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BOOK REVIEW

Tom Ginsburg, *Democracies and International Law*, Cambridge University Press, 2021, 329pp, £29.99 (hb) doi: 10.1017/9781108914871
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Never judge a book by its … well, title! *Democracies and International Law*, Tom Ginsburg's newest book, is as much about authoritarian states – and their engagement with international law – as it is about democracies. For those familiar with the author's more recent work, this will not come as a surprise. Indeed, the book can be seen as a culmination of Ginsburg's earlier reflections on the erosion of democracy and the rise of authoritarian governance in many parts of the world and the various consequences that these phenomena have, or might have, for international law and international institutions.[1]

When looking closer at *Democracies and International Law* (which grew out of the Hersch Lauterpacht Memorial Lectures given by Ginsburg at Cambridge in March 2019) it soon becomes clear that the monograph is essentially made up of three major inquires, which are conceptually related but, in many ways, also reflect fairly autonomous debates that may well stand for themselves, as independent scholarly expositions. In that sense, the first issue taken up by Ginsburg is mainly of a socio-political nature and centres on whether and, if so, why democracies differ from autocracies in their use of international law (Chapters 1 and 2). The author then sets out to examine whether international law and international institutions might help protect democracy against outright assaults and incremental erosion (Chapters 3 and 4). Lastly, Ginsburg turns to the future shape of the international normative framework 'in an era dominated by authoritarian and not democratic regimes'.[2] In so doing, he first introduces the reader to the key concept of 'authoritarian international law' (Chapter 5), before specifically focusing on China and its engagement with international law (Chapter 6). Some suggestions as to what might be done to preserve what the author calls 'prodemocratic international law' are presented in the concluding section of Ginsburg's multi-faceted study.

In exploring the empirical relationship between democracies and international law, Ginsburg starts from the premise that much of modern (post-Second World War) international law has been produced and refined by democratic states, either among themselves or in their interactions with non-democratic states. Using a plethora of descriptive data to buttress his argument, he claims that democracies are more likely to engage with international law in a whole array of contexts, ranging from the conclusion of bilateral treaties to participation in multilateral treaty regimes, norm-setting within international institutions, as well as dispute settlement before international courts and tribunals. According to the author, the greater propensity of democratic regimes to initiate and actively participate in international legal projects is in large parts due

[1]See, in particular, T. Ginsburg, 'International Courts and Democratic Backsliding', (2019) 37(2) *Berkeley Journal of International Law* 265; T. Ginsburg, 'Authoritarian International Law?', (2020) 114(2) AJIL 221. See also T. Ginsburg and A. Z. Huq, *How to Save a Constitutional Democracy* (2018), for an in-depth discussion of democratic backsliding from the perspective of – mainly US-American – constitutional law.

[2]T. Ginsburg, *Democracies and International Law* (2021), at 8.

to the fact that they operate on the basis of longer 'time horizons'.[3] What he means by this is that in democracies the regime (i.e., the political and constitutional system that provides for the holding of elections at regular intervals) remains in place even if the government loses power, whereas in autocracies regime survival and government survival are usually coextensive. As seen by Ginsburg, the principle of regular governmental turnover (by way of elections) enhances the readiness of democracies to engage in international co-operation, since it tends to generate 'a desire for certain kinds of institutions – including international law – that can commit the state to policies beyond the life of the current government'.[4]

It should be noted here that the author grounds his investigation into how and why democracies differ from non-democracies in their engagement with international law on a relatively minimalist understanding of democracy. As seen by Ginsburg, the latter is basically a system of electoral competition, underpinned by a set of rights closely related to elections and a functioning bureaucracy upholding the rule of law in electoral contestation. In effect, this is the 'Franckian' notion of democracy,[5] supplemented by a functionally limited rule of law element. Ginsburg admits that by sticking to a 'thin' definition he is distilling a complex and essentially contested concept into a small bundle of mostly procedural indicators. He justifies this, however, by arguing that using a thicker definition would significantly reduce the number of countries that can be reasonably called democratic, ultimately rendering it impossible 'to produce generalizations applicable to most states as they actually exist and operate'.[6] For some observers, of course, such generalizations are exactly the nub of the problem, particularly when classifying democracies and non-democracies becomes the key factor in an effort to demonstrate how divergent uses of international law can be correlated to regime-type.[7]

