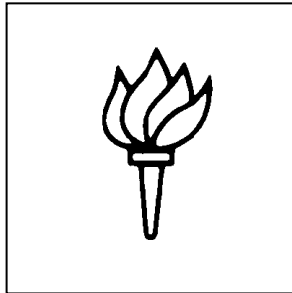


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Are Sovereigns Entitled to the Benefit of the  
International Rule of Law?

*Jeremy Waldron*

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# **Are Sovereigns Entitled to the Benefit of the International Rule of Law?**

Jeremy Waldron<sup>1</sup>

## **1. Introduction**

There is no world government, no large state-like entity lording it over all or almost all social, cultural, economic, and political activity in the world, in the way that national governments lord it over all or almost all such activity in particular countries. But there are international institutions and there is international law (IL). The existence of IL has led some jurists to wonder whether the political ideal we call “the Rule of Law” (ROL) is applicable at the international level. At the national level, we think it is very important for states to constrain and discipline their activities according to the ROL. But if there is no state or state-equivalent at the international level—nothing like an international sovereign—does this make a difference to the way that the ROL applies?

There is now a considerable body of literature addressing the issue of the ROL in the international arena.<sup>2</sup> Rather than cover ground that has already been turned over, my aim in this paper is to focus more closely on some of the theoretical issues that arise when we consider the ROL in light of the absence of an international sovereign and the extent to which individual national sovereigns have to fulfill governmental functions in the IL regime.

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<sup>1</sup> University Professor, NYU Law School and Fowler-Hamilton Visiting Fellow, Christ Church, Oxford. This paper is an expanded version of part of a lecture given originally at Wayne State University in Detroit, at the Humanities Center, as a Keynote Address to a conference on “Sovereignty, Justice and the Law across Disciplines,” April 11, 2008. I am grateful to Erica Beecher-Monas, Tony Dillof, C.J. Peters, Brad Roth, and Walter Edwards for their comments. Parts of it are adapted from Jeremy Waldron, The Rule of International Law, 30 HARVARD JOURNAL OF LAW & PUBLIC POLICY 15 (2006). I am grateful also to Benedict Kingsbury, Ryan Goodman and David Dyzenhaus for comments when this was presented at an NYU Global Legal Theory colloquium in November 2008.

<sup>2</sup> The papers that I have found most helpful include: Stéphane Beaulac, An Inquiry into the International Rule of Law, EUI Working Papers (MWP 2007/14), available at <http://ssrn.com/abstract=1074562>; James Crawford, International Law and the Rule of Law, 24 ADELAIDE LAW REVIEW 3 (2003); and Mattias Kumm, International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 19 (2003).

## 2. The Rule of Law

I am not going to spend much time at the outset asking what the ROL requires. Opinions differ on that; there is an immense literature and the ideal is heavily contested.<sup>3</sup> Readers unfamiliar with the main issues might want to look at writings on the subject by Aristotle, Dicey, Dworkin, Fallon, Finnis, Fuller, Hayek, Locke, Raz, Rawls, and Tamanaha.<sup>4</sup> I will proceed on the basis that the ROL comprises some or all of the following:

1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;
2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned;
3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particular when it impacts on vital interests in life, liberty, or economic well-being;
4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.

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<sup>3</sup> See, e.g. Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 21 LAW AND PHILOSOPHY 137 (2002).

<sup>4</sup> ARISTOTLE, POLITICS, III, Chapters 10-11 & 15-16 (Stephen Everson ed., 1988); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, Ch. 4; Ronald Dworkin, Political Judges and the Rule of Law in his collection A MATTER OF PRINCIPLE (1985), Ch. 1; Richard Fallon, The Rule of Law as a Concept in Constitutional Discourse, 97 COLUMBIA LAW REVIEW 1 (1997); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS; LON FULLER, THE MORALITY OF LAW, Ch. 2; F.A. HAYEK, THE ROAD TO SERFDOM 72; F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960); JOHN LOCKE, SECOND TREATISE, Ch. 11, Joseph Raz; The Rule of Law and its Virtue, in his book THE AUTHORITY OF LAW 210 (1979); JOHN RAWLS, A THEORY OF JUSTICE 55-60, and 235-41 (1971), and BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

These formulations are not canonical, but they will do for our purposes, provided we bear we mind two things. We must remember that these four requirements are formulated with reference to the original habitat of the ROL, viz. its role in constraining governments within a national legal system; so the application of each of these requirements in the international context may involve some change or reformulation that might—as we shall see—be quite substantial. The other thing we need to remember is that any such list, of which there are many in the literature, is controversial. My four requirements may not be particular controversial in the abstract or as they stand. But there is a possibility for tension between them, especially as between requirements 2 and 3. Many conceptions of the ROL place almost all their emphasis on legal certainty, predictability, and settlement, and on the determinacy of the rules that are upheld in society in the spirit of requirement 2. Others however emphasize the importance of a culture of formal argument, in the context of requirement 3, even when the argumentation sponsored and facilitated by legal institutions detracts from the certainty and predictability that the first set of conceptions give such weight to.<sup>5</sup> These and other controversies may well be exacerbated when we try to move the ROL from the national to the international context.

### **3. The Hobbesian Problem and the Absence of a Sovereign in IL**

My question is: does the absence of an over-arching sovereign at the international level make a difference to the way the ROL applies? What sort of difference might it make?

One possibility is that it might make the ROL easier, because we are not faced at the international level with the Hobbesian problem of subjecting the sovereign to his own laws. The traditional problem is known in its Hobbesian formulation, though Thomas Hobbes of course did not regard it as a problem. Hobbes thought it was undesirable to try to subject the sovereign to the laws, partly because he saw this as a recipe for conflict: with half the polity claiming that the sovereign has violated the laws and half denying this, who in the polity is to be judge? But, desirable or not, he also thought it was impossible, inasmuch as the sovereign himself controls the application of the laws:

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<sup>5</sup> See Dworkin, Political Judges and the Rule of Law, supra note 4, and Jeremy Waldron, The Concept and the Rule of Law, forthcoming in the *GEORGIA LAW REVIEW* (2008), presently available at <http://ssrn.com/abstract=1273005>

The sovereign of a commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before.<sup>6</sup>

He thought also it would lead to a vicious regress:

For to be subject to laws, is to be to be subject to the commonwealth, that is to the sovereign representative, that is to himself; which is not subjection, but freedom from the laws. Which error, because it setteth the laws above the sovereign, setteth also a Judge above him, and a Power to punish him; which is to make a new sovereign; and again for the same reason a third, to punish the second; and so continually without end, to the confusion, and dissolution of the commonwealth.<sup>7</sup>

Legal positivists have tended to follow Hobbes in this up until the middle of the twentieth century.<sup>8</sup> (Or they agreed at least so far as the logic of the matter was concerned; I am not sure whether John Austin agreed with Hobbes on the undesirability of subjecting the sovereign to law if a way could be found to do it.)

But if there is no over-arching sovereign in IL, then the Hobbesian problem doesn't arise. IL does not rest on the existence of "an uncommanded commander." There is no constituted agency at the international level whose subjection to law would generate the sort of paradoxes or regresses that Hobbes was talking about. IL gives us an array of institutions and processes, some of them jurisgenerative, some of them adjudicative, many of them administrative; they are relatively independent of one another for all their interconnections; and they interact with one another in a complex net of horizontal relationships, rather than in the pyramidal structure that the Hobbesian picture envisages.

And actually it is arguable that the Hobbesian problem doesn't even arise at the national level, given a more complex picture of what national sovereigns are like internally. Even at the time Hobbes wrote, his opponents were toying with the idea of the multiplication of institutions to solve the difficulty.<sup>9</sup> The emergence of modern constitutionalism and the separation of

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<sup>6</sup> THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., 1988), Ch. 26, p. 184.

<sup>7</sup> *Ibid.*, Ch. 29, p. 224.

<sup>8</sup> See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* \_\_ (Wilfrid E. Rumble, ed. 1995).

<sup>9</sup> See JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* (1656)

powers chipped away at Hobbes's paradoxes, particularly once the American example gave the lie to Hobbes's claim that a divided polity could not stand.<sup>10</sup> Dicey essayed a reconciliation of the ROL and British parliamentary sovereignty based effectively on the separation of powers between Parliament and the judiciary and the subjection of the executive to parliamentary control. And in the mid-twentieth century, H.L.A. Hart put paid finally to the sovereign-based conception by showing that even a sovereign has to be conceived as a tissue of rules and that fundamental to the existence of any legal system is not an all-powerful commanding entity, but a set of foundational secondary rules accepted and practiced by members of a ruling elite.<sup>11</sup> It is arguable, then, that the solution to the Hobbesian problem for IL is just a special—and striking—case of its solution for legal systems generally.

All that said, there may be some relics of the Hobbesian problem at the international level. Some have worried about lawlessness or arbitrary exercise of power at the highest level of international governance, for example, in the U.N. Security Council. Now the Security Council is certainly not a Hobbesian sovereign, but there do appear to be certain Hobbes-like difficulties in subjecting its decisions to legal control (not to mention legal review).<sup>12</sup>

National sovereigns<sup>13</sup> are—by their treaties and their customary observances—the main sources of IL; and they are also—by their occasional military adventures—its main (coercive) enforcers. And this may mean that national sovereigns (or some of them) are in a position to free themselves from subjection to international norms by repealing or refusing to enforce

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<sup>10</sup> HOBBS, *LEVIATHAN*, supra note 6, 127, 225, and 228.

