

Violating International Law Is Contagious

Shai Dothan*

Abstract

Democracies have a stronger incentive to comply with international law than autocracies, but they will not comply when faced with violations by other states. International law is a mechanism of cooperation between states: it can make states vulnerable to betrayal, but also increase their chances for successful collaboration. In other words, complying with international law is like playing cooperate in a stag hunt game. Cooperating is an efficient strategy but not a strategy that is evolutionarily stable. If an autocracy emerges and starts to violate international law, democracies will violate international law in response. This makes violating international law contagious. However, because democracies fare better than autocracies even when they break international law, a democratic regime type can also be contagious in some settings.

* Associate Professor of International and Public Law, Jean Monnet Chair in EU Law & Politics, University of Copenhagen Faculty of Law affiliated with iCourts – the Centre of Excellence for International Courts and Study Hub for International Economic Law and Development (SHIELD). PhD, LL.M, LL.B, Tel Aviv University Faculty of Law. I thank Patrick Barry and Uri Weiss for many conversations and comments. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts.

Table of Contents

I. Introduction	81
II. Democracies Cooperate Better with Other Democracies	83
III. International Law Compliance Is Not Evolutionary Stable.....	84
IV. Democratic Waves.....	86
V. Are Democratic Waves Still Likely Today?.....	88
VI. Conclusion.....	89

I. INTRODUCTION

Tom Ginsburg's book *Democracies and International Law*¹ demonstrates that democracies use international law as a mechanism of cooperation much more than autocracies. Democracies sign more treaties than autocracies.² Democracies file more cases in the International Court of Justice (ICJ),³ International Tribunal for the Law of the Sea (ITLOS),⁴ and the World Trade Organization (WTO) Dispute Settlement System.⁵ International organizations composed mostly of democracies have more precise obligations in their charters.⁶ Even countries that shift between democratic and nondemocratic governments are more likely to sign treaties when they are democratic.⁷

These and other observations about the greater propensity of democracies to apply international law are explained in the book by several possible theories.⁸ The most intuitive theory calls attention to the different time horizons of democracies and autocracies.⁹ Democracies behave as if they consider not just the survival of a specific government, but the success of the entire regime. While autocratic leaders care mostly about staying in power and can expect severe personal repercussions if they lose their position in government, democratic leaders care about the future prosperity of their country and may even want to use international law to bind future governments to policies they believe in.¹⁰ When future benefits are not heavily discounted, assuming international law obligations becomes a more profitable strategy.

After states accept an international law obligation, their decision of whether to comply with this obligation is also directly connected to how they discount future benefits. Compliance with international law signals that the state cares about the future and is willing to suffer immediate costs in order to gain from its future position in the international community. States that comply with their international obligations accumulate reputations that assure future partners that the state will not betray these partners for quick gains.¹¹ The higher the state's

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

² *See id.* at 62–68.

³ *See id.* at 88–90.

⁴ *See id.* at 91–92.

⁵ *See id.* at 92.

⁶ *See id.* at 100.

⁷ *See id.* at 78.

⁸ *See id.* at 39–45.

⁹ *See id.* at 39–41.

¹⁰ *See id.*

¹¹ *See* ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS—A RATIONAL CHOICE THEORY* 33–36 (2008).

reputation, the stronger its incentive to avoid international law violations, because each violation would lead to an extreme downward adjustment of its reputation in the eyes of the international community.¹²

The wish to maintain a high reputation therefore operates as an incentive that motivates states to comply with international law. This incentive is stronger for democracies compared to autocracies because democracies care more about future benefits.¹³ Autocracies care less about long-term costs, which makes noncompliance often the best solution for them because it can serve the survival of their leaders even if it damages their future reputations. Autocracies will therefore often choose not to comply even when they face other states that comply with international law. In contrast, democracies will not comply with their international obligations primarily when they are faced with noncompliance by other states. Much of international law relies on reciprocal concessions, making compliance an inferior strategy for a state that interacts with lawbreakers.¹⁴

Section II explains that, for democracies, compliance with international law therefore resembles cooperating (“playing cooperate”) in a stag hunt game: it is the best strategy if other states comply as well, but it is inefficient if other states violate the law. In a group of democracies that comply with international law, every state has an incentive to comply with international law as well. In this ideal situation, compliance is a strategy that is beneficial both for the individual state and for the group.

