Buchbesprechungen

***Ginsburg, Tom*: Democracies and International Law.** Cambridge: Cambridge University Press 2021. ISBN 978-1-108-84313-3. XVIII, 329 pp. £29.99

Since the publication of *Democracies and International Law* in 2021, the world has considerably changed. Not only has the book been reviewed several times by now[1] and has received enormous attention and praise in the form of two of the discipline's most significant book prizes.[2] Also, Russia's full-blown invasion of Ukraine underlines that the book's scholarly intervention into the world needs to reckon with new forces. Tom Ginsburg already published an update in the form of a journal article in early 2022, in which he has traced various developments around the globe which complement the analysis of his book.[3]

Democracies and International Law is an elegantly crafted and thought-provoking *tour de force* through the troubled relationship of these two notions, building on the author's 2019 Hersch Lauterpacht Memorial Lectures at the University of Cambridge. Ginsburg did not aim at writing a normative defense of democracies as superior actors on the international plane. Neither did he set out to contributing to the stream of literature on the putative normative goal of democracy that has developed since Thomas Franck's seminal works from the early 1990s.[4] Rather, Ginsburg's interest is analytical in nature: He is interested in the question of whether international law is different in nature and content when shaped by democracies. Acknowledging that the 1990s turn to democracy has run out of breath recently, the book also probes the alternatives. In other words: Is there an authoritarian international law emerging and what would its characteristics look like? Accordingly, the book is as much about the new era of systemic competition between old and new superpowers as it is about the relationship between international law and democracy.

After the introduction (pp. 1 et seq.), the first chapter is conceptual in nature and asks 'why would democracies be different' from states with other

1 See, for instance, Rosalind Dixon and Dave Landau, 'Abusive Internationalism? On Democracies and International Law', AJIL 116 (2022), 889-895; Christian Pippan, Book Review, LJIL, FirstView, <https://doi.org/10.1017/S092215652200084X>.

2 2022 Book of the Year Award, American Branch of the International Law Association and 2023 Robert E. Dalton Award, American Society of International Law.

3 Tom Ginsburg, 'Democracies and International Law: An Update', Chi. J. Int'l L. 23 (2022), 1-26.

4 Thomas M. Franck, 'The Emerging Right to Democratic Governance', AJIL 86 (1992), 46-91.

DOI 10.17104/0044-2348-2023-2-349

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

systems of government (pp. 31 et seq.). One important take-away from this chapter is that democracies have different time horizons as compared to non-democratic regimes. The regular rotation of governments may make long-term planning more difficult than it is the case for authoritarian governments.

Chapter 2 then proceeds with an empirical analysis on whether democracies indeed differ from authoritarian and other non-democratically governed states (pp. 60 et seq.). The chaper demonstrates how democratic states have been more active with respect to lawmaking, participation in international dispute settlement mechanism, and are represented to a higher degree in international organisations. In order to arrive at these findings, Ginsburg relies on data from the Polity IV democracy index, at times supplemented with data from the 'Varieties of Democracy' (V-Dem) project. Ginsburg does not aim at setting forth a causal analysis. Rather, the chapter is descriptive in nature. As an example for this approach, take the analysis of the nature of the states parties to bilateral treaties. Here, Ginsburg finds that among the approximately 9.000 bilateral treaties registered with the United Nations from 1949 to 2017, in 64 % of all cases both parties to the treaty were democracies. In comparison, using the data about the democratic nature of regimes, only 40 % of states have been democratic in the period under analysis which suggests a certain over-representation of democratic states for this category of international lawmaking. Accordingly, Ginsburg arrives at the conclusion that democratic states have shaped international law to a greater extent than their non-democratic peers, which would even be the case if one discounts the in all likelihood somewhat outsized influence of the United States as the sole hegemonic power of the post-Cold war era.

Chapter 3 discusses whether international law can save democracy (pp. 103 et seq.). Part of the motivation to study this question might come from the findings of the previous chapter which have also shown that states that oscillate between democracy and autocracy have more of an impact on the production of international law during their democratically organised periods of government. In chapter 3, Ginsburg is skeptical about how much protection international law can offer for democracies against authoritarian backsliding. He pleads for a 'modest baseline expectation' (p. 122) of what international law can achieve. In particular, he points to the political gains that populists can harvest when mobilising against 'faceless bureaucrats in foreign cities' (p. 123).

This somewhat cautious stance leads to Chapter 4 which has a focus on regional organisations defending democracy in Latin America, Europe, and Africa (pp. 124 et seq.). The results are mixed, too. Ginsburg diagnoses that 'normative articulation has exceeded the will to enforcement' in many cases (p. 184). But he also points to many examples where the recourse to interna-

 DOI 10.17104/0044-2348-2023-2-349

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

tional law has helped to stabilise democratic regimes, for instance in the context of the African Union. The book shifts gears afterwards and turns to the 'dark side', i. e. the question of whether an 'authoritarian international law' is emerging and what its characteristics might look like (pp. 186 et seq.). In this chapter, Ginsburg concludes that authoritarian states have grown more sophisticated in their usage of international law. This can be seen, for instance, in turns from binding forms of dispute settlement to 'softer 'dialogue and mutual respect' framework(s)' and in general in a shift towards a 'thinner, coordinating role' of international law (p. 235).

