HOW STRONGLY *SHOULD* WE PROTECT AND ENFORCE INTERNATIONAL LAW?

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I. Introduction

International law scholarship has long been obsessed with trying to explain and predict *why* and *when* states comply with international law.[1] Doing so, it has consistently overlooked a logically preceding, but no less important, question: To what extent *should* states perform their international commitments? Put differently, how strongly *should* we protect and enforce international law? This question is normative rather than descriptive in nature. It worries as much about *over*-enforcement of international law as *under*-enforcement of international law.

For a system long plagued by claims of irrelevance, such inquiry has understandably been somewhat of a taboo. Yet, with the habitual compliance of most states with most of international law, the reliance on international law justifications even by the most powerful states said to be in breach, and the recent strengthening of international law and its enforcement in areas ranging from trade to the environment, this article is an attempt to break this taboo.

In this article, I offer a theory of relative normativity driven by efficiency, effectiveness and legitimacy concerns, rather than a hierarchy of values. According to this theory, international law is best protected on a sliding scale between strict inalienability and simple liability. From that perspective, both what I call European 'absolutism' and American 'voluntarism' must be avoided as extreme and homogeneous normative frameworks. Neither takes international law *seriously enough*. It is exactly because international law has come to matter that we must fine-tune its normativity. Far from "a pathological phenomenon"[2] or threat to the integrity of international law, variable

[1] See, for example, ABRAM CHAYES AND ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); Harold Koh, *Why Do Nations Obey International Law?* 106 YALE JOURNAL 2599 (1997); Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002); Oona Hathawa, *Do Human Rights Treaties Make a Difference?* 111 YALE LAW JOURNAL 1935 (2002); Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law* 54 DUKE LAW JOURNAL 621 (2004); William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZONA STATE LAW JOURNAL 1243 (2004); JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).
[2] Prosper Weil, *Towards Relative Normativity in International Law* 77 AJIL 413 (1983), at 416.

normativity is proof of a maturing legal system and a *sine qua non* for its long-term survival.[3]

Rather than contenting themselves with the very creation of new rules, as difficult as this may be, and blindly assuming that harder law is always better law, treaty negotiators must consciously consider and decide how and how strongly to protect international entitlements: What is the treaty's optimal level of enforcement, what is the ultimate objective of the treaty regime and, relatedly, its dispute settlement mechanism? Such decisions ought to be a part of the design features of any new treaty.[4] They must, moreover, be carefully calibrated with reference to the special features of international law, in particular, the problem of attracting participation and preventing exit, the absence of centralized back-up enforcement and the demands of sovereignty and democratic legitimacy. Account must be taken also of the nature and objectives of the new treaty in question. In addition, optimal levels of protection for international law – be it at the international level or before domestic courts -- can vary as between states (given the huge inequalities and diversity of interests and priorities between them), as well as evolve over time depending, for example, on whether higher levels of political support and community permit, or call for, higher levels of legal protection.

Section II explains the generalized extremes of what I call European absolutism and American voluntarism. I use these contrasting approaches to international law -- portrayed as either a strict constitution or a flexible bundle of mere pledges -- as signposts for a more balanced approach to optimal protection of international law. With that objective in mind, Section III presents a more sophisticated version of international law which makes distinctions between the allocation of legal entitlements, the protection of legal entitlements and back-up enforcement. Within the second category (protection of entitlements), Section III also introduces the difference, well-known in the United

[3] As Ernest Young notes: "The point is to take international law seriously as law, by subjecting it to the same sorts of institutional give and take that have characterized our domestic legal arrangements throughout our history" (Ernest Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke Law Journal 1143, at 1259).

[4] See, in support, Andrew Guzman, *The Design of International Agreements* 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW (2005) 612 and Kal Raustiala, *Form and Substance in International Agreements* 99 AMERICAN JOURNAL OF INTERNATIONAL LAW (2005) 541.

States, between inalienability, property rules and liability rules as different levels or degrees of protection for international law. Section IV describes how international law is currently protected (*lex lata*) and illustrates, in particular, that the present level of protection follows neither European absolutism nor American voluntarism. With the limited exception of *jus cogens*, international law is *not* inalienable. Moreover, and somewhat surprisingly for an inherently weak legal system, international law is, by default, protected by a property rule, *not* a mere liability rule. Section V moves from the protection of entitlements to back-up enforcement in case the rules of protection are broken. It points at, and tries to explain, two glaring paradoxes in current international law. First, although international law is more ambitious in its default level of protection as compared to most domestic legal systems (property versus liability protection), back-up enforcement in international law is actually weaker. Second, the entitlements that international law protects most strongly (*jus cogens* and obligations *erga omnes partes*) benefit from the weakest form of back-up enforcement. Finally, Section VI turns to a normative assessment and provides a matrix of considerations and factors to consider (*de lege ferenda*) when making decisions on what *should* be the optimal level of protection and back-up enforcement for international law, including newly negotiated treaties. Crucially, this matrix includes both the international protection of entitlements, and their effect and protection in domestic law before domestic courts. Section VII concludes.

II. European absolutism *versus* American voluntarism

Traditionally, two strands of answers have been offered to the question of how strongly *should* we enforce international law? The first is what I call European absolutism or the constitutional approach to international law which holds that, ideally, international law should *always* be performed. The second, I refer to as American voluntarism, or the contractual approach to international law, according to which international law is, at best, a contract that can be broken with the payment of compensation.[5]

[5] For a representative sample on the differences between Europe and America in their approach to international law, see ROBERT KAGAN, PARADISE AND POWER, AMERICA AND EUROPE IN THE NEW WORLD

The first group consists of traditional supporters of international law, haunted by the critique that 'their' discipline has no teeth and is, therefore, largely irrelevant. In response, and somewhat paradoxically, this group insists on the strictly binding nature of international law (*pacta sunt servanda*) and portrays specific performance as the ideal or optimal level of enforcement of international law.[6] In the same spirit, this camp pursues *harder* international law as necessarily *better* international law and advocates the 'constitutionalization' of international law as a source of supreme law that ties the hands of governments to protect themselves against political, economic and other forms of government failure. In sum, the normative position of this first school of thought is that, ideally, international law should *always* be performed and complied with: the law is the law. Though crudely generalizing, I call this the constitutional approach to international law or European absolutism, both because of how the law of the European Communities (EC) has been constructed (with direct effect and supremacy in domestic legal orders) and because of how most European academics analyze and promote international law. In addition, under civil law (prevalent in most European countries) the fall-back remedy for breach is, equally, specific performance, not compensation. Many developing countries have long sympathized with this approach as they tend to regard international law as an instrument to level global political imbalances. From that vantage point as well, harder law is often presumed to be better law.

A second group consists of traditional critics of international law who question the ability of international law to influence the conduct of states. For this group, international law is a patchwork of pledges or, at best, contracts, that states engage in as self-interested, rational actors. Given the absence of centralized enforcement and the prevalence of state sovereignty, the argument goes, international law cannot -- nor should it be -- fully

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ORDER (2003) and JEREMY RIFKIN, THE EUROPEAN DREAM, HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM (2004).

[6] Recall that the (European) founder of international law, Hugo Grotius, largely equated the new discipline with natural law. In his view, "[e]st autem jus naturale adeo immutabile, ut ne a deo quidem mutari queat" (the natural law is so immutable that even God himself could not change it) (H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, book 1, ch. 1, X.5).

performed in all cases.[7] Based on a cost-benefit analysis, this camp predicts that states will only comply with international law if the costs of its defection (both in terms of direct sanctions and broader reputational costs) outweigh those of compliance. Along the same lines, the normative position of many within this second school of thought is that a state *should*, *a fortiori*, only comply with international law if, overall, it makes people better off. If a state can violate, pay full compensation to its foreign victims and still be better off, then the violation should be permitted. What is more, as it improves overall welfare, such 'efficient breach' ought to be promoted. From this perspective, full performance is, therefore, anything but optimal performance. In sum, because of its inherent weakness and the twin demands of efficiency and sovereignty, the best that international law can and should expect, according to this second group, is protection through a mere liability rule. Though, once again, crudely generalizing, I call this the contractual approach to international law or American voluntarism both because of the United States' skepticism toward international law and its self-proclaimed strategy of "coalitions of the willing"[8], and because of the pervading law and economics or rational choice approach in the US legal academy. In addition, in the common law (and in contrast to civil law), the fall-back remedy for breach is, equally, expectation damages, not specific performance.[9]

The point of this article is that both European absolutism and American voluntarism are extremes to be avoided. Both offer valuable insights that the competing camp is not always appreciating. At the same time, both are grounded too deeply in domestic law analogies and overlook the specific nature and problems faced by international law.

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[7] Or as John Bolton put it: "claims that 'international law' has binding and authoritative force ultimately ring either hollow or unacceptable to a free people" (John Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (2000) 1, at 9).

[8] See, for example, *US Sees Coalitions of the Willing as Best Ally*, Financial Times, 5 January 2005 (quoting a senior US State Department official as follows: "We 'ad hoc' our way through coalitions of the willing. That's the future").

[9] OLIVER WENDELL HOLMES, THE COMMON LAW 236 (Mark D. Howe ed., 1963) (1881) ("The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass").

III. A more sophisticated version of international law: Distinguishing allocation of entitlements, protection of entitlements and back-up enforcement

The first issue which must be faced by any legal system is what Calabresi and Melamed called the problem of 'entitlement'.[10] At the domestic level, a state is presented with the conflicting interests of two or more people, or groups of people, and must decide which side to favor. Does it grant an entitlement to make noise or an entitlement to have silence; an entitlement to private property or an entitlement to communal property; an entitlement to bodily integrity or an entitlement to rape or murder? Equally, at the international level, rules of international law take sides in conflicts of interest between nations. Like domestic law, international treaties and custom allocate entitlements to pollute or to be free from pollution, entitlements to trade or to restrict trade, entitlements to non-intervention or to respect for human rights. These are the first order of legal decisions or what, in international law, are often referred to as primary rules.

Having made its initial choice, the next question is how to protect or enforce that choice. Put differently, once an entitlement is set to, for example, silence, private property or bodily integrity, the state must next decide how and how strongly to protect this entitlement. In such second order decisions two questions must most commonly be answered. First, can an individual sell or trade its entitlement? If not, the entitlement is said to be 'inalienable'. Individuals cannot, for example, sell their kidneys or sell themselves into slavery even if they were willing to. Equally, minors cannot normally contract their rights away. In case no such prohibition applies and an individual can, therefore, validly transfer its entitlement, the following, second question arises. For the transfer to occur must the holder of the entitlement agree or can anyone simply take the entitlement and compensate for it? If the former is true – no one can take the entitlement unless the holder sells it willingly – the entitlement is said to be protected by a 'property rule'. You do not have the right, for example, to take possession of my house even if you pay the going rate for it. You can only have my house if I agree to sell it to you. If the

[10] Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW (1972) 1089, at 1090.

latter applies – the entitlement can be taken or destroyed for as long as compensation is paid – the entitlement is said to be protected by a 'liability rule'. The state can, for example, expropriate or take your land by eminent domain for as long as it pays you compensation. Equally, when an entitlement to clean air is protected by a pollution tax, I can unilaterally decide to pollute for as long as I pay the tax.

Although these second order concepts of inalienability, liability rules and property rules, coined in 1972 by Calabresi and Melamed, are omnipresent in domestic (US) legal scholarship, they are rarely addressed in international law.[11] This article is an attempt to fill that void. As a result, it asks the following basic questions:

(1) Can states freely transfer their entitlements under international law or should they at times be prohibited from doing so (making the entitlements inalienable)? If so, when, why and how should such inalienability be imposed?

(2) Can one state simply take or destroy the entitlement of another state, subject to compensation (liability rule), or should certain entitlements only transfer if the holder willingly agrees (property rule)? In other words, when, why and how should international law be protected by a property rule? And when, why and how should international law be protected by a mere liability rule?

What Calabresi and Melamed overlooked, however, is that a legal system cannot rest once it has answered the second order question of how to protect entitlements. A third and final question logically follows, namely: What happens if someone takes or destroys an entitlement *against* the rules? Put differently, how does the state respond when murder does occur, when I pollute but refuse to pay the pollution tax or when you take

[11] For the rare exception, see Jonathan Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE LAW JOURNAL (1999) 677 and Warren Schwartz and Alan Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 JOURNAL OF LEGAL STUDIES (2002) 179.

my house without my agreement? That Calabresi and Melamed did not ask this third order question of back-up enforcement is easily forgiven. In domestic law, the state has a monopoly on the use of coercive force and a variety of instruments in hand to compel its subjects to comply with the rules. Depending on how and how strongly it decided to protect entitlements, a state can seize my property when I refuse to pay taxes, it can fine you for occupying my house and incarcerate, or even execute, the murderer. Under international law, of course, the situation is different. States cannot be jailed, let alone be executed. Moreover, when states refuse to pay compensation most of their property is protected by sovereign immunity. As a result, states comply with the rules when they want to, or when other states individually (through, for example, countermeasures) or collectively (through, for example, UN Security Council Resolutions) lead them to comply. This means that in international law the third order question of what happens if entitlements are taken against the rules deserves attention. It even becomes crucial.

While focusing on the second order question of how international law protects entitlements (through inalienability, property rules or liability rules), the trust of this article is that, at the international level, any such attempt must be made in context. Firstly, we must take account of the *preceding* step of how international law allocates entitlements (essentially through voluntary assent which creates the problems of attracting participation and avoiding exit). Secondly, we cannot loose sight of the *next* step of how international law responds, or can respond, when entitlements are taken against the rules (essentially through bilateral countermeasures and non-legal remedies such as reputation costs and economic pressure).

My claim is that this interactive, three-prong analysis offers a welcome departure from the increasingly hollow debate between the traditional critics of international law and its usual supporters. The critics – labeled in this article as American voluntarism -- charge that international law has no normative value as it is unable to put any significant brake on a nation's pursuit of self-interest. Indeed, whenever essential interests are at stake,

states, especially the most powerful ones, do *not* feel compelled to comply with international law.[12]

Traditional supporters of international law – labeled in this article as European absolutism -- respond that international law *is* legally binding (*pacta sunt servanda*) and renew their resolve to strengthen the normative pull of international law as much as humanly possible. For both camps, it seems, law and normativity are homogeneous concepts.

Acknowledging that law, even domestic law, comes in different shades – as in inalienability, property rules or liability rules – moves away from the binary choice between law and not-law. Indeed, the question of how or how strongly to protect entitlements, addressed in this article, must be distinguished from whether or not international law, or the rulings of international tribunals, are legally binding.[13] When asking how to protect an entitlement the question is not *whether* there is a *legal right* to the entitlement but rather *how strongly*, on a sliding scale between strict inalienability and simple liability, the system protects the entitlement. It is one thing to have an entitlement or legal right, quite another to know how and how strongly this entitlement or right is being protected.

