

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

THE LIMITS OF AUTHORITARIAN INTERNATIONAL LAW

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Tom Ginsburg's concept of "authoritarian international law" (AIL)¹ is as important as the one it references, Thomas Franck's "right to democratic governance."² It underlines how the promise carried by Franck was betrayed in the bitter turn of history that ended the emerging hope for democracy ruling all nations in the world after 1989. This hope had developed by fits and starts as the slow fulfilment of the Kantian project for "perpetual peace" amongst a world federation of democratic republics on which the League of Nations and the United Nations were built.³ To the now-universal acknowledgment of the grave *domestic* setbacks to human rights and democracy,⁴ Ginsburg's article adds an account of the *international* setbacks which followed. Its chief importance is in raising the question of the emergent authoritarian traits of international law in the wake of these setbacks. With my appreciation of Ginsburg's formidable treatment, including a title that will mark, like Franck's, an important moment in the field, I will challenge some of his conclusions and offer counterpoints in the present essay. In particular, I will (1) suggest the irrelevance of the three "evils of AIL"; (2) highlight the significance of 2006 as the date when AIL started rising; (3) emphasize the importance of U.S. isolationism in the rise of AIL; and (4) argue that the better investment to counter that rise is in nonviolence.

On Ginsburg's "Three Evils of AIL"

Let me start with a critique of the Article's assertion that the normative trend of the emergent AIL involves "active identification of the 'three evils'—terrorism, separatism and extremism"—with "the SCO [Shanghai Cooperation Organization] as harbinger."⁵ While Ginsburg identifies these evils as the most coherent self-expression of authoritarian regimes, his anticipation of what AIL hijacks from the terrain of ideas carries with it (a) a blurred taxonomy; (b) a misunderstanding of its "fig-leaf" dimension; and (c) a wrong approach on how to fight it.

(a) *Blurred taxonomy.* These "three evils" are shared so closely with "liberal" or traditional international law that these categories are either wrong or insufficient. The line must be drawn elsewhere.

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

² Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992).

³ See Fernando R. Tesón, *Two Mistakes About Democracy*, 92 ASIL PROC. 126 (1998) and discussion in [Franck](#), *supra* note 2, at 88–9.

⁴ See TOM GINSBURG & AZIZ S. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018)

⁵ [Ginsburg](#), *supra* note 1, at 249.

Starting from the third category, the fight against extremism was coined in the late period of U.S. Secretary of State Condoleezza Rice's tenure to avoid the use of "Islamism" or "radical Islam."⁶ Fighting extremism, Islamism or otherwise, is not the authoritarian's characteristic. Neither is the concept of terrorism, in particular in international law, where it continues to defy a workable definition, and undermines the far more cohesive concept of "crime against humanity."⁷ As for separatism, I believe that its rejection is the correct attitude to salvage international law in its current configuration of nation-states.⁸ *De jure* separatism—secession, self-determination or independence, all four words covering in my understanding here the same concept—creates far more problems than it solves.⁹ On separatism, the SHO declaration accords with traditional/mainstream/non-authoritarian international law. With few exceptions best defined by unfinished colonialism and/or the Canadian Supreme Court,¹⁰ there is no room for another candidate to the present UN roster of nation-states.

(b) *The fig leaf dimension.* Ginsburg is right in anticipating the way authoritarian states are redrawing the intellectual map, but the article fails to identify the fog of authoritarianism in international law for what it really is—non-law. In the retreat of liberal international law, as opposed to its authoritarian nemesis, law disappears by giving way to ad hoc rule-less positions peddled by the larger authoritarian states. Authoritarianism does not believe in law, whether domestic or international. AIL is at best opportunistic, at worst a constructed lie. It cannot be allowed to dictate its own erratic agenda.

