

INTRODUCTION TO THE SYMPOSIUM ON AUTHORITARIAN INTERNATIONAL LAW: IS AUTHORITARIAN INTERNATIONAL LAW INEVITABLE?

*Katerina Linos**

Tom Ginsburg's powerful article "Authoritarian International Law" warns that as democracy declines within countries, the character of interstate relations changes as well.¹ Ginsburg's theoretical claims are supported by careful quantitative analyses and qualitative case studies, making this article a model for international law scholarship.² Ginsburg shows that authoritarian states participate in far fewer international institutions, treaties, and formal dispute resolution mechanisms than do democratic ones. This quantitative decline in cooperation comes with a change in the normative character of the system. Authoritarian international law emphasizes sovereign prerogatives above all else, in a return to the amoral Westphalian system.

There are certainly many ways to critique Ginsburg's pathbreaking piece. At the same time, six prominent scholars invited to offer critiques also chose to underscore the importance of Ginsburg's core thesis, by pointing out even darker implications, and proposing modes of resistance. This introductory essay previews some major questions and contributions.

Let us start with definitions, as gaps and questions often arise straightforwardly once terms are defined. Ginsburg begins with a relatively thin definition of democracy and authoritarianism. Drawing on his own work with Aziz Huq, Ginsburg defines democracies as states that hold elections, protect a small set of core rights related to political contestation, and uphold the rule of law in electoral contestation. Authoritarian states, in contrast, suppress these processes. However, many symposium contributors point to "varieties of authoritarianism" and underscore that authoritarianism is far from uniform. Ian Hurd of Northwestern University critiques quantitative indicators of democracy and authoritarianism,³ while Allen Weiner of Stanford University, drawing on Jessica Weeks' work, explains that authoritarian states vary both in their legitimating ideologies, and in their modes of succession.⁴

Two authors take us even further, by explaining how variations among the exercise of power matter for authoritarian international law. Trang (Mae) Nguyen of Temple University distinguishes between large authoritarian states that attempt to *set* new rules, and smaller authoritarian states, like Cambodia and Vietnam, that in her powerful language instead "*hedge*," seeking to balance competing pressures.⁵ Cassandra Emmons of Princeton University distinguishes between authoritarian states and "*deep* authoritarian states," suggesting, through a new

* *Professor of Law, Co-Faculty Director, Miller Institute for Global Challenges and the Law, Berkeley Law School.*

¹ Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

² Katerina Linos, *How to Select and Develop International Law Case Studies: Lessons from Comparative Law and Comparative Politics*, 109 AJIL 475, 475 (2015).

³ Ian Hurd, *Legal Rules – Political Principles*, 114 AJIL UNBOUND 232 (2020).

⁴ Allen S. Weiner, *Authoritarian International Law, the Use of Force, and Intervention*, 114 AJIL UNBOUND 220 (2020).

⁵ Trang (Mae) Nguyen, *International Law as Hedging: Perspectives from Secondary Authoritarian States*, 114 AJIL UNBOUND 237 (2020).

dataset, that only “*deep* authoritarian states” differ fundamentally from democracies in the international organizations they create.⁶

Ginsburg defines authoritarian international law as “legal rhetoric, practices and rules specifically designed to extend the survival and reach of authoritarian rule across space and/or time.”⁷ Undoubtedly, based on this definition alone, negative consequences will follow. But the symposium authors succeed in spelling out consequences that are more extensive, in depth and breadth, than what “Authoritarian International Law” proposes.

Hurd’s essay “Legal Rules – Political Principles” develops a powerful normative critique. He suggests that as authoritarian international law rises, diverse arguments by doctrinal scholars and social scientists in support of international law collapse. If it were once possible to believe that international law is a force for greater efficiency, or perhaps for the global good more broadly defined, the rise of authoritarian international law makes this belief untenable. The optimism of the 1950s, reborn in the 1990s, was highly contingent on factors that no longer hold—in particular, economic power concentrated in the hands of a handful of liberal democracies. As soon as China and Russia are setting international law’s normative contents, our assumptions about the value and values underlying international law require radical reconsideration.

Allen Weiner’s essay “Authoritarian International Law, the Use of Force, and Intervention” also points out critical consequences of the rise of authoritarian states that Tom Ginsburg’s article does not fully develop. This essay develops implications for the law of war, for both *jus in bello* and *jus ad bellum* rules. Weiner predicts a return to the black letter law of (non-) intervention, but less respect for the black letter Geneva Convention law on rights of soldiers and civilians. Weiner also warns about the rise of nationalist rhetoric in authoritarian states. While nationalist rhetoric is on the rise in democracies and authoritarian states alike, nationalist authoritarian states, he argues, may be especially likely to pursue forcible acquisition of territory (as recent developments in the Crimea and in Hong Kong illustrate). While democratically elected leaders have started global conflict in the past, it is indeed a critical moment to revisit the democratic peace theory.

