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Recommended Citation
Satya T. Mouland, Rethinking Adjudicative Jurisdiction in International Law, 29 Wash. L. Rev. 173 (2019). Available at: https://digitalcommons.law.uw.edu/wilj/vol29/iss1/6

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RETHINKING ADJUDICATIVE JURISDICTION IN INTERNATIONAL LAW

Satya T. Mouland†

Abstract: The contribution of national courts to international law has long been doubted in the international law literature. As an aspect of the state’s power to prescribe, courts have been conceived as organs that merely apply the state’s laws, which may give effect to an international law norm. According to this conception, national courts merely apply and operate within the state’s national legal system and rarely have a direct contribution to international law. However, in enforcement proceedings for international arbitral awards, arising at the intersection between the law of state immunity and the law governing the enforcement of arbitral awards, a number of cases challenge this interpretation. In this area, adjudicative jurisdiction may be emerging as a specific manifestation of the state’s enforcement jurisdiction—that is, the power to induce or compel compliance with a state’s laws. In view of the lack of clarity regarding the lawful scope of a state’s enforcement jurisdiction in international law, which is arising increasingly in a globalized world where jurisdictional disputes cross territorial borders, the approach put forward in this study may be useful for uncovering potential state practice which may crystalize as customary international law. This article seeks to draw attention to this practice, illustrating how a conception of adjudicative jurisdiction as enforcement jurisdiction is not only timely and useful, but also potentially reflective of emerging state practice. It sets some normative foundations for how such an approach may be defensible and identifiable, thereby proposing that this topic is worthy of further exploration.

Cite as: Satya T. Mouland, Rethinking Adjudicative Jurisdiction in International Law, 29 WASH. INT’L L.J. 173 (2019).

I. INTRODUCTION

In an increasingly globalized world in which disputes often cross territorial borders, jurisdictional conflicts between states arise. In this context, international law may become important for resolving questions of which state, and on what basis, has jurisdiction. This problem emerges in light of the recent Enrica Lexie dispute, currently pending before an Annex

† Satya Talwar Mouland is a fully-funded third year PhD candidate (Queen Mary Research Studentship) at Queen Mary University of London. Her PhD thesis, under the supervision of Dr. Stephen Allen, Dr. Paul Gragl, and Professor Julian Lew QC, is entitled “An Inquiry on the Scope of International Arbitral Authority: Common Approaches to Enforcement Jurisdiction.” Satya has previously published in the European Law Students’ Association and Asian Law Students’ Association journals. She has presented at several conferences, including the Queen Mary Society of Legal Scholars Graduate Conference, at the Sorbonne, and was selected to participate in the two-week Atlas Agora Programme in Dublin in 2018. Satya is a fluent German speaker and advanced French speaker.

VII Tribunal, which is an arbitral tribunal constituted under Annex VII of the UN Convention for the Law of the Sea (“UNCLOS”). The dispute arose after two Indian fishermen were shot by Italian marines just outside Indian territorial waters. India brought criminal proceedings against the Italian marines, claiming the right to prosecute on the basis of the so-called “Lotus Principle”—which holds that states have authority to adopt laws allowing them to prosecute persons provided that the state’s actions are not prohibited by international law. Italy contested India’s jurisdiction, claiming instead that the controversy should be governed by UNCLOS because it concerned a question of “interpretation or application” of the treaty. Thus, on the one hand, there was a conflict between the applicable regime (UNCLOS or general rules of jurisdiction). However, for our purposes, we are concerned with the separate issue pertaining to the lack of clarity in the international resolution of the dispute. The International Tribunal for the Law of the Sea (“ITLOS”), established under UNCLOS Article 287(1)(a) and Annex VI, issued a provisional measures order halting Indian criminal proceedings. However, it did not determine the merits of the matter—namely which state, and on what basis, had jurisdiction to enforce its criminal laws in respect of the dispute? A lack of clarity in answering these questions was acknowledged by Judge Paik in the Provisional Measures Order. The dispute is now pending before an Annex VII arbitral tribunal, which is a default method of dispute resolution for cases concerning the interpretation or application of UNCLOS. However, given the restricted mandate of the Annex VII Tribunal to decide questions of interpretation under UNCLOS, it


3 The Lotus Principle, which is contentiously debated by scholars, derives from the famous Lotus decision of the Permanent Court of International Justice and is still being relied on by states in cross-border disputes of this context. See generally S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

4 See The Enrica Lexie (It. v. India), Case No. 24, Order of Aug. 24, 2015, ¶ 38, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.24_prov_meas/24_published_texts/2015_24 _Ord_24_Aug_2015-E.pdf; see also UNCLOS art. 288(1), supra note 2, at 510 (“A court or tribunal referred to in article 287 [regarding choice of procedure] shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this [Section 2. Compulsory Procedures Entailing Binding Decisions].”).

5 Enrica Lexie, Order at ¶ 141.


7 See Case Overview, The “Enrica Lexie” Incident, supra note 1.

8 See UNCLOS Annex VII, supra note 2, at 571–74.
is unlikely that the tribunal will address the broader question of which state should have enforcement jurisdiction.

For our purposes, “enforcement jurisdiction” is not considered from the narrower viewpoint adopted in some public international law texts, which is that it is only permitted in the territory of a foreign state with that state’s consent.\(^9\) Instead, enforcement jurisdiction, as used here, may encompass any acts of states to “induce or compel compliance” with their laws or through their courts.\(^10\) This is the definition adopted in *The Restatement (Third) of Foreign Relations Law* and will be considered authoritative for these purposes. As acknowledged by the late Professor Cassese, “the great jurist observes . . . that the ‘original and persistent flaw of the international legal order’ is the lack of legislative, judicial and enforcement organs acting on behalf of the whole community.”\(^11\) From the outset, it must be noted that this is inevitable, given the decentralized nature of the international legal order, as acknowledged widely in the literature.\(^12\) However, the importance of the capacity of states to compel or induce compliance cannot be denied. It goes to the very functioning of the international legal order and is the means by which international law is given effect. Professor Harold Koh has found, for example, that the principal means by which international law is enforced are states’ abilities to induce compliance.\(^13\) In his words, “repeated compliance gradually becomes obedience.”\(^14\)

In light of the lack of clarity regarding enforcement jurisdiction, and its importance more generally, this article examines how “adjudicative jurisdiction,” that is, the decision-making authority of national courts, may be reconceived as a possible source of a state’s enforcement jurisdiction. As

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\(^9\) See, e.g., Christopher Staker, *Jurisdiction, in International Law* 313 (Malcom D. Evans ed., 4th ed. 2014) (enforcement is only mentioned in passing, and it is stated as only permitted in the territory of a foreign state with that state’s consent); Malcom N. Shaw, *International Law* 472 (8th ed. 2017).

\(^10\) See *Restatement (Third) of Foreign Relations Law* § 401(c) (Am. Law Inst. 1987). This is an academic document compiled by the American Law Institute and not an official document of the United States. It has been compiled by legal academics and practitioners and is based on comparative law sources. It will thus be considered as an authoritative source for how jurisdiction is conceived according to state practice.


