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Democracies and International Law: An Update

Tom Ginsburg*

Abstract

Democracies have traditionally played a very important role in the construction and operation of international law, but this role has come under some pressure with the wave of democratic erosion that began around 2006. In a book published last year, the author laid out an argument that in some cases, international law could help to bolster democracy around the world, but that role was under threat from rising authoritarianism. This Essay considers relevant developments, finding cause for optimism in Latin America, some cause for pessimism in Africa, and real risks in Europe. Cyber governance is going to be a critical terrain. Democracy's road ahead is likely to be fraught, but the basic stance of cautious optimism is still appropriate.

* Thanks to Miriam Kohn and Thomas Weil for research assistance, and to Aleksandra Dziegielewska for helpful comments.

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I. INTRODUCTION

This short Essay provides an update of my recently published book, *Democracies and International Law*, which brings together several of my academic concerns over the past two decades.¹ The political origins, spread, and institutionalization of constitutional democracy have been a central theme of much of my work. At the same time, I have always been fascinated with the institutional logics of authoritarian regimes.² In recent years, these two concerns for democracy and dictatorship have come together in my work with my colleague Aziz Huq on democratic backsliding.³ I started my career as an international lawyer, so thinking about the transnational dimensions of all of these issues is important as well.

Definitions are the starting point to understand the claims of the book, and I deploy a relatively minimalist understanding of both democracy and international law. Democracy, as Huq and I define it, is basically a system of electoral competition, underpinned by freedoms of speech, association, and other rights closely tied to elections. It is also underpinned by a bureaucracy that administers the elections in a neutral way, bound by the rule of law.⁴ I also understand international law as a mechanism by which a plural set of societies interacts, despite very different political systems, cultures, and modes of governance.⁵ While it includes a whole panoply of human rights, the machinery for enforcing these norms is relatively weak and depends very much on peer-to-peer pressure as well as internal dynamics within states. This relative minimalism means that I eschew the approach to international law that asserts that it *requires* democratic governance.

With these definitions in place, the book makes three observations.⁶ First, it shows that international law, as a general matter, has overwhelmingly been produced by democracies. This is true not just of areas of international law one might associate with liberal democracies, such as human rights, but extends to more general subjects, such as commercial law and the law of the sea. I argue that democratic propensity to contribute to these transnational projects has to do with temporal turnover associated with democratic governance.

¹ TOM GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* (2021) [hereinafter *DEMOCRACIES*].

² *CONSTITUTIONS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Alberto Simpser eds., 2014); *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., 2008).

³ *See generally* TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

⁴ *See id.*

⁵ *See generally* Brad ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT* (2011).

⁶ *See generally* *DEMOCRACIES*, *supra* note 1.

Second, I show that some democracies have come together to create regimes to promote and protect democracy on the regional level. The human rights regimes of Africa, Latin America, and Europe all have this character, and several trade-based regimes have adopted human rights instruments as a by-product of economic integration. Examples here are the European Union (E.U.) and the Economic Community of West African States (ECOWAS). Both the member states in these organizations, and the courts and bureaucracies they have created, have played roles in developing institutions to protect democracy and have, to some extent, enforced pro-democratic norms using a variety of techniques.

The third observation of the book demonstrates the recent rise of authoritarian international law and suggests some modest steps to combat it. The interaction of China and the United States (U.S.) will determine much about the world's governance going forward, but the relative space for authoritarian and democratic international law may depend more proximately on mid-sized states and trading blocs.

In this Essay, I consider relevant developments since the research on the book was completed in early 2021. I find that some of the arguments have held up well, but in other cases, I may have been either too optimistic or too pessimistic. It is in the nature of academic work that the world sometimes changes in unpredictable ways, but also that our own orientations can distort clear analysis. It is obviously too soon to tell, but it is my hope that, viewed from a couple of decades in the future, the volume will be seen as a pessimistic analysis, reflecting a brief period in which the self-confidence of democracies had temporarily waned. I hope the book will not be viewed as a quaint reminder of the brief decades of democratic triumphalism, before the world reverts to its usual state.

I organize this Essay by region. First, I address the recent developments in Africa which have been marked by coups and other unconstitutional changes in government. I then turn to Latin America, where developments have been more positive since my analysis was completed, which I think shows the relevance of international law for sustaining democratic turnover. I next turn to Europe, and a brief discussion of Asia, including the developments in Hong Kong, Myanmar, and Afghanistan. Finally, I look at the United Nations (U.N.) and the global developments in the regulation of cyberspace. The final Section concludes.

II. THE RETURN OF COUPS IN AFRICA

Globally, I was perhaps most optimistic about the African regional machinery. As I noted, the past two decades had seen a dramatic decline in coup d'états on the continent, but just as my book was being published, a new trend emerged. In the past two years, we have seen a series of attempted coup d'états in Africa, most of which have succeeded. Indeed, in 2021 there were coups or coup attempts in Niger, Mali (for the second time in two years), the Sudan, and Guinea,

along with a transition to a new strongman in Chad.⁷ 2022 is not starting off better: as I was drafting this paper, the military took over in Burkina Faso.⁸ There was a close call in Guinea-Bissau,⁹ and continued turmoil, though not a military coup, in Somalia.¹⁰

In each case, the regional machinery that I described in the book undertook collective action. These steps by the African Union (A.U.) and ECOWAS included suspensions, delegations, border closures, and other techniques, but there were no armed interventions of the kind that displaced Gambian leader Yahya Jammeh in 2017.¹¹ Yet in no case was democracy restored. The basic pattern that seems to have developed is dissatisfaction with a civilian government, leading to a coup d'état, followed by sanctions or suspension.¹² This is then followed by a deal to form an interim or transitional governmental authority with nominal civilian leadership or power-sharing. Next, sanctions are lifted, but in many cases, domestic criticism and protests continue. Rinse and repeat.

This Section describes the various incidents and speculates on causes and consequences.

A. Sudan

In April 2019, protests erupted in the streets of Khartoum after 30 years of leadership by Omar al-Bashir, the former dictator who, in 2016, was indicted by the International Criminal Court for war crimes, crimes against humanity, and genocide.¹³ A coup d'état removed him from power.¹⁴ This ushered in a period of power-sharing between the military government and the Forces for Freedom and

⁷ Ruth Maclean, *Five African Countries. Six Coups. Why Now?*, N.Y. TIMES (Jan. 31, 2022), <https://perma.cc/FL7L-C585>.

⁸ Declan Walsh, *After Coup in Burkina Faso, Protesters Turn to Russia for Help*, N.Y. TIMES (Jan. 25, 2022), <https://perma.cc/HLW7-HL6Y>.

⁹ *Guinea-Bissau: Many Dead After Coup Attempt, President Says*, BBC NEWS (Feb. 2, 2022), <https://perma.cc/U8CU-XTUD>.

¹⁰ *See Political Unrest Deepens in Somalia*, MIDDLE EAST MONITOR (Jan. 1, 2022), <https://perma.cc/82QM-UXKF>.

¹¹ DEMOCRACIES, *supra* note 1, at 1–2. Yahya Jammeh is the former leader of The Gambia who was militarily displaced by ECOWAS member states after refusing to step down after electoral defeat. *Id.*

¹² *See id.* at 165–66.

¹³ *See* Mark Kersten, *Sudan's President Was Indicted. Why Isn't He Paying Any Price?*, WASH. POST (May 26, 2016), <https://perma.cc/9HB8-PJGM>; *12 Defining Moments in Sudan's 12-Month Uprising*, AL JAZEERA (Dec. 18, 2019), <https://perma.cc/X2TN-PSDE>.

¹⁴ *See 12 Defining Moments in Sudan's 12-Month Uprising, supra* note 13.

