

# The Future of Embedded International Law: Democratic and Authoritarian Trajectories

Karen J. Alter\*

## Abstract

*This short Essay explains why deeply embedding international law (IL) directly into domestic legal orders is seen as a helpful democratic legal strategy to make international law more effective. It also describes the logistics of embedding international law into national legal systems. The goal is to then query whether and how authoritarian regimes dis-embed or work around this embedded IL. The analysis raises a fundamental question about how time is important for any conversation about embedded or entrenched international or authoritarian law. The embedded IL strategy is a long-game strategy, and as such it can ultimately outlive periods of authoritarian rule. Yet the longer authoritarian leaders are in office, the more time they have to displace the deep threads of embedded IL. The Essay also considers how authoritarian governments mimic and repurpose the embedded IL strategy, sometimes using this strategy to lock in policies that reflect their particularistic understandings of IL.*

---

\* Norman Dwight Harris Professor of International Relations, Northwestern University and Permanent Visiting Professor at iCourts, the Danish National Research Council's Center of Excellence for international courts.

## Table of Contents

I. Introduction .....	29
II. The Law and Politics of the Embedded International Law Strategy .....	31
A. The Many (Mostly Democratic) Reasons to Embed IL .....	32
B. The Logistics of Embedding IL: Will Embedded IL Continue? .....	34
C. The Domestic and International Strategy of Disembedding IL .....	37
III. Embedded IL and Authoritarian Leaders: Workarounds and Blanket Protections .....	39
IV. The Short Versus the Long Game of Embedded IL .....	41

## I. INTRODUCTION

Embedded international law (IL) is a democratic strategy designed to enhance respect for international law. A significant part of Tom Ginsburg's research has focused on the de facto incorporation of international legal principles into domestic legal orders, and thus on the empirical prevalence of international legal transplants.<sup>1</sup> Ginsburg's recent book *Democracies and International Law*, which inspired this symposium, identifies how democracies have been key actors in building IL and embedded IL.<sup>2</sup> Section II builds on these insights, explaining that there are both democratic and international legal, pragmatic, and political reasons to tether domestic and international law together. A frequently discussed reason is political lock-in. Domestically, lock-in creates stability, making it harder and more time-consuming for subsequent governments to reverse course.<sup>3</sup> Internationally, lock-in is attractive for countries that want to be part of the international system that democratic governments have created. For example, during the Cold War, and perhaps once again, governments often worried about upsetting powerful authoritarian countries by joining Western-led initiatives, even if the governments agreed with the initiatives. I explained the rapid expansion and increased legalization of the World Trade Organization (WTO), the Council of Europe, and changes in the number and design of international courts as spurred by the end of the Cold War, which unleashed many countries to join international agreements and institutions built by democracies.<sup>4</sup> These agreements remain embedded in many national legal systems. In addition, economic actors, firms, and pro-business actors also like the strategy of entwining private contracts, foreign economic agreements, and international arbitration because doing so makes it more costly for a government to then break IL agreements or enact policies that greatly undermine the value of existing foreign contracts. The relevant point in these examples is that at some point, actors who were in power sought to tether domestic and international law together as a legal, political, pragmatic, and sunk-cost lock-in strategy.

Yet there are other reasons to embed IL into national legal systems, which I will develop in Section II. Most of these reasons matter for democratic governments, but the embedding of IL is not limited to democracies.

---

<sup>1</sup> See, e.g., Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013).

<sup>2</sup> See Tom GINSBURG, *DEMOCRACIES AND INTERNATIONAL LAW* 60–102 (2021).

<sup>3</sup> Andrew Moravcsik explained that new democracies and liberal politicians in Latin America and Central Europe embraced regional human rights conventions and human rights courts in order to lock their newly democratic governments into respecting human rights in ways that are more difficult to reverse. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 243–46 (2000).

<sup>4</sup> Karen J. Alter, *The Evolving International Judiciary*, 7 ANN. REV. L. & SOC. SCI. 387, 401–08 (2011).

Authoritarian leaders may also embed IL, following the strategy that Ginsburg calls “mimic and repurpose.”<sup>5</sup> Sometimes mimicry is designed to capture the legitimacy associated with IL,<sup>6</sup> and sometimes repurposing is designed to use IL to further regime-longevity or regime-legitimation goals, as is arguably the case with China’s professed commitment to democracy and human rights. The economic motivation for embedding international legal commitments also pertains to authoritarian capital exporting countries, including China. Moreover, authoritarian leaders often inherit membership in regional organizations, which they are disinclined to repudiate. So, while the incentives and intentions may be different, the phenomenon of embedded IL crosses democratic and authoritarian regimes.

