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AUTHORITARIAN INTERNATIONAL LAW: AN UNFINISHED  
RESEARCH ODYSSEY

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ABSTRACT

*The concept-rich international legal space has expanded in the past few years by incorporating the notion that there is a distinct form of international law possessing authoritarian traits. This notion stands in contrast with the time-honored mainstream variant which is assumed to have liberal-democratic roots and dispositions. A product of the current decade, authoritarian international law has nevertheless left a palpable mark on international legal theory and is believed to have materially reshaped the international legal landscape. The primary aim of this Article is to summarize the achievements made in analyzing the dimensions of this new concept and its considerable practical implications, with a view to suggesting some additional lines of inquiry.*

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## I. INTRODUCTION

International law is not short of skeptics within its own ranks. Notably, many legal scholars who specialize in international law argue that the international legal normative foundation and institutional machinery have little practical relevance from a law-in-action perspective.<sup>1</sup> Such academic researchers, who embrace the ideas articulated by realist students of international relations, assert that the decentralized and fragmented global system lacks coherence and cohesion, is effectively in a state of anarchy, and is predominantly shaped by national power geared toward fulfilling a parochial agenda. They also observe its sometimes-coercive use, including through military means, by which other participants in the system are forced to accept outcomes to which they would otherwise be reluctant to acquiesce.<sup>2</sup>

It is true that States, the principal actors in the global arena, regularly couch their claims in international legal terms and invoke time-honored international legal principles in the process.<sup>3</sup> Russia's invasion of Ukraine is a case-in-point. Russia's invasion clearly constitutes a violation of Article 2(4) of the U.N. Charter, which specifies that States must refrain from the "use of force against the territorial integrity and political independence of any [S]tate."<sup>4</sup> Yet, President Vladimir Putin and his subordinates have wrongly sought to justify Russia's unprovoked onslaught on Ukraine with reference to Article 51 of the U.N. Charter, which stipulates that "nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations."<sup>5</sup> Putin's justifications reinforce rather than undermine realist propositions regarding the functioning of the global system because they demonstrate that, when it serves their interests, States are not guided

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<sup>1</sup> See Stephen D. Krasner, *Realist Views of International Law*, 96 PROC. ANN. MEETING (AM. SOC'Y INT'L L.) 265, 265 (2002).

<sup>2</sup> See *id.* For an elaboration and refinement, see generally Gregory Shaffer, *The New Legal Realist Approach to International Law*, 28 LEIDEN J. INT'L L. 189 (2015).

<sup>3</sup> See Monica Hakimi, *Why Should We Care about International Law?*, 118 MICH. L. REV. 1283, 1283 (2020).

<sup>4</sup> See John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN REL. (Feb. 28, 2022, 2:25 PM), <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law> [http://perma.cc/W4JL-D7EB].

<sup>5</sup> See *id.*; see also Marko Milanovic, *What is Russia's Legal Justification for Using Force Against Ukraine?*, EJIL: TALK! (Feb. 24, 2022), <https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/> [https://perma.cc/BF75-HE9J].

by international legal norms but opportunistically manipulate them in an effort to bolster their national strategies.

This proposition does not imply that States, especially powerful and influential ones, consistently employ international law as an instrument to support their national goals.<sup>6</sup> Realists acknowledge that, when adherence to international legal norms and the pursuit of national interests do not come into conflict, compliance with international law is typically a low-cost proposition and thus a plausible scenario.<sup>7</sup> More often than not, however, such convergence is incomplete or impossible to realize, in which case States commonly deviate from international legal norms.<sup>8</sup> As Russia's account of its invasion of Ukraine illustrates, laws are deprived of their true substance by being tactically turned into tools designed to gain national credibility and avert reputational erosion.<sup>9</sup>

Realism is not a "united front" in the analytical sense but contains a degree of heterogeneity. Traditionally, there has been a divide between socio-legal scholars who emphasize domestic political agendas as the main driving force in international relations and "structural realists," who contend that accounts and predictions of State behavior should be exclusively based on the international distribution of

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<sup>6</sup> See Hakimi, *supra* note 3, at 1283.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See Bellinger, *supra* note 4; see generally George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. 595 (2002); Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (1st ed. 2010); Roda Mushkat, *State Reputation and Compliance with International Law: Looking through a Chinese Lens*, 10 CHINESE J. INT'L L. 703 (2011); Rachel Brewster, *Reputation in International Relations and International Law Theory*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 524 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012); FRANK P. HARVEY & JOHN MITTON, *FIGHTING FOR CREDIBILITY: US REPUTATION AND INTERNATIONAL POLITICS* (2016); Mark J.C. Crescenzi, *How Reputation Matters in International Relations*, in OF FRIENDS AND FOES: REPUTATION AND LEARNING IN INTERNATIONAL POLITICS 58 (2018); Bernardo Teles Fazendeiro, *Keeping a Promise: Roles, Audiences and Credibility in International Relations*, 35 INT'L REL. 299 (2020); Matthew D. Cebul, Allan Dafoe & Nuno P. Monteiro, *Coercion and the Credibility of Assurances*, 83 J. POL. 975 (2021); Robert Jervis, Keren Yarhi-Milo & Don Casler, *Redefining the Debate over Reputation and Credibility in International Security*, 73 WORLD POL. 167 (2021); Anne van Aaken & Betül Simsek, *Rewarding in International Law*, 115 AM. J. INT'L L. 195 (2021); Fangfei Jiang, *Understanding International Credibility and Its Changes: Taking China as an Example*, 2 E. ASIAN AFF. 2250003-1 (2022).

power.<sup>10</sup> The former hold that global system dynamics are best explained by considering power disparities between States and domestic political drivers, and in particular States' contentedness with the status quo or harboring of revolutionary aspirations.<sup>11</sup> The latter have by no means dismissed the relevance of domestic political factors in this context but have argued that they should not dominate theories of international relations, broadly conceived.<sup>12</sup>

Over time, fissures have emerged in the analytical domain of structural realists. Specifically, this previously interconnected group of researchers split into two camps: "offensive realists" and "defensive realists."<sup>13</sup> The former hypothesize that States are heavily engaged in a quest for power and influence, and that they seek to attain domination and hegemony in the global system to achieve their strategic objectives.<sup>14</sup> Defensive realists, on the other hand, have postulated that such tactics would be counterproductive because they could sow instability by upsetting the prevailing balance of power.<sup>15</sup> By extension, inter-State conflict, while a prominent feature of the global political landscape, is not invariably a desirable outcome of cross-border maneuvers, and, where "structural modifiers" are present, there is some room for inter-State collaboration.<sup>16</sup> In other words, international relations may have some "positive-sum game" attributes to compete with or complement those of a "zero-sum" variety.<sup>17</sup>

The "positive-sum" element has been accorded much greater weight in international law and international relations theories that highlight the forces propelling States toward mutually beneficial cooperation. Liberally inclined socio-legal scholars, for instance, place a strong emphasis on States' manifold forms of interdependence in the era of globalization.<sup>18</sup> This condition creates incentives for cross-

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<sup>10</sup> See Krasner, *supra* note 1, at 265.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> See Steven E. Lobell, *Structural Realism/Offensive and Defensive Realism*, in OXFORD RSCH. ENCYCLOPEDIAS: INT'L STUD. 6651 (Robert A. Denemark & Renée Marlin-Bennett eds., 2010), <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-304> [<https://perma.cc/9RCV-Y4WD>].

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See Krasner, *supra* note 1, at 266.

<sup>18</sup> See Andrew Moravcsik, *Liberal Theories of International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 83, *supra* note 9, at 84.

border collaboration, which are amplified by impulses originating from transnational and subnational sources.<sup>19</sup> Due to a convergence of purposes, pivotal actors thus embark on initiatives conducive to inter-State collaboration.<sup>20</sup> Compatibility of goals exhibited by such actors is assumed to contribute to the development of international law and international legal compliance.<sup>21</sup>

International institutionalism is perhaps even more inclined to gravitate toward the positive end of the perceptual spectrum than its liberal counterpart in its various ideational, commercial, and republican<sup>22</sup> incarnations.<sup>23</sup> This was certainly true of the “old institutionalism” which mirrored the misplaced and short-lived interwar idealism and the postwar optimism, which was fueled by the rise of transnational organizations in the mid-twentieth century.<sup>24</sup> The “new institutionalism,” which is broader in scope because it encompasses both formal and informal organizational entities,<sup>25</sup> may be less sentiment-driven but is essentially positive in its depiction of global economic, legal, political, and social patterns.<sup>26</sup>

The rational-choice variant of international institutionalism largely revolves around the concepts of transaction costs and agency.<sup>27</sup> The former notion is predicated on the idea that economic transactions entail not merely production costs but also contract management and enforcement oversight.<sup>28</sup> The appeal of institutions stems from the institutions’ ability to reduce transaction costs incurred in both

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<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See generally id.* at 87-109.

<sup>22</sup> *See id.* at 84-85.

<sup>23</sup> *See generally* William J. Aceves, *Institutional Theory and International Legal Scholarship*, 12 AM. U. INT’L L. REV. 227, 235-60 (1997); Barbara Koremenos, *Institutionalism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 59, *supra* note 9.

<sup>24</sup> *See* CHRISTER JÖNSSON & JONAS TALLBERG, *Institutional Theory in International Relations*, in DEBATING INSTITUTIONALISM 3 (Jon Pierre, B. Guy Peters & Gerry Stoker eds., 2008).

<sup>25</sup> Oran Young thus equates institutions with “social practices consisting of easily recognized roles coupled with clusters of rules or conventions governing relations among the occupants of these roles.” ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT 32 (1989). Such entities are not confined to formal organizations which Young portrays as “material entities possessing physical locations (or seats), offices, personnel, equipment, and budgets.” *Id.*

<sup>26</sup> *See* Aceves, *supra* note 23.

<sup>27</sup> *See* JÖNSSON & TALLBERG, *supra* note 24, at 5.

<sup>28</sup> *See id.*

economic and non-economic inter-actor exchanges.<sup>29</sup> This, in turn, explains their growth and endurance.<sup>30</sup> The latter notion—the concept of agency—also has positive connotations.<sup>31</sup> The agency concept posits that States or principals delegate functions to international organizations or agents in order to realize efficiency gains and that, while this may lead to conflicts of interest and information asymmetries, there are partial remedies to the problems faced in this context.<sup>32</sup>

Historical and normative expressions of international institutionalism abandon economic rationale in favor of a cultural perspective, where actors are not motivated by self-centered cost-benefit analysis but are propelled by deep historical forces and binding norms and values.<sup>33</sup> The historical approach stresses the historical roots and steadfastness of international institutions, sustained during extended periods of stasis and rarely disrupted by “punctuated equilibrium.”<sup>34</sup> The normative paradigm jettisons the economically inspired “logic of instrumentality” or “logic of consequences” and embraces the ethically underpinned “logic of appropriateness,” according to which established international institutions constitute a reservoir of norms and values constraining antagonistic actors and promoting international cooperation.<sup>35</sup>

Harold Hongju Koh’s transnational legal process (“TLP”) theory unreservedly echoes this positive outlook.<sup>36</sup> TLP theory posits that ongoing involvement of States in the transnational legal process results in internalization of international norms or, in a constructivist fashion, a reconstruction of the “national interests of the participating nations.”<sup>37</sup> This is a multifaceted learning experience consisting of legal, political, and social internalization and enhanced by agents and mechanisms such as transnational norm entrepreneurs, government norm sponsors, transnational issue networks, interpretive communities and

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See id.*

<sup>33</sup> *See* JÖNSSON & TALLBERG, *supra* note 24, at 5-6.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.* at 6.

<sup>36</sup> *See generally* Regina Jefferies, *Transnational Legal Process: An Evolving Theory and Methodology*, 46 *BROOK. J. INT'L L.* 311 (2021); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (1998) [hereinafter Koh, *Bringing International Law Home*]; Harold Hongju Koh, *Why Transnational Law Matters*, 24 *PENN ST. INT'L L. REV.* 745 (2006) [hereinafter Koh, *Why Transnational Law Matters*].

<sup>37</sup> Koh, *Bringing International Law Home*, *supra* note 36, at 642.

law-declaring fora, bureaucratic compliance procedures, and issue linkages.<sup>38</sup> The upshot is closer adherence to international law and, by implication, greater international harmony.<sup>39</sup>

Quantitatively, and perhaps qualitatively, realism and its offshoots have been overshadowed by analytical schemes affirming the centrality of collaborative architecture and exchanges in the global system, as well as the propensity to comply with the global systems underlying principles and expectations. Recent years, however, have not been kind to proponents of “positive-sum”-style theory building. Globalization has apparently structurally “peaked” and States have consequently become less interdependent.<sup>40</sup> “Rogue regimes” have remained entrenched and have continued to pose a growing threat to “core countries.”<sup>41</sup> More importantly, relations between the “major powers” have significantly worsened.<sup>42</sup>

These worrisome trends have prompted a group of forward-looking researchers to systematically address whether the international legal order is unraveling.<sup>43</sup> These researchers have stopped short of

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<sup>38</sup> See *id.* at 642-55.

<sup>39</sup> See generally *id.*; Koh, *Why Transnational Law Matters*, *supra* note 36.

<sup>40</sup> See Carlo Altomonte, Elena Zaurino & Italo Colantone, *Has Globalisation ‘Peaked’? Trade and GDP Growth in the Post-Crisis Context*, BRUEGEL (Sept. 7, 2015), <https://www.bruegel.org/blog-post/has-globalisation-peaked-trade-and-gdp-growth-post-crisis-context> [<https://perma.cc/EP8D-ZYUC>]; Lex Rieffel & Stephan Richter, *Downhill from Peak Globalization: When Will It End?*, GLOBALIST (May 17, 2020), <https://www.theglobalist.com/future-of-globalization-deglobalization-9-11-global-financial-crisis-refugee-crisis-trade-isolationism/> [<https://perma.cc/4Z8C-SJ9T>]; Jonathan Watson, *Have We Reached Peak Globalisation?*, INT’L BAR ASS’N, <https://www.ibanet.org/article/0F4871BE-2D03-4F86-84EB-D9A995FA8096> [<https://perma.cc/88JF-XS9D>] (last visited Apr. 15, 2023).

<sup>41</sup> See OFF. OF THE SEC’Y OF DEF., 2019 MISSILE DEFENSE REVIEW, <https://media.defense.gov/2019/Jan/17/2002080666/-1/-1/2019-MISSILE-DEFENSE-REVIEW.PDF> [<https://perma.cc/AG2S-YVGN>] (last visited Oct. 15, 2023).

<sup>42</sup> See Céline Belin, James Goldgeier, Tanvi Madan & Angela Stent, *China’s Relations with Russia, India, and Europe*, BROOKINGS (Dec. 2022), <https://www.brookings.edu/research/chinas-relations-with-russia-india-and-europe/> [<https://perma.cc/JZL8-28CS>]; Stephen Fidler & Michael R. Gordon, *Russia, China Challenge U.S.-Led World Order*, WALL ST. J., <https://www.wsj.com/articles/russia-china-challenge-u-s-led-world-order-3563f41d> [<https://perma.cc/Q6WW-E6AH>] (Feb. 21, 2023, 4:06 PM); David M. Lampton, *Reconsidering U.S.-China Relations: From Improbable Normalization to Precipitous Deterioration*, 14 ASIA POL’Y 43 (2019); Andrea Rizzi, *A New Cold War Between the US and China Is Spreading Around the World*, EL PAÍS (Feb. 19, 2023), <https://english.elpais.com/international/2023-02-19/a-new-cold-war-between-the-us-and-china-is-spreading-around-the-world.html> [<https://perma.cc/55NR-AGDH>].

<sup>43</sup> See generally IS THE INTERNATIONAL LEGAL ORDER UNRAVELING? (David L. Sloss ed., 2022).

delivering this verdict but have noted that the global community faces a host of formidable challenges, such as climate change, and that mishandling of these risks could culminate in an unpalatable scenario.<sup>44</sup> The unfolding of the Ukraine crisis, which has serious worldwide ramifications, might have shifted these researchers closer to the negative end of the range of future possible outcomes and emphasized that the prospect of a deeply fractured international governance regime should be placed firmly on the policy agenda.<sup>45</sup>

This has analytical and practical implications. First, it is apparent that the quest for a universal theory of international law and international relations is not a realistic endeavor. The scale of the variations observed across space and time renders this an infeasible undertaking. That impossibility is reflected in the academic literature where scholars treat the various competing elements as separate constructs without seriously attempting to arrive at an effective and long-lasting synthesis.<sup>46</sup> Adopting a positive stance is not necessarily a greater virtue than maintaining a negative one, however. Indeed, given the complexity and fluidity of the global system, combining different theories eclectically, and including theories imbued with a sense of negativity and skepticism, may in different circumstances and periods be a superior strategy to rigidly clinging to a single analytical scheme.<sup>47</sup>

Second, from a practical perspective, even if this means that a degree of idealization and value judgment is lost in the process, it is beneficial to identify the factors that undermine the current international legal order. The “positive-sum” theories outlined above may

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<sup>44</sup> See generally *id.*

<sup>45</sup> See generally *The Ukraine War: A Global Crisis?*, INT'L CRISIS GRP. (Mar. 4, 2022), <https://www.crisisgroup.org/europe-central-asia/eastern-europe/ukraine/ukraine-war-global-crisis> [<https://perma.cc/2V7K-5UE9>]; Eugene Rumer, Andrew S. Weiss, Ulrich Speck, Lina Khatib, George Perkovich & Douglas H. Paal, *What Are the Global Implications of the Ukraine Crisis?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 27, 2014), <https://carnegieendowment.org/2014/03/27/what-are-global-implications-of-ukraine-crisis-pub-55112> [<https://perma.cc/U9AN-LZXS>]; Ari Shapiro, Mia Venkat & Christopher Intagliata, *How the Ukraine Crisis Could Reset the Global Balance of Power*, NPR (Jan. 25, 2022, 4:47 PM), <https://www.npr.org/2022/01/25/1075624785/how-the-ukraine-crisis-could-reset-the-global-balance-of-power> [<https://perma.cc/7RS3-SDM8>].

<sup>46</sup> See generally Brewster, *supra* note 9; DAVID ARMSTRONG, THEO FARRELL & HÉLÈNE LAMBERT, INTERNATIONAL LAW AND INTERNATIONAL RELATIONS (2d ed. 2012); ALEXANDER ORAKHELASHVILI, INTERNATIONAL LAW AND INTERNATIONAL POLITICS: FOUNDATIONS OF INTERDISCIPLINARY ANALYSIS (2020).

<sup>47</sup> See generally Paul Cairney, *Standing on the Shoulders of Giants: How Do We Combine the Insights of Multiple Theories in Public Policy Studies?*, 41 POL'Y STUD. J. 1 (2013).

have limited explanatory power but they do not lack explanatory power altogether. Their proponents compellingly emphasize the manifold benefits derived from a global regime underpinned by the spirit embodied in mainstream international law and harmonious functioning. While taking a less sanguine view of the motives of the principal actors in the global arena and the scope for inter-State collaboration, even the scholars advancing the “zero-sum” vision of a world consisting of self-seeking players are not casting doubt on the fundamental merits of the prevailing international legal order’s core.

As indicated, that core faces a host of substantial challenges. One of them, increasingly seen at the apex of the global power structure, is the emergence, persistence, and spread of international authoritarian law.<sup>48</sup> This is an essentially amorphous and often situation-specific—yet consistent and continuous—body of principles and claims that is reinforced by concrete action and desire to implement suitable measures, that is basically at variance with mainstream international law.<sup>49</sup> Moreover, it forcefully calls into question both the normative framework within which democratic regimes operate and its structural

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<sup>48</sup> See generally Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221 (2020) [hereinafter Ginsburg, *Authoritarian International Law?*]; Tom Ginsburg, *How Authoritarians Use International Law*, 31 J. DEMOCRACY 44 (2020) [hereinafter Ginsburg, *How Authoritarians Use International Law*]; Allen S. Weiner, *Authoritarian International Law, the Use of Force, and Intervention*, 114 AM. J. INT’L L. UNBOUND 220 (2020); Cassandra V. Emmons, *International Organizations: Enablers or Impediments for Authoritarian Law?*, 114 AM. J. INT’L L. UNBOUND 226 (2020); Ian Hurd, *Legal Games—Political Goals*, 114 AM. J. INT’L L. UNBOUND 232 (2020); Trang (Mae) Nguyen, *International Law as Hedging: Perspectives from Secondary Authoritarian States*, 114 AM. J. INT’L L. UNBOUND 237 (2020); Shirley V. Scott, *The Imperial Over-Stretch of International Law*, 114 AM. J. INT’L L. UNBOUND 242 (2020); Chibli Mallat, *The Limits of Authoritarian International Law*, 114 AM. J. INT’L L. UNBOUND 247 (2020); TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW (2021) [hereinafter GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW]; Karen J. Alter, *The Future of Embedded International Law: Democratic and Authoritarian Trajectories*, 23 CHI. J. INT’L L. 27 (2022); Tom Ginsburg, *Article 2(4) and Authoritarian International Law*, 116 AM. J. INT’L L. UNBOUND 130 (2022) [hereinafter Ginsburg, *Article 2(4) and Authoritarian International Law*]; Wayne Sandholtz, *Resurgent Authoritarianism and the International Rule of Law* (Berlin Potsdam Rsch. Grp., KFG Working Paper No. 38, 2019), [https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/43589/file/kfg\\_wp38.pdf](https://publishup.uni-potsdam.de/opus4-ubp/frontdoor/deliver/index/docId/43589/file/kfg_wp38.pdf) [<https://perma.cc/D7ZS-VFVG>]; *Russia, Ukraine and the Dangers of Authoritarian International Law*, WORLD JUSTICE PROJECT (Mar. 7, 2022) <https://worldjusticeproject.org/news/russia-ukraine-and-dangers-authoritarian-international-law> [<https://perma.cc/J45A-XVGP>].

<sup>49</sup> See generally Ginsburg, *Authoritarian International Law?*, *supra* note 48; Ginsburg, *How Authoritarians Use International Law*, *supra* note 48; GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48.

attributes.<sup>50</sup> The corollary is that, if unchecked, authoritarian international law poses a potential threat to such regimes.<sup>51</sup>

This diagnosis and prognosis are widely shared in liberal-democratic academic circles. Yet, comprehensively exploring the subject has virtually been one person's crusade. Tom Ginsburg alone<sup>52</sup> (and a small number of international legal scholars who have provided valuable extensions and support<sup>53</sup>) has made it his mission to come to grips with the premises, manifestations, and consequences of authoritarian international law. His work has been thorough and illuminating,<sup>54</sup> but some gaps remain in the research. The aim of this Article is to pinpoint those gaps. It begins by examining the conceptual foundations of the notion of authoritarian international law and then proceeds to review what has been accomplished in this sphere thus far and what may merit further attention.

## II. CONCEPTUAL UNDERPINNINGS

The proposition that there is a distinct legal regime possessing the characteristics of authoritarian international law is of a surprisingly recent vintage. After all, globalization's peak appears to have coincided with the severe 2008-2009 financial crisis, and since then, the

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<sup>50</sup> See, e.g., Weiner, *supra* note 48; Emmons, *supra* note 48; Hurd, *supra* note 48; Nguyen, *supra* note 48; Scott, *supra* note 48; Mallat, *supra* note 48; Sandholtz, *supra* note 48; WORLD JUSTICE PROJECT, *supra* note 48.

