INTERNATIONAL LAW IN NATIONAL LEGAL SYSTEMS: AN EMPIRICAL INVESTIGATION

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I. INTRODUCTION

International legal scholars have long recognized the importance of the rules and processes by which states adhere to international legal obligations and "translate" them into their domestic legal systems.1 Research by political scientists on specific issue areas likewise increasingly recognizes that domestic implementation is crucial to international law compliance and effectiveness.2 Yet the lack of systematic data makes it difficult to assemble an overall picture of the relationship between international law and domestic law around the world, let alone to document its evolution over time. Recent qualitative surveys of state practice have begun to fill that gap, but provide only a snapshot in time and are limited to relatively few countries.3 Some quantitative projects cover more countries, but address only a limited number of questions based solely on the text of national constitutions.4

In this essay, we draw upon a new dataset arising from a multi-year research project on international law in domestic legal systems. This dataset provides what we believe is uniquely systematic and comprehensive information on the relationship between international and national legal orders. The dataset captures numerous specific features of approaches in national legal systems to international law, including treaty-making procedures, the status of treaties in domestic law, and the reception of customary international law (CIL). It currently covers 101 countries for the period 1815-2013, thus expanding the scope of inquiry beyond well-known Western states to include numerous states in Africa, Asia, Latin America, and the former Soviet

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3 See, e.g., INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011); THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY (David Sloss ed., 2009); NATIONAL TREATY LAW AND PRACTICE (Duncan Hollis et al. eds., 2005).
Union. It covers a longer period than existing data, thus allowing identification and analysis of historical trends. It incorporates information found not only in constitutions but also in statutes, case law, executive and administrative documents, and secondary sources. This data allows us to move beyond traditional monist-dualist classifications and provide a more nuanced exploration of how countries address international law in their domestic legal systems.

In the following sections, we describe salient features of the data, identify major trends in national approaches to international law, and discuss their implications for comparative international law. We find that, in aggregate, national approaches to treaty making and implementation have changed considerably, and we suggest that the direction of change reflects simultaneous concern with securing effective implementation of a growing body of treaty law and addressing greater accountability and legitimacy concerns as more governance functions migrate to the international level. More specifically, we find that national legal systems have become more likely to give treaties direct effect and hierarchical superiority over domestic law, which is consistent with a desire to ensure effective implementation. At the same time, national legal systems have steadily expanded the categories of treaties whose ratification requires prior legislative approval, thus expanding the role of national legislatures in international lawmaking.

With respect to CIL, we find remarkable consistency across countries: the vast majority of national legal systems now recognize custom as directly applicable, at least in principle. At the same time, a growing portion of countries consider custom to be hierarchically inferior to domestic law, which limits the ability of courts to apply it directly in many circumstances and preserves the legislature’s ability to displace customary rules. Thus, the reception regime for custom reflects both traditional ideas of automatic reception of the law of nations in the domestic legal order and contemporary suspicion of the custom formation process, including its lack of formal consent by domestic political institutions.

These trends in domestic legal orders’ attitudes towards treaties and international custom hold important insights for comparative international law. For instance, our data provides information on the respective roles of such domestic political institutions as executives, legislatures, and courts in engaging with international law, which can inform comparative analysis. Although we propose conjectures about how the trends we identify relate to broader phenomena—such as the changing nature of the international legal order and debates over the democratic deficit—the methods we use do not allow us to make any causal claims. Our sample of countries is too diverse and the number of confounding variables is too large for such claims to be made and substantiated within the framework of this essay. Our primary purpose here is to document global patterns and trends and to propose hypotheses as to their potential causes and relationships that may be tested by future comparative international law scholarship.

II. A NEW DATASET ON INTERNATIONAL LAW IN DOMESTIC LEGAL SYSTEMS

Differences between countries in the relationship between international law and domestic legal systems are often accounted for in international law textbooks by reference to the monist-dualist distinction. According to this distinction, monist systems regard international law and national law as “two parts of a single system” in which “international law automatically passes into the state’s legal system,” so that “when the state ratifies a treaty, that treaty is automatically
and fully incorporated into national law."\(^5\) Indeed, in a "pure" monist system, "national law is seen as ultimately deriving its authority from international law, which stands higher in the hierarchy of legal norms."\(^6\) By contrast, dualist systems regard international law and national law as "separate legal systems" wherein "[a] rule of international law binding upon the state does not automatically become a part of national law; it only does so when it has been transformed or incorporated into national law by an act at the national level, such as an implementing statute for a treaty."\(^7\)

As our study makes clear, the monist-dualist distinction has fundamental limitations for the purpose of classifying national approaches to international law. First, because they derive from a theoretical debate about the nature of international law rather than an effort to classify actual legal systems, "neither theory offers an adequate account of the practice of international and national courts, whose role in articulating the positions of the various legal systems is crucial."\(^8\) Second, national systems do not adopt a monolithic approach to international law; most of them combine aspects of the monist and dualist approaches. For example, in the United Kingdom treaties do not become part of domestic law unless implemented by Parliament, while courts may directly apply international custom. Finally, because the distinction is articulated at a high level of generality, scholars sometimes differ as to whether a particular country should properly be classified as "monist" or "dualist." For example, while many observers consider France to be a monist country, some leading French scholars maintain that, because the direct effect and superiority of treaties in France does not rest on their international validity but on the French constitution, the country is really "dualist."\(^9\)