Entrenchment, as this symposium uses the term, is meant to describe using legal tools to consolidate authoritarian leaders’ power in weak democracies. We are living in a time of democratic backsliding, in which many people are wondering if authoritarian rule might help address the complexity and messiness that is democracy. It is in this context that Ginsburg and others are investigating the difference between democratic and authoritarian relationships to IL. Authoritarian entrenchment is a rule-by-law strategy that creates domestic legal rules that direct public and private actors to follow domestic rather than international law, or that enacts the international law in the ways that the regime desires. An example is the recent Russian law that created criminal liability for disseminating “false information and data” about the use of Russian Military Forces with the goal of stopping anyone from challenging the official Russian narrative about the “special military operations” in Ukraine.<sup>7</sup> Often, authoritarian entrenchment is a layering strategy in which laws and policies designed to protect authoritarian rule are layered over existing legal and constitutional provisions.<sup>8</sup> These new authoritarian laws may exist alongside embedded IL. This Essay explores the future of this coexisting embedded IL. Will embedded IL wither beyond recognition and purpose under authoritarian entrenchment? Does this embedded IL provide a Sleeping-Beauty-style on-ramp for international law when charismatic autocrats pass on? The Sleeping Beauty claim is that the international legal provisions can be awakened by domestic actors (most likely judges) who may activate the existing rules should the personal, political, and systemic risks go away.

---

<sup>5</sup> Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT’L L. 221, 241 (2020).

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

<sup>7</sup> Ann M. Simmons & Alexandra Bruell, *Russia Targets Media Outlets With ‘Fake News’ Law, Blocks Facebook*, WALL ST. J. (Mar. 5, 2022), <https://www.wsj.com/articles/russia-targets-media-outlets-with-fake-news-law-blocks-facebook-11646442530>.

<sup>8</sup> Layering is a concept from historical institutional scholarship. *See* WOLFGANG STREECK & KATHLEEN ANN THELEN, BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES 22–24 (2005).

To investigate the future of the embedded IL strategy, I explore three questions: 1) whether the embedded IL strategy will continue much as it has in the past—unevenly, and in fits and starts—for some issues but not for others; 2) whether disembedding of international law is likely to become more prevalent; and 3) whether new workarounds will arise that make the embedded strategy pointless, obsolete, or ineffectual. Section II defines the concept of embedded IL, and it explains the legal and political reasons that democratic politicians and IL supporters embrace an embedded IL strategy. The details help us understand what is needed to unwind an embedded IL strategy, which helps us to address the second question of the likelihood of IL disembedding. Section III considers the confrontation between authoritarianism and embedded IL, addressing the third question of whether embedded IL will be rendered pointless, obsolete, or ineffectual.

Section IV concludes by considering how time horizons and time are important factors. Even if a state dis-embeds IL, or layers authoritarian domestic statutes to counter actions that might be legal under domestic or international laws, these authoritarian legal strategies do not necessarily alter extant IL. International legal politics operate through inter-subjective understandings, meaning understandings that are shared by governments, judges, and popular audiences in diverse venues. While IL is understood and taught differently in different parts of the world,<sup>9</sup> no one government or country can control how IL is understood in other countries or by the various transnational and international actors that draw on IL to advance their causes. This means that authoritarian strategies that may be domestically successful do not necessarily travel to the international level.<sup>10</sup> The future battle for the heart and soul of IL will, therefore, not be framed around the embedding or disembedding of IL, but rather around how existing and politically unchangeable international legal texts—such as IL defending borders and sovereign choice—are to be understood.<sup>11</sup> Meanwhile, embedded IL remains as a long-term strategy to render IL more effective, meaning better able to push governments in the direction of respecting IL.

## II. THE LAW AND POLITICS OF THE EMBEDDED INTERNATIONAL LAW STRATEGY

The strategy of embedded IL is to create multiple layers of legal obligations to the point that treaty-based IL becomes almost redundant. Instead of stopping

---

<sup>9</sup> See generally ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017).

<sup>10</sup> See generally Karen J. Alter & Ji Li, *Chinese and Western Perspectives on the Rule of Law and their International Implications*, in *CAMBRIDGE HANDBOOK ON CHINA AND INTERNATIONAL LAW* (Ignacio de la Rasilla & Cai Congyan eds., 2022) (forthcoming).

<sup>11</sup> See Lauri Mälksoo, *Russia and China Challenge the Western Hegemony in the Interpretation of International Law*, *EJIL: TALK!* (2016), <https://perma.cc/TVZ6-T7QJ>.

at a single statute that domestically incorporates a treaty, the embedding strategy weaves international agreements into the deep fabric of the domestic legal order, which may involve changing statutory, administrative, criminal, civil, and corporate laws. This Section discusses the legal and political attractions of the embedded IL strategy from both a domestic and an international perspective. It then considers some nuts and bolts of the embedded IL strategy, so that we can think about what a counterstrategy might involve.

#### A. The Many (Mostly Democratic) Reasons to Embed IL

There are legal, practical, and political reasons why embedding IL directly into the national legal order can be useful. To the extent that authoritarian leaders do not face the same challenges of implementing domestic or IL, these reasons may mostly pertain to democratic governments.

