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”External” Versus “Internal” in International Law

Martin S. Flaherty*

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Abstract

The issues and analyses in this issue of the Fordham International Law Journal provide excellent cases for testing how a conventional approach would mediate current external pressures for legal change on current international and foreign relations law commitments. As it turns out, the results suggest that sovereigntist concerns are overblown, but that internationalist advocates ignore them completely at their peril.

INTRODUCTION

“EXTERNAL” VERSUS “INTERNAL” IN INTERNATIONAL LAW

*Martin S. Flaherty**

Great social forces determine the path of the law. Unless, of course, the law's internal logic redirects, reverses, or halts that path. The tension between “external” and “internal” accounts of legal change—“foreign” versus “domestic” in a less conventional sense—has been around pretty much since the law itself and can be seen almost anywhere. The internal/external debate dominates legal history. To what extent, for example, did the movement for a revolutionary commitment to equality after the Civil War overcome antebellum conceptions embedded in doctrine?¹ The dispute likewise characterizes the law today, nowhere more so than in constitutional struggles. No sooner did the Cold War end, and the need for national unity dissipate, than the Supreme Court concocted various federalism doctrines directed at devolving federal power, a process that itself appears to have slowed in light of the renewed need for national authority in light of 9/11.² Last, and most relevant, the struggle between “foreign” and “domestic” factors in this more abstract sense, plays out nowhere more dramatically than in international and foreign relations law.

The external, “foreign” pressures at play are nothing short of epic, yet they do not cut in the same direction. Globalization, in all its multi-faceted glory or horror, places obvious and inexorable pressure for the greater legal integration of domestic re-

* Professor of Law & Co-Director, Joseph R. Crowley Program in International Human Rights, Fordham Law School; J.D., Columbia Law School; M.A, M.Phil, Yale University; B.A., Princeton University.

1. *Compare* ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985) (arguing that the Reconstruction Amendments incorporated a broad conception of national citizenship rights against U.S. states), *with* WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO LEGAL DOCTRINE* (1988) (emphasizing the persisting force of federalism limitations).

2. See Martin S. Flaherty, *Are We To Be A Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1277-78 (1999).

gimes into transnational systems. The story is familiar enough. The push for new capital and consumer markets, the demand for labor, developments in technology and transportation, environmental externalities, instantly available images exposing genocide and other atrocities, all fuel the need for common rules on trade, finance, development, and the environment, not to mention human rights and humanitarian law.³ Pushing in almost exactly the opposite direction, however, is the “global war on terror,” at least as pursued by the United States. The Nation’s security needs, at least as perceived by the Bush Administration, point in the direction of going it alone through reliance on U.S. military and economic primacy, an instinct otherwise known as “American Exceptionalism.”⁴ Among the first areas in which this policy seeks exceptions to be made are exactly the increasing set of international rules that globalization fosters.⁵

Facing these and other external forces are those internal elements currently embedded in international law. These, too, do not always push in the same direction. Even today, much of international and foreign relations law resists out and out internationalism. This resistance starts with the premise of national sovereignty itself. Formal safeguards of sovereignty remain in such rules and practices as foreign sovereign immunity, the act of state doctrine, and non-self-execution declarations in treaty ratification. Yet functional ideas are sometimes just as powerful, none more so than the idea of a “democratic deficit” as a counter to transnational initiatives, such as the defeated Constitutional Treaty of Europe.⁶ That said, international law is no longer—and indeed never was—merely sovereigntist. In formal terms, the exclusivity of Chapter VII of the U.N. Charter as the

3. Cf. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623, 641-54 (1998).

4. See generally Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479 (2003). As Professor Koh notes, the term “American Exceptionalism” is thought to have been originally coined by Alexis De Tocqueville. See 2 *ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA* 36-37 (Phillips Bradley ed., Henry Reeve trans., A.A. Knopf 1948) (1835).

5. For a recent and grandiose defense of American Exceptionalism, see Stephen J. Calabresi & Stephanie Dotson Zimdhal, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *WM. & MARY L. REV.* 743 (2005).

6. But see Andrew Moravcsik, *In Defense of the “Democratic Deficit”: Reassessing Legitimacy in the European Union*, 40 *J. COMMON MKT. STUD.* 603, 604-05 (2002) (debunking the notion that the European Union lacks a sufficient democratic basis).

only means for armed conflict (absent self-defense), human rights conventions, and treaties as the "supreme law of the land,"⁷ all serve greater global integration. More general functional considerations once more reinforce these doctrinal rules. In this regard, think of the general value typically placed on the international "rule of law."⁸

All this should suggest that the conflict between the external and the internal rarely will be straightforward. To the contrary, the effect will turn on both the nature of the outside pressure and the character of the internal consideration. Start with the premise that globalization pushes in an integrationist way. Many internal rules, especially such sovereignty-based doctrines as governmental immunity, will push back. But increasingly, other doctrines will facilitate the phenomenon, including evolving customary international law. Conversely, turn to the contested though current premise that the security of a hegemonic State points toward sovereignty. Again, certain internal rules will gain renewed vigor. Many others, however, will put up a fight. Not least on this score would be the applicability of the Geneva Conventions to various aspects of the conflict.

