

Democracies and International Law

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Democracies and authoritarian regimes have different approaches to international law, grounded in their different forms of government. As the balance of power between democracies and non-democracies shifts, it will have consequences for international legal order. Human rights may face severe challenges in years ahead, but citizens of democratic countries may still benefit from international legal cooperation in other areas. Ranging across several continents, this volume surveys the state of democracy-enhancing international law, and provides ideas for a way forward in the face of rising authoritarianism.

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Introduction

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A Tale of Two Dictators

The Gambia is an impoverished African country, the smallest on the continent, known as the “Smiling Coast” for its friendly people. For two decades, it was dominated by Yahya Jammeh, who took power in a peaceful coup d’état in 1994, when he was twenty-nine years old. For the next twenty-two years, Jammeh presided over an increasingly authoritarian and erratic regime, winning four elections by implausibly widening margins. His tenure featured numerous disappearances, acts of torture and other human rights abuses, targeting journalists and opposition parties. Jammeh embodied the “Big Man” syndrome familiar to observers of African politics, in his case both figuratively and literally, as he grew ever more corpulent over the years.

With his main opponents locked up and international electoral observers banned, Jammeh seemed to be cruising comfortably to a fifth term of office in 2016. But in a surprise result, he was defeated at the polls by a relative unknown named Adama Barrow, who was backed by a coalition of opposition parties. The BBC called it “one of the biggest election upsets West Africa has ever seen.”¹ Jammeh conceded defeat, but a week later changed his mind, appealing the case to the Supreme Court, whose members he then appointed (having fired most of the court in 2015). He soon declared a state of

¹ “Gambia’s Adama Barrow Says Shock Win Heralds ‘New Hope’,” BBC News, Dec. 2, 2016, *available at*: www.bbc.com/news/world-africa-38186751

emergency. Fearing violence, refugees began fleeing across the border into Senegal.

Two regional organizations, the African Union and the Economic Community of West African States (ECOWAS), then announced that Jammeh had to resign by January 19, 2017, the day his term formally ended. In so doing, both relied on relevant prodemocracy provisions of their international legal regimes.² ECOWAS authorized its member states to move troops near the Gambian border, in a move dubbed “Operation Restore Democracy.”³ The United Nations Security Council issued a rare unanimous resolution, calling on Jammeh to step down, recognizing Barrow as president, and expressing support for the ECOWAS operation.⁴ A brief military intervention followed, led by Senegal with support from Ghana, Nigeria and other neighbors. The Gambian army pledged to support Barrow, so there was minimal violence. By January 21, Jammeh was on his way out of the country.

Jammeh ended up taking refuge in nearby Equatorial Guinea, which has the distinction of being the richest country in Sub-Saharan Africa in per capita terms, but whose tiny population mostly lives in penury. The oil-rich country is run by Teodoro

² African Union (AU), *Charter on Democracy, Elections and Governance (ACDEG)* (Jan. 30, 2007), available at: <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>; Economic Community of West African States (ECOWAS), *Protocol of the Economic Community of West African States (ECOWAS) on Democracy and Good Governance*, A/SP1/12/01 (Dec. 21, 2001), available at: www.ohchr.org/EN/Issues/RuleOfLaw/CompilationDemocracy/Pages/ECOWASProtocol.aspx. On ECOWAS, see Olabisi D. Akinkugbe, “Towards an Analysis of the Mega-Politics Jurisprudence of the ECOWAS Community Court of Justice,” in James Thuo Gathii ed., *The Performance of Africa’s International Courts: Using International Litigation for Political, Legal, and Social Change* (Oxford: Oxford University Press, 2020).

³ Final Communiqué of the 50th ECOWAS Ordinary Session of the Authority of Heads of States and Governments, at 7–8 (Dec. 17, 2016), available at: www.ecowas.int/wp-content/uploads/2016/12/Communiqu%C3%A9-Final_50th-Summit_Abuja_Dec-16_Eng.pdf; Paul Nantulya, “Lessons from Gambia on Effective Regional Security Cooperation,” *African Center for Strategic Policies* (Mar. 27, 2017), available at: <https://africacenter.org/spotlight/gambia-regional-security-cooperation/>. While secondhand resources show such a delegation decision did exist, I could not find any official resolution directly or indirectly authorizing the member states to intervene into the situation prior to the UN Security Council’s resolution.

⁴ SC Res. 2337, UN SCOR, 72d Year, Resolutions and Decisions of the Security Council 2017, S/RES/2337 (2017), available at: <https://digitallibrary.un.org/record/856865?ln=en>

Obiang, who has been president since he led a coup against his own uncle in 1979. Like Jammeh, his rule has been characterized by human rights abuses. But Obiang is in a different league in terms of the scale of his corruption. His son Teodorin's conspicuous consumption in Paris led to a conviction for money-laundering and a suit by Equatorial Guinea against France at the International Court of Justice for violating diplomatic immunities.⁵ A few months before the Gambian election, Obiang had himself won reelection with 93 percent of the vote, in a contest in which his most prominent opponent was not allowed to run. The African Union sent observers, but following the predictable result, no intervention occurred, and Obiang remains comfortably in power at the time of this writing. When asked about sending Jammeh back to the Gambia to face trial, Obiang said he could not do so: the norm of non-extradition was essential as a "guarantee for other African leaders that they will not be harassed after they leave power."⁶

Two dictators, two elections, one democratic transition. The international community mobilized against one leader's electoral interference, but left another's unchallenged. Which of these two situations was more in conformity with international law?

If you answered Equatorial Guinea, you are correct, at least under the prevailing, sovereigntist view of international law. This view is sometimes called Westphalian, in reference to the mythical origins of the system in the Treaty of Westphalia in 1648. Under Article 2 (4) of the United Nations Charter, all states agree to respect the territorial integrity and internal affairs of other states. The ECOWAS intervention may have been consistent with regional norms, and had political cover from the Security Council. But the unanimous Security Council Resolution calling for Jammeh to step down was missing something critical: it did not invoke threats to peace and security under Chapter VII of the UN Charter, which is legally required to authorize the use of force across international

⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment of 11 December 2020, ICJ Rep. 2020 (Dec. 11), available at: www.icj-cij.org/public/files/case-related/163/163-20201211-JUD-01-00-EN.pdf. Teodorin Obiang was one of the country's two vice presidents at the time of the indictment and lawsuit.

⁶ AFP, "Equatorial Guinea President Says Gambia's Jammeh 'Will Not Be Extradited'," *The Guardian*, Jan. 27, 2018, available at: <https://guardian.ng/news/equatorial-guinea-president-says-gambias-jammeh-will-not-be-extradited/>

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borders. Obtaining such authorization is rare indeed, but without it, even prodemocratic interventions are of dubious international legality. And while both dictators had engaged in clear violations of international human rights law, remedies for these violations lay elsewhere in the international system. The African Union Charter does reserve a right to intervene in cases of mass atrocity, but this was not the actual situation in the Gambia, by any account. In short, the ECOWAS intervention was arguably illegal, even if broadly legitimate.

