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Democracies and Non-Democracies: The Use of International Law and Institutions

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TOM GINSBURG. *Democracies and International Law*. Cambridge, UK: Cambridge University Press, 2021.

At the end of the Cold War, Francis Fukuyama (1992) declared the end of history, Thomas Franck (1992) published his seminal work "The Emerging Right to Democratic Governance", and Anne-Marie (Slaughter) Burley (1992) was developing her theory of international law as law between liberal nations. In response, Susan Marks (2000), Brad Roth (1999), and other scholars expressed skepticism toward certain core tenets of such liberal-democratic interpretations of international law. They argued that the understanding of democracy underpinning these theories was too minimalistic, too focused on the electoral process, and too Western-centric. Slaughter's theory has also been criticized for unduly generalizing the geographically limited experience of the European Union (EU) and, to an extent, the Council of Europe system with its European Convention on Human Rights (ECHR) and the European Court of Human Rights.[1]

Subsequent developments seem to have proven that history was more on the side of Marks, Roth, and other critical voices rather than Franck and Slaughter. The reality of present-day Europe seems to belie the liberal-democratic ideal. A self-proclaimed illiberal-democratic regime in Hungary and democratic breakdown in Poland—both members of the EU and the Council of Europe—contradict the hopes pinned to these internationally most visible instances of third-wave democratization. The United Kingdom left the EU after a referendum campaign that included strong sovereigntist rhetoric and dubious practices to mislead the electorate (Marshall and Drieschova 2018). Russia annexed Crimea in 2014, launched a full-scale armed attack on Ukraine in 2022, and withdrew from the Council of Europe in the same year. The adherence to the ECHR is also increasingly under challenge in Turkey and the United Kingdom.

The world is much different now than it was some three decades ago. I had 1990s scholarship and the present political reality in mind when I started reading Tom

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1. Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, 213 UNTS 222.

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Ginsburg's prizewinning book.[2] Meaning, I started reading it with a degree of skepticism. But I soon realized that Ginsburg seeks to clearly distinguish his work from that of Franck and Slaughter, nor is his goal to concur with Marks, Roth, and other skeptical voices. Ginsburg asks a different question, one that a careful reader might detect already in the title: democrac*ies and* international law.

A FOCUS ON DEMOCRACIES, NOT DEMOCRACY

This is thus not a book about democracy and international law or about democracy in international law. The book does not seek to discuss whether international law requires that states are democratic or whether any other political models are compatible with the rules of international law. In other words, Ginsburg does not rehearse the argument that there is a right to democracy or democratic governance under international law, and neither does he try to suggest that non-democratic states should lose some attributes of statehood. In fact, this book is not focused on democracy as such but, rather, on democratic and non-democratic states and how (differently) they engage with international law and institutions. Ginsburg's proposition is thus different from, and also less ambitious than, those of Franck and Slaughter in the 1990s. He rather seeks to "explore the empirical relationship between *democracies* and international law" (6; emphasis in original) and asks "whether, why and how democracies *behave* differently than non-democracies in their use of international legal institutions" (6; emphasis in original).

The proposition that democracies behave differently and, arguably, better on the international plane is not new. It is reflected in the so-called Neo-Kantian democratic peace theory that has its echoes even in international law (Teson 1992). The idea has also been very convincingly challenged by José Alvarez (2001). Ginsburg's approach differs from Teson in that it seeks to investigate empirically how democracies make and use international law and institutions and what the differences are between democratic and authoritarian utilizations of international law. By drawing a distinction between the different utilizations of international law, Ginsburg does not seek to argue that the rules of international law, including those on the use of force, are not applicable to non-democratic states, and he does not seek to develop an argument in favor of pro-democratic intervention.

Ginsburg's claims are not only much more modest but also much more defensible if compared to the pro-democratic international legal scholarship in the early 1990s. He argues that democracies do engage more profoundly and genuinely with international law and institutions and outlines a difference between authoritarian international law and international law as made and utilized by democracies. By drawing this distinction, Ginsburg traces different patterns of utilization and application of international law as well as in the creation of international legal obligations and institutions. Democracies or the current state of democratic international law are not idealized in this book. Indeed, Ginsburg, *inter alia*, acknowledges that (1) democracies sometimes do use international

2. 2022 Book of the Year, International Law Association, American Branch; Robert E. Dalton Prize for Best Book in Foreign Relations Law, American Society of International Law, 2023.

