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Militant Democracy Unmoored? The Limits of Constitutional Analogy in International Law

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Abstract

As constitutional democracies are faced with authoritarianism and other anti-constitutionalist threats, international law is seeing its own challenge from the increasing influence of authoritarian states. Yet, departing from the recent tendency to model the international legal order after constitutional governance, international lawyers seem to show little interest in the concept of militant democracy, while the latter lies at the centre of current debates surrounding constitutional self-defence. This article aims to bring to light the current limits of constitutional analogy in international law through an investigation into the discrepancy between constitutional and international lawyers in responding to authoritarian co-optation. A three-pronged argument is submitted. First, in contrast to other appeals for constitutional self-defence, the concept of militant democracy is contentious where it stands in tension with the constitutional ethos. Second, while militant democracy as a constitutional concept presupposes a democratic and normative version of constitutional ordering, the absence of militant democracy on the international plane betrays the non-democratic, albeit representative, character of the international legal order. Third, attempts to internationalize the concept of militant democracy should be rejected as an international version of militant democracy would only portend an (un)holy alliance of militant democracies and exacerbate the political division in international society. It is suggested that, from out of a realignment of international law with the constitutional project of progress, a new constitutional analogy may emerge, giving fresh impetus to the realization of international law's universal liberating promise.

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1 Introduction: (International) Militant Democracy Wanted

Authoritarianism and (exclusionary) populism[1] have long been circulating on the marketplace of political ideas.[2] As constant competitors *vis-à-vis* liberalism in the political process, authoritarian ideologies and populist forces have not been banished from constitutional democracies. Yet, with such anti-liberal or anti-constitutionalist forces[3] moving from the margin to the centre of the political arena, a disequilibrium in the place of the established order is seen to be driving constitutional democracies into an existential struggle. All of a sudden, the notion of 'constitutional self-defence' has emerged as one of the most visited subjects in recent constitutional literature.[4] Thus resurges the Weimar idea of 'militant democracy' as part of the strategy of constitutional self-defence: for the sake of self-preservation, constitutional democracy should not tolerate authoritarianism – populist or not[5] – and other anti-constitutionalist forces.[6] Past and present constitutional practices from Africa, to America, to Asia are

[1] In the recent literature generated by the reinvigorated interest in populist politics, populism has been used in various ways. One way to pinpoint the variety of politics labelled as populism is through its juxtaposition to the particular opposite political position in the relevant field. For example, in the field of international law, populism stands for the opposite of internationalism or globalism that prioritizes international institutions over domestic agencies. See Schwöbel-Patel, 'Populism, International Law and the End of *Keep Calm and Carry on Lawyering*', 49 *Netherlands Yearbook of International Law* (2019) 97, at 101–104. Situated in the debate that was prompted by domestic constitutional politics, populism here refers to the political ideology that envisages an anti-establishmentarian, anti-pluralist politics centring on a leader who appeals to 'the right people' constructed out of an exclusionary identity. Kuo, 'Authenticity: The Ultimate Challenge in the Quest for Lasting Constitutional Legitimacy', 41 *Oxford Journal of Legal Studies* (2021) 265, at 283–284; see also J.-W. Müller, *What Is Populism?* (2016), at 1–4. For a democratic appraisal of populism as reaction to elitist liberal politics, see Howse, 'Epilogue: In Defense of Disruptive Democracy – A Critique of Anti-Populism', 17 *International Journal of Constitutional Law* (*I•CON*) (2019) 641.

[2] Motadel, 'The Global Authoritarian Moment and the Revolt against Empire', 124 *American Historical Review* (2019) 843 (discussing authoritarian anti-colonialism in the 1930s and 1940s); Urbinati, 'Political Theory of Populism', 22 *Annual Review of Political Science* (2019) 111 (noting the parallel emergence of populism in Russia and America in the 19th century).

[3] To be more precise, anti-liberal/anti-constitutionalist forces here refer to those that aim to topple liberal democracy. Detached from the idea of democracy, liberalism can degenerate into an authoritarian form. To that extent, not all authoritarian forces are anti-liberal. See Heller, 'Authoritarian Liberalism?', 21 *European Law Journal* (*ELJ*) (2015) 295; M. Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (2021).

[4] Koncewicz, 'Of Institutions, Democracy, Constitutional Self-Defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and Beyond', 53 *Common Market Law Review* (2016) 1753; A.J. Cornell, 'Constitutional Self-Defense in the 21st Century: Protecting Liberal Democracy and the Rule of Law', European Liberal Forum Policy Paper, November 2021, available at https://fores.se/wp-content/uploads/2021/11/Policypaper-Jonsson-Cornell-November-2021.pdf; see also Sajó, 'The Self-Protecting Constitutional State', 12(2–3) *East European Constitutional Review* (2003) 78; J.E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (1991), at 32, 170–178.

[5] Not all populists are authoritarian. For a liberal claim to 'real' populism, see von Drehle, 'Barack Obama Reveals His Populist Blind Spot', *Time* (30 June 2016), available at http://time.com/4389939/barack-obama-donald-trump-populism/.

[6] Loewenstein, 'Militant Democracy and Fundamental Rights', Part I, 31 *American Political Science Review* (*APSR*) (1937) 417; Loewenstein, 'Militant Democracy and Fundamental Rights', Part II, 31 *APSR*

rediscovered and re-presented as instantiations of the idea of militant democracy.[7] Having migrated without drawing much attention for years, militant democracy now appears everywhere in global constitutional landscapes.

