¹⁵

One potentially important type of international law that falls into this accepted category of cases involves certain peremptory (non-derogable) norms referred to as *jus cogens*.¹⁶ These norms, which can operate in the realm of individual rights, have been defined as a type of conflict of laws provision and thus could apply to domestic proceedings.¹⁷ While *jus cogens* has not yet been discussed in the context of national judicial procedures, some areas of concern already exist. For example, U.S. courts and commentators have raised questions about derogations of procedural rights in certain types of civil disputes based on claims of political expediency,¹⁸ while British jurists have struggled to justify the United Kingdom’s reversal of an 800-year-old prohibition on double jeopardy.¹⁹

14. See *id.* at 1585 (noting “that strain resists engagement with the world . . . in ways both mundane and frightening”).

15. *Id.* at 1584.

16. See Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L. 331, 332 (2009).

17. See ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 53 (2006); Sue S. Guan, *Jus Cogens: To Revise a Narrative*, 26 MINN. J. INT’L L. 461, 496 (2017); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes and Other Rules—The Identification of Fundamental Norms*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: *JUS COGENS AND OBLIGATIONS ERGA OMNES* 21, 26 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

18. Political expediency has been used to explain or justify a wide range of procedural due process violations in U.S. courts. See, e.g., Amy Volz & Deborah Anker, *The Impact of President Trump’s Executive Orders on Asylum Seekers*, IMMIGR. BRIEFINGS, May 2017, at 1; Micah Herzig, Note, *Is Korematsu Good Law in the Face of Terrorism? Procedural Due Process in the Security Versus Liberty Debate*, 16 GEO. IMMIGR. L.J. 685, 687–88 (2002) (discussing procedural concerns generated by the World War II cases on Japanese internment and contemporary disputes arising out of the Bush Administration’s war on terror); Erik Larson & Kartikay Mehrotra, *Trump’s Immigration Crackdown is Likely to Bring a Flood of Lawsuits*, BLOOMBERG (Feb. 22, 2017, 8:00 AM), <https://www.bloomberg.com/news/articles/2017-02-22/trump-s-immigration-crackdown-likely-to-bring-lawsuit-flood> (discussing procedural concerns in immigration cases).

19. See Criminal Justice Act 2003, c. 44, § 75 (Eng. & Wales); Double Jeopardy (Scotland) Act 2011, (ASP 16) §§ 1–4; *HM Advocate v. Sinclair* (2014) HCJAC 121, [97]–[104] (Scot.); Gerard Coffey, *The Constitutional Status of the Double Jeopardy Principle*, 30 DUBLIN U. L.J. 138, 138 (2008); Peter W. Ferguson, *Double Jeopardy*,

As important as these issues are, scholars have seldom sought to address concerns about international procedural law on a holistic basis. One important exception was Bin Cheng, whose classic 1953 work, *General Principles of Law As Applied by International Courts and Tribunals*, analyzed the practical applications of the term “general principles of law” in Article 38(1)(c) of the Statute of the International Court of Justice in the years immediately following the creation of the court.²⁰ Cheng’s work was critical in shaping international consensus regarding both the content of general principles of law and the means by which such principles are to be derived.²¹ However, much has happened in the 65 years since he wrote, and questions have begun to arise about the continuing relevance of Cheng’s work.²²

Cheng’s work has recently returned to the limelight as the result of a book-length work by Charles Kotuby and Luke Sobota that seeks to update Cheng’s analysis.²³ Cheng, Kotuby, and Sobota devote considerable time and energy to content-based discussions about general principles of procedural law and make an invaluable contribution to the literature for that reason alone.²⁴ However, these authors also provide important insights into the methodology of international law as a result of their explicit and somewhat innovative decision to rely on authorities involving international arbitration when developing general principles of procedural law.²⁵

2009 SCOT. CRIM. L. 669, 678–79; David Hamer, *The Expectation of Incorrect Acquittals and the “New and Compelling Evidence” Exception to Double Jeopardy*, 2 CRIM. L. REV. 63, 78 (2009); *Double Jeopardy Law Ushered Out*, BBC NEWS (Apr. 3, 2005), http://news.bbc.co.uk/2/hi/uk_news/4406129.stm.

20. See Statute of the International Court of Justice, *supra* note 1, art. 38(1)(c). See generally BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (Cambridge Univ. Press 2006) (1953).

21. See M. Cherif Bassiouni, *A Functional Approach to “General Principles of International Law,”* 11 MICH. J. INT’L L. 768, 770 (1990); Jaye Ellis, *General Principles and Comparative Law*, 22 EUR. J. INT’L L. 949, 956 n.29 (2011); Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Regulation of Nationality*, 50 HARV. INT’L L.J. 1, 19 (2009).

22. See, e.g., Ellis, *supra* note 21, at 970–71 (suggesting a new methodological approach to the identification of general principles of law is in order).

23. See CHARLES T. KOTUBY, JR. & LUKE A. SOBOTA, *GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS: PRINCIPLES AND NORMS APPLICABLE IN TRANSNATIONAL DISPUTES* xiii, 157–202 (2017).

24. See CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202. The authors also discuss general principles of law from a substantive perspective. See CHENG, *supra* note 20, at 29–253; KOTUBY & SOBOTA, *supra* note 23, at 87–155.

25. See CHENG, *supra* note 20, at 23 (relying on nearly 600 decisions from international arbitral and judicial tribunals and citing materials as far back as the Jay Treaty of 1794); KOTUBY & SOBOTA, *supra* note 23, at xiii. Cheng, Kotuby, and Sobota all appear to include all types of arbitration—interstate, international commercial, and investor-state (investment)—in their analyses. See CHENG, *supra* note 20, at 29–30, 33–

Kotuby and Sobota's decision to refer to arbitral materials may not seem that striking given the pervasive nature of international arbitration in contemporary law and practice.²⁶ Although precise statistics are difficult to obtain, some commentators suggest that up to 90 percent of all international commercial contracts currently include an arbitration provision,²⁷ with similar mechanisms in place in approximately 93 percent of the 3,000–5,000 interstate investment treaties (including both multilateral investment treaties (MITs) and bilateral investment treaties (BITs)) now in effect.²⁸ Well over 5,000 international arbitrations are filed per year,²⁹ which strongly suggests that arbitration is by far the preferred means of resolving cross-border commercial, investment, and interstate disputes.³⁰ This phenomenon has led several commentators, most notably Gary Born, to characterize international arbitration as the "second generation" of international adjudication, following the first wave of permanent adjudicatory bodies such as the International Court of Justice and the International Criminal Court.³¹

When viewed in this light, Kotuby and Sobota's methodological approach does not appear particularly noteworthy.³² However, the recent

34, 55–56, 61 (referring to commercial treaties); KOTUBY & SOBOTA, *supra* note 23, at 35–37 (referring to international commercial arbitration). This Article adopts the same approach, both for ease of discussion and because all three types of arbitration include a grant of jurisdiction from the state that reflects a formal connection between the proceeding and the state. See S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 331–50 (2013).

26. See KOTUBY & SOBOTA, *supra* note 23, at 2.

27. See Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 7, 37 (2009).

28. See ORG. FOR ECON. CO-OPERATION & DEV., DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 5, 9 (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf>; S.I. Strong, *Mass Procedures as a Form of "Regulatory Arbitration"—Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 300 n.271 (2013).

29. Most arbitrations involve international commercial disputes, but 20 to 50 investment arbitrations are filed each year. See U.N. Conference on Trade and Development, *IIA Issues Note: Recent Trends in IIA and ISDS*, at 1 (Feb. 2015), http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf (stating "claimants filed 42 known treaty-based ISDS [investor-state dispute settlement] cases" in 2014); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 830, 839 (2012) (noting the lack of numerical precision comes from the confidential nature of international arbitration).

30. See 1 BORN, *supra* note 3, at 93, 97.

31. Born, *supra* note 29, at 819; see also Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 36 U. PA. J. INT'L L. 939, 948 (2015); Martinez, *supra* note 13, at 1579 n.2.

32. See KOTUBY & SOBOTA, *supra* note 23, at 2. Other contemporary commentators have also used this approach. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION xxviii–xxix, xxx–xxxi, xxxvii–xxxviii (2007) (citing arbitral decisions involving the International Centre for the Settlement of Investment Disputes, the

proliferation of international arbitration cannot be used to explain Cheng's analytical framework, since neither international commercial arbitration nor investment arbitration was in vogue in 1953, when Cheng wrote his commentary.³³ To the contrary, Cheng's analysis predates the 1958 adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), the leading international treaty on international commercial arbitration,³⁴ as well as the massive increase in BITs and MITs that began in the late 1980s and 1990s.³⁵

Georg Schwarzenberger was one of the few contemporary commentators to recognize the importance and validity of Cheng's methodological approach at the time Cheng's book was published.³⁶ According to Schwarzenberger, "Dr. Cheng has broken new ground in

Permanent Court of Arbitration, the United Nations Convention on the Law of the Sea and other arbitral tribunals); THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* xxii–xxiii (2015) (noting reliance on various arbitral sources); Desierto, *supra* note 31, at 948; Alan Nissel, *The Duality of State Responsibility*, 44 COLUM. HUM. RTS. L. REV. 793, 795–96 (2013); S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT'L L. 1027, 1083 (2014).

33. See CHENG, *supra* note 20, at 257 (framing his procedural discussion as involving "general principles of law in judicial proceedings" but using the Greco-Bulgarian Mixed Arbitral Tribunal in the *Arakas (The Georgios) Case* (1927) as his primary exemplar); see also 1 BORN, *supra* note 3, at 99, 120.

34. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 3 [hereinafter *New York Convention*]; *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited July 14, 2017) [hereinafter *New York Convention Status*] (listing 157 states as parties). Although the New York Convention is the most important treaty involving enforcement of foreign arbitral awards and agreements, a number of other instruments also exist. See generally Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, 1439 U.N.T.S. 87; Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

35. See 1 BORN, *supra* note 3, at 122. The thousands of BITs in existence do not follow a single pattern, although there are model BITs that provide a degree of consistency in the field. See, e.g., *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, U.S. Dep't of State (2004), <https://www.state.gov/documents/organization/117601.pdf>. The most important of the multilateral treaties is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, more commonly known as the ICSID Convention. See generally Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720, 575 U.N.T.S. 159 [hereinafter *ICSID Convention*]; 1 BORN, *supra* note 3, at 120.

36. Schwarzenberger can be counted among the giants of 20th century international law. See Robert Cryer, *International Law and the Illusion of Novelty: Georg Schwarzenberger*, in BRITISH INFLUENCES ON INTERNATIONAL LAW: 1915–2015 458, 462 (Robert McCorquodale & Jean-Pierre Gauci eds., 2016)

exploring the practice of international arbitration and has shown that international judicial institutions other than the World Court have found it necessary to have recourse on a much larger scale to this subsidiary source of international law,” meaning the law relating to international arbitration.³⁷ Remarkably, this aspect of Cheng’s contribution to international law has been largely ignored by the scholarly community.³⁸

It is unclear whether Kotuby and Sobota will benefit from a similar level of benign neglect given recent attacks on the legitimacy of international arbitration.³⁹ To the contrary, critics could claim that the use of dubious source materials (i.e., those relating to international arbitration) during the norm-generation process calls into question the validity of Kotuby and Sobota’s conclusions.⁴⁰ If, however, the use of arbitral materials can be justified from a methodological perspective, then any recommendations that are generated from those materials become more difficult to challenge.⁴¹

This Article, therefore, considers whether and to what extent it is appropriate to consider authorities derived from international arbitration when determining the scope and nature of general principles of procedural law. This analysis is extremely important to anyone, be they court or commentator, in the United States or abroad, who seeks to evaluate the validity of Cheng, Kotuby, and Sobota’s conclusions about the content of general principles of procedural law.⁴² Although this

37. Georg Schwarzenberger, *Foreword to CHENG*, *supra* note 20, at xi, xii.

38. *See generally* CHENG, *supra* note 20.

39. While most of the criticism has been aimed at investment arbitration, international commercial arbitration has occasionally been targeted as well. *See* 1 BORN, *supra* note 3, at 250; Sergio Puig, *Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 *FORDHAM INT’L L.J.* 465, 468–69 (2013) (citing authorities); 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. REV.* (forthcoming 2018) (citing authorities). *See generally* HALEY SWEETLAND EDWARDS, *SHADOW COURTS: THE TRIBUNALS THAT RULE GLOBAL TRADE* (2016); *THE BACKLASH AGAINST INVESTMENT ARBITRATION* (Michael Waibel et al. eds., 2010).

40. *See* Ellis, *supra* note 21, at 956. The choice of source materials can significantly alter the outcome of any critical analysis. *See* Walter D. Johnson & Edward L. Sattler, *The Importance of the Selection Process in Maintaining Expert Credibility: A Guideline for Choosing the Economist*, 2 *J. LEGAL ECON.* 3, 3 (1992); Philip M. Podsakoff et al., *Sources of Method Bias in Social Science Research and Recommendations on How to Control It*, 63 *ANN. REV. PSYCHOL.* 539, 546 (2012).

41. *See* Johnson & Sattler, *supra* note 40, at 3. For example, Nikolaos Lavranos has objected to Chester Brown’s effort to identify common procedural principles across different types of international adjudication based on the notion that procedural diversity is preferable to procedural consistency. *See* Nikolaos Lavranos, *Chester Brown. A Common Law of International Adjudication*, 20 *EUR. J. INT’L L.* 230, 230–33 (2009) (book review).

42. *See* CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202.

Article focuses exclusively on issues of procedural law, the methodological inquiry is equally valuable to those considering the propriety of Cheng, Kotuby, and Sobota's conclusions about general principles of substantive law, since the means of deriving those principles is the same, regardless of whether the issue is procedural or substantive in nature.⁴³

As important as that discussion is, this Article seeks to do more than simply evaluate the propriety of Cheng, Kotuby, and Sobota's analytical methods and conclusions.⁴⁴ Instead, the discussion takes the inquiry to the next level by considering whether and to what extent the general principles of procedural law developed by these three commentators might reflect the existence or content of what might be referred to as procedural *jus cogens*.⁴⁵ This issue has not yet been addressed in the legal literature, despite an acknowledged need for a better understanding of the theoretical aspects of international procedural law.⁴⁶ Not only would recognition of a procedural aspect of *jus cogens* affect proceedings in international courts, as in cases like *Germany v. Italy*,⁴⁷ it could also have important ramifications for domestic courts, both inside and outside the United States, to the extent those courts seek to violate certain non-derogable principles of procedural law.⁴⁸

43. Cheng, Kotuby, and Sobota spend a considerable amount of time discussing the substantive aspects of general principles of law. See CHENG, *supra* note 20, at 29–253; KOTUBY & SOBOTA, *supra* note 23, at 3–54, 87–155. However, this Article does not address those issues, in part because “[t]he resolution of [substantive] inter-state disputes is most often based on other recognised sources of international law such as treaty and custom rather than on general principles of law.” Gbenga Bamodu, *Extra-National Legal Principles in the Global Village: A Conceptual Examination of Transnational Law*, 4 INT’L ARB. L. REV. 6, 15 n.73 (2001); see also Wolfgang Friedmann, *The Uses of “General Principles” in the Development of International Law*, 57 AM. J. INT’L L. 279, 279 (1963); Roy M. Goode, *Usage and its Reception in Transnational Commercial Law*, 46 INT’L & COMP. L.Q. 1, 16–17 (1997).

44. See CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202.

45. See *infra* notes 243–59 and accompanying text (defining *jus cogens* and distinguishing it from other types of public international law, including customary international law, general principles of law, and obligations *erga omnes*).

46. A few commentators have discussed ancillary issues, but nothing has been found on this particular issue. See, e.g., Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 2 (Francesco Francioni ed., 2007) (considering whether violation of a substantive “*jus cogens* norm create[s] a corresponding non-derogable right of access to justice”); Orakhelashvili, *supra* note 12, at 89–90 (discussing whether certain substantive norms should take priority over various procedural rules in cases involving state immunity); Talmon, *supra* note 12, at 980–81 (same).

47. See *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99, paras. 45–47 (Feb. 3).

48. See *supra* notes 16–22 and accompanying text; see also *infra* notes 338–55 and accompanying text.

The Article proceeds as follows: First, Part II discusses sources and strategies relating to the development of general principles of procedural law and describes how reliance on sources generated from international arbitration can be justified as a matter of both theory and practice. Next, Part III considers how to derive the content of general principles of procedural law and describes why that process must rely on arbitral authorities if the outcome is to be sufficiently precise and complete. Having established the propriety of Cheng, Kotuby, and Sobota's methodological approach, the Article then turns in Part IV to the novel issue of whether and to what extent any of the general principles of procedural law described by the three jurists rise to the level of procedural *jus cogens*.⁴⁹ Part V concludes the Article by tying together the various strands of discussion and providing some forward-looking proposals relating to this area of law.

Before beginning, it is useful to clarify two points. First, the terms "international due process" and "general principles of procedural law" are used synonymously in this Article. Although commentators occasionally use other language to describe the relevant concepts, these two phrases appear to be the most popular and will be used interchangeably.⁵⁰ Second, this Article focuses exclusively on procedures associated with civil proceedings rather than criminal proceedings. While analysis of international criminal procedure is to some extent more advanced than international civil procedure, Cheng, Kotuby, and Sobota focus virtually exclusively on civil proceedings, making it appropriate to adopt the same approach here.⁵¹

49. See CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202; see also *infra* Part IV.

50. See *supra* note 5 and accompanying text.

51. See LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* 1–17 (2011) (suggesting domestic due process standards regarding habeas corpus should be extended to international law and recognized as *jus cogens*); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 714–15 (2006); Richard Volger, *Due Process*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 930, 930 (2012). Kotuby and Sobota have one passing reference to criminal law in their text, while Cheng appears to avoid the issue altogether. See CHENG, *supra* note 20; KOTUBY & SOBOTA, *supra* note 23, at 49.

