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To What Extent Does Authoritarianism Pose a Threat to the Legitimacy of International Law?

Annie Scott¹

Introduction

The period of domination within international law by Western liberal democracies is receding into the past rather quickly. Between America's disengagement with international law, the immense economic and political power garnered by China, and Russia's efforts to expand its influence and bolster its position as a counterbalance to Western hegemony, the global geopolitical landscape is undergoing a significant shift marked by diverging interest among major powers.² These shifting power dynamics have challenged the traditional narrative of international law.

¹ LLB, Edinburgh; LLM Candidate, London School of Economics.

² U.S Department of State, 'On the U.S. Withdrawal from the Paris Agreement' (2019) <<https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/>> accessed 12 April 2022 see also Mike Pompeo, Secretary of State and Nikki Haley, U.S. Permanent Representative to the United Nations, 'Remarks On The UN Human Rights Council' (Treaty Room, Washington, DC June 19, 2018); Anthony H. Cordesman, 'China's Emergence as a Superpower : A Graphic Comparison of the United States, Russia, China, and Other Major Powers' (Centre for Strategic and International Studies, 2023) ; Vladimir Putin, "Address concerning the events in Ukraine" (Kremlin, Moscow, 21 February 2022)< <http://kremlin.ru/events/president/news/67828>> accessed 10 April 2024 see also Tucker Carlson, Interview with Vladimir Putin, President of Russia (Moscow, 8 February 2024) <<https://www.youtube.com/watch?v=hYfByTcY49k>> accessed 10 April 2024

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Authoritarian regimes are well-familiarised with participation in regional organisations, however, they are now playing a larger role within international law institutions and its processes.³

The increased participation in international law bodies and their structures provides a wider-reaching platform for authoritarian regimes to advocate their interests, approach governance, and influence global issues. This is encapsulated by the description of international law as both a 'shield and a sword' for authoritarianism, providing protection from attack and a tool with which authoritarians can further their aims.⁴

International law is predicated on principles typically associated with liberal democracies, such as the rule of law and the protection of human rights. Authoritarian regimes often flout these principles and engage in repression, censorship, as well as human rights abuses. The increased participation of authoritarian regimes in international law raises crucial questions about how the global legal framework will adapt.

This essay seeks to address whether authoritarianism represents a threat to the legitimacy of international law. It does so by identifying three aspects of authoritarianism in international law that could pose a threat to the legitimacy of international law, examining theoretical aspects such as competing norms, as well as the emergence of threats through procedural means. These are then assessed on how they affect legitimacy according to three different interpretations of legitimacy to reach a comprehensive and fair conclusion.

The first section of this essay will define authoritarianism and provide some necessary background information. This will be followed by a discussion on the conceptualisation of legitimacy, which will also set out the schools of thought that are used to measure legitimacy, which include: natural law, legal positivism, as well as input, throughput and output legitimacy. These aim to provide a thorough and balanced approach to measuring legitimacy in this context, utilising normative and descriptive based judgements.

³ Jeffrey Feltman, 'China's expanding influence at the United Nations—And how the United States should react.' (Brookings Institution, 2020) ; Philip Remler, 'Russia at the United Nations: Law Sovereignty, and Legitimacy,' (2020) 22 Carnegie Endowment for International Peace 1; 'The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law,' 25 June 2016, <www.mid.ru/en/foreign_policy/position_word_order//asset_publisher/6S4RuXfeYlKr/content/id/2331698> accessed 10 April 2024

⁴ Tom Ginsburg, 'How Authoritarians Use International Law' (2020) 31 JD 44

The following section explores authoritarianism's influence on international law, focusing on how authoritarian regimes shape and utilise it. Firstly, it examines the experimentation with creating norms, such as the Shanghai Cooperation Organisation's ('SCO') 'three evils' doctrine. Secondly, it delves into the use of international law for illiberal purposes, citing examples like the UN General Assembly resolution on countering criminal uses of technology. Lastly, it discusses how authoritarians undermine international law institutions, as seen in China's influence over Cambodia's vote in the Association of Southeast Asian Nations ('ASEAN').

Once a consensus is reached on whether authoritarianism is a threat to the legitimacy of international law, the essay concludes with a discussion, touching on issues of interpretation, collaboration and the future of international law within a changing global context.