\(^14\) Id. at 2603.
a source of any potential practice, decisions in the area of international arbitration will be drawn upon. This is an area where it may be unsurprising that such practice is emerging, given the special nature of international arbitral tribunals as bodies constituted on the consent of the discrete parties to the dispute (and thus operating, in principle, outside of state structures) but which depend, for the enforcement of their decisions, on national courts. National courts are the principal public bodies ensuring that international arbitral tribunals’ authority is heeded.

The emergence of adjudicative jurisdiction as a possible source of any international law rules of enforcement jurisdiction challenges the orthodox discourse in public international law scholarship that adjudicative jurisdiction is merely a facet of a state’s “prescriptive jurisdiction”, or its authority to adopt laws.\(^{15}\) The relevant source is customary international law,\(^{16}\) though there is no scope within this article to examine whether any custom has crystallized. Instead, this article seeks to make a theoretical contribution to understanding how adjudicative jurisdiction as potential enforcement is worthy of further investigation. Such an approach would allow new potential state practice to be considered as a source of any rules.

To test this hypothesis: first, I examine the underlying theoretical approach that would allow adjudicative jurisdiction to be considered as a possible manifestation of enforcement jurisdiction under public international law; second, I examine this approach in context to illustrate how decision-making authority may be viewed as enforcement, focusing mainly on case law arising in the area of international arbitration; third, I look at how an approach which conceives of international law in national courts rather than national courts in international law may run into difficulties, and thus propose the latter should be adopted; fourth, I examine the extent to which principles underpinning “authority” (that is, the power of states, generally, under international law, which may be exercised through prescriptive, adjudicative or enforcement power) could assist in the coordination of consistent approaches to enforcement jurisdiction between courts (as

\(^{15}\) This orthodoxy is still promulgated by major textbook authors. See, e.g., Staker, supra note 9, at 309 (defining jurisdiction as “to make, apply and enforce rules of conduct[,]” which the judiciary only applies or interprets (but does not develop)); Michael Akehurst, Jurisdiction in International Law, 46 BRIT. Y. B. INT’L L. 145 (1972–73) (analyzing adjudicative jurisdiction solely as a form of state prescriptive jurisdiction).

\(^{16}\) See Statute of the International Court of Justice art. 38(1)(b) (referring to international custom as a source of international law) [hereinafter ICJ Statute].
opposed to jurisdiction as a specific exercise of state sovereignty, for example).

II. **ADJUDICATIVE JURISDICTION AS AUTHORITY**

Before examining the law of adjudicative jurisdiction, it is important to understand how commentators treat the general concept. Mainstream public international law commentators treat adjudicative jurisdiction as part of a state’s prescriptive jurisdiction. This means that a national court merely has the capacity to interpret international law norms to the extent that the state has adopted laws. Thus, their capacity to contribute to any international law directly is inherently limited by the state where they are located. However, as will be illustrated in the following section, adjudicative jurisdiction ought to be considered as conceptually distinct from prescriptive jurisdiction. This provides a useful starting point for determining potential state practice.

A. **Adjudicative Jurisdiction as Prescriptive Jurisdiction**

The first approach may be illustrated by use of the seminal *Trendt ex decision*. The Central Bank of Nigeria issued an irrevocable letter of credit in favor of the claimant, a Swiss company, to pay for 240,000 tons of cement that the claimant sold to an English company. Upon shipping the cement, there was congestion at the port of discharge and the Central Bank declined to make the payments. The English Court of Appeal was seized to consider the question of whether it could exercise jurisdiction in respect of the Central Bank of Nigeria—a governmental department of the state.

According to the international principle of state immunity, the capacity of a state to exercise adjudicative jurisdiction in respect of a foreign state is restricted. However, in *Trendtex*, the court found that due to the principle of international law which now recognizes that sovereign immunity should not be afforded to government departments in connection with commercial transactions, its jurisdiction was available. Thus, for what the court declared, it gave effect to the international law rule according to which a state may be impleaded before the courts of foreign states insofar as its

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19 *Id.* at 529.
20 *Id.*
commercial activities are concerned (jus gestionis). However, in terms of the effect of that decision, the court did nothing more than declare what Nigeria’s rights and obligations were. It did not compel or induce the compliance of Nigeria with its obligations.

According to this approach, courts and other judicial authorities are the means by which the state makes its law applicable to the activities, relations, or status of persons (prescriptive jurisdiction). This is reflective of the general approach taken by authors examining adjudicative jurisdiction. These authors consider adjudicative as merely declaratory of the state’s prescriptive power and, thus, ultimately constrained by the extent to which the national law adopts the international norm. Thus, Trendtex is exemplary of an approach according to which courts can be viewed as giving effect to a state’s prescriptive power.

B. The Lotus Decision on Jurisdiction

In order to understand the potential contribution of adjudicative jurisdiction to international law, it is useful to distinguish this conception from the traditional conception of jurisdiction as a specific exercise of sovereignty. The traditional conception based on sovereignty can be traced to the Lotus decision. Despite the criticisms of this approach more generally, which will be outlined below, a conceptual distinction between prescriptive and adjudicative jurisdiction is in line with the Permanent Court of International Justice’s approach in Lotus.

The Lotus dispute concerned a collision between French and Turkish ships, resulting in the death of several Turkish sailors. Turkey exercised its criminal jurisdiction over the French captain. Both parties consented to the Permanent Court of International Justice (“PCIJ”) to decide the question of whether Turkey had been permitted to exercise such jurisdiction. Thus, the

22 See, e.g., Akehurst, supra note 15; Shaw, supra note 9, at 472; Staker, supra note 9, at 309; see also 1 Oppenheim’s International Law 456 (Robert Jennings & Arthur Watts eds., 1992).
23 See S.S. Lotus, at 18–19; see also Alex Mills, Rethinking Jurisdiction in International Law, 84 Brit. Y. B. Int’l L. 190, 190–94 (2014).
24 Though the Lotus decision has been widely criticized, it is useful, as a conceptual matter, to distinguish it here because the basis upon which a state may exercise jurisdiction (state sovereignty) still pervades much of the literature. See, e.g., Staker, supra note 9; Shaw, supra note 9.
25 S.S. Lotus, at 5.
26 Id.
27 Id. at 12.
decision is of little authoritative guidance for this article since it concerned a state’s prescriptive jurisdiction and not adjudicative jurisdiction. This is also clear from the very formulation of the question before the court: “Has Turkey . . . acted in conflict with the principles of international law[?]”

This question differs from the one addressable here: whether there are any principles according to which Turkey could have lawfully exercised jurisdiction.

However, the decision still pervades much of the international law literature on the doctrine of jurisdiction more generally, which provides a useful foundation for distinguishing the approach being suggested herein—that is, adjudicative jurisdiction as a possible manifestation of a state’s general authority under international law, rather than a specific exercise of state sovereignty. With regard to prescriptive jurisdiction, the PCIJ found that a state is permitted to do all that it is not prohibited from doing. In this regard, the PCIJ approached the question of Turkish criminal jurisdiction under international law in the negative—whether there were any principles not prohibiting Turkey from exercising jurisdiction (rather than asking whether there are any allowing the exercise). This formulation suggests that the PCIJ assumed that states have broad discretion to exercise jurisdiction because international law governs only prohibitive rules of jurisdiction. With regard to enforcement jurisdiction, the court stated that this is generally prohibited within the territory of another state absent a state’s consent. This can be interpreted in line with the court’s approach to prescriptive jurisdiction as requiring some authorizing act upon which enforcement jurisdiction is based (a “permissive rule”).

