2018

Can International Law Trump Trump's Immigration Agenda: Protecting Individual Rights through Procedural Jus Cogens

S. I. Strong
University of Missouri School of Law, strongsi@missouri.edu

CAN INTERNATIONAL LAW TRUMP TRUMP'S IMMIGRATION AGENDA? PROTECTING INDIVIDUAL RIGHTS THROUGH PROCEDURAL *JUS COGENS*

*S.I. Strong**

I. INTRODUCTION

Donald Trump's approach to immigration has been revolutionary, to say the least. In his short tenure in office, his policies banning travel of individuals from certain Muslim countries have been taken to the United States Supreme Court on two separate occasions,[1] and his most recent technique of separating children from their parents at the border has already spawned litigation.[2] His boldest proposal yet, however, involves the widespread denial of procedural rights to immigrants.[3] In his words, "[w]hen somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came [sic]."[4]

If implemented, this move will doubtless generate extensive constitutional debate.[5] Immigration proceedings are considered civil rather than criminal in nature and must comply with traditional standards of due process.[6] Still, the in-

* 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.

1. *See* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017) (concerning Executive Order 13780).

2. *See* Mrs. L v. U.S. Immigration and Customs Enforcement ("ICE"), Case No. 18cv0428 DMS (MDD), Order Granting in Part Plaintiffs' Motion for Class Certification (S.D. Cal. June 26, 2018).

3. *See* Philip Rucker & David Weigel, *Trump Advocates Depriving Undocumented Immigrants of Due-Process Rights,* WASH. POST (June 25, 2018), http://www.msn.com/en-us/news/politics/trump-advocates-depriving-undocumented-immigrants-of-due-process-rights/ar-AAz62YF?ocid=ientp.

4. Katie Rogers & Sheryl Gay Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights,* N.Y. TIMES (June 24, 2018), https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html.

5. 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).

6. *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).

creasing politicization of constitutional law, as well as the tendency of a majority of the Supreme Court to, in Justice Sonia Sotomayor's words, "ignor[e] the facts, misconstru[e] our legal precedent, and turn[] a blind eye to the pain and suffering the [Trump policies] inflict[] upon countless families and individuals, many of whom are United States citizens," in immigration proceedings suggests that alternate arguments should also be considered.[7]

One intriguing option involves international law. Some people may question this approach, given the isolationist tendencies of various members of the Supreme Court.[8] Jenny Martinez has recognized, however, 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" in some circumstances.[9] Furthermore, international law offers the possibility of both judicial and non-judicial relief.[10]

This Essay therefore considers the applicability of certain peremptory norms commonly referred to as *jus cogens* to the Administration's recent calls to eliminate immigration hearings.[11] The "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."[12] Because "[*j*]*us cogens* norms are often thought to be equivalent to constitutional principles of international law . . . ," they are often referred to as "an international bill of rights, or . . . are said to constitute the highest in a norms hierarchy."[13]

The discussion begins in Section II by defining traditional and procedural elements of *jus cogens*, followed by an analysis in Section III of the content of procedural *jus cogens*. Next, Section IV considers how these principles might operate with respect to the Administration's proposals to eliminate immigration hearings. Notably, the recommendations outlined herein may apply equally to other violations of procedural law, both in the immigration context and beyond. Section V then concludes the discussion with certain forward-looking observations.

II. TRADITIONAL AND PROCEDURAL *JUS COGENS*

The traditional conception of *jus cogens* (sometimes referred to as *ius cogens*) involves 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

7. Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

8. Jenny S. Martinez, *Who's Afraid of International and Foreign Law?*, 104 CAL. L. REV. 1579, 1584–85 (2016).

9. *Id.* at 1584.

10. *See infra* notes 71–88 and accompanying text.

11. *See* Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331, 332 (2009); S.I. Strong, *General Principles of Procedural Law and Procedural* Jus Cogens, 122 PENN ST. L. REV. 347, 394–98 (2018).

