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SYMPOSIUM ON AUTHORITARIAN INTERNATIONAL LAW: IS AUTHORITARIAN INTERNATIONAL LAW INEVITABLE?

THE IMPERIAL OVER-STRETCH OF INTERNATIONAL LAW

*Shirley V. Scott**

In presenting the international law community with a call to action in defense of the liberal international order against a trend towards "authoritarian international law," Tom Ginsburg prompts us to assess the systemic dynamics at play in the contemporary international legal order.[1] In doing so, we should be cautious about assuming that the consequences for international law of any particular actor will be positive or otherwise. A couple of decades ago even American international lawyers were concerned about what they perceived to be the threat posed to international law by the United States as global hegemon. And yet from today's vantage point, it seems that the imperial actor during the post-Cold War period may not have been the United States so much as transnational civil society. The very openness of the system of international law that enables both democratic and authoritarian regimes to promote norms reflective of their policy preferences has also enabled civil society to advance norms, processes, and institutional structures that go beyond the policy preferences of dominant states. In doing so, civil society—a hallmark of what we might refer to as the "pseudo-democratic" international legal system—has challenged the delicate balance between power politics and the realization of a pure international rule of law. The consequences appear serious.

Pseudo-Democratic International Law

The current system of international law was to a considerable extent the product of democratically elected governments,[2] but as Ginsburg points out, this does not mean that most international law is inherently democratic.[3] The functioning of international institutions does not meet democratic standards,[4] certainly if democracy is understood as popular control over decisions of policy-makers.[5] In terms of substantive international law, it is arguably the international law of human rights that is most liberal in nature. The law on the use of force, on the other hand, brings into play institutions, rules, and processes of a very undemocratic nature, the most extreme of which is the UN Security Council. Obligations under the Charter trump any other legal obligations, and decisions of the

* *Professor of International Law and International Relations and Head, School of Humanities and Social Sciences, UNSW Canberra.*

[1] Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL, 221, 228 (2020).).

[2] *Id.* at 228.

[3] *Id.* at 251.

[4] *See, e.g.*, James Bohman, *International Regimes and Democratic Governance: Political Equality and Influence in Global Institutions*, 75 Int'l Aff. 499 (1999); Michael Zürn, *Global Governance and Legitimacy Problems*, 39 Gov. & Opposition 260, 260 (2004).

[5] Robert Dahl, Can International Organizations be democratic? A Skeptic's View in Democracy's Edges 19 (Ian Shapiro ed., 2009).

Council under Chapter VII are binding on member states. The Council has the power to authorize use of force against a member of the United Nations.

International law is not founded on the values of democracy but on the principle of the sovereign equality of states. And yet the principle of the sovereign equality of states has been described as pseudo-democratic in the sense that it does provide for choice,[6] including, for example, the choice to remain unbound by much of the content of international human rights law and in many instances to remain beyond the reach of third-party dispute resolution. Choice is evident in the law of treaties, insofar as a state is bound by a treaty only when it has given its consent to be bound.[7] Many treaties effectively provide for partial acceptance through a system of reservations. Adoption of a multilateral treaty at an international conference takes place by a vote of two-thirds of the states present and voting, unless by the same majority it is decided to apply a different rule.[8] There has been increased use of consensus decision-making meaning that, at least in theory, any negotiating state can block adoption of a treaty if fundamentally opposed to its provisions.

International law is arguably at its most pseudo-democratic in incorporating the ideal of a rule of law as is found in liberal democracies. The essence of the ideal is that all actors, no matter their relative power, are equal before the law. The ideal of international law is that of a system that is politically neutral. Although in practice a legal fiction, the ideal has fulfilled a normative role within pseudo-democratic international law.[9] Even where general international law is at its least democratic, the UN Security Council does not have military capability of its own but, when perceived necessary, authorizes others to enforce international law on its behalf. Where it establishes sanctions regimes, or passes so-called "legislative" resolutions binding on all states, the Council ultimately relies on states accepting the appropriateness of those decisions; it would not have the means to enforce its decisions absent broad consensus around the world that its decisions are necessary and legitimate.

Civil Society and Pseudo-Democratic International Law

The extensive role of civil society in contemporary international law is another dimension of the pseudo-democracy of general international law. NGOs—single-issue actors as opposed to states that must juggle multiple competing priorities—play an important role in democratic societies as well as in the shaping of international law. This has included for example, the drafting of the Landmines Convention,[10] and much earlier, the negotiation of the 1928 Pact of Paris—the precursor to Article 2(4) of the UN Charter.[11] Their role is thus far from new. It was the vision of nineteenth century leaders of the peace movement and legalists to have a rule of law at the international level, inclusive of a world court, that could obviate the need for war.[12] A world court would need a body of law to apply, and this was part of the impetus for the great codifying projects of the last quarter of the nineteenth and the twentieth centuries.

Civil society has also supported the post-Cold War proliferation of dispute resolution mechanisms and international courts and tribunals. Civil society was key to the success of the Rome Diplomatic Conference concluding

[6] Craig Forcese, *Hegemonic Federalism: The Democratic Implications of the UN Security Council's "Legislative" Phase*, 38 NZ J. Pub. & Int'l L. 175 (2007).

