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Response: The Perils of Exaggeration

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I am most grateful to Samantha Besson, David Dyzenhaus, Thomas Poole, and Alexander Somek for their interest in my article 'Are Sovereigns Entitled to the Rule of Law?' and for their insights, criticisms, and suggestions. I am particularly grateful to them for seeing and understanding the kind of reorientation I wanted to suggest. I shall say something about their specific criticisms shortly. But first, some general observations.

1 Sovereignty and Monism

Some of the points made in these comments presuppose that I have a more radical agenda than in fact I have. In this article, I wanted to reorient our understanding of the national state's position in international law, from that of subject to that of source and agency of that legal system, and I wanted to explore the implications of this reorientation for our understanding of the rule of law in the international realm. This reorientation of course requires us to take international law seriously. But it does not necessarily require any particular philosophical view of the relation between international law and national law.[1] In particular it does not direct us to any sort of jurisprudential monism (although it is not incompatible with monism). I think it is quite compatible with a dualist view of the relation between international and national law (not that it commits us to dualism either). It simply assigns the state a somewhat different role from that conventionally assigned in dualist theories. My analysis implies that some of what we would call national state and legal functions can (and should) sometimes be conceived as functions of the international legal system. When a state patrols its borders, for example, it is acting in part as an agency of the international refugee regime.[2] But the exercise of any given legal function can be understood in multiple ways. As I understand it, it is part of the logic of dualism that, to the extent that there is interrelation between international law and the law of any particular

[1] I am going to use the phrase 'national law' (and national legal system) to refer to what international legal scholars have traditionally called 'municipal law' (and 'municipal legal systems'), i.e., the law of particular countries as opposed to the law of the international system.

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country (and dualists should not be in the business of denying that that is possible), we need to be able to understand particular legal functions in multiple ways. I say all this not to argue for dualism, but to illustrate a point. My own instincts are monist, but I don't think monism is implied by my analysis in this article.

Equally it was not my intention to disparage national legal systems or to reduce them to mere appendages of the international legal system. Thomas Poole worries about the tendency of my analysis to reduce the state to a juridical shell, and a subordinate one at that, in which its citizens just happen to have their abode.[3] I am afraid that he shares with Professor Dyzenhaus an exaggerated sense of what I am attempting to achieve in this article. I am not trying to reduce the role of states or national legal systems. National legal systems have massively important work of their own to do (in their own territories for their citizens), as well as whatever work they do in and for the international legal system. Some of the work they do falls into both categories and in that regard there may be no choice but to regard it as governed by two independently and possibly conflicting sets of imperatives. As Professor Besson put it, states 'are doubly constrained'.[4] I did not argue that when this is so international law must always prevail. Professor Somek suggests that my argument is consistent with the work of 'those scholars who accord to the international community normative priority *vis-à-vis* the state'.[5] It may be consistent with their work, but it was not my intention in the article to sign up for that propriety. I actually think that the issue of juridical priority as between international law concerns and concerns of national law has to be settled retail – in terms of the kinds of issues that are at stake in any given instance and in terms of the way states have structured themselves constitutionally – rather than by the wholesale resources of international law jurisprudence. Some of the important work that states do has little or nothing to do with international law, for the tasks that international law has taken on are meagre in extent (which is not the same as unimportant) compared with the tasks that national legal systems take on. So it is certainly not the case, as Professor Dyzenhaus seems to suggest, that I view national states simply 'as the bearers of delegated authority'.[6] This is true of them in one aspect – the agency work that they do for international law. But even that work can be described also in other ways (that was my point in the previous paragraph), and much of the work they do – much of the important work they do in their own territories for their own citizens – is not susceptible to that description at all.

[2] I most definitely did not want to suggest that the sovereign state is like a bureaucrat (as is suggested by Alexander Somek's observation, apparently as a reproach to me, that '[m]embership of the international system is . . . unlike employment in a business bureaucracy': see Somek, 'A Bureaucratic Turn?', 22 *EJIL* (2011) 345, at 348. I meant the state is in some respects like a large administrative agency not like a bureaucratic employee.