The authoritarian wave has not left the international order undisturbed.[8] As China continues to rise and seems to be redrawing the geopolitical map with its 'sharp power', the clouds of a new cold war between the authoritarian and liberal forces – headed by

(1937) 638. For recent literature on militant democracy amid the rise of authoritarianism, see, e.g., A.S. Kirshner, *A Theory of Militant Democracy: The Ethics of Combatting Political Extremism* (2014); S. Tyulkina, *Militant Democracy Undemocratic Political Parties and Beyond* (2015); A. Ellian and B. Rijpkema (eds), *Militant Democracy: Political Science, Law and Philosophy* (2018); Wagrandl, 'Transnational Militant Democracy', 7 *Global Constitutionalism* (*GlobCon*) (2018) 143; A. Malkopoulou and A. Kirshner (eds), *Militant Democracy and Its Critics* (2019); Bourne, 'From Militant Democracy to Normal Politics? How European Democracies Respond to Populist Parties', 18 *European Constitutional Review* (*EuConst*) (2022) 488; see also Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within EU Member States?', 165 *Revista de Estudios Políticos* (2014) 141; Müller, 'Should the EU Protect Democracy and the Rule of Law Inside Member States?', 21 *ELJ* (2015) 141; Larsen, 'The European Union as "Militant Democracy"?', in J. Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (2023) 76; Theuns, 'Is the European Union a Militant Democracy? Democratic Backsliding and EU Disintegration', 13 *GlobCon* (2024) 104. For militant democracy as a special instance of constitutional self-defence, see A. Sajó and R. Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (2017), at 433–440; see also Stahl and Popp-Madsen, 'Defending Democracy: Militant and Popular Models of Democratic Self-Defense', 29 *Constellations* (2022) 310.

7 Donald Trump's eligibility for presidential candidacy in the election of 2024 under the 'disqualification clause' of the US Constitution (Amendment XIV, Section 3) has prompted the debate about what Mark Graber calls an 'American-style militant democracy'. Compare Graber, 'Who's Afraid of Militant Democracy, U.S. Style', *Verfassungsblog* (20 February 2024), available at https://verfassungsblog.de/whos-afraid-of-militant-democracy-u-s-style/, with Issacharoff, 'Trump's Trials for Democracy', *Verfassungsblog* (19 February 2024), available at https://verfassungsblog.de/trumps-trials-for-democracy/. Based on reasons unrelated to the foregoing debate, the US Supreme Court set aside the Colorado Supreme Court's ruling that disqualified Trump in the state primary. *Trump v. Anderson*, 601 U.S. ____ (2024) (slip opinion). For another application of militant democracy in the US context, see Huq, 'Militant Democracy Comes to the Metaverse?', 72 *Emory Law Journal* (2023) 1105. For the rediscovery of militant democracy in Latin America, see Zambrano and da Silva, 'Militant Democracy Stages a Comeback in Brazil', *Lawfare* (28 November 2022), available at https://www.lawfaremedia.org/article/militant-democracy-stages-comeback-brazil. For practices of militant democracy in Africa, see Elkins, 'Militant Democracy and the Pre-emptive Constitution: From Party Bans to Hardened Term Limits', 29 *Democratization* (2022) 174; see also D. McMurray and A. Ufheil-Somers (eds), *The Arab Revolts: Dispatches on Militant Democracy in the Middle East* (2013). For an example of militant democracy in Asia, see Hsu, 'Adoption and Further Development of the Concept of Militant Democracy in Taiwan-Presented as an Example of the Ban on Parties and Organizations', 1(1) *East Asian Law Journal* (2010) 15; see also Chen, 'Dealing with Disinformation from the Perspective of Militant Democracy: A Case Study of Taiwan's Struggle to Regulate Disinformation', in C. Sieber-Gasser and A. Ghibellini (eds), *Democracy and Globalization: Legal and Political Analysis on the Eve of the 4th Industrial Revolution* (2021) 125.

8 See generally L. Diamond, M.F. Plattner and C. Walker (eds), *Authoritarianism Goes Global: The Challenge to Democracy* (2016). In this article, the international order is distinguished from the international legal order. The former is similar to the concept of 'world order' in international relations scholarship. For present purposes, it refers to the arrangement of power and authority resulting from the conduct of diplomacy and world politics. See Falk, 'World Order', in *Princeton Encyclopedia of Self-Determination*, available at https://pesd.princeton.edu/node/696. As part of the international order, the international legal order refers to the totality of international law. In this article, it is used in the same way as international law with no qualifier. Thus, international law may comprise different varieties, while the international legal order only refers to its totality.

China and the USA, respectively – are gathering.[9] The 'golden era of international rule of law' that arose from the rubbles of the Berlin Wall and has since revived interest in international (or global) constitutionalism is now drawing to an end.[10] With the emergence of what Tom Ginsburg calls 'authoritarian international law' amid the rise of China's influence,[11] the gap between 'international law's universal, liberating promise'[12] and its sovereigntist/statist doctrinal basics – which was blurred by the glare of the golden era[13] – is brought to the surface again. The assumed teleological, progressive outlook in international legal reasoning that casts international law in the ideal image of the rule of law seems to be called into question.[14] As in the domestic constitutional landscape, whether international law is able to resist co-optation by authoritarian forces has not escaped the attention of some of the most astute legal minds.[15] Yet, in contrast to their predecessors who looked to the development of domestic legal orders as the model for the reform of international law,[16] current international lawyers seem less eager to learn from prescriptions as to how constitutional orders can defend themselves against subversive forces.[17] Ideas of constitutional

[9] Dreyer, 'Roundtable on Sharp Power, Soft Power, and the Challenge of Democracy: A Report from the 2018 Annual Meeting of the American Association for Chinese Studies', 25 *American Journal of Chinese Studies* (2018) 147; W.J. Dobson, T. Masoud and C. Walker (eds), *Defending Democracy in an Age of Sharp Power* (2023).

[10] Von Bernstorff, 'The Decay of the International Rule of Law Project (1990–2015)', in H. Krieger, G. Nolte and A. Zimmermann (eds), *The International Rule of Law: Rise or Decline?* (2019) 33, at 34.

[11] Ginsburg, 'Authoritarian International Law?', 114 *American Journal of International Law* (*AJIL*) (2020) 221.

[12] M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 513.

[13] M. Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (2019), at 3–10.

[14] Ginsburg, *supra* note 11.

[15] *Ibid.*; 'Symposium on Authoritarian International Law: Is Authoritarian International Law Inevitable?', 114 *AJIL Unbound* (2020) 217; Klabbers *et al.*, 'International Law and Democracy Revisited: Introduction to the Symposium', 32 *European Journal of International Law* (*EJIL*) (2021) 9 (introducing contributions to the Symposium on International Law and Democracy Revisited); *cf.* Ackerman, 'A New Deal to Make NATO and America Great Again', *Royal United Services Institute* (6 March 2017), available at https://rusi.org/explore-our-research/publications/commentary/new-deal-make-nato-and-america-great-again (suggesting NATO's role in constraining the authoritarian trend in Hungary, Poland and Turkey).