12. Criddle & Fox-Decent, *supra* note 11.

13. LARRY MAY, GLOBAL JUSTICE AND DUE PROCESS 121 (2011).

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.'"[14] These types of peremptory norms are recognized in international instruments such as the Vienna Convention on the Law of Treaties[15] as well as in domestic authorities such as the Restatement (Third) of the Foreign Relations Law of the United States.[16]

Although most discussions about *jus cogens* focus on substantive rights, peremptory norms can also be framed in procedural terms.[17] Some commentators—such as those discussing the right to *habeus corpus*,[18] state immunity,[19] and access to justice[20]—have focused on specific procedures, whereas others have made broader assertions and claimed that all human rights, including those of both a substantive and procedural nature, can be considered peremptory in nature.[21]

Determining which principles should rise to the level of *jus cogens* is a challenging task.[22] The current Essay adopts a test devised by Evan Criddle and Evan Fox-Decent, who show a relationship between *jus cogens* and the rule of law and suggest that a particular procedure "will count as *jus cogens* if respect for it is indispensable to the state's ability to secure legality for the benefit of all."[23]

Skeptics may oppose this effort from the outset, based on language from the United States Supreme Court suggesting that that "due process guarantees and the right to a fair trial" are "derogable."[24] However, it appears likely that this apparent paradox simply reflects a failure by the Court to distinguish between rights that are waivable by the parties (such as the right to an appeal or to a fully reasoned decision) and rights that are not waivable by the parties (such as the *audiatur* principle).[25] Thus, certain rights (such as notice) may be non-

14. *See* Criddle & Fox-Decent, *supra* note 11, at 331–32 (footnote omitted).

15. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Although the United States has not yet ratified the Vienna Convention, U.S. courts routinely rely upon it. *See, e.g.*, Abbott v. Abbott, 130 S. Ct. 1983, 2007 n.11 (2010) (Stevens, J., dissenting); Sanchez-Llamas v. Oregon, 548 U.S. 331, 391 (2006) (Breyer, J., dissenting); Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008).

16. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (AM. LAW INST. 1987) [hereinafter RESTATEMENT].

17. *See* Strong, *supra* note 11, at 394.

18. *See* MAY, *supra* note 13, at 120.

19. *See* Sévrine Knuchel, *State Immunity and the Promise of* Jus Cogens, 9 NW. J. INT'L HUM. RTS. 149, 160–61 (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 A.G. Talmon, Jus Cogens *After Germany v Italy: Substantive and Procedural Rules Distinguished,* 25 LEIDEN J. INT'L L. 979, 980 (2012).

20. *See* Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access,* 93 B.U. L. REV. 2033, 2035 (2014).

21. *See* ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 59–60 (2008); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT'L L. 749, 757 (2008).

22. Part of the difficulty involves the link between *jus cogens* and customary international law. *See* Strong, *supra* note 11, at 370–72.

23. Criddle & Fox-Decent, *supra* note 11, at 367.

24. *Id.* at 371 n.144 (citation omitted); *see also* M/S 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).

25. *See* Strong, *supra* note 11, at 395–97.

derogable (i.e., peremptory) by the state but waivable by the parties.[26] Indeed, scholars have recognized that "certain 'derogable' rights," including "due process guarantees and the right to fair trial," can nevertheless be peremptory in nature.[27]

Though important, the debate about waivable and non-waivable rights is beyond the scope of the current Essay, which assumes that the procedural rights that the current Administration has suggested eliminating are not rights that the individual immigrants would agree to waive. The discussion will therefore turn to issues relating to the content of procedural *jus cogens*.

III. CONTENT OF PROCEDURAL *JUS COGENS*

The largely undertheorized nature of procedural law in the United States may make the process of determining the content of procedural *jus cogens* challenging for U.S. scholars and jurists.[28] Part of the problem can be traced to statements by the United States Supreme Court claiming that procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[29] Instead, the Court has characterized due process as a flexible concept that "calls for such procedural protections as the particular situation demands."[30]

While judges may appreciate the freedom associated with procedural flexibility, such an approach can be extremely problematic, since it allows courts to violate individual rights based on nothing more than political expediency.[31] Indeed, that is precisely the concern that exists with respect to the current Administration's approach to immigration proceedings.[32]

Difficulties may also arise because of a lack of familiarity in the United States with procedures adopted by other legal systems.[33] Commentators such as Kevin Clermont, John Langbein, and Richard Marcus have long bemoaned the

26. *See id.*

26. Even when a particular procedure (such as notice) is waivable, states will often scrutinize those choices carefully. *See* M/S 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).

27. ORAKHELASHVILI, *supra* note 21, at 60; *see also* Criddle & Fox-Decent, *supra* note 11, at 370–71; Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 46 n.253 (2004).

28. Lawrence B. Solum, *Procedural Justice,* 78 S. CAL. L. REV. 181, 182–83 (2004).

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

30. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

31. Political expediency has been used to explain or justify a wide range of procedural due process violations in the United States. *See, e.g.*, Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial,* 51 UCLA L. REV. 933, 972 (2004); 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).