Section III argues that while compliance with international law maximizes the benefits of everyone when practiced by the entire group, it is not an evolutionarily stable strategy. If the group of compliant democracies is infiltrated by an autocracy that violates international law, democracies will have an incentive to violate their legal obligations as well. Just like players of stag hunt that are faced with defection, democracies will start to defect by violating international law. Soon, this strategy will spread from democracy to democracy because democracies will choose noncompliance even in their interactions with one another.

Section IV mitigates this grim prediction. It relies on Ginsburg’s book to demonstrate the advantages that democracies have over autocracies, even in cases of prevalent noncompliance with international law. If democracy is superior, it can spread from state to state as autocracies try to improve their fate by regime change.

¹² See *id.* at 38-40; Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 510 (2005); SHAI DOTHAN, REPUTATION AND JUDICIAL TACTICS: A THEORY OF NATIONAL AND INTERNATIONAL COURTS 13 (2015); Shai Dothan, *A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States*, 27 DUKE J. COMP. & INT’L L. 141, 188 (2017) (providing empirical support for this observation).

¹³ See GINSBURG, *supra* note 1, at 39–41.

¹⁴ See GUZMAN, *supra* note 11, at 42.

Section V, in contrast, calls such a positive development into question in light of recent forms of populist movements and what Ginsburg's book calls "authoritarian international law."

Section VI concludes.

II. DEMOCRACIES COOPERATE BETTER WITH OTHER DEMOCRACIES

The stag hunt game is a simple game theoretical depiction of many situations in life. The story behind the game clarifies the strategic incentives it entails. Two hunters are trying to catch a stag together. Subduing the stag requires cooperation; it cannot be performed by one hunter. Therefore, if one of the hunters decides to betray his partner—who remains committed to hunting the stag—and goes after a hare instead, he will catch that hare, but the partner will be left with nothing. If both partners choose to defect, they can both succeed to hunt hares. A stag divided between the hunters provides superior nutrition to the hares each hunter can hunt on their own.

It is easy to see that for anybody taking part in this game, the proper strategy depends on the expected strategy of their partner. If the partner is expected to defect, defection is the proper strategy: it is better to catch a hare than to go home empty-handed. If the partner is expected to cooperate, cooperating and hunting the stag can yield the maximum profit.¹⁵

International law helps states coordinate their actions. In many situations, it puts countries in conditions that resemble a stag hunt game. For example, if two countries agree to build a factory together, they will usually be better off if they cooperate to build the factory than if they refuse to do so. Assume that the factory can only be completed if both countries work together. If a country suspects its partner will not do its share in building the factory, the country will likely violate its obligations as well to avoid paying the costs of a partial construction without receiving any benefit. The same logic applies in more complicated settings such as the sharing of natural resources among states.¹⁶ Adding multiple actors or some level of uncertainty regarding the outcomes of cooperation should not change the general nature of the game.

Generally, independent states would not enter an agreement unless it makes them better off. In conditions of long-term cooperation, it is usually impossible to continuously secure investments from others and shirk your own obligations. Consequently, states can improve their situation for the long-term by signing an agreement and complying with it. Any attempt to break the agreement may allow

¹⁵ In this respect, the stag hunt game differs from the prisoner's dilemma game. In the prisoner's dilemma game, defection is a dominant strategy, which means both parties have an incentive to defect regardless of what the other party does.

