

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

### AUTHORITARIAN INTERNATIONAL LAW, THE USE OF FORCE, AND INTERVENTION

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Tom Ginsburg's thought-provoking *Authoritarian International Law?* invites us to reflect on the potential changes to the international legal order that might flow from the global decline of liberal democracy and the corresponding rise of illiberal authoritarian regimes. Given that Ginsburg's cautionary tale is predicated on the central interest of authoritarians in the survival of their regimes and their concerns about internal security,<sup>1</sup> it is not surprising that many of the implications he identifies—which involve the expansion of norms that facilitate internal repression, enable repressive regulation of online expression, and dilute international democracy promotion<sup>2</sup>—concern international law's regulation of states' *internal affairs*. If Ginsburg's predictions about expanding authoritarianism are correct, however, we should also consider the implications for the evolution of international law in the external security realm, and in particular, for the legal regime governing the use of force and intervention in the affairs of other states. In this essay, I suggest that the expansion of authoritarianism is likely to diminish legal accountability of outside states that support repression by such regimes; to entrench the legal status of existing authoritarian regimes confronting domestic political violence; and to weaken the legal basis for Security Council interventions rooted in the "responsibility to protect" principle. When authoritarian states do wage wars, particularly when they intervene in civil wars, we should expect that their compliance with international humanitarian law (IHL) will be weak.

#### *Authoritarianism and the "Democratic Peace"*

A starting point for predicting the likely impact of the spread of authoritarianism on the use of force in the international system is the "democratic peace" literature, which shows that established democratic states rarely go to war with one another.<sup>3</sup> Understanding *why* this is so may help us make smarter predictions about how authoritarian regimes will behave. Unfortunately, there is no clear consensus about the reasons why democracies use force against each other infrequently. The *norms hypothesis* focuses on the commitment of democratic states to principles of non-violence and the peaceful resolution of disputes; democracies "practice the norm of compromise with each other that works so well within their own borders."<sup>4</sup> Alternatively, the *accountability hypothesis* focuses more

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<sup>1</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221, 228 (2020).

<sup>2</sup> *Id.* at 251.

<sup>3</sup> PAUL K. HUTH & TODD L. ALLEE, *THE DEMOCRATIC PEACE AND TERRITORIAL CONFLICT IN THE TWENTIETH CENTURY* 1 (2003).

<sup>4</sup> John M. Owen, *How Liberalism Produces Democratic Peace*, 19 INT'L SEC. 87, 91 (1994).

on the institutions in democracies that make leaders responsible to the preferences of an electorate that may be reluctant to incur the costs of conflict, especially casualties.<sup>5</sup>

Early democratic peace literature largely assumed that authoritarian states were simply polar opposites of democracies with respect to the characteristics that might explain why democracies rarely wage war against one another. Autocratic regimes do not embrace norms of non-violence and compromise, and authoritarian leaders can incur the heavy costs of war because they are not politically accountable to an electorate. More recent scholarship encourages us to look more closely at the variation between different *types* of authoritarian regimes in assessing their appetite for international conflict. Jessica Weeks, for instance, highlights the differences in foreign policy behavior between “personalist” authoritarian regimes, where leaders confront few audience costs, and non-personalist autocracies that contain powerful domestic audiences with the power to punish or depose the leader.<sup>6</sup> The realization that different kinds of authoritarian regimes behave differently in their international relations has obvious implications for what the spread of authoritarianism might presage for the legal regime governing the use of force.

I suggest that in assessing the likelihood that authoritarian regimes will resort to force, we must consider not only on their type, i.e., whether they are “royal dictatorships, military juntas, [or] people’s republics,”<sup>7</sup> but also their “legitimizing ideologies,”<sup>8</sup> i.e., the organizing narratives that leaders of those states rely on to buttress their claims to authority. If recent variants of the literature on “autocratic peace” effectively apply the accountability hypothesis from the democratic peace literature to different types of authoritarian regimes, we should also apply the norms hypothesis to such regimes by examining their legitimizing ideologies. These are also likely to influence authoritarian regime behavior with respect to the international use of force.