For these reasons, in assembling our dataset, we go beyond the monist-dualist distinction to provide a more detailed picture of state practice. In doing so, we also go substantially beyond existing research. Unlike existing qualitative surveys,\(^{10}\) our dataset covers a broad range of countries from all regions of the world, systematically addresses a standard set of questions, and codes the answers in quantitative form to permit visual display and statistical analysis. Instead of providing a snapshot in time, our dataset covers the period 1815–2013, providing the first systematic picture of the evolution of national approaches to international law during that period. Another defining feature of our dataset is that it relies not only on national constitutions, but also on information found in ordinary legislation, case law, executive and administrative documents, and secondary sources. We follow this approach because constitutions

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6 Id.
7 Id.
8 James Crawford, Brownlie's Principles of Public International Law 50 (8th ed. 2012).
9 See, e.g., Alain Pellet, Vous avez dit "monisme"? Quelques banalités de bon sens sur l'impossibilité du prétendu monisme constitutionnel à la française, in L'ARCHITECTURE DU DROIT: MÉLANGES EN L'HONNEUR DE MICHEL TROPER 827 (Denys de Béchillon et al. eds., 2006). In this article, while we generally avoid using the terms "monist" and "dualist," it is sometimes necessary to do so to avoid repetition or describe how legal systems are conventionally classified. In such cases, we use the term "monist" to designate countries where treaties have direct effect upon ratification without further action by the legislature (even if legislative approval is required prior to ratification or if formal steps need to be taken by other branches to bring the treaty into effect) and "dualist" to designate countries where legislative action is required to incorporate a ratified treaty into domestic law. The monist-dualist distinction is much less salient for CIL, and we avoid its use in that context.
usually only partially define a state's relationship with international law and, in some cases, are silent on the matter altogether. In that sense, our data differs from existing initiatives by Hathaway\textsuperscript{11} and the Comparative Constitutions Project,\textsuperscript{12} which assemble information on the domestic status of international law based on constitutions alone.

In collecting our data, a first step was to identify and define the substantive issues that define a state's relationship with international law. We identified about fifty issues under the categories of treaty making, treaty reception, and CIL reception. For each country, we commissioned a written memorandum that provides a narrative answer to each of the questions and, where applicable, documents how this answer has changed over time.\textsuperscript{13} These memorandums were written by the principal investigators or by scholars, professors, and students that usually possessed substantial knowledge on the foreign legal system in question. Where multiple interpretations existed, we relied on the most authoritative source of that system to make a judgment call. The principal investigators conducted all of the coding.

Because our goal is to provide a comprehensive picture of international law in national legal systems, we include a wide range of countries: rich and poor, Western and non-Western, democratic and non-democratic. At first blush, this choice may raise questions as to the significance of the rules and procedures we identify across different regime types. For example, one might doubt that non-democratic states would require prior legislative approval of treaty ratification, and that if such provisions exist, they would have any meaningful impact.\textsuperscript{14} Yet, a cursory exploration of the data reveals that, just as authoritarian regimes almost universally hold elections, establish constitutional courts, and adopt bills of rights, they also require legislatures to approve treaties.\textsuperscript{15} The political science literature offers several explanations: some studies show that autocracies adopt seemingly democratic features merely because they are global symbols of statehood,\textsuperscript{16} while others see them as concessions to popular pressure that may become real constraints.\textsuperscript{17} Legislatures, constitutional courts, and other institutions may also represent the interests of powerful constituencies whose support the regime requires, imposing constraints upon leaders even in the absence of democratization. In this essay, we do not purport to explain why individual countries choose specific approaches to international law or to measure their effects. But the fact that many features we describe appear across different regime types—and across other salient differences among states—justifies including a broad cross-section of the world in our dataset.

\textsuperscript{11} Hathaway, supra note 4.

\textsuperscript{12} Ginsburg, et al., supra note 4.

\textsuperscript{13} We thank the Comparative Constitutions Project for providing us access to their historical repository of constitutions.

\textsuperscript{14} Of the 101 countries in our sample, 30 percent are not currently "fully democratic." We define "fully democratic" as a score of 6 or higher on the Polity IV democracy scale that is commonly used in the political science literature.

\textsuperscript{15} Indeed, the correlation between democracy and legislative involvement in treaty making is close to zero. See infra note 22 and accompanying text.

\textsuperscript{16} See David S. Law & Mila Versteeg, Constitutional Variation Among Strains of Authoritarianism, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 165 (Tom Ginsburg & Alberto Simpser eds., 2013).

III. Treaty Making

The proliferation of treaties and the expansion of their substantive scope to matters previously regarded as domestic in nature—such as economic regulation, human rights, and environmental protection—have lent new urgency to concerns about the legitimacy and democratic accountability of international law.\(^{18}\) From this perspective, participation by national legislatures in treaty making plays an important role in conferring upon treaties the imprimatur of democratic legitimacy. In addition, such participation upholds the separation of powers principles central to many constitutional democracies, under which lawmaking should be the exclusive province of the legislature rather than the executive. More generally, the insistence on legislative involvement in treaty making signals a commitment to national sovereignty and a desire to protect national political institutions from international encroachment.