By clinging to what they regard as the legal nirvana of full performance (*pacta sunt servanda*), the traditional supporters of international law overlook that even in domestic law most entitlements must *not* be sacredly respected. Even with the full force of centralized enforcement available, domestic law deliberately chooses to permit the

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[12] JACK GOLDSMITH AND ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) 14-15. Or as John Bolton put it more bluntly: "International law is not law; it is a series of political and moral arrangements that stand or fall on their own merits, and anything else is simply theology and superstition masquerading as law" (John Bolton, *Is There Really "Law" in International Affairs?* 10 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS (2000) 1, at 48).

[13] This is the question, for example, at the center of the debate between Judith Bello and Alan Sykes, on the one hand, and John Jackson, on the other. Jackson argues that WTO rulings are legally binding under international law, while Bello and Sykes take the view that they are not (for them, compensation or suffering retaliation are legal equivalents to compliance). See, most recently, John Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to 'Buy Out'*?, 98 AJIL 109 (2004). For further discussion of this debate, see *infra* notes 91-93 and text at note 128.

contracting away of most entitlements (that is, those protected by a property rule).[14] In addition, in a growing number of regulatory fields -- including, in particular, environmental protection -- domestic law goes as far as allowing the unilateral taking of entitlements subject only to compensation (thus protecting entitlements by a mere liability rule). Most importantly, domestic legal systems permit such compensated takings not for lack of enforcement tools, but because they regard such lower levels of protection as more effective or efficient. In that sense, when setting the uniform target of full compliance with all of its rules, international law tries to be 'more catholic than the pope'. Its paradoxical over-ambition in the face of obvious weakness begs for criticism. By setting a standard that it cannot[15] and, more importantly, *should not* always meet, international law further undermines its already precarious credibility.

If international law is to further develop and to become more refined and sophisticated, it must not merely attempt to create more rules (first order decisions), nor stare itself blind at the lack of centralized enforcement (third order decisions). It must incorporate the second order nuances common in domestic law and justified *a fortiori* at the international level. Indeed, my claim is that at the international level there are *additional* reasons, not present in domestic law (such as attracting and retaining participation, diversity, legitimacy and sovereignty), to stop short of full performance with each and every rule.

For the critics of international law such nuanced approach implies that the lack of full performance no longer undermines international law's claim to normativity. Not because international law, in the absence of centralized enforcement, ought to lower its expectations, but because the normativity of international law, much like that of domestic

[14] In the context of environmental protection, for example, Wiener writes that after thirty years of debate and experience, analysts agree that "incentive-based instruments such as taxes and tradeable allowances should generally be chosen over technology requirements and fixed emissions standards because the incentive-based instruments are typically far more cost-effective and innovation-generating than their alternatives". Moreover, "among the incentive instruments, the price-based tax and liability rule instruments – which set a price on emissions and let sources adjust the quantity they emit – will typically be superior to the quantity-based tradeable allowance and property rule instruments – which set the quantity of emissions and let the sources bargain over price". (Wiener, *supra* note 11, at 682). On the benefits of liability rules over property rules in terms of technological innovation for certain areas now covered by intellectual property rights, see Jerome Reichmann, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743 (2000).

[15] As Pascal famously noted: 'Do not command what you cannot enforce'!

law, is, and ought to, be relative. As in domestic law, in international law as well, it is often times more efficient and appropriate to protect entitlements by a property or liability rule rather than by inalienability.

Put differently, whilst both supporters and critics have traditionally worried about the *under*-enforcement of international law or tried to *explain why* or *predict when* states comply with international law (self-interest, domestic or foreign pressure, reputation, institutions, ideas, normative pull, psychology or, most likely, a variable combination thereof), this article takes a different track. It worries as much about *over*-enforcement as *under*-enforcement of international law and tries to determine the different degrees to which distinct types of international law *ought to be* performed or complied with.

Until quite recently such vantage point might have been preposterous. Yet, much has changed since the end of World War II and the proliferation of international organizations, treaties and international court and tribunals. In addition, the end of the Cold War reinvigorated activity at the UN Security Council and facilitated broad and deep coverage of new international mechanisms ranging from the WTO and bilateral investment treaties to the International Criminal Court. In the WTO, for example, close to 150 countries agreed to broad and deep substantive obligations (first order decisions) as well as a quasi-judiciary with compulsory jurisdiction and possible trade sanctions to enforce those obligations (third order decisions). This novel setting in world affairs calls for pause in the international lawyer's perpetual quest for further legalization, stricter compliance and more forceful remedies. We can and must now afford the luxury of taking the following, second order question, seriously: how strongly *should* we really protect international law?

IV. International law as it is currently protected: Neither absolute nor voluntary

As a descriptive matter, or question of what the law currently provides (*lex lata*), both European absolutism and American voluntarism are wrong. International law

entitlements are not sacredly protected as inalienable (Section 1), nor simply protected by a mere liability rule (Section 2).

1. International law is, in principle, not inalienable

In contrast to the demands of European absolutism, most entitlements under international law can be transferred, or contracted out from, at will and are, therefore, *not* inalienable. What follows are the default rules of protection of international law[16]: First, States have the right to amend treaties by agreement between the parties.[17] Therefore, as between a willing seller and a willing buyer, treaty entitlements can be transferred and are *not* inalienable. Second, states are equally free to contract out of customary international law (in particular the general law of treaties and state responsibility) when crafting new treaties.[18] As *lex specialis* such specific treaty provisions then prevail over the general, fall-back rules of custom which are, therefore, derogable or supplementary, rather than inalienable. Third, besides renegotiating the treaty itself or contracting out of custom, states also have the right to settle specific disputes that arise under a treaty or custom. Crucially, such settlements must not necessarily be fully consistent with the original treaty or custom. As part of a settlement, the victim of breach can validly consent to the full or partial continuation of the breach[19] and/or waive its right to invoke

[16] Subject to contracting out, *jus cogens* and the special regimes of so-called collective or *erga omnes partes* entitlements discussed *infra* text at note 36.
[17] Article 39 of the Vienna Convention on the Law of Treaties (VCLT): "A treaty may be amended by agreement between the parties".
[18] See, for example, Article 5 of the VCLT which applies the VCLT (largely considered to reflect customary international law) to treaties adopted within an international organization "without prejudice to any relevant rules of the organization". See also Article 55 of the ILC Articles stating that the ILC Articles (largely considered to reflect customary international law, at least in its main provisions) do not apply "where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law".
[19] Article 20 of the Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001 (ILC Articles): "Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent".

responsibility.[20] In sum, even under international law, full performance is *not* written in stone. States can change the rules, consent to breach or waive their rights.

The only entitlements of international law that are inalienable are those protected by what are called peremptory norms of general international law or *jus cogens*.[21] The Vienna Convention on the Law of Treaties defines these norms as those "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted". As is the case for entitlements protected by inalienability in domestic law -- such as the prohibition to sell one's kidney -- any treaty that conflicts with *jus cogens* is void.[22] Consequently, in international law, only entitlements under *jus cogens* -- such as the prohibitions of slavery, genocide, aggression and crimes against humanity -- are protected as inalienable and cannot be transferred even where both parties agree. No definite and specific list of *jus cogens* norms exists.[23] Yet, it is generally agreed that norms are, in principle, elevated to *jus cogens* status based on the important moral or ethical values that they protect.[24]

Finally, although a state may not invoke domestic law as justification for its failure to perform a treaty[25], nothing in international law obliges states to give effect, let alone priority, to international law in their domestic legal systems. As a result -- although at the

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[20] Article 45 of the ILC Articles: "The responsibility of a State may not be invoked if: (a) The injured State has validly waived the claim …".

[21] At some point, *jus cogens* (or at least part thereof) was even referred to using the domestic law analogy of 'crimes' of state (ILC Draft Articles of 1976, Article 19, contrasting crimes of state with mere delicts).

[22] Article 53 of the VCLT: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law". In addition, Article 64 provides: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates".

[23] For the very first explicit recognition of a norm as *jus cogens* by the International Court of Justice, see *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, available at www.icj-cij.org, at para. 64 (noting that the character of *jus cogens* "is assuredly the case with regard to the prohibition of genocide").

[24] Prosper Weil, *Towards Relative Normativity in International Law* 77 AJIL 413 (1983) footnote 29 ("Such terms as 'legal conscience of states', 'awakening of conscience', 'universal conscience', 'common good of mankind' recur like a leitmotiv on practically every page of the International Law Commission's work on the theories of *jus cogens* and international crimes").

[25] Article 27 of the VCLT: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Article 46 offers the only exception to this rule. It permits states to renege on a treaty that was consented to in violation of its internal law "regarding competence to conclude treaties" in case such violation "was manifest and concerned a rule of its internal law of fundamental importance".

international level, international law is superior to domestic law -- at the domestic level, states are free to give priority to domestic law, even to deny any legal effect to international law altogether.[26] From that perspective, as well, international law is *not* absolute, nor even legally effective in those legal spheres that matter most, namely the domestic, internal law of states.

2. International law is, by default, protected by a property rule, not a liability rule

If European absolutism is exaggerated, so is American voluntarism. Indeed, contrary to the claims of American voluntarism, when it comes to the second order question of how and how strongly international law is protected (to be distinguished from the third order question of back-up enforcement in case the rules of protection are flouted), international law represents far more than mere pledges. According to the principle of *pacta sunt servanda*, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".[27] In addition, and quite surprisingly for a legal system without centralized back-up enforcement, international law entitlements are, by default, protected by the relatively strong regime of property protection, not the weaker regime of mere liability. Put differently, as much as no one can take my house without my agreement, an entitlement under international law cannot be unilaterally taken without the agreement of its holder. Crucially, in both cases, this protection remains even if the taker fully compensates the holder, that is, even if the taker pays me the going price for my house or fully compensates the state for its entitlement to, for example, open trade or clean air. In sum, unless there is mutual agreement, international law cannot be 'bought out'.

More specifically, as regards past violations, or the retrospective protection of entitlements in those cases where breach has already ceased, the fall-back principle in

[26] In line with this flexibility, some states have a so-called monist regime (which automatically incorporates and gives priority to international law over domestic law), others have a dualist regime (where international law must be incorporated by parliament or congress for it to have domestic effect) and yet other states operate under a hybrid or mixed system (automatically incorporating some but not all international law).
[27] Article 26 of the VCLT.

international law is restitution, *not* compensation.[28] This obligation of restitution – defined as an obligation to "re-establish the situation which existed before the wrongful act was committed"[29] -- is only absolved in case, and to the extent that, restitution is either (1) "materially impossible"; or (2) "involves a burden out of all proportion to the benefit deriving from restitution instead of compensation".[30] Put differently, where state A confiscates the embassy of state B in violation of the rules on diplomatic immunity[31], it does not suffice for state A to pay full compensation. Unless such is "materially impossible" or involves a burden for state A "out of all proportion" to the benefit for state B, state A *must* hand the embassy back to state B. Efficient breach -- or deterring compliance whenever its costs outweigh the benefits -- is, therefore, *not* the goal of international law. On the contrary, most efficient breaches will not even be tolerated since restitution that involves a burden with *any* degree of proportion to its benefits remains mandated. Only if such burden is out of *all* proportion can the taker of an entitlement rest with mere compensation.

Crucially, as concerns the future or prospective protection of entitlements in those cases where breach continues, the fall-back principle is, equally, cessation of the breach and a continued duty of performance. In other words, the obligation is specific performance. Compensation does not suffice.[32] Apart from consent or waiver by the victim of the breach -- possibilities mentioned earlier in support of the proposition that international law is *not* inalienable – there are, under general international law, no exceptions to this obligation of cessation or specific performance.[33] Put differently, while tolerance for

[28] Article 35 of the ILC Articles.
[29] Ibid.
[30] Ibid.
[31] Article 22 of the Vienna Convention on Diplomatic Relations: "1. The premises of the mission shall be inviolable … 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution".
[32] Article 29 of the ILC Articles: "The legal consequences of an internationally wrongful act … do not affect the continued duty of the responsible State to perform the obligation breached". Article 30(b) states more explicitly: "The State responsible for the internationally wrongful act is under an obligation … to cease that act, if it is continuing". In addition, Article 30(b) even obliges the wrongdoing state "to offer appropriate assurances and guarantees of non-repetion, if the circumstances so require".
[33] This strong presumption in favor of keeping treaties intact, and obliging performance with them, is found also in Article 49.3 of the ILC Articles (even where countermeasures to induce compliance with an obligation are permitted, "[c]ountermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question") and in international case law (where courts

certain forms of efficient breach could be read in the "burden out of all proportion" language for the obligation of restitution, as regards continuing violations, efficient breach is neither the stated goal, nor ever an excuse for violation. Unless otherwise stipulated, states cannot, therefore, buy their way out of future performance. They *must* perform their obligations.[34]

In sum, making abstraction of *jus cogens* and unless otherwise specified in a specific treaty regime, international law is protected by a property rule, not a liability rule.

Finally, one precision must be added as regards multilateral treaties, that is, agreements as between more than two states. Like bilateral agreements, multilateral treaties are, by default, protected by a property rule.[35] However, in such multilateral context the question arises whether two parties to the treaty may agree to modify the treaty only as between themselves (*inter se*), that is, whether one state can agree to transfer its entitlement to, for example, clean air or free trade, to another state without the consent of the remaining parties to the treaty? As entitlements under a multilateral treaty may be held collectively by all parties (as in so-called obligations *erga omnes partes*[36]), instead of individually by one state as against each other party (as in so-called reciprocal or bundles of bilateral obligations)[37], international law has limited the possibility for such *inter se* transfers or contracting out. This, in effect, strengthens the protection of entitlements under multilateral treaties as it makes it more difficult to change them or give them away. According to the Vienna Convention on the Law of Treaties, *inter se* modifications of a multilateral treaty are only permitted if either (1) the multilateral treaty provides for such possibility, or (2) the treaty does not prohibit the *inter se* modification, and the

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and tribunals have been extremely reluctant to find the invalidity or termination of treaties, see, for example, Alan Boyle, *The Gabcikovo-Nagymaros Case: New Law in Old Bottles* (1997) 8 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL Law 13).

[34] Articles 54-64 of the VCLT (on termination and suspension of the operation of treaties) and Articles 20-27 of the ILC Articles (circumstances precluding wrongfulness) provide limited exceptions in this respect, but have nothing to do with efficient breach or permitting compensation instead of performance.

[35] The VCLT and ILC Articles apply to both bilateral and multilateral treaties.

[36] Also referred to in Article 48.1(a) of the ILC Articles as obligations "established for the protection of a collective interest of the group" of states party to the treaty (or, for that matter, bound by the custom).

