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# Sovereignty, International Law and Democracy

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## Abstract

*In my reply to Jeremy Waldron's article 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', I draw upon and in some ways expand Waldron's important contribution to our understanding of the international rule of law. First of all, I suggest that Waldron's argument about the international rule of law can be used to illuminate how we should understand the legitimate authority of international law over sovereign states, but also how some of sovereign states' residual independence ought to be protected from legitimate international law. Secondly, I argue that the democratic pedigree of the international rule of law plays a role when assessing how international law binds democratic sovereign states and whether the international rule of law can and ought to benefit their individual subjects. Finally, I emphasize how Waldron's argument that the international rule of law ought to benefit individuals in priority has implications for the sources of international law and for what sources can be regarded as sources of valid law.*

## 1 Introduction

In his article 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', Jeremy Waldron focuses 'on some of the theoretical issues that arise when we consider the [rule of law] in light of the absence of an international sovereign and the extent to which individual national sovereigns have to fulfil governmental functions in the [international law] regime' (at 316).

The central question the essay raises pertains not so much to the notion of international rule of law and its boundaries, but to the identity of the subject(s) entitled to the benefit of the rule of law in international relations and accordingly to the possible variations in that entitlement. Waldron's conclusion is that sovereign states ought

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not to be compared with individuals in the manner assumed by the conventional analogy; their sovereignty is a legal construct and should not be respected as individual autonomy would. This has consequences for both their entitlement to the benefit of the international rule of law and the scope of that entitlement: the international rule of law ought to benefit individuals in priority and sovereign states are agents of that entitlement. As such, sovereign states benefit only indirectly from the rule of law (for instance, in their relationships to one another), but not directly as agents of international law.

The article covers a lot of ground in the burgeoning field of international law theory. It succeeds remarkably well in unpacking and addressing some extremely difficult questions, and does so in Waldron's distinctive manner. After a brief restatement of what I take to be the main steps in his argument, I will present three comments.

## 2 A Restatement

Jeremy Waldron's article opens with a discussion of the rule of law and what it can mean in international relations. Waldron starts by arguing, against Hobbes' paradox and by reference to Hart's famous argument, that sovereignty is not antithetical to law (at 317–320). He further argues that sovereignty and the rule of law actually require each other and that the international realm is no exception in that respect (at 320–322).

Of course, Waldron concedes that the plurality of sovereign states, and the horizontal and decentralized relations between various international actors (states, international organizations, and other agents exercising public authority) make the rule of law *prima facie* far more difficult to respect in the international sphere (at 322). He also considers the critique that the rule of law may even be impossible to conceive in the international realm as there is no overarching governmental power to be restrained, on the one hand, and no human individuals to protect in an unmediated way, on the other (at 322–324). Looking for a way out of this impasse, Waldron emphasizes the role played by the rule of law in protecting states from abuses that stem not only from centralized political institutions but also from international law itself, as well as the need to provide sovereign states with a predictable and secure environment *per se* and in their mutual relationships (at 324–327).

Not content with this first and limited reply to the critique, Waldron looks for a better answer elsewhere and turns to the sovereignty side of the equation. From his section 6 onwards, his main question is no longer what the rule of law implies in international relations, but 'who needs the protection of the [rule of law] in the international sphere' (at 325).

Waldron identifies two main mistakes in the conventional view that sovereign states should be equated with individuals in their relation to the law, and hence ought to benefit from the international rule of law in exactly the same way as individuals benefit from the domestic rule of law. First of all, because international law protects individuals as bearers of ultimate value, individuals are the ultimate subjects of international law and sovereign states their agents (at 325–327). Of course, this distinction is difficult to perceive in practice as sovereign states are formally both international

legal subjects and international law-makers (at 329–330). But Waldron maintains that it must in the end be individuals *qua* ultimate subjects who should benefit from the international rule of law (at 325–332). Secondly, even as agents of international law, sovereign states cannot be said to be the beneficiaries of the international rule of law (at 337–342). This would not be true of domestic officials within a state, and the argument applies even less well to sovereign states as officials of international law.

Having argued against extending to sovereign states the benefit of the international rule of law, Waldron turns, in the last two sections of his article, to what he refers to as the ‘responsibility’ of sovereign states under international law. He denies sovereign states respect for their freedom or residual autonomy in the international legal order on the basis of the dis-analogy between state sovereignty and individual autonomy (at 342–343). Of course, he emphasizes the importance of respecting states as basic units of international law, but only *qua* entities imbued with the principles of legality and not as ‘brute unregulated freedom of action’ (at 343).