A legal justification for embedded IL focuses on how to overcome obstacles that arise in the implementation of IL. A strict international legal formalist might see IL as an obligation that a state creates for itself by signing and ratifying treaties. As a domestic legal matter, however, the obligation may rest at the level of the federal government or the executive branch. This dualist reality creates impediments to IL's application to the point that avoiding accidental IL violations or stopping local actors who want to deviate from IL may be difficult.<sup>12</sup> For example, if violations of IL fall squarely within the four corners of executive prerogative or foreign relations law, IL may create no internal legal obligations. Even where ratification of a treaty involves passing legislation that brings IL into the national legal order, in most legal systems the last law passed prevails. Executive ratifications may be reversed by new executive or locally enacted rules, and there may be nothing to prevent a country from accidentally or intentionally overwriting laws that were created as part of the ratification process. Indeed, even where executive branches do want to follow IL (including interpretations of IL in international legal decisions) they may find themselves hamstrung by domestic legal and political impediments. The larger a country, and the more governance authority is devolved to regional, state, or local actors, the more important it is to incorporate IL directly into federal, state, and local legal edicts. This large-size and federalist argument extends to both democratic and authoritarian regimes, so long as the regimes rely on rule of law as opposed to personalistic governance. Tethering international legal commitments to domestic law is an added step.

---

<sup>12</sup> Legal scholars contrast monist systems, where IL is formally supreme in the national legal order, with the more common dualist system, where the relationship between IL and domestic law is not specified. Personally, I think the distinction is overblown in that the combination of embedded IL and good will can matter more than a formal statement that IL is supreme to statutory laws. *See also* Karen J. Alter, *National Perspectives on International Constitutional Review: Diverging Optics*, in *COMPARATIVE JUDICIAL REVIEW* 248–50 (Erin Delaney & Rosalind Dixon eds., 2018).

Tethering and deeply embedding an international legal commitment into the fabric of the domestic legal order can be a way to overcome at least some of these legal and logistical impediments.

A domestic bottom-up political argument in favor of embedded IL might also focus on the lock-in strategy that embedding IL creates. With some important exceptions, states can exit most international legal obligations.<sup>13</sup> Indeed, because executive branches often enjoy extensive foreign relations prerogatives, exiting an international agreement might be legally and politically easier than entering an international agreement,<sup>14</sup> introducing the potential that a new administration may undo years of diplomatic, legal, and political work. Yet where domestic and international law are deeply entwined, exiting a specific agreement may make little practical sense. Many countries have experienced radical political swings based on electoral and leadership changes. Politicians who want to lock in a set of political changes often do so by directly linking national laws or constitutional provisions to an international agreement, where changing the international law-on-the-books is much more difficult. Unwinding the commitment can be difficult because doing so involves changing many rules, and because a range of domestic actors might have made decisions based on the legal commitment. These actors might then respond poorly to a political change that disrupts or creates new liabilities for decisions taken because of existing international and domestic legal commitments.

This logic did not deter the U.K. from exiting the European Union (E.U.), but it did make the U.K.'s exit significantly less disruptive in the short term because U.K. exporters did not need to worry about running afoul of European regulatory rules. The embedded lock-in logic may also be why the Trump Administration could and did withdraw from the not-yet-implemented Paris Climate Agreement, why it renegotiated rather than withdrew from the NAFTA agreement, and why the Trump Administration did not ever seriously try to withdraw from the WTO.<sup>15</sup>

---

<sup>13</sup> States cannot exit the U.N. Charter and some regional agreements create an all-or-nothing membership package. Also, where a treaty has become *jus cogens* or customary IL, exiting the agreement may have very little significance. See Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005), for the rules and politics of exiting international agreements.

<sup>14</sup> Laurence Helfer reviews international and national law regarding the conditions under which states can exit an agreement. Helfer argues that for international law, what matters are the statements and actions of the executive branch. Most domestic constitutions define the terms under which states can enter into international agreements, but they are silent regarding the terms under which states can exit international agreements. See Laurence R Helfer, *Taking Stock of Three Generations of Research on Treaty Exit: Masterclass European Society of International Law (ESIL) Research Forum Hebrew University of Jerusalem Faculty of Law, Jerusalem, Israel 28 February 2018*, 52 ISRAEL L REVIEW 103, 112-113 (2019).

<sup>15</sup> See JACK CAPORAL, WILLIAM REINSCH, MADELEINE WADDOUNS & CATHERINE TASSIN DE MONTAIGU, *THE WTO AT A CROSSROAD* 23–31 (2019), for an analysis of the many challenges of withdrawing from the WTO.

An international political reason to embed IL is that embedded IL provides a helpful way for international actors to connect to domestic compliance constituencies, so as to improve state respect for IL.<sup>16</sup> It is the felt sense of obligation that drives diplomats and legal advisors to advise their governments to respect their international legal commitments. But executive branches can be busy to the point that they lose track of what sub-state actors are doing, and external or diplomatic pressure can be insufficient or even counterproductive to the goal of rectifying adverse domestic practices. Embedded IL provides helpful legal arguments that domestic advocates can draw on as they lobby sub-state actors to bring domestic practice into compliance with IL. A pressuring tactic may involve raising a legal claim. If there is domestic legislation to draw on, an advocate is more likely to win a legal suit challenging sub-state actors for violations of domestic and/or international law.