[37] On the difference between collective and bilateral obligations, see Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature*? EJIL (2003) 907-951.

modification neither "affect[s] the enjoyment by the other parties of their rights under the [multilateral] treaty or the performance of their obligations", nor "relate[s] to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the [multilateral] treaty as a whole".[38]

In other words, as collective or *erga omnes partes* entitlements are effectively held by *all* the parties to the treaty (such as entitlements under most human rights or environmental agreements), they can, in principle, only be transferred or modified by agreement of *all* of its holders, not bilaterally as between two states only.[39] In contrast, reciprocal or bilateral entitlements -- even those set out in a multilateral treaty, such as the convention on diplomatic relations or most trade agreements – can be transferred or contracted away *inter se* unless such is either (1) prohibited in the treaty or (2) relates to a provision "derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

In sum, although both collective and bilateral entitlements benefit from property rule protection, protection of collective entitlements is stricter and more rigorous than protection of bilateral entitlements. As more states are holders of collective entitlements their mutually agreed transfer becomes naturally more difficult.

[38] Article 48 of the VCLT.

[39] Bringing the obligation close to *jus cogens* status, Article 311 of the UN Convention on the Law of the Sea (UNCLOS) goes even further and provides that "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 [declaring the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction, including its resources, to be the "common heritage of mankind"] and that they shall not be party to any agreement in derogation thereof". The difference with *jus cogens* is, of course, that Article 311 only applies to UNCLOS parties whilst *jus cogens* by definition applies to all states. See also the 1997 UNESCO Universal Declaration on the Human Genome and Human Rights, whose Article 1 declares the following: "The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity".

V. Current back-up enforcement in case international rules of protection are not respected

As pointed out in Section III, how and how strongly entitlements are protected -- as either inalienable or by property or liability rule -- must be distinguished from what the system does in case the rules of protection are not respected (back-up enforcement). Earlier, I referred to this distinction as one between second and third order questions. I also pointed out that whilst in domestic law back-up enforcement is a given (there is police, bailiffs and prisons), in international law (which lacks central enforcement) the third order question of back-up enforcement becomes a crucial part of the equation.

Logically, one would expect that higher levels of protection will also be backed-up with higher or stronger remedies in case that level is not met. Put differently, the more ambitious the goal, the more forceful the instruments to achieve that goal. This is exactly what we see in domestic law. Where entitlements are (highly) protected as inalienable, such as in criminal law, back-up enforcement takes the form of imprisonment, sometimes even the death penalty. The next level of protection by property rule is, in turn, backed up with fines coupled, if necessary, to imprisonment. Both go well beyond mere compensation. Finally, in case someone takes an entitlement protected by a liability rule without paying compensation, the holder of the entitlement can ask a court to objectively value the required level of compensation and, subsequently, enforce payment, if necessary with the help of bailiffs.

In international law, however, the situation is strikingly different, as we are faced with a double paradox: First, although international law is more ambitious in its default level of protection as compared to most domestic legal systems (property versus liability protection), back-up enforcement in international law is actually weaker (Section 1). Second, those entitlements that are most strongly protected (*jus cogens* and obligations *erga omnes partes*) benefit from the weakest form of back-up enforcement (Section 2).

1. Although protected more strongly as property, back-up enforcement of international law is actually weaker

As described earlier in Section IV, whilst default protection in many domestic settings is mere liability, international entitlements are, by default, protected as property. This rule requires, in principle, restitution and performance instead of mere compensation. Given the inherent weakness of international law (in particular, the lack of centralized power) this may come as a surprise. In the face of weakness, is international law trying to be 'more catholic than the pope'?

Considering the next step of back-up enforcement, the situation becomes even more puzzling. Though highly protected as property, in the event the rules of property protection are flouted, international law offers only the type of back-up enforcement we would expect for liability protection. Indeed, in case the taker of an international entitlement protected as property fails to meet its obligation of restitution and/or specific performance (that is, cessation of ongoing breach), the back-up is merely (1) reparation.[40] If the wrongdoer refuses to pay reparation, and to separately induce specific performance, the remedy of last resort is simply (2) *proportional* countermeasures.[41] In case of material breach of treaty, one may add (3) suspension or termination of the treaty by the victim as against the wrongdoing state.[42] However, genuine sanctions or punishment either in the form of fines or punitive (even disproportional) countermeasures are prohibited. Even the fall-back obligation of reparation is not backed-up with confiscation as most state property enjoys immunity.

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[40] ILC Articles, Article 36.1: "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution". More generally, Article 31.1 provides: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".

[41] ILC Articles, Article 49: "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two", in particular, to induce cessation of the breach and payment of reparation. Article 51, entitled 'Proportionality', limits such countermeasures to those "commensurate with the injury suffered, taking into account gravity of the internationally wrongful act and the rights in question".

[42] Article 60 of the VCLT.

In sum, international law sets for itself a level of protection that is *higher* than that for many domestic law norms (property versus liability protection). Yet, the instruments to achieve that higher level of protection (ultimately, proportional countermeasures) are *weaker* than those available in domestic law. Put differently, notwithstanding its weakness in what was referred to earlier as the third order question of how a legal system responds, or can respond, when entitlements are taken *against* the rules, international law, when answering the second order question of how strongly to protect entitlements, paradoxically, decided to *tighten* those rules.

How can one explain this puzzle?

First, the fact that international law (as compared to domestic law) prohibits punitive sanctions (i.e., offers a weak instrument of back-up enforcement) is easily explained. States, including the most powerful ones, are hesitant to enter a regime with strict remedies and tough punishments. Knowing that they may end up not only as complainants but also as defendants, states want to maintain some wiggle room.[43] Such flexibility may be sought after as an exit option to openly violate the agreement in case, for example, political circumstances change or, more likely, so as not to be hammered for good faith implementation which turns out to constitute breach. After all, treaties are incomplete contracts that cannot foresee all situations. They are also increasingly vague, especially when multilaterally negotiated, so that states acting in good faith may subsequently be found to violate the agreement.[44] As a result, if international law were to impose a back-up enforcement mechanism that is too forceful, it might either deter participation in what is essentially a consent-based system or, for those who did join but now face harsh penalties, may lead to exit from the treaty. In domestic law, neither the front-end concern of attracting participation nor the back-end concern of avoiding exit play a role: a domestic legislator rules by fiat and citizens cannot exit from specific rules.

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[43] GEORGE DOWNS AND DAVID ROCKE, OPTIMAL IMPERFECTION: DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS (1995).

[44] As one WTO arbitrator noted: "In WTO dispute settlement cases, it is probably true that most defending parties argue in good faith that they believed the measures at issue were in conformity with the relevant provisions of the WTO Agreement" (Arbitration under Article 22.6 of the DSU, *Canada – Export Credits*, para. 399).

This makes it much easier for domestic law to have strict back-up enforcement as compared to international law.

In addition, when it comes to the back-up enforcement of international law, weaker states are in a particularly difficult predicament. On the one hand, they want stronger remedies and treaties with real teeth, if not, powerful states may not comply. On the other hand, weak states have historically faced 'gunboat diplomacy' and over-enforcement by powerful states. As a result, they are the first ones to benefit from limits on the legality of countermeasures and the requirement that countermeasures be proportional. In that sense, the law on countermeasures is as much about limiting excessive self-help and leveling the playing field between hugely unequal players, as it is about effectively inducing compliance.

Second, the above reasons for weak back-up enforcement *instruments* do not, however, explain international law's paradoxically high *goal* of protection (on which more below, in Section VI.2). Moving from the instrument (proportional countermeasures) to the stated goal (restitution or specific performance), one explanation for international law's over-ambition could be overshooting. Let me explain what I mean by overshooting.

In the hope that more states will *actually* comply, international law may have raised the bar in its official *expectation* of how strongly states *ought to* comply. Knowing far too well that states cannot be forced into restitution or specific performance, international law could be imposing its high level of protection in the hope that states will at least be inclined to pay reparation. This would be like imposing a speed limit of 40 MPH hoping that, since there is no real penalty linked to speeding anyhow, drivers will at least slow down to 60 MPH. In other words, international law would then, by default and officially, be protected by a property rule, but this only to achieve, in effect, the lower level of liability protection.

Some evidence seems to support this view. After an extensive study, one author, for example, concludes that "the award of remedies other than damages by international

arbitral tribunals is extremely unusual".[45] The International Court of Justice, for example, "has generally not made orders for specific performance or for restitution in the absence of express provision for this in an agreement between the parties".[46]

Yet, overshooting does not, in my view, tell the full story. It does not explain, in particular, why most states *do perform* most of their obligations, instead of merely paying compensation which, according to the overshooting argument above, would *in effect* be the goal of international law. Indeed, if this allegation is empirically correct -- i.e., international law *does* generally meet its aimed-for high level of property protection -- the question must be turned around: With so weak an instrument as back-up enforcement – namely, proportional countermeasures – how does one explain that states so often do comply with the rules?

In my view, the answer is that states perform their obligations, not only because they want to or for fear of countermeasures, but also to uphold their reputation, for fear of emulation and, in some cases, because they feel normatively compelled to comply. It is not so much that states want to be seen as good citizens (an element that does play some role). Rather, states comply with existing rules because they know that it enhances their credibility when they make new rules.[47] After all, who wants to make a deal with someone who consistently flouts agreements? In addition, states realize that 'you win some, you loose some'. If you refuse to comply when on the defending side, why should other states comply when you are complaining? In this sense, as in domestic law, actors comply if only in the broader interest of stability and predictability. More generally,

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[45] CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 12 (1987).
[46] Christine Gray, *Types of Remedies in ICJ Cases: Lessons for the WTO*, in IMPROVING WTO DISPUTE SETTLEMENT PROCEDURES 401, 404 (Friedl Weiss, ed., 2000). Or as the arbitrators in the *Texaco v. Libya* case put it: "While the authors are unanimous, except one, in recognizing that *restitutio in integrum* expresses, in international law, as a matter of principle the proper remedy to repair injuries by an unlawful act, there are in fact many of them who declare that in practice *restitution in integrum* would only be ordered in or be suitable to exceptional cases" (*Texaco Overseas Petroleum Company/California Asiatic Oil Company v. Government of the Libyan Arab Republic*, Award of 19 January 1977, 17 I.L.M. 3 (1978)). If so, the reasons why restitution or, for that matter, specific performance may not be "suitable" are obvious. As one arbitrator put it bluntly: "it is impossible to compel a State to make restitution, this would constitute in fact an intolerable interference in the internal sovereignty of States" (*LIAMCO v. Government of the Libyan Arab Republic*, Award of 12 April 1977, 20 I.L.M. 3 (1981)).
[47] Andrew Guzman, *International Law: A Compliance Based Theory*, 90 CAL. L. REV. 1823 (2002).

states care about norms, ideas and the survival of international institutions at least for as long as they make a net gain from membership. The United States will, for example, hesitate to reject a WTO ruling out of hand as it may fear that doing so too often risks undermining the legitimacy of the WTO itself, an organization and set of norms and ideas that overall benefits the United States.

If these reputation and normative costs linked to non-performance are, indeed, real, they may, firstly, explain why we witness so much compliance with international law even though it is only backed-up by proportional countermeasures. Secondly, and perhaps more importantly, with reputation and normative costs already weighing in, to go beyond proportional countermeasures may lead to over-enforcement. In sum, with reputation and normative costs entering the equation, proportional countermeasures may already achieve optimal enforcement. For weaker states, this may offer a double victory: first, because of the proportionality principle, powerful nations are prevented from excessive self-help; second, with reputation and normative costs entering the game and particularly high where a powerful nation drags its feet as against a poor developing country, proportional countermeasures combined with reputation and normative costs may still induce powerful nations to perform.

2. Back-up enforcement of jus cogens and obligations erga omnes partes is paradoxically weaker

In the previous section, I set out, and tried to explain, a first paradox of international law enforcement as compared to the domestic protection of entitlements: Though protected more strongly as property, back-up enforcement of international law is actually weaker. In addition, a second paradox arises in respect of those entitlements which I described earlier as most strongly protected in international law, namely entitlements collectively held by the international community as a whole (*jus cogens*) or an entire group of states (collective obligations or obligations *erga omnes partes*), referred to hereafter in combination as community obligations.

This second paradox can be summarized as follows: Although *more strongly* protected as either inalienable (*jus cogens*) or difficult to transfer or to contract out from (obligations *erga omnes partes*), back-up enforcement of community obligations is actually *weaker* than that available under the default norm of property protection. Let me explain why this is so.

As is the case for other international entitlements, back-up enforcement for community obligations remains essentially limited to (1) reparation and (2) proportional countermeasures. When it comes to "serious breach" of *jus cogens* -- defined as "gross or systematic failure" to comply with *jus cogens*[48] -- states also have an obligation to "cooperate to bring to an end through lawful means" any such breach and not to "recognize as lawful a situation created by a serious breach", nor to "render aid or assistance in maintaining that situation".[49] However, other than the UN Security Council acting to maintain international peace and security, and enforcement regimes set up under specific treaties[50], there is no collective enforcement or punishment mechanism in international law. Even collective enforcement by the UN Security Council is seriously hampered as it is frequently paralyzed by the veto of one of the five permanent members. Indeed, this is especially the case when the Security Council is faced with *jus cogens* questions such as an alleged genocide or gross human rights violations (witness the reluctance of Russia in the Kosovo crisis or the reluctance of China in the Darfur crisis).[51]

Moreover, it is not just that community obligations are, notwithstanding their higher goal, backed-up by the *same* instruments as entitlements protected as property. The situation is

[48] Article 40.2 of the ILC Articles.
[49] Article 41 of the ILC Articles.
[50] Such as the Kyoto Protocol or regional human rights conventions.
[51] At the 2005 UN World Summit, the UN General Assembly did, however, make the following commitments: "The international community, through the United Nations … has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council … on a case-by-case basis … should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity" (UN General Assembly Resolution, A/Res/60/1, 24 October 2005, para. 139).

worse than that. Back-up enforcement for *jus cogens* and obligations *erga omnes partes* is actually *weaker* than the general rule.

First, given the inalienable nature of *jus cogens* obligations, states responding to breach (including those specifically injured, say, the state victim of aggression) cannot engage in reciprocal suspension of the obligation concerned, either as a countermeasure[52] or in the form of treaty suspension or termination.[53] Where a victim of WTO breach can impose reciprocal trade sanctions, a victim of aggression is *not* allowed to reciprocally invade the original wrongdoer. Without such threat of reciprocity, the cost of defection obviously decreases. Moreover, even if reciprocal suspension were permitted, for most violations of *jus cogens* it would not offer much of an incentive to end the violation: Few states would feel compelled to stop, for example, genocide because another state threatens to commit genocide on its population. Equally, as obligations *erga omnes partes* (say, those related to climate change or the high seas) are held collectively by all parties to the treaty, their bilateral, state-to-state suspension would not only affect the wrongdoer but all parties to the treaty. Because of these third party effects, the reciprocal suspension of *erga omnes partes* obligations is, by default, prohibited.[54]

Second, even though all states (or all states part of the particular treaty or community) have a right to invoke responsibility for breach of community obligations[55], the very nature of these obligations often means that no state in particular will actually invoke this right and challenge the wrongdoer. This is because violations of *jus cogens* (say,

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[52] Article 50 of the ILC Articles, listing obligations that cannot be affected by countermeasures, including obligations for the protection of fundamental human rights and obligations under peremptory norms of general international law.