II. SOURCES AND STRATEGIES RELATING TO THE DEVELOPMENT OF GENERAL PRINCIPLES OF PROCEDURAL LAW

A. *Source Material Relevant to the Development of General Principles of Procedural Law*

When seeking to determine the content of general principles of law, it is first necessary to identify the sources from which those principles will be derived.⁵² According to Cheng, Kotuby, and Sobota, that process begins by considering the procedural protections contained within various international treaties.⁵³ Not every international instrument is equally relevant to this particular task, but it is necessary to compare principles derived from a variety of different settings so as to ensure accurate conclusions.⁵⁴

Initially, it might seem best to begin the analysis by focusing on international treaties involving cross-border litigation, since courts would likely grant those instruments heightened regard as a type of *lex specialis*.⁵⁵ The problem is that there are actually very few international instruments involving procedural rights per se,⁵⁶ and those that do exist are either not very detailed or not widely adopted.⁵⁷ For example, the

52. See Ellis, *supra* note 21, at 954.

53. See CHENG, *supra* note 20, at 1, 23, 26; KOTUBY & SOBOTA, *supra* note 23, at 61.

54. See CHENG, *supra* note 20, at 1, 23, 26; KOTUBY & SOBOTA, *supra* note 23, at 61. For example, general principles of procedural law have been tied to the rule of law and international human rights as well as recognition of foreign judgments and foreign arbitral awards. See CHENG, *supra* note 20, at 10–23; ALEKSANDAR JAKSIC, ARBITRATION AND HUMAN RIGHTS 218 (2002); KOTUBY & SOBOTA, *supra* note 23, at 71–73.

55. See KOTUBY & SOBOTA, *supra* note 23, at 71–73 (suggesting the relevance of authorities involving recognition and enforcement of foreign judgments); Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT'L L. 483, 487 (2006) (“The rule *lex specialis derogat legi generali* has been referred to as a well-recognized principle of international law.”).

56. For example, the Hague Conventions on service and evidence are not really applicable to this analysis, since they do not discuss procedural minimums but instead simply facilitate certain cross-border activities. See *generally* Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231; Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163. Similarly, the Montevideo Treaty on International Procedural Law (1889, amended 1940) simply formalized the notion that trials (including those involving the enforcement of arbitral awards (*fallos arbitrales*)) should follow the procedure of the place where the action is brought. See Ana Delić, *The Birth of Modern Private International Law: The Treaties of Montevideo (1889, amended 1940)*, OXFORD PUB. INT'L LAW, <http://opil.ouplaw.com/page/Treaties-Montevideo> (last visited Dec. 7, 2017); see also Strong, *supra* note 32, at 1030 (questioning whether that principle may be overcome by contract).

57. See 1 BORN, *supra* note 3, at 79 (noting “there is no global counterpart to the New York Convention for foreign judgments”). Some success has been achieved on the

Convention on Choice of Court Agreements (COCA) incorporates some procedural standards, but only in the most general of terms, stating in Article 9 that

Recognition or enforcement [of a foreign judgment] may be refused if –

...
c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim,

i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or

ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State⁵⁸

Although these concepts are certainly relevant to the current inquiry, they are not as comprehensive as inquiries generated from other areas of law.⁵⁹ COCA's relevance is further diminished by the fact that it has only recently come into force and has only a very small number of states parties construing what are relatively general provisions.⁶⁰ As a result, COCA may not reflect a sufficiently high degree of state consensus on basic procedural principles.⁶¹

regional level, particularly within the European Union. *See* Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, recast, 2012 O.J. (L 351) 1; Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2012 O.J. (L 201) 107; Council Regulation (EC) No. 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No. 1347/2000, 2001 O.J. (L 338); Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1.

58. Convention on Choice of Court Agreements art. 9, June 30, 2005, 44 I.L.M. 1294 (entered into force Oct. 1, 2015) [hereinafter COCA].

59. *See infra* notes 75–122 and accompanying text.

60. *See* COCA, *supra* note 58, at art. 9.

61. *See id.*

Some insight could perhaps be gleaned from a proposed convention on the recognition and enforcement of foreign judgments that is being drafted by the Hague Conference on Private International Law.⁶² However, that project has been underway for several decades in one form or another, and it is by no means clear whether the most recent iteration will be successful.⁶³

These problems suggest that treaties concerning cross-border litigation may not be the best source of material from which to generate general principles of procedural law. The next most promising alternative involves instruments concerning international human rights, which often include protections relating to adjudicative procedures.⁶⁴ For example, the Universal Declaration on Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and the American Convention on Human Rights all include language describing procedural protections in civil proceedings.⁶⁵ Although these instruments have been widely adopted by numerous countries around the world and have indeed been referred to as reflecting the “international constitutional order,” they experience the same types of difficulties as COCA in that they are relatively general and insufficiently comprehensive.⁶⁶ For example, Article 10 of the Universal Declaration states only that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations

62. See *The Judgments Project*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, <https://www.hcch.net/en/projects/legislative-projects/judgments> (last visited Dec. 7, 2017).

63. See *id.*

64. See Gates Garrity-Rokous & Raymond H. Brescia, *Procedural Justice and International Human Rights: Towards a Procedural Jurisprudence for Human Rights Tribunals*, 18 YALE J. INT’L L. 559, 566–71 (1993) (discussing due process limitations on the exercise of political considerations in the area of procedure). These documents were primarily promulgated in the years after the publication of Cheng’s original text and are therefore only discussed by later commentators such as Kotuby and Sobota. See CHENG, *supra* note 20; KOTUBY & SOBOTA, *supra* note 23, at 61, 69; see also Strong, *supra* note 32, at 1091–92.

65. See American Convention on Human Rights: “Pact of San José, Costa Rica” art. 8, para. 1, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; International Covenant on Civil and Political Rights art. 14, para. 1, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14 art. 6, para. 1, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 10 (Dec. 10, 1948) [hereinafter Universal Declaration].

66. Petra Butler, *Red Riding Hood—Is Investor-State Arbitration the Big Bad Wolf?*, 5 PENN ST. J.L. & INT’L AFF. 328, 334–35 (2017); see also COCA, *supra* note 58, at art. 9; Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 749–58 (2008).

and of any criminal charge against him.”⁶⁷ Article 14 of the ICCPR is somewhat more detailed, although most of that article refers to criminal rather than civil proceedings.⁶⁸ Indeed, the civil aspects of Article 14 simply state that

All persons shall be equal before the courts and tribunals. In the determination . . . of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children. . . .⁶⁹

One major problem with human rights law involves the relative scarcity of judicial decisions construing the relevant provisions. Although various organs of the United Nations, including the Human Rights Committee, can and often do issue various soft law guidelines regarding the interpretation of these instruments,⁷⁰ many human rights documents are considered non-binding and “aspirational” in nature, which means they are not often subjected to litigation that could clarify ambiguous treaty language.⁷¹ The one exception is Article 6 of the European Convention, which has been cited so frequently (more than 28,000 times) by the European Court of Human Rights (European Court) that it has become the subject of two special guides written and published by the European Court: one dealing with civil procedure and one dealing with criminal procedure.⁷² Unfortunately, the regional nature of the

67. Universal Declaration, *supra* note 65, at art. 10.

68. See ICCPR, *supra* note 65, at art. 14.

69. *Id.* at art. 14, para. 1.

70. See *Human Rights Treaty Bodies—General Comments*, U.N. HUMAN RIGHTS, OFFICE OF THE HIGH COMM’R, <http://www.ohchr.org/EN/HRBodies/Pages/TBGeneralComments.aspx> (last visited July 14, 2017).

71. See Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 260, 278, 319–20 (2013) (discussing U.S. adherence to, including conditions attached to, the Universal Declaration and the ICCPR as well as the aspirational nature of the international human rights regime); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1398 (1999).

72. See European Convention, *supra* note 65, at art. 6, para. 1; EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—RIGHT TO A FAIR TRIAL (CIVIL LIMB) (2013), http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [hereinafter EUROPEAN COURT, CIVIL LIMB];

European Convention means that the text and the opinions of the European Court cannot be guaranteed to reflect global norms, even though many of the procedural protections reflected in the European Convention are the same or similar to other, more widely adopted international instruments such as the Universal Declaration and the ICCPR.⁷³ Difficulties also arise because scholarly analysis of Article 6 in civil proceedings is still relatively undeveloped in comparison to the commentary concerning criminal proceedings.⁷⁴

The situation would be dire indeed if these were the only two types of treaties that could be considered. However, Cheng, Kotuby, and Sobota all believed that it was both possible and prudent to supplement their analysis by considering procedural standards in international arbitration.⁷⁵

On first glance, this methodological decision may seem somewhat controversial. For example, some people have questioned the legitimacy of international arbitration based on the assumption that arbitration constitutes a “lesser” form of civil justice because parties are allowed to waive certain procedural protections that would be required in court.⁷⁶ Many, if not all, of these concerns have been answered by numerous empirical studies demonstrating that international arbitration is a fair and objective means of resolving international commercial and investment disputes,⁷⁷ and by routine suggestions by both courts and commentators

EUROPEAN COURT OF HUMAN RIGHTS, GUIDE ON ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS—RIGHT TO A FAIR TRIAL (CRIMINAL LIMB) (2013), http://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf; *Case Law Database*, EUROPEAN COURT OF HUMAN RIGHTS, <http://echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=> (follow “HUDOC database” hyperlink; then search “article 6”) (last visited July 14, 2017). Although the ACHR created a regional court similar to the European Court, that body (the Inter-American Court of Human Rights) has been nowhere near as active as the European Court. *See Case Law Database, supra* (follow “HUDOC database” hyperlink) (listing over 54,000 decisions in total); *Decisions*, INTER-AM. COURT OF HUMAN RIGHTS, <http://corteidh.or.cr/index.php/en/decisions-and-judgments> (last visited July 14, 2017) (listing only 334 decisions in total).

73. *See* ACHR, *supra* note 65, at art. 8, para. 1; European Convention, *supra* note 65; ICCPR, *supra* note 65; Universal Declaration, *supra* note 65.

74. Some commentary exists, but not on the particular points discussed herein. *See, e.g.,* PIERO LEANZA & ONDREJ PRIDAL, *THE RIGHT TO A FAIR TRIAL: ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2014) (focusing on a number of specific rights rather than on general principles of procedural law). Again, analysis of criminal procedure appears to outpace analysis of civil procedure. *See* RYAN GOSS, *CRIMINAL FAIR TRIAL RIGHTS: ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2014).

75. *See* CHENG, *supra* note 20, at 257–58; KOTUBY & SOBOTA, *supra* note 23, at 2–3.

76. *See* Paul F. Kirgis, *The Contractarian Model of Arbitration and Its Implications for Judicial Review of Arbitral Awards*, 85 OR. L. REV. 1, 14–15 (2006); Strong, *supra* note 39 (outlining arguments and providing authorities).

77. *See* Strong, *supra* note 39 (citing authorities).

that litigation and arbitration operate as functional equivalents, particularly in the international realm.⁷⁸ Indeed, the recursive nature of certain challenges to international arbitration may in many cases be attributable to a lack of appreciation about the true nature of international arbitration or an unconscious bias in favor of judicial proceedings.⁷⁹

The wealth of empirical research regarding the propriety of international arbitration should, by itself, be sufficient to justify Cheng, Kotuby, and Sobota's decision to rely on arbitral authorities when developing general principles of procedural law.⁸⁰ However, the most important reason to include arbitral standards in the evaluative process is the one that has caused the most criticism of arbitral proceedings, namely the fact that some procedural norms are considered waivable in arbitration.⁸¹

Although recent scholarship on "customized" or "bespoke" litigation suggests that parties may waive or adapt an extremely broad range of dispute resolution procedures, even in court, those practices remain largely theoretical.⁸² As a result, the most significant procedural waivers appear in the arbitral context.⁸³ However, it is possible not only

78. See Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342, 357 (Mathias Reimann & Reinhard Zimmermann eds., 2008) (describing equivalence functionalism); Thomas Schultz, *Human Rights: A Speed Bump for Arbitral Procedures? An Exploration of Safeguards in the Acceleration of Justice*, 9 INT'L ARB. L. REV. 1, 2 (noting "awards are [recognized] as equivalents to judgments").

79. See Strong, *supra* note 39.

80. See Thomas W. Wälde, *Procedural Challenges in Investment Arbitration Under the Shadow of the Dual Role of the State: Asymmetries and Tribunals' Duty to Ensure, Pro-Actively, the Equality of Arms*, 26 ARB. INT'L 3, 12 (2010).

81. See S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT'L L. 1, 19 (2015).

82. See Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 520–64 (2011); Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 776–83 (2011); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 426–28; Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516–17 (2009); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 581 (2007); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 856–69 (2006); Strong, *supra* note 32, at 1033–35; Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 183.

83. For example, waiver of the right to proceed as a class has been deemed permissible in arbitration, although such a waiver would likely be impermissible in judicial proceedings. See S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 205–22, 249–53 (2013) (discussing waivers of class arbitration, including in cases involving international parties).

that some of the procedures that are considered waivable in arbitration are not waivable in litigation but also that certain procedures are not waivable, either in litigation or arbitration.⁸⁴ For example, it would likely be impossible to agree to an arbitral or judicial process reflecting an unequal ability to present evidence or legal argumentation.⁸⁵

While complicated, the distinction between waivable and non-waivable procedures appears central to consideration of general principles of procedural law, since the various types of non-waivable norms would appear to form an irreducible core of procedural law that would be largely, if not wholly, consistent with international due process.⁸⁶ This is not to say that international arbitration describes the full panoply of procedural protections that are necessary to comply with international due process, since a number of procedures that are waivable by parties in arbitration may be required in judicial proceedings.⁸⁷ However, this latter phenomenon does not negate the benefit of identifying at least some of the baseline principles of procedural law through reliance on arbitral authorities. Indeed, as this Article demonstrates, reliance on materials generated in international arbitration advances the understanding of international due process in a way that exclusive reliance on judicial and treaty-based materials does not.⁸⁸

Although the number and quality of source materials relating to international arbitration are both broad and deep, the analytical framework identified by Cheng, Kotuby, and Sobota focuses initially on treaties.⁸⁹ Here, a distinction must be made between instruments involving international commercial arbitration (a purely private process resulting from a contractual agreement between two business entities) and instruments involving international investment arbitration (a quasi-public procedure that typically arises by treaty rather than by contract and that involves a sovereign nation as the respondent),⁹⁰ although

84. See Dodge, *supra* note 82, at 776 (“By definition, waivable rights are those for which the legislature has issued no pronouncement that the public interest should trump the private interest and has only designated a right to one party, facilitating private bargaining.”); Strong, *supra* note 81, at 19.

85. See Kaufmann-Köhler, *supra* note 5, at 1321–22.

86. See Dodge, *supra* note 82, at 772–76; Strong, *supra* note 81, at 19.

87. See *infra* Part IV. States may also require heightened evidence of consent of waiver of certain procedural rights, either in litigation or arbitration. See Strong, *supra* note 32, at 1061–69.

88. See *infra* Part III.

89. See CHENG, *supra* note 20, at 1, 23, 26; KOTUBY & SOBOTA, *supra* note 23, at 61; S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 71–137 (2009) (providing bibliographic information for materials involving international arbitration).

90. See LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 13–14 (2010); Born, *supra* note 29, at 831–39.

significant similarities exist between the two mechanisms as a matter of procedure.⁹¹

Analysis of commercial authorities begins with the New York Convention, which has been signed by 157 states parties and which is considered one of the most successful treaties in the world.⁹² The most important aspect of the New York Convention for purposes of this discussion is Article V, which identifies the exclusive bases for denying recognition and enforcement of an arbitral award.⁹³ Although Article V is similar to human rights instruments in that it describes procedural minimums in relatively general terms, the international understanding of Article V is supplemented by extensive case law from around the world.⁹⁴

Procedural standards in international commercial arbitration are further developed through the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Arbitration Law), which has been adopted in whole or in part in 75 countries and 106 jurisdictions, including eight U.S. states.⁹⁵ The Model Arbitration Law was intended to reinforce the procedural standards outlined in the New York Convention and therefore describes the various procedural requirements in language that is essentially identical to that contained in the New York

91. See Andrea Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1272 (2009) (“All of the procedural rules [in investment arbitration], whether designed specifically for use in commercial arbitrations or not, are based on commercial arbitration practice.”).

92. See New York Convention, *supra* note 34, at art. V; *New York Convention Status*, *supra* note 34 (listing 157 states as parties).

93. See New York Convention, *supra* note 34, at art. V; see also *infra* note 184 and accompanying text (reproducing text of Article V).

94. See New York Convention, *supra* note 34, at art. V; U.N. Comm’n on Int’l Trade Law, Case Law on UNCITRAL Texts (CLOUT) User Guide, U.N. Doc. A/CN.9/SER. C/GUIDE/1/Rev. 2, at 2–5, paras. 1–18 (June 2, 2010) [hereinafter UNCITRAL, *CLOUT Guide*]; U.N. Comm’n on Int’l Trade Law, Dissemination of Decisions Concerning UNCITRAL Legal Texts and Uniform Interpretation of Such Texts: Note by the Secretariat, U.N. Doc. A/CN.9/267, at 4, 7, ¶¶ 8, 16 (Feb. 21, 1985).

95. See New York Convention, *supra* note 34; U.N. Comm’n on Int’l Trade Law, UNCITRAL Model Law on International Commercial Arbitration, 18th Sess., U.N. Doc. A/40/17, Annex I (June 21, 1985), amended by Rep. of the U.N. Comm’n on Int’l Trade Law, 39th Sess., June 17–July 7, 2006, at pt. 2, para. 47, U.N. Doc. A/61/17, Annex I, U.N. GAOR, 61st Sess., Supp. No. 17 (July 7, 2006) [hereinafter Model Arbitration Law]; *Status of UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Dec. 7, 2017) [hereinafter *UNCITRAL Model Arbitration Law Status*] (including adherents to both versions of the Model Arbitration Law); STRONG, *supra* note 89, at 85–87 (discussing CLOUT).