In short, some actors are motivated by the precept of *pacta sunt servanda* (agreements are meant to be kept) or by an international *erga omnes* obligation (a duty owed to all). But many domestic actors do not think about whether they should be looking to, or actively trying to, adhere to IL. By having international law embedded into the national legal order, national judges, administrators, police, etc., may see following IL as a domestic rule of law obligation. Indeed, from the domestic perspective, the relevant state actor may not even be aware that a statute they are implementing was created because of an international legal obligation. Or the domestic actor may know of the international connection and therefore rely extensively on international interpretations of the relevant law.<sup>17</sup>

This description of embedded IL clarifies how entrenchment—creating legal rules to lock in and protect the power of authoritarian regimes—is the authoritarian flip side of embedded IL. Yet because disembedding IL can be tedious, one can find authoritarian entrenchment that exists alongside law-on-the-books that is intentionally or unintentionally connected to IL.

## B. The Logistics of Embedding IL: Will Embedded IL Continue?

The above reasoning arguably applies more to democratic than authoritarian regimes, which is to say that Ginsburg finds that democratic countries are more likely to make and commit to binding international law, and third-party adjudication of this law while authoritarian governments commit less. In addition, authoritarian governments generally have fewer domestic political and legal limitations when it comes to executive branches expanding, minimizing, or

---

<sup>16</sup> See Karen J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* 110 (2014).

<sup>17</sup> See *id.* at 64–67.

ignoring commitments to international law. If one thinks that democracy is declining and authoritarianism ascending, then these trends and insights raise the first question of whether the strategy will continue much as it has in the past—unevenly, and in fits and starts—for some issues but not for others. The embedded IL strategy is prevalent with respect to human rights and international criminal obligations because these types of obligations require a domestic statutory or constitutional foundation. This strategy is also used in economic agreements because economic actors want to know that there is legal stability and the ability to lock in property rights before they make a serious investment. Embedded IL is also a key strategy for issues involving regulatory implementation, including environmental agreements and the many security-related international efforts to transnationally coordinate to deal with shared problems such as organized crime and the financing of terrorist organizations. Embedded IL has also been used to help states support transnational commercial arbitration and to deal with the problem of parents moving their children across borders to escape a custody agreement.<sup>18</sup>

Authoritarian leaders may share some, if not all, of these priorities. Yet, given that authoritarian and democratic leaders may also want to be able to deviate from the legal agreements of prior governments, the mechanics of embedding IL are important to consider. From a top-down international legal perspective, there are at least two ways that IL becomes embedded into national legal systems. These different pathways shape the ease or difficulty associated with embedding and disembedding IL in the national legal order.

One embedding mechanism involves IL that automatically becomes a seamless part of a national legal order, without any requirement of domestic implementation. This category includes the E.U. regulations that are automatically directly applicable in member states' legal orders.<sup>19</sup> While domestic actors apply E.U. regulations (and E.U. treaties and directives), the Court of Justice of the European Union is ultimately responsible for interpreting E.U. law. Because E.U. regulations are automatically part of the domestic system, they cannot be undone by new leaders of European member states. This same logic has been generalized to regional economic regimes in Latin America and Africa.<sup>20</sup> In these

---

<sup>18</sup> See generally Asif Efrat & Abraham L. Newman, *Deciding to Defer: The Importance of Fairness in Resolving Transnational Jurisdictional Conflicts*, 70 INT'L ORG. 409 (2016).

<sup>19</sup> The European Commission states that “[r]egulations are legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.” *Types of EU Law*, EUR. COMM'N, <https://perma.cc/7479-X5WC>. The E.U. has other legal instruments that do require domestic implementing legislation, such as directives, where implementation and adherence can nonetheless be reviewed by the Court of Justice of the European Union.

<sup>20</sup> See generally Karen J. Alter, *The Global Spread of European Style International Courts*, 35 W. EUR. POL. 135 (2012).

developing-country contexts, the idea of directly applicable and supreme regional law was embraced to deal with turbulent domestic politics and with parliamentary dysfunctions.<sup>21</sup>

The category of seamless incorporation also includes treaties and laws that are directly referenced in constitutions and statutes, and in this way become embedded into the national legal apparatus. For example, Article 93 of Colombia's constitution provides that "[i]nternational treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency have domestic priority. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia."<sup>22</sup> The Colombian Constitution also directly references specific human rights, but Article 93 creates a redundant layer in the event that a new government tries to change a specific constitutional provision. Colombia's Constitutional Court has ruled that this particular constitutional provision is part of the "constitutional bloc," which cannot be revised via the constitutional amendment process.<sup>23</sup>

A second IL-embedding mechanism links treaty ratification with a requirement that state parties pass implementing legislation. A state that fails to pass domestic implementing legislation would be in violation of the international agreement. For example, the Convention against Torture requires state parties to ensure that acts of torture are offenses under criminal law,<sup>24</sup> and it requires states to take "measures as may be necessary" to establish jurisdiction over the criminal offence of torture within their territory and by their citizens.<sup>25</sup> The preamble of the International Criminal Court's (ICC's) Rome Statute states, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and it requires state parties to create the domestic legal

---

<sup>21</sup> In the Andean context, member states added to their regional integration system the supremacy and direct applicability of Andean secondary law and a regional court that could interpret this law to circumvent the rapid political swings of Latin American presidents, legislatures, and the legal challenges to Andean law these swings created. In Africa, creating directly applicable secondary law provided a means to circumvent the general dysfunction of domestic legislatures. See KAREN J. ALTER & LAURENCE R. HELFER, *TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE* 26–44 (discussing why states created the Andean Tribunal), 172–94 (discussing the authority of the Andean tribunal in times of political turbulence) (2017).