(c) *The wrong way to fight AIL.* Since the article blurs the emerging categories of AIL because some are shared with liberal international law, and misses the use of law as a fig leaf covering authoritarian regime exercise (or, in another analogy, it misses the fact that the vaunted "new order" is as empty as a *legal* concept as its infamous predecessor in the 1930s), then we should consider an alternative approach by which to oppose the rise of AIL. The approach shifts Ginsburg's approach in a number of ways developed in the next three sections, first with revisiting "2006," when a number of democratizing movements started getting pushed back or repressed by authoritarian regimes, then by noting the absence of the role of the United States in the rise of AIL, and, in the last section, by opening a vista on nonviolence as the nemesis of AIL.

2006

I agree with the choice of 2006 as the start of the downward trend for democracy and human rights.¹¹ But why that particular year, and why is this starting point significant? If the turn to the worse is situated correctly in 2005–6, what happened then that made this turn so disturbing to international law that it was then set on a steady authoritarian path?

⁶ [Transcript: Rice Discusses Political Strategy of War Against Terrorism \(National Security Advisor Addresses Need to Confront Islamic Extremism\)](#) (Aug. 19, 2004).

⁷ See CHIBLI MALLAT, [PHILOSOPHY OF NONVIOLENCE: REVOLUTION, CONSTITUTIONALISM, AND JUSTICE BEYOND THE MIDDLE EAST](#) (2015).

⁸ Or less, i.e., a configuration with less nation-states when, like the two Germanies or the seven unlinked previous Emirates in the Arab Gulf fusing in the Federal Republic of Germany and the United Arab Emirates respectively. When not physically coerced, these fusions are beneficial to international law.

⁹ The argument is elaborated best in Donald L. Horowitz, [The Cracked Foundations of the Right to Secede](#), 14 J. DEMOCRACY 5 (2003) (showing how ethnic conflicts get exacerbated rather than solved by secession, and how public international law doctrine remains oblivious to this reality).

¹⁰ On colonialism and self-determination, see [Franck](#), *supra* note 2, at 57–61. [Canada Supreme Court Judgment, Reference re Secession of Quebec, \[1998\] 2 SCR 217.](#)

¹¹ [Ginsburg](#), *supra* note 1, at 221.

2006 strikes a personal chord. It is the year when Syria's dictatorship and its main allies in Lebanon started to prevail over the Cedar Revolution—in which I participated actively, on the streets and in the leadership during my presidential campaign—to remove (unsuccessfully) the pro-Syrian president who had remained at the helm in Lebanon despite the immense tide of the Revolution.

The Cedar Revolution, one may recall, was, until 2011, the largest non-violent demonstration in history in a Middle Eastern country. It was triggered by the assassination of former Lebanese Prime Minister Rafik Hariri on February 14, 2005.¹² Within a month, the revolt brought half the active population of Lebanon to the streets, demanding “truth and justice” and the departure of Syria's troops from the country. By the end of April, these troops had departed, and a UN investigative committee was being set up on the model of the Yugoslav and Kosovo investigations and the subsequent tribunals. The Cedar Revolution, clamoring for nonviolence and justice, developed over the next year. It was ultimately defeated when the war started by Hizbullah in July 2006 halted the process to remove the Lebanese president that the Syrian dictator had forced onto the country. While people continued their resistance, the tools of repression increased; control by authoritarian protagonists also deepened. In May 2008, Hizbullah occupied Beirut militarily. It has since tightened its grip on the country. Syria's allies are back in the saddle, running Lebanon.

In light of the above, let me propose the following periodization to explain how the retreat of international law started in 2006. That year, Lebanese leaders of the non-violent revolution were killed one after the other, with the suspects left undisturbed. In 2009, as Iraq was emerging from its sectarian wars, and a decent government was stabilizing, the Obama administration decided to pull out from the country, leaving it wide open to Iran and to an ugly sectarian backlash across the region. In 2011, hopes for democracy rose again, when a Middle East-wide revolution started. In Syria, the eight months of a dominantly non-violent revolution met with immense repression between March and August–September 2011. The Syrian scene soon morphed into a brutal civil war between extremes, and an unprecedented geopolitical battle. Syria turned into the fulcrum of world violence. A third of the Syrian population fled. Fear spread in Europe, resulting in the rise of rightwing Islamophobic/xenophobic governments, and led in turn to the secession of Britain from the EU, followed by the victory of Donald Trump and a dozen other similar leaders across the planet. During this time, the authoritarian rules of Chinese leader Xi Jinping and Russian president Vladimir Putin also entrenched.