Change, a civilian group demanding democracy.¹⁵ The joint government was to be led by a military figure for twenty-one months, followed by a civilian.¹⁶ The transition was to take place in November 2021.¹⁷ In September of that year, however, there was a failed coup attempt, which some attributed to forces loyal to ousted leader Omar al-Bashir.¹⁸ This coup attempt was followed by mass demonstrations by supporters of both sides.¹⁹

On October 25, General Abdel Fattah al-Burhan, Sudan's most senior military leader, led a military coup and arrested Prime Minister Abdalla Hamdok.²⁰ In response to al-Burhan's actions, thousands of pro-democracy protesters took to the streets in Khartoum.²¹ The U.S. and E.U. responded by calling for the immediate release of the prime minister, who had been placed under house arrest in al-Burhan's home for "incitement."²² The U.S. also announced that it would pause \$700 million in planned aid to Sudan and raised the possibility of sanctions and other punitive measures.²³ Additionally, the A.U. suspended Sudan "until the effective restoration of the civilian-led transitional authority."²⁴ Finally, the World Bank suspended funding to Sudan.²⁵

Hamdok was reinstated in November 2021 through a deal that gave him freedom to reform his government, hold elections before July 2023, and release political prisoners.²⁶ However, he announced his resignation in January 2022, just two months after being reinstated.²⁷ Analysts differ on the reasons for the coup, but clearly the possible prosecution of al-Bashir might have implicated other

¹⁵ See Jen Kirby, *Sudan Signs Power-Sharing Deal as its Former Dictator Goes to Trial*, VOX (Aug. 19, 2019), <https://www.vox.com/2019/8/19/20812054/sudan-power-sharing-deal-al-bashir-trial> (last visited April 17, 2022).

¹⁶ See Ivana Kottasova & Eliza Mackintosh, *The Military Has Taken Over in Sudan. Here's What Happened*, CNN (Oct. 26, 2021), <https://perma.cc/T8R8-B2QP>.

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See Nicholas Bariyo & Gabriele Steinhauser, *Sudan Military Coup Draws Thousands to the Streets in Protest*, WALL ST. J. (Oct. 25, 2021), <https://www.wsj.com/articles/sudanese-prime-minister-detained-in-apparent-military-coup-11635150306> (last visited April 17, 2022).

²¹ See *id.*

²² *Id.*

²³ See *id.*

²⁴ *African Union Suspends Sudan After Military Coup*, DW (Oct. 27, 2021), <https://perma.cc/7VM7-PKUY>.

²⁵ See *id.*

²⁶ See *Sudan's Military Reinstates Ousted Civilian PM Hamdok*, BBC (Nov. 21, 2021), <https://perma.cc/HH5C-U7JT>.

²⁷ See Adam Taylor, *There Was an 'Epidemic' of Coups in 2021. The New Year Hasn't Cured the Political Turmoil*, WASH. POST (Jan. 4, 2022), <https://perma.cc/TN3V-G3FP>.

members of the military leadership.²⁸ In addition, military and economic interests were at stake.²⁹ At this writing, the transitional government hobbles along, but the military is clearly in the dominant position. Elections are scheduled for 2023.³⁰

B. Mali

Mali has been plagued by complex violence for many years, spilling over into other areas of the Sahel.³¹ In 2020, protests over corruption and an inability to resolve the violence led to a coup against sitting president Ibrahim Keïta by a group that called itself the National Committee for the Salvation of the People.³² Although the coup was somewhat popular domestically, the country was suspended from ECOWAS and the A.U.,³³ and the G5 Sahel Group did not let Mali take its turn in the rotating presidency.³⁴ This pressure led the junta to agree to an 18-month power-sharing arrangement with Colonel Assimi Goïta being the vice president under a civilian President, Bah N'daw.³⁵ Sanctions were then lifted.³⁶

N'daw instituted a cabinet reshuffle in May 2021, but this triggered the second coup in two years led by Goïta, who accused N'daw of “reshuffling the transition government,” an act of betrayal.³⁷ Colonel Goïta subsequently pushed elections back to 2026.³⁸ In response to the coups and election delays, ECOWAS imposed sanctions, including a travel ban and asset seizures, and sealed the borders.³⁹ These sanctions follow a period of rising tensions between Mali and

²⁸ See Alex de Waal, *Sudan Coup: Why the Army Is Gambling with the Future*, BBC (Oct. 27, 2021), <https://perma.cc/9HPC-LC8T>.

²⁹ See *id.*

³⁰ *Sudan's Burhan Says Military Will Exit Politics after 2023 Elections*, REUTERS (Dec 4, 2021), <https://www.reuters.com/world/africa/sudans-burhan-tells-reuters-army-will-exit-politics-after-2023-elections-2021-12-04/> (last visited April 17, 2022).

³¹ See generally, KATHERINE PYE, CTR. EUROPEAN REFORM, *THE SAHEL: EUROPE'S FOREVER WAR?* (2021), <https://perma.cc/563H-PJFZ>.

³² See Emily Fornof & Emily Cole, *Five Things to Know About Mali's Coup*, U.S. INST. PEACE (Aug. 27, 2020), <https://perma.cc/P62U-VJWM>.

³³ See *West African Bloc Shuts Borders with Mali, Vow Sanctions over Military Coup*, DW (Aug. 19, 2020), <https://perma.cc/M785-75NL>.

³⁴ See ECOWAS, *G-5 Sabell Ready to Punish Mali*, AFR. INTEL., (Jan. 12, 2022), <https://perma.cc/W4DR-3MXQ>.

³⁵ *Mali Coup: Military Agrees to 18-month Transition Government*, BBC (Sept. 12, 2020), <https://perma.cc/39AC-D327>.

³⁶ See *West African Leaders Lift Post-Coup Sanctions on Mali*, AL JAZEERA (Oct. 6, 2020), <https://perma.cc/9ULB-VXVM>.

³⁷ See Danielle Paquette, *Two Coups and no Election Later, West Africa Cuts off Mali*, WASH. POST (Jan. 10, 2022), <https://perma.cc/U97N-F5J2>.

³⁸ See *id.*

³⁹ See *West Africa Bloc ECOWAS Imposes Sanctions on Mali Leaders*, AL JAZEERA (Nov. 7, 2021), <https://perma.cc/9BGX-4LLG>.

ECOWAS, including the expulsion of the ECOWAS special representative to Mali in October 2021.⁴⁰ The A.U. also suspended Mali and threatened it with sanctions.⁴¹

The prospect of military force is in the background of the clash. ECOWAS has stated that its troops remain alert, as has the Mali junta.⁴² Mali has also strengthened its ties with Russia, including cutting a deal to hire Russian mercenaries.⁴³ Meanwhile, France has been withdrawing troops from the region.⁴⁴ On January 31, Goïta expelled the French Ambassador from the country.⁴⁵ This in turn led to sanctions directed at Goïta and other key leaders. These tensions are exacerbated by ongoing Islamist insurgent activities in Mali. But the external actors seem particularly tough on Mali, with the ECOWAS Chairman blaming it for the accelerated trend in coups across the region thereafter.⁴⁶

C. Guinea

In September 2021, Colonel Mamady Doumbouya staged a coup that ousted Guinean President Alpha Condé, who had served since 2010 as the country's first freely elected president but who had also amended term limits to stay in office.⁴⁷ After arresting Condé, the National Rally and Development Committee (CNRD) suspended Guinea's constitution and other institutions, closed land and air borders, and declared a nationwide curfew.⁴⁸ Regional organizations attempted to address the coup. The A.U. responded with a statement condemning CNRD's "power grab" and asking for the immediate release of Condé.⁴⁹ The A.U. and ECOWAS both suspended Guinea's membership.⁵⁰ ECOWAS also demanded a

⁴⁰ See *Mali Expels ECOWAS Envoy from the Country*, AL JAZEERA (Oct. 25, 2021), <https://perma.cc/X997-A6RY>.

⁴¹ See *African Union Suspends Mali after Military Coup and Threatens Sanctions*, REUTERS (Jun. 2, 2021), <https://www.reuters.com/world/africa/african-union-suspends-mali-after-military-coup-threatens-sanctions-2021-06-01/> (last visited Apr. 17, 2022).

⁴² See Paquette, *supra* note 37.

⁴³ See *id.*

⁴⁴ See Norimitsu Onishi et al., *France Announces Troop Withdrawal from Mali after 9-Year Campaign*, N.Y. TIMES (Feb. 17, 2022), <https://perma.cc/T92Y-AKY8>.