<sup>22</sup> CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

<sup>23</sup> Vanessa Suelt-Cock, *El Bloque de Constitucionalidad Como Mecanismo de Interpretación Constitucional. Aproximación a Los Contenidos Del Bloque En Derechos En Colombia*, 133 *UNIVERSITAS* 301 (2016). The Constitutional Court does not elevate all IL into this bloc. See Alter, *supra* note 12, at 257.

<sup>24</sup> See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>25</sup> *Id.* art. 5.

means to prosecute war crimes and procedures to cooperate with the ICC's Office of the Prosecutor.<sup>26</sup>

Creating an international legal obligation to pass domestic implementation legislation is helpful in a few ways. First, it means that a fundamental change of the implementation legislation or a failure to apply the domestic legislation might generate an international legal violation. Second, this embedding strategy creates an extra layer of legal obligation should domestic actors change national statutes. Many countries have incorporated a version of what in the U.S. is called the "Charming Betsy Doctrine," which calls on national judges to interpret domestic law in accordance with IL unless the legislature has expressly indicated a desire to deviate from IL.<sup>27</sup> By formally or informally tethering domestic and international law together, legislative enactors can clearly signal their intent, making it harder for domestic judges to find reasons to deviate from IL. Third, changing domestic law in ways that undermine the international legal obligation might affect adjacent realms that rely on reciprocity, such as extradition treaties or in the case of Brexit, the Good Friday Peace Agreement.

If the reason to embed IL is to make it harder for future governments to change the commitment, to overcome internal barriers to accidental non-compliance, to facilitate compliance, and to enable interstate coordination, then we can expect that some embedding of IL will continue to be a useful strategy. Wherever lock-in is desired, where the regulatory state and administrative law is well developed, and where governments remain committed to rule of law norms, the strategy of embedding IL is likely to continue.

### C. The Domestic and International Strategy of Disembedding IL

Here, I address question 2: whether the disembedding of IL is likely to become more prevalent. Each of the different embedding strategies requires a different disembedding strategy. Also, multiple embedding strategies may be deployed together. Indeed, the whole point of embedding IL is to weave IL into the deep fabric of the national legal order. In other words, the embedding IL strategy is designed to make disembedding IL difficult.

An authoritarian leader whose party controls a majority of the parliament and who is able to redesign and stack the judiciary with loyal judges may find few domestic impediments to passing and implementing whatever new laws the leader desires. But for political systems with a separation of powers, a commitment to the rule of law, and independent judges and administrators, disembedding IL may

---

<sup>26</sup> Rome Statute of the International Criminal Court art. 88, July 17, 1998, 2187 U.N.T.S. 90.

<sup>27</sup> Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

be quite a bit harder. This is especially so if replicants of IL are woven into many rules, laws, and practices.

It is, of course, possible to exit an international legal agreement and to change all of the relevant laws so as to fully dis-embed IL. One must wonder, however, about the attractiveness of such a strategy. For example, a government that wants to commit torture in violation of the Convention against Torture may prefer to keep domestic legal prohibitions on the books rather than publicly advocate for their repeal. Authoritarian leaders also generally want stability. For example, Venezuelan President Hugo Chavez departed the Andean Community, yet his government did not dismantle the Andean intellectual property rights (IPR) infrastructure.<sup>28</sup> Ecuadorian President Raphael Correa, himself an economist, stayed in the Andean Community and never really interfered with its IPR regime because, in both cases, business and government officials found the largely self-funded IPR system useful.<sup>29</sup>

Because legal changes are generally rather transparent, and because many international treaties are popular or helpful, governments may not want to signal their repudiation of an agreement by replacing domestic statutes associated with IL implementation. The next Section will discuss workaround strategies, including layering a blanket edict that protects cherished policies and political friends. This strategy may protect valued domestic objectives, but it does not actually dis-embed IL. And even if national law is changed to protect cherished policies, these changes will not per se impact decisions of transnational and international legal actors. A state might therefore find itself held accountable to international legal agreements in arbitration and by foreign and international courts.

The more complete disembedding strategy will therefore add reservations to international agreements and create bilateral protections. This is the strategy that the U.S. attempted when it pressured signatories of the ICC's Rome Statute to adopt so-called "Article 98" agreements, in which governments promised not to surrender Americans for ICC prosecution even though ratification of the Rome Statute required signatories to work with the ICC to arrest and capture indicted war criminals. The Article 98 strategy did not fully succeed insofar as many countries refused to adopt non-surrender agreements, arguably because some

---

<sup>28</sup> See ALTER & HELFER, *supra* note 21, at 143–44 (2017).

