Are Sovereigns Entitled to the Benefit of the International Rule of Law? An Introduction

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In this symposium, we publish Jeremy Waldron's article, 'Are Sovereigns Entitled to the Benefit of the Rule of Law?' together with four responses, by Samantha Besson, David Dyzenhaus, Thomas Poole and Alexander Somek. Waldron is justifiably renowned as a jurisprude and theorist of the concept of the rule of law. His engagement with international law is more recent, but no less significant. In this article, he takes a familiar (perhaps even tired) question among international lawyers – can there be something akin to a rule of law in international affairs? – and recasts how we ought to think about it. With characteristically deft and plain-speaking arguments, Waldron burrows to the heart of the issue: What might it mean to speak of an 'international rule of law,' and who or what are properly understood as its beneficiaries?

Waldron leads us first along a familiar path: the absence of a sovereign of sovereigns puts into doubt the possibility of a 'rule of law' in international affairs, if we conceive of the rule of law as principles of legality intended to protect the individual from the power of the sovereign. But rather than leading us down the same routes (is it law? can it be enforced? etc), Waldron turns in a different direction and challenges us to keep up. The true question is not whether one needs a sovereign to have something like the rule of law, but who needs protection from what? Unlike the liberty of individuals in domestic rule of law theory, the liberty of states cannot be a fundamental value: states are not bearers of value, but exist for the sake of human individuals. While individuals ought to benefit from uncertainty in law through a presumption of greater freedom, there is no obvious reason why the same canon of interpretation ought to be applied to states. States, in Waldron's argument, are trustees for the people committed to their care, and international law is of value because it conduces to the safety and prosperity of individuals by promoting a peaceful world order.

States are not subjects of the international rule of law in the same manner as individuals are subjects of the domestic rule of law. Rather, they are agents or officials of

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international law in a manner somewhat analogous to the way that domestic government authorities are agents of municipal public law.[1] On this analogy, a different approach to the application of rule of law values is called for: States do not have intrinsic liberty interests which require, for example, strict determinacy of applicable norms in the same way that an individual ought to have strict determinacy in respect of the criminal laws applied to her or him. Indeed, vagueness, impracticability or even retroactivity may not be such grave vices if they aim at *constraining* the discretion of agencies. One implication of Waldron's analogy is that fidelity to clear rules becomes a less significant dimension of the idea of the rule of law at the international level. What the rule of law may mean is promotion of a 'certain process of reflection and argument . . . We value the reflection that a less-than-determinate standard occasions. And similarly, one may say that we want nations to think about whether a situation is one of imminent attack – even though the term is far from determinate.'[2] The onus is on states to engage in reasoned argument concerning their obligations under norms which may be less determinate compared to those at the domestic level which bind individuals.

The article leaves us with a series of arguments about how to think about the (domestic, liberal) notion of the rule of law applied to international law. It also develops an analogy between government authorities under municipal law (agents of and constrained by constitutional and administrative law, rather than rights-bearers) and sovereign states under international law, as a means of making sense of the application of rule of law values to international law. The result is not exactly a new theory of either international law or the rule of law, but a fertile new point of view. The sweep of the argument, and the many insights developed briskly along the way, have resulted in a diverse set of preoccupations among the commentators, who push Waldron's argument in a variety of surprising directions. The result – along with Waldron's robust reply – is an exchange which is as rich and wide-ranging as the article itself.

[1] Some readers may notice an affinity with Georges Scelle, although Waldron does not embrace any kind of thorough-going monism.

[2] Waldron, at 336.