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The International Rule of Law

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The International Rule of Law

The rule of law is a moral ideal that protects distinctive legal values such as generality, equality before the law, the independence of courts, and due process rights. I argue that one of the main goals of an international rule of the law is the protection of individual and state autonomy from the arbitrary interference of international institutions, and that the best way to codify this protection is through constitutional rules restraining the reach of international law into the internal affairs of a state. State autonomy does not have any intrinsic value or moral status of its own. Its value is derivative, resulting from the role it plays as the most efficient means of protecting autonomy for individuals and groups. Therefore, the goal of protecting state autonomy from the encroachment of international law will have to be constrained by, and balanced against the more fundamental goal of an international rule of law, the protection of the autonomy of individual persons, best realized through the entrenchment of basic human rights.

Keywords:

International rule of law, human rights, state autonomy, Jeremy Waldron, legality, state consent, Kadi

The fight for an international Rule of Law is a fight against politics, understood as a matter of furthering subjective desires, passions, prejudices and leading into an international anarchy. Though some measure of politics is inevitable (as we commonly assume), it should be constrained by non-political rules.

M Koskenniemi, *The Politics of International Law* (2011, 36).

The rule of law is a moral idea, if we understand the word 'moral' as implying limits on the means by which governments as well as persons pursue their goals. Theories of law that ignore this moral element cannot distinguish law as a constraint on the exercise of power from law as an instrument of power.

T. Nardin, 'Theorizing the International Rule of Law' (2008, 385).

Introduction

International politics as the realm of lawless anarchy has long been superseded by law-governed interaction among states. International law reaches deeply into our ordinary lives, with rules regulating everything from trade in agricultural products, textiles and services, to air transport, pollution, the exploitation of ocean resources, and scientific research. Moreover, it is sufficiently institutionalized to contain agents which make, interpret, apply, and enforce rules. The expansion of international law brings with it the possibility of arbitrary interference with the authority of states and the rights of individuals. Organizations such the Security Council, can authorize the use of coercive measures and even deadly force against any country or agent, without accountability or the possibility for review of its decisions. Imposing some restrictions in the form of rule of law constraints, which require that international law officials are limited in their exercise of power, is desirable even for a young, incomplete system like international law.

Examples of overreach or arbitrary power exercised by international organizations are not difficult to find. In the early 2000s, the Security Council (SC) adopted sanctions under chapter VII of the UN Charter against individuals and entities who allegedly supported Al-Qaida and the Taliban. SC created a committee in charge of maintaining lists of individuals and organizations believed to aid and abet the terrorist network. It required all countries, including the European Union, to freeze the assets of those listed. In 2001, the SC committee added to the list Yassin Abdullah Kadi, a Saudi Arabia national and Swedish resident, and Al Barakaat, a Swedish charity for Somali refugees. Kadi and Al Barakaat brought suit against the EU for measures adopted in compliance with the sanctions, arguing that the measures violated their rights to property and due process. In a 2008 decision, the European Court of Justice ruled in favor of the

complainants, explaining that the SC provided no avenues to access the justification for including particular names on the list, thereby denying the persons and organizations listed the possibility of challenging the measures taken against them. This constituted a violation of due process. Additionally, the court found that freezing financial and material assets without justification is an infringement of their rights to property. The judgment in Kadi is significant because it marks the first time a regional or national court argued that SC measures violate fundamental rights (Kadi and Al Barakaat International Foundation v Council and Commission 2008; Zgonec-Rozej 2008). Although in Europe the application of the SC measures has been pushed back, they remain in force in much of the world.

As this example illustrates, given the extensive role it plays in regulating affairs among states, the potential for misuse or abuse of the authority of international law, and of inequities in the promulgation, interpretation, and application of its rules is vast. An international rule of law must constrain the arbitrary power of public officials, impose discipline on the requirements about the formal qualities of the law, such as publicity, prospectivity, and coherence, and protect the basic rights of its subjects. My purpose is to persuade skeptics that the moral ideal of the rule of law has a place in international politics and to offer an analysis of its implications for international law.

Yet there is an important sense in which it is premature to talk about an international rule of law. Most of the rules of international law are only binding on countries which have signed the treaties that gave rise to them, there are no courts with compulsory jurisdiction, and the rules are openly flouted when they become costly or run counter to state interest. The consensual character of international law, which means that states are only bound with their consent, makes it more akin to a network of contracts between private entities than to the legal system of

developed liberal democracies. Talk of a rule of law for the international realm cannot target law in the usual sense of the term, as a system of general, universally binding requirements, administered by an institutional system characterized by clear hierarchies and equal access to courts for the peaceful and fair settlement of disputes.

