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Rules and Standards in International Law

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The choice between rules and standards is a familiar one to domestic lawyers. In some cases, legal norms dictate particular outcomes; in others, they set forth more open-ended tests, whose application depends on the exercise of judgment or discretion. A speed limit may take the form of a rule requiring drivers to go no more than 55 miles per hour, or a standard requiring them to travel at a safe speed. Tort law may require drivers at unregulated railroad crossings to stop and look or to exercise reasonable caution.[1] Family law may provide that, in case of divorce, the mother gets custody of the children, or it may base custody decisions on the "best interests of the child."

In the domestic context, a considerable literature has developed about why decision-makers choose one legal form or the other, and which is preferable from a policy perspective.[2] But, internationally, the distinction between rules and standards has received less attention. Relatively little systematic analysis has addressed either the positive

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[1] *Compare* Baltimore & Ohio RR Co. v. Goodman, 275 US 66 (1927) (Holmes, J.) *with* Pokora v. Wabash Railway Co., 292 U.S. 98 (1934) (Cardozo, J.). The contrast between the stop-and-look rule enunciated by Justice Holmes in *Goodman* versus the "reasonable caution" standard enunciated by Justice Cardozo in *Pokora* is a common illustration of the distinction between rules and standards. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379-80 (1985); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187-88 (1989).

[2] *See, e.g.,* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992-1993); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000); Scalia, *supra* note 1; Kathleen Sullivan, *Foreword: The Justices of Rules and Standards*, 105 HARV. L. REV. 22 (1993); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV.953 (1995).

question – why do states choose one legal form or the other? – or the normative question – which makes better policy sense?

This essay represents a preliminary exploration of the choice between rules and standards in international law. It proceeds in two parts: First, it reviews the existing debate about rules versus standards in domestic law. Then, it provides a preliminary sketch of the international political economy of instrument choice, focusing on relevant differences between the domestic and international systems.

I. RULES AND STANDARDS IN DOMESTIC LAW

The distinction between rules and standards is, in essence, that between *ex ante* and *ex post* decision-making.[3] Rules attempt to define in advance what conduct is permissible. They generally consist of two parts: a set of triggering facts and a legal result. If the triggering facts are present, then the rule specifies the legal outcome in a determinate manner.[4] In contrast, a standard is less precise about what facts lead to what legal results. It thereby provides the law-applier with more discretion both in determining the relevant facts and in applying the law to those facts. As Cass Sunstein notes, with standards, "to a considerable extent we do not know what the law is until the particular cases arise."[5]

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[3] *See* Kaplow, *supra* note 2, at 557 ("*the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act*.") (emphasis in original); Sullivan, *supra* note 2, at 63 n. 259; Sunstein, *supra* note 2, at 961.

[4] Sullivan, *supra* note 2, at 58; Sunstein, *supra* note 2, at 962 ("When rules are operating, an assessment of facts, combined with an ordinary understanding of grammar, semantics and dictions – and of conventions and more substantive ideas on which there is no dispute – is usually sufficient to decide the case.").

[5] Sunstein, *supra* note 2, at 998.

Some critical scholars have questioned whether the distinction between rules and standards withstands scrutiny.[6] Certainly, no absolute division can be drawn. Over time, rules tend to become more standard-like, as exceptions are carved out that require judgment to apply and reduce the determinacy of legal outcomes. Meanwhile, standards become more rule-like, as case-by-case adjudication fills in the zone of discretion, thereby producing more determinate results.[7] Rules and standards lie along a continuum, with the difference between them one of degree rather than of kind.

The domestic analysis of rules and standards has both normative and positive dimensions, to which I now turn.

A. Normative Analysis

What is the relative desirability of rules versus standards? Which legal form is preferable under what circumstances? In addressing these normative questions, domestic commentators tend to focus on a variety of factors:

1. Administrative costs

Rules are more costly to develop than standards, because they require legal decisionmakers to determine in advance which facts are relevant and how the law should apply to them. But rules tend to lower enforcement costs, since they minimize the need to

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[6] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Schlag, *supra* note 1.

[7] Sullivan, *supra* note 2, at 62 ("A rule may be understood as simply the crystalline precipitate of prior fluid balancing that has repeatedly come out the same way.... On this view, a rule is a standard that has reached epistemological maturity.").

engage in "elaborate, time-consuming and repetitive application of background principles to facts."[8]

Which of these two effects predominates depends on the circumstances. When similar types of situations arise frequently in a similar factual context, it is usually worth the one-time, up-front investment needed to develop a rule that addresses these cases on a wholesale basis, rather than bear the recurring costs of case-by-case adjudications.[9] On the other hand, when cases arise infrequently in differing factual contexts, then it may be cheaper to resolve them as they arise, on a case-by-case basis, rather than design a rule in advance that will adequately encompass all of the relevant factual distinctions.