<sup>51</sup> See generally Ginsburg, *Authoritarian International Law?*, *supra* note 48; Ginsburg, *How Authoritarians Use International Law*, *supra* note 48; Weiner, *supra* note 48; Emmons, *supra* note 48; Hurd, *supra* note 48; Nguyen, *supra* note 48; Scott, *supra* note 48; GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; Alter, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48; Sandholtz, *supra* note 48; WORLD JUSTICE PROJECT, *supra* note 48.

<sup>52</sup> See generally Ginsburg, *Authoritarian International Law?*, *supra* note 48; Ginsburg, *How Authoritarians Use International Law*, *supra* note 48; Weiner, *supra* note 48; Emmons, *supra* note 48; Hurd, *supra* note 48; Nguyen, *supra* note 48; Scott, *supra* note 48; Mallat, *supra* note 48; GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; Alter, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48; Sandholtz, *supra* note 48; WORLD JUSTICE PROJECT, *supra* note 48.

<sup>53</sup> See generally Weiner, *supra* note 48; Emmons, *supra* note 48; Hurd, *supra* note 48; Nguyen, *supra* note 48; Scott, *supra* note 48; Mallat, *supra* note 48; Alter, *supra* note 48; Sandholtz, *supra* note 48; WORLD JUSTICE PROJECT, *supra* note 48.

<sup>54</sup> See generally Ginsburg, *Authoritarian International Law?*, *supra* note 48; Ginsburg, *How Authoritarians Use International Law*, *supra* note 48; GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; Alter, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48.

world experienced “slowbalization” or even deglobalization,<sup>55</sup> a reversal exacerbated by the Covid-19-induced “Great Lockdown.”<sup>56</sup> By the same token, rogue States positioned on the global periphery, notably Iran and North Korea, have been defiantly posturing for a considerable time.<sup>57</sup> Moreover, the chasm between the United States and its allies and Vladimir Putin’s Russia and Xi Jinping’s China has deep roots which have hardened over the course of the twenty-first century, increasingly polarizing the policy spectrum.<sup>58</sup>

Authoritarian international law stands in sharp contrast to the time-honored practice of exploring the domestic manifestations of

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<sup>55</sup> See generally Douglas A. Irwin, *Globalization Is in Retreat for the First Time Since the Second World War*, PETERSON INST. FOR INT’L ECON. (Oct. 28, 2022), <https://www.piie.com/research/piie-charts/globalization-retreat-first-time-second-world-war> [https://perma.cc/4QE3-NBS7]; ALICIA GARCÍA HERRERO, FROM GLOBALIZATION TO DEGLOBALIZATION: ZOOMING INTO TRADE (2020), <https://www.bruegel.org/sites/default/files/wp-content/uploads/2020/02/Globalization-desglobalization.pdf> [https://perma.cc/W8U8-JVXY]; Hag-Min Kim, Ping Li & Yea Rim Lee, *Observations of Deglobalization Against Globalization and Impacts on Global Business*, 4 INT’L TRADE, POLICIES & DEV. 83 (2020), <https://www.emerald.com/insight/content/doi/10.1108/ITPD-05-2020-0067/full/pdf?title=observations-of-deglobalization-against-globalization-and-impacts-on-global-business> [https://perma.cc/7WUX-FH3V].

<sup>56</sup> See generally Philip Dandolov, *Covid-19: The Deglobalization Amplifier*, GEOPOLITICAL MONITOR (May 28, 2021), <https://www.geopoliticalmonitor.com/covid-19-the-deglobalization-amplifier/> [https://perma.cc/6GT6-94QL]; Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, IMF BLOG (Apr. 14, 2020), <https://www.imf.org/en/Blogs/Articles/2020/04/14/blog-weo-the-great-lockdown-worst-economic-downturn-since-the-great-depression>; Douglas Irwin, *The Pandemic Adds Momentum to the Deglobalisation Trend*, VOXEU CEPR (May 5, 2020), <https://cepr.org/voxeu/columns/pandemic-adds-momentum-deglobalisation-trend> [https://perma.cc/5TXD-T4QV].

<sup>57</sup> See generally *Iran Threat Assessment: Introducing the Iran Threat Geiger Counter*, INST. FOR SCI. & INT’L SEC. (Oct. 20, 2022), <https://isis-online.org/isis-reports/detail/iran-threat-assessment-introducing-the-iran-threat-geiger-counter/> [https://perma.cc/CKQ2-T979]; Ctr. for Preventive Action, *North Korea Crisis*, COUNCIL ON FOREIGN REL.: GLOBAL CONFLICT TRACKER, <https://www.cfr.org/global-conflict-tracker/conflict/north-korea-crisis> [https://perma.cc/SCG3-ESAR] (Aug. 7, 2023).

<sup>58</sup> See generally Stephen Collison, *The US Now Faces Simultaneous Showdowns with China and Russia*, CNN (Feb. 14, 2023, 12:04 AM), <https://edition.cnn.com/2023/02/14/politics/us-china-russia-showdown/index.html> [https://perma.cc/C8L8-Y9PB]; Lindsay Maizland, *China and Russia: Exploring Ties Between Two Authoritarian Powers*, COUNCIL ON FOREIGN REL., <https://www.cfr.org/background/china-russia-relationship-xi-putin-taiwan-ukraine> [https://perma.cc/39J3-TGDB] (June 14, 2022, 2:30 PM); Robin Wright, *Russia and China Unveil a Pact Against America and the West*, THE NEW YORKER (Feb. 7, 2022), <https://www.newyorker.com/news/daily-comment/russia-and-china-unveil-a-pact-against-america-and-the-west> [https://perma.cc/6D24-7BM9].

authoritarianism<sup>59</sup> and the recurring concern with its foreign policy reflections.<sup>60</sup> Students of domestic politics have been particularly committed to the essence and origins of authoritarian rule, the empirical and theoretical reasons for persistently examining this phenomenon, the structural-functional variations across the authoritarian domestic political space, the socio-economic dimensions of authoritarian polities, and the overall and issue-area-specific performance of authoritarian regimes.<sup>61</sup>

The motives observed on the foreign policy side have also been mostly empirical and theoretical, drawing inspiration from the enduring nature of authoritarian-style strategies in the global arena and the need to gain a thorough understanding of their dynamics.<sup>62</sup> The underlying factor driving scholarly endeavors in both the empirical and theoretical domains has been the apparently relentless cross-border expansion and entrenchment of the authoritarian foreign policy machine and its problematic and wide-ranging economic and socio-political ramifications, as seen from a liberal-democratic perspective.<sup>63</sup> The broad lines of foreign policy inquiry have run parallel to those pursued on the domestic front.<sup>64</sup>

Despite its intellectual and research intensity, the authoritarian international law enterprise cannot claim longevity or sturdiness. The academic literature does not identify or treat authoritarian international law as a central legal concept.<sup>65</sup> It does not feature in discussions

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<sup>59</sup> See generally Oliver Schlumberger, *Authoritarian Regimes*, in OXFORD HANDBOOK TOPICS IN POLITICS (2015).

<sup>60</sup> See generally OISIN TANSEY, *THE INTERNATIONAL POLITICS OF AUTHORITARIAN RULE* (2016).

<sup>61</sup> See generally Schlumberger, *supra* note 59.

<sup>62</sup> See generally TANSEY, *supra* note 60.

<sup>63</sup> See generally Sarah Repucci & Amy Slipowitz, *The Global Expansion of Authoritarian Rule*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule> [<https://perma.cc/QVK3-WL6K>] (last visited Apr. 15, 2023); Ralf Fücks, *Dealing with Authoritarian Regimes: Challenges for a Value-Based Policy*, HEINRICH BÖLL STIFTUNG (Nov. 16, 2015), <https://us.boell.org/en/2015/11/16/dealing-authoritarian-regimes-challenges-value-based-foreign-policy> [<https://perma.cc/3WFM-BHNT>]; James Rogers, *Countering Authoritarianism*, THE FOREIGN POL'Y CTR. (Oct. 19, 2021), <https://fpc.org.uk/countering-authoritarianism/> [<https://perma.cc/W5YG-L4M4>]; Maya Wang, *China's Techno-Authoritarianism Has Gone Global*, HUM. RTS. WATCH (Apr. 8, 2021, 1:43 PM), <https://www.hrw.org/news/2021/04/08/chinas-techno-authoritarianism-has-gone-global> [<https://perma.cc/M4MY-2UHZ>].

<sup>64</sup> See generally TANSEY, *supra* note 60.

<sup>65</sup> See generally CONCEPTS IN LAW (Jaap C. Hage & Dietmar von der Pfordten eds., 2009).

and surveys of key ideas in international law,<sup>66</sup> or in less prominent ones (e.g., interdisciplinarity).<sup>67</sup> A review of the quantitatively modest but qualitatively vital output in this new investigative realm, coupled with a search for possible gaps in the international legal research agenda, needs to begin with a process akin to conceptual base-building<sup>68</sup> and mapping.<sup>69</sup>

Notably, concepts play a crucial role in all branches of the law because “all forms of law are formulated with the help of terms that express—in the eyes of many at least—concepts.”<sup>70</sup> These semantic devices also serve an important analytical purpose in legal philosophy and legal theory,<sup>71</sup> where they are differentiated from conditions and variables.<sup>72</sup> Conditions are a descriptive analytical tool that indicate the presence or absence of specific elements<sup>73</sup> (e.g., the U.S.-China “cold war”). Variables, even qualitative ones, are more precise analytical vehicles capturing “dimensionalized information about particular social phenomena”<sup>74</sup> (e.g., the level of the West’s assistance to Ukraine in its confrontation with Russia).

Concepts, on the other hand, are “somewhat more abstract . . . than either condition[s] or variables[s]”<sup>75</sup> and they imply “a richness, depth, and complexity that undermines any sense of oversimplification.”<sup>76</sup> They may possess both qualitative and quantitative characteristics.<sup>77</sup> When loosely articulated, and even where quantification is

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<sup>66</sup> See generally Myres S. McDougal, *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337 (1960); CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT (Jean D’Aspremont & Sahib Singh eds., 2019); Rabeea Alqamoudi, *The Concept of International Law*, 11 INT’L J. SCI. & RES. PUBL’NS 520 (2021).

<sup>67</sup> See generally Nikolas M. Rajkovic, *Interdisciplinarity*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT, *supra* note 65, at 490-504.

<sup>68</sup> See DAVID W. BRITT, A CONCEPTUAL INTRODUCTION TO MODELING: QUALITATIVE AND QUANTITATIVE PERSPECTIVES 19-49 (1997).

<sup>69</sup> See generally Joseph D. Novak & Alberto J. Cañas, *The Theory Underlying Concept Maps and How to Construct and Use Them*, INST. FOR HUM. & MACH. COGNITION (Jan. 2006), <https://cmap.ihmc.us/docs/theory-of-concept-maps> [<https://perma.cc/9PUL-TFQS>].

<sup>70</sup> See CONCEPTS IN LAW, *supra* note 65, at xi.

<sup>71</sup> See *id.*

<sup>72</sup> See BRITT, *supra* note 68, at 20-21.

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 20.

<sup>75</sup> *Id.* at 21.

<sup>76</sup> *Id.*

<sup>77</sup> See *id.*

feasible, concepts often exhibit a degree of vagueness which should not necessarily be viewed as a limitation because it reflects their openness to new inputs and the possibility of evolution.<sup>78</sup> Authoritarian international law is a very broad concept, encompassing a host of conditions and qualitative variables in an inherently elastic manner.

At the most fundamental level, legal concepts are assumed to perform either a law-stating function (L-concepts) or a juridical-operative one (J-concepts).<sup>79</sup> The aim of L-concepts is to state "the material legal content."<sup>80</sup> The aim of J-concepts is to facilitate the "juridical handling of the legal content."<sup>81</sup> This is a formalistic dichotomy that may not readily accommodate concepts used in the fast-growing field of interdisciplinary legal research. It may thus not be all-inclusive. Still, while incorporating insights from different analytical sources in a somewhat eclectic fashion, authoritarian international law seems to display a sufficient degree of L-type orientation to be tentatively placed in this category.

L-concepts are further divided in the theoretically leaning academic literature into four categories consisting of two distinct notional constructs each: (1) "genuine and non-genuine L-concepts"<sup>82</sup>; (2) "official and dogmatic L-concepts"<sup>83</sup>; (3) "L-concepts forming parts of rules (rule constituents) and those that systematize rules (systematizing rule concepts)"<sup>84</sup>; and (4) "L-concepts that are dependent on one particular system (system-dependent L-concepts) and those that are not (system-independent L-concepts)."<sup>85</sup>

Again, this classification is rather restrictive and not ideally suited for exploring issues at the interface between law and other academic disciplines such as international relations. That said, this classification is relevant in this context because the presence of non-genuine,<sup>86</sup> dogmatic,<sup>87</sup> systematizing,<sup>88</sup> and system-independent<sup>89</sup> L-

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<sup>78</sup> See BRITT, *supra* note 68, at 20-21.

<sup>79</sup> See Ake Frandberg, *An Essay on Legal Concept Formation*, in CONCEPTS IN LAW 1, *supra* note 65, at 2.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Frandberg, *supra* note 79.

<sup>86</sup> *See id.* at 3-4.

<sup>87</sup> *See id.* at 4-5.

<sup>88</sup> *See id.* at 5.

<sup>89</sup> *See id.* at 5-7.

concepts may be discerned in the authoritarian international law domain. Notably, this conceptual device appears to primarily fulfill a normative or policy-inspired (and consequently systematizing) function, as distinct from a predominantly intellectual one (in the sense of being marked by comprehensibility and hence qualifying as rule constituent). This conceptual device also ventures dogmatically beyond legal boundaries and lacks a normative framework underpinned by any well-delineated individual legal system (thus exhibiting system-independence).

Given the formalism and narrow ambit of this analytical scheme and its components, it may be useful to borrow the concept of “regime” from the writings of neoliberal institutionalists<sup>90</sup> and posit that authoritarian international law significantly possesses attributes that, at least partially, match those of this notional construct. An international regime was initially defined as a “set of mutual expectations, rules, regulations, plans, organizational energies and financial commitments, which have been accepted by a group of [S]tates.”<sup>91</sup> Despite attracting some criticism,<sup>92</sup> this portrayal was quickly embraced as a generally appropriate and convenient depiction of an institutional configuration whose purpose is to consistently affect State behavior in the global arena.<sup>93</sup>

This initial conceptualization was subsequently met with a degree of discomfort about its excessive vagueness.<sup>94</sup> Scholars continued to subject regimes to theoretical and empirical scrutiny, allowing socio-legal scholars to gain a better understanding of the reach and structural-functional characteristics of regimes.<sup>95</sup> As scholars began accumulating pertinent knowledge and producing relevant findings, researchers engaged in projects in this scientific sphere and forged a consensus centered on the notion that an international regime consists of:

Implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given . . . [political realm]. Principles are beliefs

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<sup>90</sup> See generally Nik Hynek, *Regime Theory as IR Theory: Reflection on Three Waves of ‘Isms’*, 11 CENT. EUR. J. INT’L SEC. STUD. 11 (2017).

<sup>91</sup> John Gerard Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT’L ORG. 557, 570 (1975).

<sup>92</sup> See generally Susan Strange, *Cave! Hic Dragones: A Critique of Regime Analysis*, 36 INT’L ORG. 479 (1982).

<sup>93</sup> See generally Hynek, *supra* note 90.

<sup>94</sup> See generally Strange, *supra* note 92.

<sup>95</sup> See generally Hynek, *supra* note 90.

of fact, causation and rectitude. Norms are standards of behavior. Rules are specific prescriptions or prescriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.<sup>96</sup>

Whether authoritarian international law satisfies these demanding standards is a moot point. Authoritarian international law lacks the compactness, coherence, stability, and substance to qualify as a full-fledged regime. This lacuna may be highlighted by contrasting authoritarian international law with, for example, the 1994 Trade-Related Aspects of Intellectual Property Rights Agreement (“TRIPs”), which was absorbed into the World Trade Organization (“WTO”).<sup>97</sup> The latter has inevitably developed fundamental resilience, sense of direction, and solidity over time but without experiencing a significant erosion of its regime-like focus.<sup>98</sup> Authoritarian international law may fall short of operating at such a level but it may harbor similar aspirations as an overarching system of regimes, and may be progressing toward this end (which may, of course, prove to be an elusive target). Furthermore, treating the parallels between the two concepts as merely partial may still be of considerable heuristic value.

Whether as an L-concept or a regime, dissecting authoritarian international law entails a degree of idealization and the exercise of individual judgment about the facts observed. Broad idealization may manifest when liberal-democracy and mainstream international law, which are challenged by authoritarian designs and maneuvers, are defensively and favorably juxtaposed with their ideological nemesis. Individual judgment, on the other hand, may be involved where the patterns unearthed in exploring authoritarian international law are observed from a predetermined and often unfavorable angle.

This dichotomy raises questions that are the focus of discourse on constructivism, interpretivism, normativity, and objectivity. Constructivism is based on the premise that reality is “in the eye of the beholder,” or that actors’ perceptions of reality are socially

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<sup>96</sup> Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 186 (1982).

<sup>97</sup> See generally Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT’L L. 1 (2004).

<sup>98</sup> See generally Suma Athreye, Lucia Piscitello & Kenneth C. Shadlen, *Twenty-Five Years Since TRIPs: Patent Policy and International Business*, 3 J. INT’L BUS. POL’Y 315 (2020).

constructed.<sup>99</sup> An illuminating example of social construction of reality is the difference in how the United States perceives the threat posed by the British (non-existent) and North Korean (significant) arsenals of nuclear weapons.<sup>100</sup> This difference stems not from the physical dimensions of that military hardware but the meaning attached to it.<sup>101</sup> The United Kingdom and North Korea perceive their social relationship with the United States similarly, leading to a shared understanding (intersubjectivity) that governs their interactions.<sup>102</sup> This example illustrates that the perceived threat of the possession of nuclear weapons has no meaning unless the social context is properly understood.

Interpretivism is a distinct methodological approach, but it partly overlaps with constructivism in its emphasis on the need for a reconstruction of socio-legal institutions, albeit from a rational-prescriptive rather than a cognitive-descriptive angle.<sup>103</sup> Actors, such as judges, when interpreting relevant materials, “should not simply do what is just (as would the realist).”<sup>104</sup> They should also not be guided “by sifting *impartially* or *objectively* what has been decided in the past by legislators and their predecessor judges (as would the formalist).”<sup>105</sup> Rather, “a judge should take account of the way in which justice has been expressed through the past practices of the institution in which [they] play[] a role *qua* judge.”<sup>106</sup>

Normativity is a cornerstone of mainstream international law which functions as a roadmap and a justificatory framework for the decision-making of members of the global community.<sup>107</sup> Normativity is commonly associated in this context with the “binding force or source-based validity of legal rules.”<sup>108</sup> More broadly speaking, normativity is equated with the “legitimacy composite that accounts for

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<sup>99</sup> See ARMSTRONG, FARRELL & LAMBERT, *supra* note 46, at 100-10; see also Phillip A. Karber, “Constructivism” as a Method in International Law, 94 PROC. ANN. MEETING (AM. SOC’Y INT’L L.) 189 (2000).

<sup>100</sup> See Alexander Wendt, *Constructing International Politics*, 20 INT’L SEC. 71 (1995).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>103</sup> See generally Patrick Capps, *Interpretivism*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT, *supra* note 66, at 566-76.

<sup>104</sup> *Id.* at 567.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See generally Anne van Mulligen, *Normativity*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT, *supra* note 66, at 662-77.

<sup>108</sup> *Id.* at 662.

the strong compliance pull of the rules of international law, which is on its own account composed of the elements of 'determinacy,' 'symbolic validation,' 'coherent application' and adherence [to] rules."<sup>109</sup> Normativity in international legal milieus is also identified with moral reason and universalist values that transcend actual practice.<sup>110</sup>

Objectivity is deemed to be a desirable goal of socio-legal inquiry.<sup>111</sup> As P. Ishwara Bhat has noted, "[c]ommitment to the pursuit of truth is central to research and its quality [and] [t]he attitude of objectivity reflects such a commitment."<sup>112</sup> And, as he has clarified, "[o]bjectivity is an approach of proceeding on any matter by relying on reality, and not by acting on imaginary views or on personal likes and dislikes."<sup>113</sup> Put another way, by objectivity "we mean that we describe the object as it is and *not* what we think it is."<sup>114</sup> The corollary is that "irrespective of investigation or study, truth exists, and that it ought not to be distorted by partisan or biased approaches, personal preconceptions, value judgements, or emotional stances."<sup>115</sup>

To take this further, it is possible to argue that, to exercise scientific objectivity, students of socio-legal phenomena should stand outside the sphere of activity that they are exploring, rather than being part of it, and scrutinize the patterns they examine from an Archimedean distance.<sup>116</sup> This is obviously easier said than done because of the inherent difficulty of simultaneously being a participant in social processes and a detached observer of their features.<sup>117</sup> Yet, this scientific objectivity is commonly thought to be a skill that needs to be acquired by socio-legal scholars engaged in scientific inquiry and one that, while difficult to develop, may be obtained by pursuing a path that leads to a "long-practiced and meticulously cultivated mental discipline."<sup>118</sup>

The notion of "positional objectivity" is closely associated with this viewpoint.<sup>119</sup> It rests on the assumption that objective evaluation

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<sup>109</sup> *Id.* at 663.

<sup>110</sup> *See id.*

<sup>111</sup> *See* P. ISHWARA BHAT, IDEA AND METHODS OF LEGAL RESEARCH 54-65 (2019).

<sup>112</sup> *Id.* at 54.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 54-55.

<sup>116</sup> *See id.* at 58.

<sup>117</sup> *See* BHAT, *supra* note 111, at 58.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 59.

may be undertaken from different angles without distorting the outcome.<sup>120</sup> Specifically, “[w]hat is observed can vary from position to position, but different people conduct their observations from similar positions and make much the same observation.”<sup>121</sup> This line of reasoning suggests that concurrence among observers is a viable basis for ascertaining the truth of assertions about socio-legal realities or that consensual validation through cross-observer agreement can effectively determine the soundness of such assertions.<sup>122</sup>

Such positionally objective claims do not readily dovetail with those espoused by proponents of constructivism and, to a somewhat lesser extent, interpretivism and normativity. While there are some rare exceptions within that space, constructivism is, for the most part, negatively disposed toward the notion that objective knowledge is a meaningful notion.<sup>123</sup> Indeed, many adherents to this paradigm contend that the very idea of truth is devoid of any analytical substance.<sup>124</sup> Interpretivism<sup>125</sup> and normativity<sup>126</sup> are more accommodating analytical paradigms but incompletely and selectively so.<sup>127</sup>

Where does that leave the study of authoritarian international law? May the few prominent researchers who are blazing a trail in this legally and politically vital area of seemingly scientific investigation profess to be participants in a high-objectivity scholarly enterprise? Or, alternatively, are they predominantly involved in their own construction and interpretation of reality and normatively inspired in a way that is not universally embraced and is not geographically or ideologically expansive?

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<sup>120</sup> *See id.*

<sup>121</sup> Amartya Sen, *Positional Objectivity*, 22 PHIL. & PUB. AFF. 126, 127 (1993).

<sup>122</sup> *See generally* Robert R. McCrae, Paul T. Costa Jr., Thomas A. Martin, Valery E. Oryol, Alexey A. Rukavishnikov, Ivan G. Senin, Martina Hřebíčková & Tomáš Urbánek, *Consensual Validation of Personality Traits Across Cultures*, 38 J. RES. PERSONALITY 179 (2004).

<sup>123</sup> *See generally* Bill Kerr, *Constructivism and Objectivity*, BILL KERR (Apr. 13, 2008) <http://billkerr2.blogspot.com/2008/04/constructivism-and-objectivity.html> [<https://perma.cc/Q7QH-82YX>].