This paper contributes a new perspective to the already extensive literature on an international rule of law, which is divided on the point or possibility of an international rule of law that mimics to the extent possible the features of a domestic rule of law (Waldron 2006, 2011; Besson 2011; McCorquodale 2016; Hurd 2015). There is wide agreement that the decentralized and consensual nature of international law, and the paucity of dispute resolution forums and of administrative and enforcement organs means that domestic rule of law requirements cannot be simply transplanted to the international realm. For example, it is not immediately clear who the public officials of international law whose arbitrary power must be restrained are. The requirements of an international rule of law must be interpreted and specified for the very different context of international law. I argue that one of the main goals of an international rule of the law is the protection of individual and state autonomy from the arbitrary interference of international institutions and that the best way to codify this protection is through constitutional rules restraining the reach of international law into the internal affairs of a state. State autonomy does not have any intrinsic value or moral status of its own. Its value is derivative, resulting from the role it plays as the most efficient means of protecting autonomy for individuals and groups. Therefore, the goal of protecting state autonomy from the encroachment of international law will have to be constrained by, and balanced against the more fundamental goal of an international rule of law, the protection of the autonomy of individual persons, best realized through the entrenchment of basic human rights.

The argument proceeds in several steps. I first provide an overview of different conceptions of rule of law, distinguishing between ‘rule of law’ and ‘rule by law,’ and between thin and thick conceptions. Some of the most defensible strands of rule of law theorizing share the notion that the rule of law demands restraint on arbitrary uses of power and serves an instrument for the protection of the equality and autonomy of the law’s subjects. In this section I argue that thin or formal conceptions of the rule of law are incomplete, because they do not provide adequate constraints on legal system to achieve equal protection under the law, and the protection of autonomy of the law’s subjects without relying on a substantive commitment to individual rights. I then discuss the implications of a thick rule of law ideal for international law, arguing that conceptions of international rule of law that defend it as an instrument for the exercise of state power as opposed to a constraint on the public uses of power are not defensible. I then explain why it is important that international law protects the equality and autonomy of both states and of individuals. I conclude with reflections on the institutional requirements of the rule of law in international law.

The implications of this argument for the legitimacy of international law ought to be clear. States often question the authority of international law on the grounds of actual or potential arbitrary interference with their sovereign authority, the unequal application of the rules, the lack of coherence between the rules of different areas of international law, and uneven access to courts for the peaceful resolutions of disputes. The state-centric bias of international law means that individuals do not enjoy an adequate protection of their interests and often lack legal standing to demand accountability for the abuses that states inflict on them. Strengthening the rule of law could go a long way towards enhancing the normative legitimacy of international law, by giving states and other agents better reasons to comply with its demands.

I. The Point of the Rule of Law. Thin and Thick Conceptions.

Unlike other concepts such as liberty, equality, democracy, whose value is regularly contested, the ideal of the rule of law receives near universal endorsement (Tamanaha 2004; Trebilcock and Daniels 2009). Closely associated with resistance to tyrannical government, protection of individual rights, and equality before the law, the idea of the rule of law took a historical hold in western absolutist monarchical states at the dawn of the Middle Ages, and played an important role in their gradual transition to fully fledged liberal democracies (Tamanaha 2004, 15–32).

Rule of law captures what are commonly described as formal and substantive features of the law. Among the formal features, the most important are 1. generality, 2. publicity, 3. prospectivity, 4. stability, 5. capacity to reflect clear, reasonable, and mutually consistent demands on individuals, 6. proportional punishment, 7. easy access to courts and 8. an independent judiciary. Formal features refer to the form and manner in which the law is promulgated rather than its content (Craig 1997, 467). These features require, respectively: 1. That laws must not single out groups or individuals, but rather be addressed to all, and ensure that no one is above the law, especially public officials; 2. That the obligations that law imposes are announced publicly, so that its subjects have reasonable notice of its demands and the opportunity to comply with them; 3. That laws are not retroactive, which would impede their ability to guide behavior; 4. That they are not changed too often, 5. That their demands cohere and they do not ask the impossible; 6. That violations do not incur draconian, disproportionate punishments; 7. That resort to justice is accessible to those who have been wronged through a

court system designed to facilitate speedy and equitable resolution of complaints, and 8. That justice is administered by officials free from political control.

Among rule of law scholars there is wide agreement that the rule of law embodies a moral ideal: it requires constraints on the arbitrary and tyrannical use of government authority for the sake of protecting individual equality and autonomy (Fuller 1969, 39; Hayek 1978; Hart 1984; Craig 1997; R. Dworkin 1998; Waldron 2006; Raz 2009, 210–33). Law itself must embody a moral relationship among the law's subjects, which means that no one person is exempt from the law, or can exercise arbitrary will over another. Moreover, law's coercive capacity means that it must be applied with restraint, such that it does not unduly interfere with the subjects' life plans, and that it gives them opportunities to demand the accurate and equitable interpretation and application of the law and challenge its violation. The rule of law ideal embodies both a horizontal relationship of equality among the law's subjects, such that no one subject has more power or authority over others, and a vertical relationship between officials and subjects, such that officials are constrained to respect for autonomy of the subjects. This is why the protection of individual rights is an essential feature of many accounts of the rule of law in addition to the 'formal' features.