32. *See, e.g.*, Erik Larson & Kartikay Mehrota, *Trump's Immigration Crackdown Is Likely to Bring a Flood of Lawsuits,* BLOOMBERG (Feb. 22, 2017), https://www.bloomberg.com/news/articles/2017-02-22/trump-s-immigration-crackdown-likely-to-bring-lawsuit-flood; HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM, THE IMPACT OF PRESIDENT TRUMP'S EXECUTIVE ORDERS ON ASYLUM SEEKERS 1 (May 2017).

33. *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").

lack of international and comparative perspectives in U.S. scholarship on procedural law,[34] and such analyses are critical to the determination of *jus cogens* norms.[35]

While space restrictions preclude a comprehensive discussion of comparative and international procedure and the way those principles affect the content of procedural *jus cogens*, such analyses do exist.[36] As a result, it is possible to summarize the process briefly here so as to apply those conclusions to the proposed U.S. policy involving immigration hearings.

According to Criddle and Fox-Decent, the general consensus is that "peremptory norms enter international law as 'general principles of law.'"[37] General principles of law have long been recognized as a legitimate type of international law and are reflected in international instruments such as the Statute of the International Court of Justice[38] and domestic authorities such as the Restatement (Third) of the Foreign Relations Law of the United States.[39] Commentary (*opinio juris*) is also central to the task of identifying general principles of law.[40] Perhaps the most important work in this area is Bin Cheng's classic text, *General Principles of Law as Applied by International Courts and Tribunals*,[41] which was updated in 2017 by Charles Kotuby and Luke Sobota.[42]

General principles of law are derived through comparative analysis of rules and practices,[43] including "basic individual rights enshrined in municipal constitutions, statutes, and judicial decisions."[44] In many ways, the methodology is not unlike that undertaken by the American Law Institute ("ALI") when generating various Restatements and the ALI/UNIDROIT Principles of Transnational Civil Procedure.[45] Identification of general principles of procedural law, however, is not the same as simply compiling and comparing a list of indi-

34. *See id.*; 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, 740 (2005).

35. *See infra* notes 49–70 and accompanying text.

36. *See* Strong, *supra* note 11, at 390–403 (discussing authorities and deriving certain peremptory norms of procedure).

37. Criddle & Fox-Decent, *supra* note 11, at 341.

38. *See* Statute of the International Court of Justice, art. 38, ¶1(c).

39. *See* RESTATEMENT, *supra* note 16, § 102.

40. *See* Criddle & Fox-Decent, *supra* note 11, at 339.

41. *See generally* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (digital reprint 2006) (Stevens & Sons Ltd. 1953).

42. *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).

43. *See* Strong, *supra* note 11, at 371 (discussing the use of municipal law in deriving general customary law, which is the basis of general principles of law); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 52 (7th ed. 2008) (noting "collections of municipal cases" are critical to the "assessment of the customary law").

44. Criddle & Fox-Decent, *supra* note 11, at 341.

45. *See* AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 3–6 (2d ed. 2015).

vidual rules of national or international procedure.[46] As Ronald Dworkin said, a principle is a "standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[47] Another way of describing the distinction in the procedural realm is that general principles identify what is considered fair, whereas rules of procedure describe the tangible means of achieving that standard of fairness.[48]

Because Kotuby and Sobota's analysis of general principles of international law is more recent than Cheng's, their conclusions will provide the framework for the current discussion. According to Kotuby and Sobota, six principles of procedure must exist if a tribunal is to provide a legitimate determination of a party's legal rights.[49] First, the court must have jurisdiction over the parties and the dispute, and the parties must have adequate notice of the proceedings.[50] While arguments can arise over 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 final and binding.[51] Indeed, as Laurence Solum has said,

[P]rocedural 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.[52]

The centrality of jurisdiction and notice to the adjudicative process suggests that both should be considered to constitute procedural *jus cogens*. This conclusion is 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."[53]

Kotuby and Sobota's second principle of international procedural law focuses on the impartiality and independence of the decisionmaker.[54] This principle has been extensively discussed in scholarly and judicial settings[55] and is al-

46. *Compare* FED. R. CIV. P. *and* CIV. PROC. R. (Eng.) *with* AMERICAN LAW INSTITUTE & UNIDROIT, PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE (2004) [hereinafter ALI/UNIDROIT].

47. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (2d ed. 1978).

48. *See* ALI/UNDITROIT, *supra* note 46, at 39 (noting the ALI/UNIDROIT Rules of Transnational Civil Procedure were meant to "provid[e] greater detail and illustrat[e] concrete fulfillment of the Principles").