2. Predictability

Because standards do not yield determinate results, they produce greater uncertainty and unpredictability about what the law requires. This has a number of disadvantages: It is unfair to the individual.[10] It increases the need to obtain legal advice. And it raises litigation costs, by producing more disputes and fewer settlements.

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[8] Sullivan, *supra* note 2, at 63. Moreover, the clarity of rules tends to lead more cases to settle and therefore produces less litigation. Korobkin 31-32.

[9] Kaplow, *supra* note 2, at 563. Kaplow gives as examples of laws that apply to frequently occurring, homogenous factual situations "many traffic laws, aspects of the law of damages (how to value disability, loss of life, or lost profits), regulations governing health and safety, and provisions of the federal income tax (some of which apply to millions of individuals and billions of transactions." *Id.* at 563-64.

[10] Sunstein, *supra* note 2, at 959 (procedural fairness includes a right to know legal requirements in advance).

3. Democratic legitimacy

In a democracy, the law is supposed to be made by the people's representatives rather than by unelected judges. This favors the *ex ante* definition of legal rules by statute, rather than the *ex post* elaboration of standards by judges in individual cases.[11] On this view, rather than engage in law-making through the interpretation and application of standards, judges should stick to the task of applying predetermined legal rules to the facts of a given case.[12]

4. Fairness

Standards give those who apply the law more or less discretion. They thus provide less assurance than rules that like cases will be treated alike. Moreover, they open the door to the possibility that decisionmakers will abuse their discretion, indulging their individual preferences or interests rather than applying the law.[13] By contrast, a rule limits the possibility of abuse by binding a decisionmaker "to respond in a determinate way to the presence of delimited triggering facts."[14]

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[11] As Kathleen Sullivan notes, the indeterminate quality of standards practically "invites judicial policymaking." Sullivan, *supra* note 2, at 118. That is why conservatives who argue for judicial restraint typically prefer rules to standards. *See, e.g.,* .Scalia, *supra* note 1, at 1176 ("Statutes that are seen as establishing rules of inadequate clarity or precision are criticized as undemocratic ... because they leave too much to be decided by persons other than the people's representatives.").

[12] Sullivan, *supra* note 2, at 64.

[13] Sunstein, *supra* note 2, at 974.

[14] Sullivan, *supra* note 2, at 58.

5. Under- and over-inclusiveness

While rules appear preferable to standards in terms of predictability, democratic legitimacy, and fairness, the very quality of determinacy that produces these benefits also has disadvantages. Because rules focus only on certain facts, they may ignore other relevant facts and thereby produce results that are at odds with the basic policies or principles underlying the rule.[15] As Justice Scalia observes, "[a]ll generalizations ... are to some degree invalid and hence every rule of law has a few corners that do not quite fit."[16] In contrast, standards allow judges to evaluate the facts in a more open-ended way and to determine the appropriate result based on the totality of the circumstances.[17]

Rules can produce error in either of two directions. On the one hand, a rule can be over-inclusive, by ignoring facts that should make it inapplicable. A 55 mile per hour speed limit would produce the wrong result if applied to an ambulance or a police car.[18] On the other hand, a rule can be under-inclusive, by failing to anticipate factual situations to which it should apply. For example, a rule prohibiting driving cars in a park fails to address the equally objectionable use of motorcycles or trucks. As Cardozo noted in *Pokora*, the chances of error are greatest "when there is no background of experience out of which the [rules] have emerged. They are then not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without."[19]

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[15] Sullivan, *supra* note 2, at 62.

[16] Scalia, *supra* note 1, at 1177.

[17] A "totality of the circumstances" test does this most completely.

[18] Sunstein, *supra* note 2, at 986-87.

[19] *Pokora*, at 104-06.

6. Flexibility

The open-ended quality of standards not only avoid errors of over- or under-inclusiveness, it allows the law to adapt more easily to changing circumstances.[20] Contrast, for example, a safety standard that requires the exercise of "reasonable care" with a rule that requires the use of particular equipment. If new safety equipment were developed, the rule would need to be amended to mandate the new equipment. But the standard could take account of the new equipment through a re-interpretation of what constitutes "reasonable care."