However, viewing adjudicative jurisdiction as a possible source of authority would not be out of step with the court’s own view on the nature of the international legal order. It stated in this regard, at p. 18 of its judgment:

International law governs the relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by

28 Id. at 5.
29 See S.S. Lotus, at 18.
30 See id. at 19 (“It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law.”).
31 Id.
usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

An approach which conceives of adjudicative jurisdiction as a specific manifestation of the state’s authority which may be exercised in a number of forms (for example, prescriptive and enforcement power) is useful for a number of reasons. First, it does not restrict the capacity of a national court to exercise jurisdiction under the formal consent of the particular state to the international law norm. This observation was made by Judge Bruno Simma in his criticism of the *Lotus* decision in the *Kosovo* advisory opinion of the ICJ.\(^{32}\) Judge Simma explained that the so-called “Lotus Principle” does not speak to the question of the legality of jurisdiction because stating that something is not prohibited does not logically mean it is therefore permitted. There may be a number of principles in between permitted and prohibited according to which a state may lawfully exercise jurisdiction, though they are not required to do so on the basis of some authorizing act (which may, for example, give effect to an international norm as part of national law). The question of whether a state is required to exercise jurisdiction according to an established international law principle (such as *jus gestionis*) is distinct from the question of whether it would not be prohibited from doing so, and such an exercise would accord with the principle of sovereign equality. Put differently, there may be lawful grounds of adjudicative jurisdiction which are not expressly authorized by an international law principle, but which are still lawful because they accord with a principle underpinning authority. “Authority” in this sense is the capacity of states to act, through prescriptive, adjudicative, and enforcement means, and will be used interchangeably with the concept of “jurisdiction” throughout.

Conceiving of jurisdiction as a specific exercise of sovereignty can, moreover, be criticized from several angles. For example, a focus on the extent to which a state may apply its own laws to foreign conduct may place too much emphasis on a state’s sovereignty without considering the

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\(^{32}\) See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, at 478, 480 (July 22) (Declaration of Judge Simma) [hereinafter Kosovo Advisory Opinion, Decl. of Judge Simma].
concomitant obligation of state responsibility under international law. 33 Under the law of state responsibility, national courts are conceived as the organs of states, and thus, to the extent that their decisions engage a norm of international law, national courts are capable of engaging the state’s responsibility. 34 Nonetheless, at the outset, it must be acknowledged that it is still the dominant approach as a matter of positive law. 35

However, an approach to jurisdiction which conceives of jurisdiction as a specific exercise of sovereignty overlooks whether there are any other grounds upon which a state may lawfully exercise its jurisdiction over a foreign state, which are not necessarily permitted or prohibited. Consequently, in view of disputes such as the Enrica Lexie, where conflicts of jurisdiction between states and jurisdictional regimes are occurring, this approach ought to be adopted.

C. Adjudicative Jurisdiction as Distinct from Prescriptive Jurisdiction

From this starting point of “jurisdiction” as “authority” more widely, it becomes possible to view a state’s adjudicative jurisdiction as manifestation of enforcement. The following sections illustrate this by applying various lenses to case law examples in the area of international arbitration, where this practice may be arising. Consequently, this section illustrates the utility of an approach that understands adjudicative jurisdiction as not merely a facet of a state’s prescriptive jurisdiction through the concrete example of national court proceedings related to arbitrations. Though international arbitration is not the principal focus of this article, it is an area in which national courts are the principle “public” bodies which may ensure the enforcement of this particular international court’s decisions. 36

33 See Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 224–302 (2007) (arguing that too much emphasis on sovereignty risks a “utopian vision of international law.” This should be tempered with a view on responsibility).


35 See, e.g., Paul Gragl, Jurisdictional Immunities of the State in International Law, in The Oxford Handbook of Jurisdiction in International Law 229 (Stephen Allen et al. eds., 2019) (Chapter 11).

36 Though international arbitral tribunals tend to be considered as “private” institutions by a number of arbitration scholars. See generally Gary Born, International Commercial Arbitration (2nd ed. 2014); Margaret Moses, The Principles and Practice of International Commercial Arbitration 1 (3rd ed. 2017) (“Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes outside any judicial system.”); Nigel Blackaby et al., Redfern and Hunter on
Thus, it is the principal source of any potential practice relating to the lawful scope of a state’s enforcement jurisdiction.

1. Applying Scelle’s Dédoublement Fonctionnel

To better understand this perspective, it is useful to apply the lens of Georges Scelle’s *dédoublement fonctionnel* theory. Scelle argued that courts have a dual role when they act within the international legal sphere: not only as state organs that apply national law, but also as international agents (*gouvernants et agents spécifiquement internationaux*). According to this, even while applying a rule of national law, a national court may act in the international sphere insofar as its decision engages a norm of international law. Put differently, when a national court acts in the international legal sphere and exercises jurisdiction, the exercise of its authority may engage a norm of international law.

To illustrate the consequences of such an approach, take the example of *LR Avionics*. LR Avionics, a company registered in Israel, had obtained an arbitration award against the Federal Republic of Nigeria in a dispute arising out of a contract between them for the supply of military equipment. The arbitration was seated in Nigeria and subject to Nigerian law. LR Avionics applied to a U.K. court for enforcement of the arbitral award. Despite there being no link to U.K. territorial jurisdiction as a matter of private or public international law (or the “public sphere”), an English commercial court ended up considering the scope of its authority to enforce the award. For our purposes, this is a potential exercise in the international sphere, seeing as there was no connection to the state’s territorial jurisdiction, and thus, no national law that could justify the exercise of the court’s authority on its own. The court found that it had the...
power to declare the foreign award as enforceable, and such a power was not excluded by the foreign state’s immunity. From a perspective of how the decision is declaratory of any international law rule, one might point to the court’s reasoning with regard to the availability of its jurisdiction to declare the award enforceable under section 101 Arbitration Act of 1996. This gives effect to Article I of the Convention on the Recognition and Enforcement of Arbitral Awards (“New York Convention”) as part of U.K. law, providing for the enforcement of arbitral awards irrespective of where they are made. The Commercial Court found that Section 101 proceedings to enforce an award are “proceedings which relate to the arbitration” within the meaning of Section 9 of the SIA and thus do not attract immunity. Thus, for what the court declared, it found that its jurisdiction was not excluded by the foreign state’s immunity. However, when viewing the court’s exercise of authority in the public sphere as potential evidence of any rule, it is possible to understand the act of enforcing—what the court did—as another source of any potential international law rule. Put differently, as a consequence of the court’s exercise of its jurisdiction to ensure that the award was declared enforceable in the public sphere, this may be suggestive that this form of jurisdiction arises as an aspect of the court’s general jurisdiction and principles of immunity operate as lex specialis to this. Insofar as such a rule is shared widely by other courts in the public sphere, this might be evidence of a growing rule according to which the power to declare an award enforceable is a generally lawful aspect of a court’s international adjudicative authority.