49. *See* KOTUBY & SOBOTA, *supra* note 42. Cheng identified eight norms, although those were very similar those proposed by Kotuby and Sobota. *See* CHENG, *supra* note 41, at 257–386 (listing jurisdiction; power to determine the extent of jurisdiction (*compétence de la compétence*); *nemo debet esse judex in propria sua causa*; *audiatur et altera pars*; *jura novit curia*; proof and burden of proof; the principle of *res judicata*; and extinctive prescription); *see also id.* at 258 (summarizing the principles outlined in the Greco-Bulgarian Mixed Arbitral Tribunal in the *Arakas (The Georgios) Case* from 1927).

50. *See* KOTUBY & SOBOTA, *supra* note 42, at 158–60.

51. *See* Solum, *supra* note 28, at 183.

52. *Id.*

53. Criddle & Fox-Decent, *supra* note 11, at 367.

54. *See* KOTUBY & SOBOTA, *supra* note 42, at 165–76.

55. *See* 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*

so considered central to the legitimacy of the dispute resolution process.[56] Again, the peremptory nature of this principle appears incontrovertible, since independence and impartiality of decisionmakers is, as Criddle and Fox-Decent say, "indispensable to the state's ability to secure legality for the benefit of all."[57]

Kotuby and Sobota's third norm involves procedural equality and the right to be heard.[58] While some commentators have found it difficult to distinguish between these two concepts at the level of individual rules,[59] there seems to be little if any scope for arguing that procedural equality and the right to be heard in matters determining one's substantive rights are not "indispensable to the state's ability to secure legality for the benefit of all[]" as a matter of principle.[60] As a result, these norms can be said to rise to the level of procedural *jus cogens*.

Kotuby and Sobota's fourth principle of international procedural law involves the condemnation of fraud and corruption.[61] In some ways, these principles appear to relate more to substantive concerns than procedural issues, given that many of the examples discussed by Kotuby and Sobota involve the duty of adjudicators not to give effect to agreements or actions that are fraudulent or corrupt.[62] Still, Kotuby and Sobota may also have been thinking about efforts to perpetuate a fraud on the judicial process, as in situations where parties or third parties seek to intimidate the judge.[63] While this latter category of concerns appears to be procedural in nature, those matters could just as easily be included in provisions regarding the independence and impartiality of decisionmakers.[64] Therefore, it does not appear that concerns about fraud and corruption can or should be characterized as independent *jus cogens* norms, although further analysis could lead to a contrary conclusion.

The fifth principle discussed by Kotuby and Sobota involves evidence and burdens of proof.[65] 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 be subsumed into other categories.[66] For example, the failure to allow parties to present evidence could fall within the gen-

of International Judges, 83 AM. SOC'Y INT'L L. PROC. 508, 508 (1989); Philippe Sands et al., *The Burgh House Principles on the Independence of the International Judiciary* 4 L. & PRAC. INT'L CTS. & TRIBUNALS 247 (2005).

56. *See* KOTUBY & SOBOTA, *supra* note 42, at 165–76.

57. Criddle & Fox-Decent, *supra* note 11, at 367.

58. *See* KOTUBY & SOBOTA, *supra* note 42, at 176–83.

59. *See* Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 136–37 (2008) (book review).

60. Criddle & Fox-Decent, *supra* note 11, at 367.

61. *See* KOTUBY & SOBOTA, *supra* note 42, at 183–90.

62. *Id.*

63. *See, e.g.*, *Judges Targeted Fast Facts,* CNN (Apr. 18, 2018), http://www.cnn.com/2013/11/04/us/judges-targeted-fast-facts/ (listing federal judges who have been threated or killed as a result of their work).

64. *See* KOTUBY & SOBOTA, *supra* note 42, at 165–76.

65. *See id.* at 190–96.

66. *See id.* at 197.

eral right to be heard, as could concerns about improperly or illegally obtained evidence.[67] Other issues that are discussed by Kotuby and Sobota under this heading, such as those relating to burdens of production and proof, and matters involving the weight of evidence, would seem to be better categorized as rules rather than core principles of procedural justice, given the significant variation between jurisdictions on how these norms operate.[68] Therefore, those issues—such as the right to present evidence—that fall within other protected categories could be considered peremptory in nature, whereas those matters—such as those involving burdens of production and proof—that are more akin to rules would not rise to the level of procedural *jus cogens*.

