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Optimal Protection of International Law: Navigating between 'European Absolutism' and 'American Voluntarism'

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Imagine a world where international law can be flawlessly enforced. In that world, how strongly should international law be protected? With ever more international law and more international tribunals this world is no longer a fantasy. This article addresses the question of optimal protection of international law in a three-step model of allocation, protection and back-up enforcement of international law entitlements. The article does not ask the tired question of whether international law is law or legally binding. Rather, with the use of law and economics tools, the article assesses how strongly states are, or should be, bound to international law. The article concludes, somewhat counterintuitively, that by default international law ought to be protected by a property rule. This prediction is confirmed in the current state of international law and debunks both what I call European absolutism and American voluntarism. Relatively weak formal instruments of back-up enforcement (compensation and 1:1 retaliation) do not undermine this property protection thanks to what I call the kicker of community costs. At the same time, the article proposes a matrix of considerations that, in specific circumstances, should shift optimal protection to either stronger inalienability protection or weaker protection under a liability rule. If international law is to further develop and refine it must adopt a model of variable protection.