A first important distinction legal scholars and practitioners make is between 'rule of law' and 'rule by law.' Brian Tamanaha thoughtfully points out that rule by law, or simply legality, sometimes masquerades as the rule of law. For example, China is happy to pay lip service to the ideals of the latter while avoiding many of its essential constraints (Tamanaha 2004, 92). 'Rule by law' or *legality* describes government action guided by law as opposed to the personal whims or arbitrary will of public officials. Yet the content of the rules can be such that they authorize the government to unduly limit people's independence, to create and cement

inequality between the law's subjects, and to immunize public officials against rules that apply to ordinary citizens, and against challenges to their authority. Rule *by* law is not rule *of* law, because it need not impose constraints on government power other than the requirement to remain within the bounds of the law. Rule by law can move a legal system away from the rule of law rather than closer to it.¹

One of the main reasons China has rule by law but not rule of law, is because it displays 'rule of law' features imperfectly or not at all (Chin 2014). Any country like China that has general laws promulgated via a parliamentary and other law-making process, which guide both government and citizens' behavior, whatever their content, can display some measure of generality, publicity, prospectivity, stability, and consistency. But generality requires that public officials are not above the law, which is plainly not the case in China. One of the major problems of the Chinese legal system is the fact that, due to the continued control of the courts by the ruling communist party, party officials are not accountable to general applicable laws.² Legal professionals are routinely harassed, arrested, and tortured as a way to discourage challenges against government's authority (Pils 2017, 258; Haas 2017). Furthermore, the commitment to proportional punishment, equal access to courts, or fidelity to constitutional rules is at the best uneven and at worst inexistent. For example, the constitution is vague, full of political slogans, and there is no provision for its enforcement, perhaps by design (Zhang 2012, 65). Rule by law does very little to restrain abusive government practices, especially when the content of the law is oppressive or the law is applied without respect for due process: conviction rates in criminal trials near 100%, and are often based on coerced confessions. In the latest Rule of Law Index (2016), a ranking that measures restrictions on government power, the protection of fundamental right, civil and criminal justice, China ranked 80 out of 113 countries, and limited progress in the

past few decades on the rule of law front goes hand in hand with backtracking due to an increase in abusive legal practices (Chin 2016).³

As China's case illustrates, rule by law does not go very far in the direction of securing even the 'formal' features of the rule of law. Moreover, the language of 'formal' and 'substantive' limits the proper understanding of the rule of law, since it gives the wrong impression that formal features are value free or value neutral. Some of the so called 'formal' features protect substantive values. The idea that no one is above the law, especially public officials, is a clear expression of a commitment to the moral equality of individuals. The idea of proportional punishment likewise embodies the idea of retributive fairness, which serves a more abstract notion of justice as giving people their due. The language of thick and thin conceptions of the rule of law better captures the idea that 'formal' and 'substantive' criteria are part of a continuum of rule of law features imbued with moral commitments.

Thick conceptions of the rule of law include requirements about the content of the law, not just their formal features. A list of basic individual rights is often considered a necessary requirement of the rule of law ideal, such as the right to life and to physical integrity, rights of due process, rights to freedom of action and freedom of thought, and of private property. There are in fact two types of disagreements related to the substantive account of the rule of law: whether such an account is defensible and if so, which rights are worth including. I do not have the space to fully defend the idea that individual rights should be part of an account of the rule of law, but a few reasons in its favor are worth mentioning. The first thing to say in defense of incorporating rights protection is that what is considered as merely 'formal' rule of law is compatible with extensive tyranny. The 'formal' requirements about generality, stability, and even equality before law will be incompletely realized and will offer limited protection against

abusive government policies. The limited formalism achieved under Chinese law shows that rule by law is compatible with predatory laws leading to widespread expropriation, or laws whose role is to oppress and intimidate. Formal restraints are an important first step in constraining the government's use of arbitrary power, but insufficient unless complemented by substantive constraints as well.

Second, it is hard to make sense of features such as equality before the law without individual rights protection. The point of insisting on equality before the law is to embody the fundamental notion that individuals are of equal moral worth, and the most secure embodiment of this notion is through the guarantee of rights protection. The point of the rule of law in limiting the exercise of political authority is to prevent regular abuses committed by governments against their citizens such as unjust imprisonment, torture, freedom from violence, large scale oppression of political dissenters or minorities, and these are rightly seen as violations of individuals and groups' fundamental rights. Rights violations are the reason government tyranny is seen as a universal bad and the reason for endorsing the moral value of the rule of law (Bennett 2011, 613).