Portraying these complex relationships, however, is merely prologue. The real task becomes how and to what extent international and foreign relations law should accommodate outside pressures without sacrificing the internal integrity that distinguishes them as law in the first place. In the first instance, the question may be more the province of legal philosophers than international lawyers. A conventional lawyerly approach may still be worth pursuing, if only to see how the law might and might not mediate the high stakes trends of modern foreign affairs. A typical mainstream approach would posit at least two general conditions before external pressure could effect change on internal legal norms absent some deliberate alteration of norms through recognized legislative or constitutional processes. First, material change could not occur where a formal legal rule is reasonably clear and settled. Second, even in the absence of formal barriers, significant adaptation in an internal legal regime cannot take place unless relevant underlying

7. U.S. CONST. art. 6, cl. 2.

8. See, e.g., Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19 (2003).

and strongly-held functional values are addressed.⁹ Though there are myriad demons in the details, only when these general conditions are satisfied is any external change likely to be seen as legitimate, or even successful.

The issues and analyses in this issue of the *Fordham International Law Journal* provide excellent cases for testing how a conventional approach would mediate current external pressures for legal change on current international and foreign relations law commitments. As it turns out, the results suggest that sovereigntist concerns are overblown, but that internationalist advocates ignore them completely at their peril.

Consider first the current controversy over U.S. judges relying on international and comparative law in the interpretation of domestic law.¹⁰ At least in its recent accelerated and high-profile form, the practice owes a good deal to the external force Professor Anne-Marie Slaughter has termed “judicial globalization.”¹¹ Just as clearly, there is no established internal rule in U.S. law prohibiting it. To the contrary, much in our legal order supports judicial reliance on “foreign” law. The Founding displayed a strong internationalist side that has since become a hallmark of fledgling republics.¹² Internationalist doctrines in related areas remain well-established, such as the *Charming Betsy* canon that ambiguous statutes be construed consistent with international law.¹³ Substantial precedent from the eighteenth

9. Cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1813-14 (1996) (describing how the U.S. Supreme Court applies constitutional norms to changed circumstances).

10. See, e.g., Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocation of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006).

11. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

12. See Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,”* 99 COLUM L. REV. 2095, 2120-26 (1999); see also David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697, 1701-02 (2003) (arguing that early constitutional history indicates the Framers’ internationalist tendencies); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 197 (2003) (observing that courts of fledgling States have long had to borrow from external legal sources).

13. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

through the twentieth century further support the practice.¹⁴ Conversely, not a few of the objections to the phenomenon are trivial. Legal materials from non-U.S. countries present no greater—and in practice almost certainly less—temptation to misuse than do historical materials, which tend to be a favorite source of judicial globalization's staunchest critics.

That said, the democratic objections are not so easily dismissed. As Professor Donald J. Kochan indicates in *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocation of Foreign and International Law*, the more international and comparative materials appear to drive decisions, the more their use raises legitimate concerns as to reliance on legal norms that have never received assent either from "We the People" of the United States or "we the electorate."¹⁵ These underlying functional values, moreover, resonate, evidenced by the as yet unsuccessful congressional attempts to enact a formal prohibition.¹⁶ So far, defenders of judicial borrowing have simply failed to grapple with this functional challenge at all, much less convincingly. Until defenses grounded in democratic concerns are on offer, the practice will remain controversial, if only in the United States. Fortunately, there are several promising justifications for use of "foreign" law precisely on democratic grounds. The challenge remains developing these.¹⁷

Domestic enforcement of treaty obligations presents another timely issue, but with different dynamics. Here, the domi-

14. See generally Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

15. See Kochan, *supra* note 10; see also Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 367 (2005); see also Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 154 (2005).

16. See, e.g., American Justice for Americans Citizens Act, H.R. 1658, 109th Cong. § 3 (2005) (House Resolution attempting to prohibit the use of most non-U.S. legal sources in interpreting the U.S. Constitution); American Justice for Americans Citizens Act, H.R. 4118, 108th Cong. § 3 (2004) (same); 150 Cong. Rec. E512 (2004) (Statement of Representative Ron Paul (R-Tex.) on the introduction of American Justice for American Citizens Act).