Whatever one makes of Ginsburg's thesis about the dominance of democratic states in the production of modern international law, including the regime-type classification scheme and empirical indicators it relies on, the argument is eventually not constitutive for the author's subsequent probe into how, if at all, international law can contribute to safeguard democracy. Ginsberg opens the debate with general observations on the potential tools (the 'carrots' and 'sticks') that might be applied by international institutions in order to support and uphold domestic democracy, before diving into an in-depth examination of pertinent regional norms and mechanisms in Latin America, Europe, and Africa. As his survey shows, regional actors have neither shied away from articulating core standards on democratic governance nor from putting in place modalities for their collective promotion and protection, though this has only rarely been followed-up by effective enforcement. There are of course notable differences among regions, with Africa's anti-coup/pro-democracy framework perhaps being the boldest and most advanced in respect of both its normative thickness and its institutional design. Ginsburg's reflections in this context are particularly interesting where they focus on the jurisprudence of regional courts (including lesser-known bodies, such as the East African Court of Justice and the ECOWAS Community Court of Justice) on matters related to political participation, elections, and the independence of the judiciary. He also highlights several cases in which regional courts issued decisions of an essentially 'constitutional' character, eventually resulting in a reform of public institutions,

[3]See ibid., at 39.

[4]Ibid., at 40.

[5]In an influential article, written at the height of the post-Cold War euphoria, Thomas Franck has postulated that democracy is increasingly becoming a 'global legal entitlement' protected by collective international processes. In laying out his argument (which, it should be noted, is clearly not shared by Ginsburg), Franck operated with a definition of democracy that was essentially restricted to the right of citizens to take part in periodic, free and fair elections; see T. M. Franck, 'The Emerging Right to Democratic Governance', (1992) 86 AJIL 46.

[6]See Ginsburg, *supra* note 2, at 26.

[7]See, for instance, I. Hurd, 'Legal Games – Political Goals' ['Symposium on Authoritarian International Law: Is Authoritarian International Law Inevitable?'], (2020) 114 *AJIL Unbound* 232.

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the modification of domestic legislation, or even an amendment of the constitution of the state concerned itself.

When looking at the overall record of regional institutions in pushing back at various forms of 'abusive constitutionalism'[8] and democratic erosion, however, there clearly is room for improvement. In Latin America, for instance, the Organization of American States (OAS) has for years proven unable to effectively tackle the demise of democracy in Venezuela as well as in Nicaragua (in fact, controversies among member states on how to handle these cases have plunged the organization into its gravest crises in recent history).[9] Likewise, in Europe, the responses of the European Union to backsliding in Hungary and Poland have not just been slow but also inadequately calibrated to the scale of the illiberal turn in these countries.[10] Ginsburg is of course fully aware of the chequered record of regional actors in effectively dealing with sticky cases of democratic regression. He nonetheless maintains that, 'when collective action among democracies obtains', international institutions 'can at least put a pause button on democratic backsliding'.[11]

For Ginsburg, focusing on regional institutions and their legal regimes can prove helpful in uncovering trends that might ultimately influence normative developments in the broader international arena. It thus seems consequent that, in documenting what he perceives to be the emerging new field of authoritarian international law, he also primarily turns to the regional level of international co-operation and law-making. As explained by the author, the notion of authoritarian international law refers to 'norms and institutions that specifically enhance authoritarianism'.[12] Such norms and institutions tend to be distinctly protective of the internal affairs of states and typically provide for cross-border co-operation that reinforces the security and continuity of authoritarian rule. In some cases, they also form the basis for more innovative concepts facilitating repression and the dilution of democratic processes 'at home' and abroad. Among the institutions the author studies more closely in this context are ASEAN, the Gulf Cooperation Council, the Bolivarian Alliance of the Peoples of Our Americas (initiated by Venezuela under the Chávez regime), the Eurasian Economic Union (led by Russia) and, particularly, the Shanghai Cooperation Organization (dominated by China).