[16] The classic example is A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926); see also R. St. J. Macdonald and D.M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005); de Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (*ICLQ*) (2008) 51; J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (2009); J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); Peters, 'The Merits of Global Constitutionalism', 16 *Indiana Journal of Global Legal Studies* (2009) 397; C.E.J. Schwöbel, *Global Constitutionalism in International Legal Perspective* (2011); A. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014); *cf.* Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529.

[17] As the European Union (EU) has been moving further and further away from its legal roots as an international organization and has increasingly taken on a state-like character, some commentators have characterized the EU as a (transnational) militant democracy. Jan-Werner Müller is the representative voice of this school of thought. See Müller, 'Militant Democracy', *supra* note 6; Müller, 'EU Protect Democracy', *supra* note 6. For other discussions of the EU as a militant democracy, see Wagrandl, *supra* note 6; Walter, 'Interactions between International and National Norms: Towards an Internationalized Concept of Militant Democracy', in Ellian and Rijpkema, *supra* note 6, 79. Since such characterization

self-defence such as militant democracy are conspicuously absent when a new '*nomos* of the earth',[18] driven by authoritarian forces, seems to be redefining the international legal order.

This article takes up this apparent discrepancy between constitutional and international law in their responses to authoritarian co-optation, with an eye to making sense of the limits of constitutional analogy in international law. With the current limits of constitutional analogy in the international legal order brought to light, this article advances a three-pronged argument. First, it makes an analytical point of the relationship between constitutional self-defence and militant democracy: while needs for self-defence (or self-preservation) inhere in every constitutional order,[19] not all appeals for constitutional self-defence risk losing the ethos of their attendant constitutional orders in the same way as the call for militant democracy does.[20] Failing to see what is put to the test amid this new wave of migration of constitutional ideas,[21] we can hardly appreciate why and how the continuing spread of militant democracy has made constitutional scholars sweat in the face of calls for constitutional self-defence.

Second, it argues that the idea of militant democracy as a constitutional concept presupposes a democratic and normative version of constitutional ordering. Thus, the absence of the concept of militant democracy seems to speak to international law's openness towards competing ideologies, betraying the non-democratic – albeit representative – and deeply pluralist character of the international legal order. By bringing to the fore the international legal order's ingrained pluralism and its normative underpinnings and implications, we can see why not only the concept of militant democracy but also the very idea of constitutional self-defence has difficulty finding its place in international law.

Third, it warns against the (inadvertent) projection of the concept of militant democracy onto the international plane as a countermeasure to the authoritarian co-optation of international law. Given the international legal order's non-democratic but pluralist character, an international version of militant democracy would not bring about democratic international law or global constitutionalism. Rather,

is based on the EU's perceived quasi-state character, it does not contradict my statement in the body. Interestingly, those who question the EU as a proper militant democracy have focused on the EU's 'voluntarist', 'heterogene[ous]' character, which, as will be further discussed in section 3, is characteristic of the international legal order. Compare Theuns, *supra* note 6, with Larsen, *supra* note 6. For present purposes, I do not include the EU in the following discussion.

[18] C. Schmitt, *The* Nomos *of the Earth in the International Law of* Jus Publicum Europaeum, translated by G.L. Ulmen (2004).

[19] In this article, I do not use constitution (including the related term constitutional) in its normative sense unless otherwise specified. In contrast, 'constitutionalist' is employed in the context of normative significance. For the idea of normative constitution and other ideal types of constitution, see K. Loewenstein, *Political Power and the Governmental Process* (1957), at 147–153.

[20] Constitutional ethos refers to that which is expressive of the character of the constitutional order that is not exhausted by the constitutional regime in practice. See P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982), at 94–95. To anticipate, constitutional ethos is broader than constitutional identity, another key concept in this article. Changing the constitutional identity does not necessarily result in the alteration of constitutional ethos. For the usage of constitutional identity in this article, see the discussion in note 34 below.

[21] See generally S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2007).

projecting the concept of militant democracy onto the international plane portends a present-day (un)holy alliance of militant democracies that would only exacerbate the political division in international society. It is suggested that, to contend with authoritarian international law, its root causes should not be left unaddressed. By identifying the source of the frustration with the state of international law, we can then do justice to the constitutional potential of the ideal of international law. Through this realignment of international law with the constitutional project of progress[22] – instead of militant democracy as a choice of constitutional self-defence – the constitutional analogy in international law can transcend its current limits and serve international law's cosmopolitan ideal in a 'rooted' way.[23]

I should make clear where the critique of international militant democracy to be developed in the following pages is situated before proceeding. As noted above, the concept of militant democracy remains absent from international law. Yet lessons from comparative constitutional law have shown that militant democracy has no difficulty finding its place in jurisdictions where this concept was considered all too alien until recently.[24] Moreover, practices of rediscovering and reframing past and present constitutional practices in terms of militant democracy are not a monopoly of the friends of constitutionalism. Abusers of constitutionalism have also quickly embraced this militant idea.[25] In this light, the worry is that, when calls for democratic rallying continue to arise in the face of a seemingly contrary trend in the international order,[26] democracies have invested interest in justifying and framing their action in conceptual terms as they are becoming militant.[27] And militant democracy is a handy candidate for democracies on this conceptual front in the changing international order.[28] Thus, despite the virtual absence of militant democracy from international law, I take up

22 U.K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress*, translated by D. Lucas Schneider (1995).

23 For an application of the implementation of the cosmopolitan ideal in a rooted way, see Ackerman, 'Rooted Cosmopolitanism', 104 *Ethics* (1994) 526. The concept of rooted cosmopolitanism is developed in K.A. Appiah, *The Ethics of Identity* (2005), at 213–270.