<sup>11</sup> H.L.A. HART, *THE CONCEPT OF LAW* (NEW EDITION, 1994), Ch. IV. Cf. Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, *FORDHAM LAW REVIEW*, 75 (2006) 1697, at \_\_: Hart insisted “that sovereignty—where it exists—depends on rules, is constituted by rules, and so cannot intelligibly be regarded as the source of all the rules that make up the legal system. But once we acknowledge that sovereigns are constituted by rules, we might entertain the possibility that the foundations of some legal systems can be constituted by rules in a way that establishes a constitution of a fundamentally different shape—for example, in a way that does not yield anything that looks remotely like a sovereign. We can then see through to the possibility that a legal system need not have a constituted sovereign at its base (though some do); it may just have a constitution. (This is how we have to think about the legal system of the United States, for example.)”

<sup>12</sup> See Simon Chesterman, *The UN Security Council and the Rule of Law*, available at <http://ssrn.com/abstract=1279849>. See infra note 63.

<sup>13</sup> From now on, I shall use the term “national sovereign” simply to refer to independent countries acting in their (external) sovereign capacity. It is a loose usage—like my use of “nation-state”—and it is not supposed to beg any questions about the doctrine of nationalism. It embraces countries as diverse as the U.S., China, France, New Zealand, Belgium, Fiji, and so on.

those laws that trouble them. Along these lines some worries have been voiced about customary IL, where there does seem to be a problem of a consistent pattern of violations generating the conclusion that the law has changed rather than that the law needs to be more severely enforced.<sup>14</sup>

Also Hart's conception disposes only of the logical side of Hobbes's argument. It does not address the political argument—that the subjection of state institutions to state law may provide an occasion for conflict or paralysis.<sup>15</sup> This may be more of a problem at the national level, where state agencies are trying to do so much; but as international governance expands it may become a problem at the international level as well. A tangle of horizontal checks and balances among a plethora of agencies is one thing where the agencies are operating relatively independently of one another; but as the problems they address become more interconnected and as global administration becomes more extensive and multi-faceted, there will be some pressure to think about clearer lines of review and control. If these begin to assume a pyramidal shape—if we try to reduce the chaos of agency A ruling on the activity of agency B and vice versa and there being no mechanism to resolve their disagreements about such review—then of course we will have to face up to the problem of reconciling supremacy in such a structure with the ROL.

[In this context, it is worth remembering that, although many ROL theorists think that strong judicial review of executive action (and maybe of legislative action too) is essential for the ROL, many recognize at the same time that the supremacy of the highest entity exercising judicial review does pose something like a Hobbesian problem. Unreviewable rule by judges in a supreme court is, they might say, as much an instance of rule by men as unreviewable power of any other kind. The rule of law is not satisfied by a sovereign-like entity wearing a gown or sitting in a wood-paneled chamber.]<sup>16 17</sup>

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<sup>14</sup> See, for example, Robert Goodin, Toward an International Rule of Law: Distinguishing IL-Breakers from Would-Be Law-Makers, 9 JOURNAL OF ETHICS 225 (2005).

<sup>15</sup> This point is made forcefully in JEAN HAMPTON, HOBBS AND THE SOCIAL CONTRACT TRADITION, pp. 98-9.

<sup>16</sup> I said the following in Is the Rule of Law an Essentially Contested Concept?, supra note 3, at 147-8: "Some thought that the resolution of any issue counted as the Rule of Law provided it was done through the hierarchy of courts. ... Yet others evidently thought that the autonomy and unaccountability of judges was precisely the sort of problem that the Rule of Law ideal was supposed to confront. On the former view, a court deciding an issue is the same as that issue being decided as law. Of course it is possible that the courts may get the law wrong; but short of the fantasy that the laws themselves might rear up and render their own objective decision, this is the most that the Rule of Law could possibly entail. Realistically—according to this view—the Rule of Law consists in issues being settled by ponderous legal processes, procedures of

#### 4. Sovereignty and Rule-of-Law Discipline

In connection with the last point—about multiplicity of entities and agency-interaction etc.—it may be thought that the absence of an over-arching sovereign in some ways makes the ROL more difficult in the international sphere, because the absence of centralized authority generally means it is harder to subject law-making and legal administration to ROL discipline: non-centralized law-making and administration is haphazard and effectively uncontrolled. At the municipal level, the ROL depends on a certain amount of organization, discipline and orchestration among the forces of the state. (That’s why informal enforcement by hue and cry is often seen as the antithesis of the ROL. It is not just because they get the wrong people; but because it is not properly regularized.)

Lon Fuller, in The Morality of Law, listed “congruence” between law on the books and official action as one of the principles of what he called “the inner morality of law.”<sup>18</sup> At one extreme, he had in mind the deliberately fomented chaos of the Nazi regime where, as he said in his 1958 debate with Hart, “when legal forms became inconvenient, it was always possible for the Nazis to bypass them entirely and ‘to act through the party in the streets.’ There was no one who dared bring them to account for whatever outrages might thus be committed.”<sup>19</sup> As Hannah Arendt has remarked, Nazi “governance” was not tightly organized under the auspices of a centralized state. Quite the contrary: there were parallel organizations of party and government, with actions by organs of the former often at odds with or canceling out actions by organs of the latter.<sup>20</sup> That is a case of

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deliberation and reason-giving that are focused on antecedent legal materials rather than political advantage, and in a form of deference on the part of the contesting parties that is motivated by the stake they have, along with their fellow citizens, in the integrity of the legal and constitutional order. On the latter view, by contrast, there is always the danger that judges are taking advantage of the power and authority of their office to make themselves into the very autocrats whose rule the Rule of Law is supposed to supersede. On both sides in the Florida debacle, criticism of judicial decision-making resonated with what is now a settled feature of American political culture—the suspicion that judges are elevating their own morality or their own political preferences above the law of the land. We want the rule of laws, not men, say most Americans, and ‘men’ includes judges.”

<sup>17</sup> Cf. Lord Bingham, The Rule of Law and the Sovereignty of Parliament, Commemoration Oration, Kings College London, October 31, 2007, p. 24: “The British people have not repelled the extraneous power of the papacy in spiritual matters and the pretensions of royal power in temporal in order to subject themselves to the unchallengeable rulings of unelected judges.” Lord Bingham’s address is available at <http://www.kcl.ac.uk/content/1/c6/01/45/18/TheRuleofLawandtheSovereigntyofParliament.pdf>

<sup>18</sup> FULLER, MORALITY OF LAW, supra note 4, 39 and 81-91.

<sup>19</sup> Lon Fuller, Positivism And Fidelity To Law—A Reply To Professor Hart, 71 HARVARD LAW REVIEW 630, 652 (1958).

<sup>20</sup> HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (New edition, 1973), section on “The So-Called Totalitarian State,” at 392 ff.



deliberately fomented incongruence, deliberate abandonment of the ROL. But in less malign cases, Fuller was concerned about the difficulty in maintaining congruence between law on the books and various forms of official, administrative and agency action—even with the best will in the world. It is hard enough for a modern state, for example, to maintain congruence between law on the books and the action of the judiciary—and that is with a reasonably tightly organized governmental structure. It becomes much more difficult in the circumstances of modern international governance, when there is no overall entity responsible for the big picture.

It seems paradoxical to say that we need the help of something like a sovereign to maintain the ROL. “ROL” and “sovereignty” are so often seen as antithetical terms. But consider the following example.

In 1963 the United States entered into a treaty obligation to ensure that Mexican nationals arrested for serious crimes in the U.S. should have access to consular assistance. When Texan authorities arrested José Medellín for murder in 1993 he was denied that access, and eventually tried, convicted, and sentenced to death. The International Court of Justice held that the United States had violated its treaty obligation in Medellín’s case (and others) and that it must now “provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals” to determine whether the violations “caused actual prejudice.”<sup>21</sup> In response, President George W. Bush issued a memorandum that stated the United States would discharge its international obligations by “having State courts give effect to the [ICJ] decision in accordance with general principles of comity.”<sup>22</sup> But when he sought review of his conviction and sentence, Medellín was rebuffed by the Texas courts on the ground that he had failed to raise the issue at his trial or on direct review. The Supreme Court of the United States held that the federal government had no authority to require the State of Texas to abide by the ICJ ruling.<sup>23</sup> Even though the position of the United States was that the President's Declaration made the ICJ judgment binding upon Texas, the Court held that the President did not have the authority to vindicate his country’s undertakings in this way.

There is a lot in the Medellín case that cannot be discussed here, but it is illustrative of a general problem of gaining sufficient coordination and

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<sup>21</sup> Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. No. 128 (Judgment of Mar. 31).

<sup>22</sup> George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as Amicus Curiae.

<sup>23</sup> Medellín v. Texas 128 S.Ct. 1346 (2008).

discipline in an unwieldy decentralized federal system to ensure that legal obligations undertaken by the system as a whole are properly attended to and fulfilled. A tightly-constituted internal sovereign would not have the same embarrassment at the hands of a governmental sub-unit (Texas) in regard to its international obligations. But in this regard the United States has not properly formed itself into an entity that is capable of keeping its own promises.<sup>24</sup> In this sense, its lack of sovereignty as an aspect of internal organization is a disadvantage from the point of view of the ROL.

## 5. Rule-of-Law Concerns in the International Realm

Turning this issue of the ROL in the international realm over and over, and looking at it from various angles, our next question might be: Are ROL concerns applicable in the international realm? Might it not be the case that the absence of an international sovereign makes the ROL unnecessary? We usually say that the point of the ROL is to protect individual values like liberty, dignity etc.<sup>25</sup> The ROL is not identical with valuing liberty, dignity, etc., but the value of liberty, dignity, etc. explain why the ROL is such a big deal, and why it embraces the particular requirements that it does (such as those set out in §2 above).<sup>26</sup> So, if this is the point of the ROL, then we might ask: Is there any need for that in IL, where (i) there is no all-powerful world government that the ROL needs to protect us all from, and (ii) the subjects of IL—sovereign states—are not vulnerable to power exercised against them or upon them at this level in the same way as natural individuals are vulnerable to the power of national governments. If the ROL is conceived in the ordinary way as a check on governmental power, for the

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<sup>24</sup> See FRIEDRICH NIETZSCHE, *THE GENEALOGY OF MORALS*, Bk. II, §§1-2, for a fine account of the difficulty involved in the emergence of a sovereign individual, an entity capable of giving its word and keeping it, amid all the complexity and changes of circumstances that we face. “To breed an animal that is entitled to make promises—is that not precisely the paradoxical task nature has set itself where human beings are concerned? ...—[someone] who makes promises like a sovereign, seriously, rarely, and slowly, who is sparing with his trust, who honours another when he does trust, who gives his word as something reliable, because he knows he is strong enough to remain upright even when opposed by misfortune....”