2. Third Restatement

The new edition of The Restatement (Third) of Foreign Relations Law of the United States, a source compiled on the basis of comparative law research by the American Law Institute, also reflects this conceptual distinction between adjudicative and prescriptive jurisdiction. It has added “adjudicative jurisdiction” as a separate category to prescriptive and enforcement jurisdiction. In his commentary on the Third Restatement, the

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43 Id. at [21]–[23].
44 Id.; see Arbitration Act 1996, c. 23, § 101 (Eng.).
47 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 401(b) (AM. LAW INST. 1987).
48 See id.
late Cecil J. Olmstead, former president of the International Law Association and an advisor on the Third Restatement, points out that the addition of adjudicative jurisdiction does not just reflect an actualization of prescriptive jurisdiction (i.e., an exercise of the “law-making process” by the state through its courts under international law) but is rather the manifestation of a specific exercise of enforcement jurisdiction (i.e., the enforcement of a prescription through a judicial process). This seems to acknowledge, at least as a conceptual matter, that adjudicative jurisdiction is a separate source of international law and a possible source of a state’s enforcement power. Moreover, under section 431, “jurisdiction to enforce,” the relationship between prescriptive jurisdiction and enforcement jurisdiction is quite clear: a state may only enforce its laws if it has jurisdiction to prescribe such laws. However, there is no such limitation prescribed under section 421, “jurisdiction to adjudicate.” In this respect, in principle, a state may exercise jurisdiction through its courts whenever it would be “reasonable”. Consequently, the Third Restatement also supports an approach according to which there is no inherent restriction on a state’s authority to adjudicate to the prescriptive power of the state. Instead, through the addition of “adjudicative jurisdiction” as an additional category, the authors of the Third Restatement have acknowledged that adjudicative jurisdiction may be a separate source, and thus, a separate source of potential state practice.

III. ADJUDICATIVE JURISDICTION AS A SPECIFIC EXERCISE OF ENFORCEMENT JURISDICTION—UNCOVERING DIFFERENT APPROACHES

This section will illustrate, through a selection of representative case law examples in the area of arbitration, the different ways in which adjudicative jurisdiction may be treated as enforcement jurisdiction. This further supports the theoretical approach (that considers adjudicative jurisdiction as state authority) laid out in the previous sections by demonstrating its relevance in the practice of national courts. The first approach considers how national courts may act as enforcement agents as a consequence of the enactment of an international norm as domestic law. The second approach considers how courts may attain this status from the inherent powers of domestic courts in international law. The third approach

51 Id. § 421 (“A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.”) (emphasis added).
considers the issue through comparison of the approaches of different national courts’ legal reasoning in decisions engaging international norms. This third comparative approach considers situations where national courts exercise authority despite there being no connection between the forum and the controversy.

Beginning with the first approach, a domestic court may be obliged to recognize it has jurisdiction because of the enactment of an international rule within national law. Viewed on their own, judicial decisions are merely declaratory of the scope of a state’s prescriptive jurisdiction. This point can be illustrated not only by the effect of the Trendtex decision, as examined above, but also by its reasoning. In Trendtex, Lord Denning stated “in the last 50 years there has been a complete transformation in the functions of the sovereign state. Nearly every country engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit”.52 As a result of what Denning now stated to be a “modern rule of international law”, he found that since Nigeria engaged in these commercial activities, “it is [not] open to the Government of Nigeria to claim sovereign immunity in respect of commercial transaction”.53 Consequently, the court’s decision could, at best, be viewed as declaring the existence of the principle54 of jus gestionis.

Reversing the mode of analysis to consider not merely international law in national courts, but national courts in international law, new potential practice on enforcement may be considered. In his article, Domestic Courts in International Law: The International Judicial Function of National Courts, Professor Antonios Tzanakopoulos points out that domestic decisions may be “constitutive” of rules of international law.55 As such, we should consider “domestic courts in international law” rather than “international law in domestic courts.”56 To consider the latter, it is useful to apply Immanuel Kant’s philosophy of law to consider whether adjudicative

52 Trendtex, at 555.
53 Id.
54 This is a (normative) principle rather than a rule. See, e.g., HAZEL FOX & PHILLIPA WEBB, THE LAW OF STATE IMMUNITY 484 (Sir Frank Berman ed., 3d ed. 2013). Since there are still other approaches, jus gestionis can at best be considered a principle which has not yet crystallised into a source of international law.
56 Id. 133–37.
jurisdiction may be a manifestation of enforcement jurisdiction according to an inherent power of national courts.\textsuperscript{57} From the “practical necessity” (\textit{praktische Vernunft}) perspective, Kant describes the possibility that law may have some inherent quality.\textsuperscript{58} An act or a principle, for example, freedom (\textit{Wille}) is distinguished from freedom of choice (\textit{Willkür}). While freedom of choice is a desire that is not merely based in an action, but also in a reason for choosing to act in a certain way, freedom is fundamentally grounded in practical necessity. This perspective might be fruitfully applied to the notion that national courts’ actions, and not merely their decisions, may be constitutive of law. If courts consistently act in a particular way—such that (though they may not expressly state as much) the effect of their decisions is enforcement—then a practical necessity perspective would justify considering such practice as law. This is because there is something inherent in the act, which may itself be constitutive of law when taken together with other similar acts (to the extent it is in conformity with principles underpinning international law).

To illustrate the effect that this approach would have to understanding adjudicative jurisdiction as potential state practice on enforcement, consider the decision in \textit{Diag Human}.\textsuperscript{59} In \textit{Diag Human}, a Liechtenstein blood plasma company sought to enforce an award against the Czech Republic in the U.S. courts.\textsuperscript{60} As a matter of private international law, neither the parties nor the controversy had links to the United States or came under U.S. jurisdiction.\textsuperscript{61} The United States District Court for the District of Columbia dismissed the case, stating that it lacked jurisdiction to enforce the award because there was no commercial relationship between the parties, and therefore, the New York Convention did not apply.\textsuperscript{62} The New York Convention requires contracting states (of which there are 159, including the United States) to enforce international arbitration awards “irrespective of where they are made.” However, the United States has adopted a reservation in limiting the application of this principle to “commercial” activities.\textsuperscript{63}

\begin{footnotesize}
\begin{enumerate}
\item See id. at 370–85.
\item Id. at 132.
\item Id.
\item Id. at 134.
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Upon appeal, the district court’s dismissal was reviewed de novo. This time, the U.S. Court of Appeals considered the scope of its authority to enforce the award broadly and in accordance with specific requirements of foreign state immunity enacted in U.S. law. Section 1605(a)(6) of the Foreign Sovereign Immunities Act (“FSIA”) provides the general exception in respect of proceedings related to arbitrations. The court found that under section 1605(a)(6) there was a legal relationship between the parties and a governing legal instrument, and consequently, it could exercise its jurisdiction to recognise and enforce the arbitral award. Thus, by interpreting the FSIA’s exception in the negative, and considering its jurisdiction as not excluded under the statute, the court exercised jurisdiction to enforce the award.

However, the Diag Human court’s exercise could not be identified if one scrutinized the reasoning of the court alone. In other words, the court did not expressly state that it would be permitted to exercise jurisdiction to enforce the award because some national or international norm obliged it to do so. Nonetheless, the effect of the exercise ensured enforcement of the award in conformity with the principle of enforceability under the New York Convention. Though the New York Convention was not the source of the court’s authority, it informed the court’s decision as to why it ought to exercise its authority. Accordingly to this, the court exercised authority in the public sphere to enforce the award.

