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# Why Sovereigns Are Entitled to (Horizontal) Benefits of the International Rule of Law

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*A dozen years ago, Jeremy Waldron published an influential article arguing that sovereign states are not entitled to the benefits of the international rule of law. His conclusion follows from his assertions that the purpose of the rule of law is to protect individual liberty, and the purpose of international law is to protect individuals. This article critically responds to his position. International law is based on the notion that states are autonomous and equal members of the international society ordered through legal relations. The legal relations of the international community of states, I argue, constitute the horizontal dimension of the rule of law, which Waldron overlooked. Focusing on horizontal rule of law functions, I provide descriptive, theoretical, and normative reasons why states are, and should be, entitled to the benefits of the rule of law.*

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#### INTRODUCTION

A decade ago, Jeremy Waldron published an influential article arguing that sovereign states are not entitled to the benefits of the rule of law. Pared to the core, his argument is: (1) “the point of the rule of law (ROL) is to protect individual values like liberty, dignity, etc.,”<sup>1</sup> (2) “the ‘true’ subjects of international law (IL) are really human individuals (billions of them);”<sup>2</sup> (3) in domestic legal systems, government officials and agencies are not entitled to rule of law protections like private individuals;<sup>3</sup> (4) sovereign states should be seen as “officials” or “agents” of the international law system rather than as subjects;<sup>4</sup> and (5) “then maybe it is inappropriate to think that sovereign states are entitled to the same ROL protections at the international level as individuals are entitled at the municipal level.”<sup>5</sup> This narrow construction, I argue in this essay, is an unwarranted and undesirable theoretical limitation of the benefits of national and international rule of law.

A few words about the current Russian invasion of Ukraine will help set up this argument. Russian President Vladimir Putin justified the invasion as necessary to protect Russian-speaking residents of Donbas region (who he claims want to be part of Russia) from genocide by Ukraine; he claimed that Ukraine is not a genuine state but a historic part of greater Russia, and that NATO’s expansion into Eastern Europe is a threat to Russia’s security.<sup>6</sup> The UN General Assembly voted overwhelmingly to condemn Russia’s invasion as a violation of Article 2(4) of the UN Charter prohibiting the use of force against the territorial integrity and political independence of another state.<sup>7</sup> The first line of the Resolution states: “Reaffirming the paramount importance of the Charter of the United Nations *in the promotion of the rule of law among nations.*”<sup>8</sup> Ukraine filed a complaint against Russia at the International Court of Justice, arguing that Russia falsely claimed Ukraine was committing genocide as a pretext for its invasion. By a vote of thirteen to two (the dissenting judges were from Russia and China), the ICJ ordered, “[t]he Russian

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1. Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 EUR. J. INT’L L. 315, 322 (2011).

2. *Id.* at 315.

3. *Id.* at 322–23.

4. *Id.* at 327–332.

5. *Id.* at 315.

6. See *Extracts from Putin’s Speech on Ukraine*, REUTERS (Feb. 21, 2022, 12:39 PM), <https://www.reuters.com/world/europe/extracts-putins-speech-ukraine-2022-02-21/>.

7. G.A. Res. A/ES-11/L.1 (Mar. 1, 2022).

8. *Id.* at 1.

Federation shall immediately suspend the military operations.”<sup>9</sup> Russia has ignored this order. After holding a “referendum” in areas under its occupation, Putin signed a law annexing nearly 20% of Ukrainian territory, proclaiming it part of Russia.<sup>10</sup> The UN General Assembly rejected this purported annexation as illegal under international law by a vote of 143 to 4 (with 35 abstentions).<sup>11</sup>

Waldron is likely aghast at the murderous and horrifically destructive Russian invasion of Ukraine. Still, those who argue that sovereign states are not subjects entitled to the benefits of the international rule of law should be given pause by this latest reminder of the danger that states pose to one another and their populaces. They should consider why states view actions like this as a violation of the rule of law, and consider whether granting states the benefits of the rule of law has important positive consequences.

On descriptive, theoretical, and normative grounds, I argue that sovereign states, along with all persons and entities, should be regarded as subjects fully entitled to all benefits of international rule of law. Part I elaborates the fundamental international law principle of sovereign autonomy, comprising a nested arrangement that protects both states and individuals. Depicting the rule of law as the ideal of a legally ordered community, Part II shows that the rule of law advances several vertical and horizontal functions—not only individual liberty. Part III reveals that Waldron overlooked the horizontal rule of law treatment of government within domestic legal systems. Articulating the international rule of law as the ideal of the legal ordering of the international community, Part IV argues that sovereign states already are, and should be, entitled to the benefits of the international rule of law. Part V closes the essay with brief comments about how this understanding is well suited to addressing the emerging transnational legal order. In the course of this critical engagement with Waldron’s position, I lay out a broad understanding of the rule of law that applies within states and the international community.

#### I. INTERNATIONAL LAW’S NESTED DUALISM OF STATES AND INDIVIDUALS

“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,”<sup>12</sup> Waldron asserts. This stance, however, tends to erase the pivotal role international law accords to states, protecting state autonomy as well as individuals in a nested arrangement.<sup>13</sup> Respect for state sovereignty, non-

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9. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Unofficial Press Release, ¶ 86 (1) (Mar. 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-PRE-01-00-EN.pdf>.

10. Jonathan Landay & Felix Hoske, *Putin Finalises ‘Annexation’ in Ukraine even as Troops Flee Front*, REUTERS (Oct. 5, 2022, 6:37 PM), <https://www.reuters.com/world/ukraine-forces-break-through-russian-defences-south-advance-east-2022-10-03/>.

11. Bill Chappell, *Only 4 Countries Side with Russia as UN Rejects Annexations in Ukraine*, NPR (Oct. 13, 2022, 9:49 AM), <https://www.npr.org/2022/10/13/1128642820/un-rejects-russian-annexations-ukraine>.

12. Waldron, *supra* note 1, at 325 (emphasis added).

13. Arguing that international law protects individuals and the autonomy of states, *see* Carmen

interference, and sovereign equality are fundamental principles of international law that enable states to serve their responsibilities to their populace. Primary responsibility for the protection of individuals in this arrangement is accorded to the nation state, while direct protection for individuals under international law is largely limited to human rights.