So much for the sovereigntist view. On another view of international law, however, the Gambia is the correct answer to the question posed above. International law does not tolerate human rights abuses, and increasingly reflects a commitment to good governance and democracy. Regional organizations such as ECOWAS have been at the forefront of these developments, and are to be celebrated for taking costly action to restore and uphold democracy in countries like the Gambia. In doing so, they help to crystalize new norms, in which international law supports and reinforces democracy. This view of international law, in which sovereignty takes a back seat to rights and democracy, gained increasing support from scholars and states after the Cold War, and reflects a certain cosmopolitanism in that the operation of a country's government is a proper subject of international concern. Many of the debates in international law over the past three decades can be understood as debates over the scope of exceptions to sovereignty. Does self-determination allow unilateral secession in the face of oppression?⁷ Are there conditions under which humanitarian crises or threats of genocide allow for external intervention? When can immunities be relaxed for the prosecution of very serious international crimes?

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The vignette of the two dictators raises an enduring question that this book will tackle: What exactly is the relationship between

⁷ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ 423 (ICJ 2010); *Reference Re Secession of Quebec*, [1998] 2 SCR 217 (Canada); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 119–23 (New York: Cambridge University Press, 1995).

democracy and international law? This is already the subject of a vast literature, attacking the question from a variety of theoretical, doctrinal and institutional perspectives. The sovereigntist view sees the two in inherent tension, and has traditionally been the prerogative of dictators like Jammeh, who argue that the choice of political system is a purely local matter. Although international legal documents have numerous references to political participation, local processes determine the mechanisms by which democracy is effectuated, and there is no requirement that a legitimate regime be democratic. Stealing an election or overturning its result is not, in and of itself, a violation of international law.

The cosmopolitan paradigm sees democracy and international law in tension as well, but celebrates the international level as “domesticating” sovereignty and its attendant risks. According to many international lawyers and political theorists, international law embodies values of human dignity, participation and welfare.⁸ This view is epitomized by the international human rights movement that generally privileges global liberalism over democracy.

These two paradigms are in a moment of intense struggle. The cosmopolitan view has been highly influential, and seemed to be gaining ground until recently. But the sovereigntist view is apparently making something of a comeback in the current era of populist nationalism and rising authoritarianism, each of which has a distinct motive for suspicion of international institutions. Populists place democracy above international law. Since international commitments tie the hands of the *demos*, limiting flexibility and constraining freedom to engage in collective projects, international law is to be kept in its proper, subordinate place. One might say that populism privileges one version of democracy over global liberalism. Authoritarian regimes value neither, and therefore emphasize sovereignty for a different reason – they want to preserve control over internal governance, upon which their survival depends.

⁸ See, e.g., Carmen Pavel, *Law beyond the State: Dynamic Coordination, State Consent and Binding International Law* (New York: Oxford University Press, 2021); Charles R. Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1999); Thomas W. Pogge, “Cosmopolitanism and Sovereignty,” *Ethics* 103(1): 48–75 (1992); David Held, *Democracy and Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995).

In this book, I want to explore the relationship from a novel angle, which I call “democracies and international law.” As I will explain, this is distinct from better-trodden inquiries about the democratic *nature* of international law, or about whether international law *requires* democratic governance. Both of these views, which I will lay out in a bit more depth, are ones in which “all good things go together.”⁹ Democracy and international law, they assert, are mutually reinforcing, so that one can support the other; there is no conflict between the two levels of government, but a deep, perhaps even essential compatibility.

My inquiry is a slightly different one. I want to explore the empirical relationship between *democracies* and international law. That is, rather than start with a normative inquiry that assumes that democracy is important and must be advanced either within or through international law, I begin by asking the positive questions of whether, how and why democracies *behave* differently than non-democracies in their use of international legal institutions. Only when we know whether and how democracies behave differently can we unpack how, if at all, international law can buttress domestic democracy, or undermine it.

Exploring this relationship requires returning to some of the foundational assumptions of modern political thought. The idea that democratic governments would behave differently on the international plane goes back at least to Immanuel Kant’s essay on *Perpetual Peace*, which we will revisit in Chapter 1. Kant makes an explicit connection between internal governance systems and behavior on the international plane. Representative governments were, in his view, capable of cooperating to create international organizations and even world peace.¹⁰ This is an empirical assertion, and a large literature has confirmed Kant’s musings in the realm of war. Other scholars have demonstrated how some democracies are more willing to join and cooperate in international

⁹ Robert A. Packenham, *Liberal America and the Third World* 288 (Princeton, NJ: Princeton University Press, 2015).

¹⁰ See the recent treatment by Alec Stone Sweet and Claire Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice and the European Convention on Human Rights* (Oxford: Oxford University Press, 2018).

organizations.¹¹ I will advance this line of inquiry further in Chapter 2 by exploring whether democratic states are more likely to use international law in a whole array of contexts, while trying to identify whether the mechanism is that posited by liberal theorists. I show that international law as we know it, which I will call general international law, is largely produced by and utilized by democratic states, either among themselves or in their interactions with nondemocracies.

Next, in Chapters 3 and 4, I reverse this question and ask whether international law can help *protect* democracy, as one view of the ECOWAS intervention would have it. Scholars working in the liberal institutionalist vein have argued that international institutions, which create the possibility of imposing costs on domestic actors, facilitate *commitment* to particular policies, and indeed the theoretical accounts of several regional human rights and trade regimes draw heavily on this idea. The “commitment” theory rests on the assumption that international law has bite, and that the threat of externally imposed costs will be significant enough to prevent violations. After the Cold War, this theory prompted extensions of international institutions to new democracies, and scholars have shown how international law helped to lock in democratic institutions.¹²

The environment is quite different today. Examining the position of international institutions trying to confront democratic backsliding, the early record presents a mixed bag. The European Union machinery was slow and failed to stem democratic regression in the case of Hungary, but has belatedly become more active with regard to Poland. Latin American countries have a longer record of confronting backsliding, but the record is again mixed. In Africa, the machinery seems to be slightly more active, despite the lower baseline levels of democracy in the region. This variation is something that requires explanation.

The darker turn for democracy has implications for international law, and in Chapter 5 I ask what those will look like if current trends

¹¹ Paul Poast and Johannes Urpelainen, *Organizing Democracy: How International Organizations Assist New Democracies* (Chicago, IL: University of Chicago Press, 2018).

¹² Poast and Urpelainen, *supra* note 11; Tom Ginsburg, “Locking in Democracy: Constitutions, Commitment, and International Law,” *New York University Journal of International Law and Politics* 38: 707–59 (2006).

continue. In an era dominated by authoritarian and not democratic regimes, what role will international law play? To be sure, I do not want to blindly project forward from current trends. There are many reasons to think that the current hand-wringing about the future of democracy is overblown. Institutions and publics may prove resilient as they respond to current threats, as they have in a number of countries.¹³ But the rise of authoritarian China, with its own increasingly resilient legal system, along with an assertive Russian regime, suggests that the question of authoritarian international law is worth exploring. Authoritarian international law draws on the language of sovereignty, but in fact involves active cooperation that includes intervention in other jurisdictions to preserve authoritarian rule.

Having laid out this trichotomy of general, prodemocratic and authoritarian international law, and shown how their relative weight is a product of state interactions over time, I speculate in Chapter 6 about future directions. I focus heavily on the most powerful democracy, the United States, and the most powerful dictatorship, China. These countries have extraordinary influence on the world as a whole. Their interaction will shape the environment within which other states operate, setting something of the global “order” to the extent one stabilizes in future years. I conclude, rather counterintuitively, that the countries actually share a good deal in common in terms of their approach to international law, driven by hegemonic aspirations.

