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International Law in National Courts:

The International Rule of Law and the Limits of the Internationalist Model

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TABLE OF CONTENTS

I. Introduction ........................................................................................................... 19
II. The Internationalist Model Justified: Furthering the International
Rule of Law ........................................................................................................... 21
   A. The Meaning of the International Rule of Law ........................................... 22
   B. Implications for the Role of National Courts ............................................. 22
   C. The Moral Case for the International Rule of Law ....................................... 24
III. The Model Assessed: Countervailing Concerns ............................................. 26
   A. The Ambivalent Nature of the Rule of Law ............................................... 27
   B. The Argument from Reciprocity .................................................................. 28
   C. The Argument for Flexibility: The Preference for Soft Law
      and the Significance of States' Intent ......................................................... 30
IV. Conclusions .......................................................................................................... 32

I. INTRODUCTION

Should national courts in liberal constitutional democracies enforce international law even when there is no specific authorization from the legislative or executive branches to do so? Do the prerogatives of a more interconnected world require a more proactive role for national judiciaries as aggressive enforcers of international law? Does effective and fair global governance require the uniform application of international law—the proper institutionalization of an international rule of law? How should national courts approach the question whether to

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enforce international law when international law claims are made in cases before them?

Of course, it is no longer sufficient to dismiss claims based on international law on the grounds that it is not really law. Claims denying the legal character of international law, invoking either state sovereignty—the lack of a sovereign on the international level—or the lack of centralized enforcement mechanisms, have generally failed. Not surprisingly, then, actual doctrinal practice in this area is complicated and, as is generally the case in legal argument, grounded in constitutional text, history, and precedent. Nevertheless, text, history, and precedent frequently turn out to be indeterminate, ambiguous, or contradictory in this area of the law. In such cases, the debate about what a national court should do in particular circumstances tends to be informed by general theories about the proper relationship between international law and national law in national courts.

The focus of the following is one such general theory that I, following Curtis Bradley, will refer to as the internationalist approach. Professor Bradley argues that the internationalist approach has been influential in the American law academy in recent years and informs a considerable degree of recent writing in the area. According to the internationalist approach as Bradley sketches it, “the incorporation and status of international law in the U.S. legal system should be determined, at least to some extent, by international law itself.”

Internationalist authors tend to argue for the enforcement of international law by national courts without specific political authorization by national political branches.

For the purposes of this article, nothing turns on whether this characterization of the influence of internationalist thinking on the American law academy is accurate. Nor does it matter whether such a conception is deeply at odds with the American constitutional tradition

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1. For a classical discussion on whether absence of any of these features of international law undermines its claim to be law, see H.L.A. HART, THE CONCEPT OF LAW 213-37 (2d ed. 1994). Because the existence of international law is no longer regarded as a major concern, Thomas Franck speaks of the post-ontological era of international law, see THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (Oxford Univ. Press 1995). These debates have generally been replaced with debates about compliance and legitimacy of international law in specific contexts. But see Estreicher’s article in this volume for the claim that customary international law is not really law.

2. For a claim that general theories guide arguments in specific doctrinal contexts, see Curtis Bradley, Breaud, Our Dualist Constitution, and the Internationalist Conception, 51 STAN. REV. 529 (1999).

3. Id. at 531.

4. Id.
or plausibly interpreted to be an integral part of it. Instead, the focus here is on the normative justification for an internationalist position along the lines Bradley describes.

Should the internationalist position guide the interpretation of actual constitutional practice? Should constitutional democracies and their courts change so as to conform their self-understanding and practice to the internationalist model? Is current practice deficient in important ways by not being sufficiently internationalist? Can we be sure that the status quo in this respect is not based on little more than nationalist recalcitrance, fostered by habit and prejudice, in conjunction with a lack of education and sophistication, as international lawyers sometimes suggest? The challenge can also be turned around: What reasons are there for national courts to enforce international law, even in the face of conflicting national laws enacted by national parliaments, and perhaps even in the face of conflicting constitutional provisions? What basis is there for national courts to disregard national law in favor of applying international law?