Convention.⁹⁶ The relative generality of the Model Arbitration Law is also offset by extensive case law from around the world construing the different provisions.⁹⁷

Parties from around the world can easily access judicial decisions concerning both the New York Convention and the Model Arbitration Law through a free electronic database that is hosted by UNCITRAL and known as CLOUT (Case Law on UNCITRAL Texts).⁹⁸ Discussion of procedural protections in international commercial arbitration can also be found in various arbitral awards that have been published either in arbitral reporting series or as part of recognition and enforcement proceedings in national courts.⁹⁹ Courts and commentators can also consult an extensive and ever-increasing body of international scholarship on international arbitration.¹⁰⁰

Investment arbitration offers an equally rich array of source materials. The analysis begins with Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), which describes the procedural minimums that must be met to avoid annulment of an investment award and which operates as the functional equivalent of Article V of the New York Convention.¹⁰¹ Although the self-contained nature of the ICSID regime means that there are no court cases construing ICSID procedures or awards, the awards themselves provide a considerable amount of

96. See New York Convention, *supra* note 34, at art. V; Model Arbitration Law, *supra* note 95, at arts. 34, 36.

97. See Model Arbitration Law, *supra* note 95; UNCITRAL, *CLOUT Guide*, *supra* note 94, at 2–5, paras. 1–18.

98. See *Case Law on UNCITRAL Texts (CLOUT)*, U.N. COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/case_law.html (last visited July 14, 2017); see also New York Convention, *supra* note 34; Model Arbitration Law, *supra* note 95; UNCITRAL, *CLOUT Guide*, *supra* note 94, at 2–5, paras. 1–18; STRONG, *supra* note 89, at 85–87 (discussing CLOUT). Other databases also exist. See 1958 NEW YORK CONVENTION GUIDE, <http://newyorkconvention1958.org/> (last visited July 14, 2017).

99. Awards generated in international commercial arbitration have been published for decades, typically in denatured (anonymized) form. See STRONG, *supra* note 89, at 72–88; ALBERT JAN VAN DEN BERG, *THE NEW YORK CONVENTION 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 2–3 (1981).

100. Scholarly commentary plays a particularly important role in international commercial and investment arbitration. See STRONG, *supra* note 89, at 28–30. There is a high degree of consistency in commentary on commercial and investment proceedings, since investment arbitration modeled itself on international commercial arbitration, at least in areas of procedure. See Bjorklund, *supra* note 91, at 1271.

101. See ICSID Convention, *supra* note 35, at art. 52; New York Convention, *supra* note 34, at art. V; see also *infra* note 187 and accompanying text (reproducing text of Article 52). According to Article 53, Article 52 is the exclusive means of annulling an award rendered under the ICSID Convention. See ICSID Convention, *supra* note 35, at art. 53.

information on questions of procedure.¹⁰² Although these awards were at one time considered private and confidential, recent initiatives on transparency in investment arbitration, including the enactment of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration in 2014, have greatly increased public access to investment awards.¹⁰³ Indeed, many treaty-based awards are now published in their entirety.¹⁰⁴

Public and private parties have undertaken considerable efforts to ensure a high degree of consistency in the way that procedural standards in international arbitration are interpreted and applied by both arbitrators and national courts.¹⁰⁵ Not only does this phenomenon provide a high degree of confidence in the content of international due process protections in arbitration, it also is consistent with the way in which general principles of law develop.¹⁰⁶

Together, these features more than justify the inclusion of international arbitration in the norm-generation process involving general principles of procedural law. However, there are two additional reasons why international arbitration should be part of this particular endeavor. Both rationales are linked to the structure of the arbitral regime.

The first reason involves how and why international arbitration became the predominant means of resolving cross-border civil disputes.¹⁰⁷ As it turns out, the path by which international arbitration developed bears little resemblance to the route taken by domestic

102. The ICSID arbitration system is entirely self-contained, unlike the world of international commercial arbitration, which interacts with national courts at various points. See ICSID Convention, *supra* note 35, at arts. 53–54; S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 3 (2012).

103. See G.A. Res. 69/116, U.N. Convention on Transparency in Treaty-Based Investor-State Arbitration (Dec. 18, 2014).

104. See *Award—ICSID Convention Arbitration*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (ICSID), <https://icsid.worldbank.org/en/Pages/process/Award-Convention-Arbitration.aspx> (last visited Dec. 7, 2017).

105. See KOTUBY & SOBOTA, *supra* note 23, at 2; STRONG, *supra* note 102, at 93; see also *supra* notes 98–100 and accompanying text (discussing the CLOUT system). See generally New York Convention, *supra* note 34 (setting procedural standards for enforcement).

106. See Schwarzenberger, *supra* note 37, at xii. As Schwarzenberger explains: [T]he international lawyer must call for [succor] from his colleagues in the field of comparative law. They alone can provide him with authoritative studies on the scope and limits of the general principles [recognized] by [civilized] nations. Only on this basis will he then be able to determine which of these principles of public and private, adjective and substantive, law are applicable in the environment of present-day international society.

Id.; see also *infra* Part III.

107. See 1 BORN, *supra* note 3, at 93, 97.

arbitration, which is the procedure that is most familiar to most people.¹⁰⁸ In most jurisdictions, domestic arbitration evolved out of a desire to avoid the formalities associated with judicial procedures and frequently involves the use of mandatory arbitration provisions imposed by repeat respondents on weak or vulnerable individuals without any real consent or knowledge on the part of the future claimants.¹⁰⁹ International arbitration, on the other hand, typically involves extremely knowledgeable commercial or state actors of roughly equal size and sophistication adopting individually negotiated dispute resolution provisions as a result of arm's-length bargaining.¹¹⁰ Even more to the point, international arbitration did not develop in order to avoid judicial formalities; to the contrary, international arbitration involves an intricate and diverse array of procedural mechanisms that are very similar to the normative framework that is used in complex commercial litigation.¹¹¹ In fact, the most common criticism of international arbitration is not that it is too informal but that it is too legalistic.¹¹²

If international actors did not adopt arbitration to avoid judicial formalities or impose an unfair procedure on weaker parties, why did the procedure become the primary means by which international commercial and investment disputes are resolved?¹¹³ The answer lies in the absence of any international consensus on or international treaties concerning transnational litigation.¹¹⁴ The numerous uncertainties associated with cross-border litigation, including where a suit will be heard, what substantive law will control, what procedures will apply, and whether a judgment can be enforced across national borders, make judicial methods of dispute resolution far too unpredictable and risky for commercial

108. See STRONG, *supra* note 102, at 4–5 (discussing consumer and employment arbitration).

109. See *id.*; Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. ILL. L. REV. 695, 697.

110. See 1 BORN, *supra* note 3, at 79. But see Strong, *supra* note 32, at 1051 (noting an increase in small and medium sized enterprises in international trade, which may require reevaluation of the traditional transactional paradigm). Although investment arbitration arises by treaty, the claimant is the one to choose whether to proceed in arbitration pursuant to the host state’s standing offer to arbitrate. See NIGEL BLACKBAY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 11 (6th ed. 2015).

111. See 2 BORN, *supra* note 3, at 2127 (noting “international arbitration can closely resemble proceedings in the commercial courts of some major trading states”).

112. See S.I. Strong, *Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures*, 7 WORLD ARB. & MEDIATION REV. 117, 117 (2013).

113. See 1 BORN, *supra* note 3, at 93, 97.

114. See *id.* at 98–102; see also *supra* notes 55–63 and accompanying text.

actors.¹¹⁵ Furthermore, both public and private entities express concerns about the neutrality of foreign courts and prefer to have their disputes heard in a forum that ensures the independence and impartiality of the decision maker.¹¹⁶ As a result, international arbitration may be more accurately characterized as a replacement for litigation rather than an alternative to litigation, as is the case with domestic procedures.¹¹⁷ This phenomenon suggests that international arbitration can and should be considered a type of *lex specialis* in the area of international procedural law.¹¹⁸

The second structural reason why materials relating to international arbitration are relevant to the process of deriving general principles of procedural law relates to the fact that arbitral standards operate as procedural minimums beyond which states and parties may not go.¹¹⁹ Furthermore, the New York Convention, ICSID Convention, and other arbitral authorities do not provide aspirational standards that parties may adopt or disregard at will; instead, these documents establish legal binding procedural norms on which there is widespread global consensus.¹²⁰ This feature is significant, since it offsets the view that by choosing to have their disputes heard in arbitration, parties can effectively avoid the application of core procedural protections.¹²¹ By

115. See 1 BORN, *supra* note 3, at 98–102. Enforcement of foreign judgments is particularly difficult, particularly compared to the ease with which arbitral awards can be enforced internationally. See *id.*

116. See *id.* at 1529–33, 1988–92.

117. Authorities are unclear as to whether arbitration constitutes a substitute for, an alternative to, or a supplement to litigation. See LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:1, at 1-3 (3d ed. 2010) (noting arbitration coexists with litigation as “part of the American system of administering justice”); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, 7 ICCA CONGRESS SERIES 24, 25 (1996) (noting arbitration is sometimes considered “a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends”); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting “arbitration is a substitute for adjudication by litigation”). Some variation may also exist according to the type of arbitration in question. See EDMONSON, *supra*, § 1:3, at 1-8 to -9 (noting that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply).

118. See Simma & Pulkowski, *supra* note 55, at 487 (defining *lex specialis*).

119. See Strong, *supra* note 32, at 1103. Indeed, some commentators, most notably Gary Born, have suggested that the New York Convention operates as a type of constitutional document. Gary B. Born, *Keynote Address: Arbitration and the Freedom to Associate*, 38 GA. J. INT’L & COMP. L. 7, 21–23 (2009); Peter B. Rutledge, *Introduction: The Constitutional Law of International Commercial Arbitration*, 38 GA. J. INT’L & COMP. L. 1, 2 (2009).

120. See 1 BORN, *supra* note 3, at 70. See generally New York Convention, *supra* note 34; ICSID Convention, *supra* note 35.

121. See Drahozal, *supra* note 109, at 697; Kirgis, *supra* note 76, at 14–15.

establishing the terms on which arbitration can and will proceed, including the basic procedural safeguards that must be respected as part of the arbitral proceeding, states have defined the outer boundaries of international procedural law. This is not to say that arbitral authorities describe the full panoply of general principles of procedural law; indeed, there may be additional standards that must be met in litigation. Nevertheless, the law of international arbitration provides a number of extremely useful insights into the general principles of procedural law that must exist for a dispute resolution procedure to be considered legitimate.¹²² This issue is taken up in more detail in the following section.

B. Strategic Issues Involving the Development of General Principles of Procedural Law

As important as it is to identify the proper sources from which to derive general principles of procedural law, that is only the first step of the process.¹²³ The second step involves the separation of norms that reflect a general principle of procedural law from those that can be characterized as “mere” rules.¹²⁴ Niels Petersen has discussed the difficulty of this task, noting that

The distinction between legal rules and principles is not new and has frequently been used in international law. However, there is no consensus on what the difference is between these two categories of laws. Most often the term principles is used for the more general, fundamental norms of a legal order, while concrete provisions are called rules. Such a distinction is, however, of no heuristic value because it is only of gradual and not qualitative character.¹²⁵

The task is further complicated by the close connection between customary international law and general principles of law.¹²⁶ Indeed, Cheng himself noted that “the line of demarcation between custom and general principles of law . . . is often not very clear, since international custom or customary international law, understood in a broad sense, may

122. See *supra* Section II.A.

123. See Ellis, *supra* note 21, at 954.

124. See CHENG, *supra* note 20, at 24 (distinguishing principles and rules); Talmon, *supra* note 12, at 981.

125. Niels Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23 AM. U. INT'L L. REV. 275, 286–87 (2008).

126. See CHENG, *supra* note 20, at 23. Customary international law is one of several types of international law. See Statute of the International Court of Justice, *supra* note 1, at art. 38(1)(c) (noting the other sources are treaties (conventions) and general principles of law).

include all that is unwritten in international law, i.e., both custom and general principles of law.”¹²⁷

Although the connection between general principles of law and customary international law can prove challenging, it also provides important insights into how the former develops. For example, Ian Brownlie has stated any practice that is to be recognized as customary international law must be of sufficient duration, reflect a degree of uniformity and consistency, be of a general nature, and be accepted as law.¹²⁸ He has also argued that “collections of municipal cases” are critical to the “assessment of the customary law.”¹²⁹

In the past, it has been difficult to establish the requisite amount of uniformity and consistency in the area of procedural law, because research into municipal cases typically demonstrated an absence of any commonality of procedure due to the parochialism and exceptionalism that is the hallmark of national civil procedure.¹³⁰ As a result, most commentators have concluded that there is no customary international law of procedure, although there are those who take a contrary view.¹³¹ However, expanding the analysis to include sources derived from international arbitration effectively negates claims that procedural norms are too diverse to generate any overarching norms of behavior.¹³² Indeed, a number of the procedural norms discussed by Cheng, Kotuby, and Sobota appear to meet Brownlie’s test for customary international law.¹³³

As intriguing as that analysis may be, this Article does not seek to determine whether and to what extent an international customary law of

127. CHENG, *supra* note 20, at 23.

128. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7–8 (2008).

129. *Id.* at 52.

130. See Clermont, *supra* note 9, at 530; Marcus, *supra* note 9, at 709, 740.

131. See Francioni, *supra* note 46, at 1–2; Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT’L & COMP. L. 491, 497–503 (2003) (offering both sides of the argument that *aut dedere aut judicare* constitutes a form of customary international procedural law); Wälde, *supra* note 80, at 12. Part of the problem is that most commentary on customary international law has focused on substantive concerns.

132. As the preceding paragraphs note, there are a significant number of domestic court decisions relating to international due process in the arbitral setting as well as an ever-increasing number of arbitral awards on that subject. See *supra* notes 98–100 and accompanying text (discussing CLOUT).

133. See BROWNLIE, *supra* note 128, at 6–7 (discussing evidence of international custom); CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202; see also Frédéric G. Sourgens, *Law’s Laboratory: Developing International Law on Investment Protection as Common Law*, 35 NW. J. INT’L L. & BUS. 181, 185, 187–88 (2014) (suggesting awards from investment arbitration can evince customary international law based on an inductive, rather than deductive, analytical approach); Strong, *supra* note 32, at 1096–97 (applying Brownlie’s analysis to procedural principles developed for and reflected in international arbitration).

procedure exists. Instead, the focus here is on general principles of procedural law. According to Cheng, the process of identifying general principles of law differs from that relating to customary international law to the extent the former includes:

[an] element of recognition on the part of [civilized] peoples but the requirement of a general practice is absent. The object of recognition is, therefore, no longer the legal character of the rule implied in an international usage, but the existence of certain principles intrinsically legal in nature. This part of international law consists in the general principles of that social phenomenon common to all [civilized] societies which is called law.¹³⁴

Other commentators appear to agree with this approach.¹³⁵ Therefore, under the Brownlie-Cheng test, a particular norm may be classified as a general principle of procedural law so long as the concept has endured for a sufficiently long period of time, reflects a degree of uniformity and consistency, is of a general nature, and reflects a legal character.¹³⁶

III. CONTENT OF GENERAL PRINCIPLES OF PROCEDURAL LAW

A. *Using Content-Based Analyses to Determine Appropriate Source Materials*

Academics have long recognized that choices about research methodology can be outcome-determinative.¹³⁷ This phenomenon is

134. CHENG, *supra* note 20, at 24.

135. See BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATION* 162 (2010) (discussing the relationship between customary international law and general principles of law); Petersen, *supra* note 125, at 277 (noting general principles of law do not require proof of state practice).

136. See BROWNIE, *supra* note 128, at 7–8; CHENG, *supra* note 20, at 24; see also Bassiouni, *supra* note 21, at 768. Cherif Bassiouni states:

The writings of scholars and opinions of international and national tribunals have invariably confirmed that ‘General Principles’ are, first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law enumerated in the statutes of the PCIJ and ICJ; namely, conventions, customs, writings of scholars, and decisions of the PCIJ and ICJ.

Bassiouni, *supra* note 21, at 768; Ellis, *supra* note 21, at 954. Jaye Ellis similarly notes:

The methodology indicated in doctrinal writings is generally described as involving two steps: first, the identification of a principle that is common to municipal legal orders belonging to the main legal systems of the world; secondly, the distillation of the essence of the principle. To these is often added a third, namely modifying the principle to suit the particularities of international law.

Ellis, *supra* note 21, at 954 (footnote omitted).

137. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1918 (2011); William Thomas

critical to the current analysis, since reliance on different bodies of law can yield very different results about the content of general principles of procedural law.¹³⁸

Part II of this Article used a forward-looking methodological analysis to demonstrate the practical and theoretical reasons why materials involving international arbitration can, and should, be taken into account when identifying general principles of procedural law.¹³⁹ However, it is also possible to test the propriety of that approach from a backward-looking, content-based perspective that seeks to determine whether, and to what extent, general principles of procedural law can be derived without recourse to arbitral materials.¹⁴⁰ In so doing, this step provides a substantive double-check of the methodology used in Part II.

As it turns out, insights about general principles of procedural law can be gleaned from a number of different areas of law.¹⁴¹ For example, a number of commentators, including Kotuby and Sobota, have considered procedural elements involving the rule of law.¹⁴² Although A.V. Dicey's classical definition of the rule of law enunciated a somewhat limited concept that emphasized "[f]irst, the supremacy of law over arbitrary power (the rule of law, not men, is the slogan generally associated with this influential concept); second, equality before the law of all, including government officials; and, third, constitutional law as fundamental law,"¹⁴³ subsequent analysis by legal philosophers ranging from Lon Fuller and Joseph Raz to John Rawls and Ronald Dworkin suggests that the rule of law cannot be characterized solely as a structural norm but must also include certain fundamental values.¹⁴⁴

Worster, *The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*, 31 B.U. INT'L. L.J. 1, 72 (2013).