### *Authoritarian Legitimizing Ideologies*

A sampling of authoritarian regimes across the globe reveals the wide range of legitimizing ideologies on which they rely. The Communist Party regime in China relies on a narrative of developmental prowess and governing efficiency in generating rapid economic progress and lifting hundreds of millions of people out of poverty. Under President Putin, Russia highlights the state’s role in affirming traditional religious and patriotic values,<sup>9</sup> and in serving as a bulwark against the spread of Western decadence. In Egypt, President Sisi’s government appears to base its legitimacy on delivering stability, in contrast to the tumult experienced during the Arab Spring. Saudi Arabia’s basic law emphasizes the central role of Islam; Article 7 declares that “[g]overnment in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.”<sup>10</sup>

A legitimizing ideology that deserves special mention in evaluating the prospects of the use of force by illiberal and authoritarian regimes is nationalism. Although nationalism in its most general sense is merely a sense of citizens’ affinity with their national identity, a dangerous aspect of nationalism in the realm of international relations is the tendency of nationalists to adopt attitudes of national superiority and to denigrate

<sup>5</sup> HUTH & ALLEE, *supra* note 3, at 12.

<sup>6</sup> Jessica L. Weeks, *Strongmen and Straw Men: Authoritarian Regimes and the Initiation of International Conflict*, 106 AM. POL. SCI. REV. 326, 327 (2012).

<sup>7</sup> Ginsburg, *supra* note 1, at 224.

<sup>8</sup> Tom R. Tyler, *Introduction: Legitimizing Ideologies*, 18 SOC. JUST. RES. 211, 212 (2005).

<sup>9</sup> See, e.g., *The Russian Federation’s National Security Strategy, Approved by Russian Federation Presidential Edict 683* (Dec. 31, 2015) (noting that “[t]raditional Russian spiritual values are being revived” and invoking “respect for family and faith traditions, and patriotism”).

<sup>10</sup> *Basic Law of Governance, No. A/90* (Mar. 1, 1992).

other states.<sup>11</sup> Nationalist sentiments can also encourage leaders, when faced with adverse domestic political conditions, to adopt aggressive foreign policies to induce “the public to ignore domestic problems and [to] ‘rally around the flag’ to meet the foreign threat.”<sup>12</sup>

Considering regime type and legitimating ideologies can sharpen our understanding of the implications of growing authoritarianism for the international legal regime on the use of force and intervention. In terms of authoritarians’ common interests, because popular domestic uprisings present one of the main threats to authoritarian regime survival, and successful uprisings in one state can inspire such uprisings in other states, these regimes have a shared interest in preventing popular uprisings against other autocratic or illiberal regimes. For this reason, as Ginsburg notes, “[i]nternational cooperation that facilitates internal repression is desirable” among authoritarian states.<sup>13</sup> In practice, we see evidence of such anti-revolutionary cooperation among contemporary authoritarians, ranging from Russia’s extensive military intervention in Syria to support the Assad regime in a civil war initially triggered by demands for political reform<sup>14</sup> to Iran’s recent delivery of gasoline supplies to shore up the Maduro regime in Venezuela.

### *Authoritarianism and the Normative Development of International Law*

But what is the likely impact of such behavior on the *normative* development of international law? Authoritarian regimes are certainly unlikely to press for a general right on the part of states to intervene in one another’s internal affairs; to the contrary, authoritarian states generally “have a common interest in reasserting norms of non-interference.”<sup>15</sup> If the spread of authoritarianism only encourages support for “those forms of international cooperation that will help the [incumbent] *government* survive,”<sup>16</sup> won’t that merely reinforce the black letter international law of intervention—i.e., that during times of political violence, states may not intervene on behalf of non-state groups but may intervene on behalf of the government? If so, perhaps expanding authoritarianism may *not* have much impact on the international legal regime governing intervention and the use of force.

But I believe Ginsburg’s intuition that growing authoritarianism may begin to shape, in subtle ways, the contours of the law related to intervention and the use of force is correct. First, authoritarian-to-authoritarian assistance may serve to weaken the ability to hold states legally responsible for assisting other states in the commission of wrongful acts, a principle addressed in Article 16 of the Articles on State Responsibility.<sup>17</sup> There is ambiguity about the “mental state” required for a state assisting a wrongful act to incur responsibility; while Article 16 provides that a state must act with “knowledge” that it is assisting a wrongful act, the International Law Commission’s commentary suggests that the assisting state must *intend* for the wrongful act to be committed.<sup>18</sup> Although states like Russia and Iran have been criticized for supporting regimes in Syria and Iraq, respectively, that have committed IHL and

<sup>11</sup> Rick Kosterman & Seymour Feshbach, *Toward a Measure of Patriotic and Nationalistic Attitudes*, 10 POL. PSYCH. 257, 271 (1989).