In this respect, countries that require treaties to be implemented through domestic legislation (often referred to as “dualist” systems) are sometimes said to be more protective of sovereignty than countries where treaties become directly applicable upon ratification (“monist” systems). In the former, the executive usually possesses the power to conclude treaties, but these treaties do not become part of domestic law until implemented by legislative action. If the legislature is dissatisfied with a treaty, it can refrain from implementing it altogether, adopt legislation that alters its content, or circumscribe its application. This possibility provides the executive with strong incentives to anticipate potential legislative objections to the treaty and take them into account during the negotiation and drafting processes.\(^{19}\) Thus, the “act of transformation serves as an important democratic check on the treaty-making process.”\(^{20}\) By contrast, systems where international law applies directly can be seen as more open to international law. Moreover, since these systems do not require treaties to be implemented through domestic legislation, they might allow the executive to create or modify domestic law through treaty making without the consent of the legislature, potentially upsetting the separation of powers that formally characterizes most systems.\(^{21}\)

Our data on legislative involvement in treaty making reveals a more complicated picture than the one suggested by the traditional monist-dualist divide. First, our data shows that systems in which treaties apply directly almost universally require the executive to obtain legislative approval prior to ratification. Figure 1 shows the prevalence of such prior legislative approval requirements among “monist” systems (Panel A) and among “dualist” systems (Panel B), respectively. Panel A reveals that, currently, every country where treaties apply directly requires prior legislative approval. It also shows that this practice has been common at least since the nineteenth century. Panel B shows that prior legislative approval is much less common in countries that require treaties to be implemented by domestic legislation.\(^{22}\)


\(^{21}\) Id. at 325.

\(^{22}\) As noted above, this requirement is found both in democracies and in non-democratic regimes. The correlation between democracy and whether a country requires prior legislative approval is 0.06, which means that the two features are almost entirely unrelated. Just as autocracies commonly hold elections, they require the legislature
Second, not only do a growing number of states require legislative approval for treaty ratification, but the list of treaties that require such approval has also expanded considerably over time. Most notably, countries increasingly require legislative approval for treaties that fall within the traditional legislative domain. As Figure 2, Panel A shows, the percentage of states that require legislative approval for treaties that modify domestic law has increased. Likewise, the Figure shows an increase in legislative approval requirements for treaties that require domestic spending, the monitoring of which is regarded as a core task of democratic legislatures. At the same time, as Panel B shows, legislative approval requirements for treaties that fall within the traditional realm of international relations (such as military treaties, friendship treaties, treaties that modify borders, or trade treaties) have remained more constant over time. Thus, as international treaties have proliferated, countries increasingly insist on legislative to approve treaty ratification, upholding a formal separation of power between the executive and legislative branches.

23 Specifically, in many civil law countries, the constitution distinguishes between legislative and regulatory domains. The legislative domain comprises laws approved by parliament as a whole, while the regulatory domain consists of regulations adopted without parliamentary approval. In many cases, the constitution explicitly sets out which substantive issues fall within the legislative domain. Where treaties deal with issues that fall within the legislative domain, parliamentary approval is required.

24 In the words of Gladstone in an 1891 speech, "if the House of Commons can by any possibility lose the power of the control of the grants of public money, depend upon it your very liberty will be worth very little in comparison."
approval of those treaties that fall within the traditional legislative realm, thereby preserving the formal separation of powers between the different branches of government.\textsuperscript{25} Notably, this trend appears both in democracies and non-democracies, which suggests that rather than a true democratization of international lawmaking, the trend may be a reaction to the increasing encroachment of treaties in areas traditionally regulated by national legislatures.\textsuperscript{26}

Together, these two findings draw attention to the legislature as a critically important actor in treaty making and implementation: legislatures commonly approve treaties prior to ratification and, in many cases, are also tasked with translating them into domestic law.\textsuperscript{27} At the same time, these findings point to potentially important differences in the ways legislatures interact with international law in different systems. At first glance, one might expect that the legislature is able to alter domestic understandings of international law only in states where treaties require incorporation along traditional "dualist" lines. Legislative implementation

\textsuperscript{25} One might object that such formal treaty-making procedures are meaningless if the executive can bypass them by entering into international agreements through other means, such as executive agreements. However, in countries that require prior legislative approval of specific categories of treaties, the virtually uniform rule is that executive agreements may not constitutionally be used in these areas.