<sup>124</sup> *See generally id.*

<sup>125</sup> *See generally* Marcos S. Scauso, *Interpretivism: Definitions, Trends, and Emerging Paths*, OXFORD RSCH. ENCYCLOPEDIAS: INT’L STUD., Feb. 28, 2020, <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-522>.

<sup>126</sup> *See generally* Roberto Gronda, *Normativity and Objectivity: The Semantic Nature of Objects and the Potentiality of Nature*, 7 EUR. J. PRAGMATISM & AM. PHIL. 115 (2015).

<sup>127</sup> *See generally id.*; Scauso, *supra* note 125; *see also* Capps, *supra* note 103; van Mulligen, *supra* note 107.

There is no single answer to this set of interrelated questions but the “standard of reasonableness”<sup>128</sup> may arguably be satisfied by shunning constructivist, interpretivist, and normativist “excesses.” After all, it would be absurd to deny the basic factual truth of reports outlining the transfer of Ukrainian children to Russia.<sup>129</sup> It would be consistent with the available evidence to assert that forceful deportation has occurred.<sup>130</sup> Normative judgment, coupled with a degree of constructivist and interpretivist reconfiguration, cannot be avoided in such circumstances, for instance, when considering whether this has amounted to a war crime.<sup>131</sup> Merely because facts and norms are often intertwined does not deprive facts of their meaning and render them unusable.<sup>132</sup>

The view that propositions of international law cannot be both objective and normative is not universally held.<sup>133</sup> Emmanuel Voyiakis, however, has convincingly shown that objectivity and normativity may comfortably and productively coexist in international legal contexts.<sup>134</sup> According to Voyiakis, “the skepticism about values is incoherent and, therefore, the opposition between objectivity and normativity is illusory.”<sup>135</sup> The corollary is that the kind of liberal blending

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<sup>128</sup> See generally W. M. Sibley, *The Rational Versus the Reasonable*, 62 PHIL. REV. 554 (1953); Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41 (1994); Igor Grossman, Richard P. Eibach, Jacklyn Koyama & Qaisar B. Sahi, *Folk Standards of Sound Judgment: Rationality Versus Reasonableness*, 6 SCI. ADVANCES, Jan. 8, 2020; Paul Daly, *Reasons and Reasonableness in Administrative Law*, ADMIN. L. MATTERS (May 30, 2012), <https://www.administrativelawmatters.com/blog/2012/05/30/reasons-and-reasonableness-in-administrative-law/> [<https://perma.cc/Z68Z-6T7N>].

<sup>129</sup> See generally Sarah El Deeb, Anastasiia Shvets & Elizaveta Tilna, *How Moscow Grabs Ukrainian Kids and Makes Them Russian*, ASSOCIATED PRESS (Mar. 17, 2023, 4:45 PM), <https://apnews.com/article/ukrainian-children-russia-7493cb22c9086c6293c1ac7986d85ef6> [<https://perma.cc/963U-7GUN>].

<sup>130</sup> See generally Anderson Cooper, *Thousands of Children Forcibly Deported from Ukraine and Sent to Russia*, CNN (Mar. 18, 2023), <https://edition.cnn.com/videos/world/2023/03/18/russia-childrens-rights-commissioner-war-crimes-bell-dnt-vpx.cnn> [<https://perma.cc/KJS4-BJA3>].

<sup>131</sup> See generally Laura Gozzi, *Deportation of Ukrainian Children to Russia Is a War Crime - UN*, BBC (Mar. 16, 2023), <https://www.bbc.com/news/world-europe-64985009> [<https://perma.cc/WZ6E-BPDX>].

<sup>132</sup> See BHAT, *supra* note 111, at 60-63; see generally Dennis Patterson, *Normativity and Objectivity in Law*, 43 WM. & MARY L. REV. 325 (2001).

<sup>133</sup> See generally Emmanuel Voyiakis, *International Law and the Objectivity of Value*, 22 LEIDEN J. INT'L L. 51 (2009).

<sup>134</sup> See generally *id.*

<sup>135</sup> *Id.* at 51.

of factual and normative statements that is amply present in accounts of authoritarian international law is neither ill-founded nor fruitless.

Janina Dill offers a possible strategy for conceptualizing the relationship between these two types of statements in more precise terms.<sup>136</sup> She endeavors to analytically reconcile the pressures stemming from States' desire to realize their utilitarian goals (rooted in prior interests) with the values that are expected to guide them (rooted in prior normative beliefs).<sup>137</sup> Dill implicitly agrees with Voyiakis<sup>138</sup> that there is no inherent contradiction between the two but rather a continuum extending in practice from one end to the other.<sup>139</sup> This may be true of the relationship between factual and normative statements made in reference to international legal issues. If so, the study of authoritarian international law is, broadly speaking, a factually rich scientific undertaking transparently pursued within a well-defined normative framework.

A key question that needs to be addressed when grappling with a concept in socio-legal research is whether the concept is a good one.<sup>140</sup> John Gerring has proposed eight criteria that ought to be reasonably satisfied when assessing a concept: (1) "familiarity";<sup>141</sup> (2) "resonance";<sup>142</sup> (3) "parsimony";<sup>143</sup> (4) "coherence";<sup>144</sup> (5) "differentiation";<sup>145</sup> (6) "depth";<sup>146</sup> (7) "theoretical utility";<sup>147</sup> and (8) "field utility."<sup>148</sup> This is a large set of criteria and they are not easy to apply in practice, other than perhaps in a qualitative and subjective fashion.

Nevertheless, it is apparent that, if the concerns expressed within the normative framework adopted for this purpose are accepted as

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<sup>136</sup> See generally JANINA DILL, *LEGITIMATE TARGETS? SOCIAL CONSTRUCTION, INTERNATIONAL LAW AND US BOMBING* (2014).

<sup>137</sup> See generally Voyiakis, *supra* note 133.

<sup>138</sup> See generally DILL, *supra* note 136.

<sup>139</sup> See generally *id.*

<sup>140</sup> See generally Giovanni Sartori, *Concept Misformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033 (1970); John Gerring, *What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31 POLITY 357 (1999); GARY GOERTZ, *SOCIAL SCIENCE CONCEPTS AND MEASUREMENT* (2d ed. 2020).

<sup>141</sup> Gerring, *supra* note 140, at 368-70.

<sup>142</sup> *Id.* at 370-71.

<sup>143</sup> *Id.* at 371-73.

<sup>144</sup> *Id.* at 373-75.

<sup>145</sup> *Id.* at 375-79.

<sup>146</sup> *Id.* at 379-80.

<sup>147</sup> Gerring, *supra* note 140, at 381-82.

<sup>148</sup> *Id.* at 382-84.

valid, as this article does,<sup>149</sup> the concept of authoritarian international law resonates and is sufficiently parsimonious, coherent, differentiated, deep, theoretically useful, and suitably located within a field of interconnected terms. Quantitatively speaking, these qualities may not yet be fully reflected in the academic literature, whose volume remains relatively modest, but the profound unease with its conceptual legitimacy is consistently and emphatically communicated through other, less formal channels.<sup>150</sup>

The recent origins of authoritarian international law and the rather slim volume of academic writings specifically focused on it should not be equated with low familiarity. As noted above, full-fledged scholarly surveys are merely one of several significant sources where strong and systematic interest in authoritarian international law may be discerned. The academic work in this area, while not voluminous, can be said to have been marked by a high degree of coherence,

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<sup>149</sup> See generally Phil C. W. Chan, *China's Approaches to International Law Since the Opium War*, 27 LEIDEN J. INT'L L. 859 (2014); PHIL C.W. CHAN, CHINA, STATE SOVEREIGNTY AND INTERNATIONAL LEGAL ORDER (2015); Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 AM. J. INT'L L. 710 (2022).

<sup>150</sup> See generally WORLD JUSTICE PROJECT, *supra* note 48; Repucci & Slipowitz, *supra* note 63; Fücks, *supra* note 63; Rogers, *supra* note 63; Wang, *supra* note 63; JON BATEMAN, U.S.-CHINA TECHNOLOGICAL "DECOUPLING": A STRATEGY AND POLICY FRAMEWORK (2022), [https://carnegieendowment.org/files/Bateman\\_US-China\\_Decoupling\\_final.pdf](https://carnegieendowment.org/files/Bateman_US-China_Decoupling_final.pdf) [<https://perma.cc/M4TE-YEUZ>]; Jonathan G. Odom, *Understanding China's Gamesmanship in the Rule-Based Global Order*, in CHINA'S GLOBAL INFLUENCE: PERSPECTIVES AND RECOMMENDATIONS (Scott D. McDonald & Michael C. Burgoyne eds., 2019), [https://dkiapcss.edu/wp-content/uploads/2019/09/12-Chinas\\_Legal\\_Gamesmanship-odom.pdf](https://dkiapcss.edu/wp-content/uploads/2019/09/12-Chinas_Legal_Gamesmanship-odom.pdf) [<https://perma.cc/92GE-RT5H>]; Matthew H. Ormsbee, "Lawcraft": *China's Evolving Approach to International Law and Its Implications for American National Security*, 90 FORDHAM L. REV. ONLINE 1 (2021); Philip Remler, *Russia at the United Nations: Law, Sovereignty, and Legitimacy*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 22, 2020), <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753> [<https://perma.cc/9LMJ-KRMK>]; Michael Shuman, *China's Wants to Rule the World by Controlling the Rules*, THE ATLANTIC (Dec. 9, 2021), <https://www.theatlantic.com/international/archive/2021/12/china-wants-rule-world-controlling-rules/620890/> [<https://perma.cc/RC94-JKM7>]; Lise Morjé Howard, *A Look at the Laws of War—and How Russia is Violating Them*, U.S. INST. OF PEACE (Sept. 9, 2022), <https://www.usip.org/publications/2022/09/look-laws-war-and-how-russia-violating-them> [<https://perma.cc/GB7Q-2SZ2>]; ROBERT D. WILLIAMS, INTERNATIONAL LAW WITH CHINESE CHARACTERISTICS: BEIJING AND THE "RULE-BASED" GLOBAL ORDER (2020), [https://www.brookings.edu/wp-content/uploads/2020/10/FP\\_20201012\\_international\\_law\\_china\\_williams.pdf](https://www.brookings.edu/wp-content/uploads/2020/10/FP_20201012_international_law_china_williams.pdf) [<https://perma.cc/SRT6-RP6M>].

differentiation, depth, theoretical utility, and field utility.<sup>151</sup> Perhaps most importantly, the concept of authoritarianism and its political manifestations have been studied extensively.<sup>152</sup> Authoritarian international law may be viewed as an integral part of this firmly established agenda and merits close attention in its own right.

### III. AUTHORITARIAN INTERNATIONAL LAW COMES OF AGE

The increasingly disorderly, but not yet extinct and selectively functional, international legal order is not the product of broad, egalitarian participation of States. Small States in particular, while collectively and even individually, not without power and voice, can be said to have contributed relatively little to the development of international law.<sup>153</sup> By the same token, in an ideologically fragmented global system, Western liberal democracies have played a disproportionate role in shaping the contours of the prevailing international legal order.<sup>154</sup>

This imbalance notwithstanding, what is past is not inescapably prologue. Historical forces may not necessarily determine the future of the highly fluid international law and international relations spheres. As William Burke-White has observed, the influence of the major Western powers on the evolution of international law has materially diminished in recent years.<sup>155</sup> According to Burke-White, the global system has undergone a structural transformation culminating in a substantively meaningful pluralist configuration, with the United States and its key European allies no longer in a position to solely, or

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<sup>151</sup> See generally Katerina Linos, *Introduction to the Symposium on Authoritarian International Law: Is Authoritarian International Law Inevitable?*, 114 AM. J. INT'L L. UNBOUND 217 (2020).

<sup>152</sup> See generally Schlumberger, *supra* note 59; FATHALI M. MOGHADDAM, *THREAT TO DEMOCRACY: THE APPEAL OF AUTHORITARIANISM IN AN AGE OF UNCERTAINTY* (2019); BEN RHODES, *AFTER THE FALL: BEING AMERICAN IN A WORLD WE'VE MADE* (2021); ERIC NILSEN, *THE ORIGINS OF AUTHORITARIANISM—AND WHY IT STILL WORKS TODAY* (2022).

<sup>153</sup> See generally ADAM LUPEL & LAURI MALKSOO, *A NECESSARY VOICE: SMALL STATES, INTERNATIONAL LAW, AND THE UN SECURITY COUNCIL* (2019), [https://www.ipinst.org/wp-content/uploads/2019/04/1904\\_A-Necessary-Voice\\_Final.pdf](https://www.ipinst.org/wp-content/uploads/2019/04/1904_A-Necessary-Voice_Final.pdf) [<https://perma.cc/NG6N-Y5TG>]; Maria Nilaus Tarp & Jens Ole Bach Hansen, *Size and Influence: How Small States Influence Policy in Multilateral Arenas*, (DIIS, Working Paper 2013:11), [https://www.files.ethz.ch/isn/173785/WP\\_2013\\_11%20size%20and%20influence.pdf](https://www.files.ethz.ch/isn/173785/WP_2013_11%20size%20and%20influence.pdf) [<https://perma.cc/RCV7-X66S>].

<sup>154</sup> See generally William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. J. INT'L L. 1 (2015).

<sup>155</sup> See generally *id.*

even largely, determine the outcome of international legal processes.<sup>156</sup>

Interestingly, Burke-White portrays a world in transition from unilateralism to multilateralism rather than merely bilateralism or an oligopolistic-type structure.<sup>157</sup> He argues that the common occurrence of such events when the twenty-first century was well underway confirms a far-reaching international readjustment that extends beyond the rise of China and also encompasses the other BRIC club members (Brazil, Russia, and India) and a host of middle powers such as Indonesia, Mexico, South Africa, and Turkey.<sup>158</sup> By implication, the “relative power of the United States is declining.”<sup>159</sup> The corollary is that the “era in which the United States and Europe could steer the international legal system has passed.”<sup>160</sup>

Burke-White has depicted this structural metamorphosis in predominantly analytical terms, refraining from resorting to strong normative assertions. The concrete manifestations of that shift—power diffusion,<sup>161</sup> power disaggregation,<sup>162</sup> issue-specific asymmetries in power distribution<sup>163</sup>—in the emerging multi-hub international regime have been subjected to clinical analysis mostly devoid of firmly articulated value judgment. The functional challenges posed by decentralization (e.g., coordination difficulties) have been clearly identified,<sup>164</sup> but the multi-hub institutional architecture has been presented as a pattern possessing some advantages, from an international legal perspective.<sup>165</sup>

Most intriguingly, Burke-White claims that the loosening of the international power structure is not without benefits for the United States (and presumably its allies).<sup>166</sup> First, the proliferation of hubs ought to provide the former hegemon with greater flexibility to pick and choose from the multitude of preference sets seen in different pockets of international power, which apparently has long been its

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<sup>156</sup> *See generally id.*

<sup>157</sup> *See id.* at 1-2.

<sup>158</sup> *See id.* at 2.

<sup>159</sup> *Id.*

<sup>160</sup> Burke-White, *supra* note 154, at 2.

<sup>161</sup> *See id.* at 17-19.

<sup>162</sup> *See id.* at 19-22.

<sup>163</sup> *See id.* at 22-24.

<sup>164</sup> *See id.* at 38-42.

<sup>165</sup> *See id.* at 42-47.

<sup>166</sup> *See* Burke-White, *supra* note 154, at 78-79.

goal.<sup>167</sup> Second, the United States should be able to effectively promote its interests through the hubs because they consist of small and cohesive coalitions.<sup>168</sup> Third, burden-sharing with the hubs, which basically seem to be willing to reconcile their preferences with the vision embodied in mainstream international law, ought to reduce costs for the United States to act as a leader in the global arena.<sup>169</sup>

At its core, the picture painted by proponents of authoritarian international law is fundamentally at variance with this sanguine outlook on the United States' influence in the international power structure. Surveying the international legal scene at the turn of the current decade—five years following Burke-White's account and endorsement of the structural realignment and the transition to substantive pluralism that still enjoys some momentum—Tom Ginsburg has produced a number of influential academic publications vividly highlighting the downside of the multi-hub system. The system's emergence, Ginsburg notes, has been accompanied by an offensively (as distinct from defensively) inclined and unsettling form of authoritarian international law, when viewed from a liberal-democratic perspective.<sup>170</sup>

There is no clear explanation for the sharp divergence between these two vantage points. The divergence may be due to a different construction of the same reality or a result of changes in the international legal and political environment during the five-year period separating Burke-White's and Ginsburg's reflections.<sup>171</sup> The position adopted in this Article is that in recent years there has indeed been some acceleration in authoritarian cross-border action and rhetoric, but international legal researchers have been slow to recognize its previous scope and intensity. Ginsburg's construction may thus be seen as an appropriate but lagged response to prevailing international trends, some of which may have not been given proper weight by Burke-White because of the time that it takes for cognitive apparatuses to adjust to reality and the impediments encountered in the process.

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<sup>167</sup> *See id.*

<sup>168</sup> *See id.* at 79.

<sup>169</sup> *See id.*

<sup>170</sup> *See generally* Ginsburg, *Authoritarian International Law?*, *supra* note 48; Ginsburg, *How Authoritarians Use International Law*, *supra* note 48; GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48.

<sup>171</sup> *Compare* Burke-White, *supra* note 154, *with* Ginsburg, *Authoritarian International Law?*, *supra* note 48, Ginsburg, *How Authoritarians Use International Law*, *supra* note 48, GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; Ginsburg, *Article 2(4) and Authoritarian International Law*, *supra* note 48.

Ginsburg's thesis unfolds along two pathways. First, he juxtaposes the apparent decline of liberal democracy with the growing presence, self-assurance, and sophistication of authoritarian regimes.<sup>172</sup> This pattern is attributed to the latter's greater integration into the global economy through production, investment, and trade channels and the pivotal place that they have consequently earned in fora to determine the rules governing international economics.<sup>173</sup> Partially abandoning ideology in favor of pragmatic utilitarianism has enhanced the effectiveness of authoritarian regimes in that respect.<sup>174</sup> This shift includes their adroit employment of democratic strategies and tactics for anti-democratic offensive and defensive purposes.<sup>175</sup>

Accommodation of authoritarian impulses in the international law and international relations space has ebbed and flowed over the years, but, in the aftermath of the Iron Curtain's collapse, the international legal system has exhibited distinct liberal characteristics.<sup>176</sup> Ginsburg contends that "this [golden] era is now decidedly over, and we may be returning to an era in which international law is facilitative of authoritarian governance."<sup>177</sup> While not without historical precedents in certain key respects, what differentiates this new era from similar predecessors "is the way in which authoritarians are using international law, building on and repurposing some of the norms of the liberal era, but to very different ends."<sup>178</sup> These developments are likely to have a palpable impact on the international legal system in general and the practices of a considerable number of States in particular.<sup>179</sup>

Locating authoritarian international law within the international legal domain is not a simple proposition because of divergences of opinion regarding how closely it should be associated with liberal-democratic norms, as distinct from "neutral" norms.<sup>180</sup> Dissecting authoritarian international law is a delicate undertaking, so staying close to the neutral end of the ideational spectrum is the appropriate course of action in analytical contexts, even if normatively inspired.<sup>181</sup>

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<sup>172</sup> See Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 221-23.

<sup>173</sup> See *id.* at 222.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.* at 222-23.

<sup>176</sup> See *id.*

<sup>177</sup> *Id.*

<sup>178</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 224.

<sup>179</sup> See *id.*

<sup>180</sup> See *id.* at 225-27.

<sup>181</sup> See *id.* at 227.

Ginsburg thus builds on the work of legal scholars and political scientists who view international law as a tool that enables States to accomplish what would otherwise be difficult to realize or that provides for the exchange of public goods across national borders.<sup>182</sup> This leads to an initial definition of authoritarian international law as a process consisting of “international legal interactions among authoritarian [S]tates,”<sup>183</sup> although it is reasonable to infer that it also encompasses the outcomes of that process.

The nature of such interactions is said to be different from the liberal-democratic realm, where there is more active participation in the international legal system and effort to expand the sphere of liberal-democratic governance.<sup>184</sup> Authoritarian States generally adopt a more passive stance geared toward restoring Westphalian international law. A degree of restraint should not be equated with a lack of strategic purpose, however, because authoritarian moves are oriented toward stretching the territorial boundaries of authoritarian governance.<sup>185</sup> This construction results in a broader and more final definition of authoritarian international law as “a legal rhetoric, practices, and rules specifically designed to extend the survival and reach of authoritarian rule across space and/or time.”<sup>186</sup>

A convenient way to capture the essence of authoritarian governance is by positing that it encompasses all forms of undemocratic governance,<sup>187</sup> subject to the qualification that some socio-legal scholars draw a fine distinction between the authoritarian and totalitarian variants.<sup>188</sup> Authoritarian governments constitute a large group of political regimes divided into a number of dissimilar segments. The actual number of authoritarian regimes varies according to the source, but it ranges from high-to-low single digits, with three being the lowest

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<sup>182</sup> *See id.*

<sup>183</sup> *Id.*

<sup>184</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 227-28.

<sup>185</sup> *See id.* at 228.

<sup>186</sup> *Id.* at 228 (emphasis omitted).

<sup>187</sup> Hans-Joachim Lauth, *Authoritarian Regimes*, UNIVERSITÄT BIELEFELD: CTR. FOR INTERAMERICAN STUD., <https://www.uni-bielefeld.de/einrichtungen/cias/publikationen/wiki/a/authoritarian-regimes.xml> [<https://perma.cc/4Y2M-NXJA>] (last visited Apr. 15, 2023).

<sup>188</sup> *See generally* CARL JOACHIM FRIEDRICH & ZBIGNIEW K. BRZEZINSKI, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* (2d ed. 1965); JUAN J. LINZ, *TOTALITARIAN AND AUTHORITARIAN REGIMES* (2000).

figure available.<sup>189</sup> This renders generalization across the entire set problematic but not impossible.<sup>190</sup>

For instance, Juan Linz, who has opted for placing authoritarianism and totalitarianism in separate categories, has attributed three widely shared features to authoritarian governance: (1) limited pluralism, in contrast with the practically unlimited pluralism seen in democratic milieus and the monism characterizing totalitarianism; (2) limited political participation (i.e., depoliticization) and neither broad-based nor deep-guided, bottom-up, socio-political mobilization; and (3) no regime legitimation by a common and overarching ideology, but instead through mentalities,<sup>191</sup> which are modes of “thinking and feeling, more emotional than rational, that provide non-codified ways of reacting to different situations”<sup>192</sup> (e.g., [fake] democratization, modernization, nationalism, order, patriotism, and the like<sup>193</sup>). An array of coercive and non-coercive tactics is employed at home and abroad<sup>194</sup> to ensure that these features remain intact.<sup>195</sup> These tactics typically entails reliance on three interconnected pillars: cooptation of nonmembers into the political establishment/ruling elite, legitimacy achieved by delivering economic goods and/or manipulating mentalities, and hard and soft forms of repression.<sup>196</sup>

Milan Svobik has ascribed the roots of this structural-functional configuration to two fundamental challenges faced by authoritarian governance regimes, namely, the “problem of authoritarian control”

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<sup>189</sup> See Lauth, *supra* note 187.

<sup>190</sup> See *id.*

<sup>191</sup> *Id.* (citing Juan J. Linz, *Totalitarian and Authoritarian Regimes*, in HANDBOOK OF POLITICAL SCIENCE, VOLUME 3: MACROPOLITICAL THEORY 175, 264 (Fred I. Greenstein & Nelson W. Polsby eds., 1975)).

<sup>192</sup> LINZ, *supra* note 188, at 162.