24 See the discussion in note 7 above.

25 See R. Dixon and D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (2021), at 103–112.

26 See 'The Biden-Harris-Administration's National Security Strategy', *White House* (12 October 2022), available at https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf; see also Grant, 'A League of Their Own: The Rationale for an International Alliance of Democracies', 41 *George Washington International Law Review* (2009) 243; A. Jain, M. Kroenig and J. Parello-Plesner, 'An Alliance of Democracies: From Concept to Reality in an Era of Strategic Competition', *Atlantic Council Report* (2021), available at https://www.atlanticcouncil.org/wp-content/uploads/2021/12/An-Alliance-of-Democracies-From-concept-to-reality-in-an-era-of-strategic-competition.pdf; Mounk, 'Democracy on the Defense: Turning Back the Authoritarian Tide', 100(2) *Foreign Affairs* (2021) 63; M.J. Stephan, 'The Global Far-Right Authoritarian Alliance Threatening US Democracy – And How to Weaken It', *Just Security* (29 June 2023), available at https://www.justsecurity.org/87086/the-global-far-right-authoritarian-alliance-threatening-us-democracy-and-how-to-weaken-it/.

27 For a discussion of the importance of conceptualization of democratic ideas in another context, see Kurki, 'Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion', 12 *International Studies Review* (2010) 362.

28 Walter, *supra* note 17.

the (want of) internationalization of militant democracy and its implications ahead of time amid increasing calls for democratic defence on the international plane.[29]

The argument proceeds as follows. Section 2 first investigates the relationship between constitutional self-defence and militant democracy, suggesting that militant democracy, as seen in the discourse on constitutional self-defence strategies, presupposes a normative democratic version of constitutional ordering – liberal democracy. Section 3 then takes on the absence of the concept of militant democracy when international law is seemingly under the pressure of authoritarian co-optation and brings to light the non-democratic character of the international legal order. Section 4 provides a critique of the implications of the implicit internationalization of militant democracy as a response to the continuing expansion of authoritarian forces. It further discusses options for liberal democracies facing authoritarian pressure under a de facto China-USA 'duarchy' – a Schmittian *nomos* resting on the balance of power between China and the USA as two co-ruling hegemons.[30] Section 5 concludes with reflections on the relationship between constitutionalism and international law.

2 Constitutional Self-Defence and Militant Democracy Realigned

Every legal system has its own identity. Without identity, the system cannot hold.[31] Instead, we will only see a hotchpotch of statutory enactments, administrative rules, judicial judgments and other juridical precepts in the legal space concerned. Where the concept of identity is banished in conceiving of the interrelationships among those motley legal precepts, we cannot even speak of it as a legal order properly.[32] This formal concept of identity in jurisprudence frames constitutional thinking too.[33] Seen in this light, constitutional ordering works under the assumption that each constitutional

[29] See the sources cited in note 26 above.

[30] For a discussion of the constitutional significance of Carl Schmitt's conception of *nomos* in the international legal order, see B.A. Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (2017), at 147–151.

[31] J. Raz, *The Authority of Law: Essays on Law and Morality* (1979), at 78–102; J. Finnis, *Philosophy of Law: Collected Essays*, volume 4 (2011), at 408; see also H. Kelsen, *General Theory of Law and State*, translated by A. Wedberg (1945), at 219–221; *cf.* H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 92–95, 100–123, 249–250.

[32] Noting the separateness of the problem of the existence of legal systems from that of identity, Joseph Raz pointed out that the problem of identity concerns the scope and continuity of a legal system. Compare Raz, *supra* note 31, at 78–81, with Hart, *supra* note 31, at 92; see also Roth, 'Legitimacy in the International Order: The Continuing Relevance of Sovereign States', 11 *Notre Dame Journal of International and Comparative Law* (2021) 60, at 85–86.

[33] Raz noted the relevance of the material unity of a legal system to the concept of identity but centred the concept of identity to the formal unity. Raz, *supra* note 31, at 79–80. Assuming the jurisprudential notion of identity, discussions of identity in the constitutional literature suggest a focus on the material unity of a constitutional order. See G.J. Jacobsohn and Y. Roznai, *Constitutional Revolution* (2020), at 5–6, 15; G.J. Jacobsohn, *Constitutional Identity* (2010); see also Kuo, 'The Reign of Constitutional Positivism: Revolution Reconceived in the New Constitutional Age', 37 *Constitutional Commentary* (2022) 201, at 210–215.

order has its own identity.[34] The migration of the doctrine of unconstitutional constitutional amendment the world over testifies to the jurisprudential influence of the formal concept of identity.[35] Yet the notion of identity in constitutional thinking is more than a conceptual apparatus that enables systematic thinking in conceiving of constitutional ordering. As manifested in, *inter alia*, the 'eternity clause' in master-text constitutions,[36] the 'basic structure doctrine'[37] and the 'substitution test'[38] in the comparative jurisprudence of unconstitutional constitutional amendment, constitutional identity is substantive, departing from the formal concept of identity as the lynchpin of a legal system espoused by legal philosophers. A constitutional order assumes an identity – which is to be identified in the substance of the constitution[39] – and mutates into another when its identity alters.[40] Thus, a constitutional order must be able to protect its identity in the face of revolutionary constitutional changes.[41] The doctrine of unconstitutional constitutional amendment is a means to defend the constitution against threats to its identity – a measure of constitutional self-defence.[42]

Seen in this light, the notion of constitutional self-defence is not exclusive to constitutional democracies. Every constitutional order has its own identity, and, thus, all

[34] See C. Schmitt, *Constitutional Theory*, edited and translated by J. Seitzer (2007), at 59–66, 75–81, 150–154, 247–258; Reestman, 'The Franco-German Constitutional Divide: Reflections on National and Constitutional Identity', 5 *EuConst* (2009) 374; Polzin, 'Constitutional Identity, Unconstitutional Amendments and the Idea of Constituent Power: The Development of the Doctrine of Constitutional Identity in German Constitutional Law', 14 *I•CON* (2016) 411; see also Sajó and Uitz, *supra* note 6, at 63–66. The conventional usage of constitutional identity as the core fundamental principles or values that give integrity or unity to a constitutional order has been contested in the recent literature. In contrast to the conventional understanding, constitutional identity in some constitutional scholarship is conceived in sociological or politico-psychological terms. For discussions of constitutional identity in the new strand, see Jacobsohn, *supra* note 33; M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (2010); see also Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany', 27 *European Public Law* (2021) 465, at 470. For present purposes, I follow the conventional usage of constitutional identity.