This nested arrangement has long been a staple of international law. Samuel Pufendorf articulated a view variously expressed by many theorists in the past four centuries during the consolidation of the state system: “the over-riding purpose of states is that, by mutual cooperation and assistance, men may be safe from the losses and injuries which they may and often do inflict on each other.”<sup>14</sup> Emer de Vattel, an influential early international law writer, similarly held that nations are “societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.”<sup>15</sup> The duty of the state is to insure the safety and welfare of the populace.<sup>16</sup> “States are now widely understood to be instruments at the service of their peoples, and not vice versa,” observed UN Secretary General Kofi Annan.<sup>17</sup>

Sovereign states discharge this duty through the right and power to act on behalf of its populace both internally and externally. “It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere with the government of another,” Vattel observed.<sup>18</sup> “The sovereign is he to whom the nation has entrusted the empire and the care of the government,” he continued. “It does not then belong to any foreign power to take cognizance of the administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it.”<sup>19</sup> Immanuel Kant’s 5th article for peace among nations: “No state shall violently interfere with the constitution and administration of another.”<sup>20</sup> Article 2(4) of the UN Charter codifies this position: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Consistent with this position, the International Court of Justice asserted, “[e]very State possesses a fundamental right to choose and implement its own political, economic, and social systems.”<sup>21</sup>

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E. Pavel, *The International Rule of Law*, 23 CRITICAL REV. INT’L SOC. & POL. PHIL. 332, (2019).

14. SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 139 (Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673).

15. EMER DE VATTEL, THE LAW OF NATIONS 67 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797).

16. PUFENDORF, *supra* note 14, at 151; VATTEL, *supra* note 15, at 97.

17. Quoted in Shaffer & Sandholtz, *supra* note 7, at 16.

18. VATTEL, *supra* note 15, at 289.

19. *Id.* at 290.

20. IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 112 (M. Campbell Smith trans., George Allen & Unwin Ltd. 1903) (1795).

21. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 131 (June 27).

The right of sovereign states to noninterference is not upheld out of a naive faith in states or misplaced dedication to sovereignty as an abstract notion, but because it serves several crucial purposes. A major impetus in the development of international law was to diminish incessant wars in Europe and the carnage they wrought on civilian populations. Wars of aggression occur when a state (or coalition of states) seeks to expand its territory or access to resources by conquering or absorbing or controlling another state or its territory; and also when a governing regime feels its internal hold on power is threatened by rising internal discontent or by aggression from another state, which it attacks to rally the populace and to reduce the perceived external threat. Respect for sovereignty and non-interference protect individuals by dampening wars.

Nonetheless, many international law scholars (particularly from Western societies) disfavor sovereignty<sup>22</sup>—a shield behind which states all too often abuse their own citizens—and insist that the *primary* objective of international law is to protect individuals. Carmen Pavel argues that state autonomy has no intrinsic value of its own: “state autonomy is valuable to the extent that it protects individual autonomy.”<sup>23</sup> This position links state sovereignty to a deeper ultimate purpose that provides a critical standard and justification for outsiders to coercively penetrate state autonomy when necessary to protect citizens from bad actions by their own governing regime.

Owing to conflicting interests, mutual distrust, nationalist sentiments, global pluralism of values, and the prioritization of peace, however, it is not acceptable to penetrate state sovereignty for other than the most blatant violations of human rights. States are not in a position to determine in an unbiased way—one not colored by their own interests and values—whether or when other states are in fact serving or harming their citizens. The leaders of every state are skeptical and critical of the actions of other states (including allies), while at the same time they reject criticisms from others of their own conduct. Officials in the United States, Germany, and Japan, no less than officials in Russia and China, and every other country, insist that they, and they alone, are in the best position to recognize and advance the interests of their populace. All states legislate morality, set up economic and political systems, specify the status of religion, impose criminal law and taxation, create and utilize coercive policing, restrict political opposition within certain parameters, and limit protests by citizens, in certain states suppressing the press (through criminal or civil sanctions) or using brutal crackdowns in the name of maintaining public security and order. In these and other matters states make choices and take actions that other states do differently. Self-determination and political and moral pluralism—which give rise to contrasting views of substantive justice and the common good within societies—are moral considerations that underlie sovereign autonomy.<sup>24</sup> Finally,

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22. BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST LEGAL ORDER 3 (2011).

23. Pavel, *supra* note 13.

24. For an account, see ROTH, *supra* note 22.

coercively penetrating sovereignty may provoke a violent backlash by the governing regime, which leads to further abuses and possibly outright war.

State sovereignty and non-interference have become entrenched in the primary international law principle of sovereign equality: all states must be treated equally in their capacity to act on behalf of their populace (self-determination) and all states enjoy the same legal rights as sovereigns within international law.<sup>25</sup> What sovereign equality means, Arthur Watts wrote, “is that since all States are sovereign, they are thus neither subject to any external authority nor themselves possessors of authority or pre-eminence over other States, and are accordingly in those respects in principle legally equal with one another as members of the international community.”<sup>26</sup> Sovereign equality is especially necessary to protect weak states against the coercive intrusions of powerful states.<sup>27</sup> The 2012 Declaration of the High-level Meeting of the UN General Assembly on the Rule of Law (more on this Declaration shortly) emphasized, “[w]e rededicate ourselves to support all efforts to uphold sovereign equality of all states, to respect their territorial integrity and political independence[.]”<sup>28</sup> A country-by-country study by Noora Arajarvi found that Non-Aligned countries (120 in total) collectively and individually have “consistently demanded that the international rule of law must be anchored in the principle of sovereign equality.”<sup>29</sup>

Russia and China have affirmed the principle of “sovereign equality,” which includes that “[s]tates enjoy their rights on the basis of independence and on an equal footing” along with “the principle of non-intervention in the internal or external affairs of States.”<sup>30</sup> A joint statement they issued three weeks before Russia’s invasion of Ukraine states:

The sides [Russia and China] believe that the advocacy of democracy and human rights must not be used to put pressure on other countries. They oppose the abuse of democratic values and interference in the internal affairs of sovereign states under the pretext of protecting democracy and human rights, and any attempts to incite divisions and confrontation in the world. The sides call on the international community to respect cultural and civilizational diversity and the rights of peoples of different countries to self-determination.