[53] Article 60.3 of the VCLT, dis-applying treaty suspension or termination in response to material breach in the case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

[54] Article 49 of the ILC Articles stresses that countermeasures may only be taken "against a State which is responsible for an internationally wrongful act", not against third parties. Moreover, the bilateral suspension of collective obligations would also violate the *pacta tertiis* rule (Article 34 VCLT and, for *inter se* suspensions of multilateral treaties, Article 41.1(b)(i) VCLT, discussed *supra* text at note 37).

[55] Article 48.1 of the ILC Articles: "Any State other than an injured State is entitled to invoke the responsibility of another State … if: (a) The obligation breached is owed to a group of States including that States, and is established for the protection of a collective interest of the group; or (b) The obligation breached is owed to the international community as a whole".

genocide) or obligations *erga omnes partes* (say, those related to global commons such as the ozone layer or the high seas) may not affect any other state in particular. Sometimes they do not materially affect other states at all (as is the case when a government abuses the human rights of its own population). This creates a collective action problem where more often than not states are unwilling to bear the cost (both economic and political) of enforcing an obligation that does not individually affect them. In this sense, the difference between a common or public good and a good that does not belong to anyone (i.e., between the 'common heritage of mankind' and *res nullius*) is small. In both cases, no one may effectively protect the good.

Third, even if a state, not specifically affected, were willing to take up the role of policeman in the collective interest, it can only request cessation and reparation.[56] It is generally accepted that under current international law, such policing nation -- unless it is specifically injured (say, itself the victim of aggression) -- does *not* have the right to take individual countermeasures. In other words, it cannot resort to the ultimate and most important back-up enforcement instrument available for standard breaches of international law.[57] Knowing that for some violations no single state will be individually

[56] Article 48.2 of the ILC Articles, with the limitation that reparation can only be requested "in the interest of the injured State or of the beneficiaries of the obligation breached".

[57] Article 54 of the ILC Articles: "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached", underlining added. The reference to lawful measures is generally understood as excluding countermeasures which, by definition, are unlawful but excused. In the ILC Commentary to Article 54 (p. 355, para. 6), state practice is reviewed and the following conclusion is made: "the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest". Similarly, after an exhaustive review of state practice, another author concludes: "a close examination of the cases … in which states seemed to be acting in the name of collective interests cannot determinatively lead to the conclusion that there is an established customary or other rule of international law permitting resort to such measures" (ELENI KATSELLI, COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY, 2005, at 277, DPhil thesis on file with the author). According to Katselli, "states have been hesitant to resort to countermeasures whenever not individually injured because they believed that they had an obligation to refrain from doing so … states not only have been reluctant to clearly spell out that they were acting on the basis of a right under international law, but they also stated that doing so would be in violation of international law" (ibid., p. 226). For a partially opposite view, see CHRISTIAN TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2005), 250 (finding, after an equally exhaustive survey of state practice that "it seems justified to conclude that present-day international law recognizes a right of all States, irrespective of individual injury, to take countermeasures in response to large-scale or systematic breaches of obligations *erga omnes*").

injured (as in human rights violations), this, in effect, means that the back-up enforcement of countermeasures is, for certain community obligations, not available *at all*. The reason for this prohibition goes back to the power inequalities between states and the fear of smaller states that the most powerful nations will engage in excessive forms of self-help, in this case, even where they are not individually affected.[58] Weaker states must, therefore, balance the benefits of more effective enforcement of community obligations, against the risk that the most powerful nations become the ideological policemen of the world in the guise of individually enforcing obligations in the collective interest.

In sum, community obligations in a system without community enforcement are doomed to remain in "the world of the 'ought' rather than that of the 'is'".[59] Even though more states have the right to do something about breach of community obligations, in practice, fewer states (if any at all) may actually take the initiative. Moreover, those who are willing to act are deprived of the standard instruments of last resort namely both (1) reciprocal suspension of the obligation breached and (2) individual countermeasures (unless the state is individually injured by the breach). In this sense, community obligations experience the worst of both worlds: They lack an effective community-based enforcement mechanism (be it under general international law or specific treaty regimes) and, on top of that, are deprived from the normal back-up of individual enforcement, be it reciprocal suspension or countermeasures.[60]

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[58] A similar reluctance to collectively enforce *jus cogens* can be found in the VCLT. Articles 65 and 66 thereof grant jurisdiction to the ICJ to examine disputes on the validity of a treaty on *jus cogens* grounds. Given that all states are harmed by breach of *jus cogens* one would think that all states can invoke this procedure. Yet, the wording of Articles 65 and 66 is such that most commentators conclude that only parties to the treaty in question may invoke its invalidity on the ground that it violates *jus cogens* (Andreas Paulus, Jus Cogens *in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal*, 74 NORDIC JOURNAL OF INTERNATIONAL LAW (2005) 297, at 305 and references in footnote 23).

[59] Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for the Individual or Collective Responses to Violations of Obligations* erga omnes*?* In THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT, NEW SCENARIOS – NEW LAW? (ed. Jost Delbruck), 1993, 125. Or as Ian Brownlie put it more bluntly in respect of *jus cogens*: "the vehicle does not often leave the garage" (Ian Brownlie, *Discussion Statement*, in A. CASSESSE AND J. WEILER (EDS.), CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING (1988) 110.

[60] Philip Allott speaks of a fundamental tension between contemporary international society and contemporary international law: "The tension is between what has been the intrinsically *bilateral* character of international legal accountability and an incipient international *social* responsibility" (PHILIP ALLOTT, EUNOMIA: NEW ORDER FOR A NEW WORLD (1990) 333).

In many respects, and quite paradoxically, the *actual* protection of international entitlements is, therefore, inversely related to how strongly international law *aims* or *pretends* to be protecting the entitlement. As a result, stakeholders in regimes such as trade or environmental protection who are normally anxious to elevate 'their' norms to the status of community obligations in an effort to transcend the debasing tit-for-tat horse-trading between states[61], must realize what they are asking for. Taking reciprocity away from a treaty regime without replacing it with a sufficiently solid community may actually weaken rather than strengthen the effectiveness of the treaty.

The challenges set out above for the protection of community obligations – lack of effective community enforcement mechanisms, the absence of reciprocal suspensions as back-up, fewer, if any, states willing to enforce community obligations for lack of individual impact, and the prohibition for states, other than the injured state, to take countermeasures -- explain, at least partially, a broader paradox between domestic and international law, one that could be referred to as a paradox of reverse priorities. Consider the fields that most individuals would regard as prime candidates for strong regulation, fields which are, indeed, most forcefully regulated in most domestic legal systems: crimes, civil liberties, human rights, society-wide questions of security and minimum welfare. Turn now to international law. Exactly those same fields are least regulated or benefit from the lowest level of enforcement. Instead, the domains most densely regulated and most effectively enforced at the international level are commercial or reciprocal in nature: trade, finance, investment, intellectual property and other standards.[62] Indeed, not only the default rules of general international law offer what, in effect, amounts to weaker protection for community obligations. In addition, even the *lex specialis* enforcement mechanisms under specific treaties that set out collective obligations (such as universal human rights conventions or multilateral environmental

[61] In respect of trade see, for example, Sungjoon Cho, *The WTO's Gemeinschaft*, 56 ALA. L. REV. 483 (2004). For the environment, see Michael J. Sandel, Editorial, *It's Immoral To Buy the Right To Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

[62] Others have referred to this lopsided world, or two-class society, of international law as a "partially globalized world" and find a "global governance deficit of considerable magnitude", see Gary Gereffi and Frederick Mayer, *Making Globalization Work*, February 2004 (paper on file with author), 2.

treaties) are generally weaker, not stronger, than mechanisms protecting and enforcing what are essentially bilateral obligations (such as trade or investment agreements).[63]

VI. A matrix to decide on how international law entitlements *should* be protected

So far, I have focused on what current international law provides. More particularly, I have explained, first, how international entitlements are protected (Section IV) and, second, what happens in case those rules of protection are not respected (Section V). In contrast to my caricature of European absolutism, only a very select group of international entitlements are protected as inalienable (*jus cogens*). Moreover, unlike the extreme of what I called American voluntarism, international law is, by default, protected by a property rule, not a liability rule: Its goal is restitution or specific performance, not compensation or efficient breach. In terms of the next step of back-up enforcement, I pointed at, and tried to explain, a double paradox. First, although international law is more ambitious in its default level of protection as compared to most domestic legal systems (property versus liability protection), back-up enforcement in international law is actually weaker. Second, the entitlements that international law protects most strongly (*jus cogens* and obligations *erga omnes partes*) benefit from the weakest form of back-up enforcement.

With this status of current international law in mind, this Section moves to the normative question of what *should* be the level of protection and back-up enforcement for international law (*de lege ferenda*), including for newly negotiated treaties. As pointed out earlier, property protection is the default position of international law. Specific treaties can, however, contract out of this fall-back rule and protect entitlements, for example, by a liability rule. States must also consider when to elevate a norm to *jus*

[63] Private investors can, for example, challenge governments under the reciprocity-driven NAFTA Chapter 11 or bilateral investment treaties in case they are being discriminated. Individuals do not have that same power, however, when discriminated, for example, in violation of the major international human rights conventions which are said to set out collective obligations transcending a reciprocal exchange between states.

cogens status or to transform a treaty into one setting out what I referred to earlier as collective or *erga omnes partes* obligations.

When deciding on which norms to protect as inalienable or by property or liability rule, several factors must be considered. In particular, we can learn from analogies in domestic law but must, in addition, take account of the peculiar nature of international law, especially the absence of centralized back-up enforcement, the demands of sovereignty and democratic legitimacy, the diversity and inequalities between states and the problem of attracting participation and preventing exit. In sum, international law must further, and more consciously, evolve in the direction of relative normativity driven not only by values but also, and more importantly, by concerns of efficiency, effectiveness and legitimacy. In this calculus both the protection at the international level and the protection in domestic law and before domestic courts must be counted.

1. Why and when to protect international entitlements as inalienable or collective obligations?

a. Be careful what you wish for

Promoting a norm to *jus cogens* (thereby making it inalienable) or to collective obligation status (thereby making its transfer more onerous) is a serious decision, with important freedom restricting and back-up enforcement consequences. Yet, in international law, little thought is given as to the specific reasons why, and the circumstances of when, such decision ought to be made. Indeed, when it comes to *jus cogens*, current international law offers no criteria at all, other than the tautology that *jus cogens* norms must be "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted".[64] Equally, as far as collective obligations are concerned, all we know *lex lata* is that they are "established for the protection of a collective interest of the group".[65] In the absence of criteria and, worse, a decision-maker

[64] See *supra* note 22.
[65] See *supra* note 36.

with the power to decide which norm gets classified where[66], there is not even an accepted list of *jus cogens* or collective obligations. As a result, in many cases, states do not even know which rules are at the pinnacle of legal protection. To make a domestic law analogy, this would be like announcing the creation of a criminal justice system without defining what conduct is criminal in the first place.

In practice, the decision to promote norms to *jus cogens* or collective obligations seems to be based largely on the more or less subjective criterion of values.[67] In other words, norms that reflect values which the international community universally shares and considers most important are prime candidates for promotion. As a result, advocates and stakeholders of each specific sub-regime, be it human rights, environmental or health protection, free trade, cultural diversity or IP, have clamored for 'their' norms – which, of course, in their view, represent fundamental and universally shared values -- to be upgraded.[68] A crucial – though, in my view, mistaken -- assumption is thereby made that promotion to community obligation automatically leads to better protection and enforcement of the norm. Yet, as pointed out earlier, the opposite may well be true: Although *more strongly* protected as either inalienable (*jus cogens*) or difficult to transfer or to contract out from (obligations *erga omnes partes*), back-up enforcement of community obligations is actually *weaker* than that available under the default norm of property protection. To summarize the discussion in Section V above, even though more states have the right to do something about breach of community obligations, in practice, fewer states (if any at all) may actually take the initiative. Moreover, those who are willing to act are deprived of the standard instruments of last resort namely both (1) reciprocal suspension of the obligation breached and (2) individual countermeasures (unless the state is individually injured by the breach). In sum, community obligations in a system, such as international law, without community enforcement are difficult to uphold. In other words, when advocating, for example, that environmental norms be

[66] The ICJ has only recently decided in explicit terms that the prohibition of genocide is, indeed, *jus cogens*. See *supra* note 23. Although treaties could, in principle, decide that the obligations set out are either bilateral or collective in nature, very few do so. For an exception, see Article 311 of UNCLOS, *supra* note 39.
[67] See *supra* note 24.
[68] See *supra* note 61.

regarded as *jus cogens* or trade norms be 'promoted' to collective obligations, be careful what you wish for.

Without loosing sight of this paradox, which criteria *should* international law adopt when deciding on making entitlements inalienable? Domestic law criteria -- such as those set forth in Calabresi and Melamed -- are a good starting point, and are examined next (sub-section b). Yet, in international law, the need to make entitlements inalienable must be counterbalanced by a number of goals and principles (including the back-up enforcement paradox just discussed) that are not present in domestic law. These goals and principles are discussed at the end of this section (sub-section c).

b. Domestic law analogies: Externalities, Moralisms and Paternalism

The starting point for any discussion on inalienability, both in domestic and international law, is this: Any believer in individual freedom, or the freedom of states to set their own destiny, ought to be weary of setting norms in stone, that is, of making entitlements inalienable. Once labeled as inalienable neither individuals (under domestic law) nor states (under international law) can change or transfer the entitlement. That is not to say that no entitlement ought to be inalienable; only that the criteria for inalienability need to be carefully scrutinized. To a more limited extent, the same caution ought to apply in respect of collective obligations[69]: as they are, by definition, held by all parties to the group or treaty, the transfer of collective entitlements can only occur when all holders agree. As this restricts the contractual freedom of states, negotiators ought to think twice before labeling an obligation as collective.

For Calabresi and Melamed, who invented the typology for domestic law purposes, inalienability can be appropriate on three grounds: significant externalities, moralisms and paternalism.

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[69] See *supra* note 36.

