

## Book Reviews

Tom Ginsburg, **Democracies and International Law**. Cambridge: Cambridge University Press, 2021. Pp. 250. £29.99. ISBN: 9781108843133.

Tom Ginsburg's *Democracies and International Law* is a magisterial empirical inquiry into the relationship between contemporary democracies and modern international law under the era of the Charter of the United Nations, and why humanity stands between the 'nightmare and noble dream of international law', where, according to Ginsburg, the 'Kantian vision of perpetual peace has not been achieved ... [and] the realist vision of perpetual war has not come to pass either' (at 306). This book, based on his Hersch Lauterpacht Memorial Lectures at Cambridge University, rekindles classic and recurring debates<sup>1</sup> between sovereigntists favouring hard state consent-based international law as coexistence<sup>2</sup> and internationalists that reject any *non liquet* in the international system and who thus accept morally driven norms that may lack formal consent such as *jus cogens* as well as customary international law rules that protect non-state subjects of international law such as human rights-bearing individuals, groups and peoples.<sup>3</sup> However, Ginsburg goes further in these debates with his empirical approach to international law – this time investigating whether international law could indeed 'save democracy' (at 103–123) or, at the very least, mount a substantial 'defense of democracy' (at 124–185) through regional practices, especially in the face of a rising 'authoritarian international law' (at 186–236) championed by the governments of China and Russia.

In this continuing gulf, Ginsburg takes the position that international law 'is a morally neutral enterprise, a tool; only if international law is capable of advancing democracy in a sustained way should it attempt to do so' (at 29). Moral neutrality, however, does not imply that international law is ineffectual since Ginsburg argues that 'international law inevitably provides a structure that may support or undermine the maintenance of democracy at a national level. It cannot be truly neutral in the sense of having no effect' (at 28). The book goes on to empirically explore the mutual effects of international law and democracies on each other, most especially in contemporary contexts of democratic

<sup>1</sup> See Kelsen, 'Sovereignty and International Law', 48(4) *Georgetown Law Journal* (1960) 627; Weil, 'Towards Relative Normativity in International Law', 77(3) *American Journal of International Law (AJIL)* (1983) 413.

<sup>2</sup> See X. Hanqin, *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* (2012); Tunkin, 'Co-Existence and International Law', 95 *Recueil de Cours* (1958) 1.

<sup>3</sup> H. Lauterpacht, *The Function of Law in the International Community* (2011), at 69–71; O. A. Hathaway and S. J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017).

backsliding and authoritarian rule that have deepened during political emergencies and global economic crises. The book also sidesteps dogmatic discussions of the contrasting well-established tenets of liberalism *vis-à-vis* authoritarianism.<sup>4</sup> Instead, Ginsburg distinguishes at the outset between liberalism and democracy, where 'liberalism emphasizes individual autonomy, rights and transnational exchange, whereas democracy emphasizes elections, participations, and national sovereignty' (at 15). The distinction he makes between both concepts of liberalism *vis-à-vis* democracy is deliberate for the purposes of his empirical investigation of democratic governance throughout countries in the world, where 'we do not include the entire bundle of human rights, or require gender equality outside the context of voting ... partly [as] a matter of general methodological preference – if we want to study the effects of democracy on economic redistribution, social rights, or gender equality, we cannot incorporate those things into the definition ... the thicker the conception [of democracy], the fewer states will meet the standard, reducing the scope of the inquiry' (at 24).