But if individual rights are to be part of rule of law requirements, which ones ought to be included? Proposals range from basic rights - Friedrich A. Hayek's suggestion to include the "inalienable, individual right of man" can be read this way - to Ronald Dworkin's full set of social and political rights (Hayek 2007, 63; R. Dworkin 1985, 11-12). The inclusion of all desirable political, social, and economic rights presents a serious problem, identified early on by Joseph Raz and H.L.A. Hart, namely that the more inclusive the concept of the rule of law becomes, the less it is distinguishable from other ideas such as justice or human rights, and the less it can be used as a concept that refers to the morality of law as distinguished from other

normative concepts (Craig 1997, 468–69). This is precisely the ground on which Raz and Hart have objected to any thick/substantive rule of law ideal. They claim that 1. Including substantive moral values such as individual rights require a complete political philosophy, and 2. It would render the concept of the rule of law indistinguishable from other useful normative concepts such as democracy, human rights, or justice, and thus it would cease to serve its distinctive social function of providing a normative standard for evaluating legal systems.

We can reply to those like Raz and Hart that defend a thin/formal rule of law that the distinction between formal and substantive criteria is somewhat strained as ‘formal’ rule of law is based on substantive values such as equality, autonomy, fairness, justice. As I noted above, many of the so called ‘formal’ features of the rule of law are grounded in moral commitments. Justice in the legal context is best understood not as the most encompassing political and social value, but as the demand that the law embodies reasonable behavioral standards that are attached to proportional sanctions, fairness in the administration of the law, and equality of treatment before the law coupled with proper respect for and effective protection of basic rights. These are all contestable moral commitments, and supposing that focusing on the formal features of the rule of law avoids them misunderstands the rationale for having formal features of rule of law at all. The claim against Raz and Hart is not that ‘formal’ rule of law is no improvement over arbitrary uses of the law, but that the grounds on which to distinguish formal from substantive conceptions of the rule of law is weak, if it merely relies on the fact that formal rule of law avoids substantive ethical commitments. It does not.

The second concern is harder to dismiss, as turning the rule of law into the Trojan horse of all of the values we care about risks indeed making the concept indistinguishable from other substantive normative commitments that we resort to in order to pass judgments of justice and

legitimacy. Raz and Hart are right that going the Dworkinian path takes us away from the rule of law understood as a moral ideal embodied in the law and closer toward a fully-fledged theory of justice. One way to avoid this trap is to pack a minimal account of individual rights into the concept of the rule of law. For less than the full panoply of rights, the choice of what to include will be somewhat open-ended, but at a minimum, it would have to count among its protections the security of persons and property, due process rights, and rights to freedom of action and expression. The open-ended nature of the basic rights necessary for a defensible account of the rule of law is an advantage as it enhances the possibility to specify those right through a political process where different states and groups negotiate and compromise, which will make them more likely to be accepted and implemented, and not through philosophical armchair theorizing. Nonetheless, if the more defensible conception of the rule of law is one that includes the protection of basic individual rights, what follows for the structure and practice of international law? The next sections are devoting to answering this question.

II. Do we need an international rule of law?

Ian Hurd maintains that the domestic ideal of the rule of law cannot capture how international law works in practice. The international rule of law simply reflects the way in which state use law to justify and pursue foreign policy (Hurd 2015, 367). Tthe concepts of domestic and international rule of law arose in response to different problems. The point of domestic rule of law is to place limits on the exercise of centralized power and to protect the equality of citizens, while the point of the international rule of law is to respond to the lack of a

centralized international authority and to cement the consensual character of law among states (Hurd 2015, 366–67).

For Hurd, both the purposes and the institutional requirements of the international rule of law must be different from those of the domestic rule of law: international law regulates relations among states, while domestic law regulates relations among individuals and other non-state agents. The implication of this difference for Hurd is that the international rule of law must affirm the instrumental role international law plays in serving state interests. Each state has a different constellation of obligations, and states will use international law to justify and legitimate their actions. He claims that ‘in the interstate setting, this goal of a unified set of public rules that applies to all subjects cannot be achieved or even approximated because states retain the authority to accept, reject, or modify their legal obligations through treaty accession, reservations, and persistent objections’ (Hurd 2015, 382). Therefore, the universally binding character of domestic law cannot be a feature of international law, and therefore many of the characteristics of the domestic rule of law that come with it, such as equality before the law, must be abandoned.

Hurd makes a good case that the steady and large amount of formalization of the relations between states through treaties constitutes a big step in the direction of rule-governed interaction, as opposed to leaving them to the vagaries of politics, power imbalances, and prejudice (Hurd 2015, 378). Codification brings with it the important formal features of the rule of law such as clarity, predictability, prospectivity, coherence, and creates the basic rules that structure the relations among states. The international order is ‘constitutional’ in Hurd’s view, in the sense that it generates rules that explain how states can make treaties and the ways in which those treaties create responsibilities for them. But it is not ‘constitutional’ in the more traditional sense

in which it protects certain fundamental rights of the law's subject against encroachment by its institutions.