First, inalienability may be called for in cases where the transfer of the entitlement would create such significant externalities -- that is, costs to third parties (as in pollution) -- that no buyer would be willing to pay for them. In that case, "setting up the machinery for collective valuation will be wasteful" and "[b]arring the sale [of, for example, land] to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs – including the costs to [third parties]".[70] Put differently, as breach cannot be efficient, one might as well ban it.

Second, in some cases "external costs do not lend themselves to collective measurement which is acceptably objective and nonarbitrary".[71] In theory, one could value the external costs to other people in society related to me willingly selling myself into slavery and force the buyer to pay not just me, but also all third parties whose morals would be harmed by seeing me as a slave. Yet, because we feel that any monetization of, for example, freedom or a kidney is, by hypothesis, out of the question, most states decided to make the entitlement to be free from slavery, or to our kidneys, inalienable.

Third, paternalism can make entitlements inalienable. Self-paternalism explains why Ulysses tied himself to the mast or why individuals pass a bill of rights or constitutional safeguards "so that they will be prevented from yielding to momentary temptations which they deem harmful to themselves".[72] The same logic applies when making invalid contracts entered into when drunk or under undue influence or coercion. True paternalism, in turn, explains why we prohibit a whole range of activities by minors.

What can we make of these three reasons for inalienability – significant externalities, moralisms and paternalism – as they might apply to international law?

Note, first, that all three are based on economic efficiency, respectively, the impossibility of efficient breach, inappropriateness of monetization and long term benefits of hand-tying. As noted earlier, under international law, in contrast, the classification of norms as

[70] Calabresi and Melamed, p. 1111.
[71] Idem, p. 1112.
[72] Idem, p. 1113.

jus cogens is made predominantly, if not exclusively, with reference to values.[73] If anything, what are traditionally seen as *jus cogens* norms correspond to Calabresi and Melamed's moralisms. International law could then be said to ban slavery, genocide, aggression and crimes against humanity as *jus cogens* because states consider it inappropriate to monetize the values protected by these norms. In other words, where it is difficult, if not impossible, to put a price on an entitlement (to, for example, freedom or the survival of an ethnic group), it makes sense to altogether ban the transfer of that entitlement.

Importantly, however, also the rationale of significant externalities might apply to international entitlements. Where an activity would create such high degree of externalities – say, dropping a nuclear bomb or wide-scale, cross-border pollution – no one might be willing or able to pay for all the costs related to the transfer of the entitlement. Hence, it may be more efficient to ban the transfer in the first place.

Self-paternalism, in turn, does explain why under the law of treaties fraud, corruption and coercion render treaties invalid.[74] Yet, this happens outside of the concept of *jus cogens*. Self-paternalism may, however, explain why, for example, parties to the UN Law of the Sea Convention made certain principles related to the high seas part of a so-called "common heritage of mankind" and non-derogeable.[75] According to some commentators also the multilateral trade liberalization rules of the WTO amount to constitutional-type norms where governments, out of self-paternalism, tie their hands to the mast of free trade to resist the sirens of protectionism both at home and in other international treaty-making fora.[76]

Along similar lines, a complaint often heard by weaker countries is that bigger players 'force' them into bilateral agreements to either *detract* from earlier multilateral agreements (such as the bilateral non-surrender agreements pushed for by the United

[73] See *supra* note 24.
[74] See Articles 49 to 52 of the VCLT.
[75] UNCLOS Article 311, see *supra* note 39.
[76] See, for example, ERNST-ULRICH PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 387–92 (1991).

States to shield US nationals from the Statute of the ICC), or to *add* to earlier multilateral agreements (such as regional trade deals concluded by the United States or Europe where developing countries are 'forced' into TRIPS-plus commitments). Out of self-paternalism -- that is, so as to tie their own hands to the earlier multilateral agreement -- one way to deal with such complaints could be to make the entitlements under the multilateral agreement inalienable or, at least, derogeable only within the multilateral framework. This way, weaker countries would stop themselves from too easily selling off their hard-fought-for multilateral entitlements in some subsequent bilateral deal. A similar, though unsuccessful, attempt was made in the 1970s in respect of the rights of states to their natural resources. As part of a so-called New International Economic Order, developing countries passed resolutions, charters and declarations at the UN General Assembly proclaiming the "full permanent sovereignty of every State over its natural resources and all economic activities" and stating that "[n]o state may be subjected to economic, political or any type of coercion to prevent the free and full exercise of this *inalienable right*".[77] In subsequent investment arbitrations, however, developing countries which had nationalized foreign companies or otherwise breached contracts with foreign investors were unable to convince the tribunal that a state's rights over its natural resources are part of *jus cogens* or otherwise inalienable.[78]

Finally, true paternalism (of the minor-adult sort), has less traction in international law as all states are, in principle, equal sovereigns so that few, if any, states are likely to subject themselves to the paternalism of other states. True paternalism may, however, play out for occupied territories or failed states. The Fourth Geneva Convention, for example,

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[77] *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, A/RES/3201 (S-VI), paragraph (e), emphasis added. See also the *Charter of Economic Rights and Duties of States*, 12 December 1974, A/RES/3281 (XXIX), Article 2.1 ("Every State has and shall freely exercise *full permanent sovereignty*, including possession, use and disposal, over all its wealth, natural resources and economic activities", emphasis added).

[78] See, for example, *Kuwait v. Aminoil*, Award of 24 March 1982, 21 I.L.M. 976 (1982), para. 90 ("Equally on the public international law plane it has been claimed that permanent sovereignty over natural resources has become an imperative rule of *ius cogens* prohibiting States from affording, by contract or by treaty, guarantees of any kind against the exercise of the public authority in regard to all matters relating to natural riches. This contention lacks all foundation").

prohibits protected persons and occupied territories to renounce or transfer any of the rights granted to them in the convention.[79]

c. Factors unique to international law and possible alternatives

From the above examples, it is apparent that the class of inalienable entitlements under international law could, potentially, be vast. As noted earlier, however, any attempt to expand the list must be weighed, first, against the principles of contractual freedom and sovereign equality of states. Before tying the hands of states or telling states that they cannot be trusted, or trust themselves, when it comes to future treaties (say, on foreign investment, IP or trade), the counter-balancing need for states to be able to 'change their minds', contract out or make or amend earlier treaties as they see fit, must be carefully assessed. More so than in domestic law, the freedom of states to transfer entitlements by mutual agreement is crucial. Given the economic, social and cultural diversity between states the scope for universally shared norms to be written in stone is limited.

Making things worse, once established, *jus cogens* becomes binding on all current *and* future states, irrespective of whether or not they agreed to the norm in the first place. This, obviously, creates tension with the basic rule of state consent. Moreover, once a norm is elevated to *jus cogens* status it is extremely difficult, if not impossible, to change it, even by super-majority. This lack of legislative correction stands in contrast, for example, to domestic criminal statutes or other statutes setting out inalienable entitlements, even domestic constitutions, which can be changed by majority or super-majority in domestic parliaments.

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[79] Article 7 of the Fourth Geneva Convention provides that protected persons, who include those in occupied territories, "may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention". Article 47 reiterates and expands upon this injunction: "Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, *nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power,* nor by any annexation by the latter of the whole or part of the occupied territory" (emphasis added).

Finally, and for present purposes most importantly, because of the back-up enforcement paradox explained earlier, the promotion of a norm to *jus cogens* or collective obligation status can eventually be counter-productive as, under current international law, community obligations are backed-up with less, rather than more, enforcement. Table 1 below summarizes the arguments for and against making international entitlements inalienable.

Table 1: When to Protect International Entitlements as Inalienable?

ARGUMENTS **IN FAVOUR** OF INALIENABILITY	ARGUMENTS **AGAINST** INALIENABILITY
1. Significant externalities	1. State consent
2. Moralisms	2. Contractual freedom of states
3. Self-paternalism	3. Sovereign equality of states
4. True-paternalism	4. Diversity between states
	5. Lack of legislative correction
	6. Weaker back-up enforcement

If the above calculus militates against inalienability, what can be done to nonetheless enhance the protection of international entitlements considered to be worthy of the highest levels of enforcement?

Firstly, one could strive, with renewed energy, to create solid and homogeneous polities or communities around a set of norms, albeit at the start within a particular region. With a genuine community in place, community obligations may be sustainable. Exactly that is slowly happening within the European Union (where a community is emerging on a limited geographical scale[80]) and, perhaps, when it comes to preventing genocide on a

[80] But see how difficult it is, even within the EU, to uphold something like agreed limits on budget deficits, limits which were recently flouted by both Germany and France without sanction. Indeed, even within closer-knit communities re-negotiation rather than strict and uncompromising enforcement of the rules may, in the long term, be more productive.

worldwide scale (where an international community may be gradually ripening on an issue-specific basis[81]).

Secondly, and quite the opposite of trying to create genuine communities, thought could be given to accentuate the reciprocity inherent in certain norms generally considered as fundamental or important. In the United States, for example, Congress recently decided to impose an outright ban on torture as much out of noble feelings as for reasons of reciprocity: if the US tortures foreigners, or is even seen as a country that condones torture, other countries, in turn, are more likely to torture American captives. As notions of reciprocity can make treaties largely self-enforcing, reciprocity enhances, rather than undermines, compliance. In contrast, taking reciprocity away from a treaty regime without replacing it with a sufficiently solid community is likely to weaken, rather than strengthen, the effectiveness of the treaty. For that reason, critics of reciprocal trade sanctions as the last resort mechanism to back-up WTO obligations[82] ought to think twice before replacing trade sanctions with community based mechanisms such as suspending voting rights, monetary compensation or fines.

Thirdly, and perhaps most importantly, the most fruitful and effective means to protect international entitlements regarded as fundamental may well be through the domestic legal systems of states, including before domestic courts.[83] As much as relative normativity is appropriate at the international level, so is relative normativity of international law before domestic courts.[84] Put differently, rather than uniformly incorporating or rejecting international law as part of domestic law, states should consider giving direct effect to some rules of international law and not to others. Indeed, to some extent, a system of communicating vessels between enforcement at the international and the domestic level may be in place: Those norms weakly enforced at

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[81] See *supra* note 23 (the ICJ explicitly recognizing that the prohibition of genocide is *jus cogens*) and note 51 (the UN General Assembly recognizing a responsibility to protect populations from genocide), as well as the Kosovo crisis. Yet, contrast this to the international community's reaction in the Rwanda and Darfur crises.

[82] See, for example, Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AJIL 792 (2001).

[83] See Harold Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1990).

[84] On the freedom to give effect, or not to give effect, to international law in one's domestic legal system, see *supra* note 26.

the international level (such as *jus cogens* or fundamental human rights), could then be given more effect at home. For one thing, as there is less supervision and refinement of such rules at the international level, national executives and domestic courts are given more leeway to define, interpret and implement them domestically. In contrast, norms strongly enforced internationally (such as WTO or investment rules under NAFTA), could then be denied direct effect in domestic courts.[85] As those rules are subject to compulsory jurisdiction and further interpretation and refinement at the international level, it may be wise to reduce their impact at home. Such bifurcation between types of international norms as they play out before domestic courts can be witnessed both in the *Sosa v. Alvarez-Machain* US Supreme Court opinion (giving effect to some international law norms under the Alien Tort Statute, but not to others[86]), as well as in the courts of the European Union (denying direct effect to WTO rules[87], but giving direct effect to most other international law, including scrutiny of UN Security Council resolutions under norms of *jus cogens*[88]).

2. *Why and when to protect international entitlements by property rule versus liability rule?*

a. Property protection as the natural fall-back

As compared to both inalienability and liability protection, protecting entitlements as property gives rise to the least amount of intervention. Since an entitlement protected by property rule can be freely traded between a willing buyer and a willing seller, property protection "lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough".[89] In other words, the transfer

[85] As discussed *infra* text at note 122.
[86] 539 U.S. Supreme Court (2003) No. 03-339 finding that "federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when [the Alien Torts Statute] was enacted" in 1789, namely "offenses against ambassadors, violation of safe conduct, and piracy".
[87] PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION, LEGAL AND CONSTITUTIONAL FOUNDATIONS, 302 ff., Oxford: 2004.
[88] *Kadi v. Council of the European Union*, 21 September 2005, Case T-315/01 (under appeal).
[89] Calabresi and Melamed, p. 1092.

of entitlements is simply left to voluntary negotiations. Call it the market place of entitlements.

In many ways, property protection is naturally suited for international law. First, it coincides with the principles of contractual freedom and sovereign equality of states and also gives voice to the wide diversity between states. Indeed, if two states want to change an earlier treaty or agree to settle a dispute, even in a way that is inconsistent with an earlier treaty, why stop them? Second, since international law lacks centralized law-making and enforcement, the level of protection with the least amount of intervention is logically best-suited. Indeed, if we make an international norm inalienable, who will ensure that it is, in practice, not transferred or violated? Equally, when we let states unilaterally take entitlements or breach treaties for as long as they pay compensation, who will objectively determine the appropriate level of compensation and make sure that, afterwards, compensation is actually paid? As norms of international law are based on state consent, compulsory dispute settlement is rare (including on the question of objectively setting levels of compensation) and back-up enforcement weak. As a result, international law may have to content itself with letting the free market reign, that is, with protecting entitlements as property.

b. Domestic law analogies in favor of liability protection: Hold-outs, free-loaders and transaction costs

With the above arguments in favor of property protection, why then should we ever move away from the free market exchange of entitlements? In the previous section (VI.1), I discussed reasons to make entitlements inalienable (significant externalities, moralisms and paternalism). Inalienability favors the *holder* of an entitlement: Even if the holder *wants* to sell the entitlement, she is not permitted to do so. At the other extreme of inalienability, one may also deviate from property protection by imposing a mere liability rule. Liability protection favors the *taker* of an entitlement: Even where the holder does *not* agree to transfer the entitlement, anyone can unilaterally take the entitlement on the sole condition that the holder gets compensated. Why should we ever permit a state to

unilaterally take the entitlement of another state *without* that state's consent? At this stage, it is useful to revert to the reasons offered by Calabresi and Melamed.

Calabresi and Melamed offer three reasons to replace property by liability protection: hold-out, free-load and transaction costs.

First, even where the sale of entitlements is efficient (that is, the buyer values the entitlement higher than the seller), certain sellers, or holders of the entitlement, may refuse to sell at their 'normal' price in the hope of capturing more of the premium that the buyer is willing to pay. Calabresi and Melamed use the example of eminent domain where owners of land may hold-out in order to get a higher price from the town authority wanting to build a park. Even though objectively the park is Pareto desirable (that is, the town's citizens value a park more than the land-owners value their land), with enough hold-outs, the park will not be built. Liability protection resolves this hold-out problem: "If society can remove from the market the valuation of each tract of land, decide the value collectively, and impose it, then the hold-out problem is gone".[90] In other words, under a liability rule, the town can simply take the land and compensate its owners at an objectively determined value.