<sup>29</sup> See generally Laurence R. Helfer, Karen J. Alter & Florencia Guertzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1 (2009). We carried this analysis through 2014, publishing the results in ALTER & HELFER, *supra* note 21, ch. 5.

countries refused to break commitments associated with the Rome Statute.<sup>30</sup> That said, no Americans have been prosecuted for war crimes in foreign courts.

Insofar as IL-friendly laws and rules remain on the books, and should judges and administrators once again become independent, it may well be possible to apply the previously mentioned interpretation techniques to reinstate a respect for IL. This is where time becomes an important factor, a point that I will return to at the end of this Essay.

### III. EMBEDDED IL AND AUTHORITARIAN LEADERS: WORKAROUNDS AND BLANKET PROTECTIONS

If there remain technical, functional, legal, and political reasons to embed IL, and if disembedding IL proves more difficult than passing a new law or adding a new provision to the constitution, then the more likely future of embedded IL will involve workaround strategies. Hence the third question: whether new workarounds will arise that make the embedded strategy pointless, obsolete, or ineffectual.

To address this question, one must first query the totalistic nature of the question. Authoritarian leaders are sensitive about specific issues. Most authoritarian leaders also want to be seen as legitimate international actors, and they want their states to be seen as committed to the rule of law. There can also be issues for which embedding IL remains a reasonable strategy for authoritarian governments to continue, or where the work of disembedding IL seems too tedious. Indeed, Erik Voeten observes that populist leaders do not always carry through on their implicit and explicit threats to detach themselves from international legal oversight because of disliked international legal rulings.<sup>31</sup> Mainly, authoritarian leaders want to be unimpeded as they reward friends and pursue their agendas.<sup>32</sup> This goal can usually be achieved by finding an issue-specific workaround to protect whatever policy or friend the leader cares strongly about while preserving the embedded IL regime.

The workaround strategy, therefore, is to find ways to address the political concerns of the government. One protection strategy is to declare a state of emergency/exception. This strategy is especially attractive if a government has

---

<sup>30</sup> Judith Kelley investigated which countries did and did not sign Article 98 agreements, controlling for many factors, including the extent to which a country was dependent on the U.S. for trade or foreign aid. She finds that respect for the rule of law best explains which countries refused to sign an Article 98 agreement. See Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573, 574–75 (2007).

<sup>31</sup> See generally Erik Voeten, *Populism and Backlashes Against International Courts*, 18 PERSPS. ON POL. 407 (2020).

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

created an external enemy to rally domestic support.<sup>33</sup> A second strategy is de-judicialization (e.g., removing an entire policy domain or political realm from the purview of judicial review). For example, China’s “Three Supremes” doctrine essentially puts the Communist Party and its actions and decisions above and outside of the purview of the legal system.<sup>34</sup> The widely used system of separate military courts and legal pluralism strategies that place the resolution of family law or other types of disputes in special local adjudicatory bodies provides additional ways to insulate a part of governance from both ordinary domestic and international legal oversight. Another strategy is to assert or clarify that the supremacy of the constitution disallows the application of any contrary IL or international court interpretation of this law.<sup>35</sup>

These workarounds may protect important authoritarian policies and rules. But authoritarian leaders sometimes find that domestic legal appeals are used to challenge their actions. Faced with repeated pushback by judges and administrators, autocrats have sometimes turned to constitutional replacement or revision via referenda where leaders simultaneously change the constitution and empower a revision of separation-of-power rules and the regulation of judges and the media.<sup>36</sup> The goal in revising the constitution may be to eliminate political checks and create a blanket permission to ignore any IL and legal rulings that contradict the constitution (and the government).

There are two exceptions to this analysis. The first concerns populist leaders for whom deviance is part of the political appeal. As Rochelle Terman has argued, some backlash movements are linked to subcultures of deviance, where taboo-breaking becomes a signaling device that attracts supporters.<sup>37</sup> Authoritarian leaders can use embedded IL as a way to pick their battles, preferring to be charged with a legal violation, which then allows them to thumb their nose at the “imperialism” associated with the international legal critique, an action that will appeal to the government’s supporters. This logic also pushes against a disembedding strategy.

---

<sup>33</sup> See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 UNIV. PA. J. CONST. L. 1001, 1004–14 (2004).

<sup>34</sup> See generally Rogier Creemers, *Party Ideology and Chinese Law*, in *LAW AND THE PARTY IN CHINA: IDEOLOGY AND ORGANISATION* (Rogier Creemers & Susan Trevaskes eds., 2021).

<sup>35</sup> Russia enacted a constitutional amendment that requires Russia’s constitutional court to refuse to implement any international legal ruling that is contrary to the Russian constitution. The international law implications of this amendment are discussed in Isabelle Jeffries, *Russia’s Constitutional Amendment from an International Law Perspective* (Mar. 1, 2021), PILPG, <https://perma.cc/54W2-5987>.

<sup>36</sup> See generally Kim Lane Scheppele, *Autocratic Legalism*, 85 UNIV. CHI. L. REV. 545 (2018).