Ginsburg's inspection of selected regional manifestations of authoritarian international law, which is complemented by an account of China's advancing strategy to push forward its own brand of 'hegemonic international law',[13] allows him to arrive at a number of (rather worrying) conclusions, which may be synthesized as follows: Generally, authoritarian states (including leading states in that category, such as China and Russia) are not bent on setting up a fully-fledged alternative model to the Western international law scheme, or a replacement of instruments considered useful for their progressive integration into the global trade, financial and economic system. Increasingly, however, they are using the tools and procedures offered by the existing international legal machinery to articulate norms 'that will both insulate them from external pressures to liberalize and also consolidate internal control through cross-border cooperation'.[14] To the extent that global power continues to shift toward authoritarian states, the impact on

[8]D. Landau, 'Abusive Constitutionalism', (2013) 47 *UC Davis Law Review* 189. See also R. Dixon and D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (2021).

[9]See, e.g., L. Di Bonaventura Altuve, 'Collective Promotion of Democracy and Authoritarian Backsliding: The Organization of American States in Venezuela, Nicaragua, and Honduras', (2021) 65 *The Latin Americanist* 233.

[10]See, e.g., T. Drinóczi and A. Bień-Kacała, *Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union* (2021).

[11]See Ginsburg, *supra* note 2, at 185.

[12]Ibid., at 187.

[13]As the author explains in detail in Ch. 6 of his study, Beijing's current approach to international affairs is strongly influenced by traditional Chinese ideas of world order. Importantly, this includes the ancient concept of *tianxia* ('all under heaven'), which – according to Ginsburg – may in fact be viewed as 'the perfect underpinning of a notion of hegemonic international law with "Chinese characteristics"'. See Ginsburg, ibid., at 252.

[14]See Ginsburg, ibid., at 236.

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the normative framework underpinning international relations will be felt on multiple fronts, leading to a construction of international law that deviates sharply from the liberal model that was dominant in the 1990s and early 2000s. As a result, Ginsburg predicts, we will frequently see a return to traditional Westphalian principles of sovereignty and non-interference, thinner forms of co-operation, weaker international institutions, a move away from third-party dispute resolution, and further rejection of external scrutiny and international (criminal) accountability.

In the understanding of the author, an international order is produced 'by powerful states interacting with each other, in turn creating opportunities and constraints for other states'.[15] Evidently, the most powerful states at this juncture of history are the United States and China. Their interaction, Ginsburg claims, will therefore not just determine the shape of international governance going forward but also the relative space for prodemocratic and authoritarian international law. This, then, brings us to the core of Ginsburg's reading of the new 'tripartite' international legal order that is currently in the making. In essence, it is made up of a shrinking area of prodemocratic international law, an expanding area of authoritarian international law, and a more or less static domain of 'general or regime-neutral international law'.[16]

It should be noted in this context that the author attests the US and China a surprisingly high degree of convergence in basic assumptions about international law, as he sees both firmly preferring a hegemonic over any 'cosmopolitan' or 'constitutionalist' vision of it. As a consequence, Ginsburg contends that whatever is to remain of international legal activism in support of democracy and individual rights will ultimately depend on 'mid-sized states and regional institutions';[17] thereby confirming his overall optimism regarding the potential of regional groupings to emerge as the driving force in the area of 'preservative democracy support'. However, as he concedes in a recently published follow-up article to *Democracies and International Law*, this optimism has lately (again) been severely tested – most notably by the resurgence of coups in Africa and the inability of African regional organizations to ensure respect for the continental principle of democratic turnover in places like Mali, Sudan, Burkina Faso, and Chad.[18]