### 3 Three Comments

Jeremy Waldron’s argument in this article is seminal and timely. The conventional and individualizing view of states and sovereignty obfuscates much of what is at stake in current discussions of the legality and legitimacy of international law. It is crucial, in other words, for international legal theorists to ‘lift the state veil’.<sup>1</sup>

Agreeing with most of the argument in the article<sup>2</sup> makes it difficult to provide a radically different answer to the questions Waldron raises,<sup>3</sup> and hence to propose a critical response. Of course, one may quibble with some minor passing statements,<sup>4</sup> but this would not take anything away from the main points made in this article and would not be very constructive. What I would like to do therefore is take Waldron’s reasoning a step further and develop three potential implications of his argument. These are implications pertaining to international law’s legitimacy, and its democratic legitimacy in particular, and international legal validity.

My argument is that it is difficult to discuss the rule of law without some normative assumptions or implications about the law’s legitimacy or legitimate authority and hence the law’s validity. I will try to unpack what those could be. I will also argue that Waldron himself is making some of those assumptions in his article, especially

<sup>1</sup> On this expression see Besson, ‘The Authority of International Law – Lifting the State Veil’, 31 *Sydney L Rev* (2009) 343. See also Murphy, ‘International Responsibility’, in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010), at 299.

<sup>2</sup> See for a previous version of the argument Waldron, ‘The Rule of International Law’, 30 *Harvard J Law and Public Policy* (2006) 15.

<sup>3</sup> For an application of Waldron’s argument to the issue of the legitimacy of international law and of sovereignty see Besson, *supra* note 1; Besson, ‘Sovereignty’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of International Law* (2011, forthcoming).

<sup>4</sup> Thus, one may disagree with Waldron on the rule of law deficiencies of a federal entity (at 8–9). It would seem indeed that the federal model can also improve respect for the rule of law through decentralization and enhanced checks and balances.

towards the end. This may explain his cautious use of general terms such as ‘having the benefit of the rule of law’, but also his later reference to more normative terms such as ‘responsibilities’ of states under the rule of law or ‘requirements’ of the rule of law.

More specifically, I would like to argue that some of the normative assumptions made in a discussion of the rule of law are democratic. It is difficult indeed to mention the rule of law without questioning whose rule, or at least whose law, it is we ought to be concerned with, especially in a multi-layered political context where international institutions, states, decentralized entities and individuals are affected. Although section 2 of the article, where Waldron defines the rule of law, does not mention democracy, the connection follows clearly from Waldron’s earlier work on the rule of law<sup>5</sup> and on normative legal positivism.<sup>6</sup> It may be that Waldron would like to argue for a non-democratic justification of the legitimacy and validity of international law, but it would be interesting to see how such an argument would relate to Waldron’s earlier discussions of the domestic rule of law. It would also be important to know how in practice he would suggest we 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 proposed other grounds, on the other.<sup>7</sup>

### *A Sovereignty and International Legitimacy*

My first set of comments pertains to the implications of Jeremy Waldron’s argument for the legitimate authority of international law. After clarifying how international law may have legitimate authority over sovereign states, I will look closely at what residual autonomy they may claim in the name of state sovereignty.<sup>8</sup>

#### *1 The legitimate authority of international law*

International law rules and the rule of international law implies authority over its subjects. International law’s authority is justified or legitimate, however, only if it has ‘the right to rule’, i.e., the right to create duties to obey on the part of its subjects.

Sovereign states are the primary subjects of binding international law norms. Interestingly, one of the main challenges to the legitimacy of international law is that it allegedly fails to respect the sovereignty of states, intruding upon domains in which they should be free to make their own decisions. By analogy to individual autonomy, state sovereignty is often understood in international law as a competence, immunity, or power, and in particular as the power to make autonomous choices (so-called

<sup>5</sup> See Waldron, ‘The Concept and the Rule of Law’, 43 *Georgia L Rev* (2008) 1; Waldron, *supra* note 2; Waldron, ‘Is the Rule of Law an Essentially Contested Concept?’, 21 *Law and Philosophy* (2002) 137; Waldron, ‘The Rule of Law in Contemporary Liberal Theory’, 2 *Ratio Juris* (1989) 79.

<sup>6</sup> See, e.g., J. Waldron, *Law and Disagreement* (1999); J. Waldron, *The Dignity of Legislation* (1999).

<sup>7</sup> On this extremely topical question see, e.g., Buchanan and Powell, ‘Constitutional Democracy and The Rule of International Law: Are They Compatible?’, 16 *J Political Philosophy* (2008) 326.