\textsuperscript{26} The correlation between democracy and legislative approval requirements for treaties that alter domestic law is -0.03, while the correlation between democracy and legislative approval requirements for treaties that require domestic spending is -0.11.

offers numerous opportunities to clarify ambiguous language, insert new definitions and interpretations, and adapt the treaty to idiosyncratic domestic law concepts. Moreover, since legislatures are inherently political bodies,\(^\text{28}\) they might attempt to strategically tailor the implementing legislation to the political preferences of their constituents.\(^\text{29}\) In such systems, legislatures would play a central role in shaping the interpretation and application of international law rules. By contrast, one might expect that, in systems where treaties apply directly, courts would be the central actors in treaty application and interpretation. Unlike legislatures, courts may be presumed to be more faithful interpreters of international agreements, given their greater independence from electoral pressures and their participation in a broader worldwide community of judges.\(^\text{30}\)

Our findings suggest that this picture, informed by the traditional monist-dualist distinction, might be somewhat misleading. Since virtually all “monist” systems require legislative approval prior to ratification, their legislatures also play a central role in the treaty-making process. However, important differences remain in the timing of legislative involvement: while “monist” systems require legislative approval prior to ratification, in “dualist” systems the legislature may intervene only after ratification. This raises the question whether \textit{ex ante} or \textit{ex post} legislative involvement is more protective of domestic accountability and sovereignty. One clue is that, as Figure 1, Panel B, shows, some countries in which treaties require incorporation have recently begun to adopt prior legislative approval requirements.\(^\text{31}\) As a particularly salient example, the United Kingdom, long considered the epitome of the “dualist” model, adopted such a requirement in 2010.\(^\text{32}\) The new British rule is unusual in that, rather than requiring affirmative approval of treaties by Parliament, it requires the government to lay proposed treaties before Parliament for twenty-one sitting days before ratifying them. During that period, either House may vote against ratification, in which case the government normally cannot proceed.\(^\text{33}\) The change was reportedly motivated by perceptions of a democratic deficit in the existing treaty approval process, despite the fact that treaties did not become part of domestic law without a subsequent Act of Parliament.\(^\text{34}\) Other traditionally “dualist” countries such as Belize, Ireland, Ghana, Papua New Guinea, and Zimbabwe, have also moved towards a greater parliamentary role in recent years by adopting prior approval requirements.

This development suggests that legislative implementation requirements are not necessarily seen as more effective than direct treaty application in protecting accountability and sovereignty. Specifically, \textit{ex post} implementation may be seen as an insufficient democratic check.


\(^{29}\)See Jackson, supra note 20, at 325.

\(^{30}\)See generally ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004).

\(^{31}\)Here again, it is not necessarily the countries with the greatest democratic pedigree that have adopted this requirement: the correlation between democracy and \textit{ex ante} democratic approval is close to zero in this subsample (0.12).


\(^{33}\)The government may return the treaty to Parliament with a statement explaining why the treaty should nevertheless be ratified, triggering a new twenty-one-day period during which only the House of Commons (not the House of Lords) may block ratification. Id. § 20(4)–(5). The Act goes further than the previously applicable Ponsonby Rule, under which Parliament could review treaties but not defeat ratification by the executive. See ARABELLA THORP, PARLIAMENTARY SCRUTINY OF TREATIES: UP TO 2010, at 9 (2009), available at http://researchbriefings.files.parliament.uk/documents/SN04693/SN04693.pdf.

on the government’s ability to undertake burdensome international commitments. The most obvious benefit of involving the legislature prior to ratification in a “dualist” system is that ex post implementation is only required for those treaties that require incorporation in the domestic legal system in order to be effective. However, many treaties—such as those creating international organizations or military alliances, settling boundaries, or agreeing to international dispute settlement—do not typically require such implementation, even though they often create substantial commitments for a country and its citizens. Indeed, as Figure 2, Panel B, shows, prior legislative approval requirements often do cover such treaties, thereby giving the legislature a voice in a broader range of foreign policy matters. In this light, the nascent trend towards cumulating ex ante and ex post legislative intervention may be seen as a corrective to the insufficient coverage of ex post implementation alone.

More generally, this trend suggests that even for treaties that do modify domestic law, ex ante and ex post approval are not simply substitutes and that the policy implications of each mechanism should be explored in more detail. For example, legislatures that grant prior approval might be in a better position to require modifications or reservations to a treaty. The U.S. Senate’s frequent insistence on modifications and reservations illustrates this practice. In addition, parliamentary involvement prior to treaty ratification may signal to treaty partners that democratic institutions and major domestic constituencies support the treaty, thereby enhancing the credibility of the state’s commitment. By contrast, legislatures in systems with ex post approval only will have to take the treaty as it is, but can tailor implementing legislation to the country’s circumstances, potentially making implementation more efficient. Legislatures’ ability to refrain from passing implementing legislation may also enhance their bargaining position when treaty partners fail to uphold their commitments.35 The existing literature has paid little attention to the design question whether the legislature should be involved ex ante or ex post. We believe that this is an important avenue for future research.

IV. TREATY RECEPTION

The second central feature of a national legal system’s relationship to international law is the effect it gives to treaties once they are ratified. In some systems, treaties automatically become part of the domestic legal order and directly applicable in national courts without further legislative action. These states are traditionally referred to as “monist systems.” However, several other aspects of national reception doctrine affect the domestic application of treaties and create variation among such systems. First, “monist” systems often distinguish between “self-executing” treaties, which are directly applicable, and “non-self-executing” treaties, which require implementing legislation. Second, the hierarchical status of treaties vis-à-vis domestic legislation varies across monist systems. Third, monist systems differ in the extent to which

35 See ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 141 (2013). Increasing domestic hurdles to treaty making may also strengthen a state’s bargaining position ex ante, as its counterparts will anticipate that an insufficiently favorable treaty may not gain domestic approval. See Robert D. Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 INT’L ORG. 427, 452–53 (1988). However, it is unclear whether ex ante approval or ex post implementation requirements should systematically be more effective in this respect—except of course for treaties that do not require domestic implementation for their effectiveness.
their courts apply interpretive canons to avoid conflicts between domestic laws and treaty obligations.\textsuperscript{36} Such canons of interpretation are traditionally associated with dualist systems, where courts have long interpreted legislation in conformity with international agreements.