7. Deliberation

A final argument for standards, usually made by civic republicans, is that standards promote deliberation about the common good. When faced with standards, judges cannot simply say, "sorry, my hands are tied;" rather, they must take responsibility for their decisions through reasoned argument.[21] According to civic republicans, lawmaking should consist of such deliberation about the common good, rather than simply serve to aggregate or make tradeoffs between private interests. In a large-scale country such as the United States, courts are more likely than legislatures to be the locus of deliberation; therefore, the greater lawmaking role of judges in a regime of standards rather than rules is appropriate.

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[20] Sullivan, *supra* note 2, at 66-67.

[21] *Id.* at 67-69 (discussing work of civic republican theorists such as Frank Michelman).

B. Positive/causal Analysis

To some degree, lawmakers may be influenced in their choice between rules and standards by the normative factors discussed above. But a variety of more practical considerations may also influence their choice. These include:

1. Availability of information

Adopting a rules usually requires more information than adopting a standard, since a standard defers the decision about the relevance and legal implications of facts until the standard is applied in a particular case. Thus, lack information and expertise is one reason why lawmakers may prefer standards to rules.[22]

2. Political disagreement

When there is significant political disagreement, it may be easier to reach agreement on a standard than a rule, since standards defer the need to make difficult tradeoffs until they are applied in particular cases. It is usually easier to get agreement that conduct should be "reasonable" or "safe" than to get agreement as to what conduct satisfies these standards.

3. Relationship of law-makers with and law-interpreters and -enforcers

Because rules exert a stronger constraint on those who interpret and apply the law, lawmakers will tend to prefer rules when they distrust those charged with interpretation

[22] Sunstein, *supra* note 2, at 1003.

and enforcement and wish to control their decisions.[23] Conversely, if law-makers have confidence in those who will apply the law, they will be more likely to give them discretion, by adopting a standard.

II. RULES AND STANDARDS IN INTERNATIONAL LAW

A. Examples of Rules and Standards in International Law

The question of legal form has received considerable attention in international law. But most of this work has focused on other aspects of legal form than the rule-standard distinction. Some writers, for example, have examined the distinction between legal and non-legal norms, hard and soft law.[24] Others have focused on the difference between obligations of result (a country may not emit more than a specified amount of pollutant) versus an obligation of conduct (oil tankers must install particular pieces of equipment).[25]

International law, like domestic law, contains many examples of both rules and standards. Consider the following illustrations, drawn from a variety of subject areas:

- *Use of force* – Article 51 of the UN Charter articulates the contemporary rule governing self-defense, allowing self-defense only in response to an armed attack. The requirement of an armed attack – the triggering fact for the rule of self-defense – establishes a comparatively objective test, as compared with the more open-ended standard enunciated by Daniel

[23] *Id.* at 1004, 1012 (explaining the choice of rules versus standards as a principal-agent problem).

[24] DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (2000).

[25] *See*, e.g., RONALD MITCHELL, INTERNATIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE (1994).

Webster in the *Caroline* case, allowing self-defense when there is "an instant and overwhelming need, leaving no choice of means."

- *Human rights law* – Human rights norms tend to be articulated as standards. Examples include the prohibition on torture or cruel, inhuman or degrading treatment or punishment, or the right to liberty and security of person.[26]. But a few are more rule-like – for example, the prohibition on executing pregnant women or imposing the death penalty for crimes committed under the age of 18, or the prohibition on derogations from certain fundamental human rights.[27]
- *Trade law* – Trade law is more evenly balanced between rules and standards. The tariff bindings in the GATT schedule are, of course, rules. But the GATT also enunciates more general standards, including the principle of "national treatment," and the prohibition on measures that are "disguised restrictions on international trade."[28]
- *International humanitarian law* – The law of war – and in particular, Hague Law, which addresses the means and methods of warfare – consists largely of standards. Among the most prominent are the principles of necessity, proportionality and distinction. But that part of the law of war addressing the protection of persons *hors de combat* (usually referred to as Geneva Law) includes very precise rules regarding the treatment of prisoners of war and medical personnel.[29]

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[26] International Covenant on Civil and Political Rights, arts. 7, 9.

[27] *Id.* arts. 4(2), 6(5).

[28] GATT, arts. III, XX.

[29] Cite examples.

- *International environmental law* – A recent survey indicated that the large majority of international environmental norms are standards, but that rules have been used increasingly to establish quantity limitations (e.g., emission targets).[30] The contrast between the two can be seen in the climate change regime. The Framework Convention on Climate Change sets forth general standards, for example, requiring states to adopt domestic policies and measures to reduce emissions of greenhouse gases. In contrast, the Kyoto Protocol sets forth detailed rules about the specific emission limitation commitments of each industrialized country. Other examples of rules in international environmental law include the rules for the construction, design, equipment and manning of oil tankers, set forth in Annex I to the MARPOL agreement, and the quantified targets for the reduction and eventual phase-out of ozone-depleting substances in the Montreal Protocol.