<sup>8</sup> The argument in this section is drawn from Besson, *supra* note 1.

sovereign autonomy). Just as the legitimate authority of domestic law is often opposed to individual autonomy, the legitimate authority of international law is taken to contradict state sovereignty.

Following the analogy between states and individuals entering private contracts, sovereign states have traditionally been held as being able to bind themselves as free rational agents. For a long time, and following the consensualist paradigm in international law, this was actually the only way in which the legitimate authority of international law over sovereign states could be justified. The paradox of sovereignty, however, is that states must be capable of binding themselves if international law is to exist, and also incapable of binding themselves through international law if they are to be absolutely independent. Among the different ways out of the paradox, self-limitation was deemed the least objectionable. This is explained by reference to the idea of normative immediacy, famously captured by the International Court of Justice (ICJ) in the *Wimbledon* case,<sup>9</sup> according to which those states that are immediately bound by law are the only sovereign and legal persons in international law and vice versa.

This approach is misleading and no longer in line with modern international law, however. To start with, consent does not provide a sound justification for the authority of law *tout court*. Moreover, many international law norms can no longer be drawn back to state consent in their law-making process anyway. Finally, they can actually bind other international subjects than states consenting to them and a consent-based justification would leave a large part of international law unaccounted for.<sup>10</sup>

There is another more promising way to justify the authority of international law on sovereign states, but also on their populations and on international organizations that is in line with the account of sovereignty proposed by Waldron in his article. In order to account for the legitimacy of international law and justify the latter's exclusionary and content-independent authority, it is important to start by presenting how international law can provide reasons for action that correspond to those applying to sovereign states, and hence enhance their sovereignty (the dependence condition), before explaining in a second stage why those reasons can be said actually to exclude reasons that apply to sovereign states (the normal justification condition).<sup>11</sup>

First of all, a few clarifications pertaining to the justification of authority are in order. According to the service conception of authority propounded here, i.e., the conception of sovereignty that serves its subjects' autonomy,<sup>12</sup> authority can be justified only if it facilitates its subjects' conformity with the (objective) reasons that already apply to them and hence respects their autonomy.

The application of the service conception has a pre-requisite therefore: the subject bound by a legal norm needs to be an autonomous subject, as this is the only way that

<sup>9</sup> *Case of the SS 'Wimbledon' (France, Italy Japan and UK v. Germany)* [1923] PCIJ Rep. Series A No. 1, at 25.

<sup>10</sup> For a critique of consent-based legitimacy see Buchanan, 'The Legitimacy of International Law', in Besson and Tasioulas (eds), *supra* note 1, at 79.

<sup>11</sup> See for this conception of the law's legitimate authority Raz, 'The Problem of Authority: Revisiting the Service Conception', 90 *Minnesota L Rev* (2006) 1003.

<sup>12</sup> See *ibid.*, at 1012 ff.

its freedom to choose from a range of options can be furthered by an authoritative directive. Autonomy, in other words, does not mean freedom from duties, but only from those which do not correspond to objective reasons that apply to the autonomous subject and which do not help the subject to respect those reasons. A subject is autonomous if his freedom is complete for the purposes of leading a good life.

The analogy between authority for states or other institutional subjects of international sovereignty, on the one hand, and individuals, on the other, presupposes therefore that the value of autonomy extends to the choices and actions of states. At first sight, it seems plausible that it does, given the value of shared membership of a national political community and, as a result, of the collective self-determination of such communities. The problem highlighted by Waldron is that the value of state autonomy can only be explained in terms of the autonomy of the people constituting it. States are quite unlike individuals when it comes to the value of their autonomy. Their autonomy cannot simply be equated with that of any of their domestic legal subjects, but is the product of those subjects' autonomy as a political entity. By analogy with an individual but also because of the imperfect analogy with an individual, sovereign autonomy is even more clearly dependent on the purposes of being a good polity, i.e., a polity that is self-determining and protects its subjects' autonomy.<sup>13</sup>

It is at this stage that one may want to take Waldron's argument further and draw some of its implications for sovereign states' duties under the requirements of the international rule of law. He mentions those requirements in the article and the fact that states are bound by them (at 341), but does not explain in what way and how their duties relate to their individual subjects' direct or indirect duties under international law. This is regrettable as the legitimacy of the law the rule or authority of which is at stake is arguably part of why that rule or authority is valuable and of interest.