Significantly, Ginsburg identifies a democracy according to three baseline elements: '(1) government characterized by competitive elections, in which the modal adult can vote and the losers concede; (2) in which a minimal set of rights to speech, association, and the ability to run for office are protected for all on an equal basis; and (3) in which the rule of law governs administration' (at 21). In contrast, he observes three unique features of authoritarian regimes in these times: (i) the integration of authoritarians into the global capitalist economy and heavy reliance on international trade, labour and investment flows to enable regime survival – for example, 'there will be continuing demand for some regional and global public goods from dictatorships and democracies alike ... regulatory power is as important for markets as military power is for security' (at 188); (ii) 'the relative decline of ideology', with many authoritarian regimes 'driven more by a desire for political survival and its perquisites than they are by a constant ideological message' (at 188); and (iii) 'the abuse of democratic forms for antidemocratic purposes' (at 188–189), where ostensibly democratic institutions and processes are manipulated to serve the political survival interests of authoritarians.

In Chapter 1, 'Why Would Democracies Be Different?', Ginsburg theorizes that democracies would use international law out of their own sense of regime survival in order to cooperate on achieving public goods that cannot be produced at the level of a single state, such as larger trading markets, international security or even aviation and postal rules (at 37–38). This 'morally agnostic' view of international law situates democracies and dictatorships differently: '[D]emocracies may have longer time horizons, making them more amenable to cooperation ... democracies may seek different types of public goods because of their larger sets of constituents ... democracies may be more transparent by virtue of constitutional norms' (at 39). Chapter 2, 'Are Democracies Different? Some Facts', provides rich empirical evidence that 'during the period after World War II, democracies drove the most active era of international legal cooperation the world has seen ... there is something about the nature of democracy

<sup>4</sup> See, among others, E. Fawcett, *Liberalism: The Life of an Idea* (2018); W. Brown, P. E. Gordon and M. Pensky, *Authoritarianism: Three Inquiries in Critical Theory* (2018).

itself that leads governments to lock in commitments over time' (at 101), such that international law at this point in human history now extensively affects virtually all spheres of public and private conduct, activity, institutions and decision-making. Chapter 3, 'Can International Law Save Democracy?', proceeds to examine 'the international norms and institutions that support and underpin democratic governance' (at 103), which are a mix of 'carrots' and 'sticks' that are largely dependent on the success of collective action within the international system: (i) universal human rights and more treaties setting international cooperation expectations; (ii) international and regional adjudication bodies (such as courts, commissions and tribunals); (iii) incentives created in international cooperative arrangements for the provision of public goods or the establishment of competitive markets; and (iv) international disincentives such as international court-adjudicated reparations or politically decided sanctions or outright military intervention. Chapter 4, 'Regions and the Defense of Democracy', explores the populist pushback against perceived anti-democratic tendencies of a deepening and widening international system of cosmopolitan governance and law-making, turning instead to regional institutions that 'may be able to act to defend democracy in situations in which global actors are hamstrung ... [but could also] "tip" from defending democracy toward promoting autocracy if a sufficient number of states so desire or merely acquiesce' (at 125). Ginsburg provides rich data on the oscillation between democracy and autocracy in the Americas and the inter-American system, Europe and the European Union and the diverse continent of Africa and its regional institutions.

The most pivotal findings of this book are in its last two chapters. Chapter 5, 'Authoritarian International Law', sketches how authoritarian or autocratic regimes are developing 'norms and institutions that specifically enhance authoritarianism' (at 187), where today's authoritarian regimes 'are increasingly nimble in their engagement with international legal norms and institutions, deploying legal arguments with greater acuity, even as they introduce new forms of repression that are legally and technologically sophisticated' (at 189–190). Idiosyncratically, today's authoritarian regimes have also been 'increasingly creative in using regional organizations to develop new norms and to cooperate for defensive purposes. Regional organizations often serve as "incubators" of global norms of various types' (at 191). Drawing on data from the Comparative Constitutions Project, Ginsburg shows that authoritarians and dictators not only may mimic democratic constitution drafting but also 'quickly learn to undermine the integrity of these institutions and so the formal similarity masks difference in functions ... the evidence indicates that democracies innovate and authoritarians mimic and repurpose' (at 193). Most importantly, authoritarian international law makes the 'concerted effort to neutralize multilateral forums as vehicles for democracy promotion' (at 229), such as the 'capture of the [United Nations (UN)] Human Rights Council' (at 229) by authoritarian states. Authoritarian international law, as Ginsburg theorizes, layers new ideas, rhetoric and institutions onto the existing international system, through 'thinner models of cooperation that demand little of members and can be discarded once their political purpose has been served ... a softer "dialogue and mutual respect" framework that is less rule-bound and more