Widening out to the third approach it becomes possible to identify further practice which may crystallize into customary international law. Customary international law requires widespread, consistent and representative practice. As explained, it is not being examined whether this

64 Diag Human, 824 F.3d at 134.
65 Id.
67 Diag Human, 824 F.3d at 134–37.
68 See Diag Human S.E. v. Czech Rep. Ministry of Health, 907 F.3d 606, 608–09 (D.C. Cir. 2018) (“We enforce foreign arbitral awards according to the New York Convention, part of a carefully crafted framework for the enforcement of international arbitration awards.”) (internal quotations removed). Thus, the New York Convention is merely the framework within which the national court considers the scope of its authority but does not oblige them to exercise jurisdiction.
69 This would, of course, require the further conditions of widespread and representative practice, as well as opinio juris on the part of the affected states, which outside the scope of this article.
has emerged in any particular area, but rather how an approach which conceives of exercises of adjudicative jurisdiction as potential state “acts” may contribute to the identification of such practice. This might begin with the second approach for identification of such practice, which examines other exercises of decision-making authority to find commonalities between national courts. Thus, to the extent that national courts exercise enforcement forms of authority consistently with each other and in accordance with the relevant principles of international law which underpin authority, this may be evidence of growing customary international law relating to lawful grounds of enforcement jurisdiction.

Beginning with the Diag Human decision, there are many decisions in other jurisdictions in which national courts have effectively exercised enforcement jurisdiction to ensure that an international arbitration award would be declared enforceable. For example, in Svenska Petroleum, in France, an arbitration award was rendered against the Republic of Lithuania in favor of a Swedish company, Svenska Petroleum, according to the International Chamber of Commerce (“ICC”) Arbitration Rules. The parties had selected these rules to govern their dispute. However, a U.K. court—without any territorial connection to the dispute—was faced with deciding whether it could enforce the award. The court found that it had jurisdiction over the proceeding to declare the award enforceable because the arbitral award fell within the meaning of Section 9 of the UK State Immunity Act 1976 (“SIA”). Consequently, the court followed the approach in LR Avionics and exercised jurisdiction to enforce the award. Thus, both for what the court decided and its exercise of authority to enforce, the decision may be viewed as a possible source of state practice to the extent that the same approach is shared by other courts. The consequence of any such practice would be that, at least as far as a court’s power to declare an award enforceable, this form of jurisdiction would be viewed, as between those courts, as a lawful exercise of enforcement.


71 See infra Part V.


73 Svenska Petroleum, at [116].
IV. POSSIBLE EFFECTS OF MONISM AND DUALISM DISTINCTION ON UNDERSTANDING ADJUDICATIVE JURISDICTION AS A POSSIBLE SOURCE OF INTERNATIONAL LAW

Through examination of the different approaches of monism and dualism, this section further illustrates why national courts’ contributions should be perceived as a question of domestic courts in international law rather than international law in domestic courts. For these purposes, “monism” and “dualism” describe how the national and international legal orders relate to each other. Monism treats the national and international legal systems as part of the same system.\(^{74}\) Dualism views national and international legal systems as separate in principle, and thus, generally requires the national legislature to adopt an international norm for it to become binding in the state’s national courts.\(^{75}\)

From the perspective of how international law is given effect in national courts, it might be easier to see how a national court could contribute to international law from the monist perspective as it automatically views international law as part of national law. The basic approach of monism is well explained by the monist, Hans Kelsen.\(^{76}\) In his influential work, *Pure Theory of Law*, the Austrian jurist theorized that every legal concept and body of law derives its legal validity from some basic norm (*Grundnorm*). Thus, legal principles and concepts belong to a body of law but also derive their validity (or existence) as law from the basic norms that govern them. According to this perspective, an exercise of decision-making authority by a national court could contribute to international law in a more direct sense. To illustrate this through case law in a monist state, such as France, consider *Creighton v. Qatar*.\(^{77}\) In 1982, Creighton Limited concluded a contract to construct a hospital in Qatar. The contract provided

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\(^{74}\) Anthony Aust, *MODERN TREATY LAW AND PRACTICE* 187 (2d ed. 2007).


for the final settlement of disputes by ICC arbitration. After a dispute arose, an arbitration award was rendered in favor of Creighton, which subsequently sought to attach funds of the Qatari Ministry of Domestic Affairs held in France by the Qatar National Bank and the Banque de France. Since the question of the Cour de Cassation’s jurisdiction to order attachment against Qatar arose “in light of principles of public international law concerning immunities of the foreign state,” the case presented the French judiciary with an opportunity to consider the scope of its execution jurisdiction. The court ordered attachment of Qatar’s assets, stating that it was sufficient that the arbitral award became binding, to establish its jurisdiction. This line of reasoning conflicts with the notion that sovereign immunity exempts a court’s execution jurisdiction. The court cited Article 24 of the ICC Arbitration Rules, which provides that binding ICC awards must be enforced, as a principle that justified the exercise of its jurisdiction in the public sphere. However, the court exercised its jurisdiction “in light of the public international law principles governing immunities.” Thus, even as a declaratory matter, the case can be viewed as an instance of a national court’s contribution to the potential lawfulness of execution jurisdiction in this context (arbitration) because the court itself stated that its jurisdiction was not excluded by the international principle of state immunity. Put differently, since immunity places the principal bar on a court’s enforcement authority, then a declaration that it does not might support a principle according to which execution jurisdiction is generally permissible.

On the other hand, in dualist states, such as the United Kingdom, it may be more difficult to point to significant decisions which have developed the law on enforcement jurisdiction since international law is not the source of the court’s authority but is given effect through national legislation. To

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79 Creighton Limited, supra note 77, at 608.

80 Id. (“vu les principes du droit international . . . attendu d’en execution de sentences arbitrales devenues definitives” [“having regard to principles of public international law . . . pending execution of final arbitral awards”])

81 As put forward in major state immunity textbooks. See, e.g., Fox & Webb, supra note 54, at 484.

82 Creighton Limited, supra note 77, at 608.

83 Id.
illustrate, in the area of state immunity, the United Kingdom has adopted legislation that gives effect to the international principle of state immunity as a matter of national law. Under section 1 of the SIA, a state is prohibited from exercising jurisdiction over a foreign state unless a specific enumerated exception applies. Consequently, exercises of decision-making authority arising as an exception to this rule may be authorized, at least formally, by a national law provision (such as section 9 of the SIA in the case of arbitration). A good example is the *Pearl Petroleum* decision, which concerned a London Court of Arbitration (“LCIA”) proceeding between Pearl Petroleum, a Swiss company, and the Kurdistan Republic of Iraq. During arbitration the Kurdistan Republic failed to comply with certain orders of the tribunal, as a result, the tribunal issued a peremptory order that instructed the Kurdistan Republic to pay Pearl Petroleum $100 million.

Under section 42 of the Arbitration Act of 1996, U.K. courts are empowered to enforce arbitral tribunal peremptory orders. Consequently, the question of whether the court could exercise jurisdiction in this case arose at the intersection between the law governing the enforcement of peremptory orders and the law of state immunity, rather than as a direct consequence of implementation of the international principle of state immunity. When Iraq failed to comply with the order, Pearl Petroleum applied to the U.K. Commercial Court for enforcement of the order. The court rendered a decision in Pearl Petroleum’s favor. Thus, by the court’s exercise of authority in respect of the foreign state, its act was declaratory of a potential rule relating to the legality of supportive jurisdiction. Thus, the approach suggested may become more important in order to fully analyze the contribution of courts located in states which adopt dualist approaches. For what it did, rather than said, the court’s act may be evidence of the rule that an exercise of its supportive jurisdiction is permissible. Thus, the “act,” or particular “exercise,” by the court rather than merely what the court said becomes all the more important where international law is an indirect source of the court’s decision-making authority.