II. THE INTERNATIONALIST MODEL JUSTIFIED: FURTHERING THE INTERNATIONAL RULE OF LAW

The core argument generally invoked in this context is the idea of the international rule of law. National courts should enforce international law, irrespective of national law. But this claim, frequently made and rarely defended, only raises more questions. What exactly does the international rule of law mean? Does the realization of the ideal of the international rule of law, properly understood, actually require national courts to play the role envisioned by the internationalist position? Even if it does, is the international rule of law really an attractive ideal?

There is something intuitively attractive about the idea that the international rule of law requires national courts to enforce international law that explains why the international rule of law exerts such a strong moral pull in many quarters and does not seem to require any further elucidation or justification. It is a claim closely analogous to claims about the role of national judiciaries on the domestic level. The rule of law on the domestic level, supported by independent courts as incorruptible enforcers of the law, is central to liberal constitutional democracy. Of course, a closer look at the domestic level reveals that even there the idea is not as clear as it seems at first; things are more complicated still on the international level. This article will attempt to summarize and reconstruct the core arguments and intuitions relating to
the meaning, implications, and moral significance of the international rule of law as it applies to national law, and then highlight its limitations.

A. The Meaning of the International Rule of Law

The international rule of law is a term with no fixed meaning today and which is widely used to encompass all kinds of desirable features of the international legal order. The tendency is to equate the international rule of law with whatever it takes to make an international rule of good law. Any item on an idealized list of desirable features of an international legal order—protection of human rights, procedural legitimacy, fair and just social and economic redistribution, effective protection of the environment—is likely to have been claimed by someone to be part of the international rule of law.

If the international rule of law is equated with the international rule of good law, to explain its meaning is to expound a comprehensive political philosophy. For the purposes of the questions pursued here, however, the term is best understood more narrowly to mean literally what it says: that nations, in their relationships to one another, are to be ruled by law. The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions. The international rule of law is realized to the extent states do in fact obey international law. Institutional arrangements should be reformed and reinterpreted to further the realization of that ideal to the greatest extent possible.

B. Implications for the Role of National Courts

Understanding the international rule of law in this way helps clarify why the internationalist understanding of the role of national courts is attractive. National courts in cooperation with litigants would assume the role of policing national political branches. In liberal constitutional democracies, government institutions and bureaucracies exhibit, at least as a general matter, the habit of conforming their behavior to legal requirements as interpreted by national courts. Therefore, the enforcement of international law by national courts is likely to increase

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5. Joseph Raz writes with regard to the idea of the rule of law generally: "[W]hen a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated." JOSEPH RAZ, THE AUTHORITY OF LAW 210 (OXFORD UNIV. PRESS 1979).
the probability of state compliance with international law.\(^6\)

In order for this claim to be true, it is not necessary to assume that political actors, without civilizing judicial intervention, are generally inclined to run amok and disregard international legal obligations. They are not. It is generally acknowledged that most states obey most tenets of international law almost all of the time, without much judicial enforcement.\(^7\) Explanations for this phenomenon are manifold.\(^8\) States have an interest in being regarded as members in good standing of the international community in order to reap the benefits of international cooperation. International obligations frequently reflect national interests as defined by various governmental agencies interacting and negotiating with one another in the context of making a treaty. To some extent, international legal obligations may exert a moral pull on state decision makers and their constituencies.

Whatever the reasons for widespread state compliance with international law, however, problems of noncompliance remain sufficiently widespread for national judicial actors to have a potentially significant role in the enforcement of international law. Political branches may be tempted, by populist passions or powerful interest groups, to insist on national policies that contradict the requirements of international law. The Bush administration’s tariffs on steel are a case in point.\(^9\)

More important on a practical level is the problem of benign neglect. National political actors may not place compliance with international law high on the list of national priorities. National leaders may be

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\(^7\) Louis Henkin, How Nations Behave 47 (2d ed., 1979) (“It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”).


tempted to allocate scarce resources to meet the needs of powerful national constituents, thus failing to allocate the resources necessary to comply with international legal obligations. Allowing interested individuals to police compliance with international legal obligations in national courts could mitigate these dangers.