focused around negotiated solutions to international problems ... international law plays a thinner, coordinating role' (at 235). Chapter 6, 'Whence the Liberal Order?', then situates Ginsburg's theory of 'authoritarian international law' within the complex relationship between the USA as the democratic hegemon and China as the autocratic hegemon, especially on matters involving China's Belt and Road Initiative and China's continued non-implementation of the South China Sea arbitration award in *Philippines v. China*.<sup>5</sup>

Distinctions matter in Ginsburg's analysis because he ultimately does not emphasize states' legal obligations to respect, protect and fulfil human rights obligations and their implementation and compliance with international human rights law commitments as the defining red line that distinguishes democracies from authoritarian regimes.<sup>6</sup> Rather, he shows that the 'repurposing' of democratic tools, language and institutions is no more evident than in the area of human rights where 'China has actively sought to articulate its own version of human rights, even as it has engaged with broader global discourses. Its chief approach is to frame human rights as a pluralist rather than absolute field, in which different countries can define their own approaches. China emphasizes human rights with Chinese characteristics, a view of human rights that is "distinctly and distinctively undemocratic and illiberal, sovereignist and relativist" ...' (at 254). However, this authoritarian recasting flatly contradicts the unequivocal position of the UN Office of the High Commissioner for Human Rights that 'democracy as a form of government is a universal benchmark for human rights protection; it provides an environment for the protection and effective realization of human rights'.<sup>7</sup> No less than the UN's 1993 World Conference on Human Rights in Vienna stressed that 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives ... the international community should support the strengthening and promoting of democracy, development, and respect for human rights and fundamental freedoms in the entire world'.<sup>8</sup> Ginsburg is silent on the full scope of civil, political, economic, social, cultural, environmental and developmental human rights issues that intrinsically involve democracy and democratic governance, precisely because his wide definition of democracy depends, to some extent, on his view that international law should remain 'a morally neutral tool' for humanity.

<sup>5</sup> In the Matter of the South China Sea Arbitration (Republic of the Philippines v. The People's Republic of China), Permanent Court of Arbitration (PCA) Case No. 2013-19, Award of 12 July 2016, available at <https://pca-cpa.org/en/cases/71> (last visited 31 July 2023).

<sup>6</sup> See, e.g., Nathan, 'Authoritarian Impermanence: China Since Tiananmen', 20(3) *Journal of Democracy* (*JoD*) (2009) 37; Langlois, 'Human Rights without Democracy? A Critique of the Separationist Thesis', 25(4) *Human Rights Quarterly* (2003) 990; Guzman and Linos, 'Human Rights Backsliding', 102(3) *California Law Review* (2014) 603.

<sup>7</sup> United Nations Office of the High Commissioner for Human Rights, *About Democracy and Human Rights: OHCHR and Democracy*, available at [www.ohchr.org/en/about-democracy-and-human-rights](http://www.ohchr.org/en/about-democracy-and-human-rights).

<sup>8</sup> Vienna Declaration and Programme of Action, 25 June 1993, para. 8, available at [www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action](http://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action).

But, as Ginsburg pragmatically makes clear, the erosion of the enduring ties between democracies and human rights is a symptom of the emerging ‘authoritarian international law’ (at 186–236) – one that deliberately rewrites the international system in the authoritarian mould of absolute control and non-interference and reserves for authoritarian regimes an unprecedented exclusive domestic jurisdiction over human rights issues.<sup>9</sup> The attempted rewriting of international law in the authoritarian mould (most recently exemplified by Vladimir Putin’s purported justifications for the Russian Federation’s ongoing aggression and invasion of Ukraine)<sup>10</sup> will jettison the many treaty-driven and jurisprudential developments that have afforded unprecedented recognition and deep protection under international law and human rights to individuals as full subjects of international law.<sup>11</sup> Authoritarian international law thus claws back full powers for decision-makers in states, gutting the primacy of individuals and peoples as the ultimate authority under the social contract.