[7] Vienna Convention on the Law of Treaties art. 34, 8 ILM 679 (1969).

[8] *Id.* art 9(2).

[9] Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 Victoria Univ. Wellington L. Rev. 627 (2018).

[10] Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction*, 9 Colo. J. Int'l Envtl. L. & Pol. 371 (1998).

[11] Shirley V. Scott, *Inserting Visions of Justice into a Contemporary History of International Law*, 4 Asian J. Int'l L. 41 (2014).

[12] *Id.*

the Rome Statute of the International Criminal Court (ICC).[13] The European Court of Human Rights accords NGOs a significant role in its proceedings.[14] Non-state actors cannot initiate proceedings before the ICJ, but they may influence national democratic governments to commence litigation either directly, by lobbying governments, or indirectly, by impacting public opinion.

The Dilemmas of Pseudo-Democratic International Law

Ginsburg's article highlights one of the perceived dangers of the pseudo-democratic, inclusive nature of international law: that authoritarian regimes are able to harness the system to facilitate elements of anti-democratic rule at a domestic level. To the extent that international law does provide for choice, that very choice can work to the benefit of authoritarian regimes and enable them to promote their preferred norms via the international legal order, while avoiding obligations with which they disagree. There are additional consequences of the pseudo-democracy of international law, which are leaving proponents of a "liberal international order" with some difficult choices. One implication for multilateral treaty-making is what is known as the lowest common denominator effect, by which the text of a multilateral treaty addressing a collective action problem may reflect the demands of the least willing. The plethora of treaties created to address serious collective action problems including climate change are therefore generally inadequate to the tasks asked of them. Very few multilateral treaties have solved the problems they were designed to solve. Many have helped a little.[15]

Another international law trajectory that has resulted in part from the openness of international law is what could be termed its imperial over-stretch. This concept is a reference both to Paul Kennedy's famous volume identifying military over-stretch as a precursor of imperial downfall,[16] and Dworkin's reference to "law's empire,"[17] by which he meant something akin to the rule of law. There was a renewal of interest in the concept of empire associated with the "unipolar moment" at the end of the Cold War and extending into this century; more than one author queried whether the post-World War II years of "law's empire" had, with such developments as the invasion of Iraq and legislative resolutions of the UN Security Council, instead given way to "empire's law."[18] International law was portrayed as an instrument at the service of the United States, with the potential to morph into hegemonic international law.[19]

In fact, the relationship of international law to power has been in a far more delicate balance in the contemporary international order. International law is often critiqued for not being able to hold the most powerful to account. It is true that when pitted directly against power, international law tends to come off second best. What international law has done over the last century is to offer normative standards both by which to seek incremental improvements towards a better world, and against which to measure when the powerful are stepping beyond what is acceptable. For international law to play this role, the gap between the substance of international law and what

[13] Cenap Cakmak, *Transnational Activism in World Politics and Effectiveness of a Loosely Organised Principled Global Network: The Case of the NGO Coalition for an International Criminal Court*, 12 Int'l J. Hum Rts. 373 (2008).

[14] Rachel A. Cichowski, *Civil Society and the European Court of Human Rights*, *in* The European Court of Human Rights between Law and Politics 77 (Jonas Christofferson & Mikael Rask Madsen eds., 2011).

[15] Helmut Breitmeier et al., *The Effectiveness of International Environmental Regimes: Comparing and Contrasting Findings from Quantitative Research*, 13 Int'l Stud. Rev. 579 (2011).

[16] Paul Kennedy, The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000 (1987).

[17] Ronald Dworkin, Law's Empire (1986).

[18] Empire's Law: The American Imperial Project and the "War to Remake the World" (Amy Bartholomew ed., 2006). *See also* José E Alvarez, *Contemporary International Law: An "Empire of Law" or the "Law of Empire"?*, 24 Am. U. Int'l L. Rev. 811 (2009).

[19] Detlev Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001).

is acceptable to the most powerful cannot be too stretched. If there is no gap, then law simply reflects policy preferences, but if the gap is too big, international law will be unlikely to exert any pull over the behavior of the most powerful.

And yet over the decades, single issue, ideals-based actors—often working in tandem with middle powers—have made use of the pseudo-democratic nature of international law to stretch it beyond what was acceptable to the United States and other significant powers including China and Russia. According to Nye, the role of civil society in global governance, although reflective of democracy, has arguably been less democratic even than that of international organizations, which can claim at least some indirect democratic legitimacy in the sense that they are responsive to governments to a certain extent.[20] It was thus not necessarily the United States that was functioning as the imperial power within international law, but civil society, often in the form of alliances or coalitions of NGOs. Multilateral treaties came to be regarded as a governance mechanism for addressing all manner of issues beyond those that had concerned classical international law. This continues today, with civil society calling for ratification of a treaty to outlaw nuclear weapons,[21] for negotiation of a fossil fuel non-proliferation treaty,[22] and so on.