[3] Poole, 'Sovereign Indignities: Commentary on Jeremy Waldron's "Are Sovereigns Entitled to the Benefit of the International Rule of Law?"', 22 *EJIL* (2011) 351, at 354.

[4] Besson, 'Sovereignty, International Law and Democracy – A Reply to Waldron', 22 *EJIL* (20011) 373, at 386.

[5] Somek, *supra* note 2, at 347.

[6] Dyzenhaus, 'Positivism and the Pesky Sovereign', 22 *EJIL* (2011) 363, at 366.

More than any of my commentators, Professor Dyzenhaus is interested in considering my claims in their most expansive light. He thinks my comments in this article are indicative not only of my international-law monism but of where I have got to currently in my vacillations on legal positivism and of how I conceive the relation between law and state. I won't say anything here about the topic of legal positivism and its rivals (I didn't intend to address that topic in the article we are discussing), except to say that I do not believe that a tight insistence on the relation between the rule of law (or legality) and the concept of law amounts to a natural law jurisprudence. I believe the two are tightly related but, as I argued in a recent article, that tight relation is compatible with the separation of the validity conditions of law from the bottom-line moral evaluation of a given law.[7]

Professor Dyzenhaus is also interested in how I view the relation between law and state and the implications of that for international jurisprudence. He is right that I am tempted by a Kelsenian view of the relation between national law and state,[8] which by the way means identifying the state with a particular sort of densely packed and densely unified legal system rather than with the unity of just any legal system.[9] Although there is an international legal system, I do not believe that a Kelsenian should infer from this that there must be an international state, let alone an international sovereign.[10] Dyzenhaus thinks that if I accepted this inference, I would have to go on and argue that there can't be sovereign (nation-)states in the international legal system at all, since a legal system admits of only one sovereign. I am not sure what to say about that. After a while I lose my footing in the terrain of this formalism.

As I said, I am tempted by the Kelsenian view that talking about a state is just a particular way of describing *a particular kind* of legal system. I believe that legal systems which are appropriately identified with states require a much tighter and denser degree of integration than the international law regime currently exhibits. I should add though that I am also inclined to the view that the state may also for some purposes be viewed in Weberian terms[11] – i.e., as a kind of organization which is to be understood institutionally not just as an (densely packed and densely unified) array of norms but as a certain sort of social entity that organizes itself and operates institutionally in various ways. And I am not sure yet how best to think about these two ways of looking at the state: I guess it represents the problem, perfectly well-known to Kelsen, of the relation between legal and social meanings of the same phenomena. When legal norms cohere to constitute an institution, the institution tends to take on a life of its own sociologically, and in its ethos and *modus operandi*, not to mention its general presence in society, may not be best understood for all purposes in legal terms. (Consider, by

[7] Waldron, 'The Concept and the Rule of Law', 43 *Georgia L Rev* (2008), 1, at 36–43.

[8] Dyzenhaus, *supra* note 6, at 2.

[9] I agree with Samantha Besson that '[i]n its internal dimension, the state works as a legal organization – it is the outcome of organizing certain rules of public life in a particular way': Besson, *supra* note 4, at 380.

[10] If I understand him rightly, Dyzenhaus attributes this inference to Lauterpacht. He says that, according to Lauterpacht, since sovereignty is just a word for the unity and exclusiveness of the legal system, it follows that from 'a purely legal point of view an international state is in existence': see Dyzenhaus, *supra* note 6, at 365.

[11] See Weber, 'Politics as a Vocation', in M. Weber, *From Max Weber: Essays in Sociology* (1948), at 77 ff.

analogy, a lawyer's view of a church: the lawyer will understand the church as an entity, perhaps a legal person, constituted and regulated by certain rules; but it would be a sorry form of legalism to think that, sociologically speaking, this is all one had to grasp in order to understand what a church is and the presence it has in a society.) Anyway, whatever the relation between Kelsen's and Weber's understandings, I did not want to suggest that the idea of the state as a unified entity – or even as a sovereign entity dissolves on the change of perspective that I am recommending.