This position is deeply problematic if an international rule of law is understood simply as a vehicle for facilitating the realization of state interests. Hurd is right that the different structure and purposes of international law means that its institutional requirements must be different. But he is wrong to equate the rule of international law with legality, or 'rule by law.' First of all, his approach fails to take the rule of law seriously as a moral ideal whose primary function is to place constraints on the exercise of power by subjects against one another and by political authority against subjects. As Terry Nardin aptly observes, this position belongs to a class of international relations views that fail to distinguish law as an instrument of power from law as a constraint on power (2008, 385). Hurd is repeating the common refrain among international relations scholars that since the circumstances of international anarchy make it impossible to realize uniform, enforceable law among states, international law must be by necessity an instrument of state foreign policy rather than a common instrument for solving public goods problems, or for achieving peace or justice. There is no distinction on this view between law and mere power.

Law is not only distinct from power but it must be the antithesis of power if it is to serve its social purpose properly. Law must constrain the power that individuals exercise over one another for the sake of peaceful coexistence, it must recognize and protect their equal moral status, and it must assist them in the pursuit of individual and common ends, including public goods. And above all, law must constrain the exercise of power by the public officials. The ideal rule of law is one of the ways in which law instantiates these values. While it is perfectly possible to have law as a set of primary rules that direct subjects about appropriate standards of

behavior which lacks many of these features, no system of law is merely instrumental, and serves solely for the purpose of realizing affirming the power and interests of its subjects. Mere instrumentality is actually impossible to realize, since the law's subjects exercise their power in ways that threaten each other's survival and limit the pursuit of each other's interests.

International law cannot be merely an instrument of state power simply because different states may wish to pursue conflicting and mutually exclusive ends, and the role of international law is to limit the ways in which states can harm each other and their citizens in pursuit of these ends, while protecting a sphere of autonomous action for states and individuals.

International law has distinctive substantive and structural features ill-suited at least for now for some of the common ways to implement the domestic rule of law. The strong consensual element of international law means that states are for the most part only bound by treaties and rules they explicitly agree to. The implication of this feature is that very few international rules, with the exception of the UN Charter, customary law, and the decisions of the Security Council bind everyone. This means that equality before law is limited under treaty law to states that accede to a particular treaty.⁴ For example, treaties protecting various human rights bind only the states that have ratified them, and the statute creating the International Criminal Court binds only the states that have become members of the court.

This makes the character of international law different from domestic law where law binds individuals with or without their consent. While domestic law can also distinguish between subjects based on consent, say due to the law of contract, it typically contains a large number of legal rules which apply regardless of subjects' consent, including those restricting the use of violence, granting due process rights, or subjecting public officials to generally applicable law, and thus equality before the law means that individual are subjected to laws with general

applicability, and that they possess equal rights and obligations. By contrast, states' obligations vary with their willingness to commit to certain rules and not others, and there is no minimally required set of rules set are obligated to follow, outside of the meager constraints on the use of force and the principle of sovereign equality set out in the UN Charter. A well-known point of contention is that the authority of the International Criminal Court only applies to states that have ratified the Rome Statute, which means that states are divided between those whose officials and citizens are bound by rules for criminal accountability and those to whom they do not.

Equality before the law is necessary even in a legal system such as international law, because under a consent-based system, powerful states often manage to extricate themselves from their obligations to respect even the least intrusive general rules, such as non-interference with the sovereign prerogatives of other states, and from rules that should have a more general character, such as the international rules for criminal accountability. Consent cannot be determinative of states' rights and obligations in a world in which political officials often misrepresent their citizens' interests by withholding consent from rules that could better protect these interests, at least in the case of non-democratic/authoritarian states. The normative significance of state consent is weakened by its ability to divide the world into those to whom the rules apply and those to whom it does not.

We should acknowledge with Hurd that legalization is an important step towards the implementation of the rule of law. Nonetheless, it cannot constitute the endpoint of efforts to build the rule of law. An ideal of an international rule of law can inform efforts to reform the current system to reduce power asymmetries, and place guarantees in place to ensure a more even distribution of rights and responsibilities among states. Unless one believes that feasibility constraints for an international rule of law are so great that they disqualify it as a goal worth

pursuing, we should consider possible avenues for reform in international law that place limits on the arbitrary use of power, defend the equality and autonomy of individuals, and bind public officials to generally recognized rules. It is difficult to contemplate at this point in time a world in which states have stronger and equal obligations under international law given that states have a propensity to guard their sovereign prerogative jealously. Yet the domestic rule of law developed as a response to similar circumstances, in which individuals and groups enjoyed unequal status and power, there was no unified system of rules that applied to all, and legal rules lacked generality, coherence, or fairness in their application.