<sup>37</sup> See generally Rochelle Terman, *The Positive Side of Negative Identity: Stigma and Deviance in Backlash Movements*, 22 BRIT. J. POL. & INT’L RELS. 621 (2020).

The second exception to relying on workarounds involves situations in which legal appeals to independent international adjudicators remain possible. Zimbabwe faced this dilemma, and it found a costly solution. After President Mugabe's efforts to transfer land from white farmers to political loyalists were repeatedly rebuffed by domestic judges, President Mugabe orchestrated a change in Zimbabwe's constitution and the judiciary to ensure that his land transfers would no longer be subjected to domestic legal review.<sup>38</sup> White farmers then appealed to the Tribunal of the South African Development Community (SADC), where Mugabe's policies and land-transfer decisions were rebuked.<sup>39</sup> All efforts to invalidate the SADC's legal ruling failed, at which point Zimbabwe started to block all judicial appointments to the Tribunal, to the point that the Tribunal ceased operation.<sup>40</sup> This strategy was emulated by the Trump Administration, which blocked appointments to the point that the WTO's appellate body became inoperable.<sup>41</sup> Whereas Zimbabwe's goal was to transform the SADC Tribunal into an interstate body, the U.S. seems to want to leverage a resumption of the Appellate Body with a set of changes in WTO rules that address U.S. concerns.<sup>42</sup>

These various arguments all point in the same direction—workaround strategies usually make more sense than disembedding IL. This means that any disembedding of IL may also be partial, which in turn means that embedded IL will neither become pointless nor entirely obsolete. Yet, so long as there is no independent adjudication or IL enforcement, the difference between disembedding and ignoring IL may be moot.

#### IV. THE SHORT VERSUS THE LONG GAME OF EMBEDDED IL

Much of my research has focused on how delegating interpretation of IL to international courts—external legal actors that exist beyond the control of any single government—changes the politics of international lawmaking, compliance, and enforcement. In my book *The New Terrain of International Law*, I point out how the international liberal order is encoded into IL. The combination of encoding and delegation to international courts creates

---

<sup>38</sup> See Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293, 311 (2016).

<sup>39</sup> SADC Tribunal, *Campbell and Others v. Zimbabwe (Merits)*, Case No. SADC (T) 2/2007, 28 Nov., 2008 (the “and others” were 77 additional farmers whose cases were adjoined to Campbell's case).

<sup>40</sup> See Alter, Gathii & Helfer, *supra* note 38, at 306–14 (2016).

<sup>41</sup> See generally Gregory Shaffer, Manfred Elsig & Mark Pollack, *U.S. Threats to the WTO Appellate Body* (U.C. Irvine School of Law Legal Studies Research Paper Series No. 2017-63, 2017).

<sup>42</sup> This is conjecture, but as Mark Pollack shows, the Biden Administration has not reversed course. Mark A. Pollack, *International Court Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body*, GOVERNANCE 1 (2022).

a slow time-release mechanism that litigants can activate to push in the direction the law indicates. International courts are designed to promote the objectives of economic and political liberalism written into the DNA of IL, enforcing the legal rules that governments agreed to perhaps expecting that they would never truly be held to these legal commitments<sup>43</sup>

Today, scholars and commentators are talking about democratic backsliding and the waning appeal of the International Liberal Order. This conversation is motivated in no small part by China's rise and the growing appeal of its authoritarian developmentalist model. These trends may limit or stop the growth of embedded IL, yet they might also contribute to a growing number of appeals to international courts and other types of external oversight bodies as litigants try to hold governments accountable to international legal obligations.

The previous Section explained how workarounds may be the most expedient means to accomplish authoritarian leaders' short-term goals of protecting a cherished policy or friend, insulating a sensitive issue from external interference, or rallying supporters. It is not just authoritarian leaders who use these workarounds. Already mentioned is how the Trump Administration blocked appointments to the WTO's appellate body, so that adverse panel rulings could no longer lead to authorized international retaliation. The point is that workarounds and appointing administrators and judges who will do the bidding of a political leader are short-term political strategies that can be successful at the domestic level. Whether these strategies impede the invocation or enforcement of IL at the international level is another matter. The existence of embedded IL and compliance constituencies that support IL may make it even more likely that international courts will be appealed to as a way to challenge policies that violate IL. Embedded law may also provide an on-ramp should the authoritarian appeal become less attractive. Indeed, we should not forget that even in authoritarian regimes there are people who want to see international legal rules implemented.

If we then think about the long game of IL, the pro-democracy goal would be to avoid controversy in the short run in the hope that an authoritarian leader will soon depart office. If the authoritarian leader departs fairly quickly or on poor terms, then all of the changes created by the authoritarian leader may be swept aside by new governments, judges, and administrators returning to the practice of enforcing domestic and embedded IL. Also, the more reviled the authoritarian leader, the more young and repressed people will flee to the democratic West for education and for a better future. Should these individuals return home, becoming lawyers, judges, politicians, and administrators, the embedded-IL model can start to resume the strategy of nudging a state towards greater respect for IL.