Furthermore, suggesting that national courts could have an important role to play in this regard does not make unrealistic assumptions about the potential clout of courts as political actors. It is not necessary to stylize national courts as Herculean institutions able to resist strong-willed national politics under all circumstances. Of course courts are not like that. Institutionally, national courts—including constitutional courts—are far too weak to withstand persistent majoritarian pressures for long. The assumption is merely that courts, as comparatively independent institutions, have a possible role to play in placing a thumb on the scales in favor of the international rule of law. If national constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law.

C. The Moral Case for the International Rule of Law

How strong is the case for using courts to further the international rule of law? Is the international rule of law an attractive ideal? Does the principle of international legality deserve to be supported? What is gained by embracing it?

A principle of international legality has \textit{prima facie} appeal for a whole range of reasons. Most obviously, the international rule of law, effectively established, would curtail the abuse of political power. It would prevent powerful actors, who would otherwise have the capacity to exercise political power to the detriment of those protected by law, from doing so.

More specifically, there are three kinds of problems that the international rule of law can help mitigate. The first is related to asymmetries in power and the potential for political abuse that such asymmetries entail. This abuse can take the form of unjustified coercive intervention or other forms of unilateral impositions. Under the principle of international legality, less powerful states tend to be more effectively protected against impositions by powerful states. Just as the rule of law became the battle cry for political reformers in much of Europe in the eighteenth and early nineteenth centuries to curb the arbitrary exercise of authority on the domestic level, so the international rule of law has been embraced in the twentieth century as a means of
reining in the exercise of power by militarily and economically powerful actors on the international level.

Of course, to some extent any asymmetries of power are likely to be reflected in the rules of the international legal system. To the extent the rules reflect these power asymmetries, however, the existence of such rules, if obeyed, provide some degree of protection and security for the weak, just as they did on the domestic level. Not only does the international rule of law instill a habit of obedience, thereby civilizing the exercise of power; but the requirement of consistency would also provide greater predictability and a more stable international environment. Furthermore, an environment in which the international rule of law is realized provides a more solid basis for principled deliberation with a view to reform and improve international rules. One dimension of the international rule of law, then, is that it furthers the right of a people to govern itself without inappropriate impositions by other states.

Second, the international rule of law contributes to the protection of domestic groups within a particular state who are protected by international law. This is true, for example, with respect to international human rights norms. In this way international law contributes to the checks and balances of a constitutional system, complementing domestic separation of powers and federalism. An effective institutionalization of the rule of law on the international level also tends to limit the executive's opportunity to claim foreign affairs prerogatives and obtain power in a way that endangers and destabilizes national democracy. In these ways, the international rule of law locks in and stabilizes liberal constitutional democracy on the domestic level.

Third, the international rule of law should also be seen as providing an asset to the international community as a whole. Once international law operates as the ideal suggests, it provides a valuable institutional resource. Law is an effective instrument that enables and fosters the establishment of welfare-enhancing cooperative endeavors. Law can reduce transaction costs for setting up transborder cooperative schemes. Law helps build trust between international actors and thus facilitates engagement in mutually beneficial cooperative endeavors, thereby enhancing global welfare. Law can be a tool that fosters the development of transnational communities, internalizes externalities, prevents prisoner-dilemma-based misallocation of resources, and allows parties to realize efficiency gains beyond the pareto-optimal level.