<sup>25</sup> See, for example, HAYEK, *CONSTITUTION OF LIBERTY*, supra note 4.

<sup>26</sup> It is important to note that saying that the ROL serves certain underlying values is not the same as adopting what is sometimes called a “substantive” conception of the ROL. A substantive conception might hold that the ROL requires freedom of speech, for example, or religious freedom, or economic freedom: it treats certain human rights or other substantive political demands as among the principles that the ROL comprises. I am not saying that. Instead, I am arguing that dignity and liberty concerns underlie the non-substantive demands--the formal and procedural and institutional demands—which, in my view, the ROL comprises. For a further explanation of all this, see my discussion in Jeremy Waldron, *Legislation and the Rule of Law*, 1 *LEGISPRUDENCE* 91 (2007), also available, for a price, at SSRN: <http://ssrn.com/abstract=1117463> or by application to the author.

benefit of the freedom and dignity of individual persons, then it may be redundant in this context because there is no over-arching government to limit and there are no natural persons to protect. The whole problematic of the ROL seems to be avoided here.<sup>27</sup>

There are two points raised here, which we should deal with separately: (i) The ROL is usually supposed to be restraining of governmental power; and (ii) the ROL is usually supposed to be protective of human individuals. The issue is that neither (i) nor (ii) appears to be present in this case. But appearances can be misleading. In both (i) and (ii), it might be thought that we can resuscitate the application of ROL concerns. Let me explain.

In regard to question (i), “What is the power that the international ROL seeks to restrain, if there is no world government?”—we might say, along lines intimated by Joseph Raz, that the ROL aims to protect us (or whoever) against certain abuses that may arise out of law itself, whether it is associated with governmental/state power or not. Raz says that “[t]he law inevitably creates a great danger of arbitrary power” and that “the rule of law is designed to minimize the danger created by the law itself.” I have never been entirely happy with this formulation.<sup>28</sup> It is certainly not the whole point of the ROL, and Raz’s position is inadequate if it neglects the point that—at least in the national context—the ROL aims primarily not to defend us against law as such but to defend us against governmental power by insisting that governmental power be more law-like and exercised through proper legal channels. Still, to the extent that there is anything in Raz’s point, we might say that it is at least part of the purpose of the ROL in the international realm to protect the subjects of IL from dangers created by IL itself.

Also, even if there is no world government, certainly there are sometimes powerful entities acting in the name of IL. States are sometimes acted on by one another in enforcement exercises, in what was described as an “international police action” in the Korean War, for example, or the First Gulf War, or—more controversially—the Second Gulf War. Just as natural

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<sup>27</sup> A similar question is posed by Allen Buchanan, Democracy and the Commitment to International Law, 34 *GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 305, at 314-5 (2006): “[T]he most morally compelling features of the ideal of the rule of law have to do with the ways in which a legal system can protect individuals’ interests and respect individuals’ autonomy; but much of IL concerns the relations among states and in many cases states do not represent the interests of some or even most of their citizens. So it is not clear just how the commitment to the rule of law is to be cashed out in the international arena.”

<sup>28</sup> See the discussion in Waldron, The Concept and the Rule of Law, *supra* note 5.

individuals and firms within a nation-state<sup>29</sup> demand that the law and its application should be predictable, so one can imagine small nation-states (rogue or otherwise) demanding a degree of calculability in the forcible application of IL to them. And then we are back with the concern discussed above in §4: without a world government, is there any way IL enforcement efforts can be organized, coordinated, and disciplined to provide this calculability?

In regard to question (ii), “Who, exactly, needs the protection of the ROL in the international sphere?”—we might say that actually some or all nation-states do, for they often have interests analogous to those of individuals. We know that, at the national level, the ROL inures to the benefit not just of natural persons but also legal persons like corporations. They too are conceived to have certain interests in liberty—if not dignity<sup>30</sup>—that might be served by the ROL. If we acknowledge that the ROL might protect the interests of corporations, might we not also say that it is needed too in order to protect the interests of national sovereigns. As I suggested a moment ago, national sovereigns or nation-states might have an interest in a calculable legal environment.<sup>31</sup> Matthias Kumm has pointed out that

the international rule of law also provides predictability and enhances the freedom of individual actors. The rule of law secures fixed points of reference by stabilizing social relationships and providing them with predictability. In this way, the international rule of law protects and enhances the freedom of various actors, creating a predictable environment in which actors can make meaningful choices.<sup>32</sup>

Kumm concedes that “[t]his may be of lesser significance for powerful governments with the resources and bureaucracies to process information and negotiate commitments from other actors in other ways.”<sup>33</sup> (I shall say more about this—much more—in §§\_\_ below.) But it may have some

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<sup>29</sup> See note 13 above, for my very loose usage of this and similar terms.

<sup>30</sup> But see the discussion in Jeremy Waldron, *The Dignity of Groups*, forthcoming ACTA JURIDICA (2008), presently available at <http://ssrn.com/abstract=1287174>

<sup>31</sup> Kumm, *supra* note 2, at 25-6: “[T]he international rule of law also provides predictability and enhances the freedom of individual actors. The rule of law secures fixed points of reference by stabilizing social relationships and providing them with predictability. In this way, the international rule of law protects and enhances the freedom of various actors, creating a predictable environment in which actors can make meaningful choices. The rule of law accomplishes the same purpose on the national level. This may be of lesser significance for powerful governments with the resources and bureaucracies to process information and negotiate commitments from other actors in other ways.”

<sup>32</sup> *Ibid.*, 25-6.

<sup>33</sup> *Ibid.*, 26.

importance nevertheless, particularly with regard to the interests and concerns of those states that want to be law-abiding in the international realm, if only they can ascertain what is required of them.<sup>34</sup> A basic respect for this aspiration seems to require that IL be made and administered clearly and transparently.

More fundamentally, under both headings (i) and (ii), it may be a mistake to think that the ROL aims only to protect subjects from the state, government or law itself. It also aims to protect them from one another, both from other individuals at the national level, and perhaps from other nation-states at the international level. As Kumm puts it, “[u]nder the principle of international legality, less powerful states tend to be more effectively protected against impositions by powerful states.”<sup>35</sup> It might even be thought that the international ROL seeks to vindicate among states a principle of juridical equality, so that in regard to elementary rights and duties, states are treated as equals, no matter how powerful or powerless some of them may be in fact. (I will say more about this in §8.)

## **6. Protecting Individuals in the International Sphere?**

There is much more that needs to be said about the points that were raised in §5, and really the rest of this paper is devoted to a development of those points. For example, more needs to be said about our response in §5 to point (ii), viz. “Who needs the protection of the ROL in the international sphere?”

It may be a mistake to think that if the ROL operates in the international sphere, it must operate to protect the interests of the formal subjects of IL, namely nation-states. Our analysis so far may involve a misleading picture of IL, which treats individual sovereign states simply as subjects and considers only whether they need protections analogous to those needed by individuals at the level of national law. Formally that picture may be correct, but if we are looking anyway behind the formalities—at the real concerns that underlie the ROL—we might want to develop a more realistic picture of what those real concerns are, or ought to be.

At least part of the reason why we value IL is that it offers to improve the lives of real individuals, billions of them—men, women, and children—

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<sup>34</sup> Cf. the riposte to Oliver Wendell Holmes’s “bad man theory” of law in HART, *THE CONCEPT OF LAW*, supra note 11, at 40: “Why should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is?”

<sup>35</sup> Kumm, supra note 2, at 24.

in the world. Formalistically, we say that the subjects of IL are national sovereigns and that the people of the world are rather like chattels belonging to the sovereigns. But nobody wants to be heard saying that sort of thing nowadays, at least outside the towers of narrow scholasticism. The real purpose of IL and, in my view, of the ROL in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge. People are not now regarded just as chattels of the sovereign powers, if they ever were.

Think of it this way. In the last resort, states are not the bearers of ultimate value.<sup>36</sup> They exist for the sake of human individuals. To use Kant's terminology, they are not ends in themselves, but means for the nurture, protection, and freedom of those who are ends in themselves. This is acknowledged in the philosophy of municipal law, when it is said that the state exists for the sake of its citizens, not the other way around. I believe the same is true in the international arena, where states are recognized by IL as trustees for the people committed to their care.<sup>37</sup> As trustees, they are supposed to operate lawfully and in a way that is mindful that the peaceful and ordered world that is sought in IL—a world in which violence is restrained or mitigated, a world in which travel, trade, and cooperation are possible—is something sought not for the sake of national sovereigns themselves, but for the sake of the millions of men, women, communities, and businesses who are committed to their care. These millions are the ones who are likely to suffer if the international order is disrupted; they are the ones whose prosperity is secure when the international order is secure. Their well-being, not the well-being of sovereign nation-states, is the ultimate end of IL. Nowhere is this clearer than in the role of IL in articulating a set of common standards for the protection of human rights. A pedant might see this as a departure from the essentially intergovernmental character of IL. In reality, though, this is a consummation of the concept that a government is a trustee for its people's interests: ultimately, IL is oriented to the well-being of human individuals, rather than the freedom of states.