The sides [Russia and China] note that the Charter of the United Nations

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25. See Stéphane Beaulac, *The Rule of Law in International Law Today*, in RELOCATING THE RULE OF LAW 197, 209–12 (Gianluigi Palombella & Neil Walker eds., Hart Publishers 2008).

26. Arthur Watts, *The International Rule of Law*, 36 GER. Y.B. INT’L. LAW 15, 31 (1993).

27. ROTH, *supra* note 22, at 13–15.

28. G.A. Res. A/67/L.1, ¶ 3 (Sept. 19, 2012) [hereinafter Rule of Law Declaration].

29. Noora Arajarvi, *The Core Requirements of the International Rule of Law in the Practice of States*, 13 HAGUE J. RULE L. 173, 183 (2021).

30. See The Declaration of the Russian Federation and the People’s Republic of China on the Promotion of International Law, China-Russ., June 25, 2016, <https://www.lawfareblog.com/text-russia-china-joint-declaration-promotion-and-principles-international-law>; see also Joint Statement of the Russian Federation and the People’s Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, China-Russ., Feb. 4, 2022, <http://en.kremlin.ru/supplement/5770>.

and the Universal Declaration of Human Rights set noble goals in the area of universal human rights, set forth fundamental principles, which all states must comply with and observe in deeds. At the same time, as every nation has its own unique national features, history, culture, social system and level of social and economic development, universal nature of human rights should be seen through the prism of the real situation in every particular country, and human rights should be protected in accordance with the specific situation in each country and the needs of its population.<sup>31</sup>

Significantly, Russia and China affirm their commitment to international law and human rights, as well as their obligation to serve their populace; they also support democracy, tailored to the conditions of each society. Russia contends that its conduct in Ukraine is justified under international law, as described at the outset. On its treatment of Uyghurs, which has received international condemnation, China denies that it has mass imprisonment camps and insists that the Uyghurs who have been detained have engaged in terroristic acts. Their joint statement contends that foreign critics are imposing their own values and agenda, failing to respect the unique cultural, social, economic, political, and legal circumstances of Russia and China.

Skepticism about Western motives has ample grounds. Many examples of uses and abuses of international law by Western countries to bludgeon other societies can be cited, from Western colonization of large parts of the globe, to the United States invasion of Iraq to topple Saddam Hussein, to torture of detainees by the Bush Administration.<sup>32</sup> The Chinese no doubt recall the Opium War, in which Britain seized control of Hong Kong, and in the name of international law and free trade forced China to allow in opium brought by the British East India Company.<sup>33</sup> International law was born of European notions and practices that were applied as standards to adjudge other nations.<sup>34</sup> As Terry Nardin describes, this “generated a bifurcated international order: an egalitarian horizontal international law for relations between European states and a hierarchical imperial law for relations between European and non-European peoples.”<sup>35</sup> International lawyers may insist (exasperatedly) that this is all in the past and not relevant today, but the invasion of Iraq is a recent event, not to mention ongoing US drone strikes in other nations without their permission.<sup>36</sup> In an article on the international rule of law, James Crawford, a prominent international lawyer who subsequently served on the International Court of Justice, wryly commented: “The United States these days

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31. Joint Statement of the Russian Federation and the People’s Republic of China on the International Relations Entering a New Era and the Global Sustainable Development, *supra* note 33, at III.

32. See Ian Hurd, *The International Rule of Law: Law and the Limits of Politics*, 28 ETHICS & INT’L AFFS. 39, 48 (2014).

33. See C.A. BAYLY, *THE BIRTH OF THE MODERN WORLD 1780-1914: GLOBAL CONNECTIONS AND COMPARISONS* 137–138 (2004).

34. See BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* ch. 6 (2017).

35. Terry Nardin, *Theorising the International Rule of Law*, 34 REV. INT’L STUD. 385, 388 (2008).

36. Peter Baker et. al., *U.S. Drone Strike Kills Ayman al-Zawahri, Top Qaeda Leader*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/08/01/us/politics/al-qaeda-strike-afghanistan.html>.



appears to apply the policy: international law for others and not for itself.”<sup>37</sup>

Past and present illegal actions by Western states, of course, do not absolve Russia and China of their own violations of international law. States regularly make factual claims and offer legal justifications for their actions that are not true or consistent with international law. The factual premises of the U.S. invasion of Iraq were false, and its overthrow of the government and subsequent occupation violated Iraq’s sovereignty, resulting in the deaths of several hundred thousand Iraqi civilians from war-related causes.<sup>38</sup> Russia’s invasion and attempted annexation of eastern and southern Ukraine patently violates the territorial integrity of Ukraine, and its deliberate attacks on civilians are war crimes;<sup>39</sup> and strong evidence has been compiled that China is violating the human rights of Uyghurs.<sup>40</sup>

The point of this discussion is that, owing to well-founded concerns about wars, conflicting interests, a mutual lack of trust, nationalism, contrasting political and moral values, and the depredations of powerful states on weak states, international law constructs a nested dual arrangement in which states have the primary duty to protect their populace, and are shielded from coercive foreign interference in their treatment of their own citizens (except when this treatment rises to the level of flagrant and extreme human rights violations and even then with great reluctance). This arrangement gives a state regime great scope to harm its populace—a sadly common occurrence—but no other approach is currently viable. For these reasons, the preservation of state autonomy within a community of states is a direct objective of international law, even as it strives to protect individuals.

Waldron may be correct that “*ultimately*, international law is oriented to the well-being of human individuals, rather than the freedom of states.”<sup>41</sup> But international law serves this goal via protections for state autonomy and equal sovereignty to act on behalf of citizens. Protections for state sovereigns, I argue below, are and should be included within the benefits of the international rule of law *for the good of individuals* in societies around the world.

## II. HORIZONTAL AND VERTICAL FUNCTIONS OF THE RULE OF LAW

Disagreement over what the rule of law means and its defining features,

37. James Crawford, *International Law and the Rule of Law*, 24 ADEL. L. REV. 3, 8 (2003).

38. See Philip Bump, *15 Years after the Iraq War Began, the Death Toll is Still Murky*, WASH. POST (Mar. 20, 2018), <https://www.washingtonpost.com/news/politics/wp/2018/03/20/15-years-after-it-began-the-death-toll-from-the-iraq-war-is-still-murky/>.