⁴⁵ See Bola A. Akinterinwa, *Terrorism, Armed Banditry and Coups d'État in West Africa: Recidivist Dynamics and Quo Vadis*, THIS DAY LIVE (Feb. 13, 2022), <https://perma.cc/K6Q3-HKZD>.

⁴⁶ See *ECOWAS Chairman Says 'Contagious' Mali Coup Has Set a Dangerous Trend*, FRANCE24 (Feb. 3, 2022), <https://perma.cc/RPE8-3PPB>.

⁴⁷ See Umaro Djau, Kareem Khadder & David McKenzie, *Guinean Military Officer Says President Alpha Conde Arrested, as Apparent Coup Unfolds*, CNN (Sept. 6, 2021), <https://perma.cc/UNB6-VUXJ>.

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ See *African Union Suspends Guinea After Military Coup*, DW (Oct. 9, 2021), <https://perma.cc/CL4N-NDTV>.

six-month transition to democratic government and imposed smart sanctions, including freezing the financial assets of the junta members and their relatives and barring them from travelling.⁵¹ Analysts emphasized the weak international responses to other coups in the region:

Doumbouya also probably assessed that the region and international community, which had weakly protested Condé's third term, would do little substantively to oppose the coup, judging from their ham-fisted responses to recent unconstitutional moves in Mali and Chad. The African Union, the Economic Community of West African States (ECOWAS), France, and the United States have been hesitant to exact significant penalties in recent years, a contrast to past decades of principled responses to unconstitutional takeovers.⁵²

D. Chad

President Idriss Déby had taken power of his country in 1990, after a coup d'état against President Hissene Habre.⁵³ Déby won six consecutive elections of limited democratic quality, surviving a number of coup attempts and rebellions.⁵⁴ In 2021, while visiting the front lines during a military conflict with rebels, Déby was killed.⁵⁵ The army dissolved parliament and appointed Déby's son, Mahamat Idriss Déby Itno, as head of a Transitional Military Council that would guide the country for 18 months until the next elections.⁵⁶ Déby Itno is a four-star general who was formerly in charge of the presidential guard.⁵⁷

The A.U. has not imposed sanctions on Chad or suspended its membership in response to the most recent transfer of power. It did, however, send a fact-finding mission to Chad.⁵⁸ The A.U. mission recommended a power sharing arrangement between the military and civilian leaders, and a "National Dialogue" was announced for May.⁵⁹ Chad is a case in which the nominal form of

⁵¹ *Guinea Junta Brushes off Impact of ECOWAS Sanctions*, REUTERS (Sept. 18, 2021), <https://www.reuters.com/world/africa/guinea-junta-brushes-off-impact-ecowas-sanctions-2021-09-18/>, (last visited Apr. 17, 2022).

⁵² Judd Devermont, *Guinea: The Causes and Consequences of West Africa's Latest Coup*, CTR. STRATEGIC & INT'L STUD. (Sept. 8, 2018), <https://perma.cc/TK63-T97E>.

⁵³ See Scott Neuman, *Chad's President, Idriss Déby, Reportedly Killed During Clash with Rebels*, NPR (Apr. 20, 2021), <https://perma.cc/EFY8-J6CP>.

⁵⁴ *Id.*

⁵⁵ See *Chad President's Death: Rivals Condemn 'Dynastic Coup'*, BBC (Apr. 21, 2021), <https://perma.cc/UTB4-QRM8>.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *African Union Mission Urges Return to 'Constitutional Order' in Chad*, REUTERS (May 12, 2021), <https://www.reuters.com/world/africa/african-union-mission-urges-return-constitutional-order-chad-2021-05-12/>, (last visited Apr. 17, 2022).

⁵⁹ See *id.*

government seems less important than the fact of seemingly permanent internal conflict, which pushes toward strongman rule.

E. Niger

In the early morning of March 31, 2021, some elements of the military (specifically the Air Force), led by Captain Sani Saley Gourouza, attempted a coup two days before the inauguration of president-elect Mohamed Bazoum.⁶⁰ The coup was repelled and most perpetrators were arrested.⁶¹ Gourouza was arrested the next month in Benin and is being held in Niger.⁶² There was no direct intervention by any regional bodies.

The transition to Bazoum was the first transfer of power between two democratically elected leaders since Nigerien independence in 1960. President Bazoum's rival, Mahamane Ousmane, however, rejected the results of the election by alleging fraud.⁶³ Bazoum has received support from the A.U. as well as other members of the G5 Sahel, especially Nigeria, who view him as a force for continuity.⁶⁴ But Niger is and will likely continue to be a coup-prone country, especially if opposition figures do not accept defeat easily.⁶⁵

F. Central African Republic

In 2013, President François Bozizé was ousted from power by a rebel group known as Seleka.⁶⁶ Ever since, there has been a great deal of insecurity in the country. In the leadup to the 2020 election, after Bozizé's application to run for president was rejected, he led a separate group of rebels in the Central African Republic (CAR), the Coalition of Patriots for Change (CPC), in an attempt to oust the sitting president, Faustin-Archange Touadéra, from the capital city of Bangui.⁶⁷ These rebels were repelled by U.N. peacekeeping forces along with Russian and Rwandan mercenaries.

⁶⁰ *Niger Ex-Minister Held Over 'Attempted Coups'*, BARRON'S (Apr. 11, 2022), <https://perma.cc/J7QL-BND8>.

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See Niger 'Coup' Thwarted Days Before Inauguration*, BBC (Mar. 31, 2021), <https://perma.cc/2W6W-6HDF>.

⁶⁴ *See Olayinka Ajala, Botched Coup in Niger Points to Deep Fissures in the Country*, CONVERSATION (Apr. 2, 2021), <https://perma.cc/GP6G-MNBB>.

⁶⁵ *See Akinterinwa, supra* note 45.

⁶⁶ *See Pauline Bax, Russia's Influence in the Central African Republic*, INT'L CRISIS GRP. (Dec. 2, 2021), <https://perma.cc/4S9G-C6FL>.

⁶⁷ *See id.*

Touadéra won the election with 53% of the vote and was declared the president in early January 2021, but the situation remained volatile.⁶⁸ Analysts have noted how the coup attempt put international organizations in a tough spot because coming out in favor of the elected President Touadéra could be seen as “championing elections that many believe were neither safe nor fair.”⁶⁹ In a statement on July 21, 2021, the A.U. Peace and Security Council reaffirmed its solidarity with the people of the CAR as well as its respect for the country’s sovereignty.⁷⁰ It reiterated support for the government and its implementation of the 2021 Political Agreement for Peace and Reconciliation in the Central Africa Republic (PAPR-CAR), for which the A.U. is the guarantor.⁷¹

Another player is the Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), the U.N. peacekeeping mission in CAR, in place since 2014.⁷² The U.N. Security Council passed an arms embargo, but in 2017 it granted Russia an exemption to sell light arms to Touadéra to assist with the repulsion of rebels.⁷³ Later in 2018, Touadéra appeared in public with a security detail widely believed to be from the Wagner group, a Russian mercenary outfit.⁷⁴ In exchange for training and protection, the Russian oligarch who runs the Wagner group, Yevgeny Prigozhin, was granted exclusive mining rights to seven gold and diamond mines.⁷⁵ Successfully repelling the CPC and ensuring Touadéra stays in power will ensure both business as usual for the Wagner group and Russia, and continued extraction of CAR resources.⁷⁶ Touadéra has also credited Rwanda as vital in pushing the rebels back, and in August of 2021, the two countries signed four additional bilateral agreements, including one on defense and security.⁷⁷

⁶⁸ John A. Lechner & Alexandra Lamarche, *Outside Powers are Making the Conflict in the Central African Republic Worse*, FOREIGN POL’Y (Jan. 22, 2021), <https://perma.cc/AUK2-LMX3>.

⁶⁹ *Id.*

⁷⁰ *See Communique of the 1011th Meeting of the African Union Peace and Security Council on the Report of the PSC Field Mission to the Central African Republic, 21 July 2021*, RELIEFWEB (Aug. 4, 2021), <https://perma.cc/UH6P-EBZ4>.