As for the idea of sovereignty at the national level, it was not my intention to dissolve this either or call it into question. I said in the article that I was inclined to H.L.A. Hart's view that sovereignty could not be fundamental in any legal system, because it had itself to be explained in terms of certain rules.[12] And I suggested in a footnote that once that insight of Hart's is accepted, internal sovereignty will appear to be a feature of some states rather than others. Some states, considered as arrays of legal rules, exhibit the shape of sovereignty in the way they confront their citizens. They are organized hierarchically in terms of secondary rules which enable us to say that one all-powerful legal institution dominates the legal system (as, for example, the Queen-in-Parliament used to dominate the legal system of the United Kingdom). Others, like the United States, are organized in a multi-peaked way: their constitutions establish several institutions of coordinate status at the highest level, and they may have little need of the idea of sovereignty as a way of characterizing their law in its relation to the citizens who are governed by it. But none of this does away with sovereignty considered as an external attribute, i.e., as an aspect of a legal system in its relation to other legal systems. There the concept is (arguably) useful for characterizing important aspects of the legal position of every national state, though – as I hope I have made clear – it does not follow from this that a description using the term 'sovereignty' is always the best and most illuminating characterization of what states do in the international legal system. My thesis is that national states, which are often properly describable as sovereigns in international law (e.g., in their relations to one another), may also be described using other concepts like *administrative agency* in certain international law contexts. (Whether one says, in these contexts, that it is *sovereign* states that act as agencies of the international legal system may be largely a matter of taste.) I accept Hart's point in the final chapter of *The Concept of Law* that external sovereignty is also a construction of rules, and that what the sovereignty of nation-states implies is a matter of what rules the legal system has.[13] External sovereignty may be strong or weak, depending on the content of the rules, and, if weak, it may be weak to vanishing point – for example, if there were not a strong fundamental norm of the international system precluding in most cases interference in the internal life of other countries.[14] (If that were the case, we might well abandon

[12] Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', 22 *EJIL* (2011) 315, at 319 and, particularly, n. 11.

[13] H.L.A. Hart, *The Concept of Law* (2nd edn by P. Bulloch and J. Raz, 1994), at 220 ff.

the concept as an organizing idea for international law jurisprudence. I believe there have been times in history when this has been appropriate.)

Whether sovereignty, on the understanding of modern international law, requires sovereign equality is another matter. I shall say more about this when I consider Samantha Besson's extraordinarily helpful comments on the relation between sovereign equality and democracy. For now, let me just add this to the slightly sceptical noises I made about sovereign equality in the article.[15] Some of the things that we say follow from sovereign equality simply follow in fact from according sovereignty to various states. We say, for example, that sovereigns are equal in that they all have the juridical power to enter into treaties, or that sovereigns are equal in that they all have a right not to have their territory invaded by others. But these are just consequences of their all being sovereigns, not of their being equal sovereigns. (Analogously, many claims in political morality associated with the equality of individuals are really just claims about the application of rights; that rights apply equally to the people who have them is just a tautology; it is not a substantial thesis of equality.[16]) I guess the equality part of the equation is just our decision to have an undifferentiated concept of sovereignty, and our decision to apply that undifferentiated concept to states of all shapes and sizes. There is more to be said on this topic; but there is no space for it here.

