

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

### INTERNATIONAL ORGANIZATIONS: ENABLERS OR IMPEDIMENTS FOR AUTHORITARIAN INTERNATIONAL LAW?

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International organizations (IOs) provide space for the exchange of ideas. Particularly since the Cold War ended, many expected that this exchange would inevitably lead to more democratization and liberalization around the globe.<sup>1</sup> Instead, some of the largest non-democratic actors on the global stage have functioned within these organizations for decades without liberalizing, while others joined as full or newly transitioned democracies just to see those qualities slowly erode. As Tom Ginsburg's recent article concludes, today's autocrats might instead use international law—including the legal apparatus of IOs—to further their own authoritarian agendas.<sup>2</sup> This essay engages with Ginsburg's thoughtful piece by suggesting that IOs both enable *and* resist the emergence of "Authoritarian International Law" (AIL). Creating or joining IOs is a costly but attractive strategy for revisionist states since members equally influence IO evolution. Fortunately for democracy's advocates, IOs are usually status quo entities, and liberalism is deeply embedded in many existing today. Cross-temporal observations of changes in IO membership, members' regime types, and IO features beyond the founding documents are needed to fully understand how organizations simultaneously perform these paradoxical functions.

#### *IO Membership as a Permissive Condition for AIL*

States become IO members either by creating organizations or by joining existing ones. Changes in IO membership are quite common; for example, in the Democracy Enforcement Toolkit Dataset—which codes changes to democratic commitments of twelve regional IOs from 1948 to 2017—only one IO has had constant membership over its lifetime.<sup>3</sup> A full overview of the robust political science debate questioning why states design IOs is beyond the scope of discussion here. The main camps argue that IOs are either created to reflect and reinforce power asymmetries<sup>4</sup> or to solve coordination problems efficiently.<sup>5</sup> In either case, founding states

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<sup>1</sup> Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EJIL 503 (1995).

<sup>2</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AJIL 221 (2020).

<sup>3</sup> UNASUR, which is also an outlier in that it is the newest IO in the dataset (established 2008). Data source: Cassandra Emmons, *Regional Organizations as Democracy Enforcers: Designing Effective Toolkits*, (Ph.D. Diss., Princeton University, 2020).

<sup>4</sup> RANDALL STONE, *CONTROLLING INSTITUTIONS* (2011).

<sup>5</sup> ROBERT KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

have the luxury of designing an organization according to their combined preferences to meet certain rational ends.<sup>6</sup>

When states join existing IOs, however, they do not immediately have the same creative control over the organization. Joining is costly, often requiring some domestic reforms to align with the group. Current members determine the accession conditions, usually placing an onus on “fit.”<sup>7</sup> States might accept these costs in pursuit of domestic political or economic benefits. For example, liberal theories suggest that “weak democracies” join international organizations in order to tie the hands of future elites, thus ensuring democratic governance continues.<sup>8</sup> States also might accept these external conditions in order to gain international legitimacy, signaling that the state meets the requisite conditions of membership.<sup>9</sup> Post-accession, though, all member states, new and old, belong to the “in group,” meaning they are all able to influence the organization’s trajectory, at least when acting with a majority of other members.

While some IOs are actors in their own right, they function, at minimum, as *environments* for regular interaction among member state representatives. As a consequence, IOs allow for the exchange of ideas beyond formal economic, security, or other functional purposes. Because many IOs are not exclusively comprised of democratic states, leaders are exposed not only to liberal ideas within these organizations, but to authoritarian ones as well. Today’s new autocrats learn effective means of sheltering their authoritarian stripes from international criticism by participating in an IO setting. IO membership is thus a “permissive condition” for the emergence of AIL.<sup>10</sup>