⁷¹ *See id.*

⁷² S.C. Res. 2149, ¶ 18 (Apr. 10, 2014).

⁷³ *See Bax, supra* note 66.

⁷⁴ *See Danielle Paquette, Russian Mercenaries Have Landed in West Africa, Pushing Putin’s Goals as Kremlin is Increasingly Isolated*, WASH. POST (Mar. 9, 2022), <https://perma.cc/3S9R-NNQW>.

⁷⁵ *See Bax, supra* note 66.

⁷⁶ *See Neil Edwards, Coup-Proofing: Russia’s Military Blueprint to Securing Resources in Africa*, COUNCIL FOREIGN RELS. (Mar. 10, 2021), <https://perma.cc/8SH9-QXVT>.

⁷⁷ James Karuhanga, *CAR, Rwanda Sign Four Bilateral Agreements*, ALLAFRICA.COM (Aug. 4, 2021), <https://perma.cc/V763-MEWW>.

G. Burkina Faso

In January 2022, military forces detained President Roch Marc Christian Kaboré of Burkina Faso, suspending the constitution.⁷⁸ The nominal reason for the coup was the inability of the civilian leadership to address the Islamist insurgency and the deteriorating security situation.⁷⁹ ECOWAS and the A.U. suspended the country from membership.⁸⁰ One week later, the military leaders restored the constitution and named military leader Paul Damiba as interim president.⁸¹ Popular demonstrations celebrated the coup and called on Russia to replace France as the primary source of military assistance.⁸²

H. Somalia

Somalia continues to experience government infighting. On December 27, 2021, President Mohamed Abdullahi Mohamed suspended Prime Minister Mohammed Hussein Roble for suspected corruption.⁸³ Mohamed also removed the commander of Somalia's marine forces.⁸⁴ Roble responded by labeling his suspension "an open coup attempt against the government and the national constitution."⁸⁵ The suspensions have occurred against a backdrop of election delays and an ongoing Islamist insurgency.⁸⁶ Mohamed has engaged in previous undemocratic behavior, including unilaterally extending his four-year term by two years in April 2021.⁸⁷ The A.U. responded to the recent fallout between Mohamed and Roble by urging them to hold talks.⁸⁸

⁷⁸ See Nicolas Negoce, *Burkina Faso Coup 2022*, BBC (Mar. 4, 2022), <https://perma.cc/HS6V-WD9N>.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² See Declan Walsh, *After Coup in Burkina Faso, Protestors Turn to Russia for Help*, N.Y. TIMES (Jan. 25, 2022), <https://perma.cc/V9WD-WKUF>.

⁸³ See Abdi Sheikh & Feisal Omar, *Somalia's PM Accuses President of 'Coup Attempt' After Powers Suspended*, REUTERS (Dec. 27, 2021), <https://www.reuters.com/world/africa/somalias-president-suspends-prime-minister-over-corruption-probe-2021-12-27/> (last visited Apr. 17, 2022).

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ See Moses Mozart Dzawu, *African Union Urges Somalia's Fending Leaders to Hold Talks*, BLOOMBERG (Dec. 30, 2021), <https://perma.cc/N3CQ-XKV5>.

I. Guinea-Bissau

In early January 2022, a coup attempt targeted the president of Guinea Bissau. It failed.⁸⁹

J. Analysis.

The trend toward new coups has a number of causes. In the cases of Mali, Niger, and Chad, longstanding conflicts with rebel groups in the Sahel have empowered militaries relative to civilian leaders and made it easy to blame civilians for failure to secure peace. Violence in the Sahel has arguably had spillovers in Guinea and Burkina Faso, which border Mali, and in turn affected Guinea-Bissau, which borders Guinea. A large swath of Africa is now affected. All of these countries are former French colonies, save Guinea-Bissau, which was a Portuguese colony.

The region is likely to be coup-prone because of underlying conditions of poverty, insecurity, and corruption. Robust democracy would be remarkable under such conditions, and it is important to note that in some of the countries—Mali, Burkina Faso, and Guinea—the coups were welcomed by the population initially.⁹⁰ It is too early to say whether governance under military rule will be worse than the various civilian authorities that were displaced. The main objective of “preservative democracy support” in such contexts should be to minimize the worst practices and to try to nudge countries toward electoral mechanisms so that machinery is in place when and if conditions ever improve.

In several of the cases, the strategy has been to encourage a temporary power sharing arrangement with a civilian elite. But as the stories in Sudan and Mali indicate, these deals tend to unravel when the military feels that its core interests are threatened. Indeed, it is hard to name a case in which the interim power sharing deal has led to a successful return to civilian government.

The primary mechanism applied by the international organizations has been a threat of outcasting, but regional trade and integration are so low, and the governments so little concerned with citizen welfare, that these are not strong threats. Nor are the relevant coup leaders likely to have large amounts of assets stashed in ECOWAS countries, and as such, smart sanctions are unlikely to be effective. The main loss a coup leader feels is the lack of status. It may be going too far to say that the regional machinery has had no effect, of course. Arguably, the coup d'états of the past two years have been less bloody than those in prior years. But the trend does not bode well for the outcasting mechanism that I celebrated, and so I confess to a bit of over-optimism.

⁸⁹ See *Guinea-Bissau: Many Dead After Coup Attempt, President Says*, BBC (Feb. 2, 2022), <https://perma.cc/E5HR-FFAF>.

⁹⁰ See Akinterinwa, *supra* note 45.

III. THE CONSOLIDATION OF NORMS OF ROTATION IN OFFICE IN LATIN AMERICA

Executive overstay has been a persistent problem in parts of Latin America, and one phenomenon I wrote about was the abuse of human rights law by leaders intent on staying in office.⁹¹ The history of the substantive adjudication of term limits by constitutional courts, in which they set aside formal constitutional term limits because of purported limitations of the rights of incumbents to run for office, is recent but intense.⁹² It began with the Supreme Court of Nicaragua in 2009, focused on the political rights of strongman Daniel Ortega. This was followed by decisions by the Supreme Court of Honduras and the Constitutional Court of Bolivia in 2015 and 2017, respectively.⁹³ These decisions were facilitated by the Inter-American Court's doctrine of "conventionality control" by which the American Convention on Human Rights (American Convention), and the Court's interpretations thereof, were to be implemented directly by national judges.⁹⁴

In response to this abuse of human rights law, the Inter-American Court issued an advisory opinion in June 2021, requested by the government of Colombia, that clarified the matter.⁹⁵ (Colombia's Constitutional Court had found an unwritten limitation to presidential re-election in a case involving former strongman Alvaro Uribe, a key moment in preventing democratic erosion in that country.)⁹⁶ Colombia asked the Court whether presidential re-election was a human right protected by the American Convention, so that term limits in a constitution would be a violation thereof.⁹⁷ The opinion interpreted the scope of Articles 1, 23 (right to participate in public affairs and to be elected), and 32 (limitations of rights) of the American Convention,⁹⁸ as well as Article XX of the American Declaration of Human Rights (political participation).⁹⁹

⁹¹ See Democracies, *supra* note 1, at 137–38.

⁹² See Daniel Cerqueira, *Is There a Human Right to Indefinitely Run for Reelection?* VERFASSUNGSBLOG (Oct. 22, 2020), <https://perma.cc/GLE9-KUJ6> (describing recent cases in which Latin American courts adjudicate on the constitutionality of term limits).

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ Presidential Reelection Without Term Limits in the Context of the Inter-American Human Rights System, Advisory Opinion OC-28/21, Inter-Am. Ct. H.R. (ser. A.) No. 28 (June 7, 2021), <https://perma.cc/HG5R-BNRZ>.

⁹⁶ See generally Tom Ginsburg & Aziz Huq, *Democracy's "Near Misses,"* 29 J. DEM. 16 (2016).

⁹⁷ See Advisory Opinion OC-28/21, *supra* note 95, ¶ 3.