The choices a national system makes when adopting and applying each of these doctrines might have significant implications both for the effectiveness of treaties and for the democratic accountability and legitimacy of international law. On the one hand, choices that favor strong and unconditional reception of treaties—such as giving most or all treaties self-executing status, granting treaties hierarchical superiority over other sources of domestic law, and applying strong presumptions of conformity—may increase the credibility of a state’s commitments and the effectiveness of the relevant international regime. On the other hand, the same features reduce the ability of domestic institutions to serve as a check on international law and international institutions and to act as intermediaries in adapting treaties to the national legal order. Our data suggests how these doctrines have evolved over time as some of these concerns have become more salient.

First, while international lawyers have long recognized that the principle of direct application often comes with exceptions for non-self-executing treaties,\textsuperscript{37} the prevalence of these exceptions is thus far unknown. Our data shows that the overwhelming majority of systems that, in principle, apply treaties directly recognize exceptions to this rule and grant courts substantial discretion in determining whether a treaty is self-executing. Figure 3 depicts the number of “monist” systems that allow for such exceptions. That number has grown steeply, even though the prevalence of such exceptions has remained relatively stable as a proportion of all “monist” countries. As of 2014, Belarus, Egypt, Estonia, Iran, Latvia, Morocco, Tajikistan, Turkey, Turkmenistan, and Ukraine are the only states for which we have found no evidence of a distinction between self-executing and non-self-executing treaties. The lack of such a doctrine might result from the fact that some of these countries have relatively weak judiciaries which may discourage litigants from relying on treaties and explain why the question of self-execution rarely arises.\textsuperscript{38} At the same time, many other countries with weak judiciaries do recognize this distinction. Indeed, the correlation between the existence of a non-self-executing treaty doctrine and judicial independence is fairly low.\textsuperscript{39}

\textsuperscript{36} Importantly, these are not the only ways in which international law can enter national law. For example, in some well-known cases, national courts have considered a state’s international legal obligations—albeit formally unincorporated—in circumscribing permissible administrative action. See, e.g., Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 (Austl.). The degree of influence that international law can exert within a national legal system is ultimately a matter of degree. See Benedict Kingsbury, The Concept of “Law” in Global Administrative Law, 20 EUR. J. INT’L L. 23 (2009). In this contribution, we focus on those aspects of the relationship—including the formal applicability of ratified treaties by national courts and the explicit articulation of an interpretive presumption of conformity—that are well-documented across many countries and therefore lend themselves to consistent coding.


\textsuperscript{38} In 2011, Belarus, Iran, Morocco, Tajikistan, Turkmenistan, and Ukraine were all rated as “not independent” by the CIRI human rights dataset (which rates judicial independence on a three-point scale “not independent,” “partially independent,” and “generally independent”). See David L. Cingranelli et al., The CIRI Human Rights Dataset, CIRI HUMAN RIGHTS DATA PROJECT (Apr. 4, 2014), at http://www.humanrightsdatabox.com/p/data-documentation.html. Egypt, Latvia, and Turkey were all rated “partially independent.” Id. Only Estonia was rated as “independent.” Id.

\textsuperscript{39} The correlation is 0.17. Of the twenty-two countries in our data that were rated as “not independent” by the CIRI dataset in 2011, sixteen recognized a distinction between self-executing and non-self-executing treaties, while only six did not recognize such a distinction.
The near-universality of the distinction has several implications. First, it suggests that there is less at stake in the decision whether to apply treaties directly than is often suggested, because even those states that apply treaties directly in fact require legislative implementation for many treaties. This finding also points to the importance of self-executing treaties as an object of comparative international law, as a treaty that is deemed self-executing in one state may not be in another. The distinction is notoriously imprecise, with the standards used by courts difficult to codify or even formulate, leaving substantial scope for judicial discretion that may be influenced by numerous legal and political factors. Thus, while few scholars believe that *Medellin v. Texas* adopted a presumption against self-execution, the U.S. Supreme Court's emphasis on direct textual evidence of self-execution implies that the bar is quite high. By contrast, Argentine courts have held some provisions of the International Covenant on Social, Economic, and Cultural Rights to be directly applicable, a status denied by virtually all other national systems. In civil law systems, different judicial orders within the same country have sometimes

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**FIGURE 3.** Exceptions for non-self-executing treaties (countries where treaties apply directly only).

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40 Buergenthal, *supra* note 37, at 317.


clashed over whether a particular treaty is self-executing. The practice of national courts in designating some treaties as self-executing and others as non-self-executing is an important area of comparative international law research.