138. See Gluck, *supra* note 137, at 1918; Worster, *supra* note 137, at 72.

139. See *supra* Part II.

140. See *infra* notes 141–232.

141. See CHENG, *supra* note 20, at 10–23; JAKSIC, *supra* note 54, at 218; KOTUBY & SOBOTA, *supra* note 23, at 71–73.

142. See JAKSIC, *supra* note 54, at 218; KOTUBY & SOBOTA, *supra* note 23, at 71–73; Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7–9 (2008) (discussing procedural aspects of the rule of law).

143. Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1465–66 (2010) (citing A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183–205 (10th ed. 1959)).

144. See *id.* at 1469–71; see also Desierto, *supra* note 31, at 948. The rule of law is intimately connected with some conception of justice, which can reflect “corrective, substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative, and transitional” values, depending on the circumstances. Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 28 (2008); see also *id.* at 28–32 (linking different commentators to different conceptions of justice).

Jeremy Waldron has used this jurisprudential foundation to develop “[a] procedural understanding of the Rule of Law” that does not simply demand “that officials apply the rules as they are set out; it [also] requires application of the rules with all the care and attention to fairness that is signaled by ideals such as ‘natural justice’ and ‘procedural due process.’”¹⁴⁵ Perhaps the most useful application of this concept is found in the work of Gunnar Bergholtz, who used a comparative international methodology to identify a “procedural trinity” that is necessary to establish the rule of law.¹⁴⁶ According to Bergholtz, the rule of law requires courts to recognize and protect

1. the audiatur principle (audiatur et altera pars), which in England and America forms part of natural justice and due process of law;
2. explicit reasons and fact finding; [and]
3. the right to appeal.¹⁴⁷

While useful, this standard is clearly incomplete, since it fails to include certain principles (such as notice of a determination of the parties’ legal rights) that are universally considered necessary as a matter of procedural justice.¹⁴⁸ Furthermore, two of the three elements included in Bergholtz’s trinity (i.e., the right to appeal and the right to explicit reasons and fact-finding) are waivable by parties in arbitration and perhaps in litigation,¹⁴⁹ even though many countries consider an appeal on the merits to be a fundamental or constitutional right.¹⁵⁰ These

145. Waldron, *supra* note 142, at 7–8; *see also* Rodriguez et al., *supra* note 143, at 1470–71.

146. *See* Gunnar Bergholtz, *Ratio Et Auctoritas: A Comparative Study of the Significance of Reasoned Decisions with Special Reference to Civil Cases*, 33 SCANDINAVIAN STUD. L. 11, 44 (1989).

147. *Id.*

148. *See* AM. LAW INST. & INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE 22–23 (2006) [hereinafter ALI & UNIDROIT PRINCIPLES] (requiring “notice . . . by means that are reasonably likely to be effective”); CHENG, *supra* note 20, at 291; KOTUBY & SOBOTA, *supra* note 23, at 158–64; Solum, *supra* note 8, at 192. *But see* Solum, *supra* note 8, at 183 (“Even the United States Supreme Court seems to have suggested that the most basic procedural rights, notice and an opportunity to be heard, may be denied if the balance of interests does not favor them.”). While some fundamental procedural protections (such as notice) may be waivable in certain circumstances, states will scrutinize those choices in some detail. *See* *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); *Nat’l Equip. Rental v. Szukhent*, 375 U.S. 311, 315–16 (1964); Noyes, *supra* note 82, at 596–97; Thornburg, *supra* note 82, at 209–10 (discussing criteria that might govern procedural autonomy).

149. *See* Strong, *supra* note 81, at 19.

150. *See* Bergholtz, *supra* note 146, at 44. Although a number of jurisdictions, particularly those from the common law tradition, have suggested that the right to an appeal in civil matters is neither constitutional nor fundamental in nature, that view is by no means universal. *See* CONSTITUTION OF NIGERIA (1999), § 241 (providing a constitutional right to appeal); CONSTITUTION OF PERU (2009), art. 139(6) (protecting “[t]he plurality of the jurisdictional level,” meaning appeal); CONSTITUTION OF SERBIA

problems suggest that general principles of procedural law cannot be derived solely from the literature on the procedural aspects of the rule of law.¹⁵¹

Another field of interest involves international human rights.¹⁵² Reliance on human rights norms might be particularly attractive not only because of the multiple references to procedural law in different international instruments but also because of the degree of deference shown to some of those provisions.¹⁵³ The most notable example of the latter involves Article 6(1) of the European Convention, which is respected by both national and international courts as a fundamental norm of procedural law.¹⁵⁴ Although Article 6(1) is relatively general, as is typical of procedural standards in international human rights instruments, and only applies on a regional basis, it has been judicially construed on numerous occasions and thus provides somewhat detailed insights into basic procedural norms.¹⁵⁵ Article 6(1) is also useful

(2006), art. 36 (“Everyone shall have the right to an appeal or other legal remedy against any decision on his rights, obligations or lawful interests.”); *Nat’l Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43 (1954) (noting in the context of U.S. constitutional law that “[w]hile a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process”); *Tolstoy Miloslavsky v. United Kingdom*, No. 18139/91, 20 Eur. H.R. Rep. 442, 460–62 (1995) (stating the English Court of Appeal could require security for costs without violating Article 6.1 of the European Convention); Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. HUM. RTS. L. REV. 457, 468 (2000); Vincenzo Varano, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England*, 28 CIV. JUST. Q. 152, 154–55 (2009) (reviewing NEIL ANDREWS, *THE MODERN CIVIL PROCESS: JUDICIAL AND ALTERNATIVE FORMS OF DISPUTE RESOLUTION IN ENGLAND* (2008)) (noting that appeals under English law “have been made subject to permission either by the court of first instance or by the appellate court” and noting that “[t]his is something which civil lawyers should give some thought, since first instance judgments continue to be normally subject to appeal as of right” because “[a]ppeal is so deeply rooted in the civil law tradition as to be considered a part of the fundamental guarantee of a fair procedure”). Only a handful of countries allow appeals of arbitral awards on the merits. *See* Arbitration Act 1996, c. 23, § 69 (Eng.); 3 BORN, *supra* note 3, at 3181, 3341.

151. Difficulties also arise to the extent that there are no treaties focusing on the rule of law per se, and the most popular methodological approaches to general principles of law require analysis of international instruments. *See* CHENG, *supra* note 20, at 1, 23, 26; KOTUBY & SOBOTA, *supra* note 23, at 61. Similar problems arise with respect to the shortage of municipal case law on the rule of law as a standalone concept. *See* Bassiouni, *supra* note 21, at 768; Ellis, *supra* note 21, at 954–55.

152. *See supra* notes 64–74 and accompanying text.

153. *See supra* notes 64–74 and accompanying text.

154. *See* European Convention on Human Rights Act 2003 § 4 (Ire.) (requiring Irish courts to take the European Convention and the jurisprudence of the European Court into account when construing certain issues); Human Rights Act 1998, c. 42, § 2 (Eng.) (same); European Convention, *supra* note 65, at art. 6, para 1; *see also supra* note 72 and accompanying text (regarding jurisprudence of the European Court involving Article 6(1)).

155. *See Case Law Database, supra* note 72; EUROPEAN COURT, CIVIL LIMB, *supra* note 72. According to the European Court, the Court’s judgments on Article 6.1

because its procedural provisions are in many ways similar to procedural standards found in more generally applicable human rights documents, which opens the door to analyses based on analogy.¹⁵⁶

The civil aspects of Article 6(1) state that

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.¹⁵⁷

As useful as this standard may initially seem, a number of problems arise upon closer examination. For example, Article 6(1) fails to mention the right to an appeal, which is not only part of Bergholtz's "procedural

serve not only to decide those cases brought before [the Court] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25. . .).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012).

EUROPEAN COURT, CIVIL LIMB, *supra* note 72, at 5.

156. See European Convention, *supra* note 65, at art. 6, para. 1.

157. *Id.* Criminal proceedings are subject to additional protections under the European Convention. For example, Article 6 goes on to state:

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Id. at art. 6, paras. 2-3.

trinity” but which is also explicitly mentioned by Cheng as a fundamental element of international due process.¹⁵⁸ Article 6(1) also incorporates certain elements not found in various commentary, including the requirement that parties are ordinarily entitled to a public hearing.¹⁵⁹

While the concept of a public hearing is central to contemporary notions about the administration of justice,¹⁶⁰ some types of non-public procedures (most notably interstate arbitration) have long been considered legitimate.¹⁶¹ Furthermore, it is unclear whether, and to what extent, certain long-cherished views about the nature of civil justice remain valid in an era where non-judicial forms of dispute resolution, including negotiated and mediated settlements, predominate, both domestically and internationally.¹⁶² While this observation should not be taken to suggest that the requirement of a public hearing is not important and should not be retained, it does indicate a need to consider such issues in light of contemporary law, practice, and theory.¹⁶³

As this example shows, human rights law cannot provide all the answers to questions about the content of international due process. However, this is not to say that human rights law is irrelevant to the current analysis; indeed, a variety of commentators, most notably Petra Butler, have argued that international arbitration is not only consistent with various human rights norms but is built on core principles reflected in the International Bill of Rights (i.e., the Universal Declaration, the ICCPR, and the International Covenant on Economic, Social and

158. See CHENG, *supra* note 20, at 372; Bergholtz, *supra* note 146, at 44.

159. See European Convention, *supra* note 65, at art. 6, para. 1.

160. Article 6.1's reference to a public procedure has occasionally been used to challenge the legitimacy of arbitration, although most authorities have held that aspect to be inapplicable if the right to a public hearing has been properly waived by the parties to arbitration. See *id.* at art. 6, para. 1; *Tabbane v. Switzerland*, App. No. 41069/12 (Mar. 24, 2016), <http://hudoc.echr.coe.int/eng?i=001-161870> (available only in French); *Stretford v. Football Assoc. Ltd.* [2007] EWCA (Civ) 238, [45] (Eng.); JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 90–93, paras. 5-57 to -67 (2003).

161. See 1 BORN, *supra* note 3, at 8–19.

162. See *id.* at 96 (noting, in the international realm, “[t]he number of disputes that are settled by negotiation dwarfs those that are litigated or arbitrated”); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459–60 (2004); S.I. Strong, *Defining the Litigation Default* (forthcoming 2018) [hereinafter Strong, *Litigation Default*] (discussing “the Benthamite notion that civil justice is an intrinsically public endeavour”); S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1973, 1983–85 (2016) (discussing increasing interest in international commercial mediation).

163. See Strong, *Litigation Default*, *supra* note 162.

Cultural Rights).¹⁶⁴ Instead, the argument here is that human rights instruments, by themselves, cannot provide a comprehensive understanding of the requisite procedural norms. As a result, it is necessary to consult other areas of law.

The next discipline that might be considered involves transnational litigation. This field was deemed somewhat problematic in the forward-looking methodological analysis conducted in Part II due to the scarcity of binding international instruments, and similar difficulties would arise under a content-based assessment, since the absence of any broadly applicable treaties suggests the lack of widespread international consensus on the relevant principles.¹⁶⁵ However, some useful insights might be gleaned from soft law documents like the Principles of Transnational Civil Procedure (ALI/UNIDROIT Principles), which were promulgated by the American Law Institute (ALI) and UNIDROIT as part of an effort to harmonize civil procedural norms applicable to cross-border commercial cases.¹⁶⁶ In fact, Kotuby and Sobota specifically mention this project as a possible source of inspiration, since the ALI/UNIDROIT Principles reflect international consensus on a number of important issues and were developed through cross-border comparative analysis, which is critical to the process of determining the content of general principles of law.¹⁶⁷

Although the ALI/UNIDROIT Principles offer some interesting insights, they are not a panacea.¹⁶⁸ For example, the ALI/UNIDROIT Principles share some common ground with commentary generated through rule of law analyses, in that both paradigms require respect for the *audiatur* principle, reasoned judgments, and the right to appeal.¹⁶⁹ However, the ALI/UNIDROIT Principles suggest that a number of additional procedures, including but not limited to jurisdiction and notice, must also exist if a particular process is to be considered

164. See ICCPR, *supra* note 65; International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 3; Universal Declaration, *supra* note 65; Butler, *supra* note 66, at 332; see also Susan L. Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 LEWIS & CLARK L. REV. 423, 432 (2013).

165. See *supra* notes 58–61 and accompanying text (discussing COCA).

166. See ALI & UNIDROIT PRINCIPLES, *supra* note 148; see also Geoffrey C. Hazard, Jr., et al., *Reporters' Preface to id.* at xxvii, xxvii (noting the initiative was meant “to overcome fundamental differences between common-law and civil-law systems and, among common-law systems, to cope with the peculiarities of the U.S. system”).

167. See ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 20–24; KOTUBY & SOBOTA, *supra* note 23, at 69; Schwarzenberger, *supra* note 37, at xii.

168. See Bergholtz, *supra* note 146, at 44.

169. See ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 20–23, 41–42, 47; Bergholtz, *supra* note 146, at 44.

legitimate.¹⁷⁰ While the lack of consistency between the ALI/UNIDROIT Principles and rule of law requirements is not fatal—indeed, it was expected that different disciplines would yield different results—divergence requires additional analysis to determine which approach is preferable.

Another issue involves the level of detail used to define the relevant concepts. For example, Bergholtz describes *audiatur et altera pars* in very general terms, likening it to natural justice in England and due process in the United States.¹⁷¹ In contrast, the ALI/UNIDROIT Principles provide much more specificity, noting that the *audiatur* principle includes “the right to submit relevant contentions of fact and law and to offer supporting evidence;” the ability to “have a fair opportunity and reasonably adequate time to respond to contentions of fact and law and to evidence presented by another party, and to orders and suggestions made by the court;” and the requirement of “equal treatment and reasonable opportunity for litigants to assert or defend their rights” and “avoidance of any kind of illegitimate discrimination, particularly on the basis of nationality or residence.”¹⁷² Additional insights into the scope and nature of *audiatur et altera pars* can be found in the ALI/UNIDROIT Rules of Transnational Civil Procedure, which were meant to “provid[e] greater detail and illustrat[e] concrete fulfillment of the Principles.”¹⁷³

While the level of detail provided by the ALI and UNIDROIT is very useful and is, in fact, similar to the type of extensive analysis conducted by Cheng, Kotuby, and Sobota in their texts,¹⁷⁴ the ALI and UNIDROIT were seeking to establish a new code of civil procedure and, therefore, include a number of issues, such as those involving the nature of judicial pleadings and case management techniques, that cannot be characterized as general principles of procedural law.¹⁷⁵ Instead, those provisions are better described as rules or principles of judicial administration.¹⁷⁶ While those elements could theoretically be set aside, scholars have found it difficult to distinguish between procedures that are

170. See ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 18–20, 22–24.

171. See Bergholtz, *supra* note 146, at 44.

172. ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 20–23, 41–42.

173. *Id.* at 99; RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 68–69 (2012).

174. See CHENG, *supra* note 20, at 290–98 (discussing the *audiatur* principle); KOTUBY & SOBOTA, *supra* note 23, at 176–83 (discussing procedural equality and the right to be heard).

175. See ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 111–13, 117–20, 144–46; Strong, *supra* note 32, at 1114–15.

176. See ALI & UNIDROIT PRINCIPLES, *supra* note 148, at 111–13, 117–20, 144–46; Strong, *supra* note 32, at 1115.

purely adjudicative and procedures that are merely administrative, which suggests that reliance on the ALI/UNIDROIT Principles would lead to extensive debate about which elements were procedural and which elements were administrative.¹⁷⁷ As a result, this instrument is not as helpful as it initially appears.

Reliance on the ALI/UNIDROIT Principles is also problematic because of the limited practical success of the initiative.¹⁷⁸ Ten years after their adoption, the ALI/UNIDROIT Principles do not appear to have been formally adopted by any jurisdiction.¹⁷⁹ This is not to say that the initiative was a complete failure, because the European Law Institute is relying heavily on the ALI/UNIDROIT Principles in a project seeking to establish what will be known as the European Rules of Civil Procedure, but the lack of widespread state support for the document suggests the ALI/UNIDROIT Principles cannot be read as reflecting general principles of procedural law under the Brownlie-Cheng test.¹⁸⁰ Indeed, these and other difficulties ultimately led Kotuby and Sobota to

177. See generally ALI & UNIDROIT PRINCIPLES, *supra* note 148; see also Dodge, *supra* note 82, at 766 (distinguishing procedures relating to court administration from procedures involving party conduct); Strong, *supra* note 32, at 1115.

178. See ALI & UNIDROIT PRINCIPLES, *supra* note 148.

179. See *id.* at xxix, xxxviii–xxxix (noting effect of the ALI/UNIDROIT Principles in Mexico); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1, 23 (2011).

180. See Study LXXVIA—*Transnational Civil Procedure—Formulation of Regional Rules*, INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW, <http://www.unidroit.org/work-in-progress/transnational-civil-procedure> (last updated Sept. 21, 2017); see also ALI & UNIDROIT PRINCIPLES, *supra* note 148; BROWNLIE, *supra* note 128, at 7–8; CHENG, *supra* note 20, at 24. Interestingly, a number of European countries are planning to develop new English-language courts to handle cross-border commercial matters in response to the United Kingdom’s expected withdrawal from the European Union. See *Creation of an English-speaking International Commercial Court in Brussels*, LEXGO (Oct. 30, 2017) (discussing the Brussels International Business Court (BIBC)), <https://www.lexgo.be/en/papers/judicial-law/international-private-law/creation-of-an-english-speaking-international-commercial-court-in-brussels,114947.html>; Karin Matussek & Gaspard Sebag, *Paris, Frankfurt Try to Grab Lucrative Legal Action From London*, BLOOMBERG BUSINESSWEEK (Nov. 7, 2017, 11:01 PM), <https://www.bloomberg.com/news/articles/2017-11-07/paris-frankfurt-try-to-grab-lucrative-legal-action-from-london>; Mattias Weller, *The Justice Initiative Frankfurt am Main 2017*, CONFLICTOFLAWS.NET (Mar. 31, 2017), <http://conflictoflaws.net/2017/the-justice-initiative-frankfurt-am-main-2017-law-made-in-frankfurt/>. Perhaps the most intriguing of these English-language commercial courts will be seated in Paris and will adopt common law procedures where appropriate. See Leigh Thomas & Michel Rose, *Brexit: France Promises New Court to Handle English Law Cases in Bid to Lure UK-based Firms*, INDEPENDENT (June 30, 2017, 15:41 BST), <http://www.independent.co.uk/news/business/news/brexit-france-promises-new-court-to-handle-english-law-cases-in-bid-to-lure-uk-based-firms-a7817281.html>. As part of their analysis, the French courts may have to determine what procedural mechanisms are required as a part of procedural fairness in civil actions.

decide not to give much weight to the ALI/UNIDROIT Principles in their analysis.¹⁸¹

The shortcomings associated with the jurisprudence concerning the rule of law, international human rights, and transnational litigation led Cheng, Kotuby, and Sobota to look elsewhere for guidance about the nature and scope of general principles of procedural law.¹⁸² As it turned out, international arbitration provided significant insights not found in other fields of study.¹⁸³

The analysis begins with Article V of the New York Convention, which states in part:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

....
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

....
(d) The . . . arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place . . .