Fourth, the international rule of law also provides predictability and
enhances the freedom of individual actors. The rule of law secures fixed points of reference by stabilizing social relationships and providing them with predictability. In this way, the international rule of law protects and enhances the freedom of various actors, creating a predictable environment in which actors can make meaningful choices. The rule of law accomplishes the same purpose on the national level. This may be of lesser significance for powerful governments with the resources and bureaucracies to process information and negotiate commitments from other actors in other ways. However, non-governmental actors, too, have seen their horizons expanding so that their radius of action is not limited to the jurisdiction of the states in which they reside. This is most obviously true for multinational corporations (MNCs). It is not surprising that MNCs have been among the non-governmental actors aggressively pushing the rule of law, both on the international and national levels, in areas within the scope of their decision making. Corporations seek to make strategic decisions knowing that market access will be guaranteed. They want projects and budgets for research and development to be determined, knowing that intellectual property will be protected according to international rules. Investors can make informed investment decisions without having to factor in the risks and insurance costs relating to confiscation of property in violation of international standards. Ordinary citizens, too, have something to gain. Citizens rely on being treated in accordance with international legal standards when visiting foreign countries, and on having access to diplomatic and consular personnel. Citizens also rely on certain basic guarantees relating to fundamental rights both at home and abroad.

III. THE MODEL ASSESSED: COUNTERVAILING CONCERNs

Even if the arguments in favor of the international rule of law are plausible, they do not prove much. They have certainly not established that the internationalist model is the right model to adopt. The argument so far has emphasized potential benefits if international law were to govern the behavior of its subjects. It has also established that, were national courts to adopt the internationalist approach to the enforcement of international law, they could have a role to play in enforcing state compliance with international law, thereby furthering the international rule of law. However, nothing has been said about countervailing concerns. I will briefly discuss three of them.
A. The Ambivalent Nature of the Rule of Law

The first concern relates to the potential dark side of the rule of law itself. Effectively enforced, law does not simply constrain power. It is also a source of power. If international law is effectively and uniformly enforced, the power of actors able to influence the outcomes of the international jurisgenerative process increases commensurately. Conversely, those actors who would have benefited from contrary decisions, had national courts not stepped in to enforce international law, lose power.

This transfer of power can be a good or a bad thing. Is it a good thing that a people governing itself democratically is prevented from subjecting industries to environmental regulations without having to compensate foreign investors in a prohibitive fashion, because an arbitration tribunal established under a free trade agreement has determined that is how property guarantees in the agreement should be understood? Is it a good thing if in some Eastern European countries, hospitals and schools are radically underfunded as governments, prodded by the European Commission and the threat of litigation in their own courts by EU-financed interest groups, are forced to implement complex and expensive environmental programs legislated on the level of the European Union?

On the other hand, it may be a good thing if the international rule of law implies that the cacophony of voices across the range of world cultures that have a role to play in the development of customary international law converge on a rule that juvenile delinquents should not be executed, with only Iran, Iraq, Nigeria, Pakistan, and Bangladesh in dissent; and similarly, if this rule were enforced by U.S. federal courts to supplant the rules of a handful of U.S. states that permit the execution of juvenile offenders. Much will be said about such concerns in the next section of this article. Here, it must suffice to point out that a focus on the international rule of law should not obfuscate a far more expansive set of questions. Who makes these rules? Are they just, or at least reasonable? What is wrong with allowing the political process on the state level to determine the content of such rules? Assessing constitutional choices regarding the interface between national and international law requires addressing these questions. These questions turn on more than whether a set of doctrines adopted by national courts furthers the international rule of law narrowly defined.
B. The Argument from Reciprocity

The second issue relates to separation of powers concerns in the area of foreign affairs and focuses on problems regarding reciprocity. One of the problems of the internationalist position is its requirement that national courts enforce international law without regard to whether other obligated parties are also complying with international law. Many obligations under international law are assumed on a quid pro quo basis. If other parties do not comply and effective legal remedies are not available, it seems unfair to hold the remaining party to the bargain.\(^\text{10}\)

It may no longer be plausible to describe the arena of the international system as the domain of lawlessness—an arena where Hobbesian adversaries prowl in a perpetual bellum omnium contra omnes. But there may well be serious issues related to reciprocal compliance that cause a party serious concern. This is one reason why the European Court of Justice (ECJ) has refused to give direct effect to obligations of the European Union arising under the General Agreement on Tariffs and Trade (GATT). International treaty law reflects this concern by allowing the termination or suspension of a treaty as a consequence of its material breach.\(^\text{11}\) The option of suspending or terminating the treaty may strengthen the negotiating position of the compliant party and ultimately provide an incentive for the other party to resume compliant behavior. It would be peculiar if the executive branch were to be robbed of this option when negotiating compliance by a national judiciary that insists on enforcing the treaty obligations domestically.