<sup>193</sup> See Lauth, *supra* note 187; Dan Perry, *What to Do About Fake Democracy?*, NEWSWEEK (Sept. 24, 2021, 8:00 AM), <https://www.newsweek.com/what-do-about-fake-democracy-opinion-1632108> [<https://perma.cc/H2J9-GQ94>].

<sup>194</sup> See, e.g., Charles Edel & David O. Shullman, *How China Exports Authoritarianism: Beijing's Money and Technology Is Fueling Repression Worldwide*, FOREIGN AFFS. (Sept. 16, 2021), <https://www.foreignaffairs.com/articles/china/2021-09-16/how-china-exports-authoritarianism> [<https://perma.cc/266Y-YEGR>].

<sup>195</sup> See generally LINZ, *supra* note 188, at 159-71; see also Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379 (1991); MILAN W. SVOLIK, *THE POLITICS OF AUTHORITARIAN RULE* (2012); Marcus Michaelsen & Marlies Glasius, *Authoritarian Practices in the Digital Age*, 12 INT'L J. COMM. 3788 (2018).

<sup>196</sup> Dirk Kaufmann, *Clinging to Power*, DEUTSCHE WELLE (Sept. 3, 2013), <https://www.dw.com/en/how-do-dictatorships-survive/a-17062347> [<https://perma.cc/XZ65-8ETQ>].

and the “problem of authoritarian power-sharing.”<sup>197</sup> The former emanates from the difficulty of attaining an effective and sustainable control over the majority of those excluded from power, and the latter stems from the strains that surface within the political establishment/ruling elite.<sup>198</sup> The two problems are closely related because the core of the political establishment/ruling elite cannot, in the long run, successfully maintain authoritarian control alone without coopting potentially unreliable allies.<sup>199</sup> This means that “authoritarian elites may fall out both with the people and among themselves,”<sup>200</sup> which accounts for the structural and functional features of authoritarian governance regimes outlined above.

Softening the hard edges of authoritarian governance, however, does not in itself amount to regime change, let alone meaningful democratization.<sup>201</sup> Cooptation; authoritarian bargains (whereby economic benefits are traded for compliance);<sup>202</sup> mentality manipulation; and soft repression loom increasingly large in the authoritarian assortment of control mechanisms.<sup>203</sup> Indeed, as Sergei Guriev and Daniel Treisman have amply documented, most of today’s authoritarian rulers favor soft over hard policy vehicles for keeping the polity’s grassroots in check.<sup>204</sup>

Ginsburg illuminates how and to what end authoritarian regimes uniquely pursue their governance agendas in the international legal arena, having recourse to both a shield and a sword in the process.<sup>205</sup> Specifically, such regimes tend to follow narrowly delineated, inner-oriented, present-focused, and both offensive and defensive strategies because of the challenge posed by the authoritarian control and

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<sup>197</sup> SVOLIK, *supra* note 195, at 2.

<sup>198</sup> *Id.*

<sup>199</sup> *See id.*

<sup>200</sup> *Id.*

<sup>201</sup> *See generally* SERGEI GURIEV & DANIEL TREISMAN, SPIN DICTATORS: THE CHANGING FACE OF TYRANNY IN THE 21ST CENTURY (2022).

<sup>202</sup> *See generally* Raj M. Desai, Anders Olofsgård & Tarik M. Yousef, *The Logic of Authoritarian Bargains: A Test of a Structural Model*, (Brookings Inst., Global Economy and Development Working Paper, Paper No. 3, 2007), [https://www.brookings.edu/wp-content/uploads/2016/06/01globaleconomics\\_desai.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/01globaleconomics_desai.pdf) [<https://perma.cc/Q5LY-ED7V>].

<sup>203</sup> *See* LINZ, *supra* note 188, at 162-65; Lauth, *supra* note 187; GURIEV & TREISMAN, *supra* note 201.

<sup>204</sup> *See generally* GURIEV & TREISMAN, *supra* note 201.

<sup>205</sup> *See* Ginsburg, *How Authoritarians Use International Law*, *supra* note 48, at 47-55.

authoritarian power-sharing problems.<sup>206</sup> Such regimes deftly take advantage of existing and new institutional platforms to achieve their goals<sup>207</sup> and do not hesitate to put their stamp on the international normative edifice.<sup>208</sup>

Thus, when authoritarian regimes actively seek cooperation with other States, they usually confine themselves to club goods or segmentable public goods that may readily be offered to their allies but may equally readily be denied to their adversaries.<sup>209</sup> They are also inclined to refrain from making long-term international commitments that potentially extend beyond their lifetimes.<sup>210</sup> In other words, authoritarian regimes are reluctant to productively address complex international issues that have intergenerational ramifications because their own time horizon, as distinct from that of their entire "constituency" or nation, normally does not stretch beyond the current generation.<sup>211</sup>

External threats to authoritarian governance regimes weigh heavily on the regimes' minds but not to the same extent as internal ones because the latter usually pose a greater danger to their stability and survival.<sup>212</sup> Authoritarian regimes consequently favor types of international collaboration that enable repression at home and impede empowerment of domestic opponents.<sup>213</sup> As information control is a key control mechanism relied upon by authoritarian rulers, particularly the modern-style spin doctors, they place a high premium on low-transparency and low-public profile international cooperative ventures. Authoritarian regimes do this to hedge against the possibility of the undertaking yielding no tangible benefits or turning out to be a failure and the regime incurring serious reputational costs.<sup>214</sup>

For the same reason, authoritarian governance regimes are ill-disposed toward international practices involving third-party dispute resolution, an important cornerstone of the international legal order since the Permanent Court of Justice was established in 1922.<sup>215</sup> Given the open nature of such procedural devices and the ceding of control to

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<sup>206</sup> *See id.*

<sup>207</sup> *See id.* at 50-51.

<sup>208</sup> *See id.* at 51-53.

<sup>209</sup> *See* Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 229.

<sup>210</sup> *See id.* at 229-30.

<sup>211</sup> *Id.*

<sup>212</sup> *See id.* at 230.

<sup>213</sup> *See id.*

<sup>214</sup> *See id.*

<sup>215</sup> *See* Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 230.

independent bodies, acceptance of alternative dispute resolution procedures may expose authoritarian rulers to substantial risks by revealing information not internally accessible and culminating in decisions that may negatively reverberate within their tightly reined polities.<sup>216</sup>

These actions are not merely about self-preservation and minimizing internal threats to authoritarian governance. As Xi Jinping, China's paramount leader, has proclaimed, his economically confident and militarily resurgent country "dare[s] to fight."<sup>217</sup> The blueprint outlined by Xi Jinping envisions marginalization of the United States as a pillar of the international legal system and the emergence of a new world order closely aligned with China's interests.<sup>218</sup> This entails initiatives that are detrimental to democratic governance abroad as well as at home, potentially paving the way for a more authoritarian version of international law.<sup>219</sup>

The blueprint is sketched more clearly and forcefully than in the past, but the underlying strategy is not new. The strategy has been pursued, whether decisively or incrementally, on several fronts in various forms.<sup>220</sup> The stage provided by existing international institutions, over which authoritarian governance regimes have significantly tightened their grip, has been a crucial platform for authoritarian regimes to change the world order.<sup>221</sup> A notable example is the United Nations where, at the time of this writing, Russia has assumed the presidency of the Security Council despite acting in gross violation of the spirit and letter of international humanitarian law in Ukraine and elsewhere.<sup>222</sup>

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<sup>216</sup> *See id.*

<sup>217</sup> Joe Leahey, Kathrin Hille, Andy Lin & Michael Pooler, 'Dare to Fight': Xi Jinping Unveils China's New World Order, *FIN. TIMES* (Mar. 31, 2023), <https://www.ft.com/content/0f0b558b-3ca8-4156-82c8-e1825539ee20> [<https://perma.cc/E5PN-PW4P>].

<sup>218</sup> *See id.*

<sup>219</sup> *See* Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 231, 250.

<sup>220</sup> *See generally* Russia Says It's Building a New "Democratic World Order" with China, *CBS NEWS* (Mar. 30, 2022, 6:53 PM), <https://www.cbsnews.com/news/russia-china-lavrov-visit-beijing-vladimir-putin-xi-jinping-new-world-order/> [<https://perma.cc/39DT-DUTL>]; David Rennie, *China Wants to Change, or Break, a World Order Set by Others*, *ECONOMIST* (Oct. 10, 2022), <https://www.economist.com/special-report/2022/10/10/china-wants-to-change-or-break-a-world-order-set-by-others> [<https://perma.cc/2DX3-4SU8>].

<sup>221</sup> *See* Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 250.

<sup>222</sup> *See generally* George Wright, *Russia Assumes UN Security Council Presidency Despite Ukrainian Anger*, *BBC* (Apr. 1, 2023), <https://www.bbc.com/news/world-europe-65146557> [<https://perma.cc/W3C4-AZBQ>]; *Russia, Ukraine & International Law: Occupation, Armed Conflict and*

In addition to growing presence on established international institutional platforms, authoritarian governance regimes have been setting up their own similar organizational vehicles, possessing increasingly greater power and reach, as well as influence on the evolution of international law.<sup>223</sup> The process began with the creation of reactive collective entities such as the Warsaw Pact, a partial attempt to match the North Atlantic Treaty Organization (“NATO”), which unraveled as the Cold War ended.<sup>224</sup> Authoritarian influence progressed further with the formation of regional functional institutions, addressing joint economic and security concerns, such the Association of Southeast Asian Nations (“ASEAN”)<sup>225</sup> and the Eurasian Economic Union (“EAEU”). These regional institutions allowed the regimes to largely pursue an economic agenda in a specific regional context, but in institutions that are less sovereignty-centered and more focused on building cross-border integrative mechanisms.<sup>226</sup> Increased proliferation of collaborative international schemes, such as the Shanghai Cooperation Organization (“SCO”), a multifaceted and open-ended international entity whose ambitions extend beyond any cluster of issues and region, also ultimately advanced the organizations’ founders’ visions of authoritarian international law.<sup>227</sup>

The SCO has been the most determined to leave its imprint on the international normative fabric and has been successful in making steady headway in this respect.<sup>228</sup> Its 2001 Convention on Countering Terrorism, Separatism and Extremism and instruments subsequently adopted reflect this intent and the authoritarian tilt of its core agenda.<sup>229</sup> The definition of terrorism is broadly consistent with prevailing international standards but those of separatism and extremism

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*Human Rights*, HUM. RTS. WATCH (Feb. 23, 2022, 5:25 PM), <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights> [<https://perma.cc/T5FY-NSWN>]; Howard, *supra* note 150; SYRIAN NETWORK FOR HUM. RTS., SEVENTH ANNUAL SNHR REPORT ON RUSSIAN FORCES’ VIOLATIONS SINCE THE BEGINNING OF RUSSIA’S MILITARY INTERVENTION IN SYRIA ON SEPTEMBER 30, 2015 (2022), <https://snhr.org/blog/2022/09/30/seventh-annual-snhr-report-on-russian-forces-violations-since-the-beginning-of-russias-military-intervention-in-syria-on-september-30-2015/> [<https://perma.cc/D6TJ-2UHG>].

<sup>223</sup> See Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 241-50.

<sup>224</sup> See *id.* at 242-43.

<sup>225</sup> See *id.* at 243-45.

<sup>226</sup> See *id.* at 245-47.

<sup>227</sup> See *id.* at 247-50.

<sup>228</sup> See *id.* at 251-53.

<sup>229</sup> See Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 255.

are couched in classical authoritarian terms designed to entrench authoritarian rule and minimize its vulnerability to internal threats.<sup>230</sup> This notion of extremism, elaborated upon and expanded further in the following years,<sup>231</sup> has been recently applied in relation to Hong Kong.<sup>232</sup>

Importantly, this normative thrust has aimed to prevent member countries from serving as safe havens for regime opponents based elsewhere.<sup>233</sup> This principle was implemented in the handling of the anti-China riot that took place in Urumqi, Xinjiang, in July 2009.<sup>234</sup> Four SCO members joined forces to quash the security threat this riot posed; Kyrgyzstan detained riot organizers, while Kazakhstan and Russia extradited riot suspects and dissidents to China.<sup>235</sup> SCO members have refined their collective responses to such contingencies since that event.<sup>236</sup>

Cyberlaw is another area where authoritarian governance regimes have aligned in an effort to shape the international normative landscape.<sup>237</sup> In the cyberlaw domain, these regimes' purpose has been the forging of international legal instruments intended to forestall progress toward an open internet architecture.<sup>238</sup> Interestingly, cyberlaw has been another vital realm of international concern and cooperation where authoritarian governance regimes have shrewdly resorted to multilateral diplomacy channeled through essentially liberal-democratic international institutions to achieve their authoritarian goals.<sup>239</sup>

Allen Weiner has sought to explore the implications of this analysis for the development of international law in the external security sphere, with special reference to States' intervention in the internal affairs of other States and the use of force.<sup>240</sup> He has noted that authoritarian governance regimes' growing recourse to various modes of mutual assistance in the global arena may undermine the international

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<sup>230</sup> *See id.* at 255-56.

<sup>231</sup> *See id.*

<sup>232</sup> *See id.*

<sup>233</sup> *See id.* at 252.

<sup>234</sup> *See id.*

<sup>235</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 252.

<sup>236</sup> *See id.* at 253.

<sup>237</sup> *See id.* at 253-55.

<sup>238</sup> *See id.*

<sup>239</sup> *See id.* at 255.

<sup>240</sup> *See generally* Weiner, *supra* note 50.

community's ability to hold States "legally responsible for assisting other [S]tates in the commission of wrongful acts."<sup>241</sup>

Weiner has also observed that increasing collaboration among authoritarian governance regimes may reinforce international law's apparent "preference for incumbent regimes experiencing insurrectionary or secessionist political violence."<sup>242</sup> This is an ambiguous international legal domain.<sup>243</sup> International law supports the self-determination of peoples but offers no direction on the permissibility of activities designed to organize a new government or State.<sup>244</sup> The lack of legal direction thus creates a window of opportunity for authoritarian governance regimes to tilt the balance in favor of non-intervention.<sup>245</sup>

Moreover, the rise of authoritarian governance regimes is likely to shrink the space within which the Security Council might be in a position to "authorize forcible action . . . to halt humanitarian abuses perpetrated by a government against its own people."<sup>246</sup> With China and Russia commanding veto power as permanent members of the Security Council and adopting the stance that violations of human rights do not amount to "threats to international peace and security,"<sup>247</sup> the scope to collectively safeguard crimes against humanity, ethnic cleansing, genocide, and war crimes is bound to be materially reduced.<sup>248</sup>

The picture regarding the use of force may turn bleaker as well.<sup>249</sup> Authoritarian governance regimes may be less inclined to adhere to the principles of international humanitarian law ("IHL"),<sup>250</sup> as recently witnessed during Russia's invasion of Ukraine.<sup>251</sup> When waging war, such regimes face fewer and softer normative impediments at home, and hence less pressure to exercise restraint than their genuinely democratic counterparts.<sup>252</sup> By the same token, because IHL is rooted in

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<sup>241</sup> *Id.* at 222.

<sup>242</sup> *Id.* at 223.

<sup>243</sup> *See id.*

<sup>244</sup> *See id.*

<sup>245</sup> *See id.*

<sup>246</sup> Weiner, *supra* note 50, at 223.

<sup>247</sup> *Id.*

<sup>248</sup> *See id.*

<sup>249</sup> *See id.* at 223-24.

<sup>250</sup> *See id.*

<sup>251</sup> *See generally* U.S. INST. OF PEACE, *supra* note 150; *What Is a War Crime and Could Putin Be Prosecuted over Ukraine?*, BBC (July 20, 2023), <https://www.bbc.com/news/world-60690688> [<https://perma.cc/KE8Y-SP4V>].

<sup>252</sup> *See* Weiner, *supra* note 50, at 223.

the principle of reciprocity, authoritarian governance regimes may be reluctant to comply with IHL rules in situations where they confront non-State armed units that do not possess belligerent rights.<sup>253</sup> To complicate matters, should the authoritarian leaders lose, authoritarian governance regimes elsewhere might be unwilling to hold them accountable for violations of IHL and even provide them with sanctuary, resulting in dilution of international legal norms applicable in such circumstances.<sup>254</sup>

Karen Alter has made a valuable contribution to authoritarian international law discourse by conceptualizing the relationship between the international and domestic sides of the legal edifice in an analytically rigorous fashion.<sup>255</sup> Her key argument is that liberal-democratic governance regimes have found it advantageous to embed international law into their domestic legal systems.<sup>256</sup> As a consequence, in such political environments, “national judges, administrators, police, etc., may see following [international law] as a domestic rule of law obligation.”<sup>257</sup> In fact, “from the domestic perspective, the relevant [S]tate actor may not even be aware that a statute they are implementing was created because of an international legal obligation.”<sup>258</sup>

There are compelling legal, practical, and political reasons for States to pursue this strategy.<sup>259</sup> From a legal angle, low-barrier international law integration is a convenient way to overcome impediments to the implementation of international law in a multi-level governance regime with several semi-autonomous decision-making centers.<sup>260</sup> In such an institutional milieu, the international obligation may be regarded as most binding at the top of the nationwide organizational pyramid and least binding at its bottom layers.<sup>261</sup> The larger the country and the more decentralized the governance regime, obstacles to uniform international law integration become greater; solidifying domestic connection to international systems at all levels is a possible tactic for circumventing this issue.<sup>262</sup>

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<sup>253</sup> *See id.*

<sup>254</sup> *See id.* at 223-24.

<sup>255</sup> *See generally* Alter, *supra* note 48.

<sup>256</sup> *See id.* at 32-34.

<sup>257</sup> *Id.* at 34.

<sup>258</sup> *Id.*

<sup>259</sup> *See id.* at 32-34.

<sup>260</sup> *See id.* at 32-33.

<sup>261</sup> *See* Alter, *supra* note 48.

<sup>262</sup> *See id.*

Insofar as the practical aspects are concerned, domestic policy-makers who assume an international legal obligation may opt to link the external and internal elements of the overall legal equation in order to create obstacles to departure from international agreements by their successors.<sup>263</sup> For instance, “[p]oliticians who want to lock in a set of political changes often do so by directly linking national law or constitutional provisions to an international agreement, where changing the international law-on-the-books is much more difficult.”<sup>264</sup> In such circumstances, to overlook external responsibilities may be challenging “because doing so involves changing many rules, and because a range of domestic actors might have made decisions based on the legal commitment.”<sup>265</sup>

From a political standpoint, embedding international law into the domestic legal order may serve the purpose of connecting international actors to domestic compliance bodies and thus enhancing State adherence to international law.<sup>266</sup> If softer forms of pressure prove ineffective, raising a legal claim might be a viable option where appropriate.<sup>267</sup> In that case, the availability of pertinent domestic legislation reinforced by the external-internal linkage might make it easier to prevail in a legal suit against non-compliant entities because of a potential breach of domestic as well as international legal provisions.<sup>268</sup>

There are two major pathways for turning these aspirations into reality.<sup>269</sup> The least complicated but most demanding pathway, which overlooks specific national interests—such as in the E.U. regulatory context—entails the automatic incorporation of international law into the domestic legal fabric without having to overcome implementation hurdles.<sup>270</sup> The second route is potentially less smooth but wider in the sense of furnishing States with greater room for maneuver.<sup>271</sup> In this case, the ratification of an international agreement requires the passage of implementing legislation and the failure to act accordingly is deemed a violation of the agreement.<sup>272</sup>

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<sup>263</sup> *See id.* at 33.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *See id.* at 34.

<sup>267</sup> *See Alter, supra* note 48.

<sup>268</sup> *See id.*

<sup>269</sup> *See id.* at 35-37.

<sup>270</sup> *See id.* at 35-36.

<sup>271</sup> *See id.* at 36-37.

<sup>272</sup> *See id.*

The reverse process involves the dis-embedding of international law, whether entirely or partially.<sup>273</sup> If pursued openly and unambiguously, this dis-embedding is not necessarily an appealing strategy for authoritarian rulers who wish to be perceived as legitimate and trustworthy international actors and who wish for their States to be seen as following sound governance principles and the rule of law.<sup>274</sup> A more attractive technique is to find workarounds enabling them to both minimize reputational damage and shield the regime from possible threats to its stability.<sup>275</sup>

Examples include declaring a state of emergency (i.e., an exception) or asserting that pivotal domestic legal instruments such as constitutions militate against the application of any conflicting international law or the rendering of judgment by an international court.<sup>276</sup> Replacing or revising a constitution that offers insufficient protection via a referendum or a similar populist mechanism is another option available to authoritarian rulers in such circumstances.<sup>277</sup> If nothing else yields satisfactory results, a regime may simply choose outright defiance as a means of inspiring its supporters through a demonstration of strength, thus bolstering its standing at home,<sup>278</sup> and it may take steps to bring about international legal paralysis.<sup>279</sup>

While liberal-democratic governance regimes are also capable of self-serving actions entailing the dis-embedding of international law and reliance on workarounds, there is a difference in terms of ambit, frequency, and ramifications.<sup>280</sup> As Alter has noted, “when we are talking about the dismantling of democracy and the entrenchment of authoritarian rule,”<sup>281</sup> to claim that almost all States do it to some extent is misleading and unproductive.<sup>282</sup> After all, “chimpanzees and humans share over ninety-seven percent of the same DNA. Yet the differences, however numerically small, are huge in impact.”<sup>283</sup> Alter aptly opines that by minimizing resort to dis-embedding strategies and

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<sup>273</sup> See Alter, *supra* note 48, at 37-39.

<sup>274</sup> See *id.* at 39.

<sup>275</sup> See *id.* at 39-40.

<sup>276</sup> See *id.* at 40.

<sup>277</sup> See *id.*

<sup>278</sup> See *id.*

<sup>279</sup> See Alter, *supra* note 48, at 41.

<sup>280</sup> See *id.* at 42-44.

<sup>281</sup> *Id.* at 44.

<sup>282</sup> See *id.*

<sup>283</sup> *Id.*

workarounds, liberal-democratic governance regimes may form a bulwark against the entrenchment of authoritarian international law.<sup>284</sup>

Academics acknowledge that authoritarian governance regimes constitute a heterogeneous category,<sup>285</sup> but they are seldom treated as such. As Ginsburg highlights in his seminal article, such regimes “are incredibly diverse as a group.”<sup>286</sup> They include “royal dictatorships, military juntas, and people’s republics.”<sup>287</sup> Moreover, there is a group of States like Hungary, Poland, Turkey, and Venezuela, which hold elections, but in which elected leaders or narrow networks of leaders enfeeble representative institutions and undermine “the rule of law and core rights of speech and association.”<sup>288</sup> To complicate matters, several of “today’s populist regimes hover near the boundary.”<sup>289</sup> Nevertheless, Ginsburg has chosen, and appropriately so given his specific objectives, to overlook such vital differences.<sup>290</sup>

A notable exception in this respect is the perspective offered by Trang (Mae) Nguyen.<sup>291</sup> She has drawn a useful distinction between primary and secondary authoritarian States. Primary States include large and powerful countries, such as China and Russia, and the secondary States consist of small countries with limited capabilities, a source of fragility which is preventing them from having a palpable impact on international events, unless they join forces and operate as a cohesive group.<sup>292</sup> Nguyen has identified Cambodia and Vietnam as examples of such States and has insightfully explored the dilemmas they confront in trying to position themselves vis-à-vis the great powers in the international legal space.<sup>293</sup>

Nguyen has pointed out that Cambodia and Vietnam are primarily concerned with regime survival and that the likelihood of their goals materializing is a function of the international power structure.<sup>294</sup> Unipolarity on the international stage circumscribes their room

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<sup>284</sup> *See id.* at 42-43.