I think that all the comments I have made so far – which I hope err on the side of modesty, aimed as they are to dispel any impression that I am dissolving sovereignty or arguing for monism or reducing the nation-state to a delegated instrument of the international system – lend weight to the observations at the beginning of Thomas Poole's article about the danger of analogies.[17] When I developed what I called a 'new analogy' between states and administrative agencies,[18] my claim was intended to be modest in at least three regards. First, it was a comparative claim. I was arguing that nation-states are *better* conceived as administrative agencies than they are as mere subjects of international law (if being a subject is understood on the analogy of an individual citizen's subjection to national law). I was not arguing that they are better conceived as administrative agencies than as sovereigns. Secondly, it was intended as an analogy, not a reduction. I was seeking the illumination that might result from our saying, 'Let us try thinking about states as agencies of the international system'. I was certainly not saying, 'This is all that nation-states are, juridically speaking'. Each analogy we use is just 'one view of the cathedral', so to speak.[19] Thirdly, an analogy is not a complete normative theory. Dr Poole makes some heartfelt complaints about my

[14] So I accept Professor Dyzenhaus's imputation to me of the thesis that, in the philosophy of international law, sovereignty is best not conceived as something pre-legal with which law has to come to terms: see Dyzenhaus, *supra* note 6, at 365.

[15] See Waldron, *supra* note 12, at 334–335.

[16] See J. Raz, *The Morality of Law* (1986), at 217–222.

[17] Poole, *supra* note 3, at 1.

[18] Waldron, *supra* note 12, at 329.

[19] See Calabresi, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', 85 *Harvard L Rev* (1972) 1089, at 1128. See also Poole's query: 'do we really have to make a binary choice? Might it not be the case that the individual model works well in certain contexts and the agency model better in others?': *supra* note 3, at 4 n. 12.

failure to specify a resolution to the kind of issues that arose in the *Kadi* case.[20] He says that my conception 'does not even have the potential to say anything about this' case:

> Does the agency analogy mean that states are obliged as though by a superior legal authority to act the way the Security Council prescribes? Or does the . . . public law character of international law mean that states must internalize Security Council resolutions in a way that accords its own understanding of what the rule of law requires? There is no way of knowing. Either works; and neither.[21]

Well, it will depend among other things on the theory one develops of (a) the rule-of-law responsibilities of administrative agencies in general, (b) the distinctive role as an agency of either a nation-state in the international system or a regional super-state like the European Union in such a system, and (c) the place of a Security Council resolution – as opposed to a multi-lateral treaty – as a source of primary law for agency implementation. My article, suggesting, as it did, a background reorientation of some of our thinking about the place of nation-states in international law, did not work through the issues that arise under (a), (b), and (c). But if Poole is inferring from this that I need not have bothered with the analogy, then I submit he is mistaken and perhaps blinkered a little by his preoccupation with the political bottom line. None of the questions (a), (b), and (c) would have arisen without the new analogy: but the new analogy suggests that these are the questions to ask. None of them would have arisen under the traditional analogy which treats states (and perhaps also the EU) as simply subjects of international law. Try solving the *Kadi* problem(s) using just *that* analogy! At least the new analogy positions us to say something intelligent about the issue, with exactly the right parties and relationships identified. But Poole is certainly right that it leaves room for further work, and indeed for further controversy.

Let me finish these preliminary comments with the suggestion that not every aspect of my approach in the article we are discussing involves analogy. I was and am inclined to say that international law is almost always better conceived as public law rather than private law. I suppose it would be an analogy if I were to represent it as: international law should 'be treated like, (domestic) public law'[22] (at 6). But I am not exactly assimilating it to *domestic* public law. I want to say that it is public law in its own right. So I don't really think it is a question of analogy.[23] Assimilating it to private law certainly involves an analogy – between sovereign states and individual parties in contract law. But it doesn't follow that discrediting one analogy involves adopting another. Equally I don't mean to be implying, with my claim that international law is best conceived (in its own right) as public law, that therefore it is best conceived in a monistic relation with the public law of the nation-states that it binds. That, as I said earlier, is another matter.

[20] Cases C–402/05P and C–415/05P, *Kadi* and *Al Barakaat* [2008] ECR I–6351, at para. 303.

[21] Poole, *supra* note 3, at 359.