When a state is morally bound by a norm of international law, the duties imposed on it will require action that burdens individuals either indirectly, through international state action that is costly to national resources, or directly through the duty to enact domestic laws in order to transpose international law into domestic law or implement the latter directly in the domestic sphere. This affects individuals' balance of reasons as a result. It also explains why the autonomy of states and its ability to bind and to be bound depends on its constituency's autonomy and hence on its ability to represent the latter. States can bind and be bound by international legal norms only when they represent those subjects as officials and hence can bind them as proxy subjects of international law. This approach actually has the advantage of providing a single legitimacy concept applicable to all sources of international law and to all subjects of international law duties, whether states, international organizations, or individuals, as all of them are reducible eventually to individuals.

Of course, states remain free rational, albeit artificial, agents, and as such they can enter into binding agreements the way an individual would enter a contract. This can be the case for many contract-like treaties and other international agreements, although consent does not necessarily bind in all cases. The opposite view would

<sup>13</sup> See also Endicott, 'The Logic of Freedom and Power', in Besson and Tasioulas (eds), *supra* note 1, at 245.

simply strip states from their right to bind themselves, and hence from any of the meaningful implications of their quality as primary international legal subjects. Further, states' international legal obligations to obey would remain in place even if they were illegitimate, as they are often backed up by legal sanctions. And so would states' moral obligations to abide by morally correct directives which would bind individuals (and states for them collectively) in any case. But populations unrepresented by those states would not be morally bound by those legal directives *qua* legitimate law. Nor could those states be accordingly.

Secondly, for the authority of international law to be actually justified and hence legitimate, the reasons international law provides should not only match pre-existing reasons of sovereign states, i.e., the reasons that make them good polities and hence autonomous and sovereign states. Authoritative reasons should also be able to preclude those reasons by helping the subjects to respect them better than they would on their own. This is the second condition of the legitimate authority of international law: the normal justification condition.

Justifications that comply with the normal justification condition can be numerous and range from cognitive or volitive qualities to coordination abilities. In the circumstances of reasonable disagreement and social and cultural pluralism that prevail globally and even more severely among states, I have argued elsewhere, drawing on Waldron's previous work on coordination and authority for officials,<sup>14</sup> that coordination provides one of the best justifications for the legitimate authority of international law, even outside clear coordination problems.<sup>15</sup> More particularly, democratic coordination constitutes the justification for the legitimacy of international law that is most respectful of individuals' and peoples' political equality and hence of the reasons that apply to sovereign states. What democracy requires in international law-making and between sovereign states will be addressed later on in this reply.

## 2 *Legitimate authority and sovereign independence*

Interestingly, even when the conditions for the legitimate authority of international law over sovereign states are fulfilled, there could still be some matters over which it is more important for a sovereign state to be able to decide independently. This is by analogy to what applies to individuals: it is important that, in some cases at least, a person reaches and acts on her own decision, rather than take a putative authority's directives as binding, even if doing the latter would result in decisions that, in other respects, better conform to reason.

In general, it is difficult, however, to distinguish those cases from cases where legitimate authority can apply, the incompatibility being at the most contingent and relative to certain circumstances. The contingency of the independence condition is even more clearly the case in international law. If states are deemed officials both *qua* law-makers and *qua* proxy-subjects of authority in the international legal order, their

<sup>14</sup> See, e.g., Waldron, 'Authority for Officials', in L. Meyer, S. Paulson, and T. Pogge (eds), *Rights, Culture, and the Law. Themes from the Legal and Political Philosophy of Joseph Raz* (2003), at 45.

<sup>15</sup> See Besson, *supra* note 1.

independence, as Waldron argues, cannot simply be equated with that of any of their domestic legal subjects. It is the product of those subjects' autonomy as a political entity and the value of that autonomy itself which depends on that of the individuals of which it is constituted.

Considered in both its internal and external dimensions, a state's sovereign autonomy is, says Waldron, a legal construct, not something the value of which is to be assumed as a first principle of normative analysis. In 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. Its sovereignty is artificial and it is legally constructed for the benefit of those whose internal interests it protects. In its external dimension, the sovereignty and the sovereign autonomy of the individual state are equally artefacts of law. What a state's sovereignty is and what it amounts to is not given as a matter of the intrinsic value of its individuality, but determined by the rules of the international legal order. Those rules define state sovereignty so as to protect the internal and external interests and values of a given political community *qua* sovereign equal to others, but also to protect the interests of their subjects.

If Waldron's argument is correct in that respect, which I think it is, we may want to go one step further and draw conclusions from the dis-analogy between sovereign autonomy and individual freedom for the residual independence of sovereign states under international law and the circumstances under which one may argue that a sovereign state ought not be bound by international law even when the latter is legitimate.