[35] Y. Roznai, *Unconstitutional Constitutional Amendments* (2017); R. Abeyratne and N.S. Bui (eds), *The Law and Politics of Unconstitutional Constitutional Amendments in Asia* (2021).

[36] S. Suteu, *Eternity Clauses in Democratic Constitutionalism* (2021); see also Preuss, 'The Implications of "Eternity Clauses": The German Experience', 44 *Israel Law Review* (2011) 429.

[37] S. Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (2011); see also Polzin, 'The Basic-Structure Doctrine and Its German and French Origins: A Tale of Migration, Integration, Invention and Forgetting', 5 *Indian Law Review* (2021) 45.

[38] See Iturralde Sánchez and Bonilla Maldonado, 'Lifetime Imprisonment and the Identity of the Constitution', *Verfassungsblog* (1 February 2022), available at https://verfassungsblog.de/lifetime-imprisonment-and-the-identity-of-the-constitution/.

[39] See Schmitt, *supra* note 34, at 75–81, 150; see also Roznai, *supra* note 35, at 148–149.

[40] See R. Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (2019), at 85–86; see also Jacobsohn and Roznai, *supra* note 33, at 61–62; *cf*. Harris, 'Constitution of Failure: The Architectonics of a Well-Founded Constitutional Order', in J.K. Tullis and S. Macedo (eds), *The Limits of Constitutional Democracy* (2010) 66, at 68–69.

[41] Compare Jacobsohn and Roznai, *supra* note 33, at 30–31, with Roznai, *supra* note 35, at 148–150. Mirroring the jurisprudence of the German Constitutional Court, this line of thinking – under which constitutional identity marks the limits of (democratic) constitutional change – is globally influential but far from a universal standard. See Wendel, *supra* note 34, at 470.

[42] Landau, Dixon and Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras', 8 *GlobCon* (2019) 40, at 46–47.

constitutional orders have the inherent right to self-defence, if you will, so that their identity can be preserved. Needless to say, a constitution – understood as that which sustains the functioning of a political society – is 'not a suicide pact'.[43] Consider the remaining socialist constitutional orders.[44] The leadership of a Marxist-Leninist party as the designated vanguard movement party in the perceived historic struggle for socialism constitutes the core of these constitutions.[45] To allow for competitive party politics by constitutional amendment would be nothing but a (counter-)revolution.[46] The ban on independent parties in these states is just part of their measures for constitutional self-preservation.[47]

The party ban in the existing socialist states suggests that existential threats to a constitutional order are not confined to identity-altering constitutional change. Thus, the toolkit for constitutional self-defence contains more than the doctrine of unconstitutional constitutional amendment. As shown in comparative constitutional studies, the dissolution of anti-constitutionalist parties, the exclusion of individuals with criminal records for treason, sedition or similar antagonistic activities from public office, the ban on organizations considered a danger to democratic constitutionalism and other measures falling under the notion of militant democracy are all instruments for constitutional self-defence.[48] Yet, in contrast to the party ban in socialist states, as noted above, the legitimacy of measures of constitutional self-defence steered by the concept of militant democracy continues to be contested.[49] I hasten to add that the party ban in the existing socialist states is no less contentious than the means associated with militant democracy. Yet what sets them apart is that the party ban in those socialist constitutions is not contested because it is contradictory to the ethos of its attendant constitutional order. On the contrary, constitutional self-defence by means of banning independent parties mirrors a particular type of socialist constitutional

[43] S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (2015), at 123–124 (citation omitted).

[44] Socialist constitutions have survived the collapse of the Soviet Union, the archetype of the socialist model of constitutional orders, in China, Cuba, Laos, North Korea and Vietnam. See N.S. Bui, *Constitutional Change in the Contemporary Socialist World* (2020), at 4.

[45] *Ibid.*, at 66–67, 77–78. Notably, not all socialist constitutions in history subscribe to this type of regime. The Portuguese Constitution of 1976 before its transformative revision in 1980s is an example. Brito Vieira and da Silva, 'Getting Rights Right: Explaining Social Rights Constitutionalization in Revolutionary Portugal', 11 *I•CON* (2013) 898.

[46] Referring to Central and Eastern European countries, András Sajó notes that in the post-World War II transition to communist regimes, independent parties were banned as 'anti-democratic' or 'counter-revolutionary'. Sajó, *supra* note 4, at 79; see also S. Saxonberg, *Transitions and Non-Transitions from Communism: Regime Survival in China, Cuba, North Korea, and Vietnam* (2013), at 81.

[47] Notably, even a socialist constitutional order resting on the Marxist-Leninist ideology may allow nominal parties to exist under the leadership of the ruling socialist party. For example, China has eight 'democratic parties', apart from the vanguard Chinese Communist Party. 'China's One-Party System Has a Surprising Number of Parties', *The Economist* (9 March 2017), available at https://www.economist.com/china/2017/03/09/chinas-one-party-system-has-a-surprising-number-of-parties.

[48] See Tyulkina, *supra* note 6; Bourne, *supra* note 6; Teitel, 'Militating Democracy: Comparative Constitutional Perspectives', 29 *Michigan Journal of International Law* (2007) 49; see also Sajó, *supra* note 4, at 80–85. For new additions to the toolbox of militant democracy, see the sources cited in note 7 above.