Clarifying Authoritarianism

As a preliminary matter, a definition of authoritarianism should be established for the purposes of this essay. Definitions of authoritarianism typically focus more on what authoritarianism is not, or what it opposes. This does have some logic, as there is a great deal of variation among authoritarian regimes. In the present day, there are authoritarian governments which could be categorised as absolute monarchies, military regimes, and ideologically based systems of government.⁵ These governments are not uniform, but all feature low levels of civil liberties, political participation, electoral freedom and integrity, and political participation.⁶ This is the approach that will be taken when characterising a country's government as 'authoritarian.'

Based on this criteria, multiple indexes indicate a dramatic decline in the number of fully democratic countries over the last twenty years.⁷ If this trend continues, fewer than 5% of the global population will reside in full democracies by 2026.⁸ Therefore, the increased participation of authoritarian governments in international law is unsurprising and expected to grow further. Authoritarian governments are known to be more prone to conflict with each

⁵ Economist Intelligence Unit, 'Democracy Index 2023' (The Economist Group, 2024); for an example of each: Saudi Arabia, Myanmar, and North Korea

⁶ *ibid*

⁷ Economist Intelligence Unit, 'Democracy Index 2023' (The Economist Group, 2024); Freedom House, 'Freedom In The World 2022' (2022)

⁸ Nic Cheeseman and others, 'The rise of authoritarianism is misunderstood – and it matters' [2023] The Centre for Elections, Democracy, Accountability and Representation

other, spread disinformation, and engage in cross-border cyber-attacks.⁹ This underscores the importance of international law as a mechanism to address these cross-border issues, which are likely to become more frequent in a future marked by increased authoritarianism.

Interestingly, few nations self-identify as authoritarian regimes and often utilise the 'institutional trappings' of democracy, including constitutions.¹⁰ Yet these mimicked institutions, processes and elements of democratic governance often lack proper autonomy and credibility, leading to concerns over how authoritarian regimes will respond to similar features of international legal processes.

Authoritarian governments are not wholly new to international law, although historically they were viewed more as a cause for suspicion than as active participants. The exclusion of the Soviet Union from NATO during the Cold War era reflects the legal and political division rooted in ideological differences between Western democracies and the Soviet Bloc.¹¹ Similarly, the exclusion of the People's Republic from the United Nations until 1971 highlights the tensions between the Western-dominated international order and the communist ideology espoused by the Chinese government.¹² In this sense, the highly politicised nature of international law at the time made it an inhospitable environment for authoritarian regimes.

The Warsaw Pact, established in response to NATO, serves as an example of rudimentary authoritarian international law. Notably, the treaty's first line affirms the importance of a collective security regime 'irrespective of social and political systems.'¹³ Unlike NATO, it lacked mechanisms for domestic legislative approval, indicating reliance on Soviet power for enforcement rather than democratic processes. While espousing principles of state sovereignty, its actions, such as the invasion of Hungary in 1956, reflected a regime geared towards extending authoritarian rule rather than upholding international legal norms.¹⁴

⁹ *ibid*

¹⁰ Michael Albertus and Victor Menaldo, 'The Political Economy of Autocratic Constitutions', in *Constitutions in Authoritarian Regimes* (eds. Tom Ginsburg & Alberto Simpser: Cambridge University Press, 2014), 80

¹¹ Geoffrey Roberts, 'Molotov's Proposal that the USSR Join NATO, March 1954' 27 *CWIHP*

¹² United Nations, General Assembly Resolution 2758

¹³ Treaty of Friendship, Cooperation and Mutual Assistance Between the People's Republic of Albania, the People's Republic of Bulgaria, the Hungarian People's Republic, the German Democratic Republic, the Polish People's Republic, the Romanian People's Republic, the Union of Soviet Socialist Republics, and the Czechoslovak Republic (14 May 1955)

¹⁴ Treaty of Friendship, Cooperation and Mutual Assistance art 8; Office of the Historian, 'Soviet Invasion of Czechoslovakia, 1968' (United States Department of State) < <https://history.state.gov/milestones/1961-1968/soviet-invasion-czechoslovakia> > accessed 12 April 2024

When assessing the legitimacy of authoritarian international law, such as the Warsaw Pact, questions arise regarding the appropriateness of applying democratic benchmarks as metrics of legitimacy. The idea of legitimacy in the context of international law will be further explored in the following section to enable a more comprehensive understanding of such questions.