To start with, the potential cases of incompatibility between the legitimate authority of international law and state sovereignty are likely to be even more contingent in the international legal order than in the domestic context. This is because, as Waldron rightly states, of the dis-analogy with individual freedom: 'we cannot attribute such value to freedom of state action in the international sphere any more than we can in the national sphere' (at 341).

At the same time, however, and Waldron does not seem sensitive to this argument, sovereign states are collective entities, and as such their relationships are likely to be even more riddled with disagreement than individuals'. Moreover, one of the values of sovereignty being self-determination, it is clear that decisional independence is of value in the case of sovereign states as well. Finally, given the circumstances of social and cultural pluralism that prevail globally, it is likely that state autonomy can be exercised valuably in very different manners. All this makes self-determination over certain matters as important in the case of sovereign states as for individuals, albeit for different reasons.

In sum, state sovereignty is not necessarily compatible with the authority of international law. It is only the case when the latter has legitimate authority, i.e., furthers state autonomy and the reasons that underlie state autonomy. Those can be understood by reference to the values that make a good state, or more generally a good political entity, such as self-determination, democracy, and human rights, but also the values that make a good international community of equal sovereign entities. Of course, this should not be taken to mean that state sovereignty is incompatible with



international law's authority only when it is illegitimate. There may be cases where autonomy requires legitimate authority, but others where self-direction is valuable despite the *prima facie* justification of international law's authority. Too much international regulation would empty sovereign autonomy of its purpose.<sup>16</sup>

In short, it would be wrong to explain sovereignty only by reference to the legitimacy of international law, but also conversely the legitimacy of international law only by reference to sovereignty. It is by reference to the values they both serve that the authority of international law can be justified in some cases, and hence also the *prima facie* restrictions to state autonomy this implies.

## B Sovereignty and International Democracy

Democratic legitimacy constitutes the object of the second set of comments to Waldron's rule of law argument.<sup>17</sup>

It seems important in the context of a discussion of the international rule of law to determine whose rule, or at least whose law, this is, especially in a multi-layered political context where international institutions, states, decentralized entities, and individuals are concerned. In international circumstances, the democratic background to the rule of law cannot simply be presumed. And this concern for the democratic pedigree of the international rule of law is even more pressing, as in practice one often encounters 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.<sup>18</sup> In those conditions, the democratic background to the rule of law cannot be deemed dispensable, as it will most probably be given in one case and not the other despite the fact that all legal norms apply to the same people.

Curiously, Waldron does not address the relationship between the international rule of law and democracy, whether domestic or international. This is surprising, given the connection he has made between the two themes in his earlier work and the democratic underpinnings of his defence of normative positivism and the rule of law in particular.<sup>19</sup> Of course, the link that is made between the two in those earlier writings goes in one direction, i.e., a democracy-based justification for normative legal positivism or a certain approach to the rule of law. It is clear, however, from some of Waldron's statements that he considers that it may be difficult to justify some of the mainstream features of legal positivism and of the rule of law, such as the publicity

<sup>16</sup> See also Endicott, *supra* note 13.

<sup>17</sup> The argument in this section is drawn from Besson, *supra* note 3.

<sup>18</sup> On this extremely topical question see, e.g., Buchanan and Powell, *supra* note 7.

<sup>19</sup> See on the relationship between democracy and the rule of law, e.g., Waldron 1989, *supra* note 5, at 79; and most recently Waldron, 'The Rule of Law and the Importance of Procedure', in M. Williams (ed.), *Getting to the Rule of Law, Nomos 54* (2011, forthcoming). See on the relationship between democracy and normative legal positivism, e.g., Waldron, 'Can There Be a Democratic Jurisprudence?', *Public Law & Legal Theory Research Paper Series Working paper no. 08-35* (2008), NYU Law School, Nov. 2008, at 46; Waldron, 'Normative (or Ethical) Positivism', in J. Coleman (ed.), *Hart's Postscript. Essays on the Postscript to the Concept of Law* (2001), at 411.

and generality of law in particular, without some democratic presuppositions.<sup>20</sup> Provided his account of the international rule of law in the article is based on a legal positivist approach, those democratic presuppositions are therefore in need of unpacking.

Nor is Waldron particularly concerned with political equality in international relations or its relationship to any kind of political community beyond sovereign states. While section 9 of his article is entirely dedicated to the individual freedom/sovereign autonomy analogy, the direct analogy between individual and sovereign equality is quickly disparaged (at 337–340). Although Waldron is right about the dubious natural analogies between human equality and states' equality, there is no further treatment of the question of political and juridical equality between (democratic) sovereign states or even between individual subjects of international law elsewhere in the article. This is surprising, given his earlier emphasis on the importance of the juridical equality of states and its vindication by the international rule of law (at 334), albeit potentially justified for other moral and political reasons than the rule of law.