Having said all that (and so emphatically), we have to concede that it does not necessarily follow that applying ROL principles to IL is the best way of protecting the interests of the people whose rights and well-being are, in the end, the telos of IL. That is surely an open question. For the formalistic picture is correct to the following extent: most international legal norms apply in the first instance to national governments; and in the first

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<sup>36</sup> These paragraphs are adapted from Waldron, The Rule of International Law, supra note 1.

<sup>37</sup> See generally BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 201-51 (1999).

instance, any ROL constraints on those norms or on the way they are administered, will be for the benefit of those governments. And that may or may not benefit the people whom they rule or whose well-being and rights is ultimately affected by their actions.

For example, the ROL may be thought to require clarity in the rules that are applied to states in the international arena; it may be thought to prohibit the imposition of international obligations on states by norms whose meaning is controversial or unclear. Some countries have been heard to complain that various human rights and humanitarian law provisions violate these ROL requirements. The ROL requires clarity; but the prohibitions on torture or on cruel, inhuman, and degrading treatment or punishment, or on outrages upon personal dignity, are unclear.<sup>38</sup> So—it might be said—a country may legitimately complain on the basis of the ROL about having its actions judged according to these vague and indeterminate standards. But of course this may have a far-from-benign impact on the human persons affected by the actions of the government in question. A detainee in the “war on terror,” for example, may be worse off as a result of the government refusing to be bound by international norms that do not satisfy the ROL.

But there is more to be said about this example. First, although the government’s insistence on the ROL may harm some people who need to be protected, some will suggest that it may actually protect others—e.g., others who might be held liable (e.g., as war criminals) for violating these standards.<sup>39</sup> Secondly, it is in fact far from clear that the provisions I have mentioned do actually fall foul of the ROL. Some conceptions of the ROL place a premium on clear determinate rules;<sup>40</sup> but others embrace standards as well, maintaining that the argumentation framed and facilitated by a standard such as the prohibition on inhuman and degrading is actually part of what we value when we talk about the ROL.<sup>41</sup>

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<sup>38</sup> For further discussion of this alleged indeterminacy, see Jeremy Waldron, Inhuman and Degrading Treatment: The Words Themselves, available at <http://ssrn.com/abstract=1278604>

<sup>39</sup> Cf. this statement by President Bush in 2006: “It’s very vague. What does that mean, ‘outrages upon human dignity’? That’s a statement that is wide open to interpretation. . . . [T]he standards are so vague that our professionals won’t be able to carry forward the program, because they don’t want to be tried as war criminals. . . . These are decent, honorable citizens who are on the front line of protecting the American people, and they expect our government to give them clarity about what is right and what is wrong in the law.” *Press Conference of the President*, September 15, 2006: <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>

<sup>40</sup> Most notably, Antonin Scalia, The Rule of Law as a Law of Rules, 56 UNIVERSITY OF CHICAGO LAW REVIEW (1989).

<sup>41</sup> This takes us back to the point made in §2 concerning controversies about the meaning of the ROL. See *supra*, text accompanying note 5. And I will come back to it later.

Thirdly, although it is no doubt true that it may be worse for many vulnerable people when a national government resists the application of human rights or international humanitarian standards that do not satisfy the ROL, there is a sense in which the determinacy and certainty valued under certain conceptions of the ROL is also beneficial to the individual bearers of rights. In the ROL tradition, determinacy and certainty are valued not just so people can know clearly what their obligations are, but also so that people, can know clearly what protections they can rely on. This has been very important, for example, in the national arena, in the relation between the ROL and property rights. People want to know where they stand and what property rights they can rely on, so that they can make their economic plans accordingly. What the ROL offers them is security.<sup>42</sup> It may be thought that people have a similar interest in clarity and determinacy of human rights protections. If their government regards itself as bound by norms that clear, determinate and transparent, then the people subject to them will at least know where they stand. Of course, they may be disappointed that their government is not willing to accept more extensive obligations than this. But at least they will not be misled or given false hopes by vague declamations as to what their rights effectively are. (This, in a way, is an application of A.V. Dicey's third heading of the ROL: that it is better if rights-guarantees are conceived as resultants of actually applied law rather than as generalities laid out in dedicated charters.)<sup>43</sup>

## **7. Are Nation-States Subjects or Agencies of International Law?**

In the last couple of sections, we have tried to look behind the formal position that nation-states or national sovereigns are the subjects of IL. We have tried to look behind that, in order to get a sense of the real, as opposed to the formal importance that the ROL may have in this sphere. As we proceed with this realistic analysis, we may start moving towards the position, not only that states are not the ultimate subjects of IL, but that they are not really its subjects at all.

We are held in the grip of a picture that sees the relationship between national sovereigns and IL as exactly analogous to the relationship between

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<sup>42</sup> The locus classicus of this is Jeremy Bentham, Security and Equality of Property, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS (C.B. Macpherson ed., 1978). This is an extract from Jeremy Bentham, Principles of the Civil Code, in JEREMY BENTHAM, THE THEORY OF LEGISLATION 88, 109 (C.K. Ogden ed., 1931).

<sup>43</sup> See DICEY, *supra* note 4, at \_\_\_.



individual citizens and national law.<sup>44</sup> The picture is appealing as a natural interpretation of the position that national sovereigns are subordinate to IL. But there are different kinds of subordination to law. Ordinary humans are subordinate to the law of the land; they are bound by it and they must comply with it. But also government agencies are subordinate to the law of the land. They too are bound by it, and in their procedures, deliberations and actions and in the outcomes that they impose (on those who in turn are subject to them), they are bound by the law of the land. More specifically, they are bound by constitutional and administrative law. Which of these modes of subordination at the national level provides a better model for understanding the legal subordination of sovereigns at the international level?

It is tempting to say that the individual model is appropriate. It is true that we are talking now about a government, but given that we have gone up a level, given that we are now in the international realm, it is often said that at the municipal level governments are just like individuals. In Hobbes' language, "commonwealths once instituted take on the personal qualities of men."<sup>45</sup> As individual humans are the subjects of domestic law, so nation-states are the individual subjects of IL. And so—the argument goes—a national government deserves the benefit of the same attitude toward the ROL in the international realm as individuals have in relation to the law of the land.

But patently, there are many respects in which national sovereigns at the international level are quite unlike natural individuals at the national level. For one thing, they are already law-constituted entities. Considered in both its municipal aspect and in its international aspect, a state's sovereignty is an artificial construct, not something whose value—like that of the human individual—is to be assumed as a first principle of normative analysis. At home, the state is a particular tissue of legal organization: it is the upshot of organizing certain rules of public life in a particular way.<sup>46</sup> Its sovereignty is something made, not assumed, and it is made for the benefit of those whose interests it protects. In its international aspect, the sovereignty and sovereign freedom of the individual state is equally an artifact of IL. What its

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<sup>44</sup> See the useful discussion in Rosalyn Higgins, Conceptual Thinking about the Individual in International Law, 24 NEW YORK LAW SCHOOL LAW REVIEW 11 (1978-1979).

<sup>45</sup> THOMAS HOBBS, ON THE CITIZEN 156 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647).

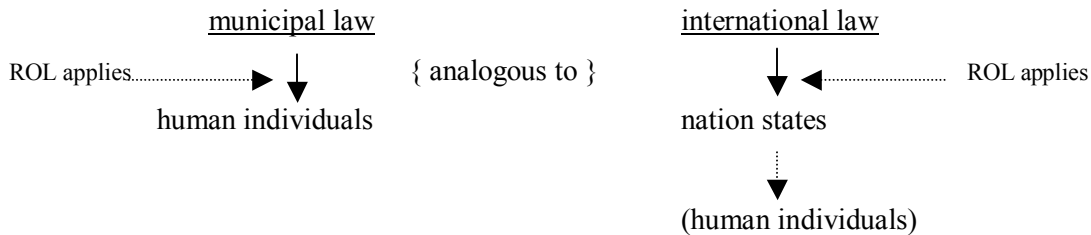
<sup>46</sup> For this way of regarding the state, see HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY § 48, at 99-106 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., 1992).

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 order.<sup>47</sup>

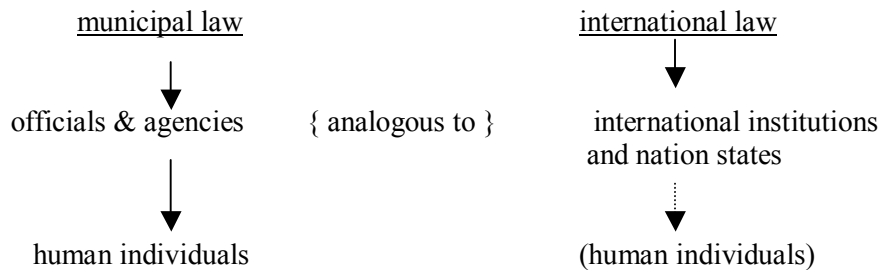
What we have just said, of course, does not show that the state (in IL) is best regarded on the model of an agency (in national law). It might show rather that it is best regarded on the model of a corporation (in national law), which—as we noted in §5—are entitled to the benefit of the ROL in much the same way as private individuals. But there are other aspects of the state in the international order which distinguish it from that model too.

Abram Chayes once remarked that “[i]f states are the ‘subjects’ of international law, they are so, not as private persons are the ‘subjects’ of municipal legal systems, but as government bodies are the ‘subjects’ of constitutional arrangements.”<sup>48</sup> I think this is a helpful insight. It takes us away from the conventional analogy to a new analogy. The new analogy

**CONVENTIONAL ANALOGY:**



**NEW ANALOGY:**




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<sup>47</sup> See HART, *CONCEPT OF LAW*, supra note 11, 223 (“[I]f in fact we find that there exists among states a given form of international authority, the sovereignty of states is to that extent limited, and it has just that extent which the rules allow. Hence we can only know which states are sovereign, and what the extent of their sovereignty is, when we know what the rules are ....”). [Cite also to Ryan Goodman’s work on the striking legal similarities between sovereignty institutions around the world.]