<sup>12</sup> Gilat Bachar & Allen S. Weiner, *Governments, Publics, and Enemies: Intragroup Dynamics as Barriers to Conflict Resolution*, 7 DYNAMICS OF ASYMMETRIC CONFLICT 198, 203 (2014).

<sup>13</sup> *Ginsburg*, *supra* note 1, at 230.

<sup>14</sup> Russia has generally adopted a policy of “mak[ing] alliances with other authoritarian regimes that are . . . concerned about the possibility of a popular uprising that could lead to their loss of power.” Dmitry Gorenburg, *Countering Color Revolutions: Russia’s New Security Strategy and its Implications for U.S. Policy* 2 (PONARS Eurasia Policy Memo No. 342, Sept. 2014).

<sup>15</sup> *Ginsburg*, *supra* note 1, at 231.

<sup>16</sup> *Id.* at 229.

<sup>17</sup> *Report of the International Law Commission*, UN GAOR, Supp. No. 10, at 27, UN Doc A/56/10 (2001).

<sup>18</sup> *Id.* at 66 (“A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.”).

human rights violations, there does not appear to be much insistence that the assisting states are themselves legally responsible for the underlying wrongful acts. Growing cooperation among authoritarians to repress domestic opposition groups, and reduced condemnation of states that assist such repression, may accordingly diminish the responsibility of states under customary international law for assisting other states' wrongful acts.

Second, growing cooperation among authoritarian states may entrench international law's preference for incumbent regimes in countries experiencing insurrectionary or secessionist political violence. International law in general is quite agnostic about the legality of either domestic revolutions or secession. There are, of course, international legal standards for determining when a separatist entity qualifies as a state and when a revolutionary regime must be treated as the government of a state. Apart from a general preference for self-determination of peoples, however, international law says little—or at least is unsettled—about the permissibility of efforts to establish a new state or install a new government.<sup>19</sup> The effort Ginsburg describes by some authoritarian states increasingly to condemn “separatism,” as such, and to denounce any anti-regime political violence as unlawful “extremism”<sup>20</sup> may privilege the legal standing of status quo entities, be they states or governments, so as to give rise to an international legal norm discouraging revolution or secession.

Third, the growing role of authoritarian states will narrow international expectations about the circumstances under which the Security Council may authorize forcible action pursuant to its Chapter VII authorities to halt humanitarian abuses perpetrated by a government against its own population. China and Russia, permanent members of the Security Council, have demonstrated a reluctance to authorize Chapter VII action to address humanitarian abuses, sometimes on the grounds that the human rights violations do not constitute a threat to international peace and security triggering the Council's Chapter VII powers,<sup>21</sup> and sometimes because they politically support the regime carrying out the abuses.<sup>22</sup> Although the General Assembly, in its 2005 World Summit Outcome document, embraced the “responsibility to protect” (or “R2P”) doctrine to safeguard populations from widespread atrocities, it seems highly doubtful that a Security Council on which Russia and China wield a veto would be likely to act under Chapter VII to—in the words of the World Summit Outcome document—“take collective action . . . to protect . . . populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”<sup>23</sup> The Security Council's 2011 authorization to use force to protect civilians from governmental attacks in Libya may well be the last such case. The rise of global authoritarianism, in other words, may spell the demise of R2P.

Finally, when authoritarian states do wage war, we should expect that their compliance with IHL will be relatively weak. Compliance with IHL is driven both by principles of reciprocity and by domestic normative pressure rooted in media reporting, advocacy by civil society groups, and public opinion. Authoritarians face fewer domestic institutional constraints on violating IHL. Reciprocity, too, will serve as a weaker inducement for compliance, at least for authoritarian states waging wars against non-state armed groups that lack belligerent rights. Moreover, if an authoritarian leader loses a civil war and is forced from power, authoritarian regimes are less likely to press for

<sup>19</sup> See [Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo](#), Advisory Opinion, 2010 ICJ REP. 403, 438 (July 22) (noting “radically different views” about whether “the international law of self-determination confers upon part of the population of an existing State a right to separate from that State”).

<sup>20</sup> [Ginsburg](#), *supra* note 1, at 251-53.

<sup>21</sup> As early as 2007, in vetoing a U.S.-drafted resolution that would have, among other things, called on the Government of Myanmar to halt attacks against civilians, both China and Russia stated that conditions in Myanmar did not pose a threat to international or regional peace and security. [UN SCOR, 62nd Sess., 5619th mtg. at 3, 6, UN Doc. S/PV.5619](#). (Jan. 12, 2007).