In complement to Waldron's argument, I would like to argue that until we know how to assess the democratic legitimacy of international law, and hence the democratic justification of the international rule of law, not much can be said about sovereign states' and individuals' duties to abide by international law and the residual independence of sovereign states. Sovereign states cannot react in the same way to the international rule of law depending on whether they are democratically organized or not, on the one hand, and whether international law is democratically adopted or not, on the other.

True, international sovereignty and democracy are sometimes held to be in tension. Non-democratic states are sovereign and benefit from all rights and duties of a sovereign state. As they benefit from the principle of sovereign equality, requiring them to be democratic seems to be an invasion of their sovereignty. This approach corresponds, however, to the classical view of sovereignty in international law where the political regime was a matter of internal sovereignty, and hence left to domestic law. During the second half of the 20th century, democratic requirements on states multiplied in international law, *qua* human rights duties (e.g., political rights, right to self-determination) but also *per se*. One may mention the international human right to democratic participation in this respect.

With the democratization of states and the correlative development of human rights protection within states in the second half of the 20th century, domestic sovereignty has gradually become more and more limited and has found its source in a democratically legitimate legal order. Post-1945, international law was seen by Western democracies as an additional way to secure their democratic development and to entrench democratic requirements from the outside through minimal international standards.<sup>21</sup> International sovereignty limited in this way has become, in other words, a direct way to secure domestic sovereignty in a legitimate fashion. As a result, contemporary state

<sup>20</sup> See Waldron (2008), *supra* note 19, at 51 and 57.

<sup>21</sup> See, e.g., Moravcsik, 'The Origins of Human Rights Regimes', 54 *Int'l Org* (2000) 217; G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007), at ch. 1.

sovereignty now finds its source both in constitutional and international law – and this in turn explains the circumstances of constitutional and legal pluralism where distinct valid legal orders overlap by contrast to the constitutional and legal monism that used to prevail at the international level and at the domestic level.<sup>22</sup>

According to modern sovereignty, therefore, the sovereign subjects behind international law are peoples within states, and no longer states only. And those peoples organize and constrain their popular sovereignty through both the international and domestic legal orders, and hence through both the international rule of law and the domestic rule of law.

Importantly, however, international sovereignty protects a collective entity of individuals – a people – and not individual human beings *per se*. Of course, their fates are connected, just as democracy and human rights are correlated. But sovereignty, and sovereign equality in particular, protects democratic autonomy in a state's external affairs and remains justified for this separately from international human rights. This dualist dimension of the international community gets lost in Waldron's account of the international rule of law that seems to be concerned exclusively with individuals as such as opposed to peoples.

Interestingly, many of those democratic limitations to internal sovereignty are not consent-based and top-down, but stem bottom-up from customary international law norms or general principles themselves developed from domestic democratic practices. This may be explained by the fact that these norms are the reflection of the minimal common denominator to the practice of democratic sovereign states constituting the international community, and are produced as a result by accretion through the gradual recognition of those norms at the domestic level in modern democracies. Provided those democratic standards are sufficiently general, coherent, and constant to become internationalized – which in view of the number of non-democratic states to date is not guaranteed – those norms may work as legitimate minimal constraints on the autonomy of those states to contextualize and hence to flesh out those minimal international standards in their respective jurisdictions, thus contributing in return to the consolidation of those standards at the international level.<sup>23</sup>

Of course, the democratic legitimacy of those international constraints on domestic democracy may still be questioned. If international law is allowed to regulate internal matters, including human rights and democracy, its democratic legitimacy has to be accepted. The internationalization of modern democracy should go hand in hand with the democratization of international law itself. As this is clearly not yet the case, even in a non-statist minimal model of democracy, the democratic legitimacy of international law is still open to debate. And so is that of its role in the limitation and constitution of domestic democracy. As long as those questions have not received a satisfactory answer, the resilience of the *Wimbledon* self-limitation approach in certain parts of international law,<sup>24</sup> as exemplified in the International Court of Justice's *Nicaragua* decision<sup>25</sup>

<sup>22</sup> See also Cohen, 'Sovereignty in the Context of Globalization: a Constitutional Pluralist Perspective', in Besson and Tasioulas (eds), *supra* note 1, at 261.

<sup>23</sup> See on this virtuous circle A. Buchanan, *Justice, Legitimacy and Self-Determination* (2004), at 186–190.

and arguably in the ICJ's *Kosovo* opinion,<sup>26</sup> should not come as a surprise. And nor should the resistance to the idea of an international rule of law constraining sovereign states accordingly.