<sup>285</sup> *See, e.g.,* Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 224.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*; *see also* 2021 Country Reports on Human Rights Practices: Poland, U.S. DEP’T OF STATE, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/poland/> [<https://perma.cc/W4LX-9AX6>] (last visited Apr. 15, 2023).

<sup>289</sup> Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 224.

<sup>290</sup> *See id.*

<sup>291</sup> *See generally* Nguyen, *supra* note 48.

<sup>292</sup> *See generally id.*

<sup>293</sup> *See generally id.*

<sup>294</sup> *See generally id.*

for maneuver and multipolarity enhances it.<sup>295</sup> In a currently bipolar international setting, the optimal strategy for secondary authoritarian States is one of hedging, that is, minimizing excessive dependence on either of the two opposing political blocs.<sup>296</sup> Nguyen demonstrates the validity of this hypothesis (although less successfully in the case of Cambodia than Vietnam) by examining the behavior of these two Southeast Asian nations with respect to the South China Sea dispute and China's Belt-and-Road Initiative ("BRI").<sup>297</sup>

The implications for authoritarian international law are, however, uncertain. On the one hand, the findings demonstrate that, even in a region where China is or may aspire to become the dominant power, its authoritarian neighbors may not side with it unreservedly and may actively engage in fruitful exchanges with the liberal-democratic camp spearheaded by the United States. On the other hand, decisively shifting away from authoritarian regimes such as China might prove costly for secondary authoritarian States because of the potential erosion of independence and the pronounced liberal-democratic dispositions exhibited by most members of the U.S.-led coalition. There are doubtlessly additional factors at play here, which merit closer scrutiny by socio-legal scholars.

#### IV. TOWARD AN EXPANDED RESEARCH AGENDA

##### *A. The Case for Venturing Further*

Advancing the concept of authoritarian international law as an analytical vehicle with practical ramifications, methodically delineating it, and amply highlighting its broad relevance has unquestionably contributed to international legal knowledge, international relations theory, and the conduct of foreign policy. The fact that, quantitatively speaking, the literature on the subject remains limited should be attributed to the fact that the concept was introduced merely a few years ago and introduced so authoritatively that the scope for adding further value and internalizing the ideational blueprint was relatively modest.

Scholars express doubts about generalizing across space and time with respect to the international behavior of authoritarian governance regimes, as well as their liberal-democratic counterparts.<sup>298</sup> They

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<sup>295</sup> See generally *id.*

<sup>296</sup> See generally *id.*

<sup>297</sup> See Nguyen, *supra* note 48, at 238-41.

<sup>298</sup> See Hurd, *supra* note 48, at 233-34; see generally Nien-chung Chang-Liao, *China's New Foreign Policy Under Xi Jinping*, 12 *ASIAN SEC.* 82 (2016); Susan L.

contend that these regimes consist of a diverse group whose external leanings and internal structures change over time.<sup>299</sup> Diversity and changeability, however, should not prevent analytical generalization. It is apparent that, in its current form, the concept of authoritarian international law is both situation-dependent and time-dependent, but those factors should not detract from its theoretical and empirical value.

In recent years, for instance, scholars have given considerable attention to the emergence of seemingly new types of authoritarianism, such as the competitive<sup>300</sup> and democratic<sup>301</sup> variants. The former features political competition that is manipulated by the regime without an electoral or representative component.<sup>302</sup> Democratic authoritarianism constitutes an advanced form of its competitive counterpart and is characterized by a more elaborate presence of representative institutions designed to bolster the regime's strength "through five main mechanisms: signaling, information acquisition, patronage distribution, monitoring, and credible commitment."<sup>303</sup> The implications of such institutional divergences are worth considering without necessarily abandoning the search for commonalities across the authoritarian governance spectrum.

Where appropriate, the differences among the subcategories of an overarching category may be attributed to the influence exerted by an intervening variable and therefore must be duly factored into an

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Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, 29 J. DEMOCRACY 22 (2018); Yipin Wu, *Dynamics of Policy Change in Authoritarian Countries: A Multiple-Case Study on China*, 40 J. PUB. POL'Y 236 (2020); GIOVANNI BALDONI, A THEORETICAL ANALYSIS OF RUSSIA'S FOREIGN POLICY: CHANGES UNDER VLADIMIR PUTIN (2016), <https://www.e-ir.info/pdf/65770> [<https://perma.cc/24E6-EPKL>]; Joelson Maodina Anere, *A New Era of Chinese Foreign Policy*, DIPLO, <https://www.diplomacy.edu/blog/a-new-era-of-chinese-foreign-policy/> [<https://perma.cc/H6R7-CKCW>] (Sept. 15, 2022); KEVIN M.F. PLATT, EDMUND J. & LOUISE W. KAHN, RUSSIAN DOMESTIC POLITICS: THE COMING SPIRAL OF REPRESSION (2022), <https://global.upenn.edu/sites/default/files/perry-world-house/plattukrainethoughtpiece.pdf> [<https://perma.cc/MVA3-D2SY>].

<sup>299</sup> See Hurd, *supra* note 48; see also Chang-Liao, *supra* note 298; Shirk, *supra* note 298; Wu, *supra* note 298; BALDONI, *supra* note 298; Anere, *supra* note 298; PLATT ET AL., *supra* note 298.

<sup>300</sup> See generally Steven Levitsky & Lucan Ahmad Way, *The New Competitive Authoritarianism*, 31 J. DEMOCRACY 51 (2020).

<sup>301</sup> See generally Dawn Brancati, *Democratic Authoritarianism: Origins and Effects*, 17 ANN. REV. POL. SCI. 313 (2014).

<sup>302</sup> *Id.* at 313.

<sup>303</sup> *Id.*

explanatory scheme.<sup>304</sup> A relevant example refers to the relationship between leadership style, regime type, and foreign policy crisis behavior.<sup>305</sup> The prevailing view posited that democracies behave peacefully toward all regimes, although this view is challenged by researchers who argue that this attitude is merely exhibited vis-à-vis fellow democracies.<sup>306</sup> Jonathan Keller injects greater clarity into the picture by adding leadership style (constraint respecters versus constraint challengers) as an intervening/mediating variable to the analytical structure.<sup>307</sup> This enabled him to determine that “democracies led by constraint respecters stand out as extraordinarily pacific in their crisis responses, while democracies led by constraint challengers and autocracies led by both types of leaders are demonstrably more aggressive.”<sup>308</sup>

This finding suggests that a new line of inquiry centered on the dichotomy between governance regimes headed by constraint respecters and those led by constraint challengers may be more fruitful than inquiries traditionally focused on the distinction between democratic and authoritarian polities. That, however, is not the case. As Susan Hyde and Elizabeth Saunders have shown, the domestic constraints that democratic and authoritarian rulers face are fundamentally different, which crucially affect their *modus operandi* domestically and abroad.<sup>309</sup>

Literature on the relationship between governance regime type and international behavior, including in the legal arena, is substantial, still growing, and still incomplete.<sup>310</sup> That said, the weight of the empirical evidence strongly supports the time-honored assumptions regarding international behavior.<sup>311</sup> It also supports the proposition that the dichotomy between democratic and authoritarian polities cannot

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<sup>304</sup> See generally Jonathan W. Keller, *Leadership Style, Regime Type and Foreign Policy Crisis Behavior: A Contingent Monadic Peace?*, 49 INT’L STUD. Q. 205 (2005).

<sup>305</sup> See generally *id.*

<sup>306</sup> See generally *id.*

<sup>307</sup> See generally *id.*

<sup>308</sup> *Id.* at 205.

<sup>309</sup> See generally Susan H. Hyde & Elizabeth N. Saunders, *Recapturing Regime Type in International Relations: Leaders, Institutions and Agency*, 74 INT’L ORG. 363 (2020).

<sup>310</sup> See generally Joe D. Hagan, *Regime Type, Foreign Policy, and International Relations*, OXFORD RSCH. ENCYCLOPEDIAS: INT’L STUD., Oct. 30, 2019, <https://oxfordre.com/internationalstudies/display/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-415>.

<sup>311</sup> See generally *id.*

be omitted as a pivotal causal variable, with its significance varying according to issue area and the presence or absence of additional intervening and contextual variables.<sup>312</sup>

One must also recognize the pseudo-democratic nature of an international legal system that often purports to be purely democratic.<sup>313</sup> Specifically, Shirley Scott has claimed, with some justification, that one should not overlook the non-democratic international practices of liberal-democratic powers or the non-democratic elements of international law that they are responsible for creating and nurturing.<sup>314</sup>

Though valid, such attempts to minimize the differences between various forms of “imperial” and similar practices are not entirely productive. There is a basic distinction between colonialism and imperialism, and both have had multiple manifestations.<sup>315</sup> Chinese<sup>316</sup> and

<sup>312</sup> See generally *id.*

<sup>313</sup> See generally Scott, *supra* note 48.

<sup>314</sup> See generally *id.*

<sup>315</sup> See generally Krishan Kumar, *Colony and Empire, Colonialism and Imperialism: A Meaningful Distinction?*, 63 COMP. STUD. SOC'Y HIST. 280 (2021); Janet Jacobs, *4 Types of Imperialism (Everything to Know)*, COLD WIRE, <https://www.thecoldwire.com/4-types-of-imperialism/> [<https://perma.cc/4SL2-E92U>] (Oct. 15, 2020); Benedikt Stuchtey, *Colonialism and Imperialism, 1450-1950*, EUR. HISTORY ONLINE, <http://ieg-ego.eu/en/threads/backgrounds/colonialism-and-imperialism> [<https://perma.cc/B7QX-M4N4>] (Jan. 24, 2011).

<sup>316</sup> See generally *China Marches on to Militarism and Totalitarianism*, ANI NEWS (Mar. 2, 2021, 10:33 AM), <https://www.aninews.in/news/world/asia/china-marches-on-to-militarism-and-totalitarianism20210302103301/> [<https://perma.cc/DZM6-DHQH>]; Peter Chan, *Is China Imperialist?*, ROMANIA NEWS (Jan. 14, 2022), <https://chinaworker.info/en/2022/01/14/33092/> [<https://perma.cc/SC5K-33K3>]; Brahma Chellaney, *China's Expansionism Enters Dangerous Phase*, THE HILL (Aug. 25, 2020, 7:00 PM), <https://thehill.com/opinion/international/513574-chinas-expansionism-enters-dangerous-phase/> [<https://perma.cc/XY6D-6T6M>]; Brahma Chellaney, *China's Expansionism Creeps Along as West Distracted by Ukraine*, NIKKEI ASIA (Oct. 7, 2022 5:00 PM), <https://asia.nikkei.com/Opinion/China-s-expansionism-creeps-along-as-West-distracted-by-Ukraine> [<https://perma.cc/PA3F-ENXV>]; Rush Doshi, *The Long Game: China's Grand Strategy to Displace American Order*, BROOKINGS INSTITUTE (Aug. 2, 2021), <https://www.brookings.edu/essay/the-long-game-chinas-grand-strategy-to-displace-american-order> [<https://perma.cc/SY67-RHMF>]; Magnus Fiskesjo, *The Legacy of Chinese Empires Beyond “the West and the Rest”*, CONTEMP. POSTCOLONIAL ASIA, <https://www.asianstudies.org/wp-content/uploads/the-legacy-of-the-chinese-empires-beyond-the-west-and-the-rest.pdf> [<https://perma.cc/7TSP-9USE>] (last visited Apr. 15, 2023); Minqi Li, *China: Imperialism or Semi-Periphery?*, MONTHLY REV. (Jan. 1, 2021), <https://monthlyreview.org/2021/07/01/china-imperialism-or-semi-periphery/> [<https://perma.cc/87SL-PUD2>]; Pierre Rousset, *China: A New Imperialism Emerges*, INT'L VIEWPOINTS (Nov. 18, 2021), <https://internationalviewpoint.org/spip.php?article7401> [<https://perma.cc/QYC9-BZA7>]; Simon Tisdall, *In China's New Age of Imperialism, Xi Jinping Gives Thumps Down to Democracy*, THE GUARDIAN (Dec. 12, 2021, 7:00 AM),

Russian<sup>317</sup> imperialism have unique features,<sup>318</sup> which can be distinguished from American “over-stretch” abroad.<sup>319</sup> Moreover, mainstream international law possesses a wide range of democratic elements and non-democratic ones, though the former outweigh the latter.<sup>320</sup>

Care should also be exercised when engaging in analogical reasoning<sup>321</sup> and drawing—in the process—historical lessons progressing linearly over several periods. Linear explanations may be misleading

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<https://www.theguardian.com/commentisfree/2021/dec/12/xi-jinping-china-beijing-new-age-of-imperialism> [<https://perma.cc/2JQP-TLB5>].

<sup>317</sup> See generally Murat Aslan, *The Urge to Kill to Survive: Russia's Imperialist Expansionism Explained*, POL. TODAY (Mar. 18, 2022) <https://politicstoday.org/russia-putin-imperialist-expansionism-ukraine-war/> [<https://perma.cc/RQ7D-BHD8>]; *How the World Forgot about Russian Imperialism*, FOREIGN POL'Y (Mar. 12, 2023, 10:00 AM) <https://foreignpolicy.com/2023/03/12/russia-imperialism-empire-ukraine-history-war/> [<https://perma.cc/EU7H-U5G9>]; Julia Gurganus & Eugene Rumer, *Russia's Global Ambitions in Perspective*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 20, 2019), <https://carnegieendowment.org/2019/02/20/russia-s-global-ambitions-in-perspective-pub-78067> [<https://perma.cc/2KCY-HFR4>]; Lynne Hartnett, *The Long History of Russian Imperialism Shaping Putin's War*, WASH. POST (Mar. 2 2022, 6:00 AM), <https://www.washingtonpost.com/outlook/2022/03/02/long-history-russian-imperialism-shaping-putins-war/> [<https://perma.cc/MXY4-SJ4C>]; Botakoz Kassymbekova, *How Western Scholars Overlooked Russian Imperialism*, AL JAZEERA (Jan. 24, 2023), <https://www.aljazeera.com/opinions/2023/1/24/how-western-scholars-overlooked-russian-imperialism> [<https://perma.cc/7ATD-5HX3>]; Dominique Moïsi, *Vladimir Putin, On the Way to New Russian Imperialism?*, INSTITUT MONTAIGNE, <https://www.institutmontaigne.org/en/expressions/vladimir-putin-way-new-russian-imperialism> [<https://perma.cc/BY28-2SRK>] (last visited Apr. 15, 2023).

<sup>318</sup> See Scott, *supra* note 48, at 242.

<sup>319</sup> See generally ADAM BURNS, *AMERICAN IMPERIALISM: THE TERRITORIAL EXPANSION OF THE UNITED STATES, 1783-2013* (2017); STEPHEN KINZER, *THE TRUE FLAG: THEODORE ROOSEVELT, MARK TWAIN AND THE BIRTH OF AMERICAN EMPIRE* (2017); JAMES PETRAS, *U.S. IMPERIALISM: THE CHANGING DYNAMICS OF GLOBAL POWER* (2020).

<sup>320</sup> See generally GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW*, *supra* note 48; DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000); Ronald Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20 (2001); Jan Klabbers, Doreen Lustig, André Nollkaemper, Sarah Nouwen, Michal Saliternik & Joseph H. H. Weiler, *International Law and Democracy Revisited: Introduction to a Symposium*, 32 EUR. J. INT'L L. 9 (2021); Jan Wouters, Bart De Meester & Cedric Ryngaert, *Democracy and International Law*, LEUVEN INT'L RSCH. GRP. ON INT'L AGREEMENTS & DEV. (June 2004), <https://iuristebi.files.wordpress.com/2012/12/democracy-and-international-law.pdf> [<https://perma.cc/TJK6-ER5K>].

<sup>321</sup> See WENDELIN KÜPERS, *Analogical Reasoning*, in *ENCYCLOPEDIA OF THE SCIENCES OF LEARNING* 222 (Norbert M. Seel ed., 2012).

because they overlook historical discontinuities.<sup>322</sup> It may plausibly be contended that Chinese<sup>323</sup> and Russian<sup>324</sup> “imperialisms” have taken a reversionary turn in recent years, whereas the American<sup>325</sup> variant has progressed, or at least seems to have lost some of its hard edges. Students of authoritarian international law do not aspire to produce timeless analytical surveys, but are primarily focused on the present and the immediate future. The conceptual edifice that they construct should be observed from that angle.

This conceptual edifice rests on a solid foundation, because the differences between authoritarian international law and its democratic counterpart are clearly and compellingly outlined and the researchers engaged in this project have delved broadly and deeply into the subject. The implications of the state of affairs observed have also been dispassionately and methodically assessed. Moreover, relevant developments in this domain apparently continue to be closely monitored by Tom Ginsburg, the legal scholar who placed authoritarian international law on the academic agenda.<sup>326</sup> However, there seems to be a need to explore some of the raised and omitted issues further. These key issues are identified and organized within two categorical sets below.

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<sup>322</sup> See generally LYNN FENDLER, *Critical Powers of Historical Framing: Continuity and Representation*, in FOLDS OF PAST, PRESENT AND FUTURE 59 (Sarah Van Ruyskensvelde, Geert Thyssen, Frederik Herman, Angelo Van Gorp & Pieter Verstraete eds, 2023).

<sup>323</sup> See generally Chellaney, *supra* note 316; Rousset, *supra* note 316; Tisdall, *supra* note 316.

<sup>324</sup> See generally Moisi, *supra* note 317.

<sup>325</sup> See generally Seung-Whan Choi & Patrick James, *Why Does the United States Intervene Abroad? Democracy, Human Rights Violations, and Terrorism*, 60 J. CONFL. RESOL. 899 (2016); Michael Crowley & Edward Wong, *Ukraine War Ushers ‘New Era’ for U.S. Abroad*, N.Y. TIMES (Mar. 12, 2022) <https://www.nytimes.com/2022/03/12/us/politics/biden-ukraine-diplomacy.html> [<https://perma.cc/P6KA-6QUS>]; James Dobbins & Gabrielle Tarini, *The Lost Generation in American Foreign Policy*, RAND CORP. (Sep. 15 2020), <https://www.rand.org/blog/2020/09/the-lost-generation-in-american-foreign-policy.html> [<https://perma.cc/B66V-CZKY>]; Lane Kenworthy, *US Military Intervention Abroad*, LANE KENWORTHY (May 2023), <https://lanekenworthy.net/us-military-intervention-abroad/> [<https://perma.cc/Z2MZ-8GZG>]; Ben Rhodes, *This Is No Time for Passive Patriotism*, THE ATLANTIC (Jan. 28, 2022) <https://www.theatlantic.com/ideas/archive/2022/01/no-time-passive-patriotism/621377/> [<https://perma.cc/X4B3-9BUF>].

<sup>326</sup> See generally Tom Ginsburg, *Democracies and International Law: An Update*, 23 CHI. J. INT'L L. 1 (2022).

### B. Relative Regime Resilience

First, the tension between international law's democratic and authoritarian elements and its uncertain future should be examined from a two-dimensional instead of a unidimensional perspective, highlighting both sides' capabilities and vulnerabilities rather than merely from a defensive democratic perspective. Thus far, figuratively speaking, authoritarian forces have been depicted as unrestrained colossuses that are making significant inroads into the international legal realm while their democratic counterparts have been portrayed as hastily retreating cowards. Scholarship gives the impression that little prevents this pattern from continuing for the foreseeable future.

Democratic governance regimes' putative ills are well-known. Those ills that are most often singled out include influence of special interests,<sup>327</sup> institutional fragmentation,<sup>328</sup> ideological polarization,<sup>329</sup> logrolling,<sup>330</sup> policy paralysis,<sup>331</sup> and short-termism.<sup>332</sup> The corrosive

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<sup>327</sup> See generally Maira Martini, *Influence of Interest Groups on Policy-Making*, CHR. MICHELSEN INST. (June 12, 2012), <https://www.u4.no/publications/influence-of-interest-groups-on-policy-making.pdf>.

<sup>328</sup> See generally Tom Christensen & Per Laegreid, *The Fragmented State—The Challenges of Combining Efficiency, Institutional Norms and Democracy*, 14 GESTIÓN Y POLÍTICA PÚBLICA 557 (2005); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 576 (2014); JARED SONNICKSEN, TENSIONS OF AMERICAN FEDERAL DEMOCRACY: FRAGMENTATION OF THE STATE (2022).

<sup>329</sup> See generally Richard H. Pildes, *Democracies in the Age of Fragmentation*, 110 CAL. L. REV. 2051 (2022); John O. McGinnis, *Our Fragmented Democracy*, LAW & LIBERTY (Mar. 10, 2022), <https://lawliberty.org/our-fragmenting-democracy/> [<https://perma.cc/F274-DN3Q>]; Richard H. Pildes, *Political Fragmentation in Democracies of the West*, <https://www.law.nyu.edu/sites/default/files/Colloquium%20Paper%20Political%20Fragmentation%209-22%28Autosaved%29.pdf> [<https://perma.cc/H83C-UXJD>] (last visited Apr. 15, 2023).

<sup>330</sup> See Chris Edwards, *Why the Federal Government Fails*, 777 POL'Y ANALYST 19-21 (2015).

<sup>331</sup> See generally Eric Kuhn, *On Democratic Paralysis*, CT. MIRROR, <https://ctmirror.org/2021/10/20/on-democratic-paralysis/> [<https://perma.cc/FKA7-9KPG>] (last visited Apr. 15, 2023); A. Michael Spence, *Why Are Governments Paralyzed?*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/blog/why-are-governments-paralyzed/> [<https://perma.cc/JXG4-F2C2>] (last visited Apr. 15, 2023).

<sup>332</sup> See generally Michael K. MacKenzie, *Institutional Design and Sources of Short-Termism*, in INSTITUTIONS FOR FUTURE GENERATIONS 24-46 (Íñigo González-Ricoy & Axel Gosseries eds., 2016); Jorgen Randers, *The Tyranny of the Short-Term: Why Democracy Struggles with Issues like Climate Change*, DEMOCRATIC AUDIT Sept. 2, 2015), <https://www.democraticaudit.com/2015/02/09/the-tyranny-of-the-short-term-why-democracy-struggles-with-issues-like-climate-change/> [<https://perma.cc/BE3Y-Z4GW>]; Bryden Spurling, *The Peril of Modern Democracy: Short-Term Thinking in a Long-Term World*, U.S. STUD. CTR. (Feb. 2, 2020),

influence of those ills is believed to be reflected in divergences between the national interest and narrowly framed group preferences, impediments to formulating and implementing coherent and consistent policies, policy oscillations and reversals, inability to see beyond the current and next electoral cycle horizons, parochialism and tribalism, populist surges, and strategic inertia.<sup>333</sup> Foreign policy may be less constrained by these factors than its domestic counterpart, but it is by no means unique to domestic policy machinery.<sup>334</sup>

These manifestations of fragility are thought to have contributed to democratic backsliding, although there have also been external factors at work.<sup>335</sup> The contraction of democracy—a venerable institution at the heart of the liberal world order—has been deemed of such paramount importance that Thomas Carothers and Benjamin Press have opined that “democratic backsliding has become a defining trend in global politics.”<sup>336</sup> These two authors have suggested that this worrisome phenomenon has not exhibited structural-functional homogeneity but has taken three distinct institutional configurations: grievance-fueled illiberalism, opportunistic authoritarianism, and entrenched-interest revanchism.<sup>337</sup>

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<https://www.ussc.edu.au/analysis/the-peril-of-modern-democracy-short-term-thinking-in-a-long-term-world> [<https://perma.cc/55JK-G72D>].