The Conclusion takes up the question of what is to be done. If international law is a terrain with some capacity to influence the survival of domestic regimes, then democracies should be attuned to its dynamics, and should engage in collective action to defend their interests. But democracies have other interests besides the reinforcement of democracy, and so it is not quite right to see democracies and dictatorships fighting the equivalent of a new cold war. Further, the tools and precise modalities of transnational reinforcement of democratic survival are tricky to identify, and their deployment depends on uncertain political developments within democratic states. Strategy always depends on an underlying theory

¹³ Tom Ginsburg and Aziz Huq, “Democracy’s ‘Near Misses,’” *Journal of Democracy* 29(4): 16–30 (2018) (examining how democracies were deteriorated and restored through the involvement of institutional actors).

of international relations, but overly abstract theories do not admit of precise tactics. I focus on the level of tactics, and provide some simple advice for those concerned with democracy's survival.

Before launching into the analysis, the remainder of this introduction will define terms, and explain how we got to the point where an inquiry into democracies, autocracies and international law is more timely than we might like.

An Anxious Moment

One grim bit of evidence for the basic compatibility of democracy and international law is that both seem to be in trouble at the same time, challenged by nationalist resurgence around the globe. The facts about democratic decline are stark: the number of democracies has declined every year, since peaking in 2006, and the trend seems to be accelerating.¹⁴ Democracy has now been described as in full-scale "retreat."¹⁵ Within countries, roughly three times as many have experienced declines as advances in the quality of democracy. High-profile, enduring democracies such as Venezuela have become dictatorships. Hungary, once a poster child for democratization, is increasingly authoritarian, while countries such as the Philippines and Indonesia flirt with intolerance and authoritarianism. The failure of the Arab Spring, and Turkey's slide toward civilian dictatorship also must count against the optimism of thirty years ago.

Relatedly, we have been facing a rise in populism in many democracies around the world, which has taken as its primary target the international institutions associated with globalization. The rise of populist and antisystem parties in the West suggests that the traditional mechanisms of representation are under threat even in established democracies, despite their more robust institutions.¹⁶

¹⁴ Nate Schenkkan and Sarah Repucci, "The Freedom House Survey for 2018: Democracy in Retreat," *Journal of Democracy* 30(2): 100–14 (2019). On the democratic recession, see Larry Diamond, "Facing Up to the Democratic Recession," *Journal of Democracy* 26(1): 141–55 (2015) and Ginsburg and Huq, *supra* note 13.

¹⁵ Schenkkan and Repucci, *supra* note 14.

¹⁶ Economist Intelligence Unit, *The Economist Intelligence Unit's Democracy Index* (2017), available at: <https://infographics.economist.com/2019/DemocracyIndex/>. On populism see Paul Blokker, "Populism as Constitutional Project," *International Journal of Constitutional Law* 17: 540 (2019); Bojan Bugarcic, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism,"

By one account, the number of populist parties in Europe almost doubled from 2000 to 2017, and populist vote share nearly tripled from 8.5 to 24.1 percent.¹⁷ In other parts of the world, populists from both left and right undermine democratic institutions in the name of a vague concept of the “People.”

The populist and anti-globalist backlash is, very largely, a backlash against cosmopolitan international law and the imposition of norms that originate from outside the territorial nation state, to be deployed by elites at the expense of the decisional freedom of the single sovereign people. As my colleague Eric Posner has noted, international law is inherently pluralistic, but populism is essentially anti-pluralist.¹⁸ The populist mind, he notes, “has difficulty recognizing that the interests of foreign nations are legitimate, or that there is any inherent virtue to an international order that respects differences among nations.”¹⁹ European populists rail against Brussels; Bolivarians attack the Inter-American Court of Human Rights in San Jose.²⁰ Shadowy agreements made in shadowy foreign capitals are soft targets for political demagogues, and international institutions have thus far shown a mixed record at best in being able to defend themselves. While the European Union soldiers on, it has faced unanticipated challenges in the past decade: financial crisis, waves of immigration and populism that resulted in large part from the first two, leading to a full-blown autocracy in its midst. The United Nations is in a financial crisis of its own, and seems to be reducing its footprint rather than expanding it. The great international project of the late 1990s, the International Criminal Court, is suffering from a backlash and wave of defections. In short,

International Journal of Constitutional Law 17(2): 597–616, 599 (2019) (“rather than analyzing populism per se, we should recognize that it takes a variety of guises”).

¹⁷ Wojciech Sadurski, *Poland’s Constitutional Breakdown* (New York: Oxford University Press, 2019).

¹⁸ Eric Posner, “Liberal Internationalism and the Populist Backlash,” *Arizona State Law Journal* 49: 795–819, 797 (2017).

¹⁹ *Id.* at 797.

²⁰ *But see* Bruce Jentleson, “That Post-Liberal International Order World: Some Core Characteristics,” *Lawfare Blog* (Sep. 9, 2018), *available at*: www.lawfareblog.com/post-liberal-international-order-world-some-core-characteristics. It is also important not to overstate the point. Sadurski, *supra* note 17, notes that Poles remain committed to remain in the EU even as they vote for the populist and antidemocratic Law and Justice (PiS) party. No doubt traditional security concerns related to Russia play a role here.

democracy and the liberal international order both seem to be receding around the world at the same time. We are on to the “post-liberal order” whose contours are defined only by what they are not.²¹

The anxiety of the moment reflects a shift in dynamics. We have moved from a long era in which democracy and international law were mutually reinforcing to one in which they are seen to be in tension. The things *democracies* did with international law may have led to a reversal in the direction of the relationship.

How Did We Get Here? Liberalism, Democracy and Markets

The origins and causes of the current crisis are contested. Some blame the global financial crisis of 2008–09, although democratic decline began before then. Some blame technological change, as traditional sources of information have been “disrupted” in the internet age. Some blame globalization itself, as it brought both job insecurity and increased movement of people, leading to backlash in the rich democracies of the world. Some blame the turn to cosmopolitan technocracy, which elided deep ideas of national difference.²² There is also, as will be explored in Chapter 5, the specific responses of certain authoritarian states, particularly Russia and China, that have accumulated material and symbolic power. These states have become perhaps the most vocal defenders of the sovereigntist view of the international order at a time when liberal voices are fighting on the home front and the United States is openly defecting from institutions it promoted.²³

²¹ See e.g. Yuval Noah Harari, “We Need a Post-liberal Order Now,” *The Economist*, Sep. 26, 2018, available at: www.economist.com/open-future/2018/09/26/we-need-a-post-liberal-order-now; Michael Clarke, “Shaping the Post-Liberal Order from Within: China’s Influence and Interference Operations in Australia and the United States,” *Orbis* 64(2): 207–29 (2020).

²² Guglielmo Verdirame, “Are Liberal Internationalists Still Liberal?” in Chiara Girogetti and Guglielmo Verdirame eds., *Whither the West? Concepts in International Law on Europe and the United States* (Cambridge: Cambridge University Press, 2020); Stephen Holmes and Ivan Krastev, *The Light That Failed: Why the West Is Losing the Fight for Democracy* (New York: Pegasus Books, 2020).

²³ Gregory Shaffer, *Emerging Powers and the World Trading System: The Past and Future of International Economic Law* (New York: Cambridge University Press, 2021).

Liberalism is undoubtedly undergoing some difficult trials. But the term itself encompasses several discrete ideas, which are often conflated and may bear only a family resemblance to each other.²⁴ The very breadth of its critics should give us pause before rejecting it: they include, among others, unreconstructed communists; critical theorists; conservative Catholic “integralists” who want the state to serve as an instrument of church policy; authoritarian dictators; postcolonial scholars; and agit-prop leftists. In the hands of its critics, liberalism is responsible for global capitalism, colonialism, the Iraq war, the disintegration of the nuclear family and technological domination of human beings.²⁵ It has become an epithet rather than a term of serious analysis. We should thus unpack the various strands of liberal ideas as they relate to the international order.