Finally, Ginsburg turns to the intriguing question of systemic competition. Under the theme of 'whence the liberal order?' he surveys the role of the two pre-eminent powers of our age, the United States of America and China, and discusses their respective views on what the author identifies as a return of sovereignty (pp. 237 et seq.). Here, the analysis is particularly revealing when Ginsburg, for instance, discusses the legal characteristics of the Belt and Road Initiative. He identifies three particular features of Chinese international legal policy in this regard, a turn to bilateralism (pp. 267 et seq.), the use of soft law (pp. 269 et seq.) and a 'relaxing of the public-private divide' (pp. 272 et seq.). Throughout this chapter Ginsburg shows how many traits of China's use of international law in some way mimic practices of the United States and even older Western imperial practices. The chapter ends with the sobering assessment that both remaining superpowers are not that different with respect to their attitude towards the international legal order. The author sees a surprising amount of convergence between the two states: Both states would have rejected 'cosmopolitan' European conceptions of law, 'have also not exactly been defenders of sovereigntism in general for other states' and have 'been quite willing to utilize unilateral measures of dubious international legality to coerce other states' (p. 283).

A succinct conclusion with specific policy recommendations sums up the book (pp. 288 et seq.). Among these, three might stand out: first, Ginsburg cautions against interventions for the sake of spreading democracy. Rather, he argues that democracies should shore up support for other democracies and hence help to preserve democracies (pp. 297 et seq.). Second, he sees the fight against corruption as an important terrain for defending the democratic outlook of international law (pp. 300 et seq.). And third, he argues for building linkages between democracy protection and distinct regimes of international law ('collateral areas of international law', as he calls them, p. 302), such as the law of investment protection.

The book offers many insights to all readers with an interest in the big questions of the future development of international law. The author is obviously well-versed in recent debates about the role of the United States and

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-SA

China in the international legal order and the book benefits considerably from the fact that Ginsburg is not 'merely' an international law professor, but equally at ease in the field of comparative constitutional law. This background plays out as a fundamental asset for the consideration of how democracies translate their systemic preferences into action on the international level. In passing, it can be noted that this is also an argument against too much isolation of public international law scholarship from domestic (public and/or constitutional) law. The author's analysis is also usefully complemented by the empirical analysis carried out in chapter 2 even though at times the ultimate benefit of the number-crunching exercises might not be obvious to all readers.

Whereas a strength of the book lies in its meticulous analysis of the role of the United States and China for the future international legal order, not all parts relating to the 'rest of the world' stand up to the same level. Take, for instance, the praise of the Inter-American Court of Human Rights for turning towards a model of supranational jurisprudence, supposedly following along the lines of the European Court of Justice (p. 130). The concept of supranationalism is not very well-defined here. It is doubtful whether the comparison can really tell us that much. The European Court of Justice is not a human rights court and the differences between the San José court's case-law on the effects of the Convention in domestic legal orders on the one hand and direct effect in the Luxembourg variant seem considerable. A couple of pages later, Ginsburg turns to 'the result of the inclusion of countries to the east, like Russia and Turkey, with poor records on human rights' to the European Convention system and approvingly quotes another scholar who has written in this regard of a 'Latin Americanization'[5] of the docket of the Strasbourg Court (p. 151). The combined qualification of Russia and Turkey as 'countries to the east' whose addition leads to this 'Latin Americanization' strikes me as an almost imperial gaze. Ginsburg seems to ignore here that Turkey was an original signatory of the Convention in 1950, a state party since 1954 and hence not a recent addition to the Court alongside the way of 'Eastern expansion' in the 1990 s and 2000 s.[6] Also in other parts of the book, I had the impression that in the author's juxtaposition of democratic and non-democratic states the roles are at times distributed all too neatly. In essence, the world is moving towards the age of systemic competition between the United States and China. Other perspectives get lost in this

5 Quoting Christina Cerna, 'The Inter-American System for the Protection of Human Rights', Fla. J. Int'l L. 16 (2004), 195-212 (202).

6 See also Dilek Kurban, 'Rethinking Effectiveness: Authoritarianism, State Violence and the Limits of the European Court of Human Rights', in: Helmut Philipp Aust/Esra Demir-Gürsel (eds), *The European Court of Human Rights – Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar 2021, 177-199 (179).