[22] *Ibid.*, at 353.

[23] I think Poole recognizes this. When he turns to it, he says, 'Let us turn now to the second analogy – if that indeed is what it is': *ibid.*

2 Law and Legality

David Dyzenhaus's expansive reading of my article extends to its implications for general jurisprudence. He thinks my comments are indicative of where I have got to currently in my philosophical vacillations on the topic of legal positivism and its rivals. Once again, I did not intend to address that in asking whether sovereigns were entitled to the benefit of the rule of law. But I do not mean that demurrer to be dismissive. Professor Dyzenhaus has been extraordinarily generous and patient in his attempt to discern a consistent position in my writings on general jurisprudence, and those virtues are apparent too in his comments here. As he notes, I do insist on a tight relation between the rule of law (or legality) and the concept of law. I have argued for that extensively elsewhere; [24] here I fear it is less in evidence than it ought to be, since I lazily adopt the conventional view that the existence of international law is one thing and the existence of the international rule of law is another.

I think Thomas Poole is right when he says that '[i]n its application, civil law is interpreted and applied through what we might call . . . canons of legality'.[25] Indeed canons of legality are involved not just in application, but also in inception and enactment – in the whole way we think about government by law. Government by law is not just a matter of orders being issued and officials being able to recognize them; the whole business is suffused with formal and procedural principles that we associate with the rule-of-law ideal. So Dr Poole is right: even if 'positive law is the Sovereign's . . . the strictures of legality are not, at least not in any straightforward sense'[26] (at 8).

Professor Dyzenhaus thinks that with this acknowledgment, 'the distance between Waldron's legal theory and a natural law theory of immanent principles of legality is close to the vanishing point'.[27] He talks of an ambivalence in my treatment of the rule of law in international law between, on the one hand, my positivistic commitments and, on the other, my growing sense over the last few years that the rule of law is best conceived in a way antithetical to positivism.[28] He is right about the ambivalence. However, I don't think that associating the rule of law with the concept of law entails the acceptance of a natural law jurisprudence. Certainly, as I have argued elsewhere, a tight relation between the rule of law and the concept of law is compatible with the separation of the validity conditions of law from the bottom-line moral evaluation of a given edict.[29]

So: my background position is that there is not a lot of daylight between the concept of law and the concept of legality or the rule of law. But I want to repeat that the point of my article was that, in the international sphere, we should proceed carefully and thoughtfully (rather than mechanically) from this background position. It is

[24] Waldron, *supra* note 7, at 36–43.
[25] Poole, *supra* note 3, at 357.
[26] *Ibid.*
[27] Dyzenhaus, *supra* note 6, at 372.
[28] *Ibid.*, at 364.
[29] Waldron, *supra* note 7, at 36–43.

commonplace that the rule of law is, at least in part, a contested concept.[30] Though people share a broad idea of the distinctive and valuable features of governance on the basis of general standing norms administered by legalistic tribunals (courts), there is a lot of disagreement about what (in detail) the rule of law amounts to and requires. Partly this is a matter of mapping the deep concerns that underlie the ideal of legality onto the necessarily distinctive features of law as it operates in a given area (whether it be criminal law, administrative law, or international law). So we should be careful not simply to approach the question of the rule of law (in a given area) with a check-list drawn from some other area. According to Samantha Besson:

> if legality or the rule of law is also a matter of the quality of the law's sources, the law-making processes by which we identify valid legal norms should themselves be such as to satisfy the requirements associated with the rule of law. The same should be said about the legality of international law. International law-making processes should therefore be such as to satisfy some of the requirements associated with the international rule of law and in particular the requirements of clarity, publicity, certainty, equality, transparency and fairness.[31]

But we need argument to show that these are in fact the appropriate rule-of-law criteria to apply in the international realm. In the article, I was following up Ed Rubin's insights in order to query whether the principles which make perfect sense when applied by Lon Fuller for the benefit of individuals to (say) ordinary criminal law also make sense when applied, allegedly for the benefit of states, in international law. Rubin argued that in the context of national law, rule of law for agencies need not be the same as rule of law for individuals. I thought this might be worth considering, too, for states at the international level.