B. Factors in the Choice between Rules and Standards

To a certain extent, many of the same factors that are pertinent to the choice between rules and standards in the domestic setting apply to international law as well. But the differences between the domestic and international legal systems have significant implications for how these factors play out.

[30] David Victor ....

1. Risks of under- and over-inclusiveness

As discussed above, standards are appropriate when the "range of facts ... are too broad, too variable, or too unpredictable to be cobbled into a rule,"[31] and when a rule is therefore likely to lead to erroneous results in a significant number of cases. The case for standards is particularly strong with respect to issues where the stakes (and therefore the costs of legal error) are high.[32]

Factual heterogeneity and high stakes are among the rationales for the reliance on standards in the law of war. Military experts argue that what constitutes an appropriate method of waging war depends so much on the context that defining specific rules would be undesirable. Consider a rule, for example, prohibiting the bombing of chemical factories. Although the environmental harms will often outweigh the expected military benefit, thus violating the principle of proportionality, this is not uniformly true: in some cases, a factory might play a particularly important military role or the expected pollution might be relatively small. The proposed rule is therefore over-inclusive: it prohibits some conduct that is appropriate. To avoid this result, the better approach – so military officials argue – is to rely on the general principles of necessity and proportionality, which allow commanders to evaluate all of the facts in their targeting decisions. Moreover, because the costs of legal error are so high during wartime, the rationale for standards rather than rules is particularly great.

This general kind of argument is made frequently against the use of rules in international law: international issues are highly fact-dependent; therefore, they require the application of judgment – of statecraft – rather than inflexible rules.[33] For example, the

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[31] Korobkin, *supra* note 2, at xx.

[32] *See* Sunstein, *supra* note 2, at 1014.

[33] *See, e.g.,* Robert Bork, *The Limits of International Law*, NATIONAL INTEREST (1989-1990); George Will....

prohibition on the use of force in the UN Charter, except in self-defense against an armed attack, reduces a very complex judgment about when force is appropriate into a simple rule allowing self-defense only when a narrowly defined triggering fact – an armed attack – is present.

2. Lack of information

Lack of information is another familiar basis for using standards rather than rules.[34] Rules require more information to develop than standards. When this information is lacking, rules are even more likely to produce error.

Lack of information was, in part, the reason why the UNFCCC articulated its long-term objective as a standard (i.e., atmospheric concentrations of greenhouse gases at levels that will prevent dangerous anthropogenic interference with the climate system) rather than as a rule (a specific long-term concentration target of, say, 450 or 550 ppm). The latter would have provided more guidance in the development of the climate change regime. But, given the scientific uncertainties about climate change, particularly about the level of harm resulting from different concentration levels, agreement on a precise concentration level was not only politically impossible, it also would have gone beyond present-day knowledge.

[34] Sunstein, *supra* note 2, at 1003.

3. Consensus lawmaking

In most cases, negotiating a standard is easier than negotiating a rule, since a standard leaves many issues open, deferring them to the future. This is a particularly important factor at the international level, where norms are generally created through a consensual rather than a majoritarian process. The difficulty of obtaining consensus, as compared to a majority, tends to result in least-common-denominator outcomes.[35] Although a rule can serve as a least-common-denominator by articulating a very weak requirement,[36] standards are typically better suited for this role, because they can be formulated in a manner that preserves the positions of all sides, rather than making clear that one side wins and the other loses, as is the case with a weak rule.

Consider, for example, the various principles set forth in the Framework Convention on Climate Change, including the principle of "common but differentiated responsibilities" and the "precautionary principle." In general, these were acceptable because they had no agreed meaning, and were thus compatible with the negotiating positions of all sides. In contrast, consensus would have been impossible regarding any specific rule of equity (for example, equal per capita emissions or historical responsible) or any particular approach to the precautionary principle (for example, reversal of the burden of proof), since states do not agree on any single interpretation of either principle. The principles were acceptable because they were articulated as standards, which in essence could mean all things to all states.

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[35] Although, as the Ottawa Land Mines Convention illustrates, states that support more stringent norms have the option of proceeding on their own, as a coalition of the willing, rather than accommodating those with different views.

[36] For example, the 30% emission reduction required by the first Sulphur Protocol to the Long-Range Transboundary Air Pollution Convention was a rule, but was sufficiently weak that it was acceptable to most states.