Conceptualising Legitimacy

As a definition of authoritarianism has been clarified, the next step is understanding 'legitimacy' in this context. Whether a law is legitimate depends on the beliefs of the respondent, a topic of ongoing debate in legal academia. Characterising legitimacy presents challenges, however, it is crucial given its centrality to this topic. It typically refers to the perceived validity, authority, or acceptance of legal norms, institutions, or practices within a legal system or society. It is worth noting that this essay operates under the assumption that international law can be legitimate, a notion that has been debated by scholars.¹⁵ Three theories of legitimacy will be utilised to assess the threat posed by authoritarianism: legal positivism, natural law, as well as the input, throughput, and output models.

Legal positivism, a theory in jurisprudence, holds that law's legitimacy stems from social facts rather than moral considerations.¹⁶ According to legal positivism, laws are rules established by human authority, like legislatures or courts, with legitimacy based on their source rather than content.¹⁷ Within legal positivism, theories differ on the social facts underpinning legitimacy. HLA Hart, in 'The Concept of Law,' posits that law's legitimacy hinges on adherence to proper legal procedures.¹⁸ He distinguishes primary rules, governing behaviour directly, from secondary rules, regulating the creation, modification, and enforcement of primary rules.¹⁹ Emphasising secondary rules, especially the rule of recognition, Hart contends that legal norms are legitimate if they comply with these rules.²⁰ While Hart denied that international law forms

¹⁵ For example Anthony d'Amato, 'Is International Law Really Law' (1984) 79 Nw UL Rev 1293

¹⁶ David Lyons, 'Founders and Foundations of Legal Positivism' (1983) 82 Michigan Law Review 722

¹⁷ *ibid*

¹⁸ HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press, 1961)

¹⁹ *ibid*

²⁰ *ibid*

a complete legal system due to a lack of the rule of recognition, some scholars interpret international law through a Hartian perspective.²¹ Identifying the rule of recognition within international law poses many challenges due to a lack of centralised judicial authority issuing binding decisions and various theories exist regarding its source. Another legal positivist, Joseph Raz, underscores the role of authority in legitimising law, highlighting prerequisites like publicly available rules enforced by competent officials.²² He elaborated on the rule of law concept, highlighting the significance of legal certainty, predictability, accessibility, non-retroactivity, stability, fair hearings, and administration by an independent judiciary ensuring law's legitimacy²³. According to Raz, a legal system adhering to the rule of law principles is more likely to be perceived as legitimate by its subjects.²⁴

Legal positivism adopts a descriptive approach rather than a normative one. This perspective influences how legal positivists perceive the risk of authoritarianism to the legitimacy of international law. Positivists are primarily concerned with how law operates in practice rather than prescribing how it should be. Therefore, they may be less concerned with the moral implications of an authoritarian regime's increased participation in international law. Adherents of Hart's belief system may challenge the legitimacy of international law, especially where authoritarian regimes do not adhere to correct internal processes. Raz, with his emphasis on the rule of law principles, might adopt a more critical stance toward authoritarian regimes in international law. If authoritarian regimes transplant governance styles characterised by concentration of power, weakening of independent judiciaries, and secrecy, this could undermine the rule of law in the international legal system and erode the overall legitimacy of international law.

Legal positivism contrasts with natural law theory, which asserts that universal moral principles inherent in nature determine law's legitimacy.²⁵ According to natural law, human-made laws are legitimate when aligned with these moral principles, which include fundamental rights and duties inherent to human beings regardless of societal laws.²⁶ Thomas Aquinas, a prominent medieval philosopher and theologian, is closely associated with natural law theory. His theory,

²¹ Anthony Green, 'The Precarious Rationality of International Law: Critiquing the International Rule of Recognition' (2021) 22(8) GLJ1613

²² Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, Oxford University Press, 2009)

²³ *ibid*

²⁴ *ibid*

²⁵ A G Chloros, 'What Is Natural Law?' (1958) 21(6) MLR 609

²⁶ *ibid*

rooted in reason and divine law, views natural law as an objective set of principles derived from human nature and accessible to human reason.²⁷ Aquinas saw natural law as a way of guiding human conduct and assessing the morality of laws, endorsing rights such as life, liberty, property, and religious freedom.²⁸ John Finnis, a contemporary legal philosopher, offers a modern interpretation of natural law, emphasizing the intrinsic value of human goods and practical reason.²⁹ According to Finnis, laws should promote these goods and be evaluated based on their alignment with natural law principles.³⁰ He identifies rights emerging from fundamental human goods, such as life, knowledge, friendship and religion; endorsing rights like freedom of thought and expression as part of natural law.³¹ Finnis contends that these rights are essential for individuals to pursue fulfilling lives.³²

Authoritarian regimes may engage in behaviour undermining natural law principles in international law. Aquinas might argue that authoritarian regimes threaten international law's legitimacy by enacting laws that violate natural law principles like preserving life and promoting justice. He would stress that adherence to natural law is crucial for the legitimacy of both domestic and international legal systems. Similarly, Finnis would prioritise the well-being of mankind and rights protection in international law, considering laws or actions by authoritarian regimes contrary to these principles incompatible with its legitimacy.