Kotuby and Sobota's sixth and final principle involves the concept of *res judicata*, meaning that parties are bound by properly rendered judgments, which precludes claims from being retried a second time by the same court or tribunal.[69] Given other commentary indicating that finality of decisions is "nonoptional," the notion of *res judicata* would appear to rise to the level of procedural *jus cogens*.[70]

IV. APPLICATION OF PROCEDURAL *JUS COGENS* TO U.S. IMMIGRATION DISPUTES

The next question involves how procedural *jus cogens* can be used in matters involving U.S. immigration proceedings. Several possibilities exist, including those that can be asserted by individuals and those that can be asserted by states.

A. Individual Assertions of Procedural Jus Cogens

The first way that procedural *jus cogens* could arise in matters involving U.S. immigration policy and practice is in national court proceedings. The most obvious option would be for individuals to assert *jus cogens* in U.S. court. For example, if the current Administration carries out its proposal to eliminate immigrants' access to justice, procedural *jus cogens*—particularly those aspects that focus on procedural equality and the right to be heard—could be asserted in a constitutional challenge to the implementation of that plan.[71]

How would such claims be received? At this point, the United States Supreme Court has not decided whether and to what extent *jus cogens* norms are applicable to disputes heard in U.S. court.[72] A number of circuit courts, however, have relied on *jus cogens* to hold foreign officials liable for certain actions—

67. *See id.* at 196.

68. *See id.* at 191–95; Strong, *supra* note 11, at 402–03.

69. *See* KOTUBY & SOBOTA, *supra* note 42, at 197–202.

70. Kevin M. Clermont, Res Judicata *As Requisite for Justice,* 68 RUTGERS U. L. REV. 1067, 1082 (2016).

71. Rogers & Stolberg, *supra* note 4.

72. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (declining to address the *jus cogens* claim).

typically torture—that violate those norms.[73] As a result, it is possible that some U.S. judges will be receptive to the invocation of procedural *jus cogens*.

Although the United States is the most logical place to assert a claim relating to deficiencies with U.S. immigration processes, it is not the only possible forum. Because *jus cogens* is a principle of international law, its application is not limited solely to the place where the wrongdoing occurred.[74] If the injury in question arose as a matter of international law, then individuals may be able to assert a claim for damages in another national court.[75]

One possible venue would be the home courts of the immigrant(s) in question. This option appears particularly appealing if the individual whose procedural rights were violated had obtained legal residency in the United States.[76] Still, some individuals—such as those who are fleeing persecution or who come from a country that is not willing to endanger its relationship with the United States—may not find their national courts very welcoming.

In this latter subset of cases, injured individuals should consider whether it would be possible to assert their claims in a third nation, based on the concept of universal jurisdiction.[77] Universal jurisdiction has been discussed most frequently in the context of criminal actions, but there are those who believe it is also available in civil disputes involving violations of international law.[78] Such a proposition has never been tested in cases involving violations of procedural *jus cogens*, but it is theoretically possible.

B. State Assertions of Procedural Jus Cogens

Although it may be possible for an individual to base a claim in national court on procedural *jus cogens*, it is only recently that individuals have been considered competent to obtain recovery for violations of international law.[79] Traditionally, international law operated only between states, meaning that any violation of that law was considered injurious only to a state, not an individu-

73. *See* Yousuf v. Samantar, 699 F.3d 763, 776–77 (4th Cir. 2012) (citing authorities from the Seventh and Ninth Circuits), *cert. denied*, 571 U.S. 1156 (2014).

74. *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: *JUS COGENS* AND OBLIGATIONS *ERGA OMNES* 203, 203 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006).

75. *See id.*

76. *See, e.g.*, Brittany Meija, *It's Not Just People in the U.S. Illegally ICE is Nabbing Lawful Permanent Residents Too*, L.A. TIMES (June 28, 2018), http://www.latimes.com/local/lanow/la-me-ln-lawful-resident-20180628-htmlstory.html; Maria Sacchetti & David Weigel, *ICE Has Detained or Deported Prominent Immigration Activists,* WASH. POST. (Jan. 19, 2018), https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?noredirect=on&utm_term=.84cf6df24242.

77. *See* Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction,* 100 AM. J. INT'L L. 142, 142 (2006).

78. *See id.*

79. *See* Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?*, 96 AM. SOC'Y INT'L L. PROC. 219, 225 (2002).

al.[80] While the historic understanding of international law has shifted somewhat with respect to individual rights to recovery,[81] the ability of states to enforce international law remains undiminished. It is therefore useful to consider whether and to what extent a state could object to possible violations of procedural *jus cogens* by the United States.

