

Introduction

Democracy and International Law

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

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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>

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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, ICGJ 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).

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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).

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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).

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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).

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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).

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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 Bugarić, "Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism,"

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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.