What broke in 2006? In my view, the Cedar Revolution failed when the two main tools conceived by international law in the fight for the right to democratic governance—international criminal law, and the responsibility to protect (R2P)—were slowly undermined.¹³

In the retreat of liberal international law, the criminal accountability dimension is probably the most striking. Hundreds of books and thousands of articles attest to the intellectual and practical growth of “international criminal law,” including the establishment of a dozen local/regional international/mixed tribunals, as well as the International Criminal Court, now all but moribund with its exclusive indictment of African leaders. This was also mirrored in the Lebanese Cedar Revolution, when the international criminal process, which the Lebanese revolutionaries sought to bring down the killers, was smothered by the slow and ineffective work of the Special Tribunal for Lebanon.¹⁴

The other promise of liberal international law, R2P, culminated in the International Commission on Intervention and State Sovereignty set up by Canada in September 2000.¹⁵ R2P soon turned into an increasingly

¹² Chibli Mallat, [March 2221: Lebanon's Cedar Revolution- An Essay on Non-violence and Justice](#) (2007). MICHAEL YOUNG, [THE GHOSTS OF MARTYRS SQUARE](#) (2010).

¹³ MALLAT, *supra* note 7, at 333–42 (discussing R2P and international criminal law).

¹⁴ *Id.* at 278–81.

¹⁵ *Id.*

empty doctrine, downgraded from “responsibility” to “duty” to “right.” After the downgrading, R2P was shunted aside by the veto of a single Security Council authoritarian member—Russia. Since the Libyan intervention in 2011–12, the concept has been mostly theoretical.

Isolationism

There is in Ginsburg’s article a seemingly conscious oblivion to U.S. isolationism in the rise of AIL, and its application during the presidency of Donald Trump. Isolationism in international law is, arguably, a uniquely American trait. There was never in history a single superpower on the planet before 1989, while U.S. foreign policy has always oscillated, in deep waves, between isolationism and interventionism.¹⁶ In this secular cycle, despite a template of global governance grounded in the Second World War and the postwar institutions which the United States has shaped and led, isolationism has become increasingly dominant.

Isolationism predates the Trump presidency. U.S. leadership, a central peg of international law since World War II, was marked by several retreats of democracy and human rights in the international sphere since 1992. It started with the Clinton presidency allowing the killing fields of Rwanda to happen, and refusing to stand up vigorously against the rule of Saddam Hussein in Iraq despite its signal defeat in 1991—thereby freezing the whole Middle East in the impossibility of removing the worst dictator, in a region full of them. The Iraq invasion in 2003 went in the opposite direction, by going to war where it might not have been necessary, and preventing the rapid transfer of sovereignty to Iraqis. But it came after 9/11, another turning point which, from my perspective, ruined the chances of international criminal law by making war rather than justice the dominant response to “terrorism.”¹⁷

One can multiply examples after 2006 where change towards democracy was frustrated, and where in so many countries sliding back into autocracy stood unchallenged by the United States as the “indispensable power” on the international scene. Regardless of necessary nuances, such as the fiasco in the Somalia R2P intervention, U.S. isolationism remains a growing trend.

The Trump presidency adds to the isolationist trend the erratic behavior of a lawless president (in the sense that Trump’s life and statements show that he does not believe in human rights or democratic governance, which gets expressed in a manifest disdain for law, domestic and international). This results in the disturbing attitudes to international law detailed in Harold Koh’s book,¹⁸ but it also has occasionally positive results, such as the determined standing up to Iranian expansionism in the Middle East. This is a paradox which we need not get into here.¹⁹

If Trump continues in power for a second term, it will further undermine the “law” in international law and correspondingly augment the rise of AIL. A Trump defeat, however, will not necessarily halt the deep wave of U.S. isolationist policy that started around 1992, and its extreme manifestations in Syria. The failure of an “orphaned” non-violent revolution in Syria under Barack Obama’s watch froze the rest of the region into increased

¹⁶ On isolationism in the U.S. tradition, see CHIBLI MALLAT, *DEMOCRACY IN FIN-DE-SIÈCLE AMERICA* 163–8 (2016, original Arabic 2001).