Even within the national context, opinions differ as to how important clarity and certainty are in our conception of the rule of law. Some argue that the rule of law requires a law of rules; others deny this; I myself am in the latter camp. So again there is contestation. It follows that we cannot automatically assume that applying the rule of law to international governance means emphasizing certainty above all, and the use of rules rather than standards, etc. As I argued in a long footnote, we should not mechanically assume that applying the rule of law in this realm means 'strengthening a rules-based international system'.[32] We need to think carefully about the kind of interests that are at stake and the kind of governance that is possible (and desirable).

Let me add, however, that in one respect I proceeded too quickly in my analysis. I thought it should make a difference to our conception of the rule of law in the international realm that the sovereign states – the putative subject of international law, at least on the old analogy – does not have an inherent interest in freedom remotely

[30] See Fallon, 'The Rule of Law as a Concept in Constitutional Discourse', 97 *Columbia L Rev* (1997) 1, at 6, and Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', 21 *Law and Philosophy* (2002) 137.

[31] Besson, *supra* note 4, at 386.

[32] See Waldron, *supra* note 12, at at 336, quoting Chesterman, 'The UN Security Council and the Rule of Law: the Role of the Security Council in Strengthening a Rules-Based International System', available at: http://ssrn.com/abstract=1279849.

comparable to the interest of natural individuals in their relation to law.[33] Since much of our thinking about the rule of law involves making room for individual freedom, it looked as though quite a lot of our conventional rule of law analysis might have to be abandoned when we turned to the regulation of sovereigns by international law. However, just because a sovereign state does not have an *inherent* interest in freedom comparable to the importance of individual autonomy does not mean it has no legitimate interest in freedom at all. It might have an instrumental interest in freedom related either to the purposes that are properly adopted by the state or indirectly to its protection or promotion of the individual freedom of its citizens. I stand by my suggestion that we cannot assume that pandering to the state's interest in freedom necessarily inures to the benefit of its citizens' interest in freedom (or the interest in freedom of other individuals, like detainees, subject to its power). But still the freedom of states has some significance and my critics are right to say that I wrongly attempted to exclude the idea that states can have interest of their own which can be engaged by the application of rule-of-law requirements to international law.[34] I think this is an area where I (rather than my readers) exaggerated the implications of my account.

3 The Rule of Law and Democracy

Samantha Besson invites me to consider the relation between the rule of law themes that I addressed in the article and the theme of democracy. She believes that there are important connections between the rule of law and democracy and she infers, from an article I published a while ago on the idea of a democratic jurisprudence,[35] that I might be tempted also by some connections along these lines. My aim in that article was mainly to consider connection between positivist jurisprudence and democratic ideas, but she is right that some of the themes in general jurisprudence that are considered there – like the proposition that law is by definition general – are also related to the rule of law.[36] Even so, I have to say that I am dubious about what she calls 'the democratic background to the rule of law'[37] (at 12). Of course there are connections between the two ideals (and some of these may turn out to be important), but I have long been convinced (by Joseph Raz, among others[38]) that it is better to regard them as separate stars in the constellation of our political values rather than analytically equivalent to or dependent upon one another.

Professor Besson's sense that there are important connections here is connected with a broader view she holds about the relation between the rule of law and legitimacy. She says that '[l]egitimate authority is an essential part of legality, in the sense that the law should be made in such a way that its claim to legitimacy can

[33] See *ibid.*, at 341.

[34] See, e.g., Besson, *supra* note 4, at 380.

[35] Waldron, 'Can there be a Democratic Jurisprudence?', 58 *Emory LJ* (2009) 675.

[36] Besson, *supra* note 4, at 380.