The more time in power that an authoritarian leader has, however, the more he can displace an inherited regime with something that is completely different.

---

<sup>43</sup> ALTER, *supra* note 16, at xviii.

Mark Fathi Massoud describes how Sudan's autocratic leader, President Omar Al-Bashir, converted the national legal system into a Shari'a system.<sup>44</sup> The transformation was so complete, from judicial appointments to educational institutions, that within twelve years, Al-Bashir transformed Sudan's legal system. Western educated lawyers lost all influence and power in the new Sudanese legal system.<sup>45</sup>

Yet, regional courts and pro-democracy regional rules may be a tool that pro-democracy and pro-IL internal advocates can use to build coalitions and push back against unpopular authoritarian actions. Tom Ginsburg discusses the many efforts in Africa to stem democratic backsliding by appealing to provisions in African regional systems which require democracy.<sup>46</sup> A new special issue focused on *The International Adjudication of Mega-Politics* finds that although it can be politically risky for international courts to intervene in highly contentious legal disputes, taking the side of litigants and the law can be popular, and therefore can increase the authority of IL and international courts in the longer run. International court intervention can also provide disputants with a pathway out of their conflict by addressing the worst IL violations and defining achievable steps towards IL compliance.<sup>47</sup>

The longer-term authoritarian international counterstrategy is to repurpose IL. We see this strategy at play in the February 4, 2022 joint Russia-China statement, which goes further down the repurposing pathway compared to an earlier Russia-China statement on IL.<sup>48</sup> In the February 4 statement, Russian and Chinese leaders state:

democracy is a universal human value, rather than a privilege of a limited number of States, and [] its promotion and protection is a common responsibility of the entire world community . . . Democracy is exercised in all spheres of public life as part of a nation-wide process and reflects the interests of all the people, its will, guarantees its rights, meets its needs and protects its interests. There is no one-size-fits-all template to guide countries in establishing democracy. A nation can choose such forms and methods of implementing democracy that would best suit its particular state, based on its social and political system, its historical background,

---

<sup>44</sup> See MARK FATHI MASSOUD, LAW'S FRAGILE STATE: COLONIAL, AUTHORITARIAN, AND HUMANITARIAN LEGACIES IN SUDAN 119–154 (2013).

<sup>45</sup> It helped that Sudan's population was very young. See *id.*

<sup>46</sup> See Ginsburg, *supra* note 2, at 124–185. Ginsburg's Essay in this symposium is a bit less sanguine.

<sup>47</sup> See generally Karen J. Alter & Mikael R Madsen, *Beyond Backlash: The Consequences of Adjudicating Mega-Politics*, 84 L. AND CONTEMP. PROBS. 219 (2022).

<sup>48</sup> See Kenneth Anderson, *Text of Russia-China Joint Declaration on Promotion and Principles of International Law*, LAWFARE (July 7, 2016), <https://perma.cc/3S4P-YY7Z>.

traditions and unique cultural characteristics. It is only up to the people of the country to decide whether their State is a democratic one.<sup>49</sup>

In other words, the statement advocates that democracy promotion and the ratified treaties involving democracy (and human rights) should be understood to permit unlimited and unconstrained Communist party rule in China. This position is attractive to autocrats everywhere because it allows an autocrat's professed commitment to rule in the interest of the people to substitute for actual democratic input or political checks.

I want to end by pointing out that it is not obvious that authoritarian states are an exception to Louis Henkin's adage that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."<sup>50</sup> Yet, when we are talking about the dismantling of democracy and the entrenchment of authoritarian rule, "almost all" may not matter.<sup>51</sup> According to scientists, chimpanzees and humans share over ninety-seven percent of the same DNA.<sup>52</sup> Yet the differences, however numerically small, are huge in impact. We should also embrace this reality. As Kim Scheppele points out, to build an air-tight IL system would be both imperialistic and anti-democratic.<sup>53</sup>

It is also true that authoritarian entrenchment strategies will only survive the departure of a leader insofar as the political regime itself survives. The more desperate and repressive a regime becomes, the more individuals will agitate for change. Authoritarian leaders may well be able to transform the domestic legal system. But because they are less likely to be able to transform IL, authoritarian entrenchment may itself be limited by the very fact that IL is external to the state. IL cannot be changed by a single state alone. To the extent that IL reflects the hopes and dreams of many, IL will not be changed, and it will remain as an on-ramp to the very rules and values encoded in IL.

---

<sup>49</sup> *Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development*, PRESIDENT OF RUSSIA (Feb. 4, 2022), <https://perma.cc/XCR9-VSFH>.

<sup>50</sup> LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979).

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

<sup>52</sup> *See generally* Maria V. Suntsova & Anton A. Buzdin, *Differences Between Human and Chimpanzee Genomes and Their Implications in Gene Expression, Protein Functions and Biochemical Properties of the Two Species*, 21 *BMC GENOMICS* 535 (2020).

<sup>53</sup> *See generally* Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 *TEMP. INT'L & COMP. L.J.* 241 (2013) (arguing that the war on terrorism has birthed a new anti-democratic form of imperial IL).