39. See Missy Ryan et al., *Russia Strikes Kyiv and Cities Across Ukraine after Crimea Bridge Attack*, WASH. POST (Oct. 10, 2022), <https://www.washingtonpost.com/world/2022/10/10/kyiv-missile-strikes-russia-ukraine-war/>; Masha Gessen, *The Prosecution of Russian War Crimes in Ukraine*, NEW YORKER (Aug. 8, 2022), <https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine>.

40. Office of the High Commissioner for Human Rights, OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People’s Republic of China (Aug. 31, 2022), <https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assesment.pdf>.

41. Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL’Y 15, 25 (2006) (emphasis added).

requirements, and purposes is endemic.<sup>42</sup> Even greater disagreement exists over the rule of law in the international context—including doubts about whether the rule of law applies beyond the nation state.<sup>43</sup> Given this pervasive state of disagreement, declarations about the rule of law should be taken not as generally agreed upon descriptive or conceptual claims, but as arguments offered by theorists to persuade others about how the rule of law *should* be understood.

When evaluating these arguments, one must be wary of shifts from conditional assertions to unconditional assertions. Early in his essay, Waldron states, “[w]e usually say that the point of the ROL is to protect individual values like liberty, dignity etc.”<sup>44</sup> (“Usually” is a conditional assertion.) It is true that many theorists highlight liberty and dignity—Waldron calls it “Hayekian freedom”<sup>45</sup>—though there is no consensus that this is *the* point. Later in the essay, Waldron puts it in stronger terms: “The *whole point* of the ROL is to secure individual freedom . . . 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.”<sup>46</sup> But this statement is too unequivocal for a concept that Waldron himself famously called “essentially contested.”<sup>47</sup> And this assertion carries much of his argument. Once he identifies *the* point of the rule of law as advancing individual autonomy, and *the* purpose of international law to protect individuals, it all but follows that states are not entitled to the benefits of international rule of law—since states are not individuals and, Waldron emphasizes, “are not the bearers of ultimate value.”<sup>48</sup>

Martin Krygier, another influential rule of law theorist, recognizes that “many problems have been identified for the rule of law to solve.”<sup>49</sup> “And in truth, all sorts of goods are today claimed to flow from it—e.g., economic development, human rights, and democracy.”<sup>50</sup> While rule of law is linked to various benefits and

42. See generally BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

43. The literature on international rule of law has ballooned in recent decades. See Leander Beinlich & Anne Peters, *An International Rule of Law*, OXFORD BIBLIOGRAPHIES (Aug. 25 2021), <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0222.xml>. Along with other articles on the topic cited in this essay, illuminating recent articles include Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?*, 65 INT’L & COMPAR. L.Q. 277 (2016); Ian Hurd, *The International Rule of Law and the Domestic Analogy*, 4 GLOB. CONST. 365 (2015); Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMPAR. L. 331 (2008); Paul Burgess, *Deriving the International Rule of Law: An Unnecessary, Impractical, and Unhelpful Exercise*, 10 TRANSNAT’L LEGAL THEORY 65 (2019); Richard Collins, *Two Idea(l)s of the International Rule of Law*, 8 GLOB. CONST. 191 (2019); Nardin, *supra* note 35.

44. Waldron, *supra* note 1, at 322 (emphasis added).

45. *Id.* at 339; see also *id.* at 338 n.71.

46. *Id.* at 338 (emphasis added).

47. Jeremy Waldron, *Is the Rule of Law and Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002).

48. Waldron, *supra* note 41, at 24.

49. Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 ANN. REV. L. & SOC. SCI. 199, 203 (2016).

50. *Id.* at 215.

solutions to various problems, he writes, “[r]ule of law traditions have particularly focused on arbitrary exercise of power, often using precisely that word, as the antihero in the rule of law story.”<sup>51</sup> Krygier identifies the *telos* of the rule of law as restraining the arbitrary exercise of power, and he analyzes various implications of seeing the rule of law in terms of this end.<sup>52</sup>

Presenting the rule of law in terms of a *singular* purpose or point or end is problematic for several reasons. To start with, various purposes have been identified by theorists, including Waldron and Krygier, who correctly assert that theories about the rule of law have often referred to the (different) purpose each highlights. But centering on liberty produces different emphases and implications for the rule of law than centering on restraining the arbitrary exercise of power. Why pick one as *the* end when both have been identified for sound reasons? Furthermore, the assertion that the rule of law serves a specific purpose (*telos*) that explains its existence (*raison d’être*) fits uneasily with how the rule of law has come about. The rule of law (whatever it means) was not designed or created by anyone for a particular purpose, but rather evolved over centuries owing to a confluence of beliefs, motivations, circumstances, and institutional developments in connection with cultural, religious, economic, political, legal, and other factors.<sup>53</sup> Every rule of law society has a unique history, institutional arrangement, and set of consequences. Assertions about *the* purpose is a projection by given theorists based on their particular priorities. For instance, consistent with his liberal commitment to economic liberty and his antagonism to the social welfare state, Hayek proclaimed that the rule of law is about individual freedom.<sup>54</sup> Another objection to claims about *the* purpose or point is that that social institutions commonly have multiple uses and do various things, so selecting one downplays or obscures others that may also be significant. Encompassing various functions provides a fuller understanding and appreciation of the rule of law at the national and international levels. In a study of historical and conceptual discussions of the rule of law, Richard Fallon gleans three purposes: “to protect against anarchy and establish a scheme of public order, to allow people to plan their affairs with advance knowledge of the legal consequences, and to protect against at least some types of official arbitrariness.”<sup>55</sup>

Rather than project a single purpose, let us instead focus on function, understood in terms of what the rule of law does (its effects). Bypassing the theoretical impasse over definition and elements, my starting point is a basic proposition about when the rule of law exists: *the rule of law exists in a society when government officials and legal subjects are bound by and abide by law*. “Legal subject” includes people as well as entities with legal personality (i.e. corporations, organizations,

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51. *Id.* at 203.