¹⁶ See Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 390 (1996).

a country to extract some short-term gain, but the lost cooperation on the project would lead to a long-term loss. Furthermore, noncompliance would result in a damage to the state's reputation, which would harm its ability to secure good deals in the future, constituting an additional long-term cost. Therefore, when the long term is considered, the proper strategy is to cooperate when one is interacting with other cooperators, forming a stag hunt game.

Ginsburg's book suggests that democracies are more likely to comply with international law than autocracies. The longer time horizons and lower discount rates of democracies allow them to see beyond the immediate costs of cooperation and into the benefits associated with compliance in the future: sustained collaboration and a high reputation. If a democracy collaborates with another democracy on an international project, both have a strong incentive to comply with their international obligations conditioned on the other state doing the same. Because both states expect each other to comply, both states will choose compliance over noncompliance.¹⁷

In a world populated by democracies, international deals will be kept and everybody will get to hunt the stag. International prosperity will carry on unabated and peace will come to all. This is the ideal world that Ginsburg's book refers to as reflecting a modern version of Immanuel Kant's *Perpetual Peace*.¹⁸ Democracies in this utopian world will not only abolish war but will also comply with all their international obligations to the benefit of all states. As long as this perpetual peace can be maintained, it is the most efficient state of affairs because all states will end up earning the maximum payoffs.

III. INTERNATIONAL LAW COMPLIANCE IS NOT EVOLUTIONARY STABLE

A world populated by democracies that comply with international law is the most efficient for everyone concerned. But the most efficient strategy is not necessarily the most stable one. The stag hunt modeling of inter-state interactions clarifies why.

Playing cooperate in the stag hunt game is the best strategy when one meets another actor who plays cooperate. If one expects to meet actors who play defect, defection is a better strategy. This means that playing cooperate is a good strategy only below a certain threshold of probability of meeting actors that play defect. When defection spreads in the group and that threshold is crossed, playing defect performs better.

¹⁷ See Uri Weiss & Joseph Agassi, *Game Theory for International Accords*, 16 S.C. J. INT'L L. & BUS. 1, 12 (2020) (explaining that even if an international agreement is not enforceable, if it generates an expectation of compliance, it can lead to cooperation in the stag hunt game).

¹⁸ See GINSBURG, *supra* note 1, at 31–33.

In an experiment in which a community of hunters are paired randomly with partners from a certain pool who have some risk of mutation between cooperators and defectors, there are dire prospects for the evolutionary stability of playing cooperate. If the penalty for being mismatched with a defector and playing cooperate exceeds the benefit from playing cooperate when matched with a cooperator, players will switch more easily from being cooperators to being defectors, rather than the other way around. In other words, the threshold for becoming defectors will be lower than the threshold for becoming cooperators.¹⁹

Tragically, small differences in the height of the threshold for becoming defectors can translate to enormous differences in the stability of sustaining a community of cooperators. If a small number of simultaneous mutations of cooperators to defectors suffices for passing the threshold, the probability that such a shift will occur will be very high. The perfect solution of everybody hunting stags together will not last for long. Everyone will soon switch to hunting hares.²⁰

Returning to states and their propensity to comply with international law, the implications are clear and unfortunate. Even starting from an ideal condition in which all states are democracies and all comply with international law because of their low discount rates, there is always the possibility of democracies backsliding and becoming autocracies. Ginsburg's book documents many instances of states shifting back and forth between democracy and autocracy²¹ suggesting that such mutation is inevitable.

Autocracies will find it useful to violate international law even when interacting with law-abiding states because their high discount rates and short time horizons make them focus on the costs of compliance more than the rewards it brings later on. The rewards of compliance—long-term collaboration and maintaining a high reputation—are often not potent enough incentives to convince autocracies to comply with international law. In other words, an autocracy could choose to defect even if it expects its partner to play “cooperate.”²² If autocracies violate international law, democracies that interact with them will have an incentive to violate their international commitments as well to avoid getting the sucker payoff.

When democracies start to break international law, especially in multilateral areas of international cooperation, the implications will be felt not just by the

¹⁹ See Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, U. PA. L. REV. 2027, 2047 (2001).