....

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

....
(b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹⁸⁴

181. See ALI & UNIDROIT PRINCIPLES, *supra* note 148; KOTUBY & SOBOTA, *supra* note 23, at 69, 157–202.

182. See CHENG, *supra* note 20, at 257–58; KOTUBY & SOBOTA, *supra* note 23, at 2–3.

183. See CHENG, *supra* note 20, at 257–58; KOTUBY & SOBOTA, *supra* note 23, at 2–3.

184. New York Convention, *supra* note 34, at art. V; see also 1 BORN, *supra* note 3, at 117–26 (discussing other international conventions on arbitration). Article V also addresses the invalidity of the arbitration agreement or the incapacity of the parties, see New York Convention, *supra* note 34, at art. V, para. 1(a), matters not falling within the scope of the arbitration agreement, see *id.* at art. V, para. 1(c), appointment of the arbitral tribunal, see *id.* at art. V, para. 1(d), awards that have not yet become binding or that have been set aside, see *id.* at art. V, para. 1(e), and the non-arbitrability of the subject matter of the dispute, see *id.* at art. V, para. 2(a). However, these matters are not procedural in

Commentators have noted that the concepts reflected in Article V(1) “safeguard the parties against private injustice,” while those found in Article V(2) “serve[] as an explicit catchall for the enforcement of a country’s own vital interests.”¹⁸⁵ Although questions relating to procedural fairness are usually considered under Article V(1), courts or parties occasionally elevate such matters to Article V(2)(b), which allows application of the public policy of the forum state, albeit through an international lens.¹⁸⁶

Article 52 of the ICSID Convention is somewhat similar to the New York Convention in both language and purpose, stating:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.¹⁸⁷

Although Article V of the New York Convention and Article 52 of the ICSID Convention are critical to the identification and protection of general principles of procedural law, these instruments do not operate in isolation.¹⁸⁸ Instead, both treaties work in tandem with national arbitration laws,¹⁸⁹ institutional rules,¹⁹⁰ soft law,¹⁹¹ and persuasive

the same way that the issues described in Articles V(1)(b), V(1)(d), and V(2)(b) are. See *id.* at art. V, paras 1(b), 1(d), 2(b).

185. William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 259 (2006).

186. See New York Convention, *supra* note 34, at art. V; S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 59–60 (2008).

187. ICSID Convention, *supra* note 35, at art. 52; see also New York Convention, *supra* note 34, at art. V.

188. See ICSID Convention, *supra* note 35, at art. 52; New York Convention, *supra* note 34, at art. V; 2 BORN, *supra* note 3, at 2154; STRONG, *supra* note 102, at 12 (discussing how different aspects of arbitral law work together).

189. Arbitration laws are not the same as rules of civil procedure. See STRONG, *supra* note 102, at 14. National rules of civil procedure do not apply in arbitration, unless the parties have an explicit agreement to that effect. See *Matter of the Arbitration Between InterCarbon Berm., Ltd. and Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993).

190. See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) (2006), <http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf.htm> (providing rules for ICSID arbitrations);

authority, including publicly available arbitral awards, to create a just and predictable dispute resolution regime.¹⁹² Each type of authority (i.e., treaties, national laws, arbitral rules, etc.) addresses a different part of the arbitral process and functions in a slightly different manner, which means that some core procedural principles are not reflected in the New York Convention or the ICSID Convention.¹⁹³ However, that phenomenon does not mean that those norms are unprotected; instead, those particular values are simply addressed elsewhere.¹⁹⁴

For example, those who are unfamiliar with the intricacies of international arbitration law might believe that arbitral tribunals do not need to be impartial, independent, and neutral because those principles are not specifically mentioned in the New York Convention.¹⁹⁵ In fact, the international arbitral regime places an extremely high value on arbitrator impartiality, independence, and neutrality, and protects those concepts in several interlocking ways.¹⁹⁶

Perhaps the most common means of ensuring arbitral impartiality, independence, and neutrality is through provisions found in arbitral rules that are voluntarily chosen by the parties to govern the proceedings.¹⁹⁷

STRONG, *supra* note 102, at 7–9 (discussing arbitral rules of procedure for international commercial proceedings).

191. Various forms of soft law exist in this area of law. *See, e.g.*, U.N. Comm'n on Int'l Trade Law, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17, at 62 (July 7, 2006) (suggesting how national courts should interpret certain aspects of the New York Convention).

192. *See* STRONG, *supra* note 102, at 12. Arbitral awards are published far more frequently than most people realize and are an excellent source of information about the procedures used in arbitration. *See id.* at 21–23. Scholarly commentary holds a particular place of prestige in international commercial arbitration due to civil law influences and the private nature of the arbitral procedure. *See id.* at 23–24.

193. *See* STRONG, *supra* note 102, at 12–24. *See generally* ICSID Convention, *supra* note 35; New York Convention, *supra* note 34.

194. *See* 1 BORN, *supra* note 3, at 67–68.

195. *See* New York Convention, *supra* note 34, at art. V; 1 BORN, *supra* note 3, at 67–68. Those qualities are mentioned in the ICSID Convention. *See* ICSID Convention, *supra* note 35, at art. 14(1); *see also id.* at arts. 31(2), 40(2).

196. *See* 2 BORN, *supra* note 3, at 1529–33, 1988–92.

197. *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) r. 6 (2003), https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf [hereinafter ICSID 2003 ARBITRATION RULES]; INT'L CHAMBER OF COMMERCE, ARBITRATION RULES art. 11 (2017), <https://iccwbo.org/publication/arbitration-rules-and-mediation-rules/> [hereinafter ICC ARBITRATION RULES]; LONDON COURT OF INT'L ARBITRATION, ARBITRATION RULES 2014 art. 5 (2014), http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx [hereinafter LCIA ARBITRATION RULES]; U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES arts. 11–12 (as revised in 2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter UNCITRAL ARBITRATION RULES]; *see also* 2 BORN, *supra* note 3, at 1988–92, 2137.

Although it is impossible to know precisely how many of the 3,000 to 5,000 international commercial and investment arbitrations that are filed each year are governed by formal arbitral rules, experts agree that a “very substantial proportion of international arbitrations are conducted pursuant to institutional arbitration rules of some sort.”¹⁹⁸ Whenever parties adopt any type of arbitral rules to govern an arbitral proceeding, those norms are then given explicit effect in international enforcement proceedings pursuant to Article V(1)(d) of the New York Convention, which allows national courts to deny recognition and enforcement of an arbitral award if “the arbitral procedure was not in accordance with the agreement of the parties.”¹⁹⁹ Furthermore, even if the parties do not choose to have their arbitration governed by a particular rule set, the principle of impartiality, independence, and neutrality may still be protected under Article V(1)(d) if the parties have incorporated specific language on that issue in their arbitration agreement or if national law can be used to fill a contractual gap.²⁰⁰

Article V of the New York Convention applies to actions to recognize and enforce arbitral awards and is therefore primarily applicable to matters brought in countries other than the place where the arbitration was held.²⁰¹ However, parties can also seek to have an arbitral award recognized and enforced at the arbitral seat, and those proceedings are typically governed by domestic law.²⁰² Most national arbitration laws, including those based on the Model Arbitration Law, indicate that courts should not recognize or enforce an arbitral award that is contrary to the procedural agreement of the parties (which would include explicit agreements regarding the impartiality, independence, and neutrality of the arbitrators as well as implicit agreements on those matters, as reflected in any arbitral rules adopted by the parties) or that violates the

198. 2 BORN, *supra* note 3, at 2138; *see also id.* at 94–96. Arbitrations that are administered by arbitral institutions are referred to as institutional arbitrations, whereas arbitrations that are not administered by an institution are referred to as ad hoc arbitrations. *See* STRONG, *supra* note 102, at 7–9. Formal rule sets exist for both types of procedures. *See id.* *See generally* ICSID 2003 ARBITRATION RULES, *supra* note 197; ICC ARBITRATION RULES, *supra* note 197; LCIA ARBITRATION RULES, *supra* note 197; UNCITRAL ARBITRATION RULES, *supra* note 197 (for use in ad hoc proceedings).

199. *See* New York Convention, *supra* note 34, at art. V, para. 1(d).

200. *See id.* (allowing non-recognition and non-enforcement of an arbitral award in cases where the parties did not have an explicit agreement regarding procedural issues but where the procedure that was actually used “was not in accordance with the law of the country where the arbitration took place”).

201. *See id.* at art. I, para. 1; STRONG, *supra* note 102, at 12–14 (noting the role of the New York Convention in international arbitration, including its application in the United States to awards characterized as “non-domestic”).

202. *See* STRONG, *supra* note 102, at 14–16 (noting the role of national law in international arbitration).

principle of arbitral impartiality, independence, or neutrality.²⁰³ Furthermore, parties typically do not have to wait until the arbitration has concluded to raise issues regarding impartiality, independence, or neutrality, but can instead challenge an arbitrator at the time of appointment or at the time evidence of impartiality or lack of independence or neutrality comes to light.²⁰⁴

Not only does international arbitration provide a wide range of procedures to enforce the principles of arbitral impartiality, independence, and neutrality, it also has made significant strides in defining what precisely is meant by those particular terms. Initially, arbitral impartiality, independence, and neutrality were defined by the same type of general codes and canons that apply to judges.²⁰⁵ However, in 2004, the International Bar Association (IBA) published the IBA Guidelines on Conflicts of Interest in International Arbitration (revised in 2014), which revolutionized the field of international ethics by providing parties, arbitrators, and courts with a much more detailed understanding of how and when certain ethical norms should be applied in a world of multinational law firms and corporate entities.²⁰⁶

Although it is impossible to provide an in-depth analysis of each element of international due process within the scope of the current

203. See 9 U.S.C. §§ 10(a)(2), 201, 208, 301, 307 (2012); Arbitration Act 1996, c. 23, § 24 (Eng.); Model Arbitration Law, *supra* note 95, at arts. 11–12.

204. See 2 BORN, *supra* note 3, at 2015–16, 1913–38. While the Federal Arbitration Act does not include a provision allowing U.S. courts to hear interim challenges to the arbitrators, U.S. courts will require the parties to comply with any interim challenge procedures to which the parties have agreed, including those that are described in any applicable arbitral rules. See *id.* at 1913–38; STRONG, *supra* note 102, at 60–61. Many rule sets identify a precise procedure by which challenges to arbitrators should be made, therefore eliminating much of the uncertainty associated with the process. See 2 BORN, *supra* note 3, at 1913–38.

205. Compare AM. ARBITRATION ASS'N, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 3–5 Canons 1–2 (2004), https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf, with ABA MODEL CODE OF JUDICIAL CONDUCT 14 Canon 2 (AM. BAR ASS'N 2007), https://www.americanbar.org/content/dam/aba/migrated/judiciaethics/ABA_MCJC_approved.authcheckdam.pdf; STUDY GRP. OF THE INT'L LAW ASS'N ON THE PRACTICE & PROCEDURE OF INT'L COURTS & TRIBUNALS & PROJECT ON INT'L COURTS AND TRIBUNALS, THE BURGH HOUSE PRINCIPLES ON THE INDEPENDENCE OF THE INTERNATIONAL JUDICIARY (2004), http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf [hereinafter THE BURGH HOUSE PRINCIPLES] (providing principles applicable to full-time international judges but suggesting their possible use for other types of judges and international arbitrators); see also CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014).

206. See INT'L BAR ASS'N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION Gen. Princs. 1–2 (2014), http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

Article,²⁰⁷ the discussion does not need to be very detailed to demonstrate how useful arbitral authorities are to the determination of general principles of procedural law under the Brownlie-Cheng test.²⁰⁸ Not only do arbitral materials provide a comprehensive understanding of the content of international due process, they also illustrate the binding nature of those norms.²⁰⁹ For example, it is widely accepted that the concept of international due process in international arbitration “refers to a number of notions with varying names under different national laws, including natural justice, procedural fairness, the right or opportunity to be heard, the so-called principle de la contradiction and equal treatment.”²¹⁰ Furthermore, international due process is universally characterized “as a ‘hard’ rule of law, a kind of a core or foundation of all other procedural rules, the violation or disregard of which will lead to unenforceability of the award or decision given.”²¹¹ “In many national laws this core is described as *ordre public* or public policy.”²¹²

The fundamental nature of these rights indicates that

[t]he parties cannot . . . waive the irreducible core of procedural guarantees, such as the right to an independent and impartial court, the right to a fair trial and the due process of law which are sine qua non for liberty, dignity, justice and primarily for the maintenance of the precedence of the rule of law principle.²¹³

Furthermore, the inability to waive these protections strongly suggests that these standards reflect general principles of procedural law that are as applicable in litigation as they are in arbitration.²¹⁴

207. See STRONG, *supra* note 89, at 71–137 (discussing arbitral authority and providing an extensive bibliography of works). Entire books have been devoted to the subject of international due process in arbitration. See generally KURKELA & SNELLMAN, *supra* note 5; KURKELA & TURUNEN, *supra* note 5; GEORGIOS PETROCHILOS, *PROCEDURAL LAW IN INTERNATIONAL ARBITRATION* (2004).

208. See BROWNLIE, *supra* note 128, at 7–8; CHENG, *supra* note 20, at 24.

209. See KURKELA & SNELLMAN, *supra* note 5, at 1, 4; Kaufmann-Kohler, *supra* note 5, at 1321–22.

210. Kaufmann-Kohler, *supra* note 5, at 1321–22.

211. KURKELA & SNELLMAN, *supra* note 5, at 1.

212. *Id.* at 4. “Public policy” and “*ordre public*” are not entirely synonymous. For example,

In the Anglo-Saxon legal tradition, the meaning of “public policy” is relatively narrow, referring to “matters of public morals, health, safety, welfare, and the like” and is distinguishable from matters related to due process. In the continental European tradition public policy, or *ordre public*, refers to a wider range of judicial concerns, a range that “encompasses breaches of procedural justice.”

Fernando Mantilla-Serrano, *Towards a Transnational Procedural Public Policy*, 20 *ARB. INT’L* 333, 334 (2004).

213. JAKSIC, *supra* note 54, at 218.

214. See ORAKHELASHVILI, *supra* note 17, at 59.

The notion that these values reflect general principles of procedural law is not contradicted by the fact that the arbitral regime tolerates a considerable amount of diversity in how these norms are implemented.²¹⁵ Variations arise as a result of the autonomy exercised by the parties in arbitration agreements and arbitral rules of procedure as well as through default provisions in national arbitration laws.²¹⁶ Arbitral tribunals also exercise a certain amount of discretion to ensure that the procedures are tailored to the dispute at hand.²¹⁷

The flexibility with which the various procedural norms are implemented suggests that these concepts can be considered principles rather than hard and fast rules.²¹⁸ This is a critical distinction because the process of determining general principles of procedural law “does not,” as Cheng noted, “consist . . . in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth itself, in short of Law.”²¹⁹

International arbitration—like international adjudication—clearly includes both rules and principles. Cheng described the difference between the two thusly:

A rule . . . is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.²²⁰

Under this definition, institutional rules of arbitral procedure, like judicial rules of court and rules of civil procedure, reflect the specific way that a legal system—be it national or international, arbitral or judicial—chooses to implement or protect various procedural principles.²²¹ Rules reflect but one way to implement a particular

215. See Schultz, *supra* note 78, at 9.

216. See LEW ET AL., *supra* note 160, at 522–26, paras. 21-5 to -18.

217. See *id.* at 523–24, paras. 21-12 to -13. Though potentially broad, arbitral discretion is largely circumscribed in practice by party agreement as well as by the norms and principles described in various treatises, rules, and arbitral awards, and therefore is not completely unbounded. See STRONG, *supra* note 102, at 19.

218. The distinction between procedural rules and procedural norms has been important in other contexts. See Talmon, *supra* note 12, at 981 (discussing immunity issues).