52. See also Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in RE-LOCATING THE RULE OF LAW 45 (Gianluigi Palombella & Neil Walker eds., Hart Publishers 2008).

53. See TAMANAHA, *supra* note 42.

54. *Id.* at 65–71.

55. Richard H. Fallon, “The Rule of Law as a Concept in Constitutional Discourse,” 97 COLUM. L. REV. 1 42–43(1997).

states, etc.) that engage in actions addressed by the law. The rule of law, then, is an *ideal* that strives to achieve an *effective legal ordering within a community*. As I show, this conception of the rule of law applies within states as well as at the international level.

This formulation does not reduce the rule of law to simply following the law. It is the ideal of a legally ordered community. Law does not address all actions and no society is completely legally ordered—matters not regulated by law always exist and legal violations always occur. This ideal is actualized as matter of degree; its degree of achievement varies across locations as well as across areas of legal regulation (economic transactions, criminal conduct, government actions, etc.); and it is achieved to a greater extent in rule of law societies than at the international level.

Now let me summarily identify five major functions of an effective legal ordering within a community grounded in the ideal of universally binding law (others functions may exist as well).<sup>56</sup> The first two functions, as Waldon and Krygier respectively assert, is that the rule of law *enhances individual freedom and dignity*, and *restrains the arbitrary exercise of power*.<sup>57</sup> A third crucial function the rule of law provides is overall *security* and *trust* in society that one is protected from intentional and negligent injuries by others, that one's property is protected, that economic exchanges will be effective, that the government will carry out its duties, and so forth, allowing actors to rely upon the presence of legal rules and institutions that protect, enable, and stand behind their activities in case something goes wrong.<sup>58</sup> A fourth function is that rule of law in modern society gives rise to (*constructs or constitutes*) a multitude of institutions and relationships in society—from the creation of corporations, to property ownership and contractual relations, to business transactions, to employment relations, to the creation and operation of government and private organizations, and vastly more. Fifth, drawing on the preceding functions, the rule of law *enhances economic development*.

All five functions matter greatly. Personal liberty is important, to be sure, but theorists inclined to prioritize individual liberty among these various benefits should recognize that not all cultures and circumstances share this priority, nor is it obviously the most fundamental. Protection from arbitrary government power is essential, though other threats and concerns exist. If a pervasive lack of security and trust prevails, social interaction would be limited and productive activities would freeze. Large scale societies function vastly more effectively thanks to the constitutive power law. Economic development provides basics like food, water, clothes, shelter, sanitation, medical care, and education, which are prerequisites to exercising freedom.

For the purposes of analysis, it is useful to subdivide these functions into two

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56. See Brian Z. Tamanaha, *Functions of the Rule of Law*, in THE CAMBRIDGE COMPANION TO THE RULE OF LAW 221 (Jes Meierhenrich & Martin Loughlin eds., Cambridge Univ. Press 2021).

57. *Id.*

58. *Id.* at 222–23.

perspectives on the rule of law: *vertical and horizontal*. The vertical perspective emphasizes coercive government treatment of citizens, whereas the horizontal perspective emphasizes actions and intercourse within society. The first two functions identified above—enhancing liberty and restraining arbitrary power—are based on the vertical perspective, derived from liberalism’s concerns about government tyranny and individual liberty.<sup>59</sup> The other three functions—bringing security and trust, constituting relations and institutions, and enhancing economic development—are based on the horizontal perspective that encompasses the benefits of the rule of law within society generally.<sup>60</sup> The horizontal benefits of the rule of law are enjoyed by *all* actors within society, including the state, and as explained shortly, has particular relevance to the international rule of law.

### III. WHAT WALDRON OVERLOOKED WHEN EXCLUDING SOVEREIGNS

Waldron’s argument that states are not subjects entitled to the benefit of the rule of law is sophisticated and lengthy, so only a summary of his core points can be provided here. As mentioned, he identifies *the* purpose of the rule of law as enhancing individual freedom, and *the* purpose of international law as protecting individuals.<sup>61</sup> He points out that since the rule of law is about placing legal restraints on government in furtherance of individual liberty, its primary thrust is to constrain the liberty of government. “Governmental freedom is the not the *raison d’être* of the ROL.”<sup>62</sup> Waldron challenges the conventional analogy of states in the international community under international law to the position of individuals within society under domestic law. This analogy is misleading, he contends: “it must be understood that the state is not *just* a subject of international law; it is additionally both a *source* and an *official* of international law.”<sup>63</sup> So “regulating a sovereign state in international law is more like regulating a law-maker in municipal law than like regulating a private individual.”<sup>64</sup> Sovereign states at the international level have the same potential for governmental abuse that the domestic rule of law guards against.<sup>65</sup>

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 the dangerousness of which 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

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59. For a discussion of liberal understandings of the rule of law, see TAMANAHA, *supra* note 42, at ch. 3.

60. The position is illustrated and supported by an article that is still in working progress by the author. Please contact the author directly for a copy of the work if needed.

61. Waldron, *supra* note 1, 322–24.

62. Waldron, *supra* note 1, at 339.

63. Waldron, *supra* note 41, at 23.

64. *Id.*

65. *See id.* at 327–37; Waldron, *supra* note 41, at 20–26.

ways, not by our interest in the freedom of action of natural sovereigns.<sup>66</sup>

It follows, therefore, that sovereigns are not entitled to the benefits of the rule of law.

A notable feature of Waldron's analysis is the determinative weight he places on the domestic rule of law in his analysis of the international rule of law. He does not seriously contemplate whether or how the rule of law in such different arenas can be understood on their own terms.<sup>67</sup> Before suggesting an alternative starting point for the international rule of law in the next Part, this discussion identifies an aspect of domestic rule of law that Waldron overlooked, tied to the horizontal benefits of the rule of law identified above.

Waldron overlooks that a comparable coexistence of official capacity and legal subject also holds in the national context: government entities operate in public roles while exercising rights as legal subjects in their various activities. At the domestic level, recognition that government officials are limited by law, as the rule of law holds, does not diminish or detract from the benefits the government obtains through the rule of law in its activities like any other actor within a legally ordered society. To put this point in terms of the preceding discussion, Waldron's conception of government in the national context was limited to the vertical dimension of the rule of law that emphasizes legal limits on government actions against the populace, but he ignored the horizontal dimension of the rule of law in which government benefits from the rule of law. Within domestic legal systems, the horizontal dimension operates in vis-à-vis private actors (people and entities), and vis-à-vis other government entities.