We have witnessed this over the past decade in the EU. Established in 1951 as the European Coal and Steel Community, the EU has expanded drastically in scope and membership from the original six members to twenty-eight currently. Hungary did not join the EU until 2004, after emerging as a “success story” among the former Soviet bloc states during the democratic transitions.<sup>11</sup> It obviously did not participate in the early discussions that shaped the Union, especially those that formalized the conditions of membership in the early 1990s. Hungary was a “rule-taker,” adjusting its domestic political and economic system to earn membership. Since 2010, however, Hungarian Prime Minister Viktor Orbán’s Fidesz party has dismantled the country’s democratic system beyond recognition—an authoritarian lion among liberal sheep.<sup>12</sup>

How has Hungary avoided political sanction for so long? The answer is multifaceted, but a few aspects of it are relevant for AIL. First, Hungary uses the EU’s inefficiency to its advantage.<sup>13</sup> For example, the General Affairs Council of the EU was poised to discuss the European Parliament’s 2018 resolution that triggered the suspension clause (Article 7(1) Treaty on European Union) on September 19, 2019, when—merely one week prior—the

<sup>6</sup> Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 769 (2001).

<sup>7</sup> RICK FAWN, *INTERNATIONAL ORGANIZATIONS AND INTERNAL CONDITIONALITY: MAKING NORMS MATTER* (2013). Even organizations like the EU—which has had a formal set of requirements for would-be members since 1993—have selectively offered membership based on identity beyond the formal fit. Turkey has sought EU membership since 1987. For a different theory on who joins, see Christina Davis & Meredith Wilf, *Joining the Club: Accession to the GATT/WTO*, 79 J. POL. 964 (2017).

<sup>8</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217 (2000); Jon Pevehouse, *With a Little Help from My Friends? Regional Organizations and the Consolidation of Democracy*, 46 AM. J. POL. SCI. 611 (2002).

<sup>9</sup> For an example of status seeking via international institutions, see JUDITH KELLEY, *SCORECARD DIPLOMACY: GRADING STATES TO INFLUENCE THEIR REPUTATION AND BEHAVIOR* (2017).

<sup>10</sup> Hillel Soifer, *The Causal Logic of Critical Junctures*, 45 COMP. POL. STUD. 1572 (2012).

<sup>11</sup> András Bozóki, *Broken Democracy, Predatory State, and Nationalist Populism*, in *THE HUNGARIAN PATIENT: SOCIAL OPPOSITION TO AN ILLIBERAL DEMOCRACY 3* (Péter Krasztev & Jon Van Til eds., 2015); SUSAN ROSE-ACKERMAN, *FROM ELECTIONS TO DEMOCRACY: BUILDING ACCOUNTABLE GOVERNMENT IN HUNGARY AND POLAND* (2005).

<sup>12</sup> Freedom House, *Freedom in the World: Hungary* (2020).

<sup>13</sup> See, e.g., Eszter Zalan, *EU Action on Hungary and Poland Drowns in Procedure*, EU OBSERVER (Nov. 13, 2018).

Hungarian government circulated a 158-page rebuttal.<sup>14</sup> The delegation then relied heavily upon this updated information during the meeting, curtailing serious debate since others had no time for proper vetting or review.<sup>15</sup> Second, Fidesz has used its membership in the European People's Party, the largest political group in the European Parliament, to evade other sanctions.<sup>16</sup> A third reliable strategy Hungary has used is likening its constitutional reforms to laws and practices of other member states. This practice of stitching together a “Frankenstate”<sup>17</sup> has allowed Orbán to deflect criticism from other EU members, most recently Finland.<sup>18</sup>

As the EU continued to flounder in its response to the Hungarian government, Orbán's playbook was taken up by leaders of the ruling Polish Law and Justice (PiS) party in 2015. Having observed the EU's in- (or at least insufficient) action, the PiS government began systematically dismantling its own democratic institutions—most notoriously the judiciary. Clearly, IO membership simplifies sharing authoritarian policies—and, as a phenomenon, is not exclusive to less democratically dense regions.