The ICC is perhaps the classic example of over-reach within the empire of international law, undermining U.S. support for a major systemic development. The United States had always been active in the evolution of international criminal law, playing a central role at Nuremberg and at Tokyo and promoting the establishment of the ad hoc tribunals for the former Yugoslavia, Rwanda, and Sierra Leone. The United States supported the creation of a permanent international criminal court. The 1994 draft statute prepared by the UN's International Law Commission envisaged a court along the lines of a permanent version of an ad hoc tribunal under the authority of the UN Security Council. As concluded in Rome, however, the Statute provided for situations to come before the Court not only via the Security Council, but also in the event that domestic authorities were unwilling or unable to prosecute.[23] The United States withdrew support for the Court not because it was unwilling to countenance the prosecution of its own citizens so much as because the design of the Court meant that it would be unable to preclude the prosecution of any particular U.S. citizen.[24]

Meanwhile, despite initial support for the ICC on the part of many African countries, the prevalence of African situations brought before the Court meant that it came to be viewed as operating to ensure the accountability of their citizens, but not that of U.S., Chinese, or Russian leaders.[25] The UN Security Council in 2009 refused to ask the Court to defer proceedings against President Omar al-Bashir of Sudan as requested by the African Union and, due to opposition from Russia and China, did not refer the situation in Syria to the ICC. More recently, a series of troubles culminated in widespread dissatisfaction that the pre-trial chamber did not authorize the opening of a formal investigation into the situation in Afghanistan.[26]

[20] Joseph S. Nye, Jr., *Globalization's Democratic Deficit*, 80 Int'l. Org. 2 (2001). *See also*, Robert Keohane et al., *Democracy Enhancing Multilateralism*, 63 Int'l. Org. 1 (2009).

[21] The International Campaign to Abolish Nuclear Weapons.

[22] Peter Newell & Andrew Simms, *A Fossil Fuel Non-Proliferation Treaty*, (Submission on behalf of the Rapid Transition Alliance to the Talanoa Dialogue, Oct. 2018).

[23] William Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 94 EJIL 102 (2000).

[24] Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AJIL 102 (2000).

[25] Tim Murithi, *The African Union and the International Criminal Court: An Embattled Relationship?*, Africa Portal (2013).

[26] Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis*, 20 Melb. J. of Int'l L. (2019). Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, (Apr. 2019).

The pseudo-democratic nature of international law has enabled its over-stretch in realizing the ideal of an international rule of law. The growth of international courts and tribunals has been one of the most notable systemic developments in international law of recent decades. But whereas the institutional design of the ICJ provided for some tempering of an assumption of political neutrality (judges are independent)[27] with realism (judges of the nationality of each of the parties shall retain their right to sit in a case before the Court but there is also a system of ad hoc judges),[28] more recently designed institutions do not necessarily have inbuilt design features that go as far in balancing legalism with *realpolitik*. The now sizeable cohort of international judges and their commitment to an international rule of law may be unintentionally exacerbating the over-stretch of the empire of international law.

The early post-Cold War assumption was that the United States was the primary power behind international law, but as we have seen, civil society and members of the international judiciary have shaped much of the subsequent expansion of its subject matter and played an increased role in compliance, enforcement, and third-party dispute resolution—arguably moving the system closer to the full embodiment of an international rule of law. At the same time, however, the United States, particularly under President Trump, has become disillusioned because international law has moved beyond what the United States considers acceptable—as for example, in the case of the work of the World Trade Organization's Appellate Body or the process of referral to the ICC. And, as the United States has disengaged, China has increasingly stepped up.

Conclusion

International law is formally neutral among regime types and pseudo-democratic in its own workings. This very fact has allowed those of strong political persuasion, including liberals, to pursue their preferred norms via international law. Ginsburg has alerted us to the fact that those of an authoritarian persuasion can be expected to do the same. The pseudo-democracy of international law has also arguably detracted from the effectiveness of international law. This is because there is an element of choice in several systemic regimes of international law. States can in many instances opt out of treaty provisions with which they do not agree and avoid third-party dispute resolution where they lack confidence in the relative strength of their own legal position.

Civil society has been integral to the international law project. And yet, a risk being realized within pseudo-democratic international law is the expansion of its mandate, often at the urging of civil society. Advocates of the ideal of an international rule of law may assume that the closer we can get to its complete realization the better. What has become increasingly evident is that there may be limits to the practical embodiment of the ideal of an international rule of law. Kennedy warned that imperial over-stretch was a precursor of imperial collapse. The United States has responded to imperial over-stretch within the international legal system by recalibrating the nature and degree of its own support—for example in its willingness to fatally undermine World Trade Organization dispute resolution, reject the Paris Agreement, and depart from the Human Rights Council and World Health Organization. Now Ginsburg has alerted us to China becoming increasingly proactive in using international law to pursue its preferred agenda. China may not be happy with certain features of the current international legal order, but neither is the United States.

[27] Statute of the International Court of Justice art. 2.

[28] *Id.* art. 31 (1) & (2).