<sup>48</sup> Cf. Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARVARD LAW REVIEW 1396, 1410 (1965).

works from the position that the nation-state is not (just) a subject of IL; it is both (i) a source and (ii) also an official of IL. Let me briefly explore each of these roles.

(i) A national sovereign state is a source of IL in the sense that it participates in treaty-making and in the emergence of customary ordering. Regulating a national sovereign in IL must therefore have some of the flavor of regulating a law-maker at the national level. It might be more like regulating a municipal council passing by-laws or regulating a rule-making agency than like regulating a natural individual.

Now, admittedly, private individuals are also sources of law at the national level: they can enter into contracts etc., which alter their and others' legal obligations. And we might say that this is the appropriate analogy, considering the amount of IL that arises out of treaties. It may be said that inasmuch as treaties are like contracts, sovereigns are like private contracting parties, and that—it might be said—is the best model for understanding the relation of sovereigns to IL.

But this analogy must be handled with great care. It makes most sense in regard to bilateral treaties that regulate particular aspects of trade or border relations, for example. These treaties are most like contracts.<sup>49</sup> In other areas, however, treaty-making is much more like voluntarily participating in legislation than like striking a commercial bargain. This is certainly true of multilateral human rights treaties. This sort of treaty-making has a jurisgenerative aspect. The responsibility of those who enter into a multilateral human rights convention—the Convention Against Torture, for example—is like that of a legislature that passes a law constraining its own freedom of action or the freedom of action of its members. (A rough analogy might be Congress's passage of the Religious Freedom Restoration Act.)<sup>50</sup>

(ii) I said that a nation-state is in some respects also like an official or an agency, so far as the administration and enforcement of IL is concerned. In the absence of any concentration of the means of legal coercion in international institutions, the coercive role often falls to individual states or coalitions of states and when they undertake the enforcement of IL, they take on a public role in relation to the law, a role that is no doubt entangled with their own foreign policy interests, but must also be regarded as an independent vector in their decision-making, subjecting them to the ROL in

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<sup>49</sup> See Gabriella Blum, Bilateralism, Multilateralism, and the Architecture of International Law, 49 HARVARD INTERNATIONAL LAW JOURNAL 323 (2008).

<sup>50</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (restricting the government's ability to burden a person's exercise of religion). For an example of this statute's application, see Gonzales v. O Centro Espírita Beneficente União do Vegetal, 126 S.Ct. 1211 (2006).

the way that a police department or a district attorney is subjected to the ROL.

I have already mentioned the role of states and coalitions of states as IL enforcers (in Korea, for example, in the early 1950s or (more recently, and problematically) in Iraq). But even if coercion is not directly at issue, the administration of IL often involves detailed work by states themselves as well as by international institutions. States must administer borders and waterways; they must act together to control the flow of migrants and refugees; they maintain international standards in a variety of areas from mail services to epidemic control; and so on. In all these regards, there are IL rules and standards to be applied; and the conventional picture would have it that they are applied by international institutions to regulate the activities of nation-states much as domestic executive agencies apply state or national law to regulate the activities of individuals and firms. But this conventional picture is quite misleading. For one thing, the administration of IL often requires a process of “dual positivization”<sup>51</sup> whereby IL norms are mirrored in the provisions of national legislation or regulations. So, for example, international airline and airways administration would not work without civil aviation legislation operating effectively in each country to implement the requirements of international civil aviation treaties.<sup>52</sup> I suppose that someone devoted utterly to the conventional model would say that the appropriate domestic analogy was workplace rules (in private firms) mirroring the requirements of law in regard to something like health-and-safety or non-discrimination etc. But it seems to me that this is a misleading analogy because of the way in which it understates the “official” character of national implementation of international standards (and indeed in many cases the monistic character of the administration of law at these two levels).<sup>53</sup>

In other cases, where nations administer international obligations, it is plain that they are doing so in an official public capacity. A nation’s border controls, for example, are regarded by IL not in the light of a private

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<sup>51</sup> Cf. the discussion of “dual positivization” in Gerald L. Neuman, Human Rights and Constitutional Rights: Harmony and Dissonance, 55 STANFORD LAW REVIEW \_\_ (2003).

<sup>52</sup> I am grateful to Stephanie Winston-Rota, a student in my 2004 Master’s seminar on the Rule of Law, at Victoria of Wellington, New Zealand, for this example in her paper Does the Rule of Law Apply in the International Sphere?—Case Study: Civil Aviation (available on request from JW).

<sup>53</sup> If one pushed the workplace-rules analogy too far, one might end up saying that private firms sometimes serve a public quasi-official function, rather than that nation-states are like private firms (in their private capacity). or (ii), and intriguingly, it might lead us to revisit our instinct to describe workplace rules as a wholly private matter, so far as our thinking about the ROL is concerned.

householder distinguishing between welcome guests and trespassers but in the light of an official agency administering two interrelated bodies of law, viz. national migration controls and international migration and refugee obligations. Moreover the relations between states in this regard—respecting one another’s passports, working in comity with deportation etc.—are much more like domestic police agencies cooperating than like private householders cooperating. So it seems to me that the conventional picture which portrays states at the international level as being in a position analogous to that of private individuals at the national level is rather misleading as to the real legal and administrative picture.

(Of course any analogy has its limits and each offers its insights. One thing I am trying to do in this paper is to associate our thinking about the ROL with an expanded array of analogies: nation-states in IL are not just like individuals; they are also like corporations, they are like trustees, they are like agencies, they are like municipalities, they are like police departments, they are like legislators, and so on. In the end everything is what it is and not another thing,<sup>54</sup> but analogies can help and we should not stint on the array of available analogies)

I don’t want to deny the effective role of international institutions. But two points seem to me important: (1) international institutions work in tandem with, not just at a level above, nation-states as (in effect) agencies in the international legal system; and (2) just as it would be wrong to say that international institutions are entitled to the benefit of ROL safeguards as though they were private individuals and had individual interests in dignity and liberty, so it is wrong to say that nation-states are entitled to the benefit for ROL safeguards as though they were private individuals. (I will develop point (2) extensively, in the case of nation-states, in §§8-9 below.)

By comparing nation-states to official agencies, I do not want to suggest that their compliance with international law is never a problem. It often is, as we know. But that does not mean we have to revert to the conventional analogy between a nation-state and an individual (on p. 17). Law-enforcement agencies within national legal systems are sometimes lawless; they sometimes fail to comply with the laws that apply to them. Law enforcement agencies in a particular country can sometimes try to slip almost entirely beyond legal control, and for a while they may succeed in acting lawlessly, pursuing their own brutal agendas. Again, I find this a better analogue for “rogue states” (if indeed we want to use that category)

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<sup>54</sup> ...unless it is another thing, in which case that is what it is. (W. K. Frankena, The Naturalistic Fallacy, 48 MIND 464, AT 472 (1939), with apologies to Bishop Butler).

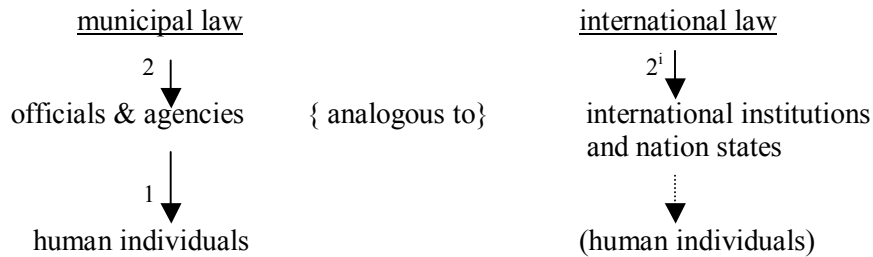
—better than the analogy which would compare them to psychopathic individual criminals.

A final point is that my analogy between nation-states and international agencies does not deny that there can be important conflicts between nation-states, which other international institutions (for example the International Court of Justice) have to try to resolve. But yet again, we may find a better analogue for this sort of conflict in considering disputes and conflicts among rival agencies in a complex national system, than by comparing nation-states to individual litigants.

**8. Is the Government Entitled to the Benefit of the Rule of Law?**

What is the consequence of shifting from the conventional analogy to the new analogy so far as our understanding of the international ROL is concerned? We can begin to answer this question by thinking about the application of the ROL to officials and agencies in the context of a municipal legal system. If we consider the left-hand-side of what I have called “the new analogy” (on p. 17), we see that officials and agencies occupy an intermediate position in the polity. On the one hand, agencies and

**NEW ANALOGY (from p. 17):**



officials exercise (and channel) governmental power over individuals; on the other hand, they are themselves subject to law just as (though certainly not in the same way as) individuals are.

As regards (1) the power that they exercise and channel, we—or many of us—believe that they ought to be subject to the ROL. There may be disputes about whether this is true of all agencies;<sup>55</sup> but generally we

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<sup>55</sup> See e.g. FULLER, MORALITY OF LAW, supra note 4, at 170-7 on the special position of agencies exercising allocative power in a mixed economy.

think it is a good thing if the ROL constrains not just the ultimate law-maker but also the agencies that implement the laws that are made. And we think that agencies' own rule-making should be by-and-large subject to ROL requirements.