4. Relationship of law-makers and law-subjects

In domestic legal systems, most law is not primarily a self-constraint on the lawmakers themselves. When judges fashion a tort rule (at a railway crossing, drivers must stop and look), they are in effect binding others, not themselves. The same is true of most legislative enactments -- environmental law, securities law, welfare law, and so forth. They are aimed at society at large, or some segment of society, not the lawmakers themselves (although, of course, lawmakers, as citizens, are also subject to laws of general application).

Contrast this with international law, At the international level, those who have the primary role in making the law – that is, states – are also usually the ones to whom the law applies. There are exceptions, of course, such as international criminal law, which limits individuals rather than states (although, even here, international law applies primarily to state officials). But, by and large, international law is a process by which states bind themselves – for example, to limits on their power vis à vis individuals (human rights law), or the environment.

This key difference between the international and domestic legal systems has significant implications for the choice between rules and standards. Given their dual roles, states have conflicting motivations: to the extent their primary concern is with the application of international law to other states, they will prefer a rule, which operates as a greater constraint than a standard (for reasons discussed in more detail in the next section). But to the extent their primary concern is with the application of international law to themselves, then they will prefer a standard, which gives them greater flexibility.

In prisoners' dilemma contexts, states are unwilling to act unless they have an assurance that others will act as well. Rules therefore are essential in order to specify exactly what each state is expected to do. A standard requiring states to take reasonable

measures to reduce greenhouse gas emissions would be unlikely to produce much action. States would be unwilling to act without knowing in advance what others will do. Whenever reciprocity of action is crucial, then there is a need for ex ante specification of what each side is required to do. That is why rules are used not only in environmental law, but in arms control agreements as well.

5. Auto-interpretation versus third-party interpretation

In domestic law, different people usually make the law and apply it in individual cases. Sometimes entirely different institutions perform these roles, as when legislatures make the law and courts interpret and apply it. But even when law is judge-made, the judge or court that articulates a legal rule is usually not the same as the one that will apply it in the future. The choice between rules and standards is, in part, a choice as to who will give content to the law: the lawmaker, by articulating a rule that leads to determinate results, or the law-interpreter, by giving a general standard content through application in an individual case. To the extent lawmakers trust the law-interpreters, they will be willing to give them discretion through the adoption of standards; to the extent that trust is lacking, the lawmakers will retain control over the content of the law through the adoption of rules.

Sometimes, international law has the same character as domestic law: a legal regime establishes a dispute settlement procedure, composed of independent experts, who apply the law to individual cases. Human rights and trade law, for example, rely on third-party dispute resolution. Ordinarily, one would expect, in such cases, that states would prefer rules to standards, since rules provide states with greater predictability about the legal requirements to which they will be subject. When a state agrees to a rule, it knows exactly what it is getting into; if it does not like the content of a rule, it can refuse to

agree. By contrast, when a state agrees to a standard that will be interpreted and applied by others, it gives up some control over the content of the law, and opens up the possibility of being subject to legal consequences that it did not anticipate. That is why private parties ordinarily prefer contract language that specifies their obligations in clear rules, rather than in standards that create uncertainty and give up control to judges or arbitrators.

An example of this rationale for rules can be seen in the United States position on compliance during the post-Kyoto climate change negotiations. Under the Clinton Administration, the United States favored a strong compliance system, involving third-party dispute settlement. But, in order to retain control, the United States proposed a system of automatic – rule-like – consequences, which would have given no discretion to the newly-formed compliance committee.

From this perspective, the use of standards in human rights and trade law, despite the prevalence of third-party decisionmaking, is an anomaly requiring explanation. One very partial explanation may be that these regimes enjoy greater homogeneity among actors – and therefore greater trust between states and tribunals – than the nascent climate change regime.

Thus far I have been considering international regimes that involve third-party dispute settlement. But, more commonly, international law differs fundamentally from domestic law in that the same entities – namely, states – both make the law and apply it in individual cases.

It is this feature of auto-interpretation that connects back up with what I said earlier about the self-constraining character of international law. To the extent that a state's primary identity is as a subject of the law, and is concerned primarily with the application of the law to itself, then it will prefer a standard, which gives it flexibility to interpret and apply the law in a manner that serves its interests. A standard regarding the

exercise of self-defense, for example, would give states more leeway to argue that their actions are lawful than a rule allowing self-defense only in response to an armed attack – a triggering fact about which there will be widespread agreement. The prevalence of standards in international law attests to the interest of states in preserving their flexibility of action.

But in international law, the identity of law-makers, law-subjects and law-interpreters is not complete, since in making the law, states act collectively, whereas in applying it, they usually act unilaterally. To the extent that states' primary identity is as lawmakers, rather than as law-subjects or law-interpreters, then they will tend to prefer rules rather than standards, since rules provide them with greater control over the content of international law.