⁹⁸ Organization of American States, American Convention on Human Rights, Jan. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, <https://perma.cc/WY5Y-DNX6>.

⁹⁹ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Serv.L/V/I.4Rev, XX (May 2, 1948) ("Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take

Article 32 was the crucial provision, as it states that rights may be “limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”¹⁰⁰ Analyzing this, the Court found that “in view of how much power is concentrated in the presidency in a presidential system, restricting the possibility of reelection without term limits is a suitable means of ensuring that a person does not hold onto power, and thus that the fundamental principles of a representative democracy are not affected.”¹⁰¹

Remarkably, the Court went on to hold that presidential term limits were required.¹⁰² In so finding, the Court first recognized “that the greatest current danger facing the region’s democracies is not the abrupt breakdown of the constitutional order, but the gradual erosion of democratic safeguards that can lead to an authoritarian regime, even if it is popularly elected.”¹⁰³ The language of the opinion, that “democratic safeguards should provide for prohibiting presidential reelection without term limits,”¹⁰⁴ does leave some room for internal variation in the design of term limits. Presumably, a state could, as some have, provide for three terms in office, or unlimited terms that are not sequential.¹⁰⁵ But the message about rotation in office is very strong.

Although the advisory opinion is not directly binding on states, it invites future challenges to the way the courts of Nicaragua and Bolivia have interpreted their own constitutions. We thus see the Organization of American States (OAS) system again providing, albeit late, support that may have prevented further waves of democratic backsliding. Of course, counterfactual reasoning is required: without the OAS, would there have been more Venezuelas and fewer Ecuadors in the wake of the “pink tide” of leftist governments in the early 2000s? One cannot say for sure. But the OAS has successfully been able to lower the stakes of partisan competition, preventing the coups we have seen in Africa, and ensuring basic continuity of democratic procedures everywhere in the regions outside of Venezuela, Cuba, and Nicaragua. Perhaps without the regional machinery in place, we would be talking about a red tide in full force.

One positive story that illustrates these dynamics has been Honduras. In the book, I recount the events over the past decade since the removal of President

part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”), <https://perma.cc/2GEX-TUC3>.

¹⁰⁰ Convention on Human Rights, *supra* note 98, art. 32.

¹⁰¹ Advisory Opinion OC-28/21, *supra* note 95, ¶ 120.

¹⁰² *Id.* ¶ 146 (“enabling indefinite presidential reelection is contrary to the principles of a representative democracy and, therefore, to the obligations established in the American Convention and American Declaration of the Rights and Duties of Man”).

¹⁰³ Advisory Opinion OC-28/21, *supra* note 95, ¶ 145.

¹⁰⁴ *Id.*

¹⁰⁵ See Tom Ginsburg, James Melton & Zachary Elkins, *On the Evasion of Executive Term Limits*, 52 WM. & MARY L. REV. 1807, 1836 n.162 (2011).

Manuel Zelaya in some detail.¹⁰⁶ Following the forcible removal of Zelaya, the OAS suspended Honduras and only restored its full membership after a deal was reached between Zelaya and his opponents.¹⁰⁷ While Zelaya's successor, Juan Orlando Hernandez, was able to extend the term limit in the constitution, he was not able to capture the election machinery. Indeed, Zelaya's wife, Xiomara Castro, ran for the presidency in 2013 and the vice presidency in 2017, eventually winning the presidential election in 2021 to become the first woman to hold the office.¹⁰⁸ Castro provoked a change in the party system, being the first president not from the Liberal or National parties since the restoration of democracy in Honduras in 1982.¹⁰⁹ The role of the international intervention here was to prevent a battle for power between two factions from escalating to the point that it overturned the basic rules of the game.

One additional feature of the Honduras saga is the importance of incentivizing leaders to step down from power after office. The presence of international positions can offer prestigious "soft landings" for presidents, which in turn can encourage them to obey term limits. This may have been particularly important for Juan Orlando Hernandez, whose brother was indicted for narco-trafficking in the United States.¹¹⁰ Soon after leaving office, Hernandez was sworn into the Central American Parliament (PARLACEN), giving him immunity from prosecution in Central America for the duration of his four-year term.¹¹¹ Hernandez's swearing in came amid speculation that the U.S. would indict him once he left office, and this soon materialized. He was subsequently extradited.¹¹²

At the same time, the OAS machinery has not prevented Nicaragua from descending into full autocracy.¹¹³ Longtime strongman Daniel Ortega has taken increasingly brutal steps to eliminate dissent and protest, and in November 2021 secured his fourth term in office after disqualifying any potential opposition.¹¹⁴

¹⁰⁶ See Democracies, *supra* note 1, at 107–08, 119–20.

¹⁰⁷ See *id.* at 109–10.

¹⁰⁸ See Zolan Kanno-Youngs & Natalie Kitroeff, *Harris Seeks Ally in Honduras as She Revisits Central America*, N.Y. TIMES (Jan. 27, 2022), <https://perma.cc/K5TL-VYKT>.

¹⁰⁹ See *id.*

¹¹⁰ See Gustavo Palencia, *Hours Out of Office, Honduras Ex-president Gains Immunity through Regional Post*, REUTERS (Jan. 27, 2022), <https://www.reuters.com/world/americas/hours-out-office-honduras-ex-president-gains-immunity-through-regional-post-2022-01-28/> (last visited Apr. 17, 2022).¹¹¹

See *id.*

¹¹¹ See *id.*

¹¹² See Maria Martin & Robbie Griffiths, *Ex-Honduran President Hernández Is Extradited to the U.S. on Drug Charges*, NPR (Apr. 21, 2022), <https://perma.cc/RL9F-K27X>.

¹¹³ See Yubelka Mendoza & Natalie Kitroeff, *Nicaragua Descends into Autocratic Rule as Ortega Crushes Dissent*, N.Y. TIMES (Nov. 7, 2021), <https://perma.cc/VV4X-LFY7>.

¹¹⁴ See *Why Nicaragua's Slide Toward Dictatorship Is a Concern for the Region and the US, Too*, CONVERSATION (Nov. 9, 2021) <https://perma.cc/EB77-YK68>. See also Keith Mines & Mary Speck, *Is Nicaragua's*

His wife, Rosario Murillo, remains as vice president, seemingly in violation of the Constitution.¹¹⁵ The OAS publicly condemned Ortega's election maneuvering with a resolution stating that Nicaragua's election lacked "democratic legitimacy."¹¹⁶ The U.S. also imposed financial sanctions and banned Ortega and other members of the Nicaraguan government from entering the U.S., provoking Ortega's ire.¹¹⁷ The Inter-American Commission on Human Rights (IACHR) published a report entitled "Concentration of Power and Weakened Rule of Law in Nicaragua" prior to the elections.¹¹⁸ The press release accompanying the report notes that Ortega's consolidation of power and ongoing human rights abuses have been "enabled by the collaboration of several State institutions, including the National Assembly, components of the Judiciary like the Supreme Court of Justice, and the Supreme Electoral Council, as well as by the lack of adequate independent and impartial oversight mechanisms."¹¹⁹ Ortega has derided the OAS as "Yankee imperialists" attempting to undermine Nicaragua's election integrity and initiated the process of withdrawing from the OAS.¹²⁰

One other "messy" situation the OAS has had to deal with is El Salvador. Since President Nayib Bukele's election in 2019, his New Ideas Party has compromised Salvadoran judicial independence by dismissing judges and prosecutors and replacing all five Constitutional Court magistrates.¹²¹ It has also expelled a Mexican editor of the news site El Faro from the country and introduced a "foreign agents bill" that would impose a 40% tax on foreign donations.¹²² In September 2021, the newly packed Constitutional Court ruled that presidents can run for a second consecutive term, allowing Bukele to seek a

Descent into Dictatorship Irreversible?, U.S. INST. PEACE (Nov. 15, 2021), <https://perma.cc/G2B4-WFZ6>.

¹¹⁵ See CONSTITUTION OF NICARAGUA, Jan. 1, 1987, art. 147:

The following persons may not run for President or Vice President of the Republic: a. Family members within the fourth level of consanguinity or the second level of marital relations of the person who exercises or has exercised the full powers of the presidency at any time during the period in which the election for the following term takes place.