[37] *Ibid.*

[38] Raz, 'The Rule of Law and its Virtue', in J. Raz, *The Authority of Law* (1979), at 224, 224–225.

sometimes be warranted'.[39] Again I am sceptical. Legitimacy is a term with multiple uses in our political discourse (which political theory rally has not got round to sorting out). Even apart from its sociological meaning, it has a number of differing normative uses. Besson associates it with the idea of authority. Now that may suggest a distinction between institutions that have and institutions that have not been established in a legitimate fashion. That sense of legitimacy I acknowledge is important for legality. In the article we are discussing, I mentioned a fine article entitled 'International Law and the Rule of Law', in which James Crawford considered a complaint made by a war crimes defendant that the International Criminal Tribunal for former Yugoslavia had not been properly established on a legal basis as required by Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).[40] I suspect that that complaint was justified – though the tribunal treated it dismissively – and it is certainly a rule-of-law issue of legitimacy. But this is a much narrower concept of legitimacy than would be needed to justify the kind of connection between the rule of law and democratic legitimacy that Besson is seeking. She needs a broader sense in which legitimacy is connected with authority generally and entitlement to rule, and I don't believe that we should think of the rule of law as either incorporating or presupposing our best theory of that.

In political philosophy, we need normative theories of several different kinds: (1) we need theories of justification which address substantive issues of the content of laws and policies; (2) we need theories which explain why some people are entitled to make laws and administer policies over others; and (3) we need theories about the mode of governance – the forms our laws should take and the procedures through which they should be administered. Category (1) will include our theory of social justice and perhaps also our theory of human rights. Category (2) will include our theory of the necessity for government and our theory of democracy. And category (3) will include our theory of the rule of law. It is possible that the word 'procedural' might lead us to elide the distinction between (2) and (3); after all, democracy is a procedural theory and so, I have argued, to a large extent, is the rule of law.[41] But the procedural aspect of the rule of law concerns the ways in which courts and other tribunals deal with individuals and reach their decisions, and this is a different topic, answering different kinds of concerns in political theory, from the concerns of procedural conceptions of democratic legitimacy.

On the other hand, the distinction between (2) and (3) does not mean that someone interested in the rule of law should neglect the legislative processes – or the legislative-like processes – of international law. Even if their democratic legitimacy is not at issue,

[39] Besson, *supra* note 4, at 386.

[40] Crawford, 'International Law and the Rule of Law', 24 *Adelaide L Rev* (2003) 3, at 8–10, cited in Waldron, *supra* note 12, at 342. The relevant part of ICCPR Art. 14(1) requires that '[i]n the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal *established by law*' (my emphasis).

[41] See Waldron, 'The Rule of Law and the Importance of Procedure', forthcoming in *Nomos L: Getting to the Rule of Law* (ed. J. Fleming 2011), available at: http://ssrn.com/abstract=1688491.

the form of the legislation they create certainly is. I said a little bit in the article to assimilate treaty-making to legislation.[42] Dr Poole argues that, as a celebrated theorist of legislation I should have said more about legislation by the Security Council, because that is an example of primary rather than delegated legislation.[43] I have two things to say about that. First, I do not think of a multilateral treaty as an instance of delegated law-making by states in the international legal system. On the contrary, it is the source of most primary law-making in international law. Until recently, the Security Council role has not been prominent, though in the last decade or so the Council has purported to undertake something like legislation, confined though to a few areas, like terrorist funding. It is far from clear that it is acting – or that it is entitled to act – as anything like a plenary legislator across all the areas that international law encompasses. And if it does not act as a plenary legislator, this is not because of inhibitions about allowing legislation (*qua* public law) to encroach on the domain of private law (treaties). It is that the main source of anything like legislation in the international arena remains multilateral conventions. And I did talk about that.