Under international law, it is easy to think of similar hold-out problems for which a liability rule may offer a solution. If, for example, the EC wants to renegotiate the WTO treaty so that it allows the EC to ban growth hormones in beef or genetically modified organisms (GMOs), and the EC is perfectly willing to pay each WTO member for this change, some WTO members may hold-out. That is, they may refuse to sign the amendment even though they are, objectively, offered full compensation (e.g., their exporters of beef or GMO products are fully compensated for the losses they make on the EC market). Why so? Because in such renegotiation, WTO members – who, of course, realize how important the proposed amendment is for the EC -- have an incentive to hide their true valuation so as to extract ever more compensation from the EC. With enough hold-outs, the price requested from the EC may simply kill the deal, even though

[90] Calabresi and Melamed, p. 1107.

objectively it should have materialized. In this situation, the market (*in casu* consensual re-negotiation of the WTO treaty) fails to establish what is Pareto desirable. Moving from a property rule (which requires consent from all sides) to a liability rule (where entitlements can be taken unilaterally as long as compensation is paid), can then offer a way out. Under such liability regime, the EC could then simply maintain its ban on growth hormones and GMOs but pay each WTO member for it, at a pre-determined or objectively set level. Although the entitlements in my example are *not* currently protected in the WTO by a mere liability rule[91], liability protection is exactly what happens in respect of certain other WTO entitlements, namely: when WTO members fail to reach agreement on proposed tariff hikes or changes in a member's schedule of specific commitments under GATS. Although WTO members must first attempt to reach agreement on such proposed changes (a requirement of property protection), in the event no agreement is made, the WTO member requesting the change can enact it unilaterally (that is, unilaterally take entitlements from other members) subject only to a collectively-set compensation, namely "compensatory adjustments" set by arbitration[92] or the suspension by other members of "substantially equivalent" concessions or benefits.[93]

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[91] Under my example of an EC request to amend the WTO treaty so that it allows a ban on growth hormones or GMOs, the entitlement (*in casu*, under the WTO's Agreement on Sanitary and Phytosanitary Measures) remains protected as property. Indeed, legally speaking, the EC *must* comply with existing WTO rules and rulings against it (see, the default rule of property protection under general international law, *supra* text at notes 28-34 confirmed, at least implicitly, in DSU Articles 21.1 and 22.2), or reach an agreement with WTO members to change those rules. Importantly, however, in case the EC breaks this rule of property protection, the legal instruments of back-up enforcement are limited to compensation or the suspension of equivalent concessions by other WTO members. In effect, this means that in case the EC unilaterally takes the entitlements of other members under the SPS Agreement (to trade in hormone-treated beef or GMOs), the EC *does* break the WTO's rules of protection, but is, eventually, sanctioned only with compensation, that is, what it would have to pay if the entitlement were protected by a liability rule. The difference is, therefore, one between the second order question of level of protection (which, in the WTO, is generally protection by property rule) and back-up enforcement (which, in the WTO, is limited to compensation or equivalent suspension). See *below* text at note 128.

[92] GATS Article XXI:3(a).

[93] GATT Article XXVIII:3(a)) and GATS Article XXI:4(b). Although trade retaliation does not normally compensate a country in economic terms (unless it is a large country with price-setting powers), it does offer political compensation or, at least, imposes reputation and political costs (if not economic harm) on the wrongdoing state. A similar liability rule applies where a WTO member wants to impose a safeguard. In a first instance, WTO members are asked to work out a deal "to maintain a substantially equivalent level of concessions and other obligations" (Article 8.1 of the Safeguards (SG) Agreement). Such deal may include an "adequate means of trade compensation for the adverse effects of the measure [i.e., the safeguard] on their trade". Yet, if no deal can be reached, the safeguard can, nonetheless, be unilaterally imposed, but affected WTO members have the right to suspend "the application of substantially equivalent concessions or other obligations under GATT 1994" (SG Article 8.2). If the safeguard responds to an absolute increase in imports and conforms to the provisions in the SG Agreement, however, such

Besides hold-out, Calabresi and Melamed offer the problem of free-load as another reason to move from property to liability protection. While hold-out occurs on the selling side, free-load occurs on the buying side. Going back to the example of eminent domain and the building of a park, although the town's citizens may each value the land at a price that makes the sale Pareto desirable, some citizens may try to free-load. That is, they may claim that the park is only worth $50 to them or even nothing at all (instead of the 'true' value to them of, say, $100). They would, of course, do so in the hope that other citizens will chip in more and buy the land with their money, even though subsequently everyone would benefit from the park. With enough free-loaders unwilling to pay, the park may not materialize even though it is Pareto desirable. As with the hold-out problem, liability protection may then offer a way out: "if society can value collectively each individual citizen's desire to have a park and charge him a 'benefits' tax based upon it, the freeloader problem is gone. If the sum of the taxes is greater than the sum of the compensation awards, the park will result".[94] In other words, where the entitlement of citizens to their money is protected by mere liability, the town can simply take the citizens' money (that is, impose a tax) and compensate them with the creation of a park.

Moving now to international law, it is readily apparent that the basic principle of voluntarism -- that is, states *cannot* be forced into an international norm or scheme without their consent -- severely limits the way international law can deal with free-loaders. If a state decides to free-load, for example, on the commitments made by other countries to cut emissions under the Kyoto Protocol, there is nothing that international law can do to force these free-loaders to join the Kyoto Protocol. In the absence of centralized power, no one can, for example, force the United States or China to pay an emissions tax. The only thing that existing Kyoto Protocol members can do is lure non-parties into joining, a process referred to by Wiener as the "beneficiary pays" principle (instead of the traditional "polluter pays" principle).[95] In this sense, at least one of the

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equivalent suspension can only be exercised three years after the safeguard was first imposed (SG Article 8.3).

[94] Calabresi and Melamed, p. 1107.

[95] Wiener, p. 750.

traditional reasons offered in domestic law in favor of liability rules is hard to apply in international law.[96]

Why can international law deal with hold-outs but not with free-loaders? In essence because international law has a hard time to either (1) stop a country from doing something (that is, in the face of hold-outs, who will stop the EC from unilaterally taking another country's entitlement to trade in GMOs?) or (2) force a country to do something (that is, who can force the United States or China to limit emissions or pay a pollution tax against their will?). Put differently, international law can overrule hold-outs because it is largely powerless to stop countries from taking other countries' entitlements. Yet, international law cannot normally resolve the free-load problem as it is largely powerless to force countries to give up entitlements.

A third reason that Calabresi and Melamed offer to shift from property to liability protection is high, or even prohibitive, transaction costs. They give the example of accidents and how it would be extremely expensive, if not prohibitive, to protect a victim's entitlement not to be accidentally injured as property. Indeed, in that case, anyone who engages in activities that may injure others would have to negotiate with all potential victims and buy the right, for example, "to knock off an arm or a leg".[97] Such requirement would preclude most activities that involve risk, even though these activities may, from an overall-welfare perspective, be worth having (ranging from driving cars to using certain machinery).

Much like hold-outs and free-loads, the problem of high transaction costs can be resolved through liability protection. As Calabresi and Melamed note, "perhaps the most common [reason], for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is

[96] This point was made earlier by Wiener, p. 683 ("the presumption favoring environmental taxes depends on the assumptions that the regulator can compel polluters to comply by fiat and that the regulator can impose the instrument directly on polluters without an intermediate level of government in the way. But neither of these assumptions – coercive fiat or unitary regulation – is valid in the global legal context").
[97] Calabresi and Melamed, p. 1109.

either unavailable or too expensive compared to a collective valuation".[98] Hence, instead of forcing risk-takers to negotiate *ex ante* a deal with all potential victims, in domestic law, the entitlement of people to be free from accidental injury is protected by a liability rule. As a result, the risk-taker can simply take the entitlement (i.e., cause an accident) but will then have to compensate the victim.

Turning now to international law, the closest analogy to liability protection based on high transaction costs is liability for cross-border environmental damage. Although international law does not prohibit all activities that may cause cross-border damage, it does impose "a general duty on the part of a state to protect other states from injurious acts by individuals within its jurisdiction".[99] Along these lines, since 1970 the UN's International Law Commission (ILC) is examining further rules on what it calls "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law".[100] States may, therefore, have an entitlement to be free from certain injury. However, other states can take this entitlement, *without* prior agreement, for as long as they pay compensation to the injured party.[101] As in domestic law, the reason to thus permit states to unilaterally take entitlements is that, otherwise, states would need to negotiate compensation agreements *ex ante* with each and every possible victim, before they engage in any risky activity. To impose property protection in this type of situation could prevent a lot of risky but overall desirable activities.

Crucially, however, the argument of high transaction costs as a reason for liability protection carries less weight at the international level than it does domestically. As there are, after all, only 191 states and only so many countries that are neighboring on a

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[98] Idem, p. 1110.

[99] ALEXANDRE KISS AND DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW (3rd edition, 2003), p. 184, referring to the famous *Trail Smelter* arbitration (3 U.N. RIAA 1938, 1965).

[100] See Alan Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in ALAN BOYLE AND DAVID FREESTONE (EDS.), INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT, PAST ACHIEVEMENTS AND FUTURE CHALLENGES (1999).

[101] See, for example, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, in PATRICIA BIRNIE AND ALAN BOYLE, BASIC DOCUMENTS IN INTERNATIONAL LAW AND THE ENVIRONMENT (1995), p. 132. Many environmental treaties do, however, also require advance notification and consultation, risk assessments and the enactment of precautionary measures. See Kiss and Shelton, *supra* note 99 at 188-223.

specific country, it is, in many cases, possible and not prohibitively expensive to have *ex ante* negotiations with all potential victims. In contrast, when, for example, driving a car under domestic law the number of potential victims runs in the thousands, if not millions, and *ex ante* negotiations are, effectively, impossible. In the WTO, for example, any member who wants to change the rules (that is, 'buy' certain entitlements from other members) will, indeed, need to negotiate with all other WTO members. Even if there are now 150 WTO members, and the transaction costs of conducting negotiations with 149 different countries are no doubt high, these costs remain relatively low as compared to negotiating with thousands of potential victims every time you drive your car.

c. International arguments in favor of liability protection: incomplete contracting, legitimacy deficit, attracting participation and preventing exit

Besides the above arguments for and against liability protection derived from domestic law analogies, crucial, new debates arise in the international context. On the one hand, when it comes to international entitlements, one can think of novel reasons in favor of liability protection. On the other hand, arguments -- unique to international law -- in favor of property protection come to mind. This sub-section focuses on the latter (in favor of liability). The next sub-section deals with the former (in favor of property). At the end of Section VI, Table 2 provides an overview of all core arguments.

Starting with possible arguments in favor of liability protection that are special or unique to international law consider, first, the fact that most international agreements are incomplete contracts. This is the case both because negotiators cannot foresee all situations and because, quite often, they can only agree on a vague compromise (given the high number of countries involved and/or diversities in state preferences).[102] Given this incompleteness of the treaty, there is a risk that states are faced with unexpected or unacceptable restrictions in the future.[103] As a result, negotiators may want to set up

[102] See the discussion *supra* text at note 43.
[103] As Sykes and Schwartz, *supra* note 11 (at p. 184) point out in respect of trade agreements, "[e]conomic conditions may change, the strength of the interest group organization may change, and so on. … even

devices that allow each party to breach the treaty subject to fully compensating any victims. In other words, they may want to permit breach in cases where the costs of performance exceed the benefits of performance. One way to do so is by protecting the entitlements in the treaty by a mere liability rule. As Downs and Rocke note in respect of the GATT, "GATT's weak enforcement norm is a result of uncertainty about the future demands of interest groups. States do not want aggressive enforcement of the GATT because most of them knew that they themselves would eventually find it advantageous to depart from the free trade standard".[104]

Second, and related, given the at times low level of democratic legitimacy of international norms, liability protection may offer a welcome democratic safety-valve. International norms may suffer a legitimacy deficit be it because they are treaties little scrutinized by domestic parliaments (or even ratified solely by dictatorial regimes), decisions by international organizations that are not necessarily representative (such as, from the perspective of some countries, the UN Security Council or the UN Human Rights Commission) or custom created by lower level officials. In such event, to force countries to perform the norm or to obtain agreement of all other parties to change it (i.e., protecting it by a property rule), may go too far. Instead, permitting countries to deviate for as long as they compensate (liability protection) may then offer an important democratic safeguard. A similar argument could be made if one believes that current international law is lopsided in favor of economic globalization and lags behind in environmental and social globalization. To avoid an even bigger divide one could then argue that, for example, trade and investment agreements should only be protected by a liability rule. To force specific performance with such agreements (i.e., protect them as property), in the absence of effective treaties in non-economic areas, would then, the argument could go, only aggravate international law's lopsidedness. If so, only once

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where the bargain on a particular issue is initially beneficial, changing circumstances may make it politically unappealing".

[104] Down and Rocke, p. 88. The same remains true to a large extent under the WTO treaty. Although there is compulsory dispute settlement under the WTO, there is no obligation to pay compensation for past damage, the remedy of last resort is purely "equivalent" trade suspensions, and WTO members are free not to give any direct effect to WTO rules and rulings before domestic courts.

stronger rules materialize in the non-economic sector should stronger protection of trade and investment entitlements follow.

Third, to permit states to breach a treaty subject only to compensation may be a way to attract broader participation in the treaty as well as a means to prevent exit from the treaty when a state is found to be in violation. As noted earlier[105], attracting participation and preventing exit largely explain the low levels of back-up enforcement in international law. The same arguments can be made in support of protecting international entitlements by a mere liability rule.

d. International arguments in favor of property protection: lack and cost/error of collective valuation, reputation costs, credible commitments, stability, states as non-unitary actors and power inequalities

In domestic contract law, with unitary actors and a centralized court system to set and enforce compensation, liability protection and the idea of stimulating so-called efficient breach can be attractive. If no one suffers and society is overall better off, why not permit breach for as long as the victim is fully compensated? In other words, why not allow a party to 'buy its way out' if the cost of its performance is higher than the victim's – compensated -- loss caused by breach?

As pointed out earlier, before moving from property to liability protection under international law, the buyer's argument of, for example, hold-outs or high transaction costs must be balanced by the seller's right to contractual freedom and sovereign equality. Put differently, before giving a state the right to unilaterally take another state's entitlement (liability protection), attention must be paid to that other state's insistence that, normally, its entitlements should only be taken with its consent (property protection).[106] More so than is the case for individuals under domestic law, the principles

[105] *Supra* text at note 43.

[106] This probably explains why in international environmental law the principle is not simply one of liability. Rather, liability is supplemented with obligations to prevent harm and to require prior authorization and consultations. See, for example, the ILC's Draft Articles on *Prevention of Transboundary Harm from Hazardous Activities* (adopted by the ILC in 2001, Report of the ILC on the

of contractual freedom, sovereignty, equality and consent form the bedrock of international law.