<sup>333</sup> See generally Abraham Diskin, Hannah Diskin & Reuven Y. Hazan, *Why Democracies Collapse: The Reasons for Democratic Failure and Success*, 26 INT'L POL. SCI. REV. 291 (2005); Larry Diamond, *Democracy's Arc: From Resurgent to Imperiled*, 33 J. DEMOCRACY 163 (2022); Samuel Issacharoff, 85 U. CHI. L. REV. 485 (2018); William A. Galson & Elaine Kamarck, *Is Democracy Failing and Putting Our Economic System at Risk?*, BROOKINGS INST. (Jan. 4, 2022), <https://www.brookings.edu/research/is-democracy-failing-and-putting-our-economic-system-at-risk/> [<https://perma.cc/FU2T-DT34>]; D. Eric Schansberg, *The Limits of Democracy*, CATO INST. (2021), <https://www.cato.org/cato-journal/fall-2021/limits-democracy> [<https://perma.cc/9B38-S2T3>].

<sup>334</sup> See generally James D. Fearon, *Domestic Politics, Foreign Policy, and Theories of International Relations*, 1 ANN. REV. POL. SCI. 289 (1998); BRETT ASHLEY LEEDS & MICHAELA MATTES, DOMESTIC INTERESTS, DEMOCRACY, AND FOREIGN POLICY CHANGE (2022); Zaara Zain Hussain, *The Effects of Domestic Politics on Foreign Policy Decision Making*, E-INT'L REL. (Feb. 7, 2011), <https://www.e-ir.info/2011/02/07/the-effect-of-domestic-politics-on-foreign-policy-decision-making/> [<https://perma.cc/N7RY-VQMZ>].

<sup>335</sup> See generally Thomas Carothers & Benjamin Press, *Understanding and Responding to Global Democratic Backsliding*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 20, 2022), <https://carnegieendowment.org/2022/10/20/understanding-and-responding-to-global-democratic-backsliding-pub-88173> [<https://perma.cc/6TC6-H3N7>].

<sup>336</sup> *Id.*

<sup>337</sup> See *id.*; see generally Nancy Bermeo, *On Democratic Backsliding*, 27 J. DEMOCRACY 5 (2016).

Such potentially serious frailties and setbacks notwithstanding, genuine liberal-democratic regimes are remarkably resilient.<sup>338</sup> Robert Lieberman, Suzanne Mettler, and Kenneth Roberts equate this fundamental strength and notable persistence with “a system’s capacity to withstand a major shock such as the onset of extreme polarization and to continue to perform the basic functions of democratic governance—electoral accountability, representation, effective restraints on excessive or concentrated power, and collective decision-making.”<sup>339</sup> According to Lieberman, Mettler, and Roberts, this structural-functional constellation owes its vigor and endurance to its institutional and behavioral makeup.<sup>340</sup> On the institutional side, its vigor is due to the preservation of checks and balances and limits on centralized power, which are at the heart of the liberal-democratic vision.<sup>341</sup> The democratic regime is marked by a substantial measure of horizontal and vertical accountability, whereby its institutions are horizontally accountable to each other, with independent watchdogs performing vital oversight functions, and vertically accountable to the public and their principals.<sup>342</sup>

On the behavioral side, fragmentation at grassroots level may detract from the effectiveness of vertical accountability but the centripetal forces operating in the liberal-democratic arena may be able to counter it in the long run.<sup>343</sup> Significant centripetal democratic forces include the dismissal of extreme views; political leaders’ ability to galvanize voters under all-encompassing appeals; the existence of “cross-cutting rather than reinforcing cleavages among the electorate”; and the maintenance of democracy’s general aura of legitimacy.<sup>344</sup>

Democratic resilience is not a foregone conclusion. Vanessa Boese and her coresearchers systematically explore political regime transformations along a continuum encompassing closed autocracy, electoral autocracy, electoral democracy, and liberal democracy.<sup>345</sup>

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<sup>338</sup> See generally DEMOCRATIC RESILIENCE: CAN THE UNITED STATES WITHSTAND RISING POLARIZATION? (Robert C. Lieberman, Suzanne Mettler & Kenneth M. Roberts eds., 2021) [hereinafter DEMOCRATIC RESILIENCE]; Vanessa A. Boese, Amanda B. Edgell, Sebastian Hellmeier, Seraphine F. Maerz & Staffan I. Lindberg, *How Democracies Prevail: Democratic Resilience as a Two-Stage Process*, 28 DEMOCRATIZATION 885 (2021).

<sup>339</sup> DEMOCRATIC RESILIENCE, *supra* note 338, at 7; *see id.* at 3-34.

<sup>340</sup> *See id.* at 7-12.

<sup>341</sup> *See id.* at 7-10.

<sup>342</sup> *See id.*

<sup>343</sup> *See id.* at 10-12.

<sup>344</sup> DEMOCRATIC RESILIENCE, *supra* note 338, at 12.

<sup>345</sup> See generally Boese et al., *supra* note 338.

Regrettably, Boese identifies a considerable number of democratic breakdowns, with a surprising acceleration since the end of the Cold War.<sup>346</sup> Yet, Boese and her scientific collaborators have also uncovered that enduring liberal-democracies, for the most part living up to their proclaimed ideals (e.g., meaningful judicial independence), have exhibited a high degree of resilience.<sup>347</sup> These liberal-democracies are the well-equipped governance regimes that are at the frontline of conflicts with the major authoritarian political systems.

Robust liberal-democratic governance regimes are also advantaged by their self-awareness, self-criticism, and willingness to challenge the status quo. Voluminous literature details liberal-democratic regimes' flaws and their strategies to rectify those flaws.<sup>348</sup> Diagnosis, prognosis, and recommendations for remedial steps may not be readily converted into concrete plans of action because of liberal-democratic governance regimes' inherently decentralized, pluralist nature. Policy learning in liberal-democratic regimes, however, takes place on a reasonable scale and the prospect of profound socio-political change is periodically embraced in such institutional milieus,<sup>349</sup> which is not necessarily true of differently constructed governance regimes.<sup>350</sup>

Such advantages notwithstanding, authoritarian governance regimes are not easy to dislodge.<sup>351</sup> Within an elaborate set-theory framework, Seraphine Maerz has demonstrated how—by employing the familiar tools of cooptation, legitimation, and repression—these regimes are able to prolong their existence.<sup>352</sup> Indeed, according to

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<sup>346</sup> *Id.* at 893.

<sup>347</sup> *Id.* at 896.

<sup>348</sup> See, e.g., Alan M. Jacobs, *Policy Making for the Long Term in Advanced Democracies*, 19 ANN. REV. POL. SCI. 433 (2016); *What's Gone Wrong with Democracy*, THE ECONOMIST (Feb. 27, 2014), <https://www.economist.com/essay/2014/02/27/whats-gone-wrong-with-democracy?> [<https://perma.cc/8JR2-7VSD>].

<sup>349</sup> See, e.g., *Theory of Change: 2022-2025*, DEMOCRATIC SOCIETY (Jan. 2022), [https://www.demsoc.org/uploads/store/mediaupload/663/file/Theory\\_of\\_Change.pdf](https://www.demsoc.org/uploads/store/mediaupload/663/file/Theory_of_Change.pdf) [<https://perma.cc/R5SH-FHNR>]; Bruce Jennings, Michael K. Gusmano, Gregory E. Kaebnick, Carolyn P. Neuhaus & Mildred Z. Solomon, *Civic Learning for a Democracy in Crisis*, 51 HASTINGS CTR. REP. S1, S2-S4 (2021).

<sup>350</sup> See generally Jan-Erik Lönngqvist, Zsolt Péter Szabó, & László Kelemen, “*The New State that We Are Building*”: *Authoritarianism and System Justification in an Illiberal Democracy*, 12 FRONTIER PSYCHOL. 1 (2021); Memorandum from Steven Heydemann for the Transnational Diffusion, Cooperation and Learning in the Middle East and North Africa Workshop (June 8-9, 2016) (on file with author).

<sup>351</sup> See generally Seraphine F. Maerz, *The Many Faces of Authoritarian Persistence: A Set-Theory Perspective on the Survival of Authoritarian Regimes*, 55 GOV'T & OPPOSITION 64 (2018).

<sup>352</sup> See generally *id.*

Maerz, they are becoming increasingly crafty and are employing progressively more sophisticated methods to prevent their implosion.<sup>353</sup> One example of this change is “[t]he shift in some authoritarian regimes from merely censoring internet freedom to proactively using social media and distorting the online public sphere with fabricated posts, trolls and electronic propaganda.”<sup>354</sup>

Nevertheless, authoritarian governance regimes are not immune to sweeping change and often succumb to it.<sup>355</sup> Andrea Kendall-Taylor and Erica Franz detail the many authoritarian regimes that have disintegrated since the 1950s, noting that they were not displaced by being voted out of office—rather, they were removed by regime insiders (e.g., through a coup) or ousted by regime outsiders (e.g., via bottom-up mass mobilization culminating in a revolt or civil war).<sup>356</sup> The frequency of the former type of regime change has declined and the frequency of the latter type has increase.<sup>357</sup>

Though it often paved the way for the emergence of hybrid regimes rather than democratic ones, the shift from insiders-driven to outsiders-driven political change is significant.<sup>358</sup> The shift highlights the vulnerabilities of closed and coercion-based authoritarian governance regimes in the current socio-political climate<sup>359</sup> and the overall switch from hard-core authoritarianism to democracy and semi-democracy.<sup>360</sup> Students of authoritarian international law cannot overlook the fact that “[w]hen leaders are toppled by revolts, democracy follows almost 45 percent of the time.”<sup>361</sup> Successful coups, on the other hand, “have historically ushered in democracy only 10 percent of the time.”<sup>362</sup>

Although authoritarian governance regimes occupy large swathes of the global landscape, they tend to exhibit a wide range of critical weaknesses, such as cognitive dissonance, corruption, feeble leadership, inadequate feedback, incoherence, inefficiency, information

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<sup>353</sup> *See id.* at 82.

<sup>354</sup> *Id.* at 83; *see also* Christopher Walker, *The Authoritarian Threat: The Hijacking of “Soft Power”*, 27 J. DEMOCRACY 49 (2016).

<sup>355</sup> *See generally* Andrea Kendall-Taylor & Erica Frantz, *How Autocracies Fall*, 37 WASH. Q. 35 (2014).

<sup>356</sup> *See id.* at 36-39.

<sup>357</sup> *See id.*

<sup>358</sup> *See id.* at 36-43.

<sup>359</sup> *See id.* at 36-39.

<sup>360</sup> *See id.*

<sup>361</sup> Kendall-Taylor & Frantz, *supra* note 355 at 42.

<sup>362</sup> *Id.*

uncertainty, innovation deficit, intelligence and counterintelligence failure, insecurity, maladaptation, malperformance, mistrust, perceptual distortion, poor accountability, shallow legitimacy, societal churn, socio-political alienation, and structural rigidity.<sup>363</sup> This may hamper their ability to pursue an authoritarian agenda in the global arena.<sup>364</sup>

These weaknesses are particularly true of authoritarian governance regimes that rely on personalist rule, currently witnessed in

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<sup>363</sup> See generally Bruce Gilley, *The Limits of Authoritarian Resilience*, 14 J. DEMOCRACY 18 (2003); Blake W. Mobley & Carl Anthony Wege, *Evading Secret Police: Counterintelligence Vulnerabilities in Authoritarian States*, 36 INT'L J. INTEL. COUNTERINTEL. 179 (2021); Tuong Vu, *Strengths and Vulnerabilities of Surviving Asian Communist Regimes from a Historical, Regional, and Holistic Approach*, 55 COMMUNIST & POST-COMMUNIST STUD. 8 (2022); Thomas Carothers & David Wong, *Authoritarian Weaknesses and the Pandemic*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Aug. 11, 2020), <https://carnegieendowment.org/2020/08/11/authoritarian-weaknesses-and-pandemic-pub-82452> [<https://perma.cc/7HS6-XRF5>]; Kendra Cherry, *What Is Autocratic Leadership?: Characteristics, Strengths, and Weaknesses of Autocratic Leadership*, VERY WELL MIND, <https://www.verywellmind.com/what-is-autocratic-leadership-2795314> [<https://perma.cc/N9G4-K4NT>] (27, 2023); Simon Commander, Saul Estrin & Thamashi de Silva, *Political Systems Affect Innovation*, LONDON SCH. ECON. & POL. SCI. (Apr. 5, 2022), <https://blogs.lse.ac.uk/businessreview/2022/04/05/political-systems-affect-innovation/> [<https://perma.cc/XWJ5-HNBK>]; Charles Dunst, *Covid Reveals the Weakness of China's Authoritarianism*, BOSTON GLOBE <https://www.bostonglobe.com/2022/03/24/opinion/covid-reveals-weakness-chinas-authoritarianism/> [<https://perma.cc/7W2S-58M3>] (Mar. 24, 2022, 3:00 AM); Francis Fukuyama, *More Proof that This Really Is the End of History*, THE ATLANTIC (Oct. 17, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/francis-fukuyama-still-end-history/671761/> [<https://perma.cc/SVK7-VX4D>]; Andreas Schedler, *The Uncertainty of Authoritarian Regimes*, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICA A.C. (Nov. 2012), <http://repositorio-digital.cide.edu/bitstream/handle/11651/1358/112412.pdf> [<https://perma.cc/FM8P-Y63Z>]; Richard Thomas, *Russian Failures a Sign of "Authoritarian Vulnerabilities"*, ARMY TECH. (Oct. 4, 2022), <https://www.army-technology.com/features/russian-failures-a-sign-of-authoritarian-vulnerabilities/> [<https://perma.cc/BDH3-MFC6>]; U.S. NAT'L INTEL. COUNCIL, *Authoritarian Regimes Will Face Vulnerabilities*, KNOWLEDGE ON WORLD WIDE WEB (2021), <https://knowww.eu/nodes/6076e1e89bf9530008945edf> [<https://perma.cc/KKB4-N8LQ>]; Natalie Yeung, *Authoritarian Leadership: Advantages and Disadvantages*, PROFOLUS (Dec. 10, 2020), <https://www.profolus.com/topics/authoritarian-leadership-advantages-and-disadvantages/> [<https://perma.cc/R38N-RTFY>].

<sup>364</sup> See generally Lucan Ahmad Way, *The Authoritarian Threat: Weaknesses of Autocracy Promotion*, 27 J. DEMOCRACY 64 (2016).

China<sup>365</sup> and Russia.<sup>366</sup> Such concentration of power often sets the stage for State failure, characterized by the inability “to perform the two fundamental functions of the sovereign nation-[S]tate in the modern world system: [projecting] authority over . . . territory and . . . peoples and [protecting] national boundaries.”<sup>367</sup> Worse still, it may precipitate the State’s complete collapse, featuring even greater disruption and more severe consequences for residents and third parties whose welfare depends on the State’s orderly functioning.<sup>368</sup>

Milan Svolik has shown that a common symptom of personalist rule is its tendency to make calamitous decisions.<sup>369</sup> Some of the examples that he offers include Joseph Stalin’s gross strategic errors

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<sup>365</sup> See generally Shirk, *supra* note 298; Yuen Yuen Ang, *How Resilient Is the Chinese Communist Party?*, 33 J. DEMOCRACY 77 (2022); Doug Bandow, *The Problem Posed by Xi Jinping’s Personal Rule for Chinese Policymaking*, CATO INST. (Mar. 22, 2022), <https://www.cato.org/commentary/problem-posed-xi-jinpings-personal-rule-chinese-policymaking> [<https://perma.cc/HGV9-9R5T>]; Erica Frantz & Andrea Kendall-Taylor, *The Move to One-Man Rule in China and Beyond*, LOWY INST.: THE INTERPRETER (Oct. 30, 2017) <https://www.lowyinstitute.org/the-interpreter/move-one-man-rule-china-beyond> [<https://perma.cc/R5BU-PRKF>]; Sue-Lin Wong, *Xi Jinping: The Making of a Dictator*, THE ECONOMIST: 1843 MAGAZINE (Oct. 19, 2022) <https://www.economist.com/1843/2022/10/19/xi-jinping-the-making-of-a-dictator> [<https://perma.cc/J2F3-BJF7>].

<sup>366</sup> See generally Frantz & Kendall-Taylor, *supra* note 365; ALEXANDER BATURO & JOHAN A. ELKINK, *THE NEW KREMINOLOGY: UNDERSTANDING REGIME PERSONALIZATION IN RUSSIA* (2021); Erica Frantz, Carisa Nietzsche, Joseph Wright & Andrea Kendall-Taylor, *How Personalist Politics Is Changing Democracies*, 32 J. DEMOCRACY 94 (2021); Celeste A. Wallander, *How the Putin Regime Really Works*, 32 J. DEMOCRACY 178 (2021); Olga Malinova, *Legitimizing Putin’s Regime: The Transformations of the Narrative of Russia’s Post-Soviet Transition*, 55 COMMUNIST & POST-COMMUNIST STUD. 52 (2022); Torrey Taussig, *The Rise of Personalist Rule*, BROOKINGS INST. (Mar. 23, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/03/23/the-rise-of-personalist-rule/> [<https://perma.cc/FT8U-XHUX>].

<sup>367</sup> Naazneen H. Barma, *Failed State*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/failed-state> [<https://perma.cc/2T6J-XQR5>] (Sept. 19, 2023); see generally ROBERT I. ROTBERG, *WHEN STATES FAIL: CAUSES AND CONSEQUENCES* (2004); Jay Ulfelder, *Contentious Collective Action and the Breakdown of Authoritarian Regimes*, 26 INT’L POL. SCI. REV. 311 (2005); Jeff D. Colgan & Jessica L.P. Weeks, *Revolution, Personalist Dictatorship, and International Conflict*, 69 INT’L ORG. 163 (2015).

<sup>368</sup> See generally ROTBERG, *supra* note 367; ABEL ESCRIBA-FOLCH & JOSEPH WRIGHT, *FOREIGN PRESSURE AND THE POLITICS OF AUTOCRATIC SURVIVAL* (2015); Barbara Geddes, *Authoritarian Breakdown: Empirical Test of a Game-Theoretic Argument* (Sept. 1999) (paper prepared for presentation at the annual meeting of the American Political Science Association) [https://eppam.weebly.com/uploads/5/5/6/2/5562069/authoritarianbreakdown\\_geddes.pdf](https://eppam.weebly.com/uploads/5/5/6/2/5562069/authoritarianbreakdown_geddes.pdf) [<https://perma.cc/8X2G-YXVW>].

<sup>369</sup> See SVOLIK, *supra* note 195, at 197-98.

during the early phase of the Second World War, Mao Zedong's ill-fated attempt to lift China out of poverty overnight by launching the Great Leap Forward, and Saddam Hussein's opposition to diplomatic efforts to resolve the crisis that escalated into the 1990-1991 Gulf War.<sup>370</sup> China's glaring mismanagement of the COVID-19 challenge and Russia's horrendous Ukraine misadventure probably belong in this category. After all, as Svulik has observed, "[u]nder established autocracy, no one dares to point out that the emperor has no clothes."<sup>371</sup> One may counter that China and Russia, two militarily and politically formidable superpowers are not short of "clothes." Whether the economic foundations are robust enough to sustain perennial mismanagement in the long run, however, is debatable. Russia's economic predicament is particularly grave; its small, overextended, and unbalanced economy is smaller and less healthy than generally assumed.<sup>372</sup> Russia's enormous demographic woes<sup>373</sup> and the heavy fallout from the Ukraine War<sup>374</sup> are likely to curtail its long-term authoritarian ambitions.

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<sup>370</sup> *See id.*

<sup>371</sup> *Id.* at 198.

<sup>372</sup> *See generally* Boris Grozovski, *Russia's Economy at the End of 2022: Deeper Troubles*, WILSON CTR. (Nov. 23, 2022), <https://www.wilsoncenter.org/blog-post/russias-economy-end-2022-deeper-troubles> [<https://perma.cc/6AKB-CLXL>]; Chris Isidore, *Russia's Economy Is Surprisingly Tiny. Here Is Why It Matters So Much to You*, CNN BUS. (Feb. 26, 2022), <https://edition.cnn.com/2022/02/26/economy/russia-economic-power-sanctions/index.html> [<https://perma.cc/539N-ZYXV>]; James Dobbins, Raphael S. Cohen, Nathan Chandler, Bryan Frederick, Edward Geist, Paul DeLuca, Forrest E. Morgan, Howard J. Shatz & Brent Williams, *Overextending and Unbalancing Russia: Assessing the Impact of Cost-Imposing Options*, RAND CORP. (2019), [https://www.rand.org/pubs/research\\_briefs/RB10014.html](https://www.rand.org/pubs/research_briefs/RB10014.html) [<https://perma.cc/M2EL-BRZ5>]; Miroslav Singer, *Most Read 2022: Russia's Economy May Be Much Smaller than Reported*, OMFIF (Dec. 27, 2022), <https://www.omfif.org/2022/12/most-read-2022-russias-economy-may-be-much-smaller-than-reported/> [<https://perma.cc/7XFT-BSX9>].

<sup>373</sup> *See generally* David M. Adamson & Julie DaVanzo, *Russia's Demographic 'Crisis': How Real Is It?*, RAND CORP. (July 1997), [https://www.rand.org/pubs/issue\\_papers/IP162.html](https://www.rand.org/pubs/issue_papers/IP162.html) [<https://perma.cc/6GH3-DWZU>]; *Russia's Population Nightmare Is Going to Get Even Worse*, THE ECONOMIST (Mar. 4, 2023), <https://www.economist.com/europe/2023/03/04/russias-population-nightmare-is-going-to-get-even-worse> [<https://perma.cc/6RPT-XY5H>].

<sup>374</sup> *See generally* Stuart Anderson, *Russia's Economic Prospects Have Gone from Bad to Terrible*, FORBES (Dec. 5, 2022, 12:10 AM), <https://www.forbes.com/sites/stuartanderson/2022/12/05/russias-economic-prospects-have-gone-from-bad-to-terrible/> [<https://perma.cc/P7AP-WYLT>]; Boris Grozovski, *Putin's War Costs: Changing Russia's Economy*, WILSON CTR.: THE RUSSIA FILE (Jan. 17, 2023), <https://www.wilsoncenter.org/blog-post/putins-war-costs-changing-russias-economy> [<https://perma.cc/8W2K-DQWL>]; Julia Horowitz, *IMF Chief: Ukraine War Will Have 'Devastating' Consequences for Russia's*

The Chinese picture is more complicated. On the one hand, China's economy has expanded tremendously during the reform era and its size has doubled virtually every decade since it implemented the Open-Door Policy in 1978.<sup>375</sup> It is now an upper middle-income country whose high-income status is within reach.<sup>376</sup> The Chinese economy is estimated to be the second-largest national economy in the world, a remarkable accomplishment for a country that was impoverished and in disarray approximately four decades ago.<sup>377</sup> The country boasts a well-oiled export engine, a solid infrastructure, and a dynamic low-cost manufacturing sector.<sup>378</sup> Millions of Chinese people were lifted out of poverty as the country industrialized and urbanized.<sup>379</sup>

On the other hand, official figures do not tell the whole story. There is no entirely reliable and uniformly accepted estimate of China's economic health. Considered together, however, accounting anomalies (resulting from the subnational government's habit of routinely investing in low-return and nonproductive projects);<sup>380</sup> data extracted from less-distorted trading-partner source;<sup>381</sup> and the upward trajectory of value-added tax (VAT) revenues<sup>382</sup> portray an economy that is not as large and vibrant as commonly believed.