One possibility is for a state to bring a claim against the United States in the International Court of Justice ("ICJ").[82] The Statute of the ICJ respects peremptory norms as a type of binding authority, so there is no difficulty in basing legal arguments on *jus cogens.*[83] Instead, the problem would involve establishing jurisdiction over the United States for injuries relating to the denial of procedural justice regarding immigrants, since the United States withdrew from the compulsory jurisdiction of the ICJ in 1985.[84] This is not to say that jurisdiction could not be established, but simply to note that it cannot be assumed.

Although states should first resort to judicial means of enforcing procedural *jus cogens*, states are allowed to respond to violations of international law through certain non-judicial mechanisms known as countermeasures.[85] Countermeasures involve various actions (other than force) that are "unilateral in character, taken for a coercive purpose by a State (the 'reacting State') in response to an internationally wrongful act committed by the State against whom the countermeasures are addressed (the 'target State') and which, under normal circumstances, would themselves be unlawful."[86] Countermeasures may be taken by a state that experiences a direct injury as a result of the violation of international law—as might be the case with the home state of an immigrant who was denied procedural justice in U.S. courts—or, in some cases, by third states.[87]

The legal literature on countermeasures is extensive and should be consulted before any action is taken.[88] It is enough for current purposes, however, to note that countermeasures need not be reciprocal in nature (*i.e.*, they need not relate to the particular harm suffered, so long as the response is proportional) and may be triggered by violations of all types of international law, ranging

80. *See id.*

81. *See id.*

82. *See* Statute of the International Court of Justice, art. 1. Only states may be parties in the ICJ. *See id.* art. 34.

83. *Id.* art. 38, ¶1.

84. *See* Letter from George P. Shultz, Secretary, U.S. Dep't of State, to Dr. Javier Perez de Cuellar, Secretary-General, United Nations (Oct. 7, 1985), *cited in* Medellín v. Texas, 555 U.S. 491, 500 (2008).

85. *See* International Law Commission, Responsibility of States for Intentionally Wrongful Acts, arts. 26, 49–54 (2001).

86. N. Jansen Calamita, *Countermeasures and Jurisdiction: Between Effectiveness and Fragmentation,* 42 GEO. J. INT'L L. 233, 242 (2011).

87. *See* International Law Commission, *supra* note 94, arts. 26, 49–54; Christian Hillgruber, *The Right of Third States to Take Countermeasures, in* THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER, *supra* note 74, at 265, 265.

88. *See* Calamita, *supra* note 86, at 242–44 (discussing authorities).

from customary international law to treaty law and thereby including *jus cogens*.[89]

V. CONCLUSION

Since January 2017, the Trump Administration has challenged numerous legal and constitutional norms and threatened the international legal and political order in several respects.[90] Furthermore, it appears likely that further initiatives, including those involving immigrants' procedural rights, will be advanced in the future.[91]

Attacks on immigrants are highly problematic for a number of reasons, not the least of which is the vulnerability of the immigrant population within the relevant legal and social structure. Immigrants make a convenient scapegoat for those seeking to offset blame, and politicians who advance anti-immigration agendas often find comfort in the belief that such actions are insulated from external review or condemnation. But international law was created precisely in order to hold both countries and individuals accountable for their improper actions.

International procedural law has long been ignored by both advocates and scholars, likely because of the perception that procedural law exists merely "to serve the substantive task."[92] That paradigm, however, is neither accurate nor wise. Procedural law is inherently and intrinsically valuable to any system of justice and provides important limitations on state and official behavior.[93] As this Essay has shown, international procedural law—particularly peremptory norms known as procedural *jus cogens*—can be used to counteract improper violations of immigrants' rights in the United States. While one hopes that such efforts will not be necessary, history has shown that it is necessary to be prepared for all possible contingencies.

89. *See id.*

90. *See supra* notes 1–4, 32 and accompanying text.

91. *See* David Nakamura, *Travel-ban Ruling Could Embolden Trump in Remaking the U.S. Immigration System*, WASH. POST (June 27, 2018), http://www.msn.com/en-us/news/politics/travel-ban-ruling-could-embolden-trump-in-remaking-the-us-immigration-system/ar-AAzdokR?li=BBnbcA1; Rucker & Weigel, *supra* note 3.

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

93. *See* John B. Attanasio, *A Duty-Oriented Procedure in a Rights-Oriented Society*, 63 NOTRE DAME L. REV. 597, 605 (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 (2009).