First, there is the original liberal idea that a society ought to give primacy to the rights of individuals, protected by law. One might call this “classical liberalism,” and it has been a contested, powerful feature of political life since the Enlightenment. Anti-liberals consistently attack this focus on the individual as overly atomistic, and have been buoyed by the sense of alienation produced by economic and technological disruption.

Gradually liberalism’s emphasis on individual freedom came to be identified with claims of groups, religious dissidents, racial minorities and others. This is another source of the contemporary backlash: by definition, providing rights to minorities limits the regulatory freedom of the majority. We thus hear, in recent years, growing calls for “illiberal democracy” and the “rights of the majority,” a call for regulatory *lebensraum* for the unitary “people” to exercise its general will.

²⁴ Jennifer Pitts, “Political Theory of Empire and Imperialism,” *Annual Review of Political Science* 13(1): 211–35, 218 (2010) (“Liberalism is notoriously and inevitably a complex ideology whose exemplars share family resemblances rather than any strict doctrine”). In his review of the Catholic integralism of Adrian Vermeule, Jason Blakely argues that liberalism should not be viewed as a mechanistic ideology but instead as a literary genre, with new forms always emerging. Jason Blakely, “Adrian Vermeule’s Integralism: Not Catholic Enough,” *Commonweal Magazine*, Oct. 4, 2020, available at: www.commonwealmagazine.org/not-catholic-enough

²⁵ See e.g. Robert Kuttner, “Blaming Liberalism: Review of Why Liberalism Failed,” by Patrick J. Deneen,” *NY Review of Books*, Nov. 21, 2019, at 36–38.

A second and conceptually distinct use is the extension of the liberal idea outside the borders of a national political community. Liberalism is distrustful of nationalism, with its claims of distinctive identities. Because liberals value the individual, there is no principled reason to favor the interests of one's countrymen over those of distant people in faraway lands. Some liberals – let us call them “cosmopolitan liberals” – are concerned with the rights of individuals everywhere on the planet. They tend to seek a global order that maximizes freedom for all, including the freedom to cooperate across borders. In an older guise, this version was used to justify colonialism, as freedom was thought to be a quality only of sufficiently civilized people.²⁶ But in current form, the human rights movement embodies the cosmopolitan aspiration. Cosmopolitanism is a “noble but flawed ideal,” which combines an admirable concern for the human rights of others with thorny problems of how to think about one's affirmative duties to them.²⁷ It has squarely run up against concerns about democracy: as Guglielmo Verdirame puts it, “we prefer to be governed by our own incompetent rulers rather than by more competent foreigners for the same reason why, as individuals, we value taking decisions for ourselves rather than letting others, even if better informed, decide for us.”²⁸

A distinct variant of cosmopolitanism focuses on the economic sphere. “Neoliberals” emphasize economic forms of cooperation, while cosmopolitans emphasize social and cultural forms, but both deemphasize state sovereignty as an independent value. Neoliberalism prioritized overall welfare, setting aside distributional concerns for a later day, even as it undermined the capacity of states to effectuate that redistribution. Neoliberalism made it more difficult, even for the richest states, to subject capital to democratic control.

Finally, there is another, purely academic sense of the term: liberal international theory. This theory, associated with Andrew

²⁶ On colonialism, see Pitts, *supra* note 24 at 216–18; Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton University Press, 2005); Pratap Bhanu Mehta, “Liberalism, Nationalism and Empire,” in Sankar Muthu ed., *Empire and Modern Political Thought* 232–60 (New York: Cambridge University Press, 2012).

²⁷ Martha C. Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (Cambridge, MA: Harvard University Press, 2019).

²⁸ Verdirame, *supra* note 22.

Moravcsik in political science and Anne-Marie Slaughter in law, was developed in opposition to the realist school of international relations, which famously saw international law as “epiphenomenal.”²⁹ The liberal view posited that international law “works” among a small set of liberal democratic countries, for which it is the external manifestation of domestic principles.³⁰ Liberal international law in this view was qualitatively different from that pursued by other states.

The assumptions of the 1990s (later characterized as the “Washington Consensus,” but in fact instantiated in Brussels as well) brought together all of these ideas into a single neat package: markets, democracy and the rule of law were all mutually supportive and reinforcing. Liberalism in the economic and political spheres were not in tension; rather, free markets would support free societies. The rule of law was the critical link between economic and political spheres, in that it would prevent economic elites from corrupting regulatory processes governed by democrats. Furthermore, it would prevent elected leaders from enriching themselves at the public expense. All of this was to be underpinned by a liberal international order.

Whatever the merits of these assumptions, they led directly to policies that accelerated their own demise. Democracies’ enhanced ability to cooperate across borders led to unintended consequences over time. By bringing China into the World Trade Organization (WTO), it was hoped that the behemoth could be domesticated and liberalized, but the opposite has occurred. Open markets were supposed to lift all boats, or at least allow for side payments to those displaced by rapid change, but the promised redistribution never occurred, a predictable victim of interest-group politics. A free and open internet was monetized for shareholders, and became a cesspool of misinformation that undermined democratic confidence. None of these things had to happen, but were the result of specific, contingent choices, based on flawed assumptions. Together, they

²⁹ John Mearsheimer, “The False Promise of International Institutions,” *International Security* 19(3): 5–49 (1994/95).

³⁰ Anne-Marie Slaughter, “A Liberal Theory of International Law,” *Proceedings of the Annual Meeting (American Society of International Law)* 94: 240–49, 240–41 (2000) (arguing that international law is constructed from the bottom up). See also Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51: 513–53 (1997).

have produced a backlash against liberalism that has undermined democracy as well. The COVID-19 pandemic of 2020–21 further hindered the liberal brand and marked a decisive end to the cosmopolitan fantasy of a borderless world. As the nation state returned, “Davos Man” – the globetrotting master of the universe who preaches the virtues of free markets and wrings hands about how the little guy just doesn’t understand – began to look *very* 2010. The United Kingdom and United States, the two countries most associated with liberalism for two centuries, each found themselves with bungled responses to the pandemic, leading to far more deaths than other comparable countries. Nothing required these policy failures, but they happened. In the United States the pandemic was accompanied by images of gun-toting maskless protestors pretending that their governments were dictatorships, an indulgent fantasy that illustrated its own falsehood. These protests sounded in libertarianism, but ultimately perverted it: nothing in liberal thought says that one is free to impose risks on others without consequence. But the larger point is that countries looking for models of how to organize their societies for the twenty-first century would not find the “liberal” brand too appealing, even if other liberal democracies like South Korea and Taiwan performed very well under the pandemic conditions.

Liberalism and democracy are often conflated, but for reasons that will become clear, I focus my discussion not on “liberal” states, but on democratic ones. There is a distinction between the two concepts.³¹ At the level of theory, liberalism emphasizes individual autonomy, rights and transnational exchange, whereas democracy emphasizes elections, participation and national sovereignty. Indeed, in some sense there is a tension between liberalism, which requires certain procedures and institutional structures to protect individuals, and democracy, which provides the collectivity with the ability to make group decisions. There are examples of liberal jurisdictions that are not democracies: Hong Kong before Beijing’s 2020 adoption of the National Security Law is one oft-cited example, and many of today’s democracies were liberal well

³¹ Verdirame, *supra* note 22.

before they were democratic, in an era before the voting franchise was widely extended. Furthermore, there are some democracies that are only weakly liberal, instead privileging collective projects: the early stages of Venezuela's Bolivarian period are an example. But that example should lead us to be cautious about claims, such as those put forward by Victor Orbán in Hungary, to be an "illiberal democracy." I do not believe that one can have a democracy that is truly illiberal in the sense of rejecting certain core individual rights.