The final approach to be utilised integrates both descriptive and normative elements of assessment, utilising the input, throughput, and output model of legitimacy developed by Fritz Scharpf and Viviane Schmidt.³³ By conceptualising governance as a process that involves inputs (such as societal demands and preferences), throughputs (the mechanisms and processes of decision-making and implementation), and outputs (the results and consequences of governance actions), a framework for analysing the functioning and legitimacy of governance systems is established. The model highlights the interplay between institutional design, decision-making processes, and the outcomes of governance systems. These criteria provide a

²⁷ Tim Murphy, 'St Thomas Aquinas and the Natural Law Tradition' in *Western Jurisprudence* (Thomson Round Hall, 2004)

²⁸ *ibid*

²⁹ John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2011)

³⁰ *ibid*

³¹ *ibid*

³² *ibid*

³³ Fritz W Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) and Viviane A Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output, and 'Throughput'' (2013) 61 PS 2

framework for evaluating the legitimacy of legal systems, considering both procedural fairness and the practical outcomes of legal decision-making. The focus here is to uncover the nuances of how authoritarianism impacts international law institutions procedurally, moving beyond broad evaluative judgments.

A proponent of the input, throughput, output model would likely view authoritarianism as a major challenge to the legitimacy of international law if it imports aspects of its domestic system into global forums. Authoritarian regimes typically prioritise centralised control over accommodating societal needs and tend to stifle diverse voices and dissent in decision-making processes. Consequently, the outcomes of governance actions frequently fail to align with societal interests and well-being. When authoritarian practices permeate international legal institutions or decision-making processes, they can erode the principles of transparency, accountability, and inclusivity that are central to input, throughput, and output legitimacy.

The following sections aim to investigate the validity of these preliminary conclusions by further examining the impact of authoritarianism on international law. These sections will endeavour to tie examples to broader themes of how authoritarianism is impacting international law to gain a more comprehensive and enduring assessment on whether authoritarianism represents a threat to international law's legitimacy.

Norm Experimentation and Dispersion

Authoritarian governments are experimenting with the creation or dispersion of norms which align with their ideological preferences and approach to governance on the international stage. A notable example is the SCO's 'three evils' of terrorism, separatism, and extremism.³⁴ The SCO is a Eurasian political, economic, international security and defence organization established in 2001 by China and Russia.³⁵ The 2001 SCO convention refined the definitions of terrorism, separatism, and extremism.³⁶ While terrorism aligns with established definitions in international law, separatism and extremism are newer concepts. Separatism refers to actions

³⁴ Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism <<https://eng.sco-russia2020.ru/images/17/25/172503.pdf>> accessed 13 April 2024

³⁵ Shanghai Cooperation Organisation, 'About SCO' (Shanghai Cooperation Organisation, 28 October 2017) <<http://www.sectsco.org/>> accessed 13 April 2024

³⁶ *ibid*

aimed at breaching territorial integrity or facilitating state disintegration.³⁷ The territorial aspect is intriguing, particularly given Russia's recent invasion of Ukraine. While separatism typically implies respect for territorial integrity, Russia's invocation of historical imperialist ideology to justify the invasion prompts the question of whether separatism is being exploited as a pretext for territorial expansion.

'Extremism' fills a gap not covered by terrorism and separatism, defined as acts aimed at seizing or maintaining power through violence or forcibly altering a state's constitutional regime, as well as violent threats to public security for such purposes.³⁸ It goes beyond conventional terrorism by focusing on seizing power which implies a narrow focus on violent political actions directed at state authorities. This aligns with the centrality of 'regime survival' to authoritarianism. Actions which could take power away from the regime represent a significant threat to its survival. While adding 'violent' may allay concerns in general contexts, its use in authoritarian settings is cause for alarm. This could lead to the targeting of peaceful protests and political mobilisation under the pretext of combating extremism, as seen in Hong Kong.³⁹

The norm-building process within the SCO often follows a sequential pattern, progressing from a conceptual framework to a specific program and then a detailed plan, with each iteration demanding increased cooperation.⁴⁰ These instruments frequently cite UN documents, including General Assembly Resolutions, indicating a strategic effort by prominent authoritarian nations to interact with the UN apparatus.⁴¹ This strategy extends to other international bodies like the Commonwealth of Independent States, as leading authoritarian nations seek to project regional norms onto a wider international stage, thereby influencing global normative development.