The rule of law for domestic law was an achievement many centuries in the making, and it started from structural background conditions not very different than the ones present in international law today. Douglass North, John Joseph Wallis, and Barry R. Weingast argue that the formation of modern states can be best understood as evolving from ‘natural state’ political orders, characterized by legal compromises among the powerful, dominant individuals, who agreed to respect each other’s privileges, including rights to territory and resources, and restrict their use of violence. ‘Natural orders’ were not inclusive, open, social orders because these privileges did not extend equally to the less powerful and more vulnerable members of the society in the same way that they do today in liberal democratic societies (North, Wallis, and Weingast 2013, 18–21, 30–76). States today rely on international law to protect their sovereign authority and territory, but at the same time insulate themselves from rules the more powerful they are, which leaves the less economically and militarily powerful states vulnerable to abuse. The former can withhold consent to international treaties that impose serious restrictions on their capacity to act, while the latter are limited in their capacity to use international law to limit violations of their rights and to protect their interests. Hierarchy, status, and raw power are as

much characteristics of international law today as they are of natural orders that characterized early state formation.⁵

International law in its current form is a rule *by* law system in which the officials in the system are guided by rules in their interaction, rather than a rule *of* law system, in which the officials are both guided and restricted by rules, and the subjects enjoy equality before the law. Rule *by* law is not acceptable as the ultimate expression of the rule of law because it does not achieve the aims of the rule of law, which are protecting the autonomy of the subjects and restraining the arbitrary use of power. While some existing features of international law will make it difficult to move beyond a consensual ‘rule by law’ framework, these features could be changed gradually to move international law toward a stronger rule of law system. Setting up general rules, expanding the number and reach of courts that give both states and individuals access to impartial dispute settlement, and creating more effective systems of enforcement are achievable given the rapid legalization of international politics today.

Therefore, an approach that takes the international rule of law as a moral ideal seriously requires the strengthening of features that circumscribe the authority of public officials and protect individual and state autonomy. Of the eight ‘formal’ features 1. generality, 2. publicity, 3. prospectivity, 4. stability, 5. capacity to reflect clear, reasonable, and mutually consistent demands on individuals, 6. proportional punishment, 7. easy access to courts and 8. an independent judiciary, only 2. publicity, 3. prospectivity, 4, stability and to some extent 5. capacity to reflect clear, reasonable and mutually consistent demands on subjects, are realized in international law. The increasing legalization of the relations among states means that more of their interactions and disagreements are governed by rules laid out in advance, that are relatively clear, stable, and public. But generality is not yet a feature of international law, nor is easy access

to courts, despite the rise in the number of international courts and tribunals. States are still the main subjects in international law, and they alone have standing to bring claims to most international courts. Furthermore, their legal standing has no effect when another state party to a dispute rejects the jurisdictional authority of an international court. Punishment for violations of international law is limited, which means proportional punishment is not yet a feature of rule-governed interaction among states. International law has been described as a self-help system and that description still applies today to large swaths of international law (Kelsen 1952, 14).

III. The Purpose of the International Rule of Law

In the absence of a bureaucratic structure that closely resembles a world government, two questions arise: 1. Which agents have the potential to exercise arbitrary power that must be limited? and 2. Who are the subjects of international law whose autonomy must be protected from arbitrary interference? The answer to the second question is more straightforward. International law is addressed mostly to states, with an increasing but still small role for individuals and other group and corporate agents – companies, indigenous groups, NGOs – as direct subjects of international law. An international rule of law would need to protect all of these agents, as well as any other actors that fall under its remit directly or indirectly through the mediating power of states, from arbitrary power exercised by global governance institutions and international officials in their exercise of their capacities.

The answer to the first question is that all of the agents that make, interpret, and apply international law can potentially exercise arbitrary power that must be limited. These are primarily states, who have the power to make treaties, and the international institutions that states

endow with autonomous capacity to apply and enforce the rules, such as the International Court of Justice, the World Trade Organization, various ad-hoc tribunals and regional courts and organizations, and the agencies of the United Nations system, including the Security Council. Thus states have a dual agency both as subjects and officials of international law.

The idea that international law should be promulgated and constrained such that it protects state autonomy is very much in dispute. Jeremy Waldron argues that the protection of state autonomy should not be one of the aims of an international rule of law (Waldron 2006, 18). He draws an analogy with domestic law, for which he distinguishes two general subjects, individuals and administration, and argues that only individuals are entitled to the benefit of the rule of law and the protection of their autonomy. The rule of law creates a predictable environment in which individuals exercise their freedom and plan their life secure in the knowledge that no arbitrary use of state power will undo their plans at will. Administration, by which he means the collection of government bureaucratic bodies, holds no entitlement to the protection of its autonomy from the law in the same way. Whereas less law is better for individual autonomy, no such presumption is warranted with respect to administration. In fact, more law is required to regulate administrative bodies rather than less, because this means that more of their actions are taken in accordance with rules laid out in advance and that their discretion is limited accordingly (Waldron 2006, 18–19).