In its interaction with private actors, the government itself relies heavily on, and benefits from, a legally bound order because many of its daily activities are legally constituted and arranged. Think of government contracts with employees, suppliers of goods and services, banks for loans and bond issues, landlords for rental property rented for government use, and in other ways, utilizing law in its undertakings; ordinary tort law, property law, and criminal law also apply to and protect governmental activities and assets. The government benefits from the predictability, certainty, security, trust, and constitutive aspects achieved by an effective legal order. In myriad contexts when carrying out its public role the government holds, utilizes, and exercises the same legal status and rights as all actors in society.

Governments also rely on and benefit from the legal ordering in their relations with other governmental entities in the furtherance of their public responsibilities. In the United States, individual states have sued other states on a variety of matters, including boundary disputes, distribution of water rights from shared rivers, harm from pollution, contract claims, acquisition of property from people who die

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66. Waldron, *supra* note 1, at 342.

67. For an argument that the domestic understanding of the rule of law does not fit the international arena, see Hurd, *supra* note 43.

without heirs, disputes over domicile for tax purposes, and other matters.<sup>68</sup> Individual states have also brought suit against the federal government as well as against federal agencies in support of “the State’s sovereign interest in the continued enforceability of state law.”<sup>69</sup> And the United States has sued states on a variety of federal matters.<sup>70</sup>

Consider the situation as a coexisting bifurcation of governmental roles. In domestic rule of law systems, on the one hand, governments officials are subject to legal restraints in its actions directed at citizens and entities (vertical dimension), and on the other hand, governments are legal subjects with enforceable powers and rights like all actors (private and public) within a legally ordered community (horizontal dimension). The fact that we want government to be limited by law does not erase the fact that the government has rights as a legal subject entitled to equal treatment under law, predictability and certainty, the application of public, prospective rules, an unbiased judge, and all other aspects of the rule of law. Which aspect of this bifurcation matters in a given instance depends on what is at issue in that situation. This same coexisting bifurcation holds in the international arena.

#### IV. WHY INTERNATIONAL RULE OF LAW DOES BENEFIT SOVEREIGNS

A great deal of sophisticated theoretical analysis has been written on the international rule of law. Disagreement prevails. Every account of the rule of law—including the one I sketch here—is proffered by theorists in the conviction that their particular articulation is descriptively, theoretically, and/or normatively useful. Remember that political and legal theorists do not have exclusive or final authority over what the rule of law means. Many theoretical analyses are grounded on what theorists (Dicey, Hayek, Raz, Waldron, and others) have said about the rule of law, but it is an ideal shaped by how people collectively understand the rule of law. When States and other international actors repeatedly express their desire for and commitment to an international rule of law, it makes sense to try to discern what they mean by this, and in what sense it is achievable and desirable.

Waldron’s position is substantially weakened by the fact that it contradicts past and recent pronouncements about the rule of law by actors on the international level, as well as inconsistent with international law treatment of states. The UN General Assembly condemned Russia’s aggression against Ukraine as a breach of “the rule of law among nations,” in contravention of international law prohibitions against “the threat or use of force against the territorial integrity or political

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68. For lists of cases and claims, see *Controversies Between Two or More States*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/controversies-between-two-or-more-states>; *Suits Between Two or More States*, JUSTIA: US LAW, <https://law.justia.com/constitution/us/article-3/29-suits-between-two-or-more-states.html>.

69. Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 865 (2016).

70. See *Suits Against States*, CORNELL L. SCH.: LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/suits-against-states>.

independence of any state.”<sup>71</sup> The clear import of these statements is that Ukraine—in its status as sovereign state—is entitled to the benefits of the rule of law.

The unanimously adopted 2012 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels expressed agreement in being “guided by the rule of law, as it is the *foundation of friendly and equitable relations between States* and the basis on which just and fair societies are built.”<sup>72</sup> Paragraph 2 specifies who is subject to, as well as benefits from, the rule of law:

We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for the promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that *all persons, institutions and entities, public and private, including the State itself, are accountable* to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.<sup>73</sup>

Subsequent paragraphs reaffirm a commitment consistent with the rule of law to “uphold sovereign equality of all States;”<sup>74</sup> respect for “territorial integrity and political independence;”<sup>75</sup> “non-interference in the internal affairs of states;”<sup>76</sup> to refrain from the use of force against other States;<sup>77</sup> the duty to peacefully settle disputes;<sup>78</sup> the universal value of human rights and democracy;<sup>79</sup> the belief that “the rule of law and development are strongly interrelated and mutually reinforcing” and necessary to eradicate poverty;<sup>80</sup> that “fair, stable and predictable legal frameworks” are necessary for international trade;<sup>81</sup> that international cooperation is needed to combat transnational criminal networks (trafficking in drugs, money laundering, arms, people, terrorism);<sup>82</sup> and much more.

Three seminal points about the international rule of law stand out from these passages. First, the rule of law is portrayed as the basis for friendly and equitable relations among the international community of states. That is consistent with my characterization of the rule of law as an *ideal* that strives to achieve an *effective legal ordering within a community*. Second, it states that *all* persons and entities in the international arena, explicitly including the state, are *bound by* law and also *entitled to*

71. G.A. Res. A/ES-11/L.1, 1 (Mar. 1, 2022).

72. Rule of Law Declaration, *supra* note 28, Preamble (emphasis added). For a detailed look at the Declaration, noting that it followed extensive high-level discussions and was unanimously adopted, see Clemens A. Feinaugle, *The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction from an International Public Authority Perspective*, 7 GOETTINGEN J. INT’L L. 157 (2016).

73. Rule of Law Declaration, *supra* note 28, at ¶ 2.

74. *Id.* at ¶ 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at ¶ 5.

80. *Id.* at ¶ 7.

81. *Id.* at ¶ 8.