[49] See Dixon and Landau, *supra* note 25, at 103–112, 194–195.

identity that the Marxist-Leninist party at the vanguard of the socialist revolution is the core of the constitutional order.[50] To put it bluntly, what is contentious about the party ban in the existing socialist states is not so much about the party ban itself in (socialist) constitutional terms as about the very morality and legitimacy of those socialist constitutional orders.[51]

In contrast, as a variety of constitutional self-defence, militant democracy has raised concerns over its compatibility with the very constitutional order that it is intended to defend – that is, constitutional democracy.[52] This should come as no surprise. After all, the very core of militant democracy is to banish the forces that aim to alter the constitutional regime from the competitive political processes that would enable them to replace constitutional democracy with another type of political order by democratic means.[53] It should be noted that the competitiveness of such political processes assumes the inclusive character of constitutional democracy.[54] If the democratic process is selectively inclusive of some political forces but not of others, its competitive character is constrained.[55] As Hannah Arendt observed when revolutionary zeal was still burning in the world, democracy as a constitutional order of political freedom works on the basis of 'deliberate choice and considered opinion' in the face of competing political forces – that is, it is based on free consent, not collective will.[56]

When some competitors are excluded from the political process, it raises the question whether the democratic choice of government resulting from the constrained political competition still gives expression to free consent. By rejecting accommodating anti-democratic forces in free political competition, democracy turns militant. Here, one finds militant democracy. Insofar as it deviates from the democratic idea of inclusiveness,[57] it casts doubt on the ethos of constitutional democracy as a political order of freedom.[58] In contrast, in constitutional orders such as China, Cuba, Vietnam and other socialist states where intolerant, exclusionist rule displaces political

[50] Bui, *supra* note 44, at 77–81.

[51] See Howard and Donnelly, 'Human Dignity, Human Rights, and Political Regimes', 80 *APSR* (1986) 801.

[52] See Sajó, *supra* note 4, at 79; Loewenstein, *Militant Democracy*, Part I, *supra* note 6, at 430–431; Stahl and Popp-Madsen, *supra* note 6, at 312–314; Kirshner, *supra* note 6; Issacharoff, *supra* note 7; A. Sajó (ed.), *Militant Democracy* (2004); Invernizzi Accetti and Zuckerman, 'What's Wrong with Militant Democracy?', 65 *Political Studies* (*PS*) (2017) 182; see also Teitel, *supra* note 48; Macklem, 'Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination', 4 *I•CON* (2006) 488, at 491–492. For a scholarly debate from a wide range of perspectives, see Malkopoulou and Kirshner, *supra* note 6.

[53] Fundamental rights, including political freedom, are not absolute and subject to constitutional limitation. In contrast to such constraints, the means of militant democracy tend to be focused on prevention and are thus controversial. See Kirshner, *supra* note 6, at 107–140.

[54] Coppedge, Alvarez and Maldonado, 'Two Persistent Dimensions of Democracy: Contestation and Inclusiveness', 70 *Journal of Politics* (2008) 632.

[55] Issacharoff and Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process', 50 *Stanford Law Review* (1998) 543.

[56] H. Arendt, *On Revolution* (1963), at 76, 170–172, 176–177; see also F.I. Michelman and A. Ferrara, *Legitimation by Constitution: A Dialogue on Political Liberalism* (2021), at 1.

[57] Coppedge, Alvarez and Maldonado, *supra* note 54, at 632 (citation omitted); see also Invernizzi Accetti and Zuckerman, *supra* note 52, at 197, note 9.

[58] O. Höffe, *Critique of Freedom: The Central Problem of Modernity*, translated by N.F. Schott (2020), at 175–191.

competition,[59] the idea of democracy – whether militant or not – does not enter the equation in planning constitutional self-defence. In such constitutional regimes where the constitutional ethos is undemocratic,[60] speaking of militant democracy in the discussion of constitutional self-preservation just makes no sense.

The foregoing discussion illuminates why bringing up militant democracy in the debate surrounding constitutional self-defence makes constitutional scholars sweat.[61] Militant democracy causes anxiety in this grand constitutional debate to the extent that it brings the question of constitutional ethos to the fore. To put it differently, in a constitutional order that does not assume free and equal competition in the political process at its core, entertaining militant democracy in the constitutional self-defence plan will hardly raise eyebrows. In the existing socialist states, with their constitutional identity built around the exclusionist rule of 'democratic centralism' under the leadership of the vanguard movement party, speaking of constitutional self-defence in terms of militant democracy evokes irony or 'infelicity' – to borrow a term from the theory of speech act[62] – rather than anxiety. Notably, these socialist states are not alone in the face of infelicity amid the talks of militant democracy and constitutional self-defence.

Reaching beyond the 'usual suspect' settings,[63] comparative constitutional scholarship has shown that not all democratic regimes embrace the idea of inclusiveness and free equal competition in political participation.[64] Thus, in democratic regimes, including but not limited to Pakistan, Singapore and Thailand, which consider competing political ideas in hierarchical terms according to religious, ideological or state-steered communitarian values,[65] constitutional self-defence would not engage the constitutional ethos by discriminating against or even banning the political forces entertaining ideas that are deemed unworthy of equal respect in constitutional terms. Since the ethos of such constitutions is to be found in terms of (established) religion, official ideology or even state-espoused common good,[66] such non-liberal democratic regimes should not feel troubled by the exclusion of some competitors from the

[59] Notably, the undemocratic exclusionist form of political rule enshrined in some socialist constitutional orders has been deceivingly designated as 'democratic centralism'. See, e.g., Constitution of the People's Republic of China, 1982, Art. 3, para. 1 (as amended in 2018); see also Bui, *supra* note 44, at 79–81.

[60] For a discussion of 'democratic ethos', see Michelman and Ferrara, *supra* note 56, at 77–79.

[61] The *Verfassungsblog* debate between Sam Issacharoff and Mark Graber surrounding the disqualification clause of the US Constitution, as mentioned in note 7 above, is a recent example.

[62] J.L. Austin, *How to Do Things with Words* (1962), at 12–14.

[63] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (2014), at 16.

[64] See Dixon and Landau, *supra* note 25, at 38–39; Tushnet, 'Authoritarian Constitutionalism', 100 *Cornell Law Review* (2015) 391; A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (2021).

[65] Speaking of 'religious constitutionalism' in Asia, Thio Li-ann notes, 'the state identifies with one specific religion, mostly relates to Buddhist (Sri Lanka … Thailand, and Bhutan) or Islamic polities (Pakistan, Malaysia, and Brunei)'. Thio, 'Varieties of Constitutionalism in Asia', 16 *Asian Journal of Comparative Law* (2021) 285, at 293. Notably, Brunei is an absolute monarchy. Thio further identifies a 'communitarian' variety of constitutionalism in Singapore and other Asian countries where 'the state actively espouses a public conception of the good which underlies the national identity'. *Ibid*., at 303–309. For a democratic regime that once prioritized socialist ideology, see Brito Vieira and da Silva, *supra* note 45, at 914–916.