In addition, before opting for liability protection – be it because of hold-outs, transaction costs, incomplete contracting or legitimacy deficits – account must be taken of certain costs traditionally linked to the collective valuation of entitlements[107]: First, the difficulty and/or cost of setting up and running a court system that objectively values entitlements. Second, the errors made by such court system in assessing the true value of an entitlement to its holder. In international law both of these costs can be significant arguments *against* liability protection.

As noted earlier, given the absence of centralized enforcement – there is no international court or tribunal that states can automatically resort to for compensation in case their entitlements are taken – in most cases liability protection is out of the question. Without a collective valuation system, liability protection risks, indeed, to amount to the law of the jungle: Yes, states could then take entitlements only if they pay for them, but without a court to set the value of the compensation and to make sure that compensation is actually paid, liability protection may well offer no protection at all. Besides overshooting and the importance of reputation costs (discussed earlier[108]), this lack of a reliable collective valuation system is an important reason why international law, by default, protects entitlements as property. It also explains why we are most likely to witness liability protection in those regimes of international law that are most legalized, that is, which benefit from a strong dispute settlement mechanism and efficient back-up enforcement. A prime example is investor protection under NAFTA Chapter 11 (and most bilateral investment treaties). Under NAFTA Chapter 11, investor entitlements are, indeed, not protected as property: States cannot be forced to, for example, withdraw an

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work of its 53th session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. V.E.1*). Although the ILC articles apply to "activities not prohibited by international law" (Article 1), states have an obligation "to take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof" (Article 3), to "require prior authorization" (Article 6) and to "enter into consultations" (Article 9).

[107] See, Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. Legal Stud. 1, 6-7 (1989) and Alan Schwartz, *The Case for Specific Performance*, 89 Yale L. J. 271 (1979).

[108] *Supra* text at note 45.

environmental statute or to return expropriated property. The only remedy that investors can expect is, instead, compensation.[109] NAFTA governments can, in other words, unilaterally take an investor's entitlement for as long as they pay compensation for it. In sum, NAFTA Chapter 11 entitlements are protected by a liability rule, not a property rule. This was made possible largely because NAFTA Chapter 11 includes a compulsory investor-state dispute settlement system which offers collective valuation. Importantly, this system is supported by efficient back-up enforcement, namely domestic courts which have an obligation to recognize and enforce NAFTA Chapter 11 awards. A similar mechanism is at work for investor-state arbitration awards under the World Bank's ICSID Convention.[110] As compulsory dispute settlement is now available at the WTO, liability protection of WTO entitlements has equally become more feasible. Witness, for example, the renegotiation procedures under GATS where, in the absence of agreement, a WTO member may unilaterally take entitlements for as long as it pays collectively determined compensation or suffers equivalent retaliation.[111]

Turning now to the costs and possible errors of collective valuation -- even where international law *does* provide a valuation mechanism -- additional arguments *against* liability protection emerge. First, to put a monetary value on harm done to a state, as

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[109] NAFTA Article 1134.1: "Where a Tribunal makes a final award against a Party, the Tribunal may award only:(a) monetary damages, and any applicable interest; or(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages, and any applicable interest, in lieu of restitution.

[110] ICSID tribunals are unlikely to award specific performance and, instead, remain focused on compensation. To that extent, they offer liability, not property, protection. Yet, such liability protection was made possible because of a strong dispute settlement mechanism including, specifically, automatic enforcement before domestic courts of any money awards. See Article 54.1 of the ICSID Convention: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" (underlining added).

[111] See GATS Article XXI and *supra* notes 92-93. At the same time, note that since its foundation in 1947 the GATT already had liability rules in place (such as Article XXVIII on tariff renegotiations) and this *without* strong dispute settlement. Yet, this is easily explained by an element that makes trade largely *sui generis* and, in a way, better suited to liability protection. In trade agreements, the compensation which is so crucial for liability protection is not in the hands of the wrongdoer. That is, international law is not tasked here with the problem of forcing a country to pay compensation. Rather, because of the reciprocity underlying trade agreements, compensation is in the hands of the victim: it takes the form of the victim suspending trade concessions as against the wrongdoer. Although such trade retaliation may not compensate the victim in economic terms (it would only do so in case the victim is a large country that is a price setter), it does offer a level of compensation in political terms (see *supra* note 93). Hence, in trade agreements, to permit a state to unilaterally take another state's entitlement subject to compensation can work and does not pose the usual problem of lack of back-up enforcement in international law.

opposed to an individual, can be difficult, especially when it comes to consolidated harm to potentially thousands of people (many of whom may have different interests) or largely intangible harm caused by, for example, infringements of a state's sovereignty or airspace.[112] Since states are not unitary actors, the taking of an entitlement may also harm some individuals within the state but benefit others, raising the question of whether compensation must be based on overall welfare losses or simply the losses caused to some groups within a state.[113] Moreover, given the economic, social and cultural diversity between states, the value of entitlements held by states is likely to be subjective and may therefore vary widely between countries. Any attempt to objectively value a state's entitlement, in particular when such is done exclusively by foreign judges, may therefore include serious errors of under- or over-valuation. Where compensation levels are *under*-valued, the transfer of entitlements is not Pareto desirable and may be overall inefficient (that is, the losses of the seller may not be compensated by buyer gains). Equally, where courts *over*-value compensations, they may deter efficient breach.

In this context, the limited evidence available of international arbitrations that do attempt to objectively set compensation indicates that in most cases there is a tendency to under-value compensation. This is the case, for example, in WTO arbitrations tasked to set the permissible level of trade retaliation in response to breach of the WTO treaty.[114] This

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[112] In support, see Sykes and Schwartz, *supra* note 11 at 187 ("the harm done to political officials by a breach of promise in the WTO is no doubt difficult to measure precisely, and when damages are hard to calculate, that fact is usually thought to be a heavy thumb on the scale of favoring a property rule over a liability rule").

[113] WTO retaliation, for example, is calculated based only on the amount of trade lost by the complainant because of a trade restriction maintained by the defendant (e.g., the US gets a right to retaliate for an amount equal to the dollar value of US meat exports kept out of the EC market because of the EC's hormone-beef ban). The fact that such lost trade can be compensated by exports to other countries (*in casu*, that the US can export its meat to countries other than the EC) does not count. Nor does the harm caused to consumers within the defending state (*in casu*, higher meat prices for EC consumers) matter. Similarly, when it comes to illegal export subsidies, retaliation has been valued at the full amount of the subsidies paid out. The fact that export subsidies are likely to benefit consumers in the complaining state is not considered. The only element that matters is that export subsidies may displace competing producers.

[114] In WTO arbitrations that set equivalent levels of trade suspension in response to WTO breach, awards have, indeed, been very conservative. In *US/Bananas* arbitrators refused to count US fertilizer and machinery exports to Latin America as well as US capital, management and packaging services offered in respect of Latin American banana exports to the EC (arguing that it was for those Latin American countries to claim these harms). In *Hormones*, the arbitrators noted: "we need to guard against claims of lost opportunities where the causal link with the inconsistent hormone ban is less than apparent" (para. 41) and rejected harm with "too remote" or "too speculative" a causal link (para. 77). In *1916 Act* the arbitrators

tendency to put conservative estimates on harm is no doubt inspired by a high degree of deference by international courts to the sovereignty of states. Where the tribunal already intruded on this sovereignty by finding a violation, it is often naturally inclined to somewhat make-up for this intrusion by low-balling the compensation to be paid for the violation. The same conservative valuations are witnessed in investor-state arbitrations and before the International Court of Justice.

For additional arguments, unique to international law, in favor of property protection, recall further the discussion above on why international entitlements are currently protected, by default, as property.[115] First, international law may be overshooting in its ambitions, e.g., prescribe specific performance, knowing far too well that achieving liability protection would already be a success (remember the analogy of setting a speed limit at 40 MPH in the hope of reducing actual speed to 60 MPF). Second, and crucially important, international law may opt for property protection, that is, demand performance or agreement on a renegotiation or settlement, to trigger reputation and normative costs in case states do breach international law.

As pointed out earlier, more than anything else, reputation costs are what drive compliance. However, under a liability regime those costs are basically wiped out. Indeed, under a liability rule no shame or blame is linked to breach for as long as it is accompanied by compensation. Yet, shame and blame is exactly what international law needs the most to induce compliance. This is why, for example, most WTO entitlements (other than tariffs and GATS specific commitments) are protected by a property rule[116] and why in all but a handful of WTO disputes the WTO dispute mechanism – whose last

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insisted on "credible, factual, and verifiable information" (para. 5.54) and stressed that "this prudent approach … is appropriate" (para. 5.57). As a result, they rejected to count any settlement under the 1916 Act that was not disclosed (para. 5.63). Since under US law most (if not all) settlements are bound by confidentiality rules, no settlements are currently covered. The same arbitrators refused to count the "chilling effect" of merely having legislation in place (even if it is not actually applied) for being "too speculative, and too remote" (para. 5.69), noting dryly that "a quantification of the chilling effect is not possible" (para. 5.72). While accepting final damages amounts and fines in judgments under the 1916 Act, they refused to count litigation costs (para. 5.76).

[115] See *supra* text at note 45..

[116] See *supra* note 91. For the liability regimes for tariffs and GATS specific commitments see *supra* note 93.

resort is, after all, merely the suspension of *equivalent* concessions -- was able to induce compliance, not merely compensatory trade suspensions (indeed, in no single case was such trade suspension regarded as 'efficient breach' that ended the dispute). Even if property protection may, eventually, only achieve the equivalent of liability protection (i.e., compensation), it does so because the goal is set at the higher level of compliance. It is the reputation and other costs of non-compliance that lead to compensation. Without those costs (i.e., if one were to openly install a mere liability regime) this, for some, disappointing level of liability protection would not even be met. In this sense, it *does* matter what you wish for: Because the goal of international law is, by default, compliance, it is able to achieve, in most cases, at least compensation. For that reason it is, in most situations, crucial for international law to 'keep up appearances' and to insist on property protection even if it knows that, in some instances, only compensation (and not performance) will follow.

In addition, without property protection, one of the core functions of international law may be endangered, namely offering countries a means to make credible commitments. If negotiators know that parties can subsequently walk away from the treaty by merely paying compensation, any commitments made will lose credibility, both at home and internationally. As against domestic audiences, tying one's hands to an international treaty becomes less credible when everyone knows that the government can anyhow buy its way out of the treaty. In rough times (e.g. in the face of temporary protectionist pressures) governments may then have a hard time to stick to the treaty. As against foreign partners, treaty commitments protected by liability equally lose credibility. Over time it may even inhibit countries from signing treaties in the first place: with past experiences of 'buy outs', why would you believe this time that a government will keep its promise?

Moreover, much more so than individuals under contract law, when states operate under international law, one of their main objectives is to create stable and predictable relationships. States do not engage in one-time contacts. They are repeat players and necessarily interact and contract in a variety of fields (from national security to trade and

health). Moreover, unlike individuals under contract law, states are not unitary actors either. Whereas the calculus of efficient breach is relatively easy where two individuals have signed a contract -- e.g., do I still gain if I just pay you out instead of fulfilling my promise to, for example, paint your house? --, the calculus of states driven by a multitude of incentives and interest groups is far more complex.[117] In particular, the situation where I pay you to get someone else paint your house – contrary to my earlier contractual promise -- whilst I engage in more lucrative activity such as law school teaching, makes sense. In contrast, the wash is more difficult to see where, for example, the United States vindicates its right to export GMOs to the EC in WTO dispute settlement, but then gets compensated with a tariff reduction on computer exports to the EC or the right to increase tariffs on EC textile imports. The bottom line is that US farmers are simply not compensated by more computer exports nor by less imports of textiles. For them, and indirectly also for the US government representing them, breach *cum* compensation is *not* the economic equivalent of compliance. This explains why no WTO complainant so far has rested its case upon receipt of trade compensation or trade suspensions. Equally, from the EC perspective, it is difficult to balance a continued ban on US GMOs with a concession of more computer imports or less textiles exports. The bottom line is that EC computer producers and EC textiles exporters are simply not willing to pay the bill for EC farmers and EC consumers averse to GMOs. For them, and indirectly also for the EC governments representing them, breach *cum* compensation is not the economic equivalent of compliance. This, in turn, explains why no WTO defendant so far has been able to end a case against it by sacrificing export interests in some other sector.

Finally, in fora where liability protection has been openly proposed (such as the WTO) the main recurring counter-argument has been that it would alter the balance in favor of

[117] For example, in the WTO steel dispute, the United States was driven to impose additional tariffs on steel imports by the domestic US steel industry. In the original battle over whether or not to impose the tariffs, the domestic steel industry won over domestic steel consumers (such as the US car industry that buys a lot of steel). Yet, once the WTO had condemned the tariff as a breach of the WTO treaty, and authorized trade retaliation on US exports of, among other things, Florida orange juice and North Carolina textiles, the domestic balance of interests shifted. Because of the additional weight added by Florida orange growers and North Carolina textile mills against the tariffs (weight that was added to the original opposition by US steel consumers), the Bush administration eventually gave up on the US steel industry and withdrew the tariff. This shows how a state's interests are not unitary but multi-faceted, nor static but changing over time.

the rich and powerful countries. Indeed, the right to unilaterally take entitlements of other countries on condition that one pays for it (the hallmark of liability protection) is likely to be invoked mainly, if not exclusively, by those countries who have the economic and/or political means to 'buy off' their obligations.[118] Few developing countries, for example, have the capital, economic or otherwise, to 'buy off' trading rights from other countries, let alone from powerful partners such as the EC or the US.[119]

e. Conclusion on property rules versus liability rules

It was not the goal of this section to conclude in favor of either liability or property protection for international law. Instead, the aim was to set out factors and arguments for and against either of these regimes. Table 2 below summarizes this assessment.

[118] Crucially, however, compensation as an alternative to compliance (under a liability rule) must be distinguished from compensation as one of several remedies to induce compliance (under a property rule). Even though WTO members often confuse the two, only compensation as an alternative to compliance attracts the arguments discussed here against liability protection.

[119] This fear of rich nations buying off obligations is arguably one of the main reasons why the multilateral trading system evolved from liability protection under GATT to property protection under the WTO. In 1947, when the GATT was created, few of the 23 participants were developing countries. In contrast, in the WTO, more than three quarters of the membership are developing countries. As noted earlier, developing countries are strong proponents of legalization and property protection, if only to level the political imbalance between them and developed nations.

Table 2: When to Protect International Entitlements by Property or Liability Rule?