17. For initial attempts, see Martin S. Flaherty, *Separation of Powers in a Global Context*, in JUDGES, TRANSITION, AND HUMAN RIGHTS CULTURES: ESSAYS IN HONOUR OF STEPHEN LIVINGSTONE (John Morrison & Colin Harvey, eds., forthcoming 2006) and Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS AND INT'L AFF. (forthcoming 2006).

nant external pressures come not from globalization, but from the “global war on terror.” The result has been sovereigntist assertions with a vengeance. The Geneva Conventions do not establish rights enforceable in U.S. courts.¹⁸ Nor does the Vienna Convention on Consular Relations. The Alien Tort Statute likewise does not create a federal cause of action for violations of international law.¹⁹ And perhaps most notoriously, the Executive may “suspend” treaty obligations, even when Congress has incorporated them into domestic law, as violations of the Commander-in-Chief and Executive Vesting Clauses.²⁰

Standing against this assault are clear internal rules and established functional values. As the Supremacy Clause makes plain, treaties at the very least are to be presumed self-executing.²¹ The Supremacy Clause, moreover, reflects the previously-noted Founding appreciation of international law, which was nowhere more strongly held than with regard to treaty commitments. Out of this same orientation developed exceptionally clear practices in which U.S. courts readily interpreted treaties as creating individual rights, consistently fashioned remedies to vindicate those rights, and almost invariably refused to defer to the Executive in treaty interpretation.²² These formal doctrines and precedents themselves reflected a functional commitment to the international rule of law as a means for the Nation to protect its

18. See Brief of Respondent at 30, *Hamdan v. Rumsfeld*, No. 05-184 (Feb. 23, 2006), 2006 WL 460875, at *30. For that matter, the Conventions do not apply to “non-state actors,” including both Common Article 3 and the Third Geneva Convention’s requirement for a hearing concerning unlawful combatant status.

19. The Supreme Court of course rejected this position in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (stating that the Alien Tort Statute “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time”).

20. See, e.g., Memorandum from John Yoo, Deputy Assistant U.S. Att’y Gen., & Robert J. Delahunty, Special Counsel to William J. Haynes II, Gen. Counsel, U.S. Dep’t of Def. (Jan. 9, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

21. See, e.g., Flaherty, *supra* note 12, at 2126; Carlos Manuel Vásquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999). But see John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2091-94 (1999) (arguing that the original understanding of the Constitution supports a presumption against the self-execution of treaties).

22. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. 5 (observing that U.S. courts have consistently vindicated treaty-based rights and listing supporting case law).

interests and security in a dangerous world. Countervailing internal considerations apply, but they are far less plausible. As Professor John Quigley demonstrates in *Toward More Effective Judicial Implementation of Treaty-Based Rights*,²³ formal sovereigntist prohibitions in this area appear non-existent or off-point.²⁴ Opposing functional values also appear comparatively weak. To take one example, democracy concerns might cut against an overly monist approach to domestic treaty enforcement. Yet, such concerns were precisely what the Founders rejected in their formal commitment to self-executing treaties and associated doctrines.²⁵ It follows that those who seek the radical departure of creating a dualist system with regard to treaties shoulder a substantial burden.²⁶

Still another issue at the law's frontier involves criminal prosecution for violations of humanitarian law, especially in transnational forums. More than most areas, the story here will vary, situation to situation. Yet, as a general matter, the issue tends to place internal and external considerations in tension when each set it at its strongest. Dominant external influence in this area has militated in favor of outside enforcement when all else fails, as illustrated by the tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, not to mention the International Criminal Court. Such influence has sprung from a powerful combination of factors, including: the end of the Cold War and the possibility of transnational enforcement, the power of televised images of atrocities, and the perceived danger that genocide even in remote corners of the world threatens peace and stability. Resisting all this is a likewise powerful array of formal and functional factors in any given internal legal system that prize local control of law enforcement as a central tenet of the

23. John Quigley, *Toward More Effective Judicial Implementation of Treaty-Based Rights*, 29 FORDHAM INT'L L.J. 552 (2006).

24. *See id.*; *see also* Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989, 1992-96 (2004).

25. *See* Flaherty, *supra* note 12, at 2112-20.

26. Conversely, concerns about self-government are more salient with regard to the question of whether U.S. courts should automatically apply judgments of international tribunals interpreting U.S. treaty obligations. When, however, treaties that the United States has signed and ratified call for such deference, democratic objections would correspondingly diminish. The Supreme Court will address exactly these issues in *Sanchez-Llamas v. Oregon*, 108 P.3d 573 (Or. 2005), *cert. granted*, 126 S. Ct. 620 (U.S. Nov. 7, 2005) (No. 04-10566) and *Bustillo v. Johnson*, No. 042023 (Va. Mar. 7, 2005), *cert. granted*, 126 S. Ct. 621 (U.S. Nov. 7, 2005) (No. 05-51).

rule of law. Formal rules typically take the form of criminal statutes, rules of evidence, statutes of limitations, and due process protections typically tailored to local circumstances. These rules, in turn, typically spring from underlying functional values that privilege local control of this core aspect of law in the first place. This is one reason why, at least in federal systems, the baseline presumption is that criminal justice should be devolved rather than centralized.