As the next chapter will lay out, I believe that it is democratic mechanisms that drive observed differences in state behavior with regard to international law, not liberal ones. ECOWAS did not invade the Gambia because Jammeh had suppressed individual rights. Nor did it invoke the doctrine of the Responsibility to Protect, put forward by liberal international lawyers in the first part of this century to justify intervention in the case of grave human rights abuses. Instead, ECOWAS was committed to the collective project of democratic government, partly because the regional organization had been composed of democratic states at the time of the adoption of the relevant rules. These states had a shared belief in the normative value of democracy, and a concern that democratic breakdown would lead to spillovers across borders, as Jammeh's attempt to retain office threatened to do.

The Unasked Questions

The approach in this book contrasts with the two most common ways of approaching the topic at hand, which instead focus on the *democracy of international law*, or on the *international law of democracy*. The *democracy of international law* is a normative and positive inquiry, examining the extent to which international legal institutions are "democratic" in some sense.³² Since no one elects international

³² Allen Buchanan and Robert Keohane, "The Legitimacy of Global Governance Institutions," *Ethics and International Affairs* 20(4): 405–37 (2006); Robert Keohane, Stephen Macedo, and Andrew Moravcsik, "Democracy Enhancing Multilateralism," *International Organization* 63(1): 1–31 (2009); Julia C. Morse and Robert Keohane, "Contested Multilateralism," *Review of International Organizations* 9(4): 385–412 (2014); José Alvarez, "Introducing the Themes," in Campbell McLachlan ed., *Special Issue: International Law and Democratic Theory*, *Victoria University Wellington Law Review* 38: 159–74 (2007); Robert O. Keohane, "Nominal Democracy? Prospects for Democratic Global

lawmakers, judges or bureaucrats, why is their output to be viewed as legitimate by citizens of democracies? This approach examines the internal structures and procedures of international organizations and courts to see whether they reflect and advance democratic values.³³ Scholars working in this vein have wrestled with the role of individual and civil society participation in global governance;³⁴ some have even argued for the “constitutionalization” of international law.³⁵

All agree that the relationship between international institutions and democracy is a difficult one, and that the responsiveness produced by elections would be difficult to obtain on a scale as large as the globe. Indeed, hand-wringing over democratic deficits has been a central feature of European transnational politics for the past two decades, and one might submit that if the problem cannot be solved at the level of a largely liberal continent, it becomes intractable when extended to regions that lack longstanding democratic and liberal traditions.

A separate lens on democracy and international law emanates from the developing world, and characterizes international law as primarily imperial in nature.³⁶ Just as dependency theorists in

Governance,” *International Journal of Constitutional Law* 13(2): 343–53 (2015); see also Grainne de Burca, “Nominal Democracy? A Reply to Robert Keohane,” *International Journal of Constitutional Law* 14(4): 925–29 (2016); Jonathan W. Kuyper and John S. Dryzek, “Real, Not Nominal Global Democracy: A Reply to Robert Keohane,” *International Journal of Constitutional Law* 14(4): 930–937 (2016).

³³ As Harry Truman put it at the founding of the United Nations, it was hoped that there would be “freedom of speech within the organization.”

³⁴ Steve Charnovitz, “The Emergence of Democratic Participation in Global Governance,” *Indiana Journal of Global Legal Studies* 10: 45–77 (2003); Steven Wheatley, *The Democratic Legitimacy of International Law* (Oxford: Hart Publishing, 2010); Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, “The Emergence of Global Administrative Law,” *Law and Contemporary Problems* 68: 15–62 (2005); Steven Wheatley, “A Democratic Rule of International Law,” *European Journal of International Law* 22(2): 525–48 (2011).

³⁵ Anne Peters, “Dual Democracy,” in Jan Klabbers, Anne Peters and Geir Ulfstein eds., *The Constitutionalization of International Law* 263–341 (Oxford: Oxford University Press, 2009); Karolina M. Milewicz, *Constitutionalizing World Politics: The Logic of Democratic Power and the Unintended Consequences of International Treaty Making* (Oxford: Oxford University Press, 2020); Jeffrey L. Dunoff and Joel P. Trachtman eds., *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009).

³⁶ Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

development studies saw newly liberated ex-colonies as retaining structural dependence on their former colonial masters, so scholars working in the “TWAIL” (Third World Approaches to International Law) school focus on international law as a tool of continuing domination. With the extensive power of the United States in the second half of the twentieth century, we should not be surprised that international law would serve its particular interests, which involved exporting the form of liberal democracy around the world, along with a capitalist economic order. The TWAIL approach shares a prediction, though not a method, with this book, namely that international law will primarily serve the interests of liberal democracies in an era in which those countries are powerful.³⁷ But my empirical strategy considers the behavior of small countries and not just hegemons, though Chapter 6 will lay out the important role of powerful states.

A number of international law scholars try to resolve the tension by articulating a “public law” view of international law that justifies the decisions and authority of international courts with reference to the individuals that they affect.³⁸ These theorists, drawing on cosmopolitan theory, take individuals, rather than states, as the primary constituents of international legal rules. Whether a “cosmopolitan legal order” or the exercise of “legitimate public authority,” scholars working in this Kantian vein argue that the very purpose of cooperation is to advance human dignity.³⁹ Similarly, theorists of

³⁷ See B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* 173 (New York: Cambridge University Press, 1993); James Thuo Gathii, “TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography,” *Trade Law and Development* 3(1): 26–64 (2011); James Thuo Gathii, “The Promise of International Law: A Third World View,” Grotius Lecture presented at the 2020 Virtual Annual Meeting of the American Society of International Law (Jun. 25, 2020), available at: <https://ssrn.com/abstract=3635509>

³⁸ Armin von Bogdandy, Ingo Venzke and Thomas Dunlap, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2016).

³⁹ Stone Sweet and Ryan, *supra* note 10; Matthias Kumm, “An Integrative Theory of Global Public Law: Cosmopolitan, Pluralist, Public Reason Oriented” (manuscript on file with author); Armon von Bogdandy and Ingo Venzke eds., *International Judicial Lawmaking* (Heidelberg: Springer-Verlag Berlin Heidelberg, 2012); Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley eds., *Transformative Constitutionalism in Latin America: Emergence of a New Ius Commune* (Oxford: Oxford University Press, 2017).

deliberative democracy argue that the principles of participation, reasoned decision-making and justification can produce responsive decision-making at the global level.⁴⁰ In short, international law itself has not been immune from broader trends in thinking about governance that emphasize participation and public input. We briefly canvass some experiments in this regard but it is not our main focus.