Importantly, this quest for the democratic legitimacy of international law *qua* source of democratic sovereignty does not necessarily amount to an attempt at politicizing the international community *qua* sovereign polity or even *qua* sovereign global state. It may be a consequence, but not a necessary one. Other forms of global or international *demoi*-cracy can be explored. Part of the answer comes from indirect state democracy as international democratic and human rights standards develop as minimal common standards, but direct democratic legitimation is also needed, as in a federal polity. The current political circumstances of international law seem more akin to a dualist model in which sovereign states and individual subjects are the key referents.

True, many obstacles remain before international law-making can be regarded as democratic in a direct, albeit non-globalizing, sense. Different sources and different subjects call for differentiated democratic regimes in international law-making. Moreover, international democracy cannot be developed without an integrated multi-level approach and multilateral democratic models ought to include domestic democracy. Relations between levels of law-making and governance that all correspond to the same sovereign peoples but in different groupings depending on the subject matter constitute another vexed issue. Subsidiarity is often put forward as a legitimate principle to govern the exercise of sovereignty in a multi-level polity and pluralist legal order. Other difficulties pertain to the modalities of participation and representation on a large scale, and to the relationship between deliberation and voting.

Finally, difficult issues remain within democratic theory itself.<sup>27</sup> One of them is political equality and the interdependence of stakes that is required for political equality to even matter and for democracy to be called for. While the latter is still contested, and so are other elements constitutive of a proper political community in international relations, the former also needs to be revisited to be applicable to the international context. Indeed, the entities the equality of which is at stake are not only individuals but also states in a two-pillar international structure, and even international organizations.<sup>28</sup> In those conditions, the modern principle of sovereign equality itself needs to be revisited in light of a complex approach to political equality and the heterogeneity of the subjects thereof. It is no longer the governing principle of a society of equal but independent states, but that of a community of different albeit interdependent actors.

<sup>24</sup> *Supra* note 9.

<sup>25</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* [1986] ICJ Rep 14, at 263.

<sup>26</sup> Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (on request of the General Assembly) [2010] ICJ Rep, at 56 and 123, available at: [www.icj-cij.org/docket/files/141/14813.pdf](http://www.icj-cij.org/docket/files/141/14813.pdf).

<sup>27</sup> See, e.g., Christiano, 'Democratic Legitimacy and International Institutions', in Besson and Tasioulas (eds), *supra* note 1, at 119.

<sup>28</sup> See Cohen, *supra* note 22.

### C *Sovereignty and International Legal Validity*

The third and final set of comments I would like to make pertains to the implications of Waldron's argument for the sources, and hence for the validity, of international law.<sup>29</sup>

International sovereignty is both law-based and a source of international law itself. Well before international sovereignty was deemed to be law-based (and hence inherently limited through law), it was regarded as a source of law. Nowadays, sovereignty is also commonly argued to be a fundamentally legal construct, intrinsically legal in nature. This in-built legality has consequences for sovereignty *qua* source of international law, and hence for the validity of international law.

Before examining why and how this is the case, it is important to look more closely at how international law is being made today. Except in cases where international organizations' institutions are involved in international law-making, international law has few institutional law-making organs of its own. Waldron rightly emphasizes how international law depends on states for law-making, and also for the enforcement of the law (at 329–330). As a result, sovereign states function not only as individual contracting parties as in contract-like treaties, but also as law-makers in the international legal order. Whereas in the former states acts as individuals entering into a set of mutual promises, in the latter instance states acts as officials for their people. In cases where international sovereignty becomes a source of law at the domestic level as well and even of law that can bind individuals directly in some cases, states can be identified with officials of their sovereign people, albeit outside the polity, but also arguably as officials of other populations, states, and international organizations.

These considerations about the role of sovereign states as international law-makers have important normative consequences. Their role as officials as opposed to free rational agents makes them responsible and constrains their international law-making competence. As a matter of fact, they are doubly constrained and hence accountable: internally, but also externally through international law rules.

One may even go one step further than Waldron and argue that the legal constraints on law-making sovereign states have implications for the theory of the sources of international law itself. Waldron mentions very briefly the question of the applicability of the international rule of law to the relationship between individual subjects of international law and sovereign states *qua* agents or officials of international law (at 329–330). But he does not seem to want to venture further into the question of what makes a given law-making procedure a source of international law. There are two arguments one may make about the validity of international law based on Waldron's argument about the international rule of law.