IOs thus enable AIL by exposing recalcitrant member states to new ideas and anti-democratic strategies, and by setting precedents of inaction when even one member models effective anti-democratic strategies for other would-be autocrats in the group. If organized, autocrats may therefore attempt to *revise* those very institutions they pined after.<sup>19</sup> As I will now discuss, though, the permissive condition of IO membership does not necessarily lead to the autocratization of international law and organizations. IOs impose barriers to revisionist states for the same reason critics are frustrated by the EU's inaction in Hungary or Poland: institutional change is slow.

### *IO Stickiness as an Impediment to AIL*

IOs usually evolve gradually—progressively or regressively—earning the label of “sticky.”<sup>20</sup> IOs also tend to last for a long time<sup>21</sup>—and while more IOs exist in the world today than ever before, IO *creation* has dropped to early Cold War levels (Figure 1). Fortunately, 70 percent of states today are already members of at least one regional IO that commits its members to democracy, so new authoritarians have work to do if they want to steer one in a different, illiberal direction.<sup>22</sup> This empirical reality suggests that we must study organizations beyond their time of creation to understand if and how they foster AIL. However, generating such cross-regional, time-series data requires deep substantive knowledge of each institution, not to mention a lot of time. A second-best approach—and a way to see if this enterprise is worthwhile—is to compare IOs created during different time periods.

<sup>14</sup> [Information Note to the General Affairs Council of the European Union by the Hungarian Government](#) (Sept. 12, 2019).

<sup>15</sup> [Values of the Union - Hungary - Article 7\(1\) TEU Reasoned Proposal Report on the Hearing Held by the Council](#) (Sept. 16, 2019).

<sup>16</sup> R. Daniel Kelemen, [EPP ♥ Orbán](#), POLITICO (2015); R. Daniel Kelemen, [Europe's Other Democratic Deficit](#), 52 GOV. & OPPOSITION 211 (2017); R. Daniel Kelemen, [The European Union's Authoritarian Equilibrium](#), 27 J. EUR. PUB. POL'Y. 481 (2020).

<sup>17</sup> Kim Lane Scheppele, [The Rule of Law and the Frankenstate](#), 26 GOVERNANCE 559 (2013).

<sup>18</sup> Prime Minister Viktor Orbán, [Speech at the 30th Bálványos Summer Open University and Student Camp](#) (July 27, 2019). See Kim Lane Scheppele, [Autocratic Legalism](#), 85 U. CHI. L. REV. 545 (2018).

<sup>19</sup> On revisionist states, see ROSEMARY FOOT & ANDREW WALKER, [CHINA, THE UNITED STATES, AND GLOBAL ORDER](#) (2011); Christian Brüttsch & Mihaela Papa, [Deconstructing the BRICS](#), 6 CHIN. J. INT'L. POL. 299 (2013); Julia Morse & Robert Keohane, [Contested Multilateralism](#), 9 REV. INT'L ORG. 385 (2014); G. John Ikenberry & Darren Lim, [China's Emerging Institutional Statecraft](#), BROOKINGS INST. (2017).

<sup>20</sup> See James Mahoney & Kathleen Thelen, [A Theory of Gradual Institutional Change](#), in EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER 1 (James Mahoney & Kathleen Thelen eds., 2009).

<sup>21</sup> I must include the caveat that IOs do not exist and function indefinitely. It is likely a number of IOs represented in Figure 1 are defunct. For an excellent take on IO vitality, see Julia Gray, [Life, Death, or Zombie? The Vitality of International Organizations](#), 62 INT'L STUD. Q. 1 (2018).

<sup>22</sup> Emmons, *supra* note 3, 2–3.