This standoff suggests variations on a theme of supplementarity. The International Criminal Court embodies a general, passive version. Under the Rome Statute of the International Criminal Court,²⁷ domestic courts enforce international law in the first instance, and only where no good faith prosecution proceeds should international mechanisms come in.²⁸ When, however, domestic failure is systemic, not just an ad hoc, but a hybrid ad hoc system seemingly offers the best promise. Just this hope underpins the experiment in Sierra Leone and the still prospective attempt in Cambodia. As with any hybrid, efforts of this sort ideally address the concerns of the opposing factors that made their creation necessary. From the internal perspective, a hybrid tribunal should to the greatest extent possible retain both domestic personnel and procedures to honor the internal legal commitments of a given regime. Conversely, external contributions should, among other things, include sufficient due process protections, assistance with arrest and incarceration, and basic infrastructure funding. In this light, the early returns on the Sierra Leone experience in particular are troubling. As Professor Chandra Lekha Sriram reports in *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*,²⁹ the experiment has managed to find the worst of both the external and internal worlds. The body lacks sufficient outside funding, even by the meager standards of the non-hybrid tribunals for Rwanda and the former Yugoslavia.³⁰ It also suffers from the

27. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

28. See Douglas E. Edlin, *The Anxiety of Sovereignty: Britain, The United States and the International Criminal Court*, 29 B.C. INT'L & COMP. L. REV. 1, 4-5 (2006) (noting that the International Criminal Court only assumes jurisdiction over trials for specific crimes when a national judiciary is unwilling or unable to proceed).

29. Chandra Lekha Sriram, *Wrong-Sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 *FORDHAM INT'L L.J.* 472 (2006).

30. *Id.* at 482.

perception of being essentially a foreign rather than domestic institution.³¹ None of this is to say that such hybrid experiments are doomed to failure. Rather, the cautionary tale suggests that a much greater effort is required to insure the best of the external and internal worlds.

Customary international law offers one further leading edge of legal debate. That this is so is curious. The exponential growth of treaty law since World War II has left little room for the application of international custom. So too has the dominance of positivist conceptions of the law in general. The forces of globalization operate to expand customary international law nonetheless, especially with regard to human rights. At least in the United States, the internal strictures of the domestic legal regime traditionally welcomed rather than resisted international custom. The U.S. Constitution, to be sure, does not privilege customary law in the way it sanctions treaties. Yet conventional sources do strongly support a place for customary international law as part of U.S. federal law, including Founding understandings, persistent practice, and case law old and new. In *Transnational Common Laws*,³² Professor H. Patrick Glenn goes these considerations one better. Whereas customary international law rests on the behavior and commitment of Nation-States, Professor Glenn's Essay reminds us that vast sources of international norms—what he terms transnational common law—has long transcended Nation-States altogether.

Yet once more, not everything points the same way. As with judicial globalization, criminal prosecution, and even treaty enforcement, functional concerns about democratic self-government intrude. These concerns have resonated as customary international law endures and expands. In part, objections stem from the "mysterious" ways international custom solidifies.³³ At least in the United States, resistance further results from the perception that the judges who identify and apply customary inter-

31. *Id.* at 489-91.

32. H. Patrick Glenn, *Transnational Common Laws*, 29 *FORDHAM INT'L. L.J.* 457 (2006).

33. See Louis Henkin, *International Law as Law in the United States*, 82 *MICH. L. REV.* 1555, 1566 (1984) (noting that "[t]he process by which customary law is created is hardly certain"); see also Patrick Kelly, *The Twilight of Customary International Law*, 40 *VA. J. INT'L L.* 449, 449 (2000) (criticizing the lack of common agreement on how customary international law is formed).

national law lack sufficient democratic pedigree.³⁴ As in related areas, internationalists ignore these concerns at international law's peril. This is not to say, however, that what peril exists cannot be addressed and avoided.

Judicial globalization, domestic treaty enforcement, transnational criminal prosecution, and international and transnational custom count among the principle areas in which the external pressures of foreign affairs developments meet the internal commitments of domestic legal systems. On balance, both the pressures from without and, perhaps to a surprising degree, the imperative from within, foster and embrace further international cooperation—provisional responses to terrorism notwithstanding. The process, more than ever, will require persistence and consideration rather than premature triumphalism.

34. See Curtis A. Bradley & Jack N. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997). But see CHRISTOPHER J. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 46-49 (2001) (discussing the need to clarify the requirements of democracy before subjecting doctrines and institutions to democratically-based critiques).