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*Economy*, CNN BUS., <https://edition.cnn.com/2023/03/08/economy/imf-kristalina-georgieva-interview/index.html> [<https://perma.cc/7Z8D-KGTQ>] (Mar. 8, 2023, 7:27 AM); Alexandra Prokopenko, *The Cost of War: Russian Economy Faces a Decade of Regress*, CARNEGIE POLITIKA (Dec. 19, 2022), <https://carnegieendowment.org/politika/88664> [<https://perma.cc/EA8B-DYBL>]; Elliott Smith, *Russia Faces 'Economic Oblivion' Despite Claims of Short-Term Resilience*, *Economists Say*, CNBC (Aug. 2, 2022, 9:22 AM) <https://www.cnbc.com/2022/08/02/russia-faces-economic-oblivion-despite-short-term-resilience.html> [<https://perma.cc/D8Q5-92YE>].

<sup>375</sup> See *The World Bank in China: Overview*, WORLD BANK, <https://www.worldbank.org/en/country/china/overview> [<https://perma.cc/9F4P-MFWP>] (Apr. 20, 2023).

<sup>376</sup> See *id.*

<sup>377</sup> See Caleb Silver, *The Top 25 Economies in the World*, INVESTOPEDIA, <https://www.investopedia.com/insights/worlds-top-economies/> [<https://perma.cc/TD9L-B6W9>] (Sept. 20, 2022).

<sup>378</sup> See *The World Bank in China: Overview*, *supra* note 375.

<sup>379</sup> See *id.*

<sup>380</sup> See Michael Pettis, *What Is GDP in China?*, CARNEGIE ENDOWMENT (Jan. 16, 2019), <https://carnegieendowment.org/chinafinancialmarkets/78138> [<https://perma.cc/V3EQ-K2FZ>].

<sup>381</sup> See John G. Fernald, Eric Hsu & Mark M. Spiegel, *Is China Fudging its GDP Figures? Evidence from Trading Partner Data* (Fed. Reserve Bank of S.F., Working Paper No. 19, 2019), <https://www.frbsf.org/economic-research/publications/working-papers/2019/19/> [<https://perma.cc/KX2D-ZM9F>].

<sup>382</sup> See Wei Chen, Xilu Chen, Chang-Tai Hsieh & Zheng (Michael) Song, *A Forensic Examination of China's National Accounts*, (Nat'l Bureau of Econ. Rsch.,

By the same token, the quality of the more-than-four-decade-long expansionary wave may have been less expansive than believed. Notably, vast infusions of capital have been necessary to sustain this expansion, leading to low productivity growth<sup>383</sup> and mounting private and public debt.<sup>384</sup> This low productivity growth may be attributed to the deficiencies of the authoritarian governance regime, which is “marked by fuzzy property rights, institutional inertia, lack of genuine economic freedom, persistent and steadily increasing dependence on State capitalism, and rule of law punctured by reversions to rule of man (as distinct from rule of law).”<sup>385</sup> Other deflationary forces such as an aging population, a declining birth rate, and a decrease in working-age population have also contributed to this state of affairs.<sup>386</sup>

To complicate matters, though the World Bank indicates that reform-era China has lifted 800 million people out of poverty, another 40% of the population has not escaped this condition.<sup>387</sup> Scott Rozelle

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Working Paper No. 25754, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3372058](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372058) [<https://perma.cc/R5JL-B8NG>]; see also Nicholas R. Lardy & Tianlei Huang, *Is China's Growth Overstated? Don't Rely on Lower Tax Revenue Growth as Evidence*, PETERSON INST. FOR INT'L ECON. (Nov. 25, 2019, 11:45 AM), <https://www.piie.com/blogs/china-economic-watch/chinas-growth-overstated-dont-rely-lower-tax-revenue-growth-evidence> [<https://perma.cc/J7G8-68U8>].

<sup>383</sup> See generally J. Stewart Black & Allen J. Morrison, *Can China Avoid a Growth Crisis?*, HARV. BUS. REV.: MAGAZINE, (Sept.-Oct. 2019), <https://hbr.org/2019/09/can-china-avoid-a-growth-crisis> [<https://perma.cc/CP27-MVNL>]; Loren Brandt, John Litwack, Elitza Mileva, Luhang Wang, Yifan Zhang & Luan Zhao, *China's Productivity Slowdown and Growth Potential* (World Bank Grp., Working Paper No. 9298, 2020), <https://documents1.worldbank.org/curated/en/839401593007627879/pdf/Chinas-Productivity-Slowdown-and-Future-Growth-Potential.pdf> [<https://perma.cc/S5VU-5RVW>]; John West, *China, a Low-Productivity Superpower*, LOWY INST.: THE INTERPRETER (Oct. 31, 2019), <https://www.lowyinstitute.org/the-interpreter/china-low-productivity-superpower> [<https://perma.cc/F7VQ-C8JN>].

<sup>384</sup> See generally *Does China Face a Looming Debt Crisis?*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 7, 2017), <https://www.csis.org/analysis/does-china-face-looming-debt-crisis> [<https://perma.cc/GMM4-N48M>]; Milton Ezrati, *China's Overwhelming Debt Problem Points to Still Deeper Problems*, FORBES (Jan. 16, 2023, 9:22 AM) <https://www.forbes.com/sites/miltonezrati/2023/01/16/chinas-overwhelming-debt-burden-points-to-still-deeper-problems/?sh=433d78694433> [<https://perma.cc/8YAP-UK36>].

<sup>385</sup> Miron Mushkat & Roda Mushkat, *Reconfiguring the Linkage Between Corruption and Economic Development in China: Legitimate Concerns Not Alleviated*, 32 S. CAL. INTERDISC. L.J. 73, 108 (2022).

<sup>386</sup> See Black & Morrison, *supra* note 383.

<sup>387</sup> See *Lifting 800 Million People Out of Poverty—New Report Looks at Lessons from China's Experience*, WORLD BANK (Apr. 1, 2022), <https://www.worldbank.org/en/news/press-release/2022/04/01/lifting-800-million->

and Natalie Hell paint an even bleaker picture.<sup>388</sup> The difficulties stemming from lingering economic deprivation and inequality<sup>389</sup> are compounded by manifestations of financial instability (especially present in the real estate sector),<sup>390</sup> persistence of severe environmental degradation,<sup>391</sup> and grassroots disaffection reflected in China's low world-happiness ranking.<sup>392</sup> Dealing with such challenges may divert attention and resources from external authoritarian designs to potentially disruptive internal strains.

Michael Pettis opines that such constraints may limit the Chinese economy's expansion rate to 2-3% per year.<sup>393</sup> Other economic commentators are less sanguine and believe that China will experience a Japanese-style prolonged stagnation.<sup>394</sup> Pettis offers five different scenarios, some featuring a steeper growth trajectory, but acknowledges that, realistically, the government's options are limited.<sup>395</sup> As matters stand, Chinese leadership appears to be leaning toward a centralized top-down-driven macro-management model<sup>396</sup> and an inward-looking orientation,<sup>397</sup> which bodes ill for economic dynamism and restricts authoritarian-style maneuvering in the global arena.

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people-out-of-poverty-new-report-looks-at-lessons-from-china-s-experience [https://perma.cc/25ZY-EEZB].

<sup>388</sup> See generally SCOTT ROZELLE & NATALIE HELL, *INVISIBLE CHINA: HOW THE URBAN-RURAL DIVIDE THREATENS CHINA'S RISE* (2022).

<sup>389</sup> See generally Sonali Jain-Chandra, Niny Khor, Rui Mano, Johanna Schauer, Philippe Wingender & Juzhong Zhuang, *Inequality in China—Trends, Drivers and Policy Remedies* (Int'l Monetary Fund, Working Paper No. 127, 2018).

<sup>390</sup> See generally Evelyn Cheng, *China's Real Estate Crisis Isn't Over Yet, IMF Says*, CNBC (Feb. 3, 2023, 4:00 AM), <https://www.cnbc.com/2023/02/03/chinas-real-estate-crisis-isnt-over-yet-imf-says.html> [https://perma.cc/KAU6-42FZ].

<sup>391</sup> See generally ELIZABETH C. ECONOMY, *THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE* (2d ed., 2019).

<sup>392</sup> See *World Happiness, Trust and Social Connections in Times of Crisis*, WORLD HAPPINESS REP. (Mar. 20, 2023), <https://worldhappiness.report/ed/2023/world-happiness-trust-and-social-connections-in-times-of-crisis/#ranking-of-happiness-2020-2022> [https://perma.cc/XZY2-JLYK].

<sup>393</sup> See generally Michael Pettis, *Can China's Long-Term Growth Rate Exceed 2-3 Percent?*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Apr. 6, 2023), <https://carnegieendowment.org/chinafinancialmarkets/89466> [https://perma.cc/57LA-PR7R].

<sup>394</sup> See, e.g., Harry Robertson & Andy Kiersz, *3 Reasons China in the 2020s Could Start Slowing Dramatically like Japan in the 1990s*, INSIDER (Oct. 16, 2021, 6:10 AM), <https://www.businessinsider.com/china-actually-like-japan-1990s-japanification-economy-evergrande-debt-ageing-2021-10> [https://perma.cc/6EM6-KN8K].

<sup>395</sup> See Pettis, *supra* note 393.

<sup>396</sup> See generally Milton Ezrati, *Paper Tiger*, CITY J. (Aug. 2, 2022), <https://www.city-journal.org/article/paper-tiger> [https://perma.cc/T9PH-29KZ].

<sup>397</sup> See generally Kerry Brown, *The Challenges of an Inward-Looking China on the World Stage*, THE NAT'L NEWS (Oct. 1, 2022),

*C. Authoritarian Goals, Strategies, and Their Effectiveness or Lack Thereof*

The future of major authoritarian regimes such as China and Russia is yet to be determined and, whatever the capabilities and vulnerabilities on both sides, a considerable degree of uncertainty is attached to the conceivable outcomes. Continuous monitoring of unfolding trends and in-depth research into the forces shaping them ought to produce a clearer picture. Besides capabilities and constraints, attention and resources should be directed toward a second set of issues that merit further examination by international legal scholars: authoritarian governance regimes' fundamental goals, strategies implemented by those regimes to fulfill their agendas, and the effectiveness of those strategies. These research issues are ripe for exploration now, but they have implications that extend beyond the short-term time horizon.

Concerning authoritarian regimes' fundamental goals, one may ask whether they are broad or narrow (i.e., aimed at global expansion of the authoritarian governance blueprint, confined to a particular territorial domain, or perhaps merely geared toward promoting specific national interests) and offensive or defensive. The prevailing view is that, although it is a matter of degree and the situation is fluid, the two primary authoritarian governance regimes differ in the sense that China's fundamental goals are broader and more defensively inclined than Russia's.<sup>398</sup>

It is argued that China seeks global domination—without firmly establishing to what extent, partial or total—and that this is reflected in its behavior in the global arena.<sup>399</sup> Evidence for this proposition includes China's support for international legal machinery that is aligned with its fundamental goals and underlying norms, notable examples including the International Monetary Fund (“IMF”), the World

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<https://www.thenationalnews.com/weekend/2022/10/21/the-challenges-of-an-inward-looking-china-on-the-world-stage/> [<https://perma.cc/4HNT-J6KH>]; David Lubin, *Why an Inward-Looking China Is Bad News for the World Economy*, CHATHAM HOUSE (Oct. 17, 2022), <https://www.chathamhouse.org/2022/10/why-more-inward-looking-china-bad-news-world-economy> [<https://perma.cc/WPT2-H8B2>].

<sup>398</sup> See generally Yun Sun, *China's Strategic Assessment of Russia: More Complicated Than You Think*, WAR ON THE ROCKS (Mar. 4, 2022), <https://warontherocks.com/2022/03/chinas-strategic-assessment-of-russia-more-complicated-than-you-think/> [<https://perma.cc/U76H-CUDC>].

<sup>399</sup> See generally *China's Approach to Global Governance*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/china-global-governance/> [<https://perma.cc/2YQV-64YT>] (last visited Apr. 15, 2023).

Bank, and the Paris Agreement on climate change.<sup>400</sup> At the same time, in areas, such as self-evidently human rights, where China's fundamental goals and underlying norms are at variance with those of liberal-democratic governance regimes, China actively endeavors to enfeeble existing and evolving international legal machinery.<sup>401</sup> China closely cooperates with other leading authoritarian governance regimes, such as Russia, in achieving these goals.<sup>402</sup>

As to the question of regimes' defensive posture versus offensive thrust, China fluctuates but tends to more closely align with the defensive end. Ghazala Yasmin Jalil asserts the prevailing view, which is that "far from being an aggressive, hegemonic and revisionist [S]tate, China is a status quo power that aims to preserve its position in the international system rather than upset it."<sup>403</sup> According to Jalil, a dissection of China's conduct reveals that its behavior in the global arena exhibits patterns consistent with "defensive rather than offensive realism."<sup>404</sup>

Russia's fundamental goals are generally regarded as more narrowly focused than China's.<sup>405</sup> The muscle-flexing and opportunism displayed under Vladimir Putin has injected some doubt into the academic and policy discourse on the subject, but expert opinion continues to lean toward the position that Russia's external ambitions remain limited to "its claim to a sphere of privileged interests around its periphery, which was staked out in the wake of the 2008 war with Georgia, and its refusal to accept the post-Cold War security order in Europe, decisively affirmed with the 2014 annexation of Crimea."<sup>406</sup>

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<sup>400</sup> See *id.*; David Dollar, *Reluctant Player: China's Approach to International Economic Institutions*, BROOKINGS INST. (Sept. 14, 2020), <https://www.brookings.edu/articles/reluctant-player-chinas-approach-to-international-economic-institutions/> [perma.cc/T4BK-4DNR].

<sup>401</sup> See *China's Approach to Global Governance*, *supra* note 399.

<sup>402</sup> See *id.*

<sup>403</sup> See generally Ghazala Yasmin Jalil, *China's Rise: Offensive or Defensive Realism*, 39 STRATEGIC STUD. 41, 41 (2019).

<sup>404</sup> *Id.* at 41; see also Tang Shiping, *From Offensive to Defensive Realism: A Social Evolutionary Interpretation of China Security Strategy*, in CHINA'S ASCENT: POWER, SECURITY, AND THE FUTURE OF INTERNATIONAL POLITICS 141-62 (Robert S. Ross & Zhu Feng eds., 2015).

<sup>405</sup> See generally Julia Gurganus & Eugene Rumer, *Russia's Global Ambitions in Perspective*, CARNEGIE ENDOWMENT INT'L PEACE (Feb. 20, 2019), <https://carnegieendowment.org/2019/02/20/russia-s-global-ambitions-in-perspective-pub-78067> [https://perma.cc/RX4P-884A].

<sup>406</sup> *Id.*

In pursuit of its fundamental goals, Putin's Russia is said to be proceeding offensively rather than defensively.<sup>407</sup> Russia's offensive posture means that there is virtually no scope for bargaining for domestic or foreign policy concessions if Russia's progress toward those goals is blocked and if it perceives external risks to its security.<sup>408</sup> Russia employs KGB-style methods to ensure that it does not deviate from its goals.<sup>409</sup> Those methods consist of a mixture of soft persuasion, naked intimidation, and the use of force, both at home and abroad.<sup>410</sup> At home, "[s]ince 2012, Putin has focused on dealing with the Russian opposition—co-opting some, and intimidating others by using the Russian legal and penal systems as a blunt instrument of repression."<sup>411</sup> And "[a]broad, Putin has used similar methods to mitigate the blow-back to Russia from a series of external shocks, including in the Middle East with the Arab Spring and its aftermath, in the global economy from the Eurozone crisis, and now in Ukraine."<sup>412</sup>

Two components of this analytical account have been called into question. Long before Xi Jinping's ascent to power and the radical changes in China's domestic and foreign policy direction that followed, Andrew Scobell averred that China's behavior in the global arena is marked by both defensive and offensive moves.<sup>413</sup> A growing number of researchers have placed an increasingly heavy emphasis on the offensive element of this equation,<sup>414</sup> including Hal Brands, who

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<sup>407</sup> See generally Fiona Hill, *Mr. Putin and the Art of the Offensive Defense: Approaches to Foreign Policy (Part Two)*, BROOKINGS INST. (Mar. 16, 2016), <https://www.brookings.edu/articles/mr-putin-and-the-art-of-the-offensive-defense-approaches-to-foreign-policy-part-two/> [perma.cc/E64F-AE72].

<sup>408</sup> See *id.*

<sup>409</sup> See *id.*

<sup>410</sup> See *id.*

<sup>411</sup> *Id.*

<sup>412</sup> Hill, *supra* note 407.

<sup>413</sup> See ANDREW SOBELL, CHINA'S USE OF MILITARY FORCE: BEYOND THE GREAT WALL AND THE LONG MARCH 141-62 (2003).

<sup>414</sup> See generally Adam Araszkiwicz, *The Concept of China's Peaceful Rise and Offensive Realism*, 14 PRZEGLĄD STRATEGICZNY 297 (2021); Hal Brands, *China Is a Declining Power—and That's the Problem*, FP (Sept. 24, 2021, 4:16 PM), <https://foreignpolicy.com/2021/09/24/china-great-power-united-states/> [https://perma.cc/Y8K6-282E]; James F. Paradise, *Soft Power on the Defensive: Contradictions of Chinese Foreign Policy*, ASIA RSCH. INST. (Mar. 23, 2016), <https://theasiadialogue.com/2016/03/23/soft-power-on-the-defensive-the-contradictions-of-chinese-foreign-policy/> [https://perma.cc/D67J-64FM]; Dennis Roy, *China Is Playing Offense, Not Defense, in the South China Sea*, THE DIPLOMAT (June 4, 2015), <https://thediplomat.com/2015/06/china-is-playing-offense-not-defense-in-the-south-china-sea/> [https://perma.cc/864P-FEH2]; J.D. Work, *China Flaunts Its Offensive Cyber Power*, WAR ON THE ROCKS (Oct. 22, 2021),

interestingly attributes China's aggressive posture to its declining power.<sup>415</sup> Military muscle-flexing in the Asia-Pacific region is often invoked to substantiate this view.<sup>416</sup>

The notions that Russia is inherently a regional rather than a global power and that Putin is a strategic aberration have been similarly oppugned.<sup>417</sup> As Julia Gurganus and Erik Rumer point out, Russia's efforts to build a network of relationships and exert influence in Africa, Latin America, the Middle East, and elsewhere is not a departure from its previous foreign policy.<sup>418</sup> To the contrary, this pattern has been observed for over two decades and has historical roots that extend much further. Indeed, its origins may be traced to the U.S.S.R. and preceding phases of Russian history.<sup>419</sup> Indeed, the "[c]ore components of the Russian toolkit have withstood the test of time, and there is every indication that Moscow will continue to rely on them, even in a post-Putin era."<sup>420</sup>

Both countries have employed a mixture of soft and hard power in pursuit of their global ambitions.<sup>421</sup> Scholars generally believe that China, slowly shedding Deng Xiaoping's legacy of low-profile

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<https://warontherocks.com/2021/10/china-flaunts-its-offensive-cyber-power/> [<https://perma.cc/DYY7-N9GF>]; Baohui Zhang, *Xi Jinping, 'Pragmatic' Offensive Realism and China's Rise*, GLOBALASIA (June 2014), [https://www.globalasia.org/v9no2/feature/xi-jinping-pragmatic-offensive-realism-and-chinas-rise\\_baohui-zhang](https://www.globalasia.org/v9no2/feature/xi-jinping-pragmatic-offensive-realism-and-chinas-rise_baohui-zhang) [<https://perma.cc/77VA-U6AU>].

<sup>415</sup> See generally Brands, *supra* note 414; see also Bonny Lin & Joel Wuthrow, *The Weakness Behind China's Strong Façade*, FOREIGN AFFAIRS (Nov. 10, 2022), <https://www.foreignaffairs.com/china/weakness-behind-china-strong-facade> [<https://perma.cc/6AZR-3BSB>].

<sup>416</sup> See generally *China's Military Aggression in the Asia-Pacific Region*, U.S. DEP'T OF STATE, <https://2017-2021.state.gov/chinas-military-aggression-in-the-indo-pacific-region/index.html> [<https://perma.cc/9JBE-74CA>] (last visited Apr. 15, 2023).

<sup>417</sup> See generally Gurganus & Rumer, *supra* note 405.

<sup>418</sup> See *id.*

<sup>419</sup> See *id.*

<sup>420</sup> *Id.*

<sup>421</sup> See generally Jacques deLisle, *Foreign Policy by Other Means: Hard Power, Soft Power, and China's Turn to Political Warfare to Influence the United States*, 64 ORBIS 174 (2020); Marcin Gornikiwicz, Radoslaw Bielawski & Marzena Walkowiak, *Russian "Hard Power" and "Soft Power" in Influencing Central and Eastern European Countries on the Example of Poland in the COVID-19 Era*, 23 EUR. RSCH. STUD. J. 18 (2020).

incrementalism<sup>422</sup> and equipped with far more resources,<sup>423</sup> is biased toward the soft side,<sup>424</sup> while Russia is predisposed to heavy-handed arm-twisting.<sup>425</sup> China's more flexible and versatile approach and much greater capabilities<sup>426</sup> have been reflected in the initiation of massive global and regional projects such as the Belt-and-Road Initiative ("BRI")<sup>427</sup> and the Asian Infrastructure Investment Bank ("AIIB").<sup>428</sup> However, in recent years, China and Russia have significantly hardened their stance vis-à-vis their political opponents and those States caught in between.<sup>429</sup>

As noted by Tom Ginsburg, China and Russia use existing international institutions and create new ones to advance their authoritarian governance agendas and specific interests.<sup>430</sup> China's use of international instruments and the impact of those actions has been accorded

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<sup>422</sup> See generally Yongnian Zheng, *Political Incrementalism: Political Lessons from China's 20 Years of Reform*, 20 *THIRD WORLD Q.* 1157 (1999); Philip Pogson, *Learning from Deng Xiaoping: Leadership Principles from the Man who Transformed China*, LINKEDIN (July 16, 2021), <https://www.linkedin.com/pulse/learning-from-deng-xiaoping-leadership-principles-man-pogson-faicd> [<https://perma.cc/DD4L-3V5J>].

<sup>423</sup> See generally Anthony H. Cordesman, *Ranking the World's Major Powers: A Graphic Comparison of the United States, Russia, China, and Other Selected Countries*, CTR. FOR STRATEGIC. & INT'L STUD., [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220427\\_Ranking\\_Major\\_Powers.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/220427_Ranking_Major_Powers.pdf) [<https://perma.cc/42Y2-NF6Q>] (May 16, 2022) (working draft).

<sup>424</sup> See generally Eleanor Albert, *China's Big Bet on Soft Power*, COUNCIL FOR. REL., <https://www.cfr.org/backgrounder/chinas-big-bet-soft-power> [<https://perma.cc/X5HA-BM8G>] (Feb. 8, 2018, 7:00 AM).

<sup>425</sup> See generally Joseph A. Paradis, *Putin's Use of Hard Power as Foreign Policy*, CAN. FORCES COLL., <https://www.cfc.forces.gc.ca/259/290/402/305/paradis.pdf> [<https://perma.cc/EJR5-UV7L>] (last visited Aug. 24, 2023).

<sup>426</sup> See generally Cordesman, *supra* note 423.

<sup>427</sup> See generally David Dollar, *China's Rise as a Regional and Global Power: The AIIB and the 'One Belt, One Road'*, 4 *HORIZONS* 162 (2015), <https://www.cirsd.org/files/000/000/000/74/e694e3c647f1142e1ce8b80efd2c56495e1da6ad.pdf> [<https://perma.cc/UD5U-MTCJ>]; James McBride, Noah Berman & Andrew Chatzky, *China's Massive Belt and Road Initiative*, COUNCIL FOR. REL., <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative> [<https://perma.cc/5YJV-R7YV>] (Feb. 2, 2023, 4:30 PM).