82. *Id.* at ¶ 24, ¶ 26.



protection of law. Under this formulation the state is not treated differently from any other person or entity within the community, which is consistent with my earlier description of legal “subject” to include people as well as entities with legal personality (corporations, organizations, states, etc.) that engage in actions addressed by the law. Third, consistent with the expressed desire for friendly and equitable relations within the international community, the bulk of matters mentioned relate to the horizontal dimension of the rule of law. It emphasizes respecting sovereignty in order to generate mutual security and trust, creating certainty and predictability for economic exchanges and development, and cooperating to fight crime and terrorism and control money flows—all of which are about the benefits of the rule of law to nations and international society. This account encompasses a number of rule of law benefits beyond enhancing individual freedom.

In fairness to Waldron, the Declaration was issued a year after his article, but this perspective on the international rule of law is not a recent development. Under the heading “Rule of Law,” the 2005 UN World Summit Outcome stated:

Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

(a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among states.<sup>83</sup>

Again, the rule of law is presented as the (horizontal) ordering of the community of states under international law. In 1970, a UN Declaration on Principles of International Law adopted by the General Assembly cited “the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations.”<sup>84</sup> Commenting on this and similar statements, three decades ago, Arthur Watts observed that the international rule of law must be understood as “legal ordering of affairs within [the international] community.”<sup>85</sup>

“International society is a society of states; international law seeks to achieve the goals and values of that society; it does so primarily by regulating states,” Anne-Marie Slaughter declared.<sup>86</sup> The vision of international law as a society of states subject to legal regulations matches Kant’s celebrated outline of the conditions for perpetual peace:

Nations, as states, may be judged like individuals who, living in the natural state of society—that is to say, uncontrolled by external law—injure on another through their very proximity. Every state, for the sake of its own security, may—and ought to—demand that its neighbor should submit

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83. G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 134 (Oct. 24, 2005).

84. G.A. Res. 2625(XXV), (Oct. 24, 1970), *quoted in* Watts, *supra* note 26, at 25.

85. Watts, *supra* note 26, at 25. Robert McCorquodale likewise defines the rule of law in terms of legal ordering, though he incorporates additional factors, in McCorquodale, *supra* note 43, at 296.

86. Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 PROC. ANN. MEETING 240, 242 (2000).

itself to conditions, similar to those of civil society where the rights of every individual is guaranteed.

[...]

For states, in their relation to one another, there can be, according to reason, no other way of advancing from that lawless condition which unceasing war implies, then by giving up their savage lawless freedom, just as individual men have done, and yielding to the coercion of public laws.<sup>87</sup>

In an article on international rule of law, Terry Nardin recognizes that “states can be subjects of law—‘legal persons’ with rights and duties under international law. International law makes that assumption by treating states as artificial persons who associate, like citizens, on the basis of law.”<sup>88</sup> The international rule of law ideal entails a legally ordered international community of states and other actors.

Waldron argues it is wrong to see the international community of states as analogous to individuals within society.<sup>89</sup> But this analogy is ingrained within international law, and is an apt depiction of the international situation. Interpersonal violence and abuse of power within society—say, when a powerful person or gang attacks a weaker person to injure them and seize their assets—is directly analogous to when a strong state or coalition attacks or seizes the territory a weaker state. Both contexts involve the lawless, violent, arbitrary abuse of power, antithetical to the (horizontal) rule of law. When a few states are militarily and economically strong, while many states are weak, Arthur Watts wrote, only through international legal ordering “can the conditions be established for increased *prosperity and security*, whether of individual States or of the international community as a whole.”<sup>90</sup>

Russia illegally and arbitrarily utilized its superior military might against the government, territory, and citizens of Ukraine, killing and maiming people and causing millions to flee, disrupting the functioning of government, destroying their collective security, trust, and economy. The United States also inflicted grievous on the state and populace when it illegally invaded Iraq. The respective actions of Russia and the United States, in turn, had severe regional and global consequences that harmed people in many societies around the globe. To vindicate their sovereign equality and repair their governments and the lives of their people, Ukraine and Iraq should be entitled to access to legal tribunals and remedies for these violations of international law. The geopolitical reality that great powers cannot be forced to acknowledge and rectify their illegal wrongdoings does not mean international law is weak or not law—no legal system successfully holds all law violators (particularly powerful ones) accountable. Rather, their lawless conduct is exposed as all the more reprehensible by its very abuse of power, flouting the rule of law of international ordering with devastating consequences, while shamelessly claiming legal justifications for their actions.

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87. KANT, *supra* note 20, at, 50.

88. Nardin, *supra* note 35, at 398.

89. Waldron, *supra* note 41, at 20–26.

90. Watts, *supra* note 26, at 24 (emphasis added).

There are multiple examples beyond wars and invasions in which international law secures the benefits of the rule of law for sovereign States and their populace. Treaties and international agreements between States cover trade, aviation, communications, intellectual property, climate change, and numerous other matters. International and transnational laws and regulations combat illegal drug trade and terrorism, secure borders, manage cross-border financial flows, limit nuclear weapons and waste, biohazards, and so forth.

It is true that sovereign states act as officials and agencies with the power to create law at the international level, as Waldron points out, but they are also legal subjects with enforceable legal rights and powers. Only states can bring cases before ICJ for violations of international law, and only states can file complaints with the World Trade Organization Dispute Settlement Body against other states for violating trade agreements. The vast majority of cases at the International Tribunal of the Law of the Sea involve conflicts between states over violations of national maritime rights. European nations have brought actions in the European Court of Justice against another European nation for breach of EU law.<sup>91</sup> Sovereign states also have enforceable rights in the courts of other nations that provide for such suits. For instance, foreign states have filed over 300 suits in U.S. courts against private parties as well as government defendants raising commercial claims, treaty violations, and other legal claims.<sup>92</sup> In many of these suits the sovereign state is defending its own powers and rights (the state's trade agreement, the state's territory, the state's maritime border, etc.), while in others it is acting to vindicate the rights and interests of its citizens or private companies.

The common treatment of sovereign states as legal subjects with enforceable rights in both national and international contexts requires Waldron to draw a tenuous line: although States are subjects with enforceable legal rights, nonetheless they are not beneficiaries of the rule of law. This stance works only if one accepts that the *only* benefit of the rule of law is individual freedom and *only* the vertical dimension of the rule of law matters.