The emerging norms aim to prevent member nations from sheltering dissidents, promoting collaboration for security. SCO members exchange intelligence on opposition groups, using

³⁷ Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism, Article 1(2)

³⁸ Shanghai Cooperation Organisation, Convention on Combating Terrorism, Separatism, and Extremism, Article 1(3)

³⁹ 'China's New Cybersecurity Rules: Foreign Companies in the Crossfire?' (BBC News, 15 August 2019) <https://www.bbc.co.uk/news/world-asia-china-49348462> accessed 14 April 2024

⁴⁰ Tom Ginsburg, 'Authoritarian International Law?' (2020) 114(2) AJIL 221

⁴¹ *ibid*

extradition and asylum refusal for political prosecution.⁴² This implicates the political offence exception in extradition law, which historically aimed to avoid political entanglement. Initially seen as safeguarding political expression, this norm shifted with exclusions like genocide and war crimes. SCO treaties exploit these exclusions, enabling extradition for vaguely defined offences like separatism and extremism⁴³ This challenges the established norms of international cooperation in extradition matters and raises questions about the extent to which multilateral treaties can supersede or modify customary international law. Customary international law evolves over time through state practice so the SCO's actions may contribute to this evolution in extradition practices.

According to a legal positivist, the experimentation with the creation and dispersion of norms by authoritarian regimes may be perceived as a legitimate aspect of the evolving international legal landscape. Legal positivists might argue that the SCO's engagement with international law demonstrates a constructive effort toward legal cooperation, albeit with potential concerns regarding the selective application of norms. Further concerns may arise if these actions lack widespread acknowledgement from the international community. The actions taken by SCO members, such as exchanging intelligence and extraditing individuals accused of certain offences, would be seen as lawful and legitimate because they are in accordance with regional treaties and agreements.

For a natural lawyer, the SCO's formulation of new norms poses significant moral challenges. The SCO's dissemination of norms which suppress dissent and restrict individual freedoms to the international law fora would likely be viewed as undermining the legitimacy of international law from a natural law perspective because it prioritises state sovereignty over the right to expression, the right to protest and potentially others depending on the enforcement of the rights. The use of extradition and asylum refusal for political prosecution and suppression could be seen as violations of the right to political expression and asylum. According to natural law, the erosion of human rights is incompatible with the inherent moral values that should guide legal norms. The legitimacy of international law is jeopardized when these norms are transplanted onto the global stage.

⁴² See the examples in International Federation for Human Rights, 'Shanghai Cooperation Organisation: A Vehicle for Human Rights Violations' (2009) <https://www.fidh.org/IMG/pdf/sco_report.pdf> accessed 14 April 2024

⁴³ Shanghai Cooperation Organisation, Agreement on Cooperation in Combating Crime (2004)

Regarding the input, output, throughput legitimacy model; when norm-building activities are conducted transparently, allowing for meaningful participation and oversight, the legitimacy of the throughput component is upheld. The legitimacy of the output component is contingent on the effectiveness and legitimacy of these norms in addressing societal needs and promoting collective well-being. If the norms produced through norm-building activities are perceived as legitimate and beneficial by member nations and other stakeholders, the legitimacy of the output component is strengthened. Though the norms could contribute to regional cooperation and stability, they conflict with human rights which underpin the aims of the foremost multilateral international institutions.

Utilisation of International Law for Illiberal Purposes

Authoritarian regimes exploit international legal structures for illiberal purposes. In November 2019, the United Nations General Assembly passed the resolution 'Countering the Use of Information and Communications Technologies for Criminal Purposes' with 88 votes in favour, 58 against, and 34 abstentions.⁴⁴ Proponents, including Cambodia, China, Iran, Myanmar, Nicaragua, Syria, and Venezuela, drew criticism from Western liberal democracies for provisions enabling online censorship, restricting human rights, and emphasising state authority with regard to internet governance.⁴⁵ Additionally, concerns arose from the formation of an expert group tasked with drafting a new cybercrime treaty, scheduled to convene in August 2020.⁴⁶ This initiative has sparked a diplomatic confrontation between democracies and authoritarian states, with Russia proposing the treaty as an 'alternative' to the Budapest Convention.⁴⁷ Critics fear that the proposed treaty could criminalise lawful online activities protected under international human rights law, signalling a broader pattern of authoritarian regimes manipulating multilateral platforms to advance their agendas.⁴⁸ If authoritarian