Thus, at least from the perspective of how international law is given effect in national courts, distinctions between the state’s approach to sources

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84 *Pearl Petroleum Company Limited v. The Kurdistan Regional Government of Iraq* [2015] EWHC (Comm) 3361, [2016] 4 WLR 2 (Eng.).
85 *Id.* at [11].
86 *Id.* at [16] (considering the application state immunity).
87 *Id.* at [53].
may provide limitations on the extent to which they can be understood to contribute to international law. Viewing national courts in international law, on the other hand, would allow their potential contribution to be considered irrespective of these distinctions. One method would be to compare exercises of decision-making authority in the international sphere, as illustrated in the previous section.

V. PRINCIPLES UNDERPINNING AUTHORITY FOR THE COORDINATION OF COMMON APPROACHES

Considering exercises of authority as possible sources of any state practice on enforcement jurisdiction, which has been the overall aim of this article, the question arises as to how we should coordinate the approaches of national courts. This question emerges where consistent approaches may emerge which have not yet crystallized into customary international law. The works of Anne-Marie Slaughter, a legal theorist, and Yuval Shany, an international lawyer, have considered coordination of courts.88 In Regulating Jurisdictional Relations Between National and International Courts, Shany studies the need to regulate jurisdictional interactions between national and international courts and any rules of international law that should, or could, govern such interactions.89 However, Shany only considers how courts may have an interpretative function in international law, and not if their decision-making authority could make more fundamentally contribute to international law.90

Similarly, taking a globalist viewpoint, Slaughter considers how national courts may cooperate according to “common goals.”91 Though both authors demonstrate the normative desirability of coordination of courts, the lens of coordination has not been applied in a practical way to determine

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89 Shany, Regulating Jurisdictional relations, supra note 88, at 4.
90 Id. at 5, 32–34 (considering only the “de facto” relationship between courts and tribunals, which creates shared “harmonizing features”). Interaction is considered under provisions of the ICSID Convention, which permits investors to initiate proceedings without the need to seize national courts. Thus, the extent to which national courts or other bodies are actually coordinated according to law is not analyzed, but merely how under certain harmonizing instruments these bodies could be coordinated as a normative matter.
91 Slaughter, A Global Community of Courts, supra note 89, at 193 (viewing “participating judges” as part of such coordination).
whether national courts are actually coordinated in any particular area. This final section examines how principles of international law may assist in the coordination of consistent approaches amongst national courts, thus illustrating which principles may already harmonize consistent approaches.

A. Comity

The first potential harmonizing principle is comity. According to its most widely accepted definition, at least in the field of private international law, comity is the “recognition which one nation allows within its territory to the legislative, execution and judicial acts of another nation.”  

However, there is a wide variety of understandings regarding the legal nature of comity. On the one hand, some scholars, such as F. A. Mann, find that comity is merely a “byword for international law.”  

From this understanding, comity binds the courts to exercise jurisdiction because international law necessitates they do so. At the other end of the spectrum, comity may merely be a discretionary principle according to which the court may exercise jurisdiction depending on the particular facts of the case. In between these two viewpoints exists the idea that comity is binding in some way which requires deference of one court to another in view of some international or foreign interest. Whichever view is adopted, all seem to agree that comity plays some kind of jurisdiction-regulating rule because it ensures that one court has jurisdiction rather than another, thereby operating as a jurisdiction-allocating tool.

Authors such as F. A. Mann who consider comity as public international law-related in nature (i.e., binding on courts as a matter of international law) work primarily in the field of private international law and

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95 Id. This is regarded as the historical role of comity by some authors but also has some resonance today. See, e.g., Niels Jansen Calamita, Rethinking Comity: Towards A Coherent Treatment of International Parallel Proceedings, 27 U. PA. J. INT’L ECON. L. 601, 606 (2006) (comity as a discretionary principle in the jurisdiction of U.S. courts to defer (or refuse to defer) to parallel courts).
refer merely to the effects of comity within domestic systems. 98 From the sovereign’s perspective, this comity is understandably international in nature since its purpose is, in some respects, international: the recognition of one sovereign’s acts within another sovereign’s system.

However, from a public international law perspective, comity does not bind national courts in the same way that international law does. 99 This can be illustrated by the use of comity in courts where the exercise of decision-making authority has the potential to engage an international law norm (given there is no connection between the court and the dispute). This occurred, for example, in one of the national court proceedings related to the Yukos dispute with a number of shareholders, inter alia, Hulley Enterprises. 100

Hulley Enterprises, a Cypriot company, was a major shareholder in Yukos, a Russian privatized oil company. 101 In 2003, the Russian Federation took a series of actions against Yukos, including ordering it to pay a total of $20 million in taxes. 102 In 2004, shareholders, including Hulley Enterprises, notified the Russian Federation that Yukos had violated the Energy Charter Treaty (“ECT”), claiming that the company had failed to accord fair and equitable treatment to investors. 103 The ECT establishes a multilateral framework for cross-border cooperation in energy disputes and provides for arbitration as the default method of dispute resolution. In 2014, an arbitral tribunal appointed under the auspices of the Permanent Court of Arbitration, rendered three final arbitration awards against Yukos, finding it had violated the ECT. 104 The shareholders sought enforcement of the awards in several countries, including the United States, where actions were commenced in U.S. federal court seeking confirmation of the awards. 105 The Russian Federation claimed that it was entitled to sovereign immunity, and thus the

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98 See generally Federick Alexander Mann, FOREIGN AFFAIRS IN ENGLISH COURTS (1986); Federick Alexander Mann, BEITRÄGE ZUM INTERNATIONALEN PRIVATRECHT [CONTRIBUTIONS TO INTERNATIONAL PRIVATE LAW] (Duncker & Humblot 1976); Mann, The Doctrine of Jurisdiction Revisited After Twenty Years, supra note 193.

99 This perspective has also been suggested already as a theoretical matter. See Schultz & Ridi, supra note 12, at 581 (“the non-bindingness of the rules of international comity is clearly not disputed, but to conclude that they have no normative value whatsoever would be a non sequitur”).


101 Id. at 272.

102 Id. at 273.

103 Id.

104 Id. at 274.

105 Id.
court had no jurisdiction to confirm the awards. Proceedings to appeal a
decision to set aside the awards were also pending before a Dutch court. In
considering whether to grant a stay of proceedings pending an appeal
against setting aside the awards in the Netherlands, the U.S. District Court
found that the principle of comity would weigh in favor of the stay. Thus,
the court not only considered its jurisdiction available, notwithstanding
the principle of immunity, but also actually exercised a supportive form of
jurisdiction (i.e., a stay) to halt its proceedings in favor of the arbitration. For
our purposes, it is significant that the court considered comity weighed in
favor of the stay. This was in view of the parallel Dutch proceedings, as the
court stated:

[I]n contrast, if the Dutch judgment is affirmed on appeal, the
shareholders may choose to stipulate to dismissal of this action
in view of this court's questionable ability to confirm an award
that has been “lawfully ‘set aside’ by a competent authority in
the state in which the award was made.” Should the
shareholders choose to proceed, this court would have to
consider interests in international comity and the avoidance of
conflicting judgments as part of its analysis as to whether any
such agreement existed.