219. CHENG, *supra* note 20, at 24.

220. *Id.*

221. See STRONG, *supra* note 102, at 18–20. See generally FED. R. CIV. P.; ICC ARBITRATION RULES, *supra* note 197; ICSID 2003 ARBITRATION RULES, *supra* note 197; LCIA ARBITRATION RULES, *supra* note 197; UNCITRAL ARBITRATION RULES, *supra* note 197.

principle, and the underlying concept may be given effect through a variety of different means. Although many of the difficulties in international procedural law have arisen because of a focus on rules rather than principles,²²² comparative analyses of different rules addressing the procedural concern can be used to identify both the existence and content of a particular principle.²²³ Indeed, that is precisely how the arbitral community developed its understanding of international due process.²²⁴

Interestingly, an analysis of arbitration's core procedural principles demonstrates a high degree of consistency with norms derived from other areas of law. For example, Matti Kurkela and Hannes Snellman have argued that non-derogable arbitral procedures constitute a "'hard' rule of law" that bears a striking resemblance to certain basic constitutional principles of procedural fairness.²²⁵ Peter Rutledge has also found evidence of an overlap between arbitration law and fundamental procedural norms, claiming that "due process norms have seeped into arbitration" through public policy provisions in various international treaties and national arbitration laws.²²⁶ Sarah Cole and Richard Reuben, writing in the domestic realm, have reached similar conclusions based on a theory of shared state action, whereby judges are considered to have a duty to apply constitutional standards of procedural fairness in arbitration because the courts are intimately involved in overseeing, facilitating, and enforcing arbitration agreements.²²⁷ Analogous arguments can be made in the international setting, given the role that national courts play in recognizing and enforcing arbitration agreements and awards.²²⁸

Judges have also recognized a connection between arbitral and non-arbitral norms. For example, Lord Neuberger, President of the Supreme Court of the United Kingdom, has noted in various extrajudicial statements that arbitrators have "a duty to act judicially" because they "are participating in the rule of law" when they are deciding disputes.²²⁹

222. See CHENG, *supra* note 20, at 24 (distinguishing between rules and principles); Talmon, *supra* note 12, at 981.

223. See Schwarzenberger, *supra* note 37, at xii; see also *supra* notes 130–33 and accompanying text.

224. See *supra* notes 205–06 and accompanying text.

225. KURKELA & SNELLMAN, *supra* note 5, at 1.

226. PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 145–59 (2013).

227. See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 3; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 956–58 (2000). Some controversy exists regarding the state action theory of arbitration, with courts often finding no state action in arbitral matters. See Cole, *supra*, at 3–5 (discussing authorities).

228. See STRONG, *supra* note 102, at 31–32.

229. Lord Neuberger, President, Supreme Court of the U.K., London Address to Property Arbitrators at the ARBRIX Annual Conference (Nov. 12, 2013),

Lord Neuberger has also suggested that the obligation to act in accordance with certain judicial standards is owed not only “to the parties to the arbitration, but . . . also . . . to the public.”²³⁰

Together, these statements support the notion that international arbitration provides important insights into general principles of procedural law. While an exclusive focus on international arbitration would be inappropriate (because there may be some procedures that are waivable in arbitration but not waivable in litigation),²³¹ arbitral authorities provide a unique perspective on global consensus on questions of procedure.

B. *Conclusions About the Content of General Principles of Procedural Law*

Having established why international arbitration can and should be considered an appropriate source from which to derive general principles of procedural law, it is time to discuss what those principles are. When Kotuby and Sobota conducted their analysis, they identified six general principles of procedural law. According to their research, any process seeking to provide a final and binding determination of a party’s legal rights must (1) provide notice to the parties and have jurisdiction over the parties and the dispute in question; (2) protect the impartiality and independence of the decision maker; (3) safeguard procedural equality and the right to be heard; (4) preclude the possibility of fraud and corruption; (5) allow the presentation of evidence and identify the necessary burdens of proof; and (6) respect the principle of *res judicata*.²³²

Kotuby and Sobota completed their work in 2017 and had the advantage of recent advancements in international arbitration.²³³ However, their list is very similar to that generated by Cheng in 1953, although Cheng described eight rather than six individual elements (jurisdiction; power to determine the extent of jurisdiction (*compétence de la compétence*); *nemo debet esse iudex in propria sua causa*; *audiatur*

<https://www.supremecourt.uk/docs/speech-131112.pdf>; see also Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 985 n.97 (2005) (claiming “the product of international arbitral decision-making is justice”).

230. Lord Neuberger, *supra* note 229.

231. See *infra* notes 276–80 and accompanying text (regarding waivers of class proceedings).

232. See KOTUBY & SOBOTA, *supra* note 23, at 157–202.

233. See *id.*; see also *supra* notes 34–35 and accompanying text.

et altera pars; jura novit curia; proof and burden of proof; the principle of *res judicata*; and extinctive prescription).²³⁴

The overlap between the two sets of conclusions supports the veracity of their content because general principles of law are not expected to change significantly over time.²³⁵ To the contrary, if a general principle of law “expresses a general truth, which guides our action, [and] serves as a theoretical basis for the various acts of our life,” then one would expect a relatively high degree of consistency, even over a period of many years.²³⁶ Indeed, the Brownlie-Cheng test for general principles of procedural law specifically stated that any norm that was to be categorized as a general principle must endure over a sufficiently long period of time.²³⁷

IV. GENERAL PRINCIPLES OF PROCEDURAL LAW AND *JUS COGENS*

A. *Definition of Jus Cogens and Its Relationship to Other Types of International Law*

As useful as Cheng, Kotuby, and Sobota’s conclusions are about the content of general principles of procedural law and the means by which those principles are derived, the analysis need not stop there.²³⁸ To the contrary, it may be possible to go even further and argue that some or all of the norms identified by Cheng, Kotuby, and Sobota as constituting international due process also reflect a type of procedural *jus cogens*.²³⁹

Although the concept of *jus cogens* has been recognized since at least the mid-20th century, international lawyers continue to debate whether and to what extent *jus cogens* actually exists in contemporary practice.²⁴⁰ Recent years have seen a resurgence of interest in the idea of peremptory norms, which suggests it may be useful to consider the

234. See CHENG, *supra* note 20, at 257–386; see also *id.* at 257–58 (summarizing the principles outlined in the Greco-Bulgarian Mixed Arbitral Tribunal in the *Arakas (The Georgios) Case* from 1927). While Kotuby and Sobota considered Cheng’s work when undertaking their analysis, they did so with a critical eye and did not simply seek to repeat Cheng’s conclusions. See KOTUBY & SOBOTA, *supra* note 23, at xiii–xiv.

235. See CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202.

236. CHENG, *supra* note 20, at 24.

237. See BROWNLIE, *supra* note 128, at 7–8; CHENG, *supra* note 20, at 24.

238. See CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202.

239. See JAKSIC, *supra* note 54, at 218.

240. See Kadelbach, *supra* note 17, at 28 (stating that “the criteria which help to identify *jus cogens* norms are not entirely clear” but noting that the concept of *jus cogens* existed prior to the Vienna Convention); see also Criddle & Fox-Decent, *supra* note 16, at 339 (suggesting that peremptory norms are rooted in customary international law).

nature and scope of what might be called procedural *jus cogens*.²⁴¹ Indeed, as Georges Abi-Saab once said, even if the concept of *jus cogens* were an “empty box, the category [is] still useful; for without the box, it cannot be filled.”²⁴²

Controversies about the practical application of *jus cogens* have not stopped scholars from reaching consensus about the definition of the term.²⁴³ At this point, the concept of *jus cogens* (sometimes referred to as *ius cogens* or peremptory norms) is universally understood to mean a tightly circumscribed set of non-derogable norms applicable to all states and “include[s], at a minimum, the prohibitions against genocide; slavery or slave trade; murder or disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and ‘the principles of the United Nations Charter prohibiting the use of force.’”²⁴⁴ These “norms are considered peremptory in the sense that they are mandatory, do not admit derogation, and can be modified only by general international norms of equivalent authority.”²⁴⁵ As a result, “[*jus cogens* norms are often thought to be equivalent to constitutional principles of international law, to an international bill of rights, or they are said to constitute the highest in a norms hierarchy.”²⁴⁶

This understanding is reflected in Article 53 of the Vienna Convention on Treaties, which refers to “peremptory norm[s] of general international law (*jus cogens*)” and explicitly states that

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and

241. See Hélène Ruiz Fabri, *Enhancing the Rhetoric of Jus Cogens*, 23 EUR. J. INT’L L. 1049, 1051–53 (2012); Thomas Kleinlein, *Jus Cogens Re-Examined: Value Formalism in International Law*, 28 EUR. J. INT’L L. 295, 296 (2017); Alexander Orakhelashvili, *Peremptory Norms of the International Community: A Reply to William E. Conklin*, 23 EUR. J. INT’L L. 863, 866–67 (2012); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 292 (2006).

242. Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491, 491 (2008) (quoting Georges Abi-Saab, *The Third World and the Future of the International Legal Order*, 29 REVUE EGYPTIENNE DE DROIT INT’L 27, 53 (1973)).

243. See Criddle & Fox-Decent, *supra* note 16, at 331–32; Shelton, *supra* note 241, at 292.

244. See Criddle & Fox-Decent, *supra* note 16, at 331–32.

245. *Id.* at 332.

246. MAY, *supra* note 51, at 121.

which can be modified only by a subsequent norm of general international law having the same character.²⁴⁷

Some questions may arise as to whether the concepts under discussion here are better analyzed as a matter of *jus cogens* or as obligations *erga omnes*, given the similarities between the two types of norms.²⁴⁸ Thomas Weatherall has explained the connection by noting that “[t]he legal effects of *jus cogens* are actualized through obligations arising from peremptory norms—obligations *erga omnes*—through which a civil society function is conceived in international law.”²⁴⁹ However, he recognizes that “[f]unctionally, the classification *erga omnes* denotes a general legal interest of all States as members of the international community in the performance of these obligations.”²⁵⁰ Thus, the two concepts—*jus cogens* and obligations *erga omnes*—are not necessarily identical.

Conceptual difficulties can arise because *jus cogens* has at times been defined as involving “rules whose effect [it] is to make conflicting treaties void,” which suggests that *jus cogens* operates primarily as a conflict of laws provision.²⁵¹ Additional problems arise to the extent that obligations *erga omnes* “have been considered . . . as a concept of State responsibility,” which can sound as if they can affect individual rights pursuant to contemporary notions about the duties owed by states to individuals as a matter of public international law.²⁵²

However, obligations *erga omnes* have also been described as “obligations towards the international community of States as a

247. Vienna Convention, *supra* note 16, at art. 53. Although the United States has signed the Vienna Convention, the instrument has not yet been ratified. Nevertheless, several members of the U.S. Supreme Court and numerous lower federal courts have relied on the Vienna Convention. *See, e.g.,* *Abbott v. Abbott*, 560 U.S. 1, 40 n.11 (2010) (Stevens, J., dissenting); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 191 (1993) (Blackmun, J., dissenting). The Second Circuit considers the Vienna Convention “‘an authoritative guide to the customary international law of treaties,’ insofar as it reflects actual state practices.” *Mora v. New York*, 524 F.3d 183, 196 n.19 (2d Cir. 2008). Furthermore, “[t]he Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice.” *Id.*

248. Kadelbach, *supra* note 17, at 26–27 (noting *jus cogens* and obligations *erga omnes* share a common core).

249. WEATHERALL, *supra* note 32, at 351.

250. *Id.* at 352.

251. Kadelbach, *supra* note 17, at 26.

252. *Id.*; *see also* Nissel, *supra* note 32, at 823; Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 98 AM. SOC’Y INT’L L. PROC. 219, 225 (2002) (“The traditional concept of public international law as a regulator of exclusively state-to-state relations has changed. Increasingly, public international law affects both the direct rights and direct responsibilities of private actors, vis-à-vis both states and each other.”).

whole.”²⁵³ While “the concept of *jus cogens* is [also] founded on community interests,” that principle is “characterized by the prohibition [of] disposing over certain rights, be it to one’s own disadvantage or to the detriment of others who are not in a position to provide effectively for this protection themselves, such as peoples, groups or individuals.”²⁵⁴ The language strongly suggests that *jus cogens* can be considered to protect certain individual rights, even though some *jus cogens* norms (such as self-determination) are not oriented toward individuals.²⁵⁵

Further support for this conclusion can be found in statements by Alexander Orakhelashvili, who believes that there is merit to the argument that all human rights, including rights concerning access to justice and the nature of the civil litigation process, are part of *jus cogens*.²⁵⁶ In his opinion,

[s]ubstantive criteria to identify peremptory human rights are the same as general criteria of identification of *jus cogens*: (1) whether a right protects the community interest transcending the individual State interests; [and] (2) whether the derogation from such right is prevented by its non-bilateralizable character.²⁵⁷

Although each right requires its own individualized analysis, it is clear that human rights can fall within the realm of *jus cogens*.²⁵⁸ While Orakhelashvili may go too far in suggesting that all human rights can be considered *jus cogens*, the fact that some human rights may rise to the level of peremptory norms demonstrates the validity of the current analysis.

Given these features, as well as the fact that obligations *erga omnes* have not been recognized as long as *jus cogens*, even at a theoretical level, this Article will focus on *jus cogens* rather than obligations *erga omnes*.²⁵⁹ Focusing on *jus cogens* also makes sense given the close

253. Kadelbach, *supra* note 17, at 35.

254. *Id.*

255. See ORAKHELASHVILI, *supra* note 17, at 53 (“Most of the cases of *jus cogens* are ‘cases where the position of the individual is involved.’”); WEATHERALL, *supra* note 32, at 444; Guan, *supra* note 17, at 496 (“[A] normative shift in *jus cogens* to conceiving of them as the rights of the individual might not so much require an overhaul of the international rights regime, as simply a reframing of the narrative.”); Reed, *supra* note 252, at 225.

256. See ORAKHELASHVILI, *supra* note 17, at 59–60; see also Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2035 (2013) (“Even if its precise contours are not entirely settled, the right to court access is increasingly recognized in both international and domestic law.”).

257. ORAKHELASHVILI, *supra* note 17, at 59.

258. *See id.*

259. See Kadelbach, *supra* note 17, at 27 (noting “[t]he *Barcelona Traction* case which expressly refers to *erga omnes* obligations is often also cited as a reference for *jus cogens*”); see also Niels Petersen, *Lawmaking by the International Court of Justice—*

connection between *jus cogens* and general principles of law.²⁶⁰ Indeed, one “popular theory of *jus cogens* asserts that peremptory norms enter international law as ‘general principles of law,’” thereby specifically raising the question at issue here, namely whether and to what extent certain general principles of procedural law can or should be recognized as a type of procedural *jus cogens*.²⁶¹

As logical as this question may be, finding the answer is somewhat challenging, given that *jus cogens* has traditionally been considered through the lens of substantive rather than procedural law.²⁶² This is not to say that the concept of a procedural element of *jus cogens* is entirely without support. To the contrary, a number of jurists have argued that procedural norms can and should be included within the concept of *jus cogens* to the extent those principles are necessary to give effect to different substantive laws.²⁶³ Thus, Larry May has claimed that habeas corpus rises to the level of procedural *jus cogens*,²⁶⁴ while other commentators have suggested that state immunity constitutes a type of procedural *jus cogens*.²⁶⁵

Procedural *jus cogens* can also be justified on other grounds.²⁶⁶ For example, Evan Criddle and Evan Fox-Decent have argued in favor of a procedural element of *jus cogens* deriving from its connection to the rule of law, suggesting that one of the “substantive criterion of *jus cogens* . . . is a procedural principle regarding the rule of law: a norm will count as *jus cogens* if respect for it is indispensable to the state’s ability to secure legality for the benefit of all.”²⁶⁷ Support for this type of procedural *jus cogens* could be found in discussions regarding the use of universal jurisdiction.²⁶⁸

Factors of Success, 12 GERMAN L.J. 1295, 1311 (2011) (noting the *Barcelona Traction* case, which arose in 1970, contains a procedural element).

260. See Criddle & Fox-Decent, *supra* note 16, at 341; Shelton, *supra* note 241, at 299 (discussing the seminal work of Alfred Verdross).

261. Criddle & Fox-Decent, *supra* note 16, at 341; see also WEATHERALL, *supra* note 32, at 129.

262. See BROWNLIE, *supra* note 128, at 510–12.

263. See MAY, *supra* note 51, at 120 (discussing habeas corpus); Knuchel, *supra* note 12, at 154–56.

264. See MAY, *supra* note 51, at 120 (discussing habeas corpus).

265. See ORAKHELASHVILI, *supra* note 17, at 340–59; Knuchel, *supra* note 12, at 154–56; Orakhelashvili, *supra* note 12, at 89–90; Talmon, *supra* note 12, at 984, 987–1001.

266. See Criddle & Fox-Decent, *supra* note 16, at 367.

267. *Id.* (discussing the work of Thomas Hobbes and Lon Fuller).

268. Although the concept of universal jurisdiction remains somewhat controversial and is primarily discussed in the context of international criminal law, there are those who have suggested the existence or development of a type of universal civil jurisdiction. See Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 142 (2006); Máximo Langer, *The Diplomacy*

Another way of considering the propriety of procedural *jus cogens* is through an analysis of the way that *jus cogens* develops. For example, Criddle and Fox-Decent have argued that *jus cogens* norms can “enter international law as ‘general principles of law recognized by civilized nations,’” which means that “[t]hese general principles may include procedural maxims such as *pacta sunt servanda* . . . as well as basic individual rights enshrined in municipal constitutions, statutes, and judicial decisions.”²⁶⁹ While Cheng, Kotuby, and Sobota characterize *pacta sunt servanda* in substantive rather than procedural terms, the underlying premise remains valid: Those procedural protections that can be considered general principles of law might, in proper circumstances, rise to the level of *jus cogens*.²⁷⁰

This is not to say that all authorities support the notion of procedural *jus cogens*. For example, some judicial opinions suggest that “due process guarantees and the right to a fair trial” are “derogable,”²⁷¹ even though numerous experts have argued that “due process” rises to the level of a peremptory norm.²⁷² While this apparent paradox may relate to a difference of opinion in terms of what is or should be included within the ambit of procedural *jus cogens*, other explanations exist.²⁷³ For example, it is at least equally possible that those who frame due process rights as being derogable are simply failing to distinguish between rights that are waivable by the parties (such as the right to an appeal or a fully reasoned decision) and rights that are not waivable (such as the *audiatur* principle).²⁷⁴ Alternatively, it may be that certain rights (such as notice)

of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 AM. J. INT’L L. 1, 3 n.4, 48 (2011); Ariel Zemach, *Reconciling Universal Jurisdiction with Equality Before the Law*, 47 TEX. INT’L L.J. 143, 145 (2011).