¹¹⁶ *Nicaragua Denounces OAS as President Ortega, Wife Banned from US*, AL JAZEERA (Nov. 16, 2021), <https://perma.cc/KYF9-EML6>.

¹¹⁷ See *id.*

¹¹⁸ *IACHR Publishes Report on the Concentration of Power and the Weakening of the Rule of Law in Nicaragua*, ORG. OF AM. STATES (Oct. 28, 2021), <https://perma.cc/5KSG-CVAD>.

¹¹⁹ *Id.*

¹²⁰ *Under Fire for 'Sham' Vote, Nicaragua Begins Withdrawal from OAS*, AL JAZEERA (Nov. 19, 2021), <https://perma.cc/WPQ9-CYDL>.

¹²¹ Bryan Avelar & Oscar Lopez, *Raids on Independent Groups in El Salvador Raise Fears of Repression*, N.Y. TIMES (Nov. 23, 2021), <https://perma.cc/D7ME-2VHM>.

¹²² *Id.*

second term in 2024.¹²³ Regional responses have been strongly worded but largely ineffective. The IACHR condemned Bukele's interference with the judiciary.¹²⁴ It also released a report entitled "The Human Rights Situation in El Salvador," which highlighted the structural nature of ongoing human rights problems in El Salvador and made recommendations to improve the situation in November 2021.¹²⁵ In another example of tension between El Salvador and OAS, El Salvador has withdrawn from an anti-corruption agreement with OAS. The agreement, called the International Commission against Impunity in El Salvador (CICIES), was created in September 2019 and broadly modeled on the commission that had operated in Guatemala with support from the U.N.¹²⁶

That body, the International Commission against Impunity in Guatemala (CICIG), successfully prosecuted many senior politicians, but its mandate was not renewed in 2019 by President Jimmy Morales.¹²⁷ Guatemala has also made moves to erode judicial independence by, among other things, bringing impeachment proceedings against members of the Constitutional Court and firing anti-corruption prosecutor Juan Sandoval.¹²⁸ The IACHR issued a statement expressing its concern over the proceedings.¹²⁹ That statement also framed Sandoval's dismissal as a part of broader concerns about weakening judicial independence and urged Guatemala to combat corruption.¹³⁰

IV. EUROPE AND THE CONTINUING SAGA OF JUDICIAL INDEPENDENCE IN HUNGARY AND POLAND

The long saga of engagement over judicial independence in the "illiberal authoritarian" regimes of Poland and Hungary is one that I described in some detail.¹³¹ These countries have led the illiberal turn on cultural issues and have

¹²³ See *id.*

¹²⁴ *The IACHR Condemns the Removal of the Judges of the Constitutional Chamber of the Supreme Court of Justice Without Respect for Due Process and Urges El Salvador to Preserve the Rule of Law*, ORG. OF AM. STATES (May 3, 2021), <https://perma.cc/ZF9T-KAJT>.

¹²⁵ See *IACHR Presents Report on the Situation of Human Rights in El Salvador*, ORG. OF AM. STATES (Nov. 2, 2021), <https://perma.cc/SS37-DLBQ>.

¹²⁶ See *El Salvador Ends Anti-corruption Accord with OAS, Dismaying U.S.*, REUTERS (June 4, 2021), <https://www.reuters.com/world/americas/salvadoran-attorney-general-ends-anti-corruption-accord-with-oas-2021-06-04/> (last visited Apr. 17, 2022).

¹²⁷ See Jeff Abbot, *Guatemala's CICIG: UN-backed Anti-Corruption Body Shuts its Doors*, ALJAZEERA (Sept 3, 2019), <https://perma.cc/B95R-LBXV>.

¹²⁸ See *IACHR Expresses Concern Over Impeachment Proceedings Brought Against Members of Guatemala's Constitutional Court*, ORG. OF AM. STATES (Mar. 18, 2021), <https://perma.cc/DPC5-XVHA>.

¹²⁹ See *IACHR Expresses Concern over Actions That Weaken Judicial Independence in Guatemala*, ORG. OF AM. STATES (Aug. 6, 2021), <https://perma.cc/56CB-FY4C>.

¹³⁰ See *id.*

¹³¹ See DEMOCRACIES, *supra* note 1, at 153–61.

openly defied attempts to convince them otherwise. In December 2021, Hungary blocked the E.U. from formally participating in President Biden's Summit for Democracy because Hungary was the only E.U. member not invited.¹³² Without an agreed upon position by all twenty-seven member states, Hungary argued that European Commission President Ursula von der Leyen and European Council President Charles Michel could not speak on behalf of the E.U. Similarly, Hungary is blocking E.U. participation in multilateral discussions about how to govern cyberspace.¹³³ This incident illustrates just how difficult it will be for the E.U. to play a role in preservative democracy support given that major diplomatic initiatives can be blocked by a single member.

Hungary announced that it would host a conference for right-wing participants from the U.S. and Europe under the umbrella of the Conservative Political Action Conference (CPAC) in March.¹³⁴ The conference was thought to be an effort by Prime Minister Viktor Orbán to shore up his standing in Europe ahead of Hungary's April 2022 elections, in which he faced a united opposition for the first time in twelve years.¹³⁵ Orbán won that election with a majority of votes.¹³⁶

In Poland, the ruling Law and Justice Party (PiS), has sought to transform the judiciary. It replaced members of the National Council of the Judiciary (which appoints judges), disciplined some judges on allegedly political grounds, and increased the power of the PiS-run Justice Ministry to appoint presidents of regional courts.¹³⁷ The government has also attacked media freedom, provoking only a nonbinding resolution of concern from the European Parliament.¹³⁸ The Polish Constitutional Tribunal has become an ally of the government's illiberal turn, banning almost all abortions.¹³⁹ The Tribunal has also asserted that European law is not compatible with the Constitution, providing a frontal challenge to

¹³² See Alberto Nardelli, *Hungary Sinks EU's Joint Role in Biden's Democracy Summit*, BLOOMBERG (Dec. 2, 2021), <https://perma.cc/YY9E-9SGS>.

¹³³ See *id.*

¹³⁴ See *Hungary to Host Global Right-Wing Populists in Support of PM Orbán*, REUTERS (Jan. 26, 2022), <https://www.reuters.com/world/europe/hungary-host-global-right-wing-populists-support-pm-orban-2022-01-26/> (last visited Apr. 17, 2022).

¹³⁵ See *id.*

¹³⁶ See Robert Tait & Flora Garamvolgyu, *Viktor Orbán Wins Fourth Consecutive Term as Hungary's Prime Minister*, GUARDIAN (Apr. 3, 2022), <https://perma.cc/95U3-EHDA>.

¹³⁷ See *The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland*, ABA CTR. HUM. RTS. (Nov. 19, 2020), <https://perma.cc/4JNY-5SDB>.

¹³⁸ See Gabriela Baczyńska, *Change Rape Definition, Stop Restricting Media, Europe Tells Poland*, REUTERS (Sept. 16, 2021), <https://www.reuters.com/world/europe/europes-rights-watchdog-tells-poland-change-definition-rape-2021-09-16/> (last visited Apr. 17, 2022).