A second finding that stands out from our data is that a growing number of states grant treaties greater domestic status than ordinary laws. Figure 4 depicts the percentage of systems that grant treaties equal status to domestic statutes (Panel A), those that consider treaties inferior to domestic statutes (Panel B), and those in which treaties trump domestic legislation (Panel C). In this figure, our sample is limited to those countries that give direct effect to treaties. In the first century in our sample (from 1850 to 1950), most of those systems considered ratified treaties equal to statutes, so that domestic legislation could trump an earlier treaty. The number of “monist” systems that considered treaties superior to domestic legislation hovered between 25 and 40 percent. From the 1960s onwards, however, this proportion has increased dramatically, with more than 70 percent now giving treaties hierarchical superiority. For the most part, this change has occurred through explicit constitutional revisions, although in some cases—such as Belgium—courts have affirmed the superiority of treaties over domestic statutes. A relatively small number of states give ratified treaties even higher status, treating them as equal or superior to the constitution.

The newly elevated status of treaties in monist systems may raise accountability and sovereignty concerns. As countries have granted higher status to treaties, they have effectively made it harder for legislatures to overturn treaty commitments through subsequent legislation. Instead, countries have empowered with their courts to strike down legislation that contradicts international treaties. At the same time, these countries have steadily expanded the categories of treaties that require prior legislative approval for ratification. Thus, while insisting upon legislative involvement ex ante, they have marginalized the role of the legislature ex post. This choice may impose substantial constraints on national political institutions when the obligations imposed by a treaty turn out to impose greater costs or constraints on domestic policy autonomy than was anticipated at the time of ratification. This effect is likely to be particularly salient with respect to membership in international organizations that may make directly applicable, legally binding decisions.

Of course, making treaties superior to ordinary legislation may also bring benefits, such as by allowing states to signal that they are credible treaty partners. The logic is the same as articulated by John Jay in the Federalist Papers, where he observed that “it would be impossible to find a nation who would make any bargain with us, which should be binding on them absolutely, but on us only so long and so far as we may think proper to be bound by it.” By making treaties trump domestic law, states effectively use their own courts as commitment mechanisms to tie their hands as to future treaty compliance. If this strategy works, other states may be more an immunological condition). See Andrew Byrnes, Second-Class Rights Yet Again? Economic, Social, and Cultural Rights in the Report of the National Human Rights Consultation, 33 UNSW L.J. 193, 206–07 (2010); Iain Byrne, Enforcing the Right to Health: Innovative Lessons from Domestic Courts, in REALIZING THE RIGHT TO HEALTH 525, 527 n.15 (Andrew Clapham & Mary Robinson eds., 2009).


See, e.g., Ginsburg et al., supra note 4.

willing to engage in mutually beneficial treaty-based cooperation. This strategy may be particularly valuable to new states with a short record of international cooperation to demonstrate their reliability. If true, this gain in international credibility explains why countries are willing to sacrifice some degree of democratic involvement and future domestic policy flexibility.

From the perspective of comparative international law, differences in the hierarchical status of treaties across national legal systems may contribute to differences in interpretation and application. On the one hand, one might expect that countries where treaties enjoy supra-legislative status will apply them more faithfully, as the legislature cannot—at least in principle—override treaties when countervailing political pressures arise. In many cases, national courts in such systems are empowered to displace national legislation that infringes treaties. In some cases, courts may even give certain treaties primacy over domestic law in the absence of express constitutional provisions to that effect, as the Nigerian Supreme Court did for the African Charter of Human and Peoples' Rights in a series of cases. The effectiveness of this approach likely turns on a host of extra-legal factors, such as the independence of courts and their willingness to enforce treaties against the will of the political branches.

On the other hand, hierarchical superiority of treaties may also lead to subtler effects on their interpretation and application. Because legislators know they will be unable to overturn the treaty by subsequent legislation, they may be more likely to condition their consent to ratification upon reservations or other modifications that reduce the domestic impact of the treaty.

46 See FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 533–37 (2nd ed. 2012).
Once treaties are ratified, the impossibility of displacing them through the normal legislative process may increase the pressure on national courts to strategically reinterpret their provisions in order to avoid conflict with the executive or the legislature, satisfy powerful domestic constituencies, or advance their own policy preferences. Thus, giving treaties higher legal status may raise the stakes of domestic interpretive battles over treaty provisions, both in the treaty approval process and in litigation in national courts. As a result, the overall effect of treaty superiority on uniform interpretation and application of treaties may be more ambiguous than often suggested. If these conjectures are correct, the trend towards granting treaties higher domestic legal status may increase the prevalence of divergent national interpretations of treaties.

One indication of how courts deal with the elevated status of international treaties is the growing prevalence of interpretive rules or presumptions similar to the well-known Charming Betsy doctrine, under which domestic law should, as far as possible, be interpreted to avoid conflict with international treaty obligations. Historically, such doctrines have been more salient in countries where treaties require domestic implementation because the lack of direct effect of treaties makes it more likely that potential conflicts will arise between domestic law and an unimplemented treaty. Indeed, as Figure 5, Panel A, shows, virtually all countries that require legislative implementation recognize such a doctrine, although the details of its application by courts may vary considerably across countries. By contrast, systems where treaties apply directly were historically less likely to rely on such doctrines, but Figure 5, Panel B, shows that an increasing number of these systems now recognize them as well. This convergence may be driven by the desire of courts in "monist" systems to give effect to some treaties—such as human rights conventions—without explicitly displacing inconsistent legislation. The trend thus suggests judicial caution in the face of a growing number of treaties that now trump domestic law.