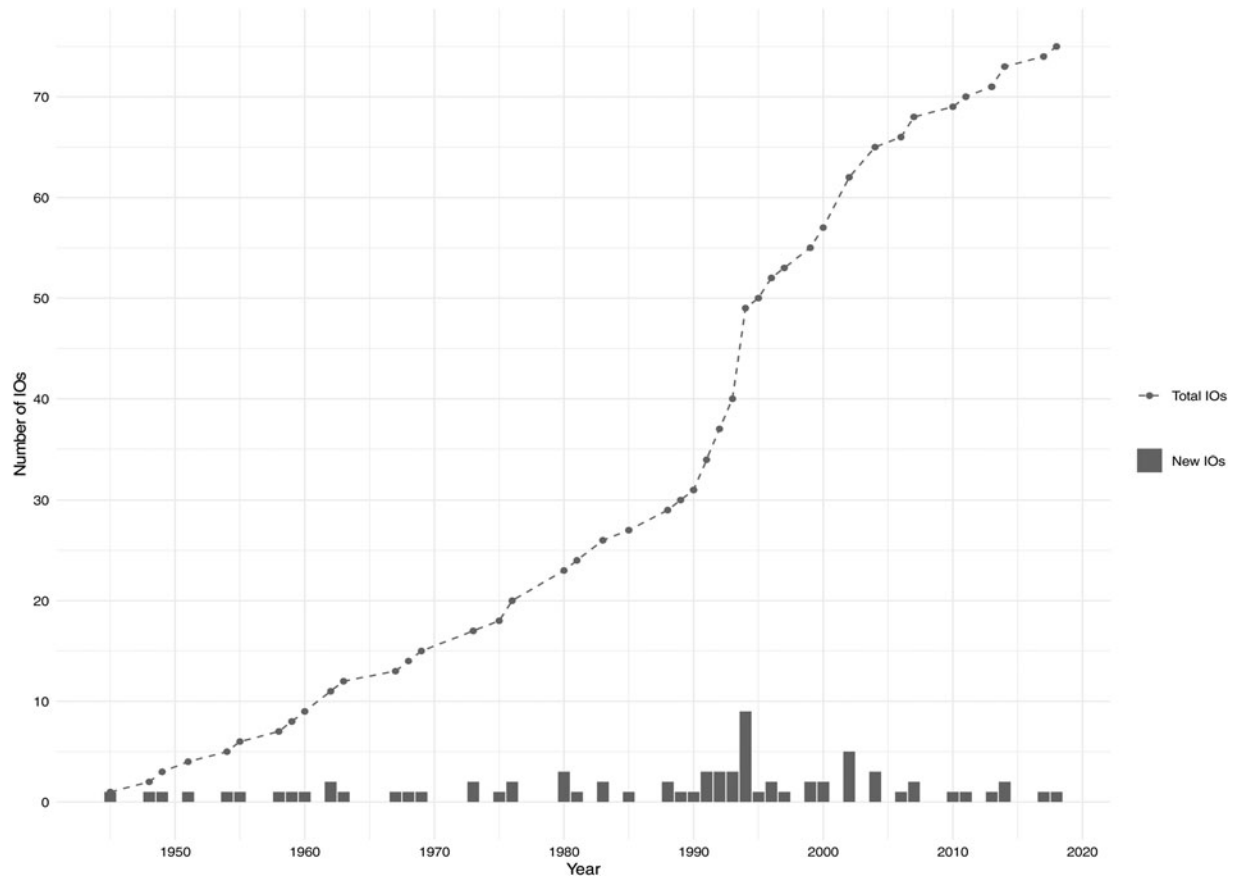


Figure 1 New versus Existing IOs Over Time, 1945–2020 (N=75)

To do so, we must first establish the appropriate cut point. If the central question is what *today's* “new authoritarians” are trying to accomplish with international law, there are many reasons to think their design incentives were different during and after the Cold War.<sup>23</sup> Ginsburg starts off his essay by convincingly arguing that the present-day authoritarian approach is distinct from that of the past, at least because autocratic states are already “integrated into the global capitalist economy”; ideology is no longer their main motivator; and domestic institutions in autocracies, namely elections and courts, parody those of a democratic state.<sup>24</sup> Along with these new characteristics of autocrats, the modal *internal* threat to authoritarian (and weak democratic) leaders has shifted since the 1990s from military or executive *coups* to more nuanced tactics.<sup>25</sup> Also, and perhaps most obviously, states have only been able to act and interact relatively independently of either American or Soviet influence since the Cold War ended. For all of these reasons, we should only expect to observe new autocrats with AIL tendencies in the post-Cold War period.