<sup>428</sup> See generally Dollar, *supra* note 427.

<sup>429</sup> See generally Paradis, *supra* note 425; Linda Ljuslin, *China's Use of Soft- and Hard Power Under the Leadership of Xi Jinping* (2021) (independent thesis advanced level, Uppsala Universitet), <https://www.diva-portal.org/smash/get/diva2:1629476/FULLTEXT01.pdf> [<https://perma.cc/9KM9-VZRB>].

<sup>430</sup> See Ginsburg, *Authoritarian International Law?*, *supra* note 48, at 236-51.

especially close attention.<sup>431</sup> For instance, it has been contended that China is “expanding its influence at the United Nations,”<sup>432</sup> is remaking the United Nations “in its own image,”<sup>433</sup> is “moving on the whole” institution,<sup>434</sup> and is taking the United Nations (and other international institutions) “over one vote at a time.”<sup>435</sup> It has also been contended that the United Nations has turned into an institution “with Chinese characteristics.”<sup>436</sup>

From a liberal-democratic perspective, Russian influence may have been more modest, but it has also been more apparent and problematic.<sup>437</sup> Ian Bond has recounted, again with an emphasis on the United Nations, how Russian maneuvers in international institutional settings have decisively shifted from relatively defensive to steadfastly offensive; from relying on international institutions “to limit the magnitude of Western interventions to [using them] to justify its own interventions in the post-Soviet era.”<sup>438</sup> This has further adversely

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<sup>431</sup> See generally Jeffrey Feltman, *China's Expanding Influence at the United Nations—and How the United States Should React*, BROOKINGS (Sept. 2020), <https://www.brookings.edu/research/chinas-expanding-influence-at-the-united-nations-and-how-the-united-states-should-react/> [<https://perma.cc/BF8X-8UWF>]; Kristine Lee, *It's Not Just the WHO: How China Is Moving on the Whole U.N.*, POLITICO (Apr. 15, 2020, 7:03 PM) <https://www.politico.com/news/magazine/2020/04/15/its-not-just-the-who-how-china-is-moving-on-the-whole-un-189029> [<https://perma.cc/SD85-CNNG>]; Jichang Lulu, *United Nations with Chinese Characteristics: Elite Capture and Discourse Management on a Global Scale*, SINOPSIS (June 25, 2018), <https://sinopsis.cz/en/united-nations-with-chinese-characteristics-elite-capture-and-discourse-management-on-a-global-scale/> [<https://perma.cc/442M-777W>]; Yaroslav Trofimov, Drew Hinshaw & Kate O'Keeffe, *How China Is Taking over International Organizations, One Vote at a Time*, WALL ST. J. (Sept. 29, 2020), <https://www.wsj.com/articles/how-china-is-taking-over-international-organizations-one-vote-at-a-time-11601397208> [<https://perma.cc/PF2W-NANT>]; Tung Cheng-Chia & Alan H. Yang, *How China Is Remaking the UN in Its Own Image*, THE DIPLOMAT (Apr. 9, 2020), <https://thediplomat.com/2020/04/how-china-is-remaking-the-un-in-its-own-image> [<https://perma.cc/QVE9-5RXK>].

<sup>432</sup> Feltman, *supra* note 431.

<sup>433</sup> Tung & Yang, *supra* note 431.

<sup>434</sup> Lee, *supra* note 431.

<sup>435</sup> Trofimov et al., *supra* note 431.

<sup>436</sup> Lulu, *supra* note 431.

<sup>437</sup> See generally Ian Bond, *Russia in International Organizations: The Shift from Defence to Offence*, in *RUSSIA'S FOREIGN POLICY: IDEAS, DOMESTIC POLITICS AND EXTERNAL RELATIONS* 189 (David Cadier & Margot Light eds., 2017).

<sup>438</sup> *Id.* at 189.

affected the functioning of international institutions and their credibility and trustworthiness.<sup>439</sup>

China and Russia do not stand alone when pursuing their agendas on international institutional platforms. They are regularly joined by other authoritarian governance regimes.<sup>440</sup> Such groups of States operate, formally and informally, as clubs whose purpose is to “supply material and ideational resources to strengthen survival politics and shield members from external interference during moments of political turmoil.”<sup>441</sup> The strategy has had some success because it has hindered democratization of international institutions, particularly at the regional level, and has increased the likelihood of authoritarian governance regime survival.<sup>442</sup>

China and Russia’s takeover of international institutions is not clearcut, however. Cassandra Emmons brings the issue into focus when she asks whether international institutions are “enablers or impediments for authoritarian international law.”<sup>443</sup> While she has left the window open for further exploration of the subject, her tentative answer is that, in reality, they perform both functions.<sup>444</sup> Importantly, Emmons also observes that international institutions “are usually status quo entities, and liberalism is deeply embedded in many existing today.”<sup>445</sup>

By the same token, the new authoritarian-style international institutions, whose politico-legal significance should not be lightly dismissed and whose prospects will doubtless continue to dominate the liberal-democratic agenda, are not without limitations. The Eurasian Economic Union, for one, is neither a *bona fide* nor a proper counterpart to the European Union.<sup>446</sup> Rather, it is an institution established

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<sup>439</sup> See generally *Credibility of International Organizations in the Face of Russia’s Invasion of Ukraine (Part 1)*, INST. CENT. EUR., <https://ies.lublin.pl/en/comments/credibility-of-international-organizations-in-the-face-of-russias-invasion-of-ukraine-part-1/> [<https://perma.cc/UJ4J-8TTF>] (last visited Apr. 15, 2023); Philip Remler, *Russia at the United Nations: Law, Sovereignty, and Legitimacy*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 22, 2020), <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753> [<https://perma.cc/TPJ6-X2BC>].

<sup>440</sup> See generally Maria J. Debre, *Clubs of Autocrats: Regional Organizations and Authoritarian Survival*, 17 REV. INT’L ORG. 485 (2022).

<sup>441</sup> *Id.* at 485.

<sup>442</sup> See generally *id.*

<sup>443</sup> Emmons, *supra* note 48, at 226.

<sup>444</sup> See *id.*

<sup>445</sup> *Id.*

<sup>446</sup> See generally Katarzyna Wolczuk, ‘The Eurasian Economic Union is a Genuine and Meaningful Counterpart to the EU’, in MYTHS AND MISCONCEPTIONS IN THE

by Russia designed to regain its regional power that it lost following the dissolution of the Soviet Union.<sup>447</sup> As such, the Eurasian Economic Union constitutes a “form of ‘soft’ hegemony through which Russia, while not controlling the domestic institutions and policies of other member [S]tates, can still ensure that their foreign policies are aligned with its own interests.”<sup>448</sup>

The Shanghai Cooperation Organization (“SCO”) is a more formidable international institutional medium designed to promote authoritarian goals on the world stage, but it is also hamstrung by centrifugal forces that reflect the structural-functional weaknesses of its members—notably, divergent interests, inward-looking orientation, latent hegemonic rivalry, parochialism, transaction-centered policy style, and ultranationalism.<sup>449</sup> Paradoxically, the SCO has grown bigger without getting stronger.<sup>450</sup> The decision to admit India and Pakistan into the organization carries considerable symbolic importance but is likely to dull the SCO’s authoritarian edges and sow further disarray within its ranks.<sup>451</sup>

China and Russia have not enjoyed substantial success in the middle ground occupied by second- and third-tier authoritarian and democratic governance regimes. Many medium and small authoritarian governance regimes and “flawed democracies” have opted for “dehedging” and gravitated toward the liberal-democratic camp. One example is the Philippines, which has provided the United States with access to four military bases close to China’s borders.<sup>452</sup> The United

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DEBATE ON RUSSIA 63, 63 (2021), [https://www.chathamhouse.org/sites/default/files/2021-05/2021-05-13-myths-misconceptions-debate-russia-nixey-et-al\\_0.pdf](https://www.chathamhouse.org/sites/default/files/2021-05/2021-05-13-myths-misconceptions-debate-russia-nixey-et-al_0.pdf) [<https://perma.cc/856Z-PKUJ>].

<sup>447</sup> See *id.* at 65.

<sup>448</sup> *Id.*

<sup>449</sup> See generally Felix K. Chang, *Organization of Rivals: Limits of the Shanghai Cooperation Organization*, FOREIGN POL’Y RSCH. INST. (Sept. 27, 2018), <https://www.fpri.org/article/2018/09/organization-of-rivals-limits-of-the-shanghai-cooperation-organization/> [<https://perma.cc/8T7V-VH69>]; Andrei Lungu, NIKKEI ASIA (Sept. 28, 2022, 5:00 PM), <https://asia.nikkei.com/Opinion/SCO-shows-the-limits-of-Chinese-style-international-organizations> [<https://perma.cc/W7S3-6MHY>].

<sup>450</sup> See Chang, *supra* note 449.

<sup>451</sup> See *id.*; Rizwan Zeb, *Pakistan in the SCO: Challenges and Prospects*, CENT. ASIA-CAUCASUS ANALYST (Feb. 8, 2018), <https://www.cacianalyst.org/publications/analytical-articles/item/13496-pakistan-in-the-sco-challenges-and-prospects.html> [<https://perma.cc/A377-S2YH>].

<sup>452</sup> See generally Brad Lendon, *US Gains Military Access to Philippine Bases Close to Taiwan and South China Sea*, CNN, <https://edition.cnn.com/2023/04/04/asia/us-philippines-military-base-access-intl-hnk-ml/index.html> [<https://perma.cc/7LPA-88CK>] (Apr. 4, 2023, 1:56 AM).

States' close relationship with Vietnam also illustrates the trend toward liberal-democracy.<sup>453</sup> The trend is not unidirectional, however, as evidenced by Brazil's recent embrace of China and Russia.<sup>454</sup> As evidenced, China and Russia have not been totally unsuccessful in expanding their spheres of influence.

Moreover, authoritarian governance regimes' efforts to remake the international normative landscape have not been entirely successful. Authoritarian regimes' selective achievements cannot obscure the fact that they have failed to change political norms at the international level.<sup>455</sup> For example, Christian Welzel has empirically demonstrated the weak support for the deconsolidation thesis, whose proponents assert that the appeal of liberal-democratic values is diminishing across the world, particularly among young people.<sup>456</sup> His data are more consistent with the postulates of modernization theory, which presupposes that "[e]conomic development brings expanding levels of education, information, travel, and other experiences that enhance human knowledge, awareness, and intelligence."<sup>457</sup> The ensuing cognitive mobilization, in turn, "inspires and empowers people to act with purpose and think for themselves, rather than accept received authority and wisdom."<sup>458</sup>

A similar observation can be made concerning the effectiveness of authoritarian governance regimes' international strategies. Jacques deLisle has carefully documented the many failures of China's recourse to both soft and hard power and its attempt to exploit the

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<sup>453</sup> See generally Nguyen Khac Giand, *U.S.-Vietnam Partnership Goes Beyond Strategic Competition with China*, U.S. INST. PEACE (Apr. 19, 2022), <https://www.usip.org/publications/2022/04/us-vietnam-partnership-goes-beyond-strategic-competition-china> [<https://perma.cc/Y8BC-DKFU>].

<sup>454</sup> See generally Mary Anastasia O'Grady, *Lula Cozies Up to America's Enemies*, WALL ST. J. (Apr. 16, 2023), <https://www.wsj.com/articles/lula-cozies-up-to-americas-enemies-brazil-kremlin-beijing-ukraine-catholic-church-bishop-alvarez-socialist-human-rights-nicaragua-iran-c7705711> [<https://perma.cc/AF9H-242M>]; Lisandra Paraguassu & Anthony Boadle, *Brazil's Lula Draws Russian Praise*, U.S. SCORN FOR UKRAINE VIEWS, REUTERS (Apr. 17, 2023), <https://www.reuters.com/world/europe/russias-lavrov-thanks-brazil-efforts-resolve-ukraine-war-2023-04-17/> [<https://perma.cc/3C4Q-F6Z9>]; Austin Ramzy & Samantha Pearson, *China's Xi Jinping, Brazil's Lula Take United Stance Against U.S.*, WALL ST. J. (Apr. 14, 2023), <https://www.wsj.com/articles/chinas-xi-jinping-brazils-lula-take-united-stance-against-u-s-e8e55c1c> [<https://perma.cc/45X2-AT29>].

<sup>455</sup> See generally Christian Welzel, *Why the Future Is Democratic*, 32 J. DEMOCRACY 132 (2021).

<sup>456</sup> See generally *id.*

<sup>457</sup> *Id.* at 132.

<sup>458</sup> *Id.*

seeming advantages of political warfare and sharp power.<sup>459</sup> This strategy has proved ineffective, as evidenced by the jettisoning of the “wolf-warrior” diplomatic offensive.<sup>460</sup> Most telling is the apparent unraveling of the vast Belt-and-Road Initiative, which may be crumbling under the weight of collapsing projects, enormous debt, and growing disenchantment among recipients.<sup>461</sup>

Russia’s Ukrainian misadventure may be the most stunning example of authoritarian governance regime failure in recent history. Russia’s economic, military, political, reputational, and social fallout will be massive and possibly irreversible.<sup>462</sup> While Russia’s sense of failure, isolation, loss, stubborn vengefulness, and wounded pride may reinforce its propensity to act offensively, the State’s diminished capabilities and greater vulnerabilities may curtail its ability to influence developments on the international front. China’s role in the conflict is

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<sup>459</sup> See generally deLisle, *supra* note 421.

<sup>460</sup> See generally Alexander Casella, *The Perils of Wolf Warrior Diplomacy*, ASIA TIMES (Nov. 3, 2022), <https://asiatimes.com/2022/11/the-perils-of-wolf-warrior-diplomacy/> [<https://perma.cc/XAS9-WHQX>]; Ray Weichieh Wang, *China’s Wolf Warrior Diplomacy Is Fading*, THE DIPLOMAT (July 27, 2022), <https://thediplomat.com/2022/07/chinas-wolf-warrior-diplomacy-is-fading/> [<https://perma.cc/A64R-46KN>].

<sup>461</sup> See generally Sumathi Bala, *China’s ‘Belt and Road’ Grew Out of a Lending Spree. Now Those Loans May Be Its Problem*, CNBC (Apr. 13, 2023), <https://www.cnbc.com/2023/04/14/china-belt-and-road-scrutinized-amid-inflation-slowdown.html> [<https://perma.cc/M58E-6A5M>]; Christina Lu, *China’s Belt and Road to Nowhere*, FOREIGN POL’Y (Feb. 13, 2023), <https://foreignpolicy.com/2023/02/13/china-belt-and-road-initiative-infrastructure-development-geopolitics/> [<https://perma.cc/UAJ6-WAV5>]; Andrew Small, *The Backlash to Belt and Road*, FOREIGN AFFS. (Feb. 16, 2018), <https://www.foreignaffairs.com/articles/china/2018-02-16/backlash-belt-and-road> [<https://perma.cc/9LTE-DTPA>]; Lingling Wei, *China Reins In Its Belt and Road Program, \$1 Trillion Later*, WALL ST. J. (Sept. 26, 2022), <https://www.wsj.com/articles/china-belt-road-debt-11663961638> [<https://perma.cc/4FAJ-D3NC>].

<sup>462</sup> See generally Elliot Abrams, *Implications of the Russia-Ukraine War*, COUNCIL ON FOREIGN RELS. (Feb. 26, 2023), <https://www.cfr.org/blog/implications-russia-ukraine-war> [<https://perma.cc/X7V4-CQ9B>]; Seth G. Jones, *Russia’s Ill-Fated Invasion of Ukraine: Lessons in Modern Warfare*, CSIS (June 1, 2022), <https://www.csis.org/analysis/russias-ill-fated-invasion-ukraine-lessons-modern-warfare> [<https://perma.cc/QB45-E55A>]; Charles Maynes, *War Against Ukraine Has Left Russia Isolated and Struggling—with More Tumult Ahead*, NPR (Dec. 31, 2022), <https://www.npr.org/2022/12/31/1145981036/war-against-ukraine-has-left-russia-isolated-and-struggling-with-more-tumult-ahed> [<https://perma.cc/TY4E-Q79A>]; Steven Pifer, *The Russia-Ukraine War and Its Ramifications for Russia*, BROOKINGS INST. (Dec. 8, 2022), <https://www.brookings.edu/articles/the-russia-ukraine-war-and-its-ramifications-for-russia/> [<https://perma.cc/KPH8-VYVV>]; Heli Simola, *What Effects Have Sanctions Had on the Russian Economy?*, WORLD ECON. F. (Dec. 22, 2022), <https://www.weforum.org/agenda/2022/12/sanctions-russian-economy-effects/> [<https://perma.cc/EG8L-2FWQ>].

uncertain but there are no indications that it will encourage moderation.<sup>463</sup>

When assessing the effectiveness of authoritarian regimes' international strategies, it is also important to consider the liberal-democratic camp's responses. A strengthened network of alliances in the Indo-Pacific region, for instance, has likely outweighed the benefits that China has reaped from its aggressive muscle flexing.<sup>464</sup> Similarly, Russia's unprovoked and devastating invasion of Ukraine has brought NATO members closer and has led to the organization's European expansion.<sup>465</sup> While liberal-democratic governance regimes have not always responded proactively to threats emanating from authoritarian sources—e.g., the meek response to Russia's annexation of Crimea may have paved the way for its current Ukrainian misadventure<sup>466</sup>—it is obvious that their authoritarian counterparts are capable of serious self-harm, with inevitable ramifications for their international ambitions, influence, and reputation.

## V. CONCLUSION

The concept of authoritarian international law has not emerged and crystalized in a politico-legal vacuum. It reflects prevailing empirical realities and mounting normative concerns. The global system is now more polarized than at any juncture since the end of the Cold

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<sup>463</sup> See generally *Why China's Stand on Russia and Ukraine Is Raising Concerns*, ASSOC. PRESS (Feb. 20, 2023, 11:30 AM), <https://apnews.com/article/russia-ukraine-politics-government-antony-blinken-china-6ad43aa87f086acce31a1de63c6caf15> [https://perma.cc/U82D-WWS7].

<sup>464</sup> See generally Jim Garamone, *U.S. Seeks to Build Network of Like-Minded Nations in Indo-Pacific*, U.S. DEP'T OF DEF. (Sept. 29, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3175237/us-seeks-to-build-network-of-like-minded-nations-in-indo-pacific/> [https://perma.cc/33FE-598F]; Richard Javad Heydarian, *US-Led Alliances Slowly but Surely Encircling China*, ASIA TIMES (Mar. 14, 2023), <https://asiatimes.com/2023/03/us-led-alliances-slowly-but-surely-encircling-china/> [https://perma.cc/6KQR-5A3V].

<sup>465</sup> See generally *What Is NATO and Why Is Finland Joining?*, BBC (July 13, 2023), <https://www.bbc.com/news/world-europe-18023383> [https://perma.cc/JP2Y-MYN9]; Rose Gottemoeller, *Rose Gottemoeller Says that NATO Has Proved Its Worth in Dealing with Russia*, THE ECONOMIST (Mar. 7, 2022), <https://www.economist.com/by-invitation/2022/03/07/rose-gottemoeller-says-that-nato-has-proved-its-worth-in-dealing-with-russia> [https://perma.cc/RQ3H-J232].

<sup>466</sup> See generally *Ukraine War: How the West's Weak Reaction to Crimea's Referendum Paved the Way for a Wider Invasion*, THE CONVERSATION (Mar. 15, 2023, 11:00 AM), <https://theconversation.com/ukraine-war-how-the-west-s-weak-reaction-to-crimeas-referendum-paved-the-way-for-a-wider-invasion-201269> [https://perma.cc/9UMK-4H8V].

War and it may well be on the verge of a New Cold War, if not worse.<sup>467</sup> The liberal-democratic camp, spearheaded by the United States, and its authoritarian counterpart, steered by China and Russia, have grown increasingly antagonistic toward each other, with the scope for averting severe friction and fostering productive collaboration rapidly shrinking.

To make matters worse, each side has been endeavoring to resolutely and uncompromisingly advance its ideological agenda, with authoritarian regimes making steady headway. The progression of the authoritarian ideological agenda has had manifold, predominantly adverse, practical and theoretical implications, in particular for the evolution of international law and its normative underpinnings. From a number of value-guided perspectives, notably a liberal-democratic viewpoint, that authoritarian progression is a worrisome pattern, and it calls for an analytically driven effort to reckon with the unfolding dynamics and their ramifications. As a research-inspired enterprise, authoritarian international law belatedly seeks to identify where authoritarian impulses are traveling, through which channels, and to what effect.

In a short period of time, substantial progress has been made toward fulfilling this goal. That progress has largely been due to the awareness, dedication, and thoroughness of Tom Ginsburg, who continues to closely monitor trends in this complex and sensitive domain. Unfortunately, the wave of research that might have materialized due to the academic and policy significance of the subject and its robust conceptual and factual foundation, is not yet under way. This may be due to a backward-looking liberal-democratic posture characterized by excessive optimism about the challenge posed by authoritarian international law, coupled with the belief that the challenge will simply fade away. It may also be caused by a lingering preoccupation with traditional-style international legal issues. If that is an accurate portrayal, sufficient evidence has been furnished for redirecting intellectual and material resources toward the authoritarian variant of international law.

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<sup>467</sup> See generally Christian Breuer, *The New Cold War and the Return of History*, 57 INTERECONOMICS 202 (2022); Robert S. Litwak, *Russia's Nuclear Threats Recast Cold War Dangers: The "Delicate Balance of Terror" Revisited*, WILSON CTR. (May 3, 2022), <https://www.wilsoncenter.org/article/russias-nuclear-threats-recast-cold-war-dangers-delicate-balance-terror-revisited> [https://perma.cc/8QW7-ATZ6]; Evan Osnos, *Sliding Toward a New Cold War*, THE NEW YORKER (Feb. 26, 2023), <https://www.newyorker.com/magazine/2023/03/06/sliding-toward-a-new-cold-war> [https://perma.cc/7AYN-KAQZ].

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As contended in this Article, it would be desirable, however, to broaden the scope of inquiry to encompass additional dimensions of the interplay between authoritarian international law and its mainstream liberal-democratic counterpart. It should not be assumed, whether explicitly or implicitly, that the former is unstoppable and the latter is destined for oblivion. Authoritarian and liberal-democratic governance regimes have their unique capabilities and vulnerabilities. Despite the presence of many centrifugal forces in the liberal-democratic realm, the ground on which it rests may well be sturdier than that occupied by any alternative governance regime. As Donald Wittman has compellingly and elegantly established, the notion of pervasive democratic failure is a myth.<sup>468</sup> By the same token, authoritarian resilience may well be overstated.

It would also be desirable to explore the external goals of authoritarian governance regimes, their international strategies, and the effectiveness of those strategies. On the one hand, the regimes' goals have expanded by becoming more global and more offensive. This strategic shift bodes ill for mainstream international law. The growing authoritarian resort to hard power, including the use of force, by the two primary authoritarian governance regimes also bodes ill for international law based in liberal-democratic principles. On the other hand, the often-staggering ineffectiveness of the international strategies pursued by both regimes and the singularly erratic implementation of those strategies—whether soft, hard, or sharp—suggests that the road ahead for authoritarian governance regimes in the global arena may be littered with many obstacles, which should not be overlooked when assessing the impact and prospects of authoritarian international law.

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<sup>468</sup> See generally DAVID A. WITTMAN, *THE MYTH OF DEMOCRATIC FAILURE: WHY POLITICAL INSTITUTIONS ARE EFFICIENT* (1995).