[66] Thio, *supra* note 65, at 293–298, 303–309; *cf.* A. Vermeule, *Common Good Constitutionalism* (2022), at 43–48.

political process. Instead, should they choose to keep out the political forces striving to displace the constitutional ethos defined in religious, ideological or communitarian terms by democratic means, these exclusionary policies reflect, rather than contradict, the existing constitutional ethos. Thus, the choices for constitutional self-defence by democratic regimes to which free and equal political competition is alien would not shed much light on our appreciation of the challenges that the idea of militant democracy poses to the grand debate over the defence of constitutional democracy.

Only in constitutional orders where different political ideas and beliefs are entitled to compete freely on an equal footing in political processes does excluding or banning the political forces deemed to be endangering the constitutional regime from free political competition – a typical means of militant democracy – raise the ethos question in conceiving of constitutional self-defence.[67] This is where the context in which the discourse on militant democracy finds itself is revealed: democracy is more than a means of channelling political participation as it presupposes normative values of freedom and equality – that is, liberal democracy.[68] Militant democracy only raises concerns over the constitutional ethos in the constitutional defence of liberal democracy and thus becomes contentious,[69] although needs for constitutional self-preservation are not off-limits to non-liberal regimes, whether they are democratic or not. Failing to see the presupposed normative democratic character of constitutional ordering in the debate over militant democracy, we risk eliding constitutional self-defence and militant democracy and thus under-appreciate the latter's challenge. Moreover, with this underlying normative assumption left out, the absence of an international version of militant democracy amid authoritarian forces marching on the international plane becomes a puzzle. It is to this puzzling absence that I now turn.

3 The Authoritarian Turn in International Law? A Betrayal of Character

To resolve the puzzle of the absence of the idea of militant democracy in the international legal order, this section first examines the perceived authoritarian turn in international law. How the character of international law – representative but not democratic – prevents the internationalization of the idea of militant democracy will be discussed next.

[67] Compare Invernizzi Accetti and Zuckerman, *supra* note 52, with Mouffe, 'The Limits of Liberal Pluralism: Towards an Agonistic Multipolar World Order', in Sajó, *Militant Democracy*, *supra* note 52, 69; see also Koskenniemi, 'Whose Intolerance, Which Democracy?', in G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000) 436.

[68] Höffe, *supra* note 58, at 184–190; see also P.W. Kahn, *Democracy in Our America: Can We Still Govern Ourselves?* (2023), at 31–32; but *cf*. Sajó, *supra* note 64, at 23–27.

[69] This is not to say that constitutional democracies must reject the concept of militant democracy or keep out any of its attendant policy suggestions. It is also worth noting that constitutional orders assuming liberal ethos may contain non-liberal elements. See Sajó, *supra* note 64, at 37–49.

A *Reading International Law under Authoritarian Clouds*

While a constitutional democracy is dislodged when authoritarian forces manage to reduce it to a democratic shell emptied of normative substance, the emergence of authoritarian international law does not herald the arrival of an authoritarian international legal order.[70] As Ginsburg observes, the authoritarian penetration into the international legal order only ends the dominance of what he calls 'prodemocratic or liberal international law' (hereinafter liberal international law) in the post-Cold War era, without eradicating international law's liberal constituents.[71] Emerging from the end of liberal dominance is an international legal order co-inhabited by three species of international law: the 'liberal' and the 'authoritarian', with the 'general' sitting in between.[72] On this view, these three species exist in a horizontal relationship. Each has its own place in the international legal order. Upon closer inspection, however, the horizon is not as flat as it seems.

In contrast to Ginsburg's portrayal above, Martti Koskenniemi, when observing the recent backlash against international institutions in his 2018 Asser Lecture, remarked: 'I do not think international law has been seriously challenged.'[73] He continued to note that the basic principles of international law such as sovereignty, non-intervention, treaty making and immunity remained intact.[74] Noticeably, the basic principles of international law that Koskenniemi invoked as evidence to the not (seriously) challenged state of international law fall into Ginsburg's 'general' species of international law. Instead of resulting from the authoritarian end of the liberal dominance of the international order, the general species has long existed as the basic principles of international law, notwithstanding the vicissitudes of different ideologies in the international arena. General international law essentially stands prior to – or above, if you will – its liberal and authoritarian cohabitants in the international legal order. With the tilted horizon on which Ginsburg's three species of international law stand revealed, we can now better appreciate how authoritarian international law emerges.

For a start, as with its liberal opponent, authoritarian international law does not result from the abrupt domination of the international legal order by some hegemon(s). Instead, both the liberal and authoritarian species find their places in international law by legal means.[75] Echoing past landmark changes in the international legal order,[76] authoritarian international law materializes through cooperation between, *inter alia*, authoritarian states that employ the 'neural' general international legal

[70] For the distinction between the international legal order and international law, see note 8 above.

[71] Ginsburg, *supra* note 11, at 256–257. Tom Ginsburg later refers to these three species of international law as pro-democratic, pro-authoritarian and regime neutral. See T. Ginsburg, *Democracies and International Law* (2021).

[72] Ginsburg, *supra* note 11, at 228–233.

[73] Koskenniemi, *supra* note 13, at 3.

[74] *Ibid.*

[75] See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 196–244.

[76] See G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at 89–224; see also Anghie, 'Rethinking International Law: A TWAIL Retrospective', 34 *EJIL* (2023) 7, at 55–56.

tools to pursue their common authoritarian goals on new international platforms.[77] For example, taking advantage of their sovereign status in the making of international law,[78] authoritarian states are able to create new multilateral arrangements among themselves.[79] As a result, new institutions of international law such as the Shanghai Cooperation Organization (SCO) have emerged alongside the established ones that are still dominated by liberal values.[80] More importantly, as the SCO example suggests, its focus on the suppression of 'terrorism, separatism and extremism' through measures such as information sharing, extradition and denials of asylum undercuts the liberal principle of the 'political offence exception' in the law of extradition. Under the SCO regime, political dissidents of individual member states who are charged with terrorism, separatism or extremism for their involvement in non-violent resistant activities are extraditable, even though such 'crimes' fall under the category of political offence.[81] The seeds for an authoritarian exception to the 'political offence exception' in international law are therefore sowed. Staying away from the liberal regimes in the international order, authoritarian states bring authoritarian – or, rather, special – international law into existence among themselves.