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law to achieve certain goals they would not have been able to achieve within the domestic setting of constitutional democracy and (2) international law operates in a pluralistic world in which certain Kantian ideals can inspire how international law could be utilized, but such ideals cannot be realized. It is nevertheless worth trying to realize those ideals. As imperfect as democracies may often be on the international plane, they are less inclined to hiding behind the shield of sovereignty, and there still are numerous examples of democracies utilizing international law and its institutions to achieve democratic ideals internationally. This has particularly been the case at the level of regional cooperation.

In this context, Ginsburg rejects Franck's (1992) conceptualization of democracy as a human right at the universal level but does demonstrate that the three regional systems of human rights protection have quite prominently developed a democratic image of human rights. In the light of subsequent democratic backsliding, Ginsburg argues that Franck's 1992 article appears to be dated from the perspective of the universally applicable rules of international (human rights) law but has had much more traction regionally. Especially the system of the European Court of Human Rights has developed robust case law of democracy as a part of the European public order. The reality on the ground has nevertheless taken a different turn in some member states.

Ginsburg acknowledges the problem of democratic backsliding in certain states that are still deemed to be democratic according to the typology adopted in this book. What I miss is a thorough, systemic consideration of the problem. Hungary and Poland are sometimes still praised for their democratization and the role they played in the third wave, yet the consequences of their democratic backsliding are not fully theorized or followed through. To many commentators, it is unclear why Hungary and Poland should still be considered democratic states (see, for example, Bernhard 2021). And if they are not democratic, this ought to have some consequences for the democratic/non-democratic typology adopted in this book, for the role of democracy in regional systems, and, ultimately, also for the success of the third wave of democratization. According to Samuel Huntington (1991), the use of the word "wave" is not accidental. A wave of democratization washes up new democracies to the shore but then pulls some of them back into the murky ocean of non-democratic regimes. And this appears to have happened with Hungary and Poland.

DEMOCRACIES, AUTOCRACIES, AND SOVEREIGNTIST INTERNATIONAL LAW

Ginsburg makes two important methodological or definitional choices. The first one is a definition of democracy, which slightly expands on Franck's (1992) definition: free and fair elections, the rights to the freedoms of speech and assembly with the equal ability to run for office, and administration governed by the rule of law (21). This still is a rather narrow definition of democracy, but narrow can also mean more tangible (compare Huntington 1991). The second important choice that Ginsburg makes is to exclude the United States and China from his democracy/autocracy typology. The reason to exclude these two states is their power and the fact that they do not easily fit into the democracy/dictatorship model. In making this choice, Ginsburg comes

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dangerously close to subscribing to American exceptionalism, which is less visible because exceptionalism is also extended to China. But the problem is broader. Ginsburg also argues that authoritarian states are more sovereigntist than democratic ones. This view can be challenged. The excessive sovereigntist positions, at least at the level of *opinio juris*, may particularly underlie China's understanding of international law. It appears to be a bit of a stretch, however, to declare that all authoritarian states are sovereigntist while all democracies are not.

It is somewhat implicit in this book that the sovereigntist perception of international law is defined by a state's attitude toward the strength of the principle of territorial integrity and the prohibition of the use of force. This is indicated already by the introductory tale of two dictators, where outside military intervention and non-intervention in The Gambia and Equatorial Guinea are contrasted. The reader is presented with the challenge that the non-interventionist—that is, sovereigntist—view was doctrinally the correct one under international law, but did it lead to a better outcome? However, one can hardly find a state that would not be sovereigntist when it comes to intervention in, or dismemberment of, its territory. For example, the counter-secession policy of arguably democratic Spain has been fierce, and certain actions against the former political leaders of Catalonia may well have violated the ECHR.