First of all, if legality or the rule of law<sup>30</sup> 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 can be said about the legality of international law. International law-making processes should therefore be such as to satisfy some of the requirements associated

<sup>29</sup> The argument in this section is drawn from Besson, *supra* note 3.

<sup>30</sup> On the connection see Waldron (2008), *supra* note 19.

with the international rule of law, and in particular the requirements of clarity, publicity, certainty, equality, transparency, and fairness.

The connection between the international rule of law and the quality of the sources of international law impacts on the idea of illegal international law propounded by some authors.<sup>31</sup> Those authors' argument is that illegal revisions of international law are justified if they can make international law more legitimate. That idea does not pay sufficient heed, however, to the value of legality of international law, and hence to the normative requirements this value imposes on its law-making processes. These normative requirements inherent in the very legality of international law – together or possibly by contrast to those relative to its procedural or substantive legitimacy – make it counterproductive to hope for the illegal making of international law whatever the urgency of the matter.<sup>32</sup> In the long run, and despite the occurrence of such forms of illegal law-making in current circumstances of international law, international law's legality will be able to consolidate itself only if its law-making processes are organized so as to reflect the very values inherent in the international rule of law.

A second argument goes further and draws some of the implications of the arguments made before about the legitimacy of international law for its validity. Legitimate 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 sometimes be warranted. This in turn means that the sources of law, i.e., the law-making processes, should be organized so as to vest the law with a plausible claim to legitimate authority. Transposed to international law-making, this implies that sovereign states as main law-makers, and main officials, ought to be producing legal norms in a way that is compatible with the way in which international law norms can bind their ultimate subjects, i.e., individuals, and that is through respecting the legitimate democratic procedures those subjects have put into place at domestic level and possibly at the international level.

Of course, in cases where the states' representativity as officials in international law-making is not respected, states can still enter into normative relationships. This is the case with contract-like treaties, for instance, that can be equated with mutual promises or agreements authorized by international law the way private contracts are authorized by domestic private law. The difference is, however, that if states do not act as officials in bilateral or multilateral agreements, they can in principle neither bind, as public authorities nor be bound as proxy subjects, and hence cannot be said to produce valid international law. Of course, the norms deriving from those treaties may still be recognized as legally valid through other international legal norms, the way private contracts would in the domestic legal order. As explained before,

<sup>31</sup> See, e.g., Buchanan, 'From Nuremberg to Kosovo: The Morality of Illegal International Law', 111 *Ethics* (2001) 673, at 680; Goodin, 'Toward an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers', 9 *J Ethics* (2005) 225.

<sup>32</sup> This does not exclude the possibility of civil disobedience to international law, which can sometimes be justified *qua ultima ratio* on grounds of justice (i) and provided the legal and democratic channels of deliberation have been exhausted (ii); see S. Besson, *The Morality of Conflict* (2005), at ch. 14.

however, the obligations thus created are more akin to those deriving from mutual promises than to those stemming from general law.

## 4 Conclusion

In these comments, I have drawn upon and in some ways expanded Jeremy Waldron's important contribution to our understanding of the international rule of law. First of all, I have suggested that Waldron's argument about the international rule of law can be used to illuminate how we should understand the legitimate authority of international law over sovereign states, but also how some of sovereign states' residual independence ought to be protected from legitimate international law. Secondly, I have argued that the democratic pedigree of the international rule of law plays a role when assessing how international law binds democratic sovereign states and whether the international rule of law can and ought to benefit their individual subjects as a result. Finally, I have emphasized how Waldron's argument that the international rule of law ought to benefit individuals in priority has implications for the sources of international law and for what sources can be regarded as sources of valid law as a result.

The shift from a rule of law argument to a legality and a (democratic) legitimacy argument may be regarded as a bold move. The argument certainly deserves more space and a more refined treatment than could be provided in this short commentary. I have explained, however, why a clarification of the relationship between the international rule of law and international legal validity and legitimacy is needed. It is certainly also called for in the context of Waldron's argument: it suffices to read his article's conclusion that 'a national sovereign sells its dignity short when it conceives of its sovereignty . . . as just brute unregulated freedom of action, considered apart from the legal constraints and the general idea of law that make it, constitutively, what it is' (at 343) together with an earlier statement of his, according to which '[d]emocracy is not just about the electoral accountability of those who make the law. It is about the law itself and is being regarded as in some strong sense the property of those who are ruled by it; democratic law is the people's law and as such its democratic character is undermined by their ignorance or mystification as to the conditions of its manufacture'.<sup>33</sup>

<sup>33</sup> Waldron, *supra* note 9, at 32–33.