I will also not be examining the right to self-determination, as taken up so elegantly by Antonio Cassese in his own Lauterpacht Lectures.⁴¹ As some have noted, the right to self-determination first requires identifying who is the “self” that is entitled to determine its own system. In terms of democratic theory, self-determination raises the so-called boundary problem of democracy. We need to define who is and who is not in the political community before we can determine how “we the people” can govern ourselves.⁴²

Another approach I will not pursue is the *international law of democracy*, which considers the extent to which the former requires the latter, and if so, precisely how. It is encapsulated in the normative and positive debates about the so-called Right to Democracy, stimulated by a famous 1992 article by Thomas Franck in the *American Journal of International Law*, which considered the extent to which some degree of democratic government was a *requirement* of international law.⁴³ In an era of high optimism about the prospects of democracy, Franck bundled a provocative claim with a positive prediction about the future trajectory of international law, generating a serious and important debate.⁴⁴ Looking for such an

⁴⁰ William Smith and James Brasset, “Deliberation and Global Governance: Liberal, Cosmopolitan and Critical Perspectives,” *Carnegie Council on Ethics and International Affairs* 22(1): 69–92 (2008); Kuyper and Dryzek, *supra* note 31.

⁴¹ Cassese, *supra* note 7; Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (New York: Oxford University Press, 2004).

⁴² Sarah Song, “The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State,” *International Theory* 4(1): 39–68 (2012).

⁴³ Thomas M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law* 86: 46–91 (1992). See also Fernando R. Tesón, “Two Mistakes about Democracy,” *Proceedings of the Annual Meeting of American Society of International Law* 92: 126–31 (1998); Fernando R. Tesón, “The Kantian Theory of International Law,” *Columbia Law Review* 92: 53–102 (1992).

⁴⁴ James Crawford, “Democracy and International Law,” *British Yearbook of International Law* 64: 113–33 (1993); Gregory H. Fox and Brad Roth eds., *Democratic Governance and International Law* (Cambridge: Cambridge University

international right reflects very deep assumptions about the nature of the international order, going back to Kant and Mill. It also exhibits great confidence in the efficacy of rights rhetoric and institutions to *advance* democracy; there is an implicit empirical assumption that the cause of democracy can be advanced by naming it as a right. We revisit some of this debate in Chapter 3, but the book does not lay out a normative argument about what the content of international law should be. Rather it assumes pluralism as a basic feature of international law.

A Working Definition of Democracy

One of the common lines of attack on Franck's article is that his conception of democracy, which focused heavily on elections, is underdeveloped.⁴⁵ Democracy is the epitome of an essentially contested concept, which scholars have conceptualized in remarkably diverse ways: by one account there are over 500 adjectives that have been used to label different kinds of democracy.⁴⁶ My own working definition of democracy is a simple one, drawn from my recent work with Aziz Z. Huq, that incorporates three

Press, 2000); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* 75 (Oxford: Oxford University Press, 2000); Susan Marks, "What Has Become of the Emerging Right to Democratic Governance?," *European Journal of International Law* 22: 507–24 (2011); J. H. H. Weiler, "The Geology of International Law – Governance, Democracy and Legitimacy," *Heidelberg Journal of International Law* 64: 547–62 (2004). See also Henry J. Steiner, "Political Participation as a Human Right," *Harvard Human Rights Year Book* 1: 77–134 (1988).

⁴⁵ Fox and Roth, *supra* note 43; Roberto Gargarella, "Democracy's Demands," *AJIL Unbound* 112: 73–78 (2018); Khalifa A. Alfadhel, "Toward an Instrumental Right to Democracy," *AJIL Unbound* 112: 84–88 (2018); Dobrochna Bach-Golecka, "The Emerging Right to Good Governance," *AJIL Unbound* 112: 89–93 (2018). See Alexandru Grigorescu and Emily Komp, "The 'Broadening' of International Human Rights: The Cases of the Right to Development and Right to Democracy," *International Politics* 54(2): 238–54 (2017); Gregory H. Fox and Georg Nolte, "Intolerant Democracies," *Harvard International Law Journal* 36: 1–70 (1995).

⁴⁶ Tom Daly cites Ercan and Gagnon for cataloguing more than 500 adjectives preceding definitions of democracy. Tom Gerald Daly, "Democratic Decay: Conceptualising an Emerging Research Field," *Hague Journal on the Rule of Law* 11: 9–36 (2019); Selen A. Ercan and Jean-Paul Gagnon, "Editorial: The Crisis of Democracy – Which Crisis? Which Democracy?," *Democratic Theory* 1(2): 1–10 (2014); Jean-Paul Gagnon, *Democratic Theorists in Conversation: Turns in Contemporary Thought* (Basingstoke: Palgrave Macmillan, 2014).

elements: (1) government characterized by competitive elections, in which the modal adult can vote and the losers concede;⁴⁷ (2) in which a minimal set of rights to speech, association and the ability to run for office are protected for all on an equal basis; and (3) in which the rule of law governs administration.⁴⁸ The middle element incorporates key liberal commitments. The last element makes our definition slightly thicker than Franck's, which includes only the first two elements. But ours is still a relatively thin and liberal definition of democracy, and requires a brief defense.⁴⁹

First, it is largely consistent with those definitions found in international legal instruments themselves. Article 21 of the Universal Declaration of Human Rights (UDHR) states that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;
- (2) Everyone has the right of equal access to public service in his country;
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The first clause guarantees participation; the second provides an equality norm for bureaucracy, underpinning the rule of law component in our definition; and the third clause guarantees elections. These rights were further elaborated in Article 25 of the International Convention on Civil and Political Rights (ICCPR), which legally guarantees citizens the right to participate in public affairs, and to vote in genuine and periodic elections. And it has been refined further in subsequent international documents. In 1996, the Human Rights Committee, established under the ICCPR, issued a General Comment elaborating on the substantive rather than formal character of Article 25.⁵⁰ That same year, UN Secretary-General Boutros Boutros-Ghali submitted *An Agenda for*

⁴⁷ Adam Przeworski, *Democracy and the Market* 10 (Cambridge: Cambridge University Press, 1991) ("Democracy is a system in which parties lose elections").

⁴⁸ Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago, IL: University of Chicago Press, 2018).

⁴⁹ There are of course, many other conceptions of democracy. See David Held, *Models of Democracy* (Stanford, CA: Stanford University Press, 3rd ed. 2006).

⁵⁰ Human Rights Committee, *General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights*,

Democratization to the General Assembly, seeking to clarify state practice, and emphasizing an independent judiciary, governmental accountability, the rule of law, and popular participation. Several other UN documents follow similar conceptions.⁵¹ In short, democracy as defined in international legal discourse is clearly about more than elections.

In our century, regional organizations have become increasingly active in defining democracy. At least ten major regional organizations have treaty clauses related to democracy, and some have gone further through the adoption of discrete “democratic charters.”⁵² The conceptions of democracy found in these charters are internally diverse, but some are thicker than our own definition. For

Adopted by the Committee at its 1510th meeting, UN Doc. CCPR/C/21/Rev. 1/Add. 7 (1996).

⁵¹ In 1999, the UN Commission on Human Rights adopted a resolution entitled *A Right to Democracy*, E/CN.4/RES/1999/57 stating that democracy includes: “the right to seek, receive and impart information and ideas through any media; the rule of law, including legal protection of citizens’ rights, interests and personal security, and fairness in the administration of justice and independence of the judiciary; the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; the right of political participation, including equal opportunity for all citizens to become candidates; transparent and accountable government institutions; the right of citizens to choose their governmental system through constitutional or other democratic means; and the right to equal access to public service in one’s own country.” A later document added elements of pluralism. UN Human Rights Council Res. 19/36, Human Rights, Democracy and the Rule of Law, 19th Sess., UN Doc. A/HRC/Res/19/36, at para. 1 (2012) (“democracy includes respect for all human rights and fundamental freedoms, *inter alia*, freedom of association and of peaceful assembly, freedom of expression and opinion, freedom of thought, conscience, religion or belief, the right to be recognized everywhere as a person before the law and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote in a pluralistic system of political parties and organizations and to be elected at genuine, periodic, free and fair elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration and decision-making and free, independent and pluralistic media”).