<sup>23</sup> Scheppelle, *supra* note 17.

<sup>24</sup> Ginsburg, *supra* note 2, 222.

<sup>25</sup> Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOC. 5 (2016).

Next, we need to establish proper conceptualizations for the IO's average member state regime type and its features, respectively the independent and dependent variables, both of which can be conceptualized as a democratic-autocratic dichotomy.<sup>26</sup> Categorizing individual states as democratic or autocratic is straightforward if one adopts a widely accepted quantitative measure, such as from the Polity IV dataset.<sup>27</sup> Averaging the member states' regime scores provides the "democratic density" of the IO.<sup>28</sup> Categorizing IOs as either authoritarian or democratic is less straightforward—and here Ginsburg's innovative conceptualization of AIL is very helpful. He suggests AIL has several distinct characteristics in substance and form that separate it from pro-democracy (or general) international law. Authoritarian treaties *emphasize sovereignty and stability* versus democracy, freedom, and human rights, using international law *to promote autocracy* rather than democracy, all while hedging primarily *against internal security threats*.<sup>29</sup> Thus, an authoritarian IO's documents will reflect "legal rhetoric, practices, and rules specifically designed to extend the survival and reach of authoritarian rule across space and time," while a democratic IO's laws "protect and extend the sphere of democratic governance."<sup>30</sup> Using these definitions, he codes seventy-six organizations based on whether the founding documents contain democratic features (mention democracy, the rule of law (ROL), human rights, or international law), authoritarian features (security), and third-party dispute resolution mechanisms (courts or dispute resolution).

When we separate the IOs into Cold War and post-Cold War periods, new patterns in treaty features emerge. The first observation we can make is that most of the post-Cold War IOs are either comprised of democratic or "hybrid" states (thirty-six of forty-five), based on the democratic density of member states.<sup>31</sup> Given the changes in dictatorial tactics in this era, many new authoritarian states fall into this hybrid category. Perhaps predictably, post-Cold War IOs also reference democratic features at higher rates than the Cold War IOs (Columns a, b). References to democracy, human rights, and the ROL nearly double even among democratic IOs (Columns c, d). Hybrid organizations are even more likely to reference democratic features in their founding treaties than democratic IOs of the same era; in fact, post-Cold War hybrid IOs almost *universally* reference human rights while barely half of the democratic IOs do (Columns h, d). This trend signals an entrenchment of these liberal values in formal institutions—which, as has been discussed, are then difficult to walk back.

The fact that hybrid organizations adopt democratic language at even higher rates than democracies could signal a few different mechanisms. It is possible these IOs' founders are *disingenuously mimicking democratic IOs*, using the same tactics Ginsburg observes at the domestic level: taking on the veneer of rule-of-law-abiding states that collectively value democracy and respect human rights. Alternatively, it might suggest *aspirational international lawmaking*, in line with the aforementioned assumption that more integration catalyzes liberalization and democratization. Only by evaluating changes to the formal IO treaties, to IO membership, and in member states' regime types *across time* can we ascertain whether international law and organizations are or are not being used to further authoritarian ends.

<sup>26</sup> In general, I conceptualize these as a spectrum, but will adopt the simplification used by Ginsburg for better engagement with his argument.

<sup>27</sup> As is common, [Ginsburg](#) (*supra* note 2, 233) treats a score of +6 or higher as a "democracy" (on a 21-point scale of -10 to +10, where negative scores are more autocratic and positive scores more democratic).