But what about (2) the power that municipal law exercises over the officials and agencies? Should this be subject to ROL requirements, imposed for the benefit of the officials and agencies? (This will be the analogue to a question we might ask about (2<sup>1</sup>) the application of the ROL for the benefit of national sovereigns on the right-hand-side of the new analogy)

If we are focused on relationship (2), and analogously on relationship (2<sup>1</sup>), one question is whether the ROL and the concerns that underlie it even make sense. In a fine and influential article published in 1989,<sup>56</sup> Edward Rubin argued that a great deal of Lon Fuller's account of the ROL (or, as Fuller calls it, "the inner morality of law") makes little sense as applied to the relationship between (say) a legislature and an administrative agency. Rubin argues that there is no particular reason why vagueness, impracticability, even retroactivity should be regarded as vices in the context of a legislature's dealings with its agencies. There is no reason why the legislature should be subject to requirements of generality or constancy in these dealings; there is no reason why it should be preoccupied with issues of promulgation so far as agencies are concerned. These requirements which make sense when considered in the context of the governments dealings with individuals make little sense when considered in the context of the government's dealings with its own agencies. I will quote Rubin at length:

With respect to generality, it is simply not true that the legislature must act in terms of general rules. Virtually every statute is specific in the sense that it names a given institution as the implementation mechanism. Internal statutes such as appropriations bills or reorganizations of governmental agencies specify their subject matter as well, and invalidation of this legislation for lack of generality is virtually inconceivable. To be sure, most statutes directing an implementation mechanism to take action against a specific private person would be objectionable even if they were intransitive in style ("Get Capone"). But the invalidity of such statutes is related to the

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<sup>56</sup> Edward Rubin, Law and Legislation in the Administrative State, 89 COLUMBIA LAW REVIEW 369 (1989).

way we believe individuals should be treated, not to the way in which legislation in general should be drafted. We believe that no person should be punished without due process, an amenity that legislatures are generally unable to provide. The rule of generality, therefore, is designed to protect individuals from punishment; it does not apply to benefits or punishments imposed on government agencies.

Promulgation and retroactivity, Fuller's next two categories, also lose their significance when applied to the more general characterization of legislation. The mere passage of the statute by normal legislative action sufficiently informs the implementation mechanism, and further promulgation can be left to the mechanism itself. Similarly, retroactive statutes create no difficulties when legislation is regarded as directives to implementation mechanisms; these mechanisms are controlled, not punished, by adverse legislative action. Budget cuts, reorganizations, revocations of authority, and the like are often based on prior agency behavior, and we view them as legitimate controls on the administrative apparatus. ...

The idea that law should remain constant over time relates closely to the idea that it should not impose excessive burdens upon private parties, that people should be able to live their lives without continual concern about the law's changing demands. For implementation mechanisms, however, an opposite argument can be made. To subject large, partially autonomous administrative agencies to the control of elected officials, there must be a continual and finely graded adjustment of the governing statute. This control is achieved through yearly budget allocations and through legislative reinterpretations of the statute that are communicated to the agency by formal hearings and informal contacts. Precisely how comprehensive this supervision should be is debatable on pragmatic grounds, but statutes that are constant and unchanging in their operation would abandon too much of this supervision for almost anyone's taste.<sup>57</sup>

One might quibble with this or that detail of Rubin's analysis, and people have expressed some concern about his similar analysis of the transitive relation (1+2) between legislature, agency, and individual (or firm).<sup>58</sup> For us, Rubin's analysis is important because it raises a question-mark over

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<sup>57</sup> Ibid., 399-402.

<sup>58</sup> Ibid., 403-8. See the useful discussion in Peter Strauss, Legislative Theory and the Rule of Law: Some Comments on Rubin, 89 COLUMBIA LAW REVIEW 427 (1989). [Say more about this: Dyzenhaus's comment.]



simplistic applications of the ROL to the relation between IL and the nation-state. If the nation-state is more like an agency than like an individual in its relation to IL than Rubin's points ought to have some application.

The application may not be a straightforward adaptation of Rubin's points. For example, what Rubin says about generality will apply more to the relationship between IL and international institutions than to the relationship between IL and nation-states, even when the later are considered as quasi-officials of the international system. But a related point is worth pursuing.

In some of the literature on the international ROL, scholars have been at pains to apply Dicey's principle of legal equality to the relation between IL and nation-states.<sup>59</sup> Just as Dicey insists in the national context that individuals are all equal before the law, so (it is said) individual states must be regarded as equal before the law.<sup>60</sup> Patently, though it would be absurd to treat this as any sort of analogy between (2) and (2<sup>i</sup>) in our diagram on p. 21, because on the left-hand-side there is no reason whatsoever for municipal law to treat all agencies as equals. Some it may treat as equals, for particular constitutional reasons: for example, the equality of the American states in relation to U.S. federal law. But some are obviously rightly treated as heterogeneous and quite unequal. (There is no reason to say that the Department of Defense is to be treated as the equal of the State of Mississippi and that both are to be treated as the equals of the Federal Reserve Bank.) Equally there is no reason for IL to treat its agencies and subordinate institutions as equals. There is certainly no such reason rooted in the Rule of Law.

In the case of sovereigns, we have adopted a principle of formal equality for political and moral reasons: in IL we no longer treat kings and kingdoms differently from emperors and empires, for example; we no longer subordinate the treatment of Liechtenstein to the treatment of Sweden simply because the former is a duchy and the latter a monarchy etc. We have very good reasons for this, but I suspect it has little or nothing to do with Dicey's conception of the ROL. (Or if it does, it is based on one of the more disreputable aspects of Dicey's theory—viz., his idiot claim that officials are to be treated on exactly the same basis as private citizens so far as their rights and duties are concerned.) Certainly attempts in the IL literature to argue for sovereign equality on grounds used in arguments that are

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<sup>59</sup> Dicey, *supra* note 4, at \_\_\_\_.

<sup>60</sup> See, e.g. Beaulac, *supra* note 2, at 14-18.

appropriate for legal equality among human individuals are simply embarrassing.<sup>61</sup>

I suspect Rubin's insights about promulgation and determinacy have some application also. No special effort needs to be made to promulgate IL to the nation-states. They are often involved intimately in its creation and they employ armies of lawyers in their State Departments and equivalents to keep track of it in the process of its creation and elaboration. (It is noteworthy that when scholars discuss promulgation of IL, they almost always switch to consideration of the relation between IL and people generally, rather than the relation between IL and national sovereigns.<sup>62</sup> This is for the good reason that the promulgation idea is more or less a redundancy in the latter context.)

As for determinacy, we need to understand that whatever arguments there are to be made in the case of individuals—knowing in advance where they stand, being able to make long terms plans, etc.—are made on the basis of their inherent interest in liberty of action, and it is simply not clear whether nation-states have anything like the same interest, or any interest of this kind that commands anything like the same respect. (I shall pursue this further in §9.) Certainly it makes little sense to demand of IL certainty and rule-like precision for the sake of nation-states considered as agencies of the international system. Nationally, attempts by legislators to micromanage agencies with highly specific rules generally do not work. As Rubin points out,

We are socially committed to the view that government agencies possess technical expertise, data-gathering ability and problem-solving capacity. Given this commitment (which may be right or wrong on empirical grounds), a legislature may quite reasonably issue vague directives to the agency, rather than try to “micromanage” complex subject matters.<sup>63</sup>

And something similar might be said of nation-states in their management of the affairs committed to their charge by IL.

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<sup>61</sup> Vattel's argument is the worst: “Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature--Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights.” -- quoted by Beaulac, *supra* note 2, at 16.

<sup>62</sup> See, e.g. Beaulac, *supra* note 2, at 13-14. See also Hans Corell, The Visible College Of International Law: “Towards The Rule Of Law In International Relations” 95 AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS 262 (April 4-7, 2001).

<sup>63</sup> Rubin, *supra* note 56, at 399.

In the analysis of this section, I have taken a familiar conception of the ROL (mostly Lon Fuller's conception) at face value and considered how it might apply to the relation between IL and nation-states, considered in their capacity as agencies of the international system. But of course some of the elements of Fuller's conception are highly controversial, even on their own ground. This is particularly true of determinacy (or, as he calls it, "clarity"). In our outline of the main ROL requirements in §2 of this paper, I noted that the demand for determinacy and the predictability of legal consequences on the basis of rules laid down clearly in advance is one of the dominant themes in the ROL tradition. But it is also controversial. There is a controversy about whether the ROL requires a law consisting mainly of determinate rules, there is a controversy about the role of standards and others kinds of norm in relation to the ROL, and there is (as I also said in §2) a controversy about how to deal with the tension in the ROL between the requirements of legal certainty on the one hand and the facilitation of legal argumentation on the other. All of this compounds the considerations that I have been pursuing in this section.<sup>64</sup>

And it extends them too. For even if the nation-state is, in some respects, more like an individual in its relation to IL, we must be careful to

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<sup>64</sup> SUBSTANTIVE FOOTNOTE:

So it is probably a mistake to approach the issue of the ROL in the international realm wholly in terms of rules. This is for two reasons: (a) rules-based conceptions of the ROL are controversial even at the level of municipal law; and (b) as shown above, rules-based conceptions may be particularly inappropriate when we are talking about law that constrains states (or state entities) as opposed to law that constrains individuals.

This mistake seems to have been committed by Simon Chesterman in at least his initial approach to the ROL/IL connection. The project in which Chesterman has been involved seems to presuppose that the ROL in IL requires rules-based decision-making. See SIMON CHESTERMAN, *THE UN SECURITY COUNCIL AND THE RULE OF LAW: THE ROLE OF THE SECURITY COUNCIL IN STRENGTHENING A RULES-BASED INTERNATIONAL SYSTEM* (Final Report and Recommendations from the Austrian Initiative (Federal Ministry for European and International Affairs), 2004-2008, also published by the Institute for International Law and Justice, New York University School Of Law). This report is available at <http://ssrn.com/abstract=1279849>

"[S]trengthening a rules-based international system" (p. 1) seems to have been the aim of this initiative, which was largely galvanized by Austria. Thus, : "Beginning in 2004, the Permanent Mission of Austria to the United Nations, together with the Institute for IL and Justice at New York University School of Law, organized a series of panel discussions to examine the "Role of the Security Council in Strengthening a Rules-Based International System" (ibid., p. 1: §4). See also the comment of Ursula Plassnik, Minister for European and International Affairs of the Republic of Austria, who observed in her Preface to Chesterman's report: "Clear and foreseeable rules and a system to prevent or sanction violations of these rules are essential preconditions for lasting peace, security, economic development and social progress."

keep faith with the variety of ROL requirements that are applicable to the law's treatment of individuals and not assume automatically that a conception of the ROL that overvalues rules and determinacy is the one to apply.<sup>64</sup> So, for example, consider the very fundamental norm of IL that force may not be used by a nation-state except in self-defense against actual or imminent attack.<sup>65</sup> A naïve application of certain conceptions of the ROL might suggest that this is a defective norm, because "imminent attack" is not well-defined. The complaint may be that nations therefore don't know where they stand, any more than individuals do when they are governed by norms afflicted by vagueness.