⁴⁴ United Nations General Assembly, 'Countering the use of information and communications technologies for criminal purposes' (25 November 2019) UN Doc A/74/401

⁴⁵ Jason Mack, 'Statement on Agenda Item 107 "Countering the use of information and communications technologies for criminal purposes"' (U.S. Mission to the United Nations, 18 November 2019)

⁴⁶ United Nations General Assembly, Resolution 74/247, 'Countering the use of information and communications technologies for criminal purposes' (27 December 2019) A/RES/74/247,

⁴⁷ Joyce Hakmeh and Allison Peters, 'A New UN Cybercrime Treaty? The Way Forward for Supporters of an Open, Free, and Secure Internet' (Council on Foreign Relations, 13 January 2020) <<https://www.cfr.org/blog/new-un-cybercrime-treaty-way-forward-supporters-open-free-and-secure-internet>> accessed 15 April 2024

⁴⁸ *ibid*

governments shape the treaty's terms, it could empower them to extend state control over digital spaces and restrict freedom of expression, potentially undermining global legal frameworks. The prevailing viewpoint in international relations posits that multilateral diplomacy inherently aligns with liberal democracy, implying that liberal democracies hold a structural advantage in multilateral negotiations. However, the recent passage of illiberal legislation indicates a shift, suggesting that authoritarian regimes are becoming increasingly adept at manoeuvring within multilateral institutions and leveraging them to implement illiberal measures.

From a legal positivist standpoint, the legitimacy of international law in this scenario would be intact. The United Nations General Assembly adopted the resolution, which means it followed the proper procedure and holds legal validity according to positivist principles. Conversely, the utilisation of international law frameworks to introduce legislation which enables censorship and restricts freedom of expression is contrary to natural law principles. According to natural law, the use of international law structures for illiberal purposes could lead to a critique of the legitimacy of international law itself, particularly if it fails to protect human rights as a result.

The input of this model includes the formation of an expert group tasked with drafting a new cybercrime treaty. Throughput involves the negotiations, discussions, and diplomatic processes surrounding these actions. The output is the passage of legislation that reflects the interests of authoritarian regimes and potentially undermines liberal democratic principles. The model may highlight the flaws in the input process by the inclusion of authoritarian nations, in this case in an expert group. From this perspective, the legitimacy of international law might be seen as compromised due to the output not aligning with international law values, namely the centrality of human rights and democracy to the UN's duties.

Manipulation of Multilateral Forums

The final area this essay will focus on are the deliberate attempts by authoritarian regimes to undermine multilateral forums, including those intended for liberal or democratic promotion. This point entails the weakening of the effectiveness of multilateral structures for liberal aims, as well as the deliberate undermining of consensus-based approaches in international law. The former is exemplified by the manipulation of the Human Rights Council, where authoritarian states have successfully weakened the requirement for strong human rights records, allowing

the administrations of Bahrain, Cuba, Qatar, and Saudi Arabia to serve on the council.⁴⁹ This entails a consideration of whether the inclusiveness of international law processes should be prioritised over, in this case, maintaining standards on human rights. The presence of authoritarian countries on the council has had the effect of neutralising it as instrumental for human rights promotion, underscoring the need for multilateral organisations to prioritise their central objectives over peripheral considerations.

Moreover, authoritarian tactics extend to stalling institution-building and blocking collective actions within regional organizations. For instance, it is alleged that China has ‘bought’ Cambodia’s vote in ASEAN and has used this influence to hinder the organization's ability to address issues like the South China Sea dispute.⁵⁰ Similarly, Hungary's questionable obstructionism within the EU has prevented the adoption of anti-China resolutions.⁵¹ Sovereign equality may not be the best path forward in regional organisations where it can be manipulated by wealthy participants or outside actors, particularly where those organisations operate by consensus, and every member state has a veto.

From a legal positivist perspective, the actions of authoritarian regimes in undermining multilateral forums intended for promoting liberal or democratic values could raise questions about the legitimacy of international law. Raz’s work emphasises the authority of the entities that promulgate laws, and if these entities are manipulated by authoritarian tactics, it undermines the perceived legitimacy of the resulting legal decisions and structures. Moreover, the consent of states is important to positivist conceptions of sovereignty.⁵² If this consent is compromised, this could implicate legitimacy.