¹⁷ Chibli Mallat, *The Original Sin: “Terrorism” or “Crime Against Humanity”?*, 34 CASE W. RES. J. INT’L L. 245, 245–248 (2002). I put “terrorism” in brackets because the world still lacks a definition of the term in international law, plagued as it remains with its two century-long believers: the right to bear arms against dictatorship (one’s terrorist is the other’s freedom fighter), and the line between violence carried out by the state against civilians and the one carried out by non-state actors, be they individuals or groups.

¹⁸ HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2019) (on the systematic pattern of breaches to treaties and other basic pillars of international law).

¹⁹ I have previously presented some arguments on the occasionally correct measures taken by Donald Trump, such as the reaction to the use of chemicals by the Syrian government against its civilian populations. See MALLAT, *BOUSSOLE ET AUTRES JOURNALISMES* (2019).

authoritarianism, comforted by an active Russian military foothold in Syria and Iranian expansionism in Iraq, Yemen, and Lebanon.²⁰

This does not mean that military interventionism is the solution to AIL. The foreign influence of the richer and more powerful countries is inevitable, and a better question has always been about the *nature* of influence and intervention. In this sense, non-intervention as policy, i.e. U.S. isolationism, and the Trump presidency's twist on it, are sorely missing in Ginsburg's article.

Nonviolence

The argument I developed in *Philosophy of Nonviolence* is that the world is witnessing a signal change where dictators are brought down by nonviolence.²¹ Let me summarize this “emerging right to nonviolence.”

Any transborder activity of authoritarianism must be understood as the projection of domestic politics by international means. We have not made much progress on Kant's *Zum ewigen Frieden* since it was published in 1795. The dictator's main concern is to remain in power at any cost, and to project his model onto neighboring countries and further afield in order to bolster his position inside. The cooperation of dictators is brutal and systematic. Its full gamut now runs from intensive exchanges in technology-based intelligence against dissent to support of like-minded political leaders and movements (military strong men or civilians, usually from the far right of the spectrum, weighing in to pervert elections), unpunished targeted assassinations of opponents abroad, and outright military repression inside and outside.²²

Granted, matters of historic importance do not move in a straight line. Ginsburg notes, for instance, how Malaysia operated quickly in turning up hope (and, since he wrote, returning somewhat to the ancient authoritarian mode), and how people continue to resist in Hong Kong. There is a new 2011 spirit blowing in the Middle East, with some success in Sudan, Algeria, and Lebanon, and even in Syria as I write. This creates a reprieve in international law for the liberal/traditional mode, but there is more to it than a reprieve. Non-violent resistance anticipates, provokes, and undermines AIL's fuzzy norm(s). It was unfolding again 2020 on the streets of major American cities in “Black Lives Matter” demonstrations competing with an electoral process to change the incumbent presidency, as well as in Hong Kong, Chile, and across the Middle East in other forms of check to authoritarianism.

The response to AIL, I contend, rests in thinking through the meaning of the non-violent movement across the globe. If nonviolence is key to defeating authoritarian domestic rule and AIL in its wake, the streets of the world are way ahead of us. The projection onto international law of the canons of nonviolence as they unfold on the domestic scene, requires urgent fleshing out. “Peace and international law” is as old as international law. “Nonviolence and international law” remains mostly virgin territory.

²⁰ ZIAD MAJED, *AL-THAWRA AL-YATIMA* (“THE ORPHANED REVOLUTION”) (2014) (On the Western and Arab abandonment of Syria to unprecedented repression). *See also*, Jane Mansbridge et al., *A Strategy for Syria Under International Law*, 53 HARV. INT'L L.J. 144 (2012).

²¹ MALLAT, *supra* note 7, at 333–42.

²² Examples abound. Of course, dictators also fight in wars against each other, which brings us back to the Kant-derived proposal that “democracies do not go to war against each other.”