¹³⁹ See *Regression on Abortion Harms Women in Poland*, HUM. RTS. WATCH (Jan. 26, 2022), <https://perma.cc/HCS2-ZGAR>.

decisions of the European Commission and the European Court of Justice (ECJ).¹⁴⁰ Ruling that several provisions of the Treaty on the E.U. were incompatible with the Polish Constitution, the Polish judges found that the contested articles empowered the E.U. to act “beyond the limits of competence transferred by the Republic of Poland in the treaties.”¹⁴¹ This is a grave challenge to the ECJ’s significant responsibility, codified in Article 19 of the Treaty on the E.U., to “ensure that in the interpretation and application of the Treaties, the law is observed.”¹⁴²

The E.U. machinery has, as noted, been slow and late, but the screws have tightened somewhat since my book was completed. In July, the European Court found that Poland’s disciplinary chamber of the Supreme Court failed to “provide all the guarantees of impartiality and independence and, in particular, [was] not protected from the direct or indirect influence of the Polish legislature and executive.”¹⁴³ In October, at the request of the European Commission, the Court authorized fines of €1,000,000 per day until the disciplinary chamber was removed or modified.¹⁴⁴ Recently, the European Commission has blocked distribution of coronavirus pandemic recovery funds to Poland and Hungary for continued failure to pay the fines.¹⁴⁵ Poland has said it will not pay the fines and accused the European Commission of interfering in member states’ affairs without a legal basis for doing so.¹⁴⁶ Hungary’s April 2022 parliamentary elections confirmed public support for Prime Minister Orbán’s policy of resistance.¹⁴⁷

Before formally triggering the conditionality mechanism, the European Commission sent letters to Hungary and Poland in November 2021 “warning that concerns over judicial independence, ineffective prosecution of corruption, and deficiencies in public procurement could pose a risk to the E.U.’s financial

¹⁴⁰ See Judy Dempsey, *Poland Tests the EU’s Future*, CARNEGIE ENDOWMENT INT’L PEACE (Oct. 14, 2021), <https://perma.cc/M63Y-78BK>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Gabriela Baczyńska, *Poland Gets Formal EU Demand to Pay Fines over Judicial Regime*, REUTERS (Jan. 20, 2022), <https://www.reuters.com/world/europe/poland-gets-formal-eu-demand-pay-fines-over-judicial-regime-2022-01-20/> (last visited Apr. 17, 2022).

¹⁴⁴ *EU Court Fines Poland 1 Mln Euros Per Day in Rule of Law Row*, REUTERS (Oct. 27, 2021) <https://www.reuters.com/world/europe/eu-top-court-orders-poland-pay-1-million-euros-day-rule-law-row-2021-10-27/> (last visited Apr. 17, 2022).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ See Jan Strupczewski, *EU Might Propose Freezing Funds for Poland and Hungary before April*, REUTERS (Jan. 25, 2022), <https://www.reuters.com/world/europe/eu-might-propose-freezing-funds-poland-hungary-before-april-2022-01-25/> (last visited Apr. 17, 2022).

interests, and could eventually lead to financial penalties.”¹⁴⁸ The basis for cutting off funds would be a law that has been in place since the start of 2021, which conditions the disbursement of funds from the E.U.’s long-term budget to respect for the rule of law.¹⁴⁹ Hungary and Poland challenged the “conditionality mechanism” in the ECJ, but the court upheld the measures.¹⁵⁰

Two commentators have suggested that “willful neglect” by E.U. institutions has led to the current entrenchment of illiberalism in Hungary and Poland.¹⁵¹ As I also noted, the 2017 and 2018 attempts to use Article 7 of the Lisbon Treaty against Poland and Hungary failed because the Article 7 requires unanimity, and the two countries protect each other.¹⁵² But if elections this year had resulted in political changes in Hungary and Poland, then we would have to say that the E.U. had turned back the tide through external pressures, in this case a set of sticks rather than the carrots that have been so characteristic of Europe’s interactions with the eastern countries to date. Clearly, the broader lesson is that outcasting mechanisms should not depend on unanimous agreement of members, as such a consensus would be impossible to achieve in most situations in regions where backsliding is ubiquitous.

V. GLOBAL CYBERGOVERNANCE

Democracies and International Law noted that the U.N. was an increasingly important forum for normative conflict over the future of the internet, particularly through the modality of governing cybercrime.¹⁵³ The major players here are China, Russia, Europe, and the U.S. The E.U. and China both emphasize the importance of sovereignty in internet governance.¹⁵⁴ The U.S. position, which has dominated internet regulation in the first decades of its existence, has led to much criticism, as well as concentration of power in a handful of platforms. This has led to backlash, and what one scholar has called a “revolt” that involves both democracies and nondemocracies.¹⁵⁵ The democratic nations are hardly united: the European Commission recently presented its “Digital Decade Principles” to

¹⁴⁸ Eszter Zalan, *EU Commission Letters to Poland, Hungary: Too Little, Too Late?*, EUOBSERVER (Nov. 23, 2021), <https://perma.cc/J9TD-C3Y9>.

¹⁴⁹ *See id.*

¹⁵⁰ Court of Justice of the European Union Press Release No. 28/22, Judgment in Cases C-156/21 Hungary v Parliament Council and C-157/21 Parliament and Council (Feb. 16, 2022).

¹⁵¹ *See* Steven Erlanger & Benjamin Novak, *How the E.U. Allowed Hungary to Become an Illiberal Model*, N.Y. TIMES (Jan. 4, 2022), <https://perma.cc/9NXV-FKR2>.

¹⁵² *See Democracies*, *supra* note 1, at 153–55.

¹⁵³ *See id.* at 226–27 (describing U.N. initiatives to govern cybercrime).

¹⁵⁴ *See* Dongsheng Zang, *Revolt Against the U.S. Hegemony: Judicial Divergence in Cyberspace*, 39 WIS. INT’L L.J. 1, 4 (2022).

¹⁵⁵ *See id.* at 9.

provide what it called a constitutional basis for a democratic internet with privacy protection at the core.¹⁵⁶ Brussels retains a massive amount of regulatory power by virtue of its large market, significant ability to govern competition law, and its impact on global standards.¹⁵⁷

In late December 2019, U.N. General Assembly (UNGA) Resolution 74/247 established an “open-ended ad hoc intergovernmental committee of experts, representative of all regions, to elaborate a comprehensive international convention on countering the use of information and communications technologies for criminal purposes.”¹⁵⁸ The committee’s organizational session, originally scheduled for August 2020, took place in May 2021.¹⁵⁹ At the organizational meeting, the group elected officers.¹⁶⁰ The U.N. Office on Drugs and Crime (UNDOC) serves as secretariat of the ad hoc committee.¹⁶¹ Representatives from the U.S. and Russia are serving as vice chairs.¹⁶² Resolution 75/282 also

[r]equests the Chair of the Ad Hoc Committee, in consultation with the United Nations Office on Drugs and Crime, to draw up a list of representatives of other relevant non-governmental organizations, civil society organizations, academic institutions and the private sector, including those with expertise in the field of cybercrime, who may participate in the Ad Hoc Committee.¹⁶³

This provision was contentious, with disagreement over the approval process for particular non-governmental organizations (NGOs) and civil society members.¹⁶⁴ Outside the U.N., Human Rights Watch and other NGOs sent a letter to the ad hoc committee urging meaningful civil society participation, as well as inclusion of clear and robust human rights safeguards.¹⁶⁵ Among other things,

¹⁵⁶ See Clothilde Goujard & Laurens Cerulus, *European Pitches Tech “Principles” to Rule the Internet*, POLITICO (Jan. 26, 2022), <https://perma.cc/6ERJ-2L3A>.

¹⁵⁷ See generally ANU BRADFORD, *THE BRUSSELS EFFECT* (2020).

¹⁵⁸ *Ad hoc Committee Established by General Assembly Resolution 74/247*, U.N. OFF. DRUGS & CRIME (2022), <https://perma.cc/7H7R-9PVT>.

¹⁵⁹ G.A. Res. 75/282 (June 1, 2021).

¹⁶⁰ See *id.* ¶ 1.

¹⁶¹ See *id.* ¶ 2.

¹⁶² See *id.* ¶ 1, n.1.

¹⁶³ See *id.* ¶ 9. The list of organizations that have applied to participate is available at: https://www.unodc.org/documents/Cybercrime/AdHocCommittee/First_session/Comments/Revised_list_applicants_OP9_5_Jan_2022.pdf (last visited Apr. 17, 2022).

¹⁶⁴ See *General Assembly Adopts Resolution Outlining Terms for Negotiating Cybercrime Treaty Amid Concerns over ‘Rushed’ Vote at Expense of Further Consultations*, U.N. (May 26, 2021), <https://perma.cc/9B9Y-TMKM>.