To sum up: Though one might not have expected it in view of its title, Ginsburg's book ultimately prepares us for the dawn of new international order, in which authoritarian states increasingly use international law in ways that advance their anti-liberal goals and policies. Recent events, which took place after the publication of the book, may in fact be read as further confirmation of Ginsburg's central argument. Consider, for instance, Russia's military intervention in Kazakhstan at the request of President Tokayev in January 2022, which was formally carried out under the framework of the Moscow-based Collective Security Treaty Organization (CSTO).[19] Likewise, consider the Joint Statement by the Russian Federation and China of 4 February 2022 on 'International Relations Entering a New Era' (adopted on the sidelines of the opening ceremony of the Olympic Winter Games in Beijing), which includes a remarkably vigorous rejection of Western efforts at promoting democratic governance as a universal value.[20] Of course, as we today

[15]Ibid., at 237.

[16]Though Ginsburg does not offer a detailed definition of the latter category (general or regime-neutral international law), he indicates that it pertains to international norms and arrangements that are meant to 'facilitate the production of international public goods' without any reference to regime-type. See Ginsburg, ibid., at 50.

[17]See Ginsburg, ibid., at 286.

[18]T. Ginsburg, 'Democracies and International Law: An Update', (2022) 23(1) *Chicago Journal of International Law* 1, at 4.

[19]The operation's objective was to quell mass protests in Kazakhstan provoked by a sudden increase in local gas prices. According to some observers, the episode has set a precedent for the use of the CSTO for internal repression in the post-Soviet space; see J. Hedenskog and H. von Essen, 'Russia's CSTO Intervention in Kazakhstan: Motives, Risks and Consequences, Stockholm Centre for Eastern European Studies', 14 January 2022, available at sceeus.se/en/publications/russias-csto-intervention-in-kazakhstan-motives-risks-and-consequences/.

[20]'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', 4 February 2022, available at www.lawinfochina.com.

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know, Russia greeted the 'New Era' three weeks later with a full-scale military assault on the Ukraine on 24 February 2022.

All in all, Ginsburg clearly has a point in arguing that authoritarian international law is on the rise – and that China and Russia are both playing a prominent role in this regard. That said, the focus on these two powerful authoritarians (especially on China), who – not least because of their permanent seats in the UN Security Council – hold privileged positions in the global system, may also risk to distort the larger picture. Whether the strategies developed by these countries to advance anti-liberal values and policies via international law truly offer an attractive model for smaller and mid-sized authoritarian states remains to be seen. When such states are not entirely dependent (in political or economic terms, or in terms of their security) on any of the larger authoritarian powers, it may well turn out that, rather than being drawn into any exclusive authoritarian international law scheme, they will continue to opportunistically engage in the international arena both with non-democratic as well as with democratic states.

Obviously, this review has addressed only selected aspects of the rich and insightful study presented by Ginsburg, which will be of great interest not only for international lawyers but also for political scientists, particularly students and scholars of international relations. For those not intimately acquainted with social science methodology (presumably most readers with an international law background), the first two chapters of the book may, at least in part, make for a difficult read. In Chapters 3 and 4 the author returns to a legal analysis, eventually demonstrating that in this day and age regional regimes of preservative democracy support are likely the most relevant remnants of the era of prodemocratic international law. The book's crown jewel are Chapters 5 and 6, which not only lay out the contours of the novel concept of authoritarian international law but also offer fascinating insights into China's trajectory toward international law, including its specific bilateral engagements with states connected to it via the 'One Belt One Road' initiative. The book definitely deserves further discussion, not only for its unconventional multidisciplinary approach, but also for its incontrovertible relevance in a world faced with yet another 'Zeitenwende'.

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