⁵² Regional organizations with clauses related to democracy include the Council of Europe (CoE), the European Union (EU), the Andean Community, the Common Market of the South (Mercosur), the Central American Integration System (SICA), the Organization of American States (OAS), the Union of South American Nations (UNASUR), the African Union (AU), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Economic Community of West African States (ECOWAS).

example, the Inter-American Charter on Democracy, issued in Lima in 2001, starts with a definition close to our own, stating that democracy requires “*inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government”⁵³ as well as “freedom of expression and of the press.”⁵⁴ This definition is analogous to our own. It goes on to emphasize transparency, participation and respect for social rights as essential principles of the exercise of democracy.⁵⁵

In 2007, the African Union promulgated a Charter on Democracy, Elections and Governance (ACDEG), which similarly emphasizes respect for human rights, representative systems of government based on regular elections and the separation of powers, participation, transparency and pluralism.⁵⁶ This was part of its basis for supporting the removal of Yahya Jammeh in the Gambia. The African Union Charter adds three additional elements to those found in earlier documents: the fight against corruption, the promotion of gender equality in public and private institutions, and the prohibition of unconstitutional changes of government, which we will examine in more depth in Chapter 3.⁵⁷

Why should we not adopt these thicker conceptions that are on offer? There are of course many elements that could be added to a definition of democracy, but all of those found in international legal instruments contain *at least* the elements of our own.⁵⁸ A norm against unconstitutional changes in government would

⁵³ Inter-American Charter on Democracy, art. 3. ⁵⁴ *Id.* at art. 4.

⁵⁵ *Id.* at arts. 4–6. ⁵⁶ See *supra* note 2.

⁵⁷ Article 4 of the Inter-American Democratic Charter mentions “probity” along with responsible public administration, so arguably incorporates the norm against corruption. See Inter-American Commission on Human Rights, Resolution 1/18, *Corruption and Human Rights* (Mar. 2, 2018), available at: www.oas.org/en/iachr/decisions/pdf/Resolution-1-18-en.pdf

⁵⁸ Corruption is obviously a violation of the rule of law component, and so within the scope of our definition. Indeed, the South African Constitutional Court relied on international law in the important *Glenister* decision of 2011, which held that international treaty obligations required the state to take steps to tackle corruption, and noted that corruption threatened democracy itself. See

certainly be included in the rule of law and elections prongs of our own definition. We recognize that corruption is particularly cancerous for democracy. As the South African Constitutional Court said in its decision in *Glenister v. President of South Africa and others*, “corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project.”⁵⁹ But some degree of corruption control is embedded in our idea of the bureaucratic rule of law.

On the other hand, we do not include the entire bundle of human rights, or require gender equality outside the context of voting. This is partly a matter of general methodological preference – if we want to study the *effects* of democracy on economic redistribution, social rights or gender equality, we cannot incorporate those things into the definition. Furthermore, the thicker the conception, the fewer states will meet the standard, reducing the scope of the inquiry. But it is worth saying a bit more about gender and minority rights in particular. I will use India, long known as the world’s largest democracy but one that is currently undergoing severe backsliding, to illustrate what is at stake.

Our criterion that the modal adult be able to vote would exclude most countries before the twentieth century, when women were granted the right to vote. In this sense, a certain degree of formal gender equality is built into my definition. But full, substantive gender equality remains elusive in many societies, including India. Indeed, the sex ratio in India is now so skewed – nine females for every ten males – that the modal adult is male. The horrific practices of femicide that underlie this dry fact are of obvious moral concern, and one might argue that any democracy with such practices is unworthy of the name. However, I would like to bracket the

Glenister v. President of the Republic of South Africa and Others, Case No. CCT 48/10; (2011) ZACC 6, at para. 166–167. “[C]orruption . . . fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. This deleterious impact of corruption on societies and the pressing need to combat it concretely and effectively is widely recognised in public discourse, in our own legislation, in regional and international conventions and in academic research.”

⁵⁹ *Id.* at para. 166.

issue of moral approval of a country's governance from the definition of its regime type. India still met the electoral criteria for democracy, at least until very recently.

Similarly, the issue of minority rights protection is one that many democracies struggle with, and surely is a desirable criterion for some definitions of democracy. India under Prime Minister Narendra Modi has undertaken a campaign of erasure, targeting the country's Muslim minority and its historical contribution to the country's heritage. Yet formally, Muslims retain the core democratic rights as much as other Indians, and their substantive oppression does not itself remove India from the ranks of democracies, in my view. If it did, the retention of caste practices even after they were abolished by the Constitution after independence would probably do so as well.⁶⁰ But one's normative assessment of such practices, with regard to both gender and minorities, should not obscure the fact that India has remained a democracy, albeit a highly imperfect one, for most of its existence.⁶¹

The real reason that India's democratic status is generating close scrutiny in recent years is not the electoral prong but the liberal one. Freedoms of speech and the press are subject to increasingly severe restrictions from government and its proxies. There have been well-documented attacks on journalists critical of the ruling Bharatiya Janata Party (BJP). The government uses sedition charges to silence and intimidate its critics. And media ownership has been concentrated into the hands of a few, so that there is very little criticism of BJP policies. In such an environment, elections may be held, but they are not necessarily meaningful contests. In short, India's democratic status may be slipping, not because of pervasive substantive inequalities, but because of concentration of political power that has undermined the ability to criticize government.

⁶⁰ Constitution of India (1950), art. 17 (banning untouchability); art. 15 (prohibiting discrimination on the basis of caste) (1950) (India). For an account of the constitutional adoption emphasizing its democratic innovations, see Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (New York: Oxford University Press, 2020).

⁶¹ As this book was going to press, India lost its status as a democracy according to many international rankings. Soutik Biswas, "'Electoral Autocracy': The Downgrading of India's Democracy," BBC.com, Mar. 16, 2021, available at: www.bbc.com/news/world-asia-india-56393944

A second reason to stick with a relatively thin definition is practical. A thicker conception reduces the number of countries that can be said to be democratic, and thus subject to analysis in the work that follows. A conception of democracy that is too thick, perhaps excluding highly unequal democracies such as Venezuela's in the decades before Chavez, would not allow us to produce generalizations applicable to most states as they actually exist and operate. To understand why democracy is facing significant challenges, it is important to consider the entire range of countries that can be reasonably called democratic.

I recognize that, by distilling a complex concept into a binary, I am engaging in simplification. This move has probably already alienated some readers. Perhaps some readers accept Jacques Derrida in his view that any binary is a "violent hierarchy," where "one of the two terms governs the other."⁶² Since autocracy is the residual category in my analysis, and the historically more common phenomenon, I freely admit to this feature of my construction.

Defending Democracy

I consider the moral case for democracy to be self-evident, and so do not develop a defense of it as a mechanism for national governance.⁶³ This is true even though democratic governments have been struggling with legitimation in recent years, and one can cherry-pick nondemocracies such as Singapore and Brunei where it might be better to be born if one could choose. Democracies with freedom of speech give their citizens the freedom to criticize, and so many of them have a recurrent sense of discontent and insecurity.⁶⁴ The "successful" response of authoritarian China to the COVID-19 crisis of 2020, in which it instantly shut down a major metropolis and then isolated an entire province, contrasted with bumbling response by the United States federal government, which was criticized for indecisiveness, incompetence and politicization by the president and his party. But it is also the case that some

⁶² Jacques Derrida, *Positions* 41 (Chicago, IL: University of Chicago Press, 1981).