For a natural lawyer, the deliberate undermining of multilateral forums and consensus-based approaches in international law by authoritarian regimes could be seen as contrary to the principles of justice and morality that underpin natural law theory. If consent is manipulated to suppress dissent or silence opposition within member states, it can result in violations of

⁴⁹ Office of the United Nations High Commissioner for Human Rights, 'Membership of the Human Rights Council' <<https://www.ohchr.org/en/hr-bodies/hrc/membership>> accessed 15 April 2024; Economist Intelligence Unit, 'Democracy Index 2023' (The Economist Group, 2024)

⁵⁰ Kheang Un, 'Cambodia is China's Leverage Point on ASEAN' (East Asia Forum, 15 December 2021) <<https://eastasiaforum.org/2021/12/15/cambodia-is-chinas-leverage-point-on-asean/>> accessed 15 April 2024

⁵¹ Stuart Lau, 'German Foreign Minister Slams Hungary for Blocking Hong Kong Conclusions' Politico (16 July 2020) <<https://www.politico.eu/article/german-foreign-minister-slams-hungary-for-blocking-hong-kong-conclusions/>> accessed 15 April 2024; François Venne, 'China in Hungary: Real Threat or False Alarm?' (CEPA, 2022)

⁵² Richard Collins, 'Classical Legal Positivism in International Law Revisited' in J d'Aspremont and others (eds) *International Legal Positivism in a Post-Modern World* (CUP, 2013)

freedom of speech, assembly, and association. This conflicts with Finnis's view that these rights are important for the pursuit of fulfilment in harmony with natural law principles. From this perspective, the legitimacy of international law may be questioned or denied if it fails to uphold fundamental principles of human rights in the face of authoritarian manipulation.

In the context of the input throughput output model of legitimacy, the deliberate attempts by authoritarian regimes to undermine multilateral forums can be seen as a disruption in the normal processes of international law. The input, which involves the formation and operation of these forums, may be distorted by authoritarian interference and participation, leading to outputs that deviate from the intended goals of promoting human rights. Buying votes or blocking decisions amounts to manipulating the input process, thus undermining the consent and participation of other member states. Manipulating consent can also diminish accountability and transparency within regional organisations. This can weaken the perceived legitimacy of international law as it fails to effectively achieve its central aims due to authoritarian manipulation.

Navigating Authoritarianism and International Law: Challenges and Opportunities

As this exploration nears its conclusion, the question of legitimacy of international law in the face of authoritarianism has been addressed, yet several areas warrant further consideration.

It is important to note the subjectivity of interpretation of key terms involved in this discussion, such as democracy and human rights, which can vary greatly depending on cultural, historical, and political contexts. This essay aims for a balanced view of the legitimacy of authoritarianism within international law, yet it acknowledges the diversity of interpretations. While a liberal democratic perspective is taken on concepts like rights and democracy, other perspectives, such as China's results-based view of democracy or Russia's relativised approach to rights, exist.⁵³ Recognising these differences is crucial for understanding the complexities of legitimacy in international law and fostering meaningful dialogue and cooperation among diverse global actors. The evolving landscape may blur the lines between authoritarianism and democracy, as

⁵³ The State Council Information Office of the People's Republic of China, 'China: Democracy That Works' (2021) 1, 48; Dmitry Shlapentokh, 'Universalization of the Rejection of Human Rights: Russia's Case' in Lynda S. Bell and others (eds) *Negotiating Culture and Human Rights* (CUP, 2001)

authoritarian countries advocate their versions of democracy internationally, and former liberal democratic strongholds edge closer to hybrid systems. The rise of populist rhetoric and emphasis on sovereignty in the UK and USA are particularly noteworthy, as issues like immigration prompt relativised human rights approaches.⁵⁴

Looking ahead, the idea of collaboration will be crucial, given the increasing cooperation among authoritarian regimes in international law. This is highly significant, demonstrating that authoritarian regimes are not being obstructed by their differences, and can utilise their majority for increased influence on the international stage. The alignment between regimes like Russia and China highlights significant agreement in their perspectives. Their joint Declaration on the Promotion of International Law emphasises sovereignty and non-intervention, along with consent and good faith in dispute resolution.⁵⁵ Scholars suggest this could lead to a new phase of international law, one which Ginsburg has characterised as 'Eastphalian', resembling classical Westphalian principles with a focus on sovereignty while relegating individual human rights to a secondary concern and limited international integration.⁵⁶