<sup>22</sup> Since civil war erupted in Syria in 2011, China and Russia have vetoed over a dozen proposed Chapter VII resolutions seeking to address the country's humanitarian crisis.

<sup>23</sup> [UNGA Res. 60/1](#), para.139 (2005)

criminal accountability for human rights violations or war crimes for which the fallen leader is responsible. Authoritarian regimes might instead offer themselves as safe-havens for ousted leaders. If such practice becomes sufficiently common, it could support the emergence of exceptions to what have long been considered unqualified international law obligations to hold leaders accountable for at least certain serious violations of IHL.

### *The Dangers of Nationalist Authoritarian Regimes*

All authoritarian regimes can be expected to support the normative legal changes I have outlined in view of their common interest in regime survival. For reasons suggested above, we should expect that the behavior of authoritarian regimes may further be shaped by their particular legitimating ideologies. States that emphasize stability, for instance, may be particularly circumspect with respect to initiating international conflict. States for which religious principles are particularly important could be expected to be prone to conflict with states espousing rival religions.

Authoritarian states in which nationalism is a powerful legitimating ideology pose a particular risk of pursuing aggressive foreign policies, including using force, in circumstances involving efforts to unify the national group or to defend co-nationals abroad from the threat of violence, real or perceived. This may be most likely in the case of non-personalist authoritarian regimes or illiberal democracies in which the leadership faces audience costs from large party cadres, or even popular masses. As is the case with emerging democracies—which have been shown to be more bellicose than established democracies—such authoritarian regimes “mobilize mass support through the language of popular sovereignty while evading the accountability that would be provided by free and fair elections at the rule of law.”<sup>24</sup> This type of governing structure produces “strong incentives for elites to mobilize popular support through nationalist appeals, which raise the risk of war.”<sup>25</sup> Governments that base legitimacy on popular appeals to nationalism, but that do not provide meaningful opportunities for citizen participation in governance, face pressure to become “performatively nationalist”<sup>26</sup> to mollify popular demands. Highly nationalist non-personalist authoritarian regimes might accordingly be much more likely to engage in irredentist aggression than established democracies. Rising Chinese nationalism and the resulting need for the regime to fulfill popular nationalist aspirations have already led to Beijing’s efforts to assert greater control over Hong Kong; it also portends a growing risk of the use of force by China to gain control over Taiwan. Vladimir Putin justified Russia’s military intervention in Ukraine and subsequent annexation of Crimea in 2014 in part on the purported need to protect ethnic Russians from the risk of harm.<sup>27</sup>

It is unclear what impact the temptation for nationalist authoritarian states to pursue forcible acquisition of territory where co-nationals or co-ethnics reside will have on the development of international law. It is difficult to imagine authoritarian states facially challenging the well-settled rule that “[n]o territorial acquisition resulting from the threat of use of force shall be recognized as legal.”<sup>28</sup> Given the fears of authoritarians that unilateral humanitarian intervention could be invoked as a justification for toppling their own regimes, they would seem particularly loathe to embrace that doctrine, which makes President Putin’s invocation of concepts resonant of humanitarian intervention as a justification for Russian aggression in Ukraine surprising. For powerful

<sup>24</sup> EDWARD D. MANSFIELD & JACK SNYDER, [ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR](#) 39 (2005). For challenges to Mansfield and Snyder’s conclusions, see Vipin Narang & Rebecca M. Nelson, [Who Are These Belligerent Democratizers? Reassessing the Impact of Democratization on War](#), 63 INT’L ORG. 357 (2009).

<sup>25</sup> MANSFIELD & SNYDER, *supra* note 24, at 35.

<sup>26</sup> James Palmer & Ravi Agrawal, [Why Are India and China Fighting?](#), FOREIGN POL. (June 16, 2020).

<sup>27</sup> [Address by Vladimir Putin, President of the Russian Federation, to State Duma Deputies, Federation Council Members, Heads of Russian Regions, and Civil Society Representatives in the Kremlin](#) (March 18, 2014).

<sup>28</sup> [UNGA Res. 2625](#) (1970).

authoritarian states that engage in nationalist aggression, the likeliest outcome is that instead of espousing new doctrinal justifications for their uses of force, they will either articulate ad hoc rationales or, more likely, will not feel the need to offer legal justifications at all. In such cases, the absence of claims for new understandings of the law governing the use of force will leave the law formally intact, if battered in practice.