²⁰ See *id.* at 2048.

²¹ See GINSBURG, *supra* note 1, at 76–78.

²² One can say that autocracies are playing a prisoner's dilemma game instead of a stag hunt game because their strategic response to cooperation is defection. See Uri Weiss & Joseph Agassi, *The Game Theory of the European Union Versus the Pax Romana*, 70 DEPAUL L. REV. 551, 559 (2021) (explaining the usefulness of transitioning from a prisoner's dilemma game to a stag hunt game, a change that occurred when European states founded the European Union).

autocracies that violated their obligations first, but also by other democracies. As a result, if democracies start to violate international law, other democracies that interact with these initial violators will violate international law as well because keeping their obligations when paired with a lawbreaker is the worst policy. Noncompliance with international law will spread like wildfire even among democracies.

Game theory literature suggests that pessimism about the stability of efficient behavior in the stag hunt game is not always warranted. If actors can leave a misbehaving community and migrate elsewhere, the evolutionary instability of playing cooperate can be mitigated.²³ This instability can also be prevented if a proper system of punishing defectors and compensating their victims is in place.²⁴ Too bad for law-abiding states! No state can detach itself from its place on the globe or completely stop interacting with its neighbors. An effective system of punishing international law violators is unrealistic in a world of independent sovereign states. The spiral of noncompliance with international law is likely to remain unchecked.

IV. DEMOCRATIC WAVES

As Ginsburg makes clear in his book, democracy is not a guarantee of compliance with international law.²⁵ But this Essay suggests that the crux of the problem of noncompliance starts with the interaction of democracies and autocracies. If the stag hunt modelling is correct, democracies that expect compliance from their interlocutors will tend to comply with international law as well. Autocracies, in contrast, will fail to comply even when they expect compliance from others, and their violations of international law will tend to spread because violations create distrust among all states, including democracies.

The prevalence of noncompliance with international law in the global arena is expected to push democracies towards noncompliance. It would not, however, make democracies abandon their regimes and become autocracies. Ginsburg's book cites evidence that democracies do not go to war against other democracies, but they have no qualms about fighting against autocracies.²⁶ Furthermore, when democracies fight against autocracies, they usually win.²⁷ Being a democracy therefore puts states in a superior position compared to autocracies. Democracies can enjoy peace with their fellow democracies even when they violate their international obligations. If, after careful consideration, they decide that war with

²³ See Mahoney & Sanchirico, *supra* note 19, at 2048–51.

²⁴ See *id.* at 2058–62.

²⁵ See GINSBURG, *supra* note 1, at 34.

²⁶ See *id.* at 31–32.

²⁷ See *id.*

an autocracy serves their interests, they can beat that autocracy on the battlefield with little concern for the rules that they break along the way.

As long as there are autocracies, noncompliance with international law can emerge and proliferate. But if the presence of autocracies is minimized, it is possible that democracies will be able to maintain an equilibrium of cooperation—they can comply with international law and get the optimal benefit of catching a stag. Compliance will occur if the probability of facing cooperate from other states is high enough to make cooperate the better strategy for democracies. Even if some autocracies are likely to maintain their regime type and even if democratic backsliding cannot be prevented, it is still possible that an increase in the proportion of democratic to autocratic states will push democracies towards fewer international law violations.

Ginsburg's book mentions the series of democratic transitions in Georgia, Ukraine, and Kyrgyzstan following the color revolutions in the early 2000s.²⁸ This is just the tip of the iceberg of a global phenomenon of so-called “democratic waves” that has recurred over the last two centuries.²⁹ A single autocracy may become a democracy because democracy leads to superior results. But waves of democratization probably occur because a shift to democracy in one country can increase the chances that other countries will shift to democracy as well.