Moreover, erstwhile sovereigntist Russia changed its rhetoric with the 2014 annexation of Crimea, when President Vladimir Putin even quoted the United States' pleadings in the *Kosovo* advisory opinion before the International Court of Justice (ICJ) to make an anti-sovereigntist argument.[3] Once-sovereigntist Russia has also been involved in the Syria conflict and has launched a full-scale aggression on Ukraine in flagrant violation of Article 2(4) of the UN Charter.[4] Rather, it may be that sovereigntist rhetoric is a matter of expediency for democratic and non-democratic states alike. If their territorial integrity is under threat (for example, in Taiwan, Catalonia, Kosovo), states are a bit more sovereigntist. If they are eager to intervene beyond international borders, states are a bit less sovereigntist. In this vein, it is instructive to look at which EU member states do not recognize Kosovo: Cyprus, Greece, Romania, Slovakia, and Spain. These tend to be those states that are either facing their own independence movements or have extensive ethnic minorities and fear boundary revisionism. It is a state's own fear for territorial integrity that inspires the sovereigntist position of democracies.

I am thus not entirely convinced that a sovereigntist reading of international law can be defined along the democratic/non-democratic divide. While China is considered to be exceptional due to its power, it appears that China's sovereigntist attitude nevertheless influences the image of all non-democratic states. At the same time, the democratic camp has had extreme sovereigntist episodes with Brexit in the United Kingdom and Spain's determined opposition toward the independence of Catalonia. Yet these developments are not fully theorized and reflected in the overall argument on the sovereigntist understanding of international law.

3. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Reports 403.

4. Charter of the United Nations, 1945, 1 UNTS 15.

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DEMOCRATIC VERSUS NON-DEMOCRATIC OR WEALTHY VERSUS POOR?

As in any work in which democracy is juxtaposed against non-democracy, and behavior of states in both categories is empirically studied and compared, the question of a democratic yardstick emerges in this book too. The central definition of democracy offered in this book is not easily quantifiable in spite of being rather narrow. Ginsburg thus embarks on empirical research on the basis of the Polity IV database, which categorizes different types of political regimes on a twenty-one-point scale. While the use of the database makes the study more tangible and supports the empirical approach and the use of some statistical methods, the attempts to measure democracy are, generally speaking, not entirely unproblematic. Nevertheless, one also needs to acknowledge that there is no perfect way of defining or even measuring democracy, and any author writing on this topic needs to make some difficult definitional and methodological choices. What I find perhaps more problematic is that the camp of democratic states in this study also happens to be—for the most part—a camp of wealthy states. There may be some exceptions in either direction, but there appears to be significant economic inequality and power imbalance between the two groups. And this inequality may well have consequences for what follows next.

Ginsburg develops his investigation into the behavior of democratic states in international law-making, the use of international dispute settlement procedures, and their roles in international organizations. Some empirical data are provided—for example, democracies conclude many more treaties than non-democracies. Ginsburg acknowledges that this observation is based only on reported treaties, and one can reasonably assume that many treaties concluded by non-democratic states are not publicly available. This nevertheless implies that democracies are better at reporting their treaties and thus subjecting them to public scrutiny. Moreover, according to data presented in this book, democracies are much more likely to add dispute settlement clauses to treaties they conclude with authoritarian states than to those treaties they conclude with other democracies; democracies are more likely to subscribe to individual complaints procedures under human rights treaties; democracies file more cases before the ICJ; democracies are more likely to have valid optional clause declarations under Article 36(2) of the ICJ Statute; and democracies are more likely to object to reservations under multilateral treaties.[5]

Perhaps somewhat counterintuitively, however, democracies are more likely to file reservations to international human rights treaties. Ginsburg explains this paradox by arguing that "democracies have domestic mechanisms that make treaty commitments meaningful" (75). In other words, when democracies ratify a human rights treaty, they know that they would need to deliver on their obligations, so they manage them with reservations; while autocracies, to put it somewhat cynically, do not plan to comply with these obligations anyway, so why bother filing a reservation. I am not entirely convinced by this logic, especially in the light of Ginsburg's other very relevant point that democracies also use international law "to accomplish illiberal ends that would be impossible for them to achieve on the domestic plane" (60). Here, I completely concur

5. Statute of the International Court of Justice, 1945, 33 UNTS 993.

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with Ginsburg. One should not idealize the manner in which democracies use international law and to which ends they use it. I return to my observation from above: the democratic camp in Ginsburg's categorization for the most part appears to be a club of wealthy states. The empirical study suggests that this club engages better, deeply, and more profoundly in international law-making, international dispute settlement, and international organizations. These states bring more international cases, file more reservations and objections to international treaties, and are more likely to add (impose?) a dispute settlement clause to a treaty with a non-democracy.