Ginsburg’s latest book is a prescient interdisciplinary opus that advances our ongoing critical rethinking of how international law could be instrumentalized by dominant or hegemonic political actors<sup>12</sup> within and among democracies (those that are robust as well as those in decline)<sup>13</sup> as well as within authoritarian regimes (whether those that are deeply ideological or others that are more driven by corruption and rent seeking).<sup>14</sup> This latest book, in many ways, appears as the international law dimension that complements Ginsburg’s previous landmark work on saving constitutional democracies.<sup>15</sup> The empirical investigation of the nature and quality of the conjunctive relationship (if any) between democracies and international law, rather than re-treading prior questions on the democratic legitimacy of international law or the right to democracy argued as an international law norm,<sup>16</sup> anchors a more sober assessment of the relative successes of the project of liberal democracy that led to modern international law in the post-war era under the UN Charter.

Most significantly, Ginsburg does not take a normative position on whether international law ought to be more democratic because in his view ‘international law governs

<sup>9</sup> See also Ginsburg, ‘Authoritarian International Law?’, 114(2) *AJIL* (2020) 221.

<sup>10</sup> See M. Fisher, ‘Putin’s Case for War, Annotated’, *New York Times* (24 February 2022), available at [www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html](http://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html).

<sup>11</sup> See A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016), at 408–471, 526–555.

<sup>12</sup> See Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, 16(3) *European Journal of International Law* (*EJIL*) (2005) 369.

<sup>13</sup> See Diamond, ‘Facing Up to the Democratic Recession’ in L. Diamond and M.F. Plattner (eds), *Democracy in Decline?* (2016) 98.

<sup>14</sup> See Soloveitchik, ‘International Law as “Instrument of Politics”’, 21(4) *University of Kansas City Law Review* (1952–1953) 169; J.J. Linz, *Totalitarian and Authoritarian Regimes* (2000), at 48–63.

<sup>15</sup> T. Ginsburg and A.A. Huq, *How to Save a Constitutional Democracy* (2018).

<sup>16</sup> See, among others, S. Wheatley, *The Democratic Legitimacy of International Law* (2010); G.H. Fox and B.R. Roth (eds), *Democracy and International Law* (2020); R. Burchill (ed.), *Democracy and International Law* (2006); J. Crawford, *Democracy in International Law* (1994); Klabbers et al., ‘International Law and Democracy Revisited’, 32(1) *EJIL* (2021) 9; Alfadhel, ‘The Right to Democracy in International Law and the Arab States Practice’, 12(2) *Journal of Islamic State Practices in International Law* (2016) 20.

relations among very different polities, some of which may have alternative moral legitimacies of their own' (at 27). His implicit view of international law is one that is pluralist in welcoming differences in the modes of government chosen by peoples, while his own moral preference for national governance is that of democracy (at 26). But this is, in many ways, a tenuous and precarious thread when one circles back to the deep cleavages that international human rights law protection demands, whether in democracies or authoritarian regimes. Perhaps because it is already obvious, Ginsburg does not discuss at length how authoritarian regimes uniquely depend for their continued existence on the institutionalized, routinized and systematized violation of and normalized atrocities against individual, group and peoples' human rights under international law.<sup>17</sup> Ginsburg acknowledges in other work that authoritarians wield international law both as a 'shield and a sword'.<sup>18</sup> While admittedly messy and imperfect in realizing their domestic and international obligations to respect, protect and fulfil individual, group and peoples' civil, political, economic, social, cultural, environmental, labour and all other human rights, democracies are built on human choices of the many. Authoritarians make no pretence that choice vests only through the absolute control of a few and the routinized repression of the freedoms and the indifference to the human dignity of the rest.