269. Criddle & Fox-Decent, *supra* note 16, at 341.

270. See CHENG, *supra* note 20, at 112–14; KOTUBY & SOBOTA, *supra* note 23, at 89–101.

271. Criddle & Fox-Decent, *supra* note 16, at 371 n.144 (quoting Michael Byers, *Alexander Orakhelashvili’s Peremptory Norms in International Law*, 101 AM. J. INT’L L. 913, 916 (2007) (book review)); see also *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); *Nat’l Equip. Rental v. Szukhent*, 375 U.S. 311, 315–16 (1964); *supra* note 146–47 and accompanying text (discussing the procedural trinity).

272. See Criddle & Fox-Decent, *supra* note 16, at 370–71; see also ORAKHELASHVILI, *supra* note 17, at 60 (“[C]ertain ‘derogable’ rights can be peremptory. This is clear with regard to due process guarantees and the right to fair trial . . .”); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT’L L. 1, 44 n.253 (2005).

273. See *infra* notes 274–75 and accompanying text.

274. See *supra* note 146–47 and accompanying text (discussing the procedural trinity).

may be non-derogable by the state (i.e., preemptory) but may be waivable by the parties in proper circumstances.²⁷⁵

This latter possibility demonstrates why it is so important to include arbitral authorities in discussions about procedural aspects of public international law. Not only does international arbitration provide important insights into general principles of procedural law (which are intimately linked with procedural *jus cogens*), it also captures the distinction between waivable and non-waivable procedural rights in a way that other areas of law do not.²⁷⁶

At this point, the most detailed discussion about waivable procedural rights involves large-scale arbitration, meaning three different types of proceedings known as class arbitration, mass arbitration, and collective arbitration.²⁷⁷ Waivers of the ability to proceed as a group have not only been successfully imposed in U.S.-style class arbitrations,²⁷⁸ they have also been sought (thus far unsuccessfully) in the context of investment proceedings.²⁷⁹ However, arbitration gives rise to a number of

275. See Strong, *supra* note 81, at 19. While some fundamental procedural protections (such as notice) may be waivable in certain circumstances, states will scrutinize those choices in some detail. See *Bremen*, 407 U.S. at 11; *Nat'l Equip. Rental*, 375 U.S. at 315–16; Noyes, *supra* note 82, at 596–97; Thornburg, *supra* note 82, at 209–10 (discussing criteria that might govern procedural autonomy).

276. See ORAKHELASHVILI, *supra* note 17, at 59 (“[C]ategorization of rights into derogable and non-derogable is not the same as dividing human rights norms into *jus cogens* and *jus dispositivum*.”); Criddle & Fox-Decent, *supra* note 16, at 341.

277. Class and collective arbitration can arise domestically or internationally, whereas mass arbitration only exists in international investment cases. See STRONG, *supra* note 83, at 205–22, 249–53 (discussing waivers of class arbitration, including in cases involving international parties).

278. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011). This issue is coming before the U.S. Supreme Court again. See *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017). A recent rule issued by the Consumer Financial Protection Board precluding the use of class waivers in certain types of consumer arbitration suggests that debate about large-scale arbitration will continue for the foreseeable future. See *generally* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

279. See S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(ive) of the Future?*, 29 ICSID REV.-FOREIGN INVEST. L.J. 690 (2014) (discussing attempted waivers of mass arbitration in investment contracts); S.I. Strong, *Limits of Autonomy in International Investment Arbitration: Are Contractual Waivers of Mass Procedures Enforceable?*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 2013 141 *passim* (Arthur W. Rovine ed., 2015) (discussing possible waivers in investment treaties).

other types of procedural waivers, and those analyses could prove useful to the analysis of procedural *jus cogens*.²⁸⁰

Valuable insights could also be derived from an examination of the structure of international arbitration. Although most structural analyses focus on the concept of consent, all three types of international arbitration (i.e., interstate, international commercial, and investor-state) require an explicit grant of jurisdiction from the state(s) in question before individual proceedings may begin.²⁸¹ This formal connection between arbitration and the state suggests that it would be impossible for states to sidestep their obligations to comply with procedural *jus cogens* simply by allowing disputes to be decided by private, non-governmental actors.²⁸² The principle is essentially one of vicarious liability: States cannot allow procedural injustice to arise, even if that injustice arises at the hands of a neutral, non-governmental arbitrator, just as employers cannot avoid liability for certain non-derogable acts simply by hiring an independent contractor to undertake the activity in question.²⁸³

These structural elements also correlate to tests relating to the development of *jus cogens*. For example, Criddle and Fox-Decent have argued that “[t]he leading positivist theory of *jus cogens* conceives of

280. See, e.g., RUTLEDGE, *supra* note 226, at 170 (discussing the right to a jury trial); Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 762–64 (2012) (discussing various procedural protections).

281. See Strong, *supra* note 25, at 331–50. Other areas of private international law experience similar issues. See Alex Mills, *The Private History of International Law*, 66 INT’L & COMP. L.Q. 1, 48 (2006) (noting the characterization of “private international law as a matter of State discretion”).

282. See MAY, *supra* note 51, at 121; Criddle & Fox-Decent, *supra* note 16, at 332; Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 368 (1986) (“Any alternative to the trial must respect relevant legal and institutional constraints . . .”); see also Vienna Convention, *supra* note 16, art. 53.

283. This principle exists in numerous state laws. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM §§ 58–60 (AM. LAW INST. 2012) (discussing U.S. law); S.I. STRONG & LIZ WILLIAMS, COMPLETE TORT LAW: TEXT, CASES, AND MATERIALS (2d ed. 2011) (discussing English law). Similar situations exist at the international level. For example, a state would not appear capable of absolving itself from the duty to prevent genocide or torture simply by delegating peace-keeping and interrogation duties to private companies, although some problems have arisen when domestic courts are unable or unwilling to address these types of concerns. See *Kiobel v. Dutch Royal Petroleum Co.*, 569 U.S. 108, 117–18 (2013) (limiting the applicability of the U.S. Alien Tort Statute). But see *Warfaa v. Ali*, 811 F.3d 653, 661, 665–66 (4th Cir. 2016) (denying action under Alien Tort Statute but allowing an action to proceed under *jus cogens* and the U.S. Torture Victims Protection Act), *cert. denied*, 137 S. Ct. 2280 (2017); H. John Goodell, *Using the Threat of the International Criminal Court to Encourage Congress to Pass the Civilian Extraterritorial Jurisdiction Act*, 14 TOURO INT’L L. REV. 261, 262 (2011) (discussing the Blackwater prosecutions); Krzysztof Kotarski, *Chapter 14 Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, 7 IUS GENTIUM 239, 240–41 (2011).

peremptory norms as customary law that has attained peremptory status through state practice and *opinio juris*.²⁸⁴ However, Criddle and Fox-Decent argue that positivist theories of *jus cogens* are somewhat unstable, leading “some scholars [to suggest] that the requirement of state consent might be satisfied if a representative supermajority of states accepted an emerging norm as peremptory.”²⁸⁵ Under this latter approach, which appears consistent with the views of the United Nation’s International Law Commission,

Peremptory norms need not achieve universal acceptance to create a binding international consensus . . . ; instead, international norms may claim a consensus of “the international community of States as a whole” if a “very large majority” of representative states accept the norms as nonderogable. Circumventing actual state practice, advocates of this consensus theory typically presume that states signal their consent to peremptory norms through a variety of expressive acts Consensus theory thus envisions a new, autonomous mode of general international law formation—a quasi-customary source that is not beholden to state practice or individualized state consent.²⁸⁶

Although detailed analysis of this and other developmental tests for *jus cogens* is beyond the scope of this Article, the overwhelming state acceptance of various treaties on international arbitration²⁸⁷ and the strong cross-border consensus on fundamental and non-derogable procedural norms in international arbitration suggests that some arbitral principles do in fact rise to the level of procedural *jus cogens*.²⁸⁸ This conclusion is not diminished in any way by arguments that international arbitration is controlled by a small cadre of industry “insiders,” because the various procedural norms are effectively ratified by states through adherence to the relevant treaties and through judicial interpretations of treaty norms that are highly consistent across national borders.²⁸⁹ Concerns about a Westernized bias in international arbitration appear

284. Criddle & Fox-Decent, *supra* note 16, at 339; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.6 (AM. LAW. INST. 1987) (claiming that *jus cogens* “is now widely accepted . . . as a principle of customary [international] law (albeit of higher status)”).

285. Criddle & Fox-Decent, *supra* note 16, at 341.

286. *Id.* at 341–42 (footnote omitted).

287. For example, the New York Convention has been adopted by 157 out of approximately 195 countries in the world. *See New York Convention Status, supra* note 34.

288. *See supra* notes 92–112 and accompanying text.

289. *See supra* notes 92–112 and accompanying text. International arbitration has long been criticized as an “insider’s club.” *See* Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429, 467–68 (2015).

equally unavailing given the rate at which Asian, African, and Middle Eastern jurisdictions have embraced international arbitration.²⁹⁰

B. General Principles of Procedural Law As A Type of Procedural Jus Cogens

The preceding discussion not only suggests that procedural *jus cogens* does in fact exist, it also demonstrates how important it is to rely on arbitral norms when developing the content of *jus cogens*. However, it is still unclear what norms might constitute procedural *jus cogens*.

Although a full analysis of this issue is beyond the scope of the current Article, it is nevertheless useful to consider whether, and to what extent, the general principles of procedural law identified by Cheng, Kotuby, and Sobota could rise to the level of procedural *jus cogens*, at least as a preliminary matter.²⁹¹ The discussion focuses on the list generated by Kotuby and Sobota because they not only considered Cheng's work in detail but also incorporated over 60 years' worth of additional materials into their analysis.²⁹²

In undertaking this analysis, it is critical to appreciate that this is merely the first step in the process of identifying the content of procedural *jus cogens*.²⁹³ For example, some types of substantive *jus cogens* norms, such as the prohibition on state aggression, are not reflected in municipal law, suggesting that some gaps could arise in any

290. International arbitration is often characterized as a blend of common law and civil law procedures, which could lead to objections that other legal traditions—such as those involving Islamic and chthonic law—are not reflected in international arbitral norms. See 2 BORN, *supra* note 3, at 2128. However, that argument does not appear to hold much weight, given the number of non-Western nations that have adopted the New York Convention and the Model Arbitration Law and the flourishing of international arbitral institutions in Asia, Africa, and the Middle East. See *New York Convention Status*, *supra* note 34; *UNCITRAL Model Arbitration Law Status*, *supra* note 95; 1 BORN, *supra* note 3, at 191–99; Nabil N. Antaki, *Cultural Diversity and ADR Practices in the World*, in *ADR IN BUSINESS: PRACTICE AND ISSUES ACROSS CULTURES* 265, 269 (Jean-Claude Goldsmith et al. eds., 2006); Natasha Bakirci et al., *Arbitration in the Dubai International Financial Center*, 7 *INT'L J. ARAB ARB.* 5, 5 (2015); David Butler, *The State of International Commercial Arbitration in Southern Africa: Tangible Yet Tantalizing Progress*, 21 *J. INT'L ARB.* 169, 169–70 (2004); Nicholas Wiegand, *Can Asia Cut the Costs?*, 34 *J. INT'L ARB.* 401, 401 (2017). Furthermore, the availability of international arbitration does not preclude the use of mediation and conciliation, which are often said (rightly or wrongly) to be more consistent with non-European dispute resolution practices and values. See Antaki, *supra*, at 269–70 (noting the ability to sequentialize different dispute resolution processes).

291. See Criddle & Fox-Decent, *supra* note 16, at 371 (suggesting such a conclusion is “emerging” but claiming that “due process demands in a particular proceeding will turn upon contextual factors”).

292. See generally CHENG, *supra* note 20 (writing in 1953); KOTUBY & SOBOTA, *supra* note 23 (writing in 2017).

293. See KOTUBY & SOBOTA, *supra* note 23, at 158–60.

type of procedural *jus cogens* that is based entirely on municipal law, as is the case here. As intriguing as this phenomenon is, it need not impede the current study, which does not seek to provide a comprehensive list of all procedural *jus cogens* norms. To the contrary, this observation suggests that more, not less, work is needed in the area of international procedural law.

The first of Kotuby and Sobota's general principles of procedural law involves notice and jurisdiction, meaning that the decision maker (be it a court or an arbitral tribunal) must have jurisdiction over the parties and the dispute, and the parties must have adequate notice of the proceedings.²⁹⁴ While arguments can arise about what constitutes "proper" jurisdiction and "proper" notice, the fundamental concept appears incontrovertible: Jurisdiction and notice must exist if the resulting decision is to be considered legitimate.²⁹⁵ Indeed, as Solum has said,

procedural justice is deeply entwined with the old and powerful idea that a process that guarantees rights of meaningful participation is an essential prerequisite for the legitimate authority of action-guiding legal norms. Meaningful participation requires notice and opportunity to be heard, and it requires a reasonable balance between cost and accuracy.²⁹⁶

Classifying the need for jurisdiction and notice as a type of procedural *jus cogens* is further supported by Criddle and Fox-Decent's claim that "a norm will count as *jus cogens* if respect for it is indispensable to the state's ability to secure legality for the benefit of all."²⁹⁷

The second concept identified by Kotuby and Sobota as a general principle of procedural law involves the impartiality and independence of the decision maker.²⁹⁸ This principle has been extensively discussed in both arbitral²⁹⁹ and judicial settings³⁰⁰ and is central to the legitimacy of the dispute resolution process.³⁰¹ Interestingly, one of the reasons why international arbitration has become so popular in recent years is because

294. See *id.*

295. See Solum, *supra* note 8, at 183.

296. *Id.*

297. Criddle & Fox-Decent, *supra* note 16, at 367.

298. See KOTUBY & SOBOTA, *supra* note 23, at 165–76.

299. See 2 BORN, *supra* note 3, at 1828; see also INT'L BAR ASS'N, *supra* note 206.

300. See THE BURGH HOUSE PRINCIPLES, *supra* note 205; Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT'L L. 111, 115–16 (2008); Edward Gordon et al., *The Independence and Impartiality of International Judges*, 83 AM. SOC'Y INT'L L. PROC. 508, 508 (1989).

301. See 2 BORN, *supra* note 3, at 1828; THE BURGH HOUSE PRINCIPLES, *supra* note 205; Brubaker, *supra* note 300, at 115–16; Gordon et al., *supra* note 300, at 508.

the use of independent, non-state tribunals eliminates longstanding concerns about actual or potential bias on the part of national courts in cases where the state is sued by foreign investors or where one of the parties is a foreign national.³⁰² The empirically proven rise in the use of international arbitration in the last few decades³⁰³ underscores the conclusion that independence and impartiality of decision makers not only constitutes a general principle of procedural law but also reflects a peremptory norm that “is indispensable to the state’s ability to secure legality for the benefit of all.”³⁰⁴

The third element discussed by Kotuby and Sobota involves procedural equality and the right to be heard.³⁰⁵ While some commentators have found it difficult to distinguish between these two concepts at the level of individual rules,³⁰⁶ the overwhelming success of international arbitration is a testament to the ability of states and parties to agree on certain fundamental norms as a matter of principle.³⁰⁷ Furthermore, there seems to be little, if any, scope for arguing that procedural equality and the right to be heard are not “indispensable to the state’s ability to secure legality for the benefit of all.”³⁰⁸ As a result, these norms can be said to rise to the level of procedural *jus cogens*.

The fourth general principle identified by Kotuby and Sobota involves the condemnation of fraud and corruption.³⁰⁹ In some ways, these principles appear to relate more to substantive concerns than procedural issues, given that many of Kotuby and Sobota’s examples involve the duty of judicial and arbitral tribunals not to give effect to agreements or actions that are fraudulent or corrupt.³¹⁰ However, it may

302. See 1 BORN, *supra* note 3, at 81 (discussing popularity of international arbitration); Marie-France Houde, *Novel Features in Recent OECD Bilateral Investment Treaties*, in INTERNATIONAL INVESTMENT PERSPECTIVES 2006 143, 144 (2006); Valentina Vadi, *Critical Comparisons: The Role of Comparative Law in Investment Treaty Arbitration*, 39 DENV. J. INT’L L. & POL’Y 67, 97 (2010).

303. See Joachim Pohl et al., *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey* 23 (Org. for Econ. Cooperation & Dev., Working Paper on International Investment No. 02, 2012), <http://dx.doi.org/10.1787/5k8xb71nf628-en>.

304. Criddle & Fox-Decent, *supra* note 16, at 367.

305. See KOTUBY & SOBOTA, *supra* note 23, at 176–83.

306. See Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 136–37 (2008) (reviewing OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT (2007)) (“[C]ivil procedure is seen as peculiarly tied to local culture and social heritage in a way that resists change . . .”). International initiatives such as the ALI/UNIDROIT Principles and the European Rules of Civil Procedure suggest that consensus is possible, given sufficient political will. See ALI & UNIDROIT PRINCIPLES, *supra* note 148.

307. See 1 BORN, *supra* note 3, at 93–97.

308. Criddle & Fox-Decent, *supra* note 16, at 367.

309. See KOTUBY & SOBOTA, *supra* note 23, at 183–90.

310. *Id.*

be that Kotuby and Sobota were thinking about efforts to perpetuate a fraud on the judicial or arbitral process, as in situations where parties or third parties seek to intimidate arbitrators or judges.³¹¹ While this latter category of concerns does appear to be procedural in nature, those matters could just as easily be included in provisos regarding the independence and impartiality of decision makers.³¹² Therefore, it does not appear that concerns about fraud and corruption can or should be characterized as independent procedural principles rising to the level of peremptory norms, although further analysis could lead to a contrary conclusion.