 DOI 10.17104/0044-2348-2023-2-349

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

account of a world moving towards a conflict between these two superpowers. For instance, Ginsburg refers to many important works on 'instances of backlash' against international tribunals and notes that many of these instances emanate from authoritarian states (p. 235). Some of the scholarship he cites there, in particular the work of James Thuo Gathii, goes some way to point to the manifold and positive contributions to the development of international law which come from states and international organisations of the 'Global South'.[7] These critical remarks point to a larger epistemic concern: While the book is an excellent and very stimulating discussion of some of the central challenges for the future development of the international legal order, it is also characterised by a specific United States (US) outlook on international law, an outlook which at times does not pay too much attention to the details of the law, falls back onto an imperial perspective and does not always engage seriously enough with knowledge production outside of the US-American (empirical legal scholarship) mainstream, as the following points may illustrate.

This critique might in turn be reproached for undue European formalism, which is certainly tainted by its own colonial and imperial legacies, and too much insistence on doctrinal details that eventually do not matter that much. But also empirical scholarship with a bend for asking the big questions would be well-advised to get these details right, which is not always the case in the book under review. Just a few examples in this regard: The juxtaposition of 'old'/Westphalian and 'new'/cosmopolitan international law (pp. 3-4) is questionable. All too often, these types of arguments help to build up straw persons and overlook how international law has developed over time, much more aptly characterised along the lines of Joseph Weiler's wonderful metaphor of the geology of international law.[8] The section on lawmaking (pp. 82 et seq.) is patchy. The transition from United Nations Commission on International Trade Law (UNCITRAL) to the International Law Commission (ILC) almost reads as if the two bodies have much in common ('Another such lawmaking body […]', p. 84). It is not convincing to speak of representation of countries in the ILC as the author does at pp. 84-85 when analysing the representation of democratic vs. non-democratic states in this body. ILC members are experts which are elected by the United Nations (UN) General Assembly. They serve in their personal capacity and even though its members also comprise government lawyers, their status as ILC members has nothing to do with that, at least *formally* (here we go again). The section on litigation

7 James Thuo Gathii, 'Promise of International Law: A Third World View', Proceedings of the ASIL Annual Meeting 114 (2020), 165-187.

8 Joseph H. H. Weiler, 'The Geology of International Law', HJIL 64 (2004), 547-562.

DOI 10.17104/0044-2348-2023-2-349

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA

starts off with a remarkable comparison between litigation and war (p. 86). Holding that the International Tribunal for the Law of the Sea 'operates roughly the same way as the International Court of Justice' (p. 91) underestimates the complexity of the dispute settlement system under the United Nations Convention on the Law of the Sea (UNCLOS) and also arguably the very different institutional cultures of the 'main judicial organ of the United Nations' and a specialised tribunal in charge with the application and interpretation of a specific treaty regime. And it is not the case that the European Court of Human Rights can '*impose damage awards* on states for misbehavior' (p. 118, emphasis in the original) – it has the power to indicate just satisfaction under Article 41 of the European Convention on Human Rights. The representation of the European system of human rights protection is also quite shallow in places, as the one-sentence description of its original purpose as a 'defense of democracy' indicates (p. 144), a characterisation which is superficial in the light of the much more nuanced literature on the various historical motives for drafting the European Convention on Human Rights in another time of systemic competition.[9]

All this should not deflect from the fact that Ginsburg has written a book which is here to stay. His critical stance towards some aspects of recent US foreign policy and disdain for international law is admirable, for instance with its very clear repudiation of the role that the United States played under President Trump as a 'revisionist hegemon' (pp. 240 et seq.). The book is rich for the sake of its empirical analysis, its perceptive analysis of recent trends in international law and its clear normative ambition. Ginsburg provides us with an important account on how the content and outlook of international law can change. The developments since the beginning of Russia's full-blown invasion of Ukraine in February 2022 confirm Ginsburg's suspicion that the future of international law will in all likelihood be not just democratic. The close alignment between China and Russia instead points to even more systemic competition among the world's superpowers. It remains to be seen how this competition will impact on the structure and content of the international legal order. For the foreseeable future, all those who wonder about these questions will be well-advised to consult Ginsburg's book.

Helmut Philipp Aust, Berlin

9 See further Alfred. W. B. Simpson, *Human Rights and the End of Empire*, Oxford: Oxford University Press 2001; Marco Duranti, *The Conservative Human Rights Revolution – European Identity, Transnational Politics, and the Origins of the European Convention*, Oxford: Oxford University Press 2017; Esra Demir-Gürsel, 'For the Sake of Unity: the Drafting History of the European Convention on Human Rights and Its Current Relevance', in: Helmut Philipp Aust/Esra Demir-Gürsel (eds.), *The European Court of Human Rights – Current Challenges in Historical Perspective*, Cheltenham: Edward Elgar 2021, 109-132.

 DOI 10.17104/0044-2348-2023-2-349

https://doi.org/10.17104/0044-2348-2023-2-349 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY-CA