Finally, one can well agree with Ginsburg that the relationship between democracies and international law should be continually assessed, debated and reformed: '[I]nternational law inevitably provides a structure which may support or undermine the maintenance of democracy at a national level. It cannot be truly neutral in the sense of having no effect' (at 28). Much of today's populist critiques against the ubiquity of international law and international institutions has resonance for many, precisely because of the failure of international decision-making and its institutions to adhere to the fundamental expectations that individual, group and peoples' human rights will be continuously and durably protected in the Charter-based era. It was, after all, the peoples (not the states) of the UN that were determined to 'save succeeding generations from the scourge of war ... and reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ... [while] promoting social progress and better standards of life in larger freedom'.<sup>19</sup> To this end, Ginsburg is well justified in seeking to have empiricism inform international law: '[I]nternational law [is] a morally neutral enterprise, a tool; only if international law is capable of advancing democracy in a sustained way should it attempt to do so' (at 29).

<sup>17</sup> See Human Rights Watch, World Report 2023, available at [www.hrw.org/sites/default/files/media\\_2023/01/World\\_Report\\_2023\\_WEBSPREADS\\_0.pdf](http://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf).

<sup>18</sup> Ginsburg, 'How Authoritarians Use International Law', 31(4) *JoD* (2020) 44.

<sup>19</sup> Charter of the United Nations, preamble, available at [www.un.org/en/about-us/un-charter/full-text](http://www.un.org/en/about-us/un-charter/full-text).

Ginsburg's latest book is required reading for our serious and careful reappraisal of international law, especially at a time of rampant proliferation<sup>20</sup> of authoritarian and semi-authoritarian regimes and the growing precarity of democracies themselves. As we live the 'nightmare and noble dream' of international law, Ginsburg presciently warns that:

international law provides resources for democrats and dictators alike. Democracies have the capacity to cooperate more deeply for the benefit of their citizens, and to defend their way of government abroad. Doing so can enhance their ability to respond to many pressing problems of the day, which cannot be resolved without transnational engagement. But political incentives to do so are not always present. ... The Kantian vision of perpetual peace has not been achieved, obviously; nor can it be in a pluralistic world. Then again, the realist vision of perpetual war has not come to pass either. Somewhere in between the cosmopolitan vision and the sovereigntist fiction, there lies a space for democratic survival and perhaps even a renewal. (305–306)

While Ginsburg's latest opus stops well short of prescribing the contours desired for that space, one might also suggest that democratic survival and renewal depends on equally upholding the binding obligations of the UN Charter. Reclaiming the protective functions and moral content of international human rights law for and by individuals, groups and peoples is even more urgent today since the absolute power and corruption of authoritarian elites enables them to unaccountably repurpose, cherry-pick and distort human rights for their private political ends, economic gain and the entrenchment of their respective authoritarian regimes and dynastic rule. In our contemporary experiences of unrelenting crises, dwindling democratic spaces and expanding authoritarianism as the 'new normal', we cannot afford the leisurely fiction of 'moral neutrality' to render us all oblivious and numb to the lived deficits of human rights protection now towering between the nightmare and noble dream of international law.

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*<https://doi.org/10.1093/ejil/chad040>*

<sup>20</sup> Freedom House, Freedom in the World 2022 Report: The Global Expansion of Authoritarian Rule, available at [https://freedomhouse.org/sites/default/files/2022-02/FIW\\_2022\\_PDF\\_Booklet\\_Digital\\_Final\\_Web.pdf](https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf); International Institute for Democracy and Electoral Assistance, The Global State of Democracy Report 2022: Forging Social Contracts in a Time of Discontent, available at <https://idea.int/democracytracker/gsod-report-2022>.