V. CUSTOMARY INTERNATIONAL LAW

For international custom, one might expect concerns over accountability to be particularly salient. Unlike treaties, established CIL rules bind states that have not expressly consented to them. As a result, states could be more hesitant to empower domestic courts to identify CIL rules and apply them directly, especially since the existence and content of the rules are often controversial. The lack of explicit consent by a state to be bound by a CIL rule also means that the domestic procedural checks that often apply to treaty making—such as prior legislative approval—are nonexistent. In addition, the legitimacy of CIL rules is often contested, notably because many of them were formed without the active participation of non-Western states. For these reasons, direct application of international custom may raise greater legitimacy concerns than for treaties. According to Posner and Sykes, "[p]eople who think that all law should have democratic pedigree are uncomfortable if customary international law can easily become domestic law."

47 As Anthea Roberts points out, courts as well as legislatures can be important fora for the "hybridization" of international and domestic norms. Anthea Roberts, Comparative International Law? The Role of National Courts in Creating and Enforcing International Law, 60 INT'L & COMP. L.Q. 57 (2011).

48 POSNER & SYKES, supra note 35, at 143.
Yet, perhaps the most striking pattern that emerges from our data is that in virtually all states, CIL rules are in principle directly applicable without legislative implementation. Figure 6, Panel A, depicts the percentage of all countries in our sample that follow this approach (solid line). Panel B depicts the percentage, among states that apply treaties directly, that give direct effect to CIL. Panel C depicts the percentage of countries that require treaties to be incorporated but give direct effect to CIL. The figure reveals that, while direct reception of CIL is somewhat more common among countries that also apply treaties directly (about 90 percent today), most countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly. For example, courts in the United Kingdom—often portrayed as the home of the “dualist” tradition—have long considered CIL to be directly applicable by courts. Thus, our data indicates that how domestic legal systems treat CIL is largely unrelated with their approaches towards treaties. It also suggests that the traditional monist-dualist distinction is inappropriate to classify national approaches towards CIL.

There are only a handful of countries that do not currently apply CIL directly in their domestic legal orders. These include countries such as Algeria, Iran, and Sri Lanka, which in the mid-to late-twentieth century took strong anticolonial stances and actively resisted customary aspects of international economic law, such as limits on expropriation of foreign investments. As a result, they departed from the acceptance of international custom as a source of law that prevails in the vast majority of domestic legal systems. In 1966, the Algerian representative on the General Assembly’s legal committee explained his country’s resistance to custom, stating...
that “a distinction must be made between obligations voluntarily accepted and the general imposition of law made in another era by an exclusionary international community.”

In some instances, these countries chose to substitute constitutional references to CIL—which were increasingly common in that period—with references to law made in international institutions that they considered more representative, such as the United Nations.

However, the almost universal acceptance of direct application of CIL does not mean that democratic accountability and legitimacy concerns are absent; instead, they appear to be channeled through other aspects of CIL reception doctrine. Most importantly, while ratified international treaties are increasingly given hierarchical superiority over statutes, the opposite is the case for international custom. Indeed, the proportion of states that consider CIL superior to ordinary legislation has decreased in recent decades. Figure 7 depicts the percentage of states that treat CIL as equal to domestic statutes (Panel A); inferior to domestic statutes (Panel B); and superior to domestic statutes (Panel C). The figure reveals that from the 1950s onwards, as a wave of new countries enters our sample, the percentage of countries that treat CIL as inferior has increased. Thus, around the same time that it became more common to make treaties superior to domestic law, it also became more common to make international custom inferior.

These findings have several implications for comparative international law. The dominant model for CIL reception is direct application coupled with hierarchical inferiority, a model that is uncommon for treaties. As a result, unlike for treaties, one might expect CIL compliance to be relatively fragile because a CIL rule can usually be displaced by legislation if it imposes excessive costs on the government or domestic interests. By the same token, while the relative imprecision of CIL rules may facilitate their strategic reinterpretation by national courts, there may be less pressure to engage in this indirect strategy because—unlike ratified treaties—burdensome CIL rules can simply be displaced by the legislature. In addition, despite the formal principle of direct application, courts sometimes carve out exceptions under which they refuse to apply CIL rules. For example, the U.K. House of Lords held that individuals could not be prosecuted criminally based on unimplemented CIL.

For these reasons, one might expect domestic litigants not to devote much effort to elaborating alternative interpretations of CIL rules, focusing rather on overriding it by legislative action or denying its applicability.

However, the stakes in domestic interpretation and application of CIL are often higher than suggested above. First, countries that wish to avoid inadvertently breaching CIL rules may—and often do—incorporate them by legislation, sometimes even giving them constitutional status. Thus, U.S. law criminalizes “piracy as defined by the law of nations” and allows civil actions for certain torts committed “in violation of the law of nations.”

Likewise, national constitutions sometimes enshrine specific CIL rules such as those regarding human rights and international humanitarian law. Second, domestic courts have invoked the jus cogens status of certain CIL rules to override domestic law, thus effectively giving these rules supraregulatory status. For example, the Chilean Supreme Court invoked the jus cogens CIL rule against torture

53 See, e.g., Constitución Política de Colombia [C.P.] art. 214.
Finally, the very nature of CIL is that it can be altered or disappear when enough states change their practices. As a result, the domestic interpretation given to CIL rules—especially by national courts, which play an important role in the recognition and development of CIL—is not a matter of indifference because it influences their evolution at the international level.