The mechanisms that make democratic shifts contagious are probably varied and complicated.³⁰ In light of the analysis conducted so far, it is possible to hypothesize one such mechanism: when the ratio of democracies to autocracies increases, becoming a democracy grows increasingly more profitable due to the prospects of greater cooperation with other democracies. A democracy that is surrounded by democracies can expect peaceful international relations and a greater chance that its efforts to comply with its international obligations would be reciprocated by its neighbors. With every democracy that is born, democratic shifts become more tempting and create a realistic possibility of sharing stags instead of hares.

To recap, while international law violations are contagious, autocracy is not. Moreover, given the proper conditions, democracy can become contagious. If enough states become democratic, an equilibrium in which compliance with international law is the norm can potentially be reached. Such an equilibrium may be precarious and unstable, but it is not unattainable.

²⁸ See *id.* at 28–29.

²⁹ See Seva Gunitsky, *Democratic Waves in Historical Perspective*, 16 PERSPS. POL. 634, 634 (2018).

³⁰ See *id.* at 636–43.

V. ARE DEMOCRATIC WAVES STILL LIKELY TODAY?

The prospect of democratic waves makes the news about the evolutionary instability of equilibriums of international law compliance a little less bleak. But democratic waves are likely to happen, at least according to the analysis in this Essay, because autocracies need them to improve their chances of international cooperation. Two recent developments discussed in Ginsburg's book suggest that autocracies can now reach at least some level of cooperation without a regime change, obviating their incentive to democratize.

The first development is what Ginsburg calls "authoritarian international law." This is the Pepsi Max version of international law: Maximum Cooperation, No Sovereignty Loss.³¹ Autocracies realized that by using existing international law institutions and taking away all the real constraints that these institutions imply on the flexibility and discretion of state behavior, autocracies are able to coordinate their actions well with one another without giving up any of their individual interests.³²

Cooperation between autocracies is always going to be fragile because the flexibility that autocracies preserve comes at the cost of minimal commitment. This means that cooperation can be successful at times but will break down quickly when conflicts arise.³³ Nevertheless, absent such conflicts, authoritarian international law may thrive, and autocracies will have no need to convert to democracy in order to improve their ability to cooperate on the international arena.

The second development is the rise of authoritarian populist movements around the world. Populism is committed to the thesis that the pure and healthy majority of the people is threatened by a corrupt elite that is usually depicted as selling out the public to external forces.³⁴ The hostility of populist regimes to international law and potent international institutions is therefore only natural. It is likely to corrode the commitment of many countries to comply with international law, while giving others an incentive to violate international law for spite, just to curry favor with their constituents.³⁵

Ginsburg shows that populist leaders such as Donald Trump, Viktor Orbán, and Jaroslaw Kaczyński tend to support each other, as do populist regimes in South America.³⁶ The great fighters against external influence become very friendly when sitting around the "council of evil" table. For those who feel

³¹ The original slogan is "Maximum Taste, No Sugar."

³² See GINSBURG, *supra* note 1, at 234–36.

³³ See *id.* at 205–07, 235–36.

³⁴ See *id.* at 123; Cas Mudde, *The Populist Zeitgeist*, 39 *GOV'T. & OPPOSITION* 541, 543 (2004).

³⁵ See GINSBURG, *supra* note 1, at 122–23.

³⁶ See *id.*

threatened by the traditional institutions of international law, coalition-building with other states in the same predicament is an existential need. Once again, recent conditions provide autocracies with incentives that allow them to cooperate without democratization.

VI. CONCLUSION

Compliance rates with international law can potentially be held in a sort of dynamic equilibrium because of the countervailing forces of two vectors: (1) international law violations are contagious because they make democracies worry that their compliance will not be reciprocated; and (2) democracy is contagious because democracies are better able to cooperate with one another than autocracies, including through compliance with international law.

There is no guarantee that both vectors will have the same impact in any set of circumstances. In fact, the possibilities afforded by authoritarian international law and collaboration between authoritarian populists may weaken the second vector, tilting the balance in favor of growing noncompliance with international law.