This is exemplary of how comity is generally used in this context. It is
not used as a justification for the source of the court’s power but as the
reason why the court should exercise the jurisdiction at its discretion in favor
of the party seeking enforcement or resisting it. Consequently, from the
perspective of national courts in international law, comity is no more than a
discretionary principle, which may be used by courts as appropriate.

This can be further demonstrated by the exemplary case of Hardy
Exploration. Hardy Exploration & Production (“HEPI”), an Indian
company, had obtained an arbitration award under a contract with the
Government of India. The arbitration proceedings took place in Malaysia,
as provided for in the contract, and the tribunal issued an award in HEPI’s

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106 Id.
107 Id. at 275.
108 Id. at 287.
109 Id. at 285.
110 Hardy Expl. & Prod. (India) Inc. v. Gov’t of India, Ministry of Petroleum & Nat. Gas, 314 F.
Supp. 3d 95, 95 (D.D.C. 2018).
111 Id. at 99.
favor.\textsuperscript{112} HEPI then sought to confirm the award in a U.S. court. India sought to have the U.S. proceedings stayed on the ground that the specific performance aspect of the award violated U.S. public policy.\textsuperscript{113} In deciding not to recognize the order for specific performance, the U.S. District Court for the District of Columbia found that the reason was because it would raise U.S. vulnerability, opening up the United States to “claims against it for its sovereign acts within its own borders.”\textsuperscript{114} Indeed, one of the justifications used by the court as to why it would stay proceedings and not recognize the order was the fact that comity counters against “[a]ctions against foreign sovereigns in our courts [which] raise sensitive issues concerning the foreign relations of the United States.”\textsuperscript{115} However, this is a clear illustration of the type of political context in which the court might consider comity to be applicable. It does not relate to whether, as a matter of public international law, the court is obliged to exercise jurisdiction. It relates to whether there is a matter that the court considers an international concern—for example, whether it is permitted to exercise jurisdiction over a foreign state in view of the international principle of immunity. There are currently no clear circumstances in which courts are obliged to exercise jurisdiction in this context on the basis of comity.

\textbf{B. Sovereign Equality}

Sovereign equality is a foundational principle of the international legal order. As subjects of international law, states only have relative sovereignty.\textsuperscript{116} Kelsen explains that, while sovereignty is of the supremacy of states under international law (insofar as they are not subjected to the authority of another state), sovereign equality is the justification for legal authority itself.\textsuperscript{117} This does not mean that states have equal rights and duties under international law, but that they have the same capacity for rights and duties.\textsuperscript{118} Consequently, sovereign equality underpins the authority of states to act, more generally, under international law (rather than to exercise jurisdiction on the basis of sovereignty). Thus, to the extent that courts act in accordance with each other and the relevant principles of international law

\begin{enumerate}
  \item \textit{Id.} at 101.
  \item \textit{Id.} at 103.
  \item \textit{Id.} at 114.
  \item \textit{Id.}
  \item \textit{Id.} at 209.
\end{enumerate}
applicable to a particular exercise of jurisdiction, such acts might be considered to be in conformity with the principle of sovereign equality.

Taking the example of Yukos as one starting point for examining the effect of this approach, Yukos, a Luxembourg company which had been a member of the “Yukos” group in Russia, had obtained an arbitration award against OJSC Rosneft Oil, a Russian state-owned company.\textsuperscript{119} The decision concerned preliminary questions relating to the enforcement of four International Commercial Arbitration Court (“ICAC”) awards,\textsuperscript{120} which a Russian court had already annulled at the seat of arbitration.\textsuperscript{121} Given that assets against which enforcement was sought were located in the Netherlands, leave to enforce the award was granted by the presiding Dutch court. The basis for this was that the decision of the Russian court had been “partial and dependent,” with the consequence that the set-aside decision would not be recognized.\textsuperscript{122} The U.K. commercial court to which Yukos had applied to confirm the award found that the defendant, Rosneft, was issue-estopped from denying that the Russian annulment decisions were the result of a partial and dependent proceeding as found by the Dutch court. This means that Rosneft could not rely on the argument that the Russian decisions were not partial and dependent in an attempt to challenge jurisdiction when the argument had already been relied on by them to appeal the earlier decision. Thus, by exercising jurisdiction to recognize the lack of validity of the Russian annulment decisions, the U.K. court, in effect, ensured that proceedings to enforce the award would be continued.

One justification for such jurisdiction is the aim of enforcement of arbitral award irrespective of where they are enshrined in the New York Convention. However, in national court enforcement decisions relating to arbitral awards, the New York Convention is not treated as the source of the court’s authority. Instead, the principle of enforceability in article 1(1) of the convention, stating that awards must be enforced “irrespective of where they are made,”\textsuperscript{123} is a normative principle according to which the court ought to enforce the award.\textsuperscript{124} Thus, the court in Yukos could be viewed, from the international perspective, as ensuring enforceability in accordance with

\begin{thebibliography}{9}
\bibitem{119} Yukos Capital Sarl v. OJSC Rosneft Oil Co [2011] EWHC (Comm) 1416 (Eng.).
\bibitem{120} Id. at [2] (ICAC is located in Russia).
\bibitem{121} Id.
\bibitem{122} Id. at [107]
\bibitem{123} New York Convention, art. 1(1).
\bibitem{124} See, e.g., \textit{Diag Human}, at 4.
\end{thebibliography}
article 1(1) of the New York Convention even though it was not the source of the court’s authority.

Alternatively, the source of the authority could be a growing principle of customary international law according to which the jurisdiction is lawful because several courts exercise similar forms of enforcement jurisdiction in accordance with the applicable principles of international law (including the principle of enforcement in the New York Convention). Such a principle might be justified by the principle of sovereign equality to the extent that common approaches, which accord with any applicable international principle (such as, here, state immunity) are shared between the affected courts.\textsuperscript{125}

\textbf{C. Rule of Law}

The final principle according to which common approaches between national courts could be coordinated is the rule of law. The rule of law in national legal systems is comprised of two elements: the legality of an exercise of public power (that is, the conformity with law)\textsuperscript{126} and the law’s justness.\textsuperscript{127} However, at the international level there is a third element: effective implementation.\textsuperscript{128} Professor Robert McCorquodale explains that at the international law level, unlike at the national law level, the rule of law has an additional enforcement function.\textsuperscript{129} This is because there is no sovereign at the international law level like at the national law level; thus,  

\textsuperscript{125} This is because customary international law requires widespread, consistent, and representative practice between affected states. If courts are “states” in such an analysis, then the practice would have to be shared between the affected courts.

\textsuperscript{126} For example, an institution may not exercise its authority beyond the scope of authority conferred upon it.