It is plain, however, that legal principles, rules, and regulations at the international level constitute relations and institutions, and provide and enhance certainty, predictability, security, trust, and economic development within the international community, which are important benefits of the rule of law. These benefits accrue to *all* legal subjects with rights and obligations, including individuals, corporations, international organizations and agencies, sovereign states, and other entities in the international arena, consistent with the 2012 Declaration that sovereign states (like all other entities) are “without discrimination entitled to equal protection of the law.”<sup>93</sup>

In debates about how the rule of law should be understood, one must consider

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91. See, e.g., Case C-457/18, *Slovenia v. Croatia*, ECLI: EU:C:2020:65 (Jan. 31, 2020).

92. See Hannah L. Buxbaum, *Foreign Governments as Plaintiffs in U.S. Court and the Case Against Judicial Imperialism*, 73 WASH. & LEE L. REV. 653, 656 (2016).

93. Rule of Law Declaration, *supra* note 28.

whether particular accounts are descriptively apt, theoretically sound, and normatively beneficial—the latter considering whether desirable consequences follow therefrom. The ideal of an international rule of law as the basis for the legal ordering of friendly and equitable relations that benefits individuals, states, and all other legal subjects, fits international law principles and matches the expressed understanding and desires of international actors. It is a theoretically sound way of seeing the benefits of the rule of law in holistic terms within a legally ordered society. As a pragmatic matter, furthermore, states will see it in their self-interest to commit to the international rule of law if they stand to benefit therefrom, which will help bring about a more effective legal ordering. Ian Hurd remarks, “[t]he international rule of law refers to the intellectual and political commitment . . . to the idea that all state behavior should conform to whatever international legal obligations relate to it and that the result of executing this commitment is a well-ordered international space.”<sup>94</sup> Individuals around the globe—and every sovereign state—would be better off if this ideal was substantially realized at the international level.

#### V. THE EMERGING TRANSNATIONAL LEGAL ORDERING

The discussion thus far has been framed in terms of the international rule of law, with an emphasis on international law, to comport with Waldron’s framework—but my analysis applies more generally to the emerging transnational legal ordering of the international community.<sup>95</sup> Transnational legal ordering encompasses all forms of law and regulation that addresses matters between and across states, a great deal of which is outside of international law proper. This includes local, national, and international law and regulations and it involves public and private actors, organizations, and tribunals; it addresses cross border matters like trade in goods and services, migration, money flows and banking, pollution control and environmental regulation, regulation and taxation of multinational corporations, shipping, rail, and air travel, telecommunications and the internet, terrorism, global health matters like pandemics, intellectual property, and much more. Much of this regulatory activity has been prompted by the expansion and intensification of capitalism around the globe and technological advances in telecommunications and transportation. All nations are now mutually intertwined in multiple ways with other nations that require coordination and regulation. This ongoing proliferation of law and regulatory regimes and institutions constitutes an extension and thickening of legal ordering in connection with activities and consequences that cross state borders. Absent world devastating man-made or natural catastrophes—looming possibilities in an age of nuclear weapons and rapid global warming—the extension and thickening of law addressing these matters appears likely to continue.

A substantial portion of intercourse between and across nations involves

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94. Hurd, *supra* note 43, at 391.

95. For an overview, see Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231 (2016); TAMANAHA, *supra* note 34.

commercial activities, which have beneficial consequences beyond merely economic. Montesquieu observed over two-and-a-half centuries ago, “[t]he natural effect of commerce is to lead to peace. Two nations that trade with each other are reciprocally dependent.”<sup>96</sup> (Think of China and the United States today.) Kant made the same point: “The commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation.”<sup>97</sup> Commerce at a distance is facilitated by legal rules, regulations, and tribunals.<sup>98</sup> The European Union is a nonpareil economically-based transnational legal ordering built on the ideal of the rule of law. National, bilateral, regional, and global regulatory regimes dealing with transnational economic activities (not to mention private elements like arbitration, model contract terms, commercial usages, and so forth) are abundant and increasing.<sup>99</sup> One commentator on transnational economic law estimated that “90 percent of international law work is in reality international economic law in some form or another.”<sup>100</sup>

Many actors operate within and utilize the transnational legal ordering of the international community: individuals, municipalities, state agencies, private corporations, public corporations, NGOs, regional and international organizations (United Nations, World Trade Organization, World Bank, International Monetary Fund, and a multitude more), sovereign states, and others. Rule of theorists who emphasize individual freedom and preventing governmental abuse of power should bear in mind that states are not the only actors who pose dangers to individuals. International organizations like the UN Security Council and the World Bank have enormous power; transnational corporations rival states in wealth and influence<sup>101</sup>; and both have the capacities to coerce states (particularly weak states) and harm their populaces. Seeing the rule of law as an ideal of effective legal ordering within, between, and across nations in the international community that restrains *and* benefits *all* actors provides the most adequate way to address the global situation.

Let me close with a note of optimism, albeit not easy to hold on to with so many dire events occurring in the world today. Over centuries of gradual development, the rule of law emerged within societies that embraced the rule of law ideal that everyone—people and corporate entities, rich and poor, government officials, kings—is bound by and should abide by law. Indications of this ideal taking hold on the international level are evident, at least in word if not deed. Keep in mind that when the domestic rule of law developed sovereigns routinely swore oaths to abide by the law, which they nonetheless violated when it suited their interests,

96. CHARLES LOUIS DE SECONDAT, BARON DE LA BRÈDE ET DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 338 (Anne M. Cohler, Basia C. Miller, & Harold S. Stone eds., Cambridge Univ. Press 1989) (1748).

97. KANT, *supra* note 20, at 56.

98. See TAMANAHA, *supra* note 34, at 167–78.

99. For a broad account of transnational economic regulatory regimes, see Joel P. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33 (1996).

100. John H. Jackson, *Global Economics and International Economic Law*, 1 J. INT'L ECON. L. 1, 8 (1998).

101. See TAMANAHA, *supra* note 34, at 171–72.

although they endeavored to justify their actions as consistent with law. This pattern of conduct is being repeated on the international level today, as sovereign states, transnational corporations, international organizations, and everyone else, increasingly claim to uphold the rule of law. The universal avowal of this ideal is a necessary step on the path to achieving the national and international rule of law, though there is a long way to go.