What does the argument for reciprocity imply for the proper role of national courts enforcing international law? It is important to see the limits of the argument. It does not follow that national courts should enforce international law only after having received the go-ahead from the executive or legislative branch. There are three reasons for this.

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10. See generally, J.H.H. Weiler, A Quiet Revolution: The European Court of Justice and its Interlocuters, 26 COMP. POL. STUD. 510, 521-22 (1994) (noting that national courts in the European community feel the temptation to resist the application of Community law out of fear that doing so would disadvantage the national system and government, but apply Community law when they find that other courts have similarly accepted it. Application in other European courts pressures them to apply Community law); and Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 EUR. J. INT'L L. 159 (1993) (noting after a comprehensive comparative survey that when national courts cannot find evidence of reciprocal acceptance of international obligations on the part of their foreign counterparts, they hesitate to place a unilateral burden on their own governments).

First, not all international obligations are best understood as a result of quid pro quo bargaining. The prohibition against torture, for example, and many other obligations in human rights treaties contain provisions that are not properly understood merely as quid pro quo bargaining results between states. Second, even where concerns relating to reciprocity matter more, other effective remedies to secure compliance by other parties may exist. Those other remedies may take the form of judicial or quasi-judicial remedies. The European Union (EU) provides the most obvious example. No state in the EU may take countermeasures simply because another state is not complying with its obligations. Instead, states have the option of suing a non-complying state before the European Court of Justice. Since enforcement mechanisms are well developed in the EU—because national courts have played a central role in enforcing EU obligations—judicial remedies are effective and other measures become unnecessary.

Even when reciprocity matters and effective alternative remedies securing compliance are unavailable, it does not follow that the judiciary should only act and enforce the obligation when there is specific executive or legislative authorization. There are more subtle and equally effective alternatives to ensure that courts are sufficiently aware of reciprocal compliance concerns when they become an issue. On the one hand, courts in liberal democracies may look to the practice of national courts in other countries subject to the same obligation. Should these courts find that other countries’ national courts effectively enforce specific obligations, reciprocity concerns would be addressed. With the development of an increasingly rich practice of horizontally networked courts engaged in mutual cross-fertilization, courts are increasingly better situated to address reciprocity independent of executive input.

Even if a court concludes that other countries’ national courts do not enforce the respective reciprocal obligation under international law, reciprocity concerns can be addressed in other ways. Particularly in constitutional democracies in which only the constitutional court has the authority to set aside legislatively-enacted laws, it is possible to design procedural devices allowing for the participation of the foreign ministry. The task of the foreign ministry could either be to provide information

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12. See the decision of the ECJ in Portuguese Republic v. Council, infra note 15.

13. See generally, Anne-Marie Slaughter, Judicial Globalization, supra note 6, at 116; A Typology of Transjudicial Communication, supra note 6, at 117; Toward a Theory of Effective Supranational Adjudication, supra note 6, at 358.
to be evaluated and assessed independently by the constitutional court, or to make the relevant determinations itself. Here, the task would be to design constructive forms of interdepartmental interaction that address the legitimate concerns underlying the reciprocity argument while not giving the political branches carte blanche to evade all judicial control.

C. The Argument for Flexibility: The Preference for Soft Law and the Significance of States' Intent

The argument for flexibility also concerns the separation of powers. What reasons are there to believe that states actually want to create legal obligations that are susceptible to domestic judicial enforcement? What is wrong with conceiving of international law as a medium to be used flexibly by international legal actors to signal and stabilize mutual expectations and coordinate activities with whatever degree of rigidity or softness they choose? If states want to insist on judicial enforcement, they should articulate this clearly.