Might it be possible that these empirical facts are not consequences of differences between democratic qualities of states but, rather, stem from the differences in their wealth and resources? The governments of wealthier states may have more resources to staff their legal departments with rigorously trained lawyers who are well versed in international treaty law and international dispute settlement. Wealthier states may effectively use their political and economic power to impose on poorer and less powerful states treaties—possibly even unfair treaties—with dispute settlement clauses. It seems to me that the possible effects of power and economic imbalance were not excluded when the argument was developed that democracies utilize international law differently, more profoundly, and more in the spirit of international cooperation.

AUTHORITARIAN INTERNATIONAL LAW OR AUTHORITARIAN GLOBAL GOVERNANCE?

After dealing with the behavior of democracies in international law and institutions, Ginsburg turns to what he calls authoritarian international law. While I have some problems with the proposition that authoritarian international law is inherently sovereigntist, Ginsburg's take on the mechanics of authoritarian international law is very insightful. This is not to be simply understood as relations between authoritarian states but, rather, those instances in which "international law … support[s] normative development that specifically enhances authoritarianism" (192). The argument advanced in this context is that "democracies innovate and authoritarians mimic and repurpose" (193). The author very convincingly proves this point by an analysis of authoritarian international treaty regimes, starting with the Warsaw Pact, that have been bad imitations of certain international institutions created by democratic states. Ultimately, as Ginsburg demonstrates, democratic tools and language are repurposed for authoritarian use. We could indeed see a great deal of imitating and repurposing in Putin's Russia, for example, from a mimic of domestic democratic institutions to the abuse of the language of international law and "whataboutism" when annexing Crimea and launching a full-scale aggression on Ukraine.

While Ginsburg's argument fully convinces me at the level of political theory, I am not so convinced that it is fair to call this practice authoritarian international law. All states have the treaty-making capacity under the Vienna Convention on the Law of Treaties (VCLT) and/or customary international law.[6] There is nothing in the VCLT,

6. Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

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and rightly so, that would prevent authoritarian states from making treaties in general or treaties with a specific institutional component. Here, we come back to the question of universality of international law. If one does not subscribe to a right to democracy and liberal theories of international law, the existence of non-democratic international (institutionalized) treaty regimes is not a problem of international law—it is a political problem. In my view, one could discuss the phenomenon of authoritarian global governance and the emergence of authoritarian institutionalized international regimes. I am reluctant to see this phenomenon as authoritarian international law quite simply because ordinary international treaty mechanisms are behind the creation of such institutions. And such treaty mechanisms can be universally used by all states.

FINAL REMARKS

This book does not intend to be a manifesto. It is a rigorous work of a leading legal scholar. There are many points in the book where I agree with Ginsburg and quite a few where I disagree, but what matters in the end is that this book is very thought-provoking and intellectually rich. Both the content and the clear writing style keep the reader alert and actively engaged with the author's argumentation. Reading it feels like a lively discussion with its author. This is not a doctrinal international law book but, rather, a book about international law written by the author who otherwise thoroughly masters all doctrinal technicalities of international law. Due to its accuracy on doctrinal matters, this book is much more convincing than some similar works written from a predominantly social science perspective.

Ginsburg concludes with the observation that "a space for democratic survival and perhaps renewal" lies "in between cosmopolitan vision and sovereigntist fiction" (306). My view is that this is also the space where the post-Second World War international law lies: the UN Charter and, even more prominently, certain regional treaty-based regimes have introduced some elements of cosmopolitanism to the international legal system, but there still is a prominent role reserved for sovereign states in this system, although we do not know what precisely sovereignty ought to mean these days. It is no coincidence that democracy and international law occupy a similar space but, nevertheless, have slightly different coordinates and do not fully converge in that space.

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