While we are on the subject of the connection between this and the rest of my work, let me say that Dr Poole's concern about my status as critic of judicial review is mostly misplaced. I have never suggested anything against judicial review of executive action,[44] or by analogy the involvement of courts in the way in which 'legislation' is implemented in the international arena. Poole writes as though I were an all-purpose critic of courts. That has never been the case. Also my critical account of judicial review is explicitly conditional,[45] and it is not clear at all that the conditions apply in the international arena. (The most obvious reason for thinking that they do not is the so-called 'democratic deficit' in international law.) Poole does wonder whether the heightened emphasis I give to international law might heighten the tendency to aggrandize judicial power at the national level: 'Waldron's argument . . . seems to involve an increase in the role that domestic courts play in articulating and enforcing international law'.[46] I am not as concerned about this as he thinks (on account of my other commitments) I ought to be. For one thing, as he acknowledges, the ascendancy of international law makes more work for national legislatures as well as for national courts.[47] For another thing, it is possible that international law will make more work for courts without it being the case that this work is done through the medium of strong judicial review of legislation. As I have argued elsewhere – in relation to the citation of foreign law by constitutional courts – we can separate the issues of the sources of law that a court should appeal to and the authority (*vis-à-vis* legislation) that a courts' decision should have.[48]

[42] Waldron, *supra* note 12, at 329–330.

[43] Poole, *supra* note 3, at 358.

[44] Waldron, 'The Core of the Case against Judicial Review', 115 *Yale LJ* (2006) 1346, at 1353–1354.

[45] *Ibid.*, at 1359–1369.

[46] Poole, *supra* note 3, at 359.

[47] *Ibid.*

[48] See Waldron, 'Rights and the Citation of Foreign Law', forthcoming in T. Campbell (ed.), *Rescuing Human Rights* (2011).

Let me return now to the broader issue of democracy. I don't want to deny that democracy – and political legitimacy, in the sense defined in (2) above – are important in the international arena. International law does suffer from a democratic deficit and, apart from whatever democratic legitimacy is conveyed indirectly by the authority of the governments that negotiate treaties and the legislatures that ratify them, the legitimacy of international law has to be established by and large on the ground of its necessity.[49] And Professor Besson is surely right that we face a tough task of trying to 'reconcile the contradictory requirements made on sovereign states and individuals by democratically legitimate domestic legal norms, on the one hand, and international legal norms legitimated on other grounds, on the other'.[50] No doubt this is one of the factors that needs to be considered in determining the issues of priority to which, as I said earlier, Alexander Somek drew our attention.[51] I did not address this task nor consider its impact on these priorities in the article under discussion. I was assuming that international law was a well-established and legitimate body of law and I was considering the position of the nation-state under that law in regard to the application of the rule-of-law ideal. My critics are certainly right that more work needs to be done in this area, and I hope that in later work I can make a contribution.

It would be wrong to end this discussion of Samantha Besson's contribution without mentioning her argument connecting democracy with sovereign equality. Unlike more familiar uses of equality, she writes:

> sovereignty protects a collective entity of individuals – a people – and not individual human beings per se. . . . [S]overeignty, and sovereign equality in particular, protects democratic autonomy in a state's external affairs and remains justified for this separately from international human rights.[52]

True, some sovereigns are not democratic, but increasingly, she says, international law is conceiving of sovereigns in democratic terms so that in fact, 'the sovereign subjects behind international law are peoples within states, and no longer states only'.[53] Besson thinks that you cannot understand my view that people (ordinary men and women) are the real focus of international law without understanding the strong international law trend towards a democratic conception of sovereignty. I must admit I hadn't made the connection but I think this is a tremendously interesting line of thought, and only the fact that it falls outside the ambit of what I was focusing on in the article under discussion prevents me from following it up here. I hope to address it on another occasion.

[49] See by analogy the argument in Green, 'The Duty to Govern', 13 *Legal Theory* (2007) 3.
[50] Besson, *supra* note 4, at 376.
[51] See *supra*, text accompanying note 5.
[52] Besson, *supra* note 4, at 382.
[53] *Ibid.*, at 382.