Several essays observe that the international law system was not as democratic as we had believed, while also suggesting possible ways to fight back. Cassandra Emmons, in “International Organizations: Enablers or Impediments for Authoritarian International Law” flags that for much of the post-WWII era—the Cold War period—authoritarian regimes were allowed to flourish. Shirley Scott of UNSW Canberra in “The Imperial Over-Stretch of International Law” emphasizes that decision-making in international institutions has long been critiqued as anti-democratic, for giving too little power to the states in which the vast majority of the world’s population lives.⁸ Chibli Mallat of the University of Utah in “Introducing Nonviolence in International Law” details why the decline in international institutions, and in democratic states’ influence over international institutions, cannot be blamed solely on the Trump administration.⁹ Indeed, he helpfully contextualizes a critical date, and explains why 2006 was the peak year for democracy in international institutions. In the years since, ineffective U.S. responses to atrocities abroad, and the limited acceptance of doctrines such as responsibility to protect and of institutions such as the International Criminal Court, have hobbled global efforts to fight even the very worst autocrats.

Amidst all this pessimism, it is helpful to look for possible paths of resistance. Scott’s essay focuses on civil society. She first points to the important limitations of the existing international law regime, warning us wisely that a system in which the hegemon happens to be a democracy need not be a democratic one. She then

⁶ Cassandra V. Emmons, [International Organizations: Enablers or Impediments for Authoritarian International Law](#), 114 AJIL UNBOUND 226 (2020).

⁷ [Ginsburg](#), *supra* note 1, at 225.

⁸ Shirley V. Scott, [The Imperial Over-Stretch of International Law](#), 114 AJIL UNBOUND 242 (2020).

⁹ Chibli Mallat, [The Limits of Authoritarian International Law](#), 114 AJIL UNBOUND 247 (2020).

emphasizes that even when there is a hegemon, small and mid-range powers can form alliances among themselves, and with civil society groups, to bring about concrete change. The Landmines Convention is one example that offers optimism. Mallat's essay reminds us of the many (successful and unsuccessful) nonviolent protest movements in both democratic and authoritarian states. The optimism in both these essays, even in this moment of darkness, is well worth underscoring. Will there be any space for non-violent protest in authoritarian regimes that have so successfully crushed prior resistance? Will there still be space for civil society to operate internationally, and, more critically translate some of these gains into domestic implementation if China's influence on the global sphere rise? I am not confident, but hope I am wrong.

Nguyen's essay, "International Law as Hedging: Perspectives from Secondary Authoritarian States" is particularly concrete and offers very rich, new material, on an alternative mode of resistance. Because international law, like history, is typically written from the perspective of the hegemon, discussions about peripheral states play a smaller role. Small democracies, by virtue of their openness to scholars, and occasionally, their wealth, can play a role in global norm-setting, as illustrated by Scott's essay on Scandinavian efforts to organize global civil society. But so little is known about small autocracies that Nguyen's essay adds a rich information trove. To better understand forms of resistance to China's efforts, Nguyen focuses on the most prominent boundary dispute, the South China Sea Dispute, and the most prominent economic initiative, the Belt and Road Initiative.¹⁰ She brings to these disputes the perspective of small states, including many details unfamiliar to Western audiences.

Nguyen's theoretical contribution—her emphasis on "hedging"—rather than actively resisting—is critical. Indeed, the strategy she proposes, in which small authoritarian states try to maintain good relations both with large authoritarian states and with large democratic ones offers reason for hope. This is because it undermines a core assumption in Tom Ginsburg's essay, that authoritarian states will group together to pursue an anti-democratic system of global governance. Nguyen's nuanced case studies also suggest that the resistance techniques and modes of dispute resolution captured by quantitative data may be inadequate, and that active resistance may be hiding behind the appearance of acquiescence.

I end by returning to Emmons' essay as it offers a different reason for optimism. It is not a hopeful essay in its entirety, and it contains many disquieting points. That said, her new data, developed more fully in her doctoral research, suggest that some of the most worrisome parts of Tom Ginsburg's analysis hold for only a small subset of authoritarian states.

Emmons systematically examines the founding charters of international organizations. She reports that, in the post-Cold War era, it is not all authoritarian states but only "deep authoritarian states" whose international organizations look distinct. At least on this measure, which focuses on formal charters, democratic and "ordinary" authoritarian states do not appear sharply different. This data might suggest that authoritarian states may not be using international law to promote anti-democratic values as forcefully as Tom Ginsburg's essay would lead us to believe.

To conclude: Tom Ginsburg's essay warns us that the character of interstate relations will change as authoritarian states gain increasing influence and seek to subvert international efforts at democracy and human-rights promotion. A series of responses, from many continents and perspectives, concede that the world around us is indeed changing, and not for the better. These essays contain strands of optimism, but only limited ones. Long lost are the days when history was thought to move in one direction alone.

¹⁰ Nguyen, *supra* note 5, at 237.