As officials in charge of making international law, states are in the same position as domestic administration, Waldron claims. Their behavior must be constrained and their discretion limited by more law not less, and they do not gain the presumption in favor of the protection of their autonomy. States are constituted as legal entities of international law and their

autonomy does not rest on a fundamental normative principle in the same way that individual autonomy does in domestic law (Waldron 2006, 23, 2011, 339).

But is it true that international law should not protect state autonomy? What would be the consequence of extensive regulatory intrusion of international law into member states, with no limit on the ability of international law to regulate or change national laws, and to create differential protections and privileges for different states such that the autonomy of some is protected but not of all? To some extent this is the current reality of international law, with the permanent members of the Security Council exercising disproportionate power over other states and enjoying some measure of immunity from the rules that these other states are subjected to. Indeed, as Anthony Anghie has argued, it is plausible to argue that the Security Council divides the world into two: those to whom the rules do not apply (the five permanent members), and those to whom they do.⁶ Antoinette Scherz and Alain Zysset argue that enhancing the normative legitimacy of the Security Council requires indeed reforming the membership structure, although any substantial reforms will meet with serious resistance (Scherz and Zysset, 13-15). Nonetheless, without such reforms, the imbalance of power at the Security Council seriously affects the fairness and legitimacy of international law as a whole, and the practical consequence of this imbalance can be a significant loss to the value of democratic self-determination within states. It opens the possibility of such severe erosion of sovereignty and all of the values it protects (independence from others, local rule, diversity of political and institutional cultures) that it raises questions about the legitimacy of international law as a whole. The existing institutional set-up could end up denying states the liberty of pursuing diverse goals, and it would misdirect the power of international law in an oppressive, paternalistic direction (Nardin 1983).

States are entitled to autonomy not for their own sake, but for the sake of the individuals they represent and govern. Thus, the value of state autonomy rests on the value of individual autonomy as a fundamental normative commitment, and in this sense, it is derivative. States' interest in autonomy is important because it protects individual and collective self-determination. As officials of international law, we can insist that states should be rule-bound in their law-making capacity. But as subjects of international law, states are entitled to a wide berth to make decisions in line with the collective wishes of their populations, and the fact that state autonomy is instrumentally valuable does not mean it carries little weight. Precisely because of its role in protecting individual autonomy, state autonomy under international law should enjoy the widest presumption. At the same time, states are not entitled to unlimited autonomy. State autonomy must be limited for the sake of other states' autonomy and the autonomy of individuals who are their own citizens or the citizens of other states. For example, international law cannot legitimate a state interfering in the autonomous decisions of other states, even if that interference has been justified via internal democratic processes. Limitations on state autonomy are justified in the name of severe violations of individual autonomy, of other states' autonomy, of solving cooperation problems such as public goods and collective action dilemmas, and in the interest of international peace and order.

Waldron quotes Abram Chayes approvingly to suggest that as mere officials of international law, states must be bound by law and are not entitled to respect for their autonomy: 'if 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' (Waldron 2011, 328). But this position does not follow from a proper description of states as both *subjects and officials* of international law. As law-makers,

states are subject to international law as governmental bodies are subject to constitutional arrangements. But as addressees of the law, they must be granted wide protections for their autonomous law-making capacity internally.

States are not the only officials of international law. International law-making organizations, including international courts, must exercise their powers through laws that are prospective, general, stable, reflect demands that are reasonable and compatible with each other, whose operation is independent of political influence and can provide easy access for the law's subjects, whether states, individuals or other agents operating in international politics.

State autonomy is valuable to the extent it protects individual autonomy. The protection of individual autonomy in international law can be realized through the protection of basic human rights, and through rules that prevent states and international organization from unduly interfering with the ability of individuals to exercise their freedom and plan their lives. This is in effect the primary goal of an international rule of law, compatible with understanding states as agents of their people and acting on their behalf. International law must protect individuals from their own states, other states or agents, and states from each other and from international institutions (Waldron 2011, 324).

IV. The Institutional Contours of the International Rule of Law

Both states and individuals enjoy some degree of rights protection in international law. States benefit from rights of non-interference with their sovereign authority, and limited rights of sovereign equality under the rules of the UN Charter, while individuals benefit from an extensive network of human rights treaties. But there are still many unresolved conflicts among the rights

of states, and between the rights of states and those of individuals, as debates about the permissibility of humanitarian intervention or limits on sovereign immunity illustrate (Nardin and Williams 2005; Pattison 2012; Knuchel 2010).