Just as is the case for treaties, domestic reinterpretation of CIL may occur in several ways. First, when lawmakers incorporate a CIL rule by legislation, they may interpret or modify the rule to provide additional detail and advance their preferred version of the rule. For example, when the United States and the United Kingdom codified foreign state immunity in the 1970s, they did not simply declare the CIL rule to be part of domestic law “as is” but adopted an extensive and detailed set of provisions, which turned out to be highly influential in subsequent applications of the rule both domestically and internationally. Second, even though legislatures can in theory displace CIL rules, parties may still find it essential to devote substantial efforts to shaping interpretations of CIL rules by domestic courts. The U.S. Congress could...
in theory repeal the Alien Tort Statute, but in practice high-stakes battles have been fought in U.S. courts over the interpretation of both the provision itself and the CIL rules for which it provides a domestic remedy. Finally, when states breach CIL rules, they may have incentives to dissimulate the breach by strategically reinterpreting the rules rather than simply overriding them by contrary legislation. The latter strategy would make the breach more obvious and lead to a greater likelihood of sanctions or reputational damage. On the other hand, proposing a new (and presumably more permissive) interpretation may create a precedent that undermines a rule that the state values. An interesting question for comparative international law is to what extent national courts engage in strategic interpretation of CIL, as part of, or as opposed to, “good faith” interpretation based on prevailing practice and opinio juris.

VI. CONCLUSION

In this contribution, we have shown how national doctrines governing treaty making and the status of treaties and CIL in the domestic legal order have changed over time. We have

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58 Pierre-Hugues Verdier & Erik Voeten, How Does Customary International Law Change? The Case of State Immunity, 59 INT'L STUD. Q. 209 (2015). Of course, this is a concern only when the state values the rule generally, but wishes to justify its defection in a particular instance. If the state dislikes the rule and actively wants to undermine it, then it should make the breach as “noisy” as possible.
argued that these changes, which reflect a continuing effort to balance legitimacy and effectiveness, have important implications for the comparative international law project because these doctrines structure how apparently uniform international law is interpreted and applied across countries. Our findings also confirm that the traditional monist-dualist distinction, which originally arose out of theoretical debates on the nature of international law, has limited value for the purpose of classifying actual legal systems or examining their policy and normative implications. The canonical features of each model are less distinctive than traditionally suggested: “monist” systems often deny direct application to “non-self-executing” treaties; many such systems historically considered treaties equal—or even inferior—to legislation; and the dichotomy is largely irrelevant to explaining the domestic status of CIL. Thus, relying on a simple monist-dualist dichotomy may often obscure more than illuminate the relevant questions.

Our approach, albeit considerably more detailed than prior classifications, nevertheless has important limits. As Karen Knop notes, “the domestic interpretation of international law is not merely the transmittal of the international, but a process of translation from international to national.”59 By coding doctrine across many countries and long periods of time, we must inevitably set aside numerous subtle differences—legal but also economic, political, and cultural—in how national legal systems engage with international law. In addition, such data cannot directly capture the practical impact of international law, such as whether courts effectively enforce the rights and obligations created by a specific treaty in a specific national context. Yet, our approach also has important benefits, enabling a more comprehensive and precise picture to emerge and long-term trends to be identified and measured. This broader picture is meant to complement and situate, not substitute for, detailed scholarly efforts that focus on specific countries, regions, or areas of international law.

Our findings can inform the broader debate on the legitimacy of international law. We have suggested that one widespread long-term response to rising legitimacy concerns has been to require greater legislative participation in treaty making. To be sure, this approach only partially addresses the issue. If countries lack the resources to participate effectively in treaty negotiations and cannot credibly refuse to join, formal legislative participation may seem illusory. Yet, political scientists have suggested that imposing constraints on domestic ratification may itself increase a country’s leverage in international negotiations.60 The effect may be compounded as more developing countries adopt such doctrines while their legislatures become more powerful and representative. Relatedly, one might doubt that formal rules giving domestic effect to international law will be effective where domestic courts are compromised by lack of resources, corruption, or political interference. Yet, national courts have sometimes been willing to take on alarming odds to implement international obligations. Formal doctrines such as constitutionally entrenched superiority of treaties may contribute to the perceived legitimacy of such interventions.

While we do not pursue causal claims in this essay, the dataset we assembled paves the way for quantitative exploration of the relationships between the trends we identify and, more broadly, of the causes and effects of international law reception doctrines. Why do

59 Knop, supra note 1, at 506.
60 Putnam, supra note 35, at 452–53.
certain countries opt for one model rather than the other? Are these choices driven by conscious concerns about effectiveness and legitimacy, or is an equal or greater role played by legal tradition, domestic political and economic factors, or historical contingencies? Do countries that grant their courts authority to apply treaties directly comply more consistently with their international commitments, disregarding domestic law if necessary? Are these countries more hesitant to ratify treaties in the first place? If the choices countries make as to the place of international law in their domestic legal order affect such outcomes, understanding these choices and their impact will be key to the success of comparative international law.