Generally, however, states do not articulate clearly that judicial remedies must be made available on the national level for the enforcement of obligations. Why not treat treaty obligations as a more or less informal focal point of expectations—a point of departure for political negotiations whenever necessary or convenient—instead of heavy-handedly limiting the options of the political branches by insisting on judicial involvement? Clearly, states sometimes want international obligations to operate in just this way. The relatively widespread use of reservations, undertakings, and declarations (RUDs), generally accepted as means of modifying treaty obligations as a matter of international law, is a clear indication of this inclination. It is not surprising that considerations of this sort played a central role when the ECJ had to decide whether to enforce GATT provisions over European law. The ECJ held that the parties to the GATT had clearly intended to settle disputes by means of negotiated agreements, allowing member-to-member trade-offs and cross-sectoral bargaining over concessions. Furthermore, the Court held that under the World Trade Organization (WTO), member states have the right to choose a remedy: a member state could, for example, provide compensatory benefits or allow for retaliation. That choice, intended by the parties, would be precluded if the Court simply enforced the original obligations. Instead of allowing

the EU to engage in an efficient breach, judicial intervention would have the effect of requiring specific performance. Given these structural features of the WTO, the Court held the obligations under the GATT not to be judicially enforceable.

What follows from this decision? Certainly courts should not enforce international obligations clearly not intended for judicial enforcement by the parties. Under those circumstances, courts should hold international law not directly effective or non-self-executing, and refuse to enforce it. Two questions remain, however. First, what are the presumptions operating with regard to the self-executing/directly effective character of international obligations? Should national courts generally assume an obligation to enforce international law, as with national law, unless there are clear indications to the contrary? Or should national courts assume no role unless international law explicitly requires judicial enforcement in national courts? Second, what is a legislature's role in this area? If a legislature specifically authorizes enforcement of a treaty, then no problem arises. Even where a national court would have deemed an international legal obligation non-self-executing, it is clear that a legislature, which could enact an international legal provision as national law may authorize courts to enforce the provision on the national level.

Things become more problematic when the legislature determines that a particular set of legal obligations is non-self-executing. There are three ways to understand such a determination. First, this could simply be an RUD, valid under international law, and therefore a feature of a treaty, to be taken into account by national courts when they assess whether the treaty is or is not self-executing. If invalid under international law because it is incompatible with the object and purpose of the treaty, the obligation would not be taken into account. Second, such a determination could be the legislature’s interpretation of the treaty’s directly effective or self-executing nature. Here, the question is whether such an interpretation deserves to be taken into consideration by a court. Should national courts defer to the legislature in this respect, and if so, to what extent? Third, it could be understood as a simple act commanding national courts not to apply international law.

IV. CONCLUSIONS

The argument from the international rule of law is insufficient to justify as strong a role for national courts as an uncompromisingly internationalist position suggests. Yet the idea of an international rule of law is strong enough to throw into serious doubt uncompromisingly dualist positions. This discussion of the international rule of law has yielded two propositions. First, there are morally attractive features about the ideal of the international rule of law that provide *prima facie* support for the claim that courts have a role to play in the enforcement of international law, even absent specific endorsement from the political branches. Second, beyond furthering the international rule of law, there are countervailing considerations that may limit the role of national courts as enforcers of international law. Reciprocity and flexibility concerns suggest that, whatever the moral case for national courts enforcing international law, national courts have independent reasons to design enforcement doctrines that foster coordination and cooperation with the executive branches to address those specific and limited concerns. Furthermore, there are important moral considerations beyond the international rule of law, narrowly understood, that need to be clarified and their implications assessed. Only then is it possible to determine to what extent competing considerations provide national courts with good reasons to enforce international law all things considered.

It follows that any general account of the relationship between international law and national law, and any arguments about the role of national courts in a specific context must be sensitive to all of these concerns in order to be convincing. To the extent dualist accounts along the lines Professor Bradley suggests fail to take into account values underlying the international rule of law, they are as one-sided and flawed as an uncompromisingly internationalist approach.