The fifth principle identified by Kotuby and Sobota involves evidence and burdens of proof.³¹³ While the authors are to be commended for trying to unbundle the constituent elements of procedure, even they recognize that some of the items under this heading could fall into other categories.³¹⁴ For example, the failure to allow parties to present evidence could very easily be subsumed within the more general right to be heard, as could concern about improperly or illegally obtained evidence.³¹⁵ However, other issues discussed by Kotuby and Sobota in this section do not appear to fall within the general right to be heard.³¹⁶ For example, questions about burdens of production and proof, as well as matters involving the weight of evidence, appear to be better categorized as rules rather than core principles of procedural justice, given the significant amount of variation between jurisdictions on how these norms operate.³¹⁷ For example, many lawyers, particularly those who come from the civil law tradition, do not view the production of evidence (i.e., discovery) to be fundamental to procedural justice, because shifting burdens of proof and negative inferences achieve the same end.³¹⁸

311. Statistics are difficult to establish, but anecdotal reports suggest that judges and arbitrators are in fact the subject of intimidation efforts. See, e.g., Günther J. Horvath et al., *Categories of Guerilla Tactics*, in *GUERRILLA TACTICS IN INTERNATIONAL ARBITRATION* § 1.02[B][2] (Günther J. Horvath & Stephan Wilske eds., 2013); Abba Kolo, *Witness Intimidation, Tampering and Other Related Abuses of Process in Investment Arbitration: Possible Remedies Available to the Arbitral Tribunal*, 26 *ARB. INT'L* 43, pt. II(a) (2010) (noting intimidation of witnesses is more frequent than intimidation of arbitrators); *Judges Targeted Fast Facts*, CNN (Apr. 27, 2017, 4:04 PM), <http://www.cnn.com/2013/11/04/us/judges-targeted-fast-facts/> (listing federal judges who have been threatened or killed as a result of their work).

312. See KOTUBY & SOBOTA, *supra* note 23, at 165–76; see also *supra* notes 298–304 and accompanying text.

313. See KOTUBY & SOBOTA, *supra* note 23, at 190–96.

314. See *id.* at 197.

315. See *id.* at 196.

316. See *id.* at 191–95; see also *supra* notes 305–08 and accompanying text.

317. See KOTUBY & SOBOTA, *supra* note 23, at 191–95.

318. See 2 BORN, *supra* note 3, at 2311–15; El Ahdab & Amal Bouchenaki, *Discovery in International Arbitration: A Foreign Creature for Civil Lawyers?*, in

Common law lawyers, of course, find such views anathema.³¹⁹ While functional alternatives can be identified in individual cases (as occurs routinely in international arbitration, which blends common law and civil law procedures),³²⁰ these features do not seem to rise to the level of procedural *jus cogens* norms, although some constituent elements (such as the right to present evidence) could be considered peremptory norms to the extent they fall within protected categories like the right to be heard.³²¹

The final principle discussed by Kotuby and Sobota involves the concept of *res judicata*, which they define as meaning that (1) parties are bound by properly rendered judgments and awards and (2) claims cannot be retried a second time by the same court or tribunal.³²² While scholars and states may differ about what precisely is meant by *res judicata* (for example, some debate exists about how appeals relate to the concept of finality), all authorities agree that the core concept reflects an undisputed general principle of law that is “nonoptional.”³²³ As a result, the notion of *res judicata* can be said to rise to the level of procedural *jus cogens*.

V. CONCLUSION

According to numerous longstanding scholarly and judicial narratives, procedural law exists merely “to serve the substantive task,” thereby implying not only that procedural law is secondary to substantive

ARBITRATION ADVOCACY IN CHANGING TIMES (INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION CONGRESS SERIES NO. 15) 65, 78–80 (Albert Jan van den Berg ed., 2011); Strong, *supra* note 25, at 365.

319. For example, Michael Bayles claims:

The common-law principle of an opportunity to be heard has typically been taken to include rights (1) to adequate notice, (2) to pre-hearing discovery, (3) to an adjournment, (4) to present evidence, (5) to rebut evidence and often to cross-examine adverse witnesses, (6) to a copy of the transcript, and (8) [sic] to reasons for a decision.

MICHAEL D. BAYLES, *PROCEDURAL JUSTICE: ALLOCATING TO INDIVIDUALS* 40 (1990). Common law reliance on cross-examination has been imported into international arbitration, although other common law procedures—most notably, discovery—find only limited application. See 2 BORN, *supra* note 3, at 2126–27.

320. See 2 BORN, *supra* note 3, at 2128.

321. See *supra* notes 305–08 and accompanying text.

322. See KOTUBY & SOBOTA, *supra* note 23, at 197–202.

323. Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 *RUTGERS U. L. REV.* 1067, 1082 (2016). Kevin Clermont explains:

In sum, based on observation of comparative laws and based on theory of adjudication, the essential core of *res judicata* is nonoptional. Still, I am not arguing a universal value that demands a minimal amount of content in *res judicata* law, but rather a universal institutional need for a minimal amount.

Id. Readers from the United States need to exercise some care, because the United States embraces perhaps the most extreme version of the *res judicata* principle in the world. See *id.* at 1069–70 (discussing American exceptionalism in procedural law).

law but also that procedural law is inherently instrumental in nature.³²⁴ However, that paradigm is not quite accurate. Although substance and procedure are inextricably linked, procedural law is inherently and intrinsically valuable and provides important limitations on state behavior.³²⁵

The centrality of procedural law to the proper functioning of civil society creates a heightened need to understand the essential nature of core procedural norms. Recognizing this need, academics have considered procedural issues from a number of different perspectives, including legitimacy theory,³²⁶ procedural justice,³²⁷ constitutional and international due process,³²⁸ the rule of law,³²⁹ and human rights.³³⁰ Although these analyses are in many ways useful, the diversity of approaches can inhibit the development of overarching theories or general principles of procedural law.³³¹

The situation is particularly problematic in the international realm. Although recent years have seen increasing interest in cross-border procedure at the regional level, there remains a dearth of material concerning international procedural law.³³² This phenomenon could be explained in a variety of ways, ranging from the perceived priority of substantive law over procedural law to the supposed parochialism of

324. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 567 (1965).

325. See John B. Attanasio, *A Duty-Oriented Procedure in a Rights-Oriented Society*, 63 NOTRE DAME L. REV. 597, 605–607 (1988); Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 82–83 (2009).

326. See Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1060 (2012); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 104 (2013); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2600 (1997).

327. See Desierto, *supra* note 31, at 948; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806–07 (2015).

328. See CHEMERINSKY, *supra* note 8, at 547; Kaufmann-Kohler, *supra* note 5, at 1321–22.

329. See Bergholtz, *supra* note 146, at 44.

330. See ACHR, *supra* note 65, at art. 8, para. 1; ICCPR, *supra* note 65, at art. 14; European Convention, *supra* note 65, at art. 6; Universal Declaration, *supra* note 65, at art. 10.

331. See Bone, *supra* note 8, at 487–88; Solum, *supra* note 8, at 182–83.

332. European private international law, including questions of procedure, has become something of a hot topic. See ADRIAN BRIGGS, *PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS* 17–22 (2014); Marise Cremona & Hans-W. Micklitz, *Introduction, in PRIVATE LAW IN THE EXTERNAL RELATIONS OF THE EU* 1, 4–5 (Marise Cremona & Hans-W. Micklitz eds., 2016). See generally GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES (Stefan Vogenauer & Stephen Weatherill eds., 2017); THE EUROPEAN UNION AND NATIONAL CIVIL PROCEDURE (Anna Nylund & Bart Krans eds., 2016).

procedural law and the lack of qualified comparatists.³³³ Commentators have also suggested that the fragmentation of international adjudication into separate “silos” (such as those involving the jurisprudence of the International Court of Justice, the International Criminal Court, the Permanent Court of Arbitration, etc.) has made overarching analysis difficult or inappropriate.³³⁴ While these factors may indeed contribute to the scarcity of academic research involving international procedural law, another explanation exists.

As the preceding pages have indicated, international arbitration has expanded at a phenomenal rate over the last few decades.³³⁵ Arbitration now dominates the field of international dispute resolution and, as a procedural specialty, diverts scholarly resources from questions of international judicial procedure. In other words, the functional importance of arbitration as the *de facto* means of resolving international disputes has very likely skewed academic output away from international procedural law and toward international arbitration law. This conclusion appears incontrovertible, given the massive amount of scholarly writing on international arbitration that is generated each year.³³⁶ While some of these resources are aimed at practitioners, the field includes an increasingly wide range of highly sophisticated empirical, theoretical, and interdisciplinary works.³³⁷

Although international arbitration may be part of the problem, it may also be part of the solution.³³⁸ For example, as the methodological aspects of this Article have shown, international arbitration provides an important and unique perspective on the content of general principles of procedural law.³³⁹ Without arbitral source materials, inquiries into international procedural norms would be incomplete at best and incorrect at worst.

As important as questions of methodology may be, this Article has not limited itself to those particular issues. Instead, this discussion has also considered whether and to what extent certain general principles of

333. See Clermont, *supra* note 9, at 530; Langbein, *supra* note 9, at 546; Marcus, *supra* note 9, at 709.

334. See Natasha A. Affolder, Tadić, *the Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445, 495 (1998); Chester Brown, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, 30 LOY. L.A. INT'L & COMP. L. REV. 219, 221 (2008); Cohen, *supra* note 326, at 1050.

335. See 1 BORN, *supra* note 3, at 122.

336. See STRONG, *supra* note 89, at 71–137 (providing bibliographic information).

337. See EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 2–3 (2010); Strong, *supra* note 39 (providing sources of empirical and interdisciplinary research).

338. See *supra* Parts II–III.

339. See *supra* Parts II–III.

procedural law can be considered to reflect a type of procedural *jus cogens*. At this point, the concept of *jus cogens* is somewhat controversial and is arguably limited to certain substantive norms, which raises questions about whether and to what extent it is necessary or appropriate to discuss the development of procedural *jus cogens*.³⁴⁰ While those concerns are valid, this Article adopts the view of Georges Abi-Saab that even if the concept of *jus cogens* were nothing more than an “empty box, the category [is] still useful; for without the box, it cannot be filled.”³⁴¹ Indeed, a simple hypothetical based on substantive law demonstrates why it is helpful, if not necessary, to begin to develop an understanding of procedural *jus cogens*.

Currently, one of the core features of *jus cogens* is the prohibition on torture.³⁴² Some people might claim that recognition of a peremptory norm on torture is unnecessary, given the large number of countries, including the United States, that preclude such practices as a matter of domestic and international law.³⁴³ While that might be true in a perfect world, the current U.S. administration has made a number of statements indicating an interest in using torture as an interrogation device, a technique that, if adopted, would violate the United States’ international obligations, including those arising under the Universal Declaration, the ICCPR, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.³⁴⁴

Skeptics may believe that such an event would never actually occur or that the courts would stop such practices even if they were attempted. However, it is unclear whether, and to what extent, U.S. judges would be capable of doing so, given various questions about the applicability of those instruments in U.S. courts.³⁴⁵ While detailed discussion of the

340. Criddle & Fox-Decent, *supra* note 16, at 332.

341. See Bianchi, *supra* note 242, at 491.

342. See Criddle & Fox-Decent, *supra* note 16, at 331–32.

343. See U.S. CONST. amend. VIII; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; ICCPR, *supra* note 65, at art. 7.

344. See Convention Against Torture, *supra* note 343, at art. 2; ICCPR, *supra* note 65, at art. 7; Universal Declaration, *supra* note 65, at art. 5; Adam Serwer, *Can Trump Bring Back Torture?*, ATL. (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-torture/514463/>.

345. See Convention Against Torture, *supra* note 343; ICCPR, *supra* note 65; United States v. Casaran-Rivas, 311 F. App’x 269, 272 (11th Cir. 2009) (concluding that the Convention Against Torture is “not self-executing, or subject to relevant legislation, and, therefore, do[es] not confer upon aliens a private right of action to allege a violation of [its] terms”); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 137 (2d Cir. 2005) (concluding that the ICCPR is not self-executing and refusing to recognize “a private right of action or separate form of relief enforceable in United States courts”); Flores v. S. Peru Copper Corp., 414 F.3d 233, 257 n.35 (2d Cir. 2003); 136 CONG. REC. S17,486-01 (Oct. 27,

ramifications of a breach of substantive or procedural *jus cogens* is beyond the scope of the current Article, *jus cogens* could provide several possible responses to any attempt to use torture as an interrogation device.³⁴⁶ For example, the violation of a *jus cogens* norm could allow third states to undertake various countermeasures permitted under international law or trigger actions for damages in foreign courts.³⁴⁷

Although a common understanding of procedural *jus cogens* has not yet developed, a need for such a concept does appear to exist, based on recent developments in the United States and elsewhere.³⁴⁸ For example, in 2005, England statutorily reversed an 800-year-old prohibition on double jeopardy to allow those who have been acquitted of a crime to be tried again, with Scotland following suit in 2011.³⁴⁹ While these laws only apply to criminal actions, a subject not considered in this Article or in analyses conducted by Cheng, Kotuby, and Sobota,³⁵⁰ prohibitions on double jeopardy are similar to the concept of *res judicata* in civil proceedings.³⁵¹ Because criminal procedure has traditionally been subject to more protection than civil procedure,³⁵² any derogation of criminal law standards raises concerns about whether political expediency could trigger similar initiatives in civil settings.³⁵³ Indeed, recent events in the

1990); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 n.6 (Am. Law. Inst. 1987) (“The binding character of the Universal Declaration of Human Rights continues to be debated”); Oona A. Hathaway et al., *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 65 (2012).

346. See Orakhelashvili, *supra* note 241, at 867 (“The principal effect of *jus cogens* is consequentially to deny the rights, privileges, and qualifications the relevant state action would command but for the peremptory status of the rule that the conduct in question violates. It is precisely the underlying community interest that leads to that result.”).

347. See Thomas Giegerich, *Do Damages Claims Arising from Jus Cogens Violations Override State Immunity From the Jurisdiction of Foreign Courts?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, *supra* note 17, at 203, 203; Christian Hillgruber, *The Right of Third States to Take Countermeasures*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, *supra* note 17, at 265, 265.

348. The current administration’s attacks on the judiciary have caused numerous concerns about the future of U.S. judicial processes. See, e.g., Amy B. Wang, *Trump Lashes Out at ‘So-Called Judge’ Who Temporarily Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.722b18158d63.

349. See Criminal Justice Act 2003, c. 44, § 75 (Eng. & Wales); Double Jeopardy (Scotland) Act 2011, (ASP 16) §§ 1–4; *Double Jeopardy Law Ushered Out*, *supra* note 19.

350. See *supra* note 51.

351. See *supra* notes 322–23 and accompanying text.

352. See *supra* notes 51, 74 and accompanying text.

353. Political expediency has been used to explain or justify a wide range of procedural due process violations. See, e.g., Herzig, *supra* note 18, at 687–88; Larson & Mehrotra, *supra* note 18; Volz & Anker, *supra* note 18, at 1.

United States have raised significant questions about whether immigration hearings (which are a type of civil proceeding) are complying with various procedural standards.³⁵⁴ These issues appear likely to arise again, despite the U.S. Supreme Court's decision in *Trump v. International Refugee Assistance Project*.³⁵⁵

These and other developments strongly suggest an increasing need to identify minimum standards of procedural justice in national and international proceedings.³⁵⁶ Past initiatives have experienced difficulties due to an inappropriate focus on rules rather than on principles, which has resulted in a widespread belief that procedural law is too exceptional and too closely tied to national legal systems to generate true cross-border consensus.³⁵⁷ However, this Article has shown that a great deal of commonality exists if the analysis focuses on general principles of law rather than on individual rules and if the research considers materials generated in international arbitration.³⁵⁸

Although this Article has broken new ground in the area of international procedural law, further research is needed. For example, considerable benefit could be derived from a detailed comparison of contemporary work on general principles of procedural law and Cheng's original text to see whether and to what extent the international understanding of various procedural principles has changed over time.³⁵⁹ Helpful insights could also be gained through an in-depth analysis of a "draft code of general principles of law" created by Cheng.³⁶⁰

Additional research might focus on how general principles of procedural law can or should be used by judges in practice. For example,

[i]n interpreting its constituent instruments must an international tribunal apply international standards of procedural fairness or may it modify these standards based on its context? What are the relevant

354. See Larson & Mehrotra, *supra* note 18; Volz & Anker, *supra* note 18, at 1. Immigration proceedings are considered civil rather than criminal in nature and must comply with traditional standards of due process. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *In re M-A-M-*, 25 I. & N. Dec. 474, 479 (B.I.A. 2011); *In re M-D-*, 23 I. & N. Dec. 540, 542 (B.I.A. 2002) (citing *Landon v. Plasencia*, 459 U.S. 21, 32–33 (1982)).

355. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

356. See generally *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

357. See CHENG, *supra* note 20, at 24 (distinguishing rules from principles); Talmon, *supra* note 12, at 981.

358. See 2 BORN, *supra* note 3, at 2126–27.

359. Although Kotuby and Sobota undertake a detailed analysis of general principles of procedural law, other analyses of interest do exist. See BROWN, *supra* note 32; CHENG, *supra* note 20, at 257–386; KOTUBY & SOBOTA, *supra* note 23, at 157–202; Francioni, *supra* note 46, at 1–2.

360. See CHENG, *supra* note 20, at 379–99, app. 1.

standards of procedural fairness to be applied by an international tribunal? Can general principles of law be used both as a gap-filling device and as an interpretative device on procedural questions?³⁶¹

Similar questions exist with respect to national court proceedings. For instance, are domestic judges bound by peremptory norms of procedure? If so, how do those norms arise? What elements are included within those norms and can any analogies be drawn between international criminal procedure and international civil procedure?³⁶²

Additional research could also focus on procedural *jus cogens*. For example, scholars might give further consideration to the scope of procedural *jus cogens* and the connection between procedural *jus cogens* and general principles of procedural law.

These are only a few suggestions on how scholarship in the field of international procedural law might develop. Doubtless there are other important issues that can and should be addressed. Hopefully, the current Article has provided a useful foundation for further studies into this vital and engaging subject.

361. Affolder, *supra* note 334, at 495.

362. Some material exists on how international law affects criminal proceedings. See, e.g., MAY, *supra* note 51, at 1–17.