Realizing the moral ideal of the rule of law in international law requires institutional reform. At the very minimum, we should move in the direction of creating some universally binding rules and courts with compulsory jurisdiction, which guarantee better access to all of the subjects of international law to the resolution of grievances of the peaceful settlement of conflicts.

Many if not all of the institutions and courts operating in international law, that contribute to making, interpreting, applying rules, and adjudicate conflicts, including the World Trade Organization, the International Criminal Court, the Law of the Sea Tribunal carry the potential to abuse their authority, and currently they face little oversight. Correcting this significant shortcoming of international law requires rules that specify in detail the limits of the authority delegated to international governance institutions, and empowers agents to check each other and to render judgment over arbitrary exercises of authority. The international rule of law demands more than oversight and accountability ensured through institutional checks and balances. It demands that equality before law be strengthened and the protection of basic interests of the participant in the international order be made explicit through a list of rights and entitlements that receive special status as fundamental building blocks of an international legal order.

There are various institutional alternatives for building of these features of the international rule of law, but one that merits attention is a constitutional international order. A constitutional international order defines the division of authority between international institutions and states, prescribes rights of non-interference for states, and enumerates basic

individual rights deserving special weight in the making, interpretation, and application of international law.

The way to solve the problem of state opt out of the morally required minimum of law is to create bodies whose authority is to create international law that applies universally, evenly, and efficiently. For example, giving the ICC jurisdiction over crimes committed by the citizens of all states, not just member states, would be a step forward in this direction. Indeed, as Thomas Christiano argues, it is hard to see the exclusion of some of the most powerful states from its jurisdiction as something other than a bold attempt to place themselves above international law (Christiano, 6-11). States could adopt universally binding rules is via some form of constitutionalization, which would spell out some minimal, binding obligations and rights for states, individuals, and other subjects of international law. Constitutionalization can preserve a substantial level of autonomy for individual states. The point of a constitutional order is to make sure that it does precisely this.

Developing an account of the constitutionalization of international law goes beyond the aim of this paper. However, others have offered instructive insights. Christian Tomuschat describes an international constitution as ‘a legal framework of limited number of basic rules’ to constrain states ‘which determines their basic rights and obligations with or without their will’ (1993, 211). Judge James Crawford, who has served at the International Court of Justice, defends a constitutional order which involves constraints on state powers and on international institutions, and guarantees for rights (2014, 455, 460–61, 466). He argues that the process of constitutionalization should build on the emerging hierarchy in international law, that places the UN Charter with its the restriction on the use of force of at its core, along with *jus cogens* norms and obligations *erga omnes* (Crawford 2014, 465–66).

While a global constitutional order would constitute a substantive, qualitative transformation of the relationship of national to international law, such transformation would not be wholesale. Global constitutionalism could still preserve the largely consensual nature of international law but make changes in the direction of creating universally binding law. This change will alter the relationship of states to international law on a number of crucial issues, and we can insist international law does so only for those issues to avoid overreach and the disabling of state sovereignty.

The road to an international constitutional order will be long and hard, fraught with resistance from states and international organizations alike, and punctuated by difficult choices about the precise content of the constitutional rules. But it marks one of the surest ways to ensure the strengthening of international rule of law. Building the rule of international law represents an important avenue for enhancing the legitimacy of international law, by giving states and individual better reasons to comply with its demands. For example, global constitutional norms which limit the authority of international law, mandate or proscribe certain behaviors for all subjects, and create courts with universal compulsory jurisdiction, can stave off concerns with arbitrary interference with state sovereignty, the unequal application of the rules, and the lack of access to courts for the peaceful resolution of disputes. A global constitution can address all of the existing limitations of international law in this respect while protecting an important sphere of autonomous state action. And it can do so consistent with a fundamental commitment to respect the basic rights of individuals on behalf of whom states exercise their authority.

Notes

¹ I thank Terry Nardin for this point.

² For example, the party appoints key members of courts or is able to veto appointments (Peerenboom 2002, 8).

³ The Rule of Law Index <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016> (accessed September 24, 2017) is a project of the non-profit World Justice Project, set up by the American Bar association with support from the International Bar Association and other groups.

⁴ Even under treaty law, signatory states do not have the same obligations as members of the same treaty. The practice of reservations allows states to opt out of certain provisions of a treaty. In customary international law, persistent objectors are states who explicitly and repeatedly claim an exemption from a generally accepted customary rule.

⁵ Consider also the United States during its westward expansion. New territories, although formally under the jurisdiction of federal law, had weak law, applied unevenly, with courts which were few and far between, under-resourced, and there was little if any supervision of legal officials. See (Kenyon 1968, 682–83). International law today shares many of these characteristics.

⁶ Anthony Anghie conference presentation, The Global Rule of Law, Singapore, February, 2017.

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