⁶³ For a recent account, see Stein Ringen, *How Democracies Live: Discourses with the Greats* (Chicago, IL: University of Chicago Press, 2021).

⁶⁴ Melissa Schwartzberg and Daniel Viehof, eds., *Democratic Failure: NOMOS LXIII* (New York: NYU Press, 2020).

democracies – Taiwan foremost among them – responded effectively and decisively, and so one should not view regime type as the primary determinant of effective crisis governance.⁶⁵

Accepting that democracy needs no defense at the national level does not tell us anything about what exactly international law should do about it. Even if we can all agree that certain ends are valuable, that does not mean that they should be specifically addressed by or required by international law. Most people in the world like sunshine, but this does not thereby turn it into an object of international interest.

Further, we cannot even extrapolate from the desirability of democracy to the structure of international law itself. The fallacy of composition holds that properties of each component of a system should also hold at the level of the system itself. Even if all countries in the world were democracies, that does not mean that international law would or should be “democratic” in its structure. Democracies acquire their moral legitimacy from the consent of their own citizens, but international law governs relations among very different polities, some of which may have alternative moral legitimacies of their own.

The twentieth century began with grand but naive hopes that international law could transform the interests of states and domesticate interstate war. The realist tradition of international relations theory has long argued that such pieties obscure the underlying conflict and competition among states, which are the true drivers of international behavior. The great E. H. Carr, writing on the eve of World War II in Europe, specifically took issue with Hersch Lauterpacht, calling him a utopian whose lawyerly examination of justiciability sidestepped the real underlying issues that were about to cause an explosion of violence.⁶⁶

But a truly Westphalian system, in which countries are free to choose their own system of government without external interference, is as utopian a construct as the international legalism attacked by Carr. As Chapter 6 points out, today a rising China claims

⁶⁵ As I write, Taiwan has suffered seven deaths from COVID-19, while the United States had more than 200,000 victims. Had the US response been as effective as that in Taiwan, the latter number would be about 100 deaths.

⁶⁶ E. H. Carr, *The Twenty Years' Crisis, 1919–39* 187, 189 (New York: Perennial, 1939 [2nd ed. 2001]).

sovereignty for itself in a defensive way, but its interests inevitably draw it into the domestic affairs of other countries, just as the United States has found for many decades. Increased interaction inevitably requires involvement in the internal affairs of other states, undermining the canonical principle of noninterference. This suggests that international law inevitably provides a structure which may support or undermine the maintenance of democracy at a national level. It cannot be truly neutral in the sense of having no effect.

Return for a moment to the tale of the two dictators. It is no doubt true that the Gambia is better off after the ECOWAS intervention, which was virtually bloodless and dispensed with an erratic dictator. I have no doubt that the citizens of Equatorial Guinea would also benefit from an action like "Operation Restoring Democracy." But does that mean the world would be better off if such actions were routine and clearly authorized or even demanded by international law?

Here a more cautious answer is in order. One of the charges directed at liberals in domestic American politics is that they believe that all problems can be solved through government action. The liberal project of expanding freedom of choice in as many realms as possible inevitably (and in some cases appropriately) generates backlash. A similar charge is directed at global liberals who see the natural movement of all societies as heading toward ever greater freedom. Democracy may be a desirable form of government, but its survival depends on economic and social conditions that are not universally present. To the extent that liberal states seek to project their systems onto other societies where democracy has little chance of working, they will generate conflict and backlash.⁶⁷ And in some cases, external actors shape the viability of democracy. One of the factors that has led to the rise of authoritarian international law was a defensive posture Russia developed after the series of "color revolutions" in its neighborhood in the early 2000s.⁶⁸ Popular protests led to

⁶⁷ John Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (New Haven, CT: Yale University Press, 2018).

⁶⁸ Alexander Cooley, "How the Democratic Tide Rolled Back," *Real Clear World*, Jan. 17, 2017, available at: www.realclearworld.com/articles/2017/01/17/how_the_democratic_tide_rolled_back_112175.html

democratic transitions in Georgia in 2003, Ukraine in 2004 and Kyrgyzstan in 2005; Russia responded by rolling back Western efforts at democracy promotion and crushing dissent at home. Soon thereafter, military adventurism led to the creation of two puppet states, Abkhazia and South Ossetia, in the territory of Georgia, and the annexation of Crimea.

My position here, as elsewhere, is that the answer to the question of what international law should do must be empirically informed. I regard international law as a morally neutral enterprise, a tool; only if international law is capable of advancing democracy in a sustained way should it attempt to do so. Routine military intervention to protect or impose democracy is neither realistic nor desirable, and the empirical record of success is poor; hence it should not be facilitated.

But there are some elements in the international legal system that suggest that prodemocratic international law is a viable project, if pursued in a cautious way. Even if, in the end, it must be driven and sustained by internal political forces, democracy can be buttressed internationally. For example, we find increasing normative agreement on ideals like human rights and democracy; Chapter 5 will detail how authoritarian regimes have made active efforts to transform the meaning of these terms rather than reject them outright. These norms can motivate domestic mobilization. We also have examples, some of which are laid out in Chapter 4, in which international actors provide symbolic and material resources that help sustain democratic processes. Finally, it is worth remembering that citizens all over the world *do* demand participation and accountability. We have seen the desire for good governance lead to massive demonstrations from Algeria to Belarus to Chile to Myanmar to Zimbabwe. Scholars who believe that the authoritarian backlash was “caused” by liberal overreach ignore these demands from below, which threaten leaders. A theory of international relations that ignores internal developments within states can say nothing about these forces; it must treat them as exogenous to the analysis.

I view domestic politics as a driving determinant of international behavior, and specifically legal behavior. Democratic regimes have a different structure than authoritarian regimes, as will be elaborated in Chapter 1, leading to differential use of international law. One of the key differences is a greater willingness to institutionalize

norms on the international plane. It is in the nature of institutions that they endure to some extent, even when preferences and power configurations change. At a minimum, existing institutions shape the strategic calculus of different players, whose interaction over time helps produce an overall order.⁶⁹ Whether these institutional structures can remain vital as underlying power dynamics change is a critical question for our moment, on which the verdict is still out. I return in the concluding chapter to this question, and offer some ways in which international law and constitutional democracy can be mutually reinforcing.

Conclusion

There is no iron law of the universe that all good things must go together. The expansion of international institutions in the 1990s appeared to be serving the interests of democratic publics with cosmopolitan preferences, so that the accompanying erosions of sovereignty reflected popular preferences.⁷⁰ Alas, the tidiness of this story was too good to be true, and the rise of populist forces in constitutional democracies was largely a response to failures of international institutions to deliver. In turning away from international institutions, however, these countries are also undermining the ability of other countries to transform their own political systems in a more democratic direction. Shuttering or neutering international institutions will mean that there will be fewer Gambias and more Equatorial Guineas going forward. This, in the end, is not in the interests of the democratic publics in the rich and powerful countries, or of those who yearn for freedom in the poor and marginal places of the earth.

⁶⁹ Shaffer and Halliday call this “Transnational Legal Ordering.” Gregory Shaffer and Terence C. Halliday, *Transnational Legal Orders* (New York: Cambridge University Press, 2014).

⁷⁰ Joel P. Trachtman, *The Future of International Law: Global Government* (New York: Cambridge University Press, 2013).