When assessing the threat of authoritarian regimes to international law's legitimacy, it's important to retain a degree of scepticism. Particularly in discussions around norm experimentation, several of the examples in this essay concern regional institutions. The 'Eastphalian' approach is less concerned with transplanting their ideology and governance approach abroad than liberal democracy. This makes it more likely that the norms may be regionally contained. It could potentially emerge as just one component operating within the wider international legal framework. Moreover, international lawyers must consider if a countering force to liberal international law could be beneficial or at least fair, acknowledging the stimulative nature of disagreement in legal processes. Embracing diverse governance styles and perspectives on international law can enrich global discourse, fostering community and constructive outcomes, as argued by Hakimi.⁵⁷ Conflict and debate contribute to the evolution of global governance structures, promoting shared purpose and collaboration among

⁵⁴ 'The Republican Party has lurched towards populism and illiberalism' *The Economist* (Oct 31 2020) <<https://www.economist.com/graphic-detail/2020/10/31/the-republican-party-has-lurched-towards-populism-and-illiberalism>> accessed 16 April 2024; Russell Foster and Matthew Feldman, 'From 'Brexit exhaustion' to 'Covidiot': The United Kingdom and the Populist Future' (2021) 17(2) *JCER* 116

⁵⁵ The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law (Beijing, 2016)

⁵⁶ Tom Ginsburg, 'Democracies and International Law: The Trials of Liberalism' (Hersch Lauterpacht Memorial Lectures Part 3, Cambridge, 14 March 2019) <<https://upload.sms.csx.cam.ac.uk/media/2939251>> accessed 14 April 2024

⁵⁷ Monica Hakimi, 'Constructing an International Community.' (2017) 111.2 *AJIL* 317

participants. Beyond this, it is possible that authoritarian influence in international law could offer some strengths. The track record of liberal hegemony, often led by the USA, has been mixed, marked by inconsistent humanitarian interventions and regime-change efforts. Non-interventionism and consensus-based approaches promoted by authoritarian regimes could lead to a more peaceful international landscape.

Conclusion

In this study of authoritarianism's impact on international law, the landscape traversed has been marked by intricate legal frameworks, diverse ideological perspectives, and evolving power dynamics. At the heart of this inquiry lies the concept of legitimacy, which serves as a lens through which to assess the validity, authority, and acceptance of legal norms and institutions within a global context.

Authoritarian regimes are actively shaping international legal frameworks to align with their ideological preferences and governance style. Examining authoritarian practices within international law reveals concerning trends. This examination has identified three notable areas of impact. Norm-building efforts that suppress dissent, the use of legal structures for illiberal purposes, and the manipulation of multilateral institutions. Examples such as the SCO's formulation of new norms and the adoption of contentious resolutions at the UN General Assembly underscore the complexities of balancing competing interests and values while retaining legitimacy within the international legal landscape.

Legal positivism prioritises the role of social facts and authority in determining the legitimacy of legal norms. While legal positivists may focus on the operation of law rather than its moral implications, the undermining of legal institutions and processes in international law could give rise to legitimacy concerns.

Natural law theory, rooted in universal moral principles, presents a different perspective, emphasising the alignment of legal norms with ethical standards. For natural lawyers, in particular, authoritarian regimes' use of international law for illiberal purposes and creation of norms which counteract human rights pose significant challenges to legitimacy.

The input, throughput, output model provides a comprehensive framework for evaluating legitimacy at all stages of legal and political processes, considering procedural fairness and practical outcomes. While the implications of norm entrepreneurship for legitimacy under this

model are not as conclusive, the manipulation of multilateral institutions interferes with input legitimacy, while leading to outputs that deviate from the intended goals of the institutions. The use of international legal structures for illiberal purposes could compromise output where it no longer aligns with the values central to the institution. Overall, authoritarian influence leads to less transparency and accountability in international law processes.

So, does authoritarianism represent a threat to the legitimacy of international law? This investigation suggests that it does. While acknowledging the complexity of the issue, this conclusion is supported by three distinct and sometimes conflicting schools of thought: legal positivism, natural law, and input, throughput, output model. Each of these perspectives indicates that authoritarianism undermines the legitimacy of international law in various respects.

By critically examining the implications of authoritarian influence on legal norms and institutions, we can better address the challenges posed to the legitimacy and effectiveness of international law. This may involve strengthening mechanisms for accountability, increased selectiveness in international law institutions, promoting transparency in decision-making processes, and stronger upholding universal principles of justice, human rights, and democratic governance. Doing so could ensure that international law strives to serve the interests of all humanity and remains a cornerstone of global stability and cooperation.