<sup>28</sup> Jon Pevehouse & Bruce Russett, [Democratic International Governmental Organizations Promote Peace](#), 60 INT'L ORG. 972 (2006).

<sup>29</sup> [Ginsburg](#), *supra* note 2, 228, 231.

<sup>30</sup> *Id.* at 228, 227. We could ask more questions about this distinction, such as what active promotion of autocracy would look like beyond rhetorical emphasis of sovereignty and respect for self-determination as a guise for anti-democratic activity, but I leave that aside here.

<sup>31</sup> [Pevehouse & Russett](#), *supra* note 28.

**Table 1** Internal Features of International Organizations Created During and After the Cold War

		<i>Member State Average Regime Type (IV)</i>							
		<i>All IOs</i>		<i>Democratic</i> Avg Polity $\geq +6$		<i>Autocratic</i> Avg Polity $< +6$		<i>Hybrid</i> Avg Polity $> 0$ and $< +6$	
		<i>(a)</i>	<i>(b)</i>	<i>(c)</i>	<i>(d)</i>	<i>(e)</i>	<i>(f)</i>	<i>(g)</i>	<i>(h)</i>
		<i>Cold War</i> ( <i>n</i> = 30)	<i>Post CW</i> ( <i>n</i> = 45)	<i>Cold War</i> ( <i>n</i> = 13)	<i>Post CW</i> ( <i>n</i> = 21)	<i>Cold War</i> ( <i>n</i> = 17)	<i>Post CW</i> ( <i>n</i> = 24)	<i>Cold War</i> ( <i>n</i> = 5)	<i>Post CW</i> ( <i>n</i> = 15)
<b>Indicators for IO Type (DV)</b>	<i>Mention democracy</i>	6 (20%)	23 (51%)	3 (23%)	10 (48%)	3 (18%)	13 (54%)	2 (40%)	10 (67%)
	<i>Mention ROL</i>	5 (17%)	19 (42%)	3 (23%)	9 (43%)	2 (12%)	10 (42%)	1 (20%)	9 (60%)
	<i>Mention human rights</i>	6 (30%)	27 (60%)	3 (23%)	10 (48%)	3 (18%)	17 (71%)	2 (40%)	14 (93%)
	<i>Mention international law</i>	9 (30%)	24 (53%)	4 (31%)	10 (48%)	5 (29%)	14 (58%)	2 (40%)	9 (60%)
	<i>Mention security</i>	19 (63%)	31 (69%)	9 (69%)	12 (57%)	10 (59%)	19 (79%)	3 (60%)	13 (87%)
	<i>Mention court</i>	8 (27%)	16 (36%)	5 (38%)	5 (24%)	3 (18%)	11 (46%)	0	10 (67%)
	<i>Mention dispute resolution</i>	17 (57%)	29 (64%)	6 (46%)	10 (48%)	11 (65%)	19 (79%)	2 (40%)	12 (80%)

Note for [Table 1](#) Based on replication data for Table 5 in Ginsburg (2020). Evaluates one treaty for each IO, usually founding treaty and year.

### Conclusions

In this essay, I explain how IOs have both contributed to AIL's emergence and made it difficult for would-be revisionists to enact completely illiberal reforms. Autocrats have learned from the exchange of ideas in these ever-changing environments. However, the stickiness of institutions and super-majorities needed for institutional reform still pose significant hurdles for today's autocrats, even as IO members. Hybrid regimes also offer hope for the preservation of the liberal order, not abject despair. Since IO creation has slowed, though, we stand to learn more about whether the entrenchment of liberal ideas in IOs can withstand the anti-democratic current by observing them over time. Evaluating these institutional design and membership changes across organizations might also clarify the conditions under which an IO will either succumb to authoritarian capture or thwart these attempted coups of international law.