One point in response will be the point that I have developed throughout this section—viz. Ed Rubin's point that it may not be appropriate to govern norms applied to state entities with a requirement of determinacy in the way that norms applicable to private individuals are governed.

But in addition to that, we may argue that determinacy is not the be-all and end-all of the ROL even in individual cases. Often what we value in regard to individual self-application of a norm (and any subsequent adjudication of it) is that the application of the norm occasions, frames, and facilitates a certain process of reflection and argument, rather than just the mechanical conformity of behavior to an empirically or even numerically defined requirement. We want individuals to think about whether they are taking reasonable care in activities that may harm their neighbor, not just whether they are going (say) faster than 55 mph. We want courts to think about whether punishments are cruel, not just whether they involve execution or flogging or whatever. We value the reflection that a less-than-determinate standard occasions. And similarly, one may say we want nations to think about whether a situation is one of imminent attack—even though that term is far from determinate. Even though opinions may differ in marginal cases, still we prefer a situation in which the imminence standard occasions thought, argument, and debate, to a situation where we embark on the hopeless business of trying to pin down how many tanks must be how many miles from a border in order to replace the imminence standard with a more determinate rule.<sup>66</sup> The ROL does not only value certainty and

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<sup>65</sup> I am probably misstating this somewhat, but it is just an example: bear with me.

<sup>66</sup> I have pursued this thought elsewhere in a number of different contexts. See Jeremy Waldron, Vagueness in Law and Language—Some Philosophical Perspectives, 82 CALIFORNIA LAW REVIEW 509 (1994) for a general treatment. See also Jeremy Waldron, Law in OXFORD HANDBOOK OF CONTEMPORARY ANALYTIC PHILOSOPHY 181, at \_\_ (Frank Jackson and Michael Smith eds., 2005). For specific applications, see also Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, 105

mechanical application. (Some would say it shouldn't value mechanical application of rule-book norms at all.)<sup>67</sup> It also puts a premium on the way that law facilitates the exercise of reason in human affairs.<sup>68</sup> And it is arguable that an obsession with rules—whether at the level of norms applicable to individuals or at the level of norms applicable to governments—disserves that aspect of the ROL.

### **9. Are States, like Individuals, Entitled to Liberty?<sup>69</sup>**

Mostly in section 8, we pursued Ed Rubin's insight that it may not be appropriate to apply traditional ROL requirements to interactions between legislatures and state agencies in the way that it may be appropriate to apply them to more direct interactions between legislatures and private individuals. I now want to develop a further and I think a deeper point. It takes some explaining, and it involves a contrast between how we see the respective responsibilities of government and individual at the national level, and how we see the responsibility of national governments at the international level.

Usually one thinks of the ROL as a requirement placed on governments: the government must exercise its power through the application of general rules; it must make those rules public; it must limit the discretion of its officials; it must not impose penalties without due process; and so on. But the ROL applies to the individual, too. What does the ROL require of the ordinary citizen? Well, it requires that she obey the laws that apply to her. She should be alert to changes in the law; she should arrange for her legal advisors to keep her informed of her legal obligations; she should refrain from taking the law into her own hands; and she should not act in any way that impedes, harms, or undermines the operation of the legal system, its institutions, and its procedures.

As the ordinary citizen goes about her business, she may find that there are areas where the law imposes minimal demands on her or no demands at all, leaving her free to her own devices. This is not a matter of regret. Allegiance to the ROL does not mean that the citizen must wish for more law—or less freedom—than there is. Neither does it require that she play any part in bringing fresh law into existence if she does not want it. She must obey the law where it does exist, but she has no particular obligation

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COLUMBIA LAW REVIEW 1681, at 1695-1703 (2005) and Waldron, Inhuman and Degrading Treatment, supra note 38, 45-7.

<sup>67</sup> Cf. Dworkin, note 4.

<sup>68</sup> Cf. Aristotle, supra note 4.

<sup>69</sup> Most of this section is adapted from Waldron, The Rule of International Law, supra note 1.

where it does not.<sup>70</sup> It is not up to individual citizens or businessmen to do the lawmakers' job for them. For example, they have no duty to extend the scope of the law's constraint (in accordance with common sense, morality, the spirit of the law, social purposes, or anything else), if the sources of law do not disclose an unambiguous enactment to that effect.

We can take this point even further. According to most conceptions of the ROL, individual citizens are entitled to laws that are neither murky nor uncertain but are instead publicly and clearly stated in a text that is not buried in doctrine. If the state impacts individuals by way of penalty, restriction, or loss then individuals are entitled to advance notice through clear promulgated laws. To the extent that the law is unclear, individuals are entitled to the benefit of that uncertainty.<sup>71</sup> In the absence of a clearly stated constraint laid down in a promulgated legal text (like an enacted rule or a well-known precedent), there is a presumption in favor of individual freedom: everything is permitted if it is not clearly forbidden. It is not inappropriate for lawyers and their clients to navigate the legal system with this in mind—looking for ambiguities and loopholes, taking advantage of them where they exist, and not going out of one's way to defer to laws whose application to their case is ambiguous or unclear.<sup>72</sup>

These actions are legitimate and entirely consistent with legality because (on most accounts) the whole point of the ROL is to secure individual freedom by providing a predictable environment in which individuals can act freely, plan their affairs, and make their decisions.<sup>73</sup> To eliminate uncertainty in the interests of freedom and to furnish an environment conducive to the exercise of individual autonomy—that is the raison d'être of the ROL. So it is perfectly appropriate to approach legal matters in the national arena with the freedom of the individual in mind—freedom from any restrictions that are not promulgated clearly in advance.<sup>70</sup>

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<sup>70</sup> Any felt obligation here will derive from the citizens' own policy convictions, party participation, general obligation to participate, etc. which—though important—are obligations that have nothing to do with the ROL.

<sup>71</sup> See, e.g., Staples v. United States, 511 U.S. 600, 619 n.17 (1994) (describing the rule of lenity).

<sup>72</sup> I'm exaggerating this a bit, for effect, and exaggerating too the extent to which it represents a consensus in ROL scholarship. It may be that the underlying principle of respect for individual freedom doesn't quite require the rule-book conception of the ROL that I am intimating here. But it is uncontroversial I think that underlying the ROL there is some sort of important principle of respect for individual freedom. And that is the point I am trying to illustrate.

<sup>73</sup> See, e.g., HAYEK, CONSTITUTION OF LIBERTY, supra note 4, 153: "The significance for the individual of the knowledge that certain rules will be universally applied is that .... [h]e knows of man-made cause-and-effect relations which he can make use of for whatever purpose he wishes."

What happens when attention is turned from the individual to the government? (For the moment, this is still in the national arena; IL is still left to one side.) Unlike the individual, the administration does not have an inherent interest in freedom of action in the national arena. It does not have an analogous interest, a morally reputable interest in being unconstrained by law, in the way that the individual does. Quite the contrary: it is important that the government should in all things act in a way that upholds the ideal of “a nation of laws, not men.” So the background moral presumption for the government goes in a direction exactly opposite to the presumption for the individual. Governmental freedom is not the *raison d'être* of the ROL. The ROL does not favor freedom or unregulated discretion for the government. Quite the opposite is true; the government is required to go out of its way to ensure that legality and the ROL are honored in its administration of society.

For the citizen, absence of regulation represents an opportunity for individual freedom. But absence of regulation represents a very different case for the state. If official discretion is left unregulated; if power exists without a process to channel and discipline its exercise; if officials are in a position to impose penalties or losses upon individuals without clear legal guidelines, then this is not an opportunity, but rather a defect, a danger, and a matter of regret so far as the ROL is concerned. A government committed to legality should feel pressed to remedy this situation by facilitating and taking responsibility for the emergence of new law to fill the gap. This does not correspond to any equivalent obligation placed on an individual citizen faced with the silence of the laws regarding her own conduct. So, although from the citizens' perspective “the more law the better” is definitely not true, something like that is true for the government. When it comes to the regulation of government discretion, more law is better—or at least that is true from the perspective of the ROL, even if it might have to be qualified from the perspective of other ideals that apply to the government.

All of this affects the way we should respond to complaints by government officials when they are made in tones analogous to complaints from ordinary citizens about infringements of the ROL. Let me cite as an example the misplaced concern of Justice Scalia, in his dissent in Rasul v. Bush in 2004, about whether or not the administration's expectations of freedom are entitled to respect: “Normally, we consider the interests of those who have relied on our decisions,” said Scalia. But, he went on, “[t]oday, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have

housed alien wartime detainees.”<sup>74</sup> The fallacy in Justice Scalia’s complaint is to think that the government’s antecedent expectations are entitled to the same ROL respect (for the sake of Hayekian freedom) as individuals’ antecedent expectations. But plainly they are not. The freedom of action that is set back when the government is surprised by a court’s ruling is not like the freedom of action of an individual—something to be treasured inherently. On a ROL account, the value of the government’s freedom of action has no value or negative value if it is not in accordance with law; and bringing it under law when it was previously thought to be lawless must count as a positive thing. The point is clearest of course in Rasul v Bush where the government’s freedom of action which was surprised by the court’s ruling was freedom of action to detain and torture individuals. But I think it is clear in any case, even when the government is acting beneficially. Neither it nor we have an interest in its acting (even beneficially) in a way that is unconstrained by the legal framework.