ARGUMENTS IN FAVOUR OF A **PROPERTY RULE**	ARGUMENTS IN FAVOUR OF A **LIABILITY RULE**
1. Contractual freedom of states	1. Hold-outs
2. Sovereign equality and diversity of states	2. Free-loaders
3. Lack of centralized law-making and enforcement	3. Transaction costs
4. Absence of collective valuation mechanism	4. Efficient breach
5. Costs of collective valuation including error and tendency to under-value	5. Incomplete contracting
6. Attract reputation and normative costs	6. Legitimacy deficit and lopsidedness of international law
7. Enable credible commitments	7. Attract participation and prevent exit
8. Importance of stability and predictability	
9. States as non-unitary actors	
10. Buy-out option favors powerful states	

At the same time, the evaluation above does tilt in favor of property protection, at least when considering the current state of international law. Two factors, in particular, militate for a default rule of property protection, that is, the rule we witness *lex lata*:

- The general lack of an efficient and effective collective valuation system, a *sine qua non* to set and collect compensation under a liability rule scheme.
- The need to create reputation and normative costs to compensate for weak back-up enforcement, crucial costs to induce some degree of compliance which would not be triggered under a liability rule.

As a result, and coming back to the paradox described in Section V.1 (international law, an inherently weak system, protects its entitlements more strongly than most domestic law regimes do), it is largely *because of* – not despite -- the weaknesses of international law that international entitlements are, by default, protected as property. In other words, it is because of the absence of a collective valuation mechanism and because of weak back-up enforcement instruments (necessitating reputation costs to induce some level of compliance) that a liability rule under current international law is unlikely to work. These weaknesses of international law do *not stop*, or *prevent it*, from the relatively high level of property protection. Rather it is those weaknesses that *explain* the prevalence of property protection.

At the same time, many of the arguments in favor of liability protection can be addressed within the current property regime of international law. In particular, the need for safety-valves in the face of incomplete contracts or rules of international law that lack legitimacy can be met at the subsequent stage of back-up enforcement. Indeed, even where international law protects entitlements as property, the instruments of back-up enforcement in case states break the rules of protection are weak (ultimately, only *proportional* countermeasures). In the WTO, for example, most entitlements are protected as property.[120] Yet, when a WTO member refuses to perform, the only back-up enforcement that member can face is *equivalent* trade suspensions (*excluding* compensation for past harm). Thus, ample scope remains for safety-valves or states continuing to breach their obligations in the subsequent stage of back-up enforcement. To move this flexibility up to the rules of protection themselves, i.e., to openly allow countries to 'buy off' WTO obligations, would keep the same safety-valves in place which are, in practice, already there through weak back-up enforcement. At the same time, however, doing so would remove the system's main tool to induce compliance, namely reputation and normative costs created by the WTO finding a country to be in breach. A move to liability protection would, therefore, seriously upset the current, carefully constructed balance between, on the one hand, providing incentives to comply (in particular, through reputation costs) and, on the other hand, offering limited safety

[120] See *supra* note 91. For exceptions, see *supra* note 93.

valves that allow for non-compliance (in particular, through weak back-up enforcement). This imbalance would, in turn, undermine the possibility for WTO members to make credible commitments, threaten one of the core objectives of the trading system, namely, stability and predictability, and risk tipping the balance against developing countries who would find it much more difficult to 'buy off' their obligations.

Moreover, besides weak back-up enforcement, an additional mechanism is available to soften problems of incomplete contracting and legitimacy deficits (arguments in favor of liability protection pointed out earlier), namely at the stage where international law reaches the domestic legal system. As noted earlier, as much as weak enforcement of *jus cogens* at the international level can be compensated by giving direct effect to *jus cogens* in domestic courts, so can strong enforcement of, for example, WTO law be offset with the safety-valve or buffer of *not* giving direct effect to WTO rules and rulings before domestic courts.[121] This is exactly what both US and EC courts are doing: so as not to tie the hands of their executives too much, these courts have refused to give direct effect to both WTO rules and rulings in WTO dispute settlement. In the US, for example, the administration has consistently referred to the absence of direct effect as proof that the US maintains its sovereignty, at least in the sense that the WTO cannot ever change US federal or state laws: As WTO law has no direct effect, such changes can happen only if the US, or US states, themselves make their own decision to that effect.[122]

That said, as international law further develops and matures, the scope for liability protection ought to increase. On condition that a reliable collective valuation mechanism is made available – or where compensation is left in the hands of the victim itself, as is the case for trade agreements[123] – in particular hold-outs, high transaction costs and incomplete contracting may justify liability protection. In the WTO, for example, tariffs and GATS specific commitments are protected by a liability rule. Yet, the fact that so far very few countries have taken advantage of this possibility to change their commitments subject only to compensation or equivalent trade suspensions, indicates that it is, at best,

[121] See *supra* text at notes 26 and 85.
[122] See USTR Press Releases whenever the US loses a major WTO dispute.
[123] See *supra* note 111.

a safety-valve for extreme cases, not evidence that the WTO's goal is to systematically avoid compliance there where compliance is costlier than breach. The arguments noted earlier of enabling credible commitments, the importance of stability and predictability to international law, the non-unitary nature of states and the fear that liability protection would favor powerful countries, may well explain the reluctance of WTO members to withdraw commitments under these liability rules.

Another, and arguably better, example of workable liability rules is the Kyoto Protocol which caps the total emissions of greenhouse gases by certain participating countries[124], but then allows those countries, as well as industries within those countries, to trade in emission rights.[125] In other words, within pre-set limits, countries or industries can pollute for as long as they 'pay for it', in the form of buying emission allowances. The core advantage of such mechanism of tradeable allowances is economic efficiency (in other words, polluting but buying emission allowances from someone who can abate more cheaply that you can, constitutes 'efficient breach'). Indeed, where emissions automatically affect all countries (as in global warming) and abatement costs vary between countries and industries, a system of tradeable quantity limits will obtain a certain level of abatement at the lowest possible cost. As Wiener explains, in such system "[e]ach source abates up to the point that its marginal costs of abatement equals the market price for an allowance to cover the next unit of emissions. High-cost abaters undertake less abatement and buy more allowances; low-cost abaters undertake more abatement and sell allowances".[126] In this case, liability protection works because it achieves abatement most efficiently, but also, and for present purposes most importantly, because a reliable collective valuation mechanism is made available, namely a private market place for emission allowances. Moreover, liability protection is, in this situation, embedded in a property regime in the sense that the number of emission allowances is capped. Hence, at the end of a certain period, overall world targets must be met (no 'buy out' is possible in this respect) and each country must either meet its emission reduction targets or present emission allowances for any short-fall. In addition, the mechanism

[124] Article 3, Kyoto Protocol.
[125] Article 6, Kyoto Protocol.
[126] Wiener, p. 697.

avoids the difficulty related to states as non-unitary actors by delegating emissions trading to private industries. It also bypasses the traditional objection of developing countries against liability schemes by not imposing emission reductions on them and letting developing countries operate as sellers, and thus beneficiaries, of emissions allowances (under the so-called clean development mechanism, for example, developed countries who invest in developing countries so as to reduce emissions there, obtain emission credits[127]).

Finally, similar factors explain why investment agreements operate under a liability rule (under NAFTA Chapter 11, for example, governments can only be forced to pay compensation, not to, for example, withdraw an environmental regulation or to return expropriated property). First, the system provides an effective collective valuation mechanism, in the form of international tribunals whose money awards are, crucially, directly binding on and enforceable before domestic courts. Second, the usual need for stability and predictability in inter-state relations, as well as the problem of states as non-unitary actors, is softened by deflecting complaints from states to private investors who have standing to sue foreign governments directly.

In sum, whilst property protection may well remain the fall-back, as international law further develops and strengthens, both inalienability and liability protection will gradually become more feasible. As both deviations require higher degrees of community, in particular community enforcement or a collective valuation mechanism, both inalienability and liability protection are more likely to emerge with stronger international law based on more cohesive geographical or subject-specific polities. Equally, both inalienability and liability protection can be fostered by more involvement of domestic courts, be it to apply *jus cogens* or to enforce money awards under NAFTA Chapter 11.

[127] Article 12, Kyoto Protocol.

VII. Conclusion

Any system of law that either uniformly requires performance in all cases, or regards its norms as mere pledges, cannot be taken seriously. Yet, this is, respectively, what European absolutism and American voluntarism – as I defined it (in Section II) -- would have us believe represents international law. Both schools are, however, wrong. To fully appreciate why, one must transcend the by now hollow debate between traditional supporters and traditional critics of international law. Both of these camps wrongly portray law and normativity as homogeneous concepts, representing a simple binary choice between law and not-law. Yet, this is not how even the most sophisticated systems of domestic law operate. On the contrary, domestic law comes in different shades. As international law further develops and matures, it should follow suit.

One such form of gradation is based on the distinction between allocating entitlements, protecting entitlements and back-up enforcement (Section III). In particular, a clear distinction must be made between the second step of *how to protect* entitlements (i.e., as either inalienable or by a property or liability rule?) and the third step of *how to react* when rules of protection are flouted (e.g., with imprisonment, fines, retaliation or simply compensation?). So far, international law scholars have given little thought to this distinction or confused the second step with the third.

In WTO circles, for example, a debate rages as to whether adverse rulings of the WTO Appellate Body impose a legal obligation to comply with WTO rules (as John Jackson has argued[128]) or whether, in contrast, WTO members have the right to 'buy off' their obligations with trade compensation or by suffering trade retaliation (the position of, in particular, Alan Sykes[129]). Within the paradigm presented in this article, both positions carry weight but only so because both confuse the steps of how international law protects and enforces entitlements. Jackson is correct that, as a matter of *how* the WTO *protects* entitlements (the second step referred to earlier), the WTO operates under a property rule,

[128] See *supra* note 13.
[129] See *supra* note 11.

that is, given the default rule of protection in international law, confirmed in the language of the DSU itself, WTO members are under a legal obligation to comply with WTO rulings.[130] Other than for tariffs and GATS specific commitments, WTO members cannot unilaterally take entitlements, pay compensation for them, and thereby end a dispute. At the same time, however, Sykes is equally correct that WTO members have, as a matter of *how* the WTO *reacts* when a WTO member flouts the rule of property protection (the third step referred to earlier), the option to simply pay trade compensation or suffer equivalent trade retaliation. Although, by doing so, the WTO member does not fulfill its ultimate legal obligation of compliance (second step), given the WTO's weak back-up enforcement (third step), a WTO member can, in practice, avoid compliance through compensation or retaliation. Sykes is also correct to regard this relatively weak back-up enforcement as a welcome safety-valve instead of a birth defect that needs cure. Equally important, Jackson's position that WTO rulings must be complied with (property protection) should not be read to mean that WTO entitlements are protected as inalienable. As is the case for property protection more generally, WTO rules are not written in stone. As a result, WTO members can settle a dispute[131] or change WTO rules[132] for as long as mutual agreement is found.

In contrast to my caricature of European absolutism, only a very select group of international entitlements are protected as inalienable (*jus cogens*) (Section IV.1). Moreover, unlike the extreme of what I called American voluntarism, international law is, by default, protected by a property rule, not a liability rule: Its goal is restitution or specific performance, not compensation or efficient breach (Section IV.2).

In terms of the third step of back-up enforcement, current international law presents an intriguing double paradox (Section V). First, although international law is more ambitious in its default level of protection as compared to most domestic legal systems (property versus liability protection), back-up enforcement in international law is actually weaker (ultimately, merely *proportional* countermeasures). I explained this paradox,

[130] See *supra* note 91.
[131] See *supra* notes 19 and 20.
[132] But see the caveats of Article 48 VCLT *supra* text at note 38.

first, with reference to what I called overshooting and, second, based on the importance of reputation and normative costs for inducing compliance with international law. As these costs would not be triggered under a mere liability rule, current international law is, by default, protected as property. Property protection is, moreover, naturally suited for international law given, in particular, the principles of state consent and sovereign equality, as well as the general absence in current international law of an effective collective valuation mechanism, a *sine qua non* for liability protection.

The second paradox of back-up enforcement under current international law is this: The entitlements that international law protects most strongly (what I called community obligations, namely *jus cogens* and obligations *erga omnes partes*) benefit from the weakest form of back-up enforcement (in particular, no reciprocal suspensions nor countermeasures unless one is individually affected). Indeed, most community obligations -- such as the prohibition of genocide, core labor standards and fundamental human rights -- currently experience the worst of both worlds: They lack an effective community-based enforcement mechanism (be it under general international law or specific treaty regimes) and, on top of that, are deprived from the normal back-up of individual enforcement, be it reciprocal suspension or countermeasures. In this sense at least, and quite paradoxically, the *actual* protection of international entitlements is inversely related to how strongly international law *aims* or *pretends* to be protecting the entitlement.

Normatively speaking, therefore, when setting the optimal level of protection for international entitlements, one must be careful what one wishes for. Although externalities, moralisms and paternalism may be arguments to make certain international entitlements inalienable, such arguments must be balanced by, in particular, the contractual freedom and sovereign equality of states and, most importantly, the generally weaker back-up enforcement available for community obligations. Hence, when, for example, supporters of the WTO advocate the promotion of WTO norms from reciprocal obligations to collective or *erga omnes partes* obligations[133], they must be careful what

[133] See *supra* notes 61 and 82.

they wish for. Although they might be inspired by noble thoughts about how important trade is and, therefore, how counterintuitive it is to uphold a trade system with reciprocal trade sanctions, collectivizing the WTO risk undermining rather than strengthening the system: Taking reciprocity away from a treaty regime without replacing it with a sufficiently solid community may actually weaken rather than strengthen the effectiveness of the treaty.

Equally, when making a choice between property and liability protection, what you wish for matters. Given the importance of reputation and normative costs as factors to induce compliance, setting the goal at performance – instead of openly permitting breach *cum* compensation – is crucial. To attract those costs and because states value stability, need to make credible commitments and are non-unitary actors with widely divergent political power, property protection is, by default, best suited for international law. Indeed, a system without compulsory dispute settlement, in particular, without an effective collective valuation system to set and enforce compensation levels, is unlikely to support liability protection.

Fortunately, and further supporting property protection, some of the strongest arguments in favor of a liability rule -- such as incomplete contracting, legitimacy deficits, attracting participation and preventing exit – can be taken care of in the *subsequent* stages of back-up enforcement and deciding what effect to give to international law before domestic courts. More specifically, international law's weak back-up enforcement (ultimately only *proportional* countermeasures) and/or denying direct effect to international rules and rulings, can offer the democratic and other safety-valves sought after.

Yet, as international law further develops and strengthens, and establishes closer ties with domestic legal systems and courts, liability protection – like inalienability -- may become more feasible (as witnessed in NAFTA Chapter 11 and emissions trading under the Kyoto Protocol). As in domestic law, in particular, hold-outs and high transaction costs can then justify liability, instead of property, protection.