¹⁶⁵ See *Letter to the UN Ad Hoc Committee on Cybercrime*, HUM. RTS. WATCH (Jan. 13, 2022), <https://perma.cc/WV6M-NU3V>.

the letter flagged increasing global abuse of cybercrime laws and advocated for a narrowly drafted convention to limit the potential for misuse.¹⁶⁶

There were also allegations that Russia rushed a “surprise text” into the UNGA on short notice.¹⁶⁷ Finally, the modalities of the ad hoc committee’s decision-making structure sparked additional controversy.¹⁶⁸ That controversy was resolved by requiring all substantive matters not decided by consensus to be settled by a two-thirds majority of the representatives present and voting.¹⁶⁹

Resolution 75/282 stipulates that a draft of the new convention on cybercrime is to be provided to the UNGA at its 78th session.¹⁷⁰ That session will run from September 2023 through September 2024.¹⁷¹ “According to Resolution 75/282, the process towards the UN convention shall take into account existing international instruments and efforts at the national, regional and international levels on combating the use of information and communications technologies for criminal purposes.”¹⁷² Within this framework, Russia submitted the first draft Convention on June 29, 2021.¹⁷³ Highlights of the proposed Convention, which will be discussed in the first round of negotiations, include: asking States Parties to criminalize cybercrime domestically; defining new procedures for legal cooperation; and establishing an International Technical Commission on Combating Information CT Crime to assist with implementation of the Convention.¹⁷⁴

There is an explicit emphasis on sovereignty in both the preamble and Article 47(9), which allows a state party to refuse extradition “where such extradition may prejudice its sovereignty, security, public order or other essential public interests.”¹⁷⁵ Article 48, which contains a *non bis in idem* provision, may further limit

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See* Davide Giovannelli, *Proposal of United Nations Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes: Comment on the First Draft Text of the Convention*, NATO COOPERATIVE CYBER DEFENCE CTR. EXCELLENCE, <https://perma.cc/Y4A7-3N5Y>.

¹⁷⁰ *See* G.A. Res. 75/282, *supra* note 159 ¶ 4.

¹⁷¹ *See* FAQ – *New United Nations Convention on Cybercrime*, U.N. (Jan. 2022), https://www.unodc.org/documents/Cybercrime/AdHocCommittee/FAQ_Jan2022.pdf/ (last visited Apr. 17, 2022).

¹⁷² G.A. Res. 75/282, *supra* note 159 ¶ 11.

¹⁷³ *See* Giovannelli, *supra* note 169. The full text of the first draft is available at https://www.unodc.org/documents/Cybercrime/AdHocCommittee/Comments/RF_28_July_2021_-_E.pdf (last visited Apr. 17, 2022).

¹⁷⁴ *See id.* arts. 5, 65 and 78.

¹⁷⁵ *Id.* art. 47, ¶ 9.

extraditions.¹⁷⁶ There is no categorization of malicious cyber activities targeting foreign elections as cybercrime.

In October 2022, Russia and the U.S. will vie for control of the International Telecommunication Union (ITU).¹⁷⁷ Officials from more than 100 countries will meet in Bucharest to choose between U.S. candidate Doreen Bogdan-Martin and Russian candidate Rashid Ismailov for the next secretary-general of the ITU, who will serve a four-year term.¹⁷⁸ The election takes place against a backdrop of criticism of the incumbent, China's Zhao Hulin, for overt support of Huawei and the Belt and Road Initiative. Bogdan-Martin has worked in the ITU for nearly thirty years, while Ismailov is a former Huawei executive who has served as Russia's Deputy Minister of Communications.¹⁷⁹ Bogdan-Martin's platform is focused on broadband access and universal digital connectivity.¹⁸⁰ Ismailov's platform includes a goal of universal broadband access and creation of international rules and ethics guidelines for autonomous artificial intelligence (AI) systems.¹⁸¹ Notably, Russia has also advocated for more expansive internet mandate for the ITU in addition to requesting discussion of cyberspace rules.¹⁸² The more expansive mandate would displace the Internet Corporation for Assigned Names and Numbers (ICANN), which Russia has alleged gives too much power to the U.S.¹⁸³

In short, there have been few developments in this area, but the basic conflict over the internet is likely to play out over the coming years with massive impact. A global constitutional moment with profound consequences for the possibilities of a democratic public sphere seems to be at hand, yet it is too early to tell where it will end up.

VI. CONCLUSION

Democracies and International Law argued that democracies exercise a powerful, but perhaps declining, impact on the structure of general international law.¹⁸⁴ It also documented how regional organizations have successfully supported democracies by providing outer bounds to domestic conflict. I may have been

¹⁷⁶ *See id.* art. 48.

¹⁷⁷ *See* Aaron Schaffer, *U.S. and Russian Candidates Both Want to Lead the U.N.'s Telecom Arm*, WASH. POST (Oct. 12, 2021), <https://perma.cc/3CF6-TBET>.

¹⁷⁸ *See id.*

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *See id.*

¹⁸⁴ *See generally* DEMOCRACIES, *supra* note 1.

overly optimistic about this regional machinery in Africa, and overly pessimistic in Europe. Latin America's democratic machinery is perhaps most developed and continues to provide thick normative language for national interpreters of law. The 2021 election of Xiomara Castro in Honduras provides a positive coda to the saga of Zelaya and Hernandez. And the advisory opinion from the Inter-American Court on term limits will have an enduring impact going forward.

Of course, the most disturbing developments came in the realm of authoritarian international law and its continued advance. Yet the heavy-handedness of coercive diplomacy has led to something of a backlash, especially after Russia's aggression in Ukraine, which provoked condemnation from dictatorships and democracies alike.¹⁸⁵ Even as China's material power continues to grow, there are some arenas in which China and the U.S. have cooperated, particularly in the aftermath of the February 2021 coup against the elected government of Myanmar. The U.N. Credentials Committee has decided to defer recognition of both the de facto Taliban authorities in Afghanistan and the Myanmar junta.¹⁸⁶ The junta has not yet been able to take the country's seat at the U.N., even as it has convicted former National League of Democracy leader Aung San Suu Kyi on sham charges. While the situation in the country remains bloody, the government controls less territory than it has at any time since independence in 1948. The relevant regional organization Association of Southeast Asian Nations (ASEAN), as I noted, has no democracy architecture, and the coup seems to have split the member states. But even this paragon of "Eastphalian" norms of non-interference has taken some tentative steps to outcast the coup-makers.¹⁸⁷ In October 2021, ASEAN barred junta leader Min Aung Hlaing from its summit after Hlaing refused to let the ASEAN Special Envoy from Brunei meet with Aung San Suu Kyi.¹⁸⁸ The bloc has maintained this stance, blocking the foreign minister from attending a recent meeting.¹⁸⁹ These unprecedented steps were perhaps assisted by the U.N. Security Council's blanket condemnation of the coup.¹⁹⁰

¹⁸⁵ 141 countries voted to condemn the invasion. See Julian Borger, *UN Votes to Condemn Russia's Invasion of Ukraine and Calls for Withdrawal*, *GUARDIAN* (Mar. 2, 2022), <https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote> (last visited April 17, 2022).

¹⁸⁶ See *General Assembly Defers Decision on Myanmar, Afghanistan Seats*, *U.N. NEWS* (Dec. 6, 2021), <https://perma.cc/5DEA-EMMR>.

¹⁸⁷ See Tom Ginsburg, *Eastphalia and East Asian Regionalism*, 44 *U.C. DAVIS L. REV.* 859–77 (2010).

¹⁸⁸ See *Timeline: ASEAN Tries to Tackle Myanmar's Worsening Crisis*, *AL JAZEERA* (Oct. 26, 2021), <https://perma.cc/F85L-TKDW>.

¹⁸⁹ *Myanmar Military Barred from ASEAN Foreign Ministers' Meeting*, *AL JAZEERA* (Feb. 3, 2011), <https://perma.cc/MU8J-UG8C>.

¹⁹⁰ See *id.*

Where does this review of developments leave us? Certainly nothing has happened to dampen the basic stance of cautious optimism that I took. But perhaps the other contributors to this symposium will disagree.