\textsuperscript{127} For example, where the exercise of public authority must be in accordance with international law norms—such as international human rights. There are formalists who merely consider the legal aspects. \textit{See}, \textit{e.g.}, Joseph Raz, \textit{The Rule of Law and its Virtue}, in \textit{Joseph Raz, The Authority of Law: Essays on Law and Morality} 210 (Clarendon Press 1979). Most formalists go beyond this to encompass notions of fairness and justice. \textit{See}, \textit{e.g.}, Arthur Watts, \textit{The International Rule of Law}, 36 German Y.B. Int’l L. 15, 23 (1993); Simon Chesterman, \textit{An International Rule of Law}, 56 Am. J. Comp. L. 331 (2008). And certainly at the international level, this is how the rule of law has been applied. \textit{André Nollkaemper, National Courts and the International Rule of Law} 3–4 (2011) (the rule of law encompasses four elements: (1) public powers should be based on authority conferred by law; (2) public powers cannot change the law at will; (3) exercise of powers must conform with fundamental civil and human rights; and, (4) public powers that contravene legal obligations, whether international or national, must be “accountable” on the basis of law).


\textsuperscript{129} \textit{Id.} at 289 (“yet legality by itself does not create an international rule of law. An effective legal order must provide for the enforcement of legal obligations”).
the rule of law would be of little effect without this additional principle. As Professor McCorquodale explains, “there is now an extensive range of international dispute settlement mechanisms that can operate in a manner that is consistent with the international rule of law.” However, these only emerge when one does not equate the national rule of law with the international rule of law, which McCorquodale states to be a “false equation”. From the perspective of adjudicative authority as merely declaratory of the state’s prescriptive jurisdiction, Professor Andre Nollkaemper has analyzed the possible contribution of national courts to the international rule of law as negligible. This is because Professor Nollkaemper only considers the international rule of law as comparable to the national rule of law, to the extent that public powers may be “controlled” by law, this is according to the concept of “accountability.” Thus, he does not address the question of whether national courts can themselves be “agents” of the international rule of law to the extent that they exercise the state’s enforcement function.

To understand the perspective that national courts may be agents of the international law, it is useful to distinguish the effect of such an approach from the effect of the principle of sovereign equality in this area. To illustrate, the Yukos decision and Pearl Petroleum decisions may be compared.

In Yukos, the setting aside of the award in view of the aim of enforcement could be viewed as giving effect to the principle of sovereign equality: the act of exercising jurisdiction did not itself give effect to a rule of enforcement, but rather the underlying reasoning for the exercise could be viewed as giving effect to that rule. To the extent that national courts follow similar reasoning in accordance with the relevant principles of international law (e.g., award enforceability and state immunity), then such exercises conform with the principle of sovereign equality. Compare this with Pearl Petroleum where the question to the U.K. commercial court was whether to recognize the peremptory order issued by the arbitral tribunal. As explained, it was the exercise of jurisdiction in the public sphere that gave effect to the

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130 Id. at 298.
131 Id. at 289.
132 NOLLKAEMPER, supra note 127, at 129, 299 (national courts’ role in the development of international rule of law is inherently limited by the fact that they are ultimately organs of states which are in control of them).
133 Id. at 3–4.
rule in this regard. Thus, whereas decisions that are declaratory of particular rule could be justified on the basis of sovereign equality, exercises in the public sphere could themselves be justified because they are manifestations of the rule of law. This is because these exercises engage international law norms (since they are not connected to the territory of any one state) and thus, they may, by their nature, be manifestations of principles underpinning authority.

However, there are some risks with treating national courts as potential conduits of the international rule of law. For example, courts might purport to act in the name of the international rule of law, when in fact they are applying a national rule that may not accord with the international one. For example, a national court may exercise jurisdiction under the national authorizing statute, ignoring the wider context in which the rule it is applying developed, and thereby create bad law. This occurred in Republic of Argentina v. NML Capital.\(^{134}\) There, the U.S. Supreme Court held that the FSIA does not restrict the discovery of a foreign state’s extraterritorial assets in aid of post-judgment attachment, and thus the court had jurisdiction under the FSIA to grant such a measure. The court stated that its jurisdiction to grant the measure is based on the FSIA, which is the “sole basis” for federal court jurisdiction over foreign sovereigns because the FSIA is a “comprehensive” and “exhaustive” statement of the law in this regard.\(^{135}\) Thus, the court essentially analyzed the scope of its jurisdiction to grant the measure on the text of the FSIA alone.

Whether the decision to grant the discovery order is correct or not as a matter of principle, the reasoning that jurisdiction is based on a power granted to the state under the FSIA is flawed. It rests on a formalistic interpretation of the principle of state immunity within the context of the FSIA, failing to acknowledge that this act gives effect to the international principle of state immunity that restricts a court’s adjudicative jurisdiction in respect of a foreign state. Even if the discovery order could be viewed as a lawful exercise of enforcement, viewed on its own, it is unclear whether this particular exercise of jurisdiction would be in accordance with the international principle of state immunity.


\(^{135}\) Foreign Sovereign Immunities Act of 1978 – Postjudgment Discovery, supra note 134.
Thus, when considering the decisions of national courts, it is important that only decisions that properly apply relevant principles of international law, or those that can be rendered compatible with them, are recognized. It remains unclear whether the discovery order in *NML Capital* could have been rendered compatible with the principle of state immunity. On the one hand, it seems that it does not compel certain action against the foreign state, but merely assists in an ongoing proceeding. On the other hand, the proceeding which it assists would have the effect of compelling the foreign state to comply with a judgment. Thus, it is questionable whether the act of the court, in effect, is lawful or ought to be viewed as excluded by the international principle of immunity.

Thus, while the international rule of law may, in theory, be a harmonizing principle, its integration within national legal systems raises certain issues regarding integration. One solution, which could be a subject of further research, would be to consider how exercises of decision-making authority may be constitutive of particular international principles underpinning authority, thereby applying these principles to determine the extent of “harmonization” of national court approaches irrespective of monist and dualist distinctions.136

VI. CONCLUSION

To conclude, this article has illustrated that reconsidering adjudicative jurisdiction as a possible manifestation of a state’s enforcement jurisdiction is a worthy question for further exploration. Such a conception may assist in the identification of potential state practice relating to the lawful scope of a state’s enforcement jurisdiction. This practice may, in turn, crystallize into customary international law, thereby providing solutions in cases such as *Enrica Lexie* where the lawful scope of a state’s enforcement jurisdiction has been at issue and remained unresolved.

This article has examined the normative underpinning of this conception of adjudicative jurisdiction and how it gives public international lawyers a new framework to consider the decisions of national courts as a possible source of international law. As evidence of this practice, case law arising in the area of international arbitration has been analyzed and illustrates the validity of the approaches defended.

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136 This is the subject matter of my PhD thesis focusing on the area of international arbitration.
Further research could be conducted, applying some of the analytical threads examined herein, to identify whether there is any consistent practice in relation to the enforcement powers of national courts in the context of international arbitrations. Indeed, this is the subject matter of my PhD thesis.

This article has merely sown the seeds of a normative approach which considers national courts in international law rather than international law in national courts. Adjudicative jurisdiction as a possible source of international law would allow public international lawyers to analyze decision-making authority in a more comprehensive manner and could provide a possible source of much needed rules of enforcement jurisdiction. This is useful, and arguably necessary, as jurisdictional conflicts will increasingly arise in our globalized world, and there is a lack of doctrinal clarity in the area of enforcement jurisdiction.