So there’s the contrast: the government should proceed on the basis that it is to act in accordance with law in all of its operations, bearing in mind at all times that this general sense of constraint is applied precisely to foster the sort of environment in which individuals can enjoy their liberty. The administration subjects itself to constraint by law so that citizens can enjoy freedom under law. The government’s own freedom of action is not an intrinsic value as it is for individual citizens.

Moving now to the international sphere, let’s consider the situation of a sovereign government under IL. Which model from national law is appropriate for analyzing what the ROL requires of a government in the international domain? Suppose there is some uncertainty—for as we have seen, often IL is less than clear. Which model from municipal law is appropriate: the model of an individual faced with legal uncertainty or the model of the state faced with legal uncertainty?

Many people are tempted to say that the individual model is appropriate. As individual humans are the subjects of domestic law, so nation-states are the individual subjects of international law. And so—the argument goes—a national government (like the Bush administration, say) deserves the benefit of the same attitude toward the ROL in the international realm as individuals have in relation to the law of the land. The administration should respect any law that is clearly applicable—the clear text of any treaty it has entered into, for example—but only to the extent that it is manifestly and unambiguously on point. On this theory, any lack of

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<sup>74</sup> 542 U.S. 466, 497-98 (2004)



clarity would be resolved in favor of liberty—in favor, that is, in this context, of the freedom of action of the individual sovereign state. The state would be entitled to treat international legal restraints in a rigorously textual spirit; IL restraints would have force where they clearly apply, but there would be no requirement to stretch or extend their meaning to constrain governmental freedom of action in areas that are unclear.<sup>75</sup> Also, on this approach, a national government would not be required to go out of its way to contribute to the establishment of international law. It need not wish for more law in this area (though it may), nor would it be required to strive to bring what jurists sometimes call “soft law” into clearer focus so that it could play a larger part in regulating or constraining sovereign states.<sup>76</sup> In the municipal sphere, the individual citizen is entitled to regard the absence of law or the lack of clarity of law as an opportunity for the exercise of freedom, and so—pursuing this analogy—an individual government would be entitled to regard the absence, gaps, or ambiguity of international law as an opportunity for the exercise of its sovereign freedom.

I hope I have said enough in this paper to indicate that I think this whole way of looking at the relationship between the state and international law is a mistake and that the conventional analogy (p. 17) on which it is based is misconceived. As I said earlier, the state is in many ways quite unlike an individual, even at the international level; certainly it is quite unlike an individual when it comes to the value of its freedom of action. In the case of an individual, we can value freedom of action quite apart from principles of legality;<sup>77</sup> but we cannot attribute such value to freedom of state action, in the international sphere any more than we can in the national sphere. Looking at the matter from the point of view of the ROL, our concern for the regularity and law-bound character of state action is undiminished when we change levels. Our reasons for wanting nation-states to remain bound by law do not evaporate just because it is now operating, so to speak, on a different plane, and just because it is intellectually possible to consider it as a possible beneficiary of the ROL.

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<sup>75</sup> For an argument that was the approach of Bush administration lawyers to the Geneva Conventions, see Waldron, *Torture and Positive Law*, supra note 65, at 1691-95.

<sup>76</sup> On the concept of “soft law,” see Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 371 (1988).

<sup>77</sup> I am making this as a limited point. I am not saying (here) that we value pure freedom apart from its moral quality. For some discussion of this, see RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 125 (2000). Dworkin’s suggestion that flat freedom or “license” for the individual apart from its moral quality has no value at all, would be an additional point, which would apply to state action too, even if freedom of state action were a candidate for value apart from constraints of legality.

Ultimately the reasons for continuing to insist that ROL requirements apply to the nation-state are the same as they always are. Those requirements apply to the state for the sake of the well-being, liberty and dignity of individuals. Those values are at much at stake when the state acts externally as they are when it acts internally: the main difference is that many more individuals may be affected by the state's external action than by its internal action.

Someone (probably an American) may ask why we should be interested in applications to the American government of ROL requirements motivated by concern for the dignity, liberty, and well-being of non-Americans. Surely the only valid motivation for ROL requirements applying to the American government are concerns for the way American citizens might be affected by its actions. It will be said that we do not maintain our principles of legality in order to benefit Frenchmen or Iraqis. Well, even within the blinkered terms of this objection, there would be a response.<sup>78</sup> We know, first, that there are no reliable firewalls between lawless state action in the international realm and state action at home. For example, abuses in the government's treatment of others abroad can creep back in and insinuate themselves into domestic state practice, infecting and contaminating the culture of legality at home. A concern along these lines was voiced by Edmund Burke in his apprehensions about the effect on England of the unchecked abuses of Warren Hastings in India,<sup>79</sup> and it is also voiced by Hannah Arendt, who offers the tradition of racist and oppressive administration in the African colonies as part of her explanation of the easy acceptance of the most atrocious modes of oppression in mid-twentieth century Europe.<sup>80</sup>

But anyway, the objection is a corrupt one in the present context. For either we are talking about the ROL in the international realm or we are not. If we are, then we must be open to the fact that now more people and more entities are involved, both as constrainees of the ROL and as its beneficiaries. And we must be open to the possibility that respect for the ROL in the international realm imposes equal or additional burdens and requirements on the nation-state. We cannot just assume that moving up a

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<sup>78</sup> This response is adapted from Waldron, *Torture and Positive Law*, supra note 65, at 1740-1.

<sup>79</sup> See Edmund Burke, *Speech in General Reply* [on the impeachment of Warren Hastings, Esq.] (May 28, 1794), in 11 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE 157, 194-225 (rev. ed. 1867) (“[T]he House of Commons has already well considered what may be our future moral and political condition, when the persons who come from that school of pride, insolence, corruption, and tyranny are more intimately mixed up with us of purer morals. Nothing but contamination can be the result . . .”).

<sup>80</sup> See ARENDT, supra note 20, at 185-86, 215-16, 221.

level is guaranteed to liberate the nation-state from the burdens of legality. The conventional analogy may have encouraged that impression; but it was just a model, and misleading one at that.

## **10. Are States Not Entitled to Respect?**

The burden of my argument has been that the conventional analogy does not work. The governmental character of the nation-state does not evaporate when we move up a level to the international realm. It remains a governmental entity whose dangerousness continues to generate ROL concerns. We may also have ROL concerns about IL and international institutions apart from nation-states, but most of those ROL concerns will be motivated by our interest in the well-being, liberty and dignity of natural human individuals, who are vulnerable directly or indirectly to IL in various ways,<sup>81</sup> not by our interest in the freedom of action of national sovereigns.

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### <sup>81</sup> SUBSTANTIVE FOOTNOTE

So, for example, James Crawford (supra note 2) pursues the complaint made in the Tadic case about the irregularity of the International Criminal Tribunal for former Yugoslavia, as a ROL complaint made by an individual against the international system.

In the case of *Prosecutor v Tadic*, heard before the International Criminal Tribunal for Former Yugoslavia (ICTY), the defendant challenged the jurisdiction of the tribunal, claiming that it has not been established by law but rather set up in an ad hoc way on the basis of a Security Council resolution. In response, the Tribunal affirmed its own right to try the case by saying, that “the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting.” (Decision at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> at §42). It said that, though it is “incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law,” this principle does not apply directly to international tribunals. And the Tribunal rejected the application in the international sphere of any argument, based on the separation of judicial and legislative functions, that tribunals must be established by legislation.

Actually, the ICTY did not dismiss all Rule of Law concerns. It said that its decision did not mean “that ... an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the Rule of Law and offer all guarantees embodied in the relevant international instruments.” The interpretation it favored of the requirement that the International Tribunal be “established by law” went like this:

For a tribunal ... to be established according to the Rule of Law, it ... must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments. ... The important consideration in determining whether a tribunal has been ‘established by law’ is not whether it was pre-established or established for a specific purpose or situation; what is important is that ... it observes the requirements of procedural fairness.

This is not to say that the sovereign state is not entitled to any respect as a basic unit of international law. But respect comes in many shapes and sizes. The respect that the state is entitled to is already bound up with its status as a law-constituted and law-governed entity. It is not to be regarded in the light of an anarchic individual, dragged kicking and screaming under the umbrella of law for the first time by some sort of international social contract. Immanuel Kant made this point long ago, in a way that was actually intended to blunt the censoriousness of certain enthusiasts for international law:

[T]he obligation which men in a lawless condition have under the natural law, and which requires them to abandon the state of nature, does not quite apply to states under the law of nations, for as states they already have an internal juridical constitution and have thus outgrown compulsion from others to submit to a more extended lawful constitution according to their ideas of right.<sup>82</sup>

But the point can be turned around and used as a way of driving home the importance of the state's continuing to regard itself as an entity imbued with the principles of legality. A state is an entity with great dignity in its own right. But its dignity is inseparable from its law-governed character. I believe the ROL in the international realm should continue to reflect this. And it has to be said: a national sovereign sells its dignity short when it conceives of its sovereignty (or tries to get others to conceive of it) 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.

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It is difficult, however, to be satisfied with this answer. ICCPR Art. 14 requires both the proper lawful establishment of tribunals and the securing of procedural guarantees. (ICCPR Art. 14 (1) and (3), respectively.) The second is not a substitute for the first and concerns about the first are not necessarily allayed by pointing proudly to the second.

<sup>82</sup> IMMANUEL KANT, PERPETUAL PEACE 18 (Lewis White Beck ed. & trans., Bobbs-Merrill Co. 1957) (1795).