Notably, authoritarian states do not just stay away. To promote their common interests,[82] authoritarian states further attempt to push away or dilute liberal values and

[77] For a detailed analysis with a focus on China from the Chinese perspective, see C. Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (2019), at 155–201. Notably, the platforms that undergird the formation of authoritarian international law are not limited to authoritarian states. Democracies that formally maintain a neutral position between authoritarian states and liberal democracies may be included. The membership of India in the Shanghai Cooperation Organization (SCO), which will be further discussed, is one such example. Another example is the BRICS (Brazil, Russia, India, China and South Africa), despite its ambiguous legal character. Originally a geo-economic block of four major emerging economies (Brazil, Russia, India, China) plus a regional economic powerhouse (South Africa), BRICS now comprises democracies (Brazil, Ethiopia, India and South Africa), secular autocracies (China, Egypt and Russia), absolute monarchies (Saudi Arabi and the United Arab Emirates) and a theocracy (Iran). Erlanger, Pierson and Chutel, 'Iran, Saudi Arabia and Egypt Join Emerging Nations Group', *New York Times* (24 August 2023), available at https://www.nytimes.com/2023/08/24/world/europe/brics-expansion-xi-lula.html. Despite being classified as a democracy, some members of BRICS such as India are seeing democratic sliding. See Varshney, 'How India's Ruling Party Erodes Democracy', 33(4) *Journal of Democracy* (2022) 104. BRICS' influence remains to be seen. Mishra, 'BRICS Shows It's Little More Than a Meaningless Acronym', *Washington Post* (25 August 2023), available at https://www.washingtonpost.com/business/2023/08/25/brics-shows-it-s-little-more-than-a-meaningless-acronym/de6b1644-4300-11ee-9677-53cc50eb3f77_story.html?isMobile=1,1,1,1,1.

[78] Ginsburg calls such exercises 'retooling'. Ginsburg, *supra* note 11, at 242.

[79] In contrast to the new institutional platforms as discussed in note 77 above, Ginsburg notes the Warsaw Pact – one of the early examples of cooperation among authoritarian states through the creation of international organizations (IOs) – as an instance of 'mimicry' of their liberal counterparts. Such examples were isolated and had little influence beyond the authoritarian states during the Cold War, only marking the prehistory of authoritarian international law. *Ibid*., at 242–243.

[80] The SCO originated as informal gatherings of the leaders of China, Kazakhstan, Kyrgyzstan, Russia and Tajikistan ('Shanghai Five') in 1996 and has since evolved into a formal international organization of nine member states – the largest democracy in the world, India, included – plus some observer states and dialogue partners. General information about the SCO is available at https://eng.sectsco.org/20170109/192193.html.

[81] Ginsburg, *supra* note 11, at 251–253.

[82] Granted, authoritarian states do not always converge on policy and may even see their individual national interests moving in opposite directions. Nevertheless, they may set aside their differences to fend

thus expand influence. On the one hand, authoritarian states create parallel mechanisms in competition with the established ones with an eye to weakening the latter's influence. Consider the China-initiated Asian Infrastructure Investment Bank (AIIB).[83] Since its inception in 2016, the AIIB has established itself as a substantial alternative source of international credit for some countries that used to look to the World Bank, the Asian Development Bank (ADB) or other lending sources for financing their various projects of economic development. With its 'strings-free' lending policy, the AIIB's influence has grown steadily. Now it is seen as undercutting the efforts of the World Bank and other traditional creditors to push for governance reform in the credit-receiving countries through the mechanism of conditionalities.[84] In addition, the AIIB is contesting the ADB's role in Asia amid the rise of new geo-economic and geopolitical challenges.[85] On the other hand, authoritarian states have learned to use the liberal language of human rights and democracy to promote their own causes.[86] Through this 'concept co-optation' and other means of engagement,[87] authoritarian states may eventually influence the established international mechanisms. Taken together, a new species of international law is emerging where authoritarian states are endeavouring to push away international law's liberal constituents.

This synopsis of the means to contest liberal dominance of the international legal order suggests that authoritarian international law virtually arises at the expense of its liberal opponent by shifting between the 'stay-away' and 'push-away' strategies.[88] Yet this contrasting image of liberal and authoritarian international law is deceiving. It obscures the general species of international law that continues to stand separately from its liberal and authoritarian cohabitants. As has been alluded to, authoritarian international law is formed through the employment of the same 'neural' general international legal tools that have enabled liberal values to crystallize into international human rights law – the epitome of both international law's liberating

off the pressure from their liberal counterparts. See Nguyen, 'International Law as Hedging: Perspectives from Secondary Authoritarian States', 114 *AJIL Unbound* (2020) 237.

83 See Cai, *supra* note 77, at 187–193.

84 *Cf.* Anghie, *supra* note 76, at 48.

85 Compare K. Sims, 'Cooperation and Contestation between the ADB and AIIB', *East Asia Forum* (24 October 2019), available at https://www.eastasiaforum.org/2019/10/24/cooperation-and-contestation-between-the-adb-and-aiib/, with Cai, *supra* note 77, at 192.

86 Apart from the well-known authoritarian 'capture' of the Human Rights Council, Ginsburg notes the 'repurposing' of election monitoring by the Commonwealth of Independent States' (CIS) Election Monitoring Organization to entrench elected autocrats within the CIS. See Ginsburg, *supra* note 11, at 255–256.

87 'Staffing' IOs is another way for the authoritarian states to increase their influence. Despite being perceived as an aggressive player in this regard, China has so far only seen modest success in its effort to staff IOs with its own nationals. See Fung and Lam, 'Staffing the United Nations: China's Motivations and Prospects', 97 *International Affairs* (2021) 1143; see also Parizek and Stephen, 'The Long March through the Institutions: Emerging Powers and the Staffing of International Organizations', 56 *Cooperation and Conflict* (2021) 204.

88 But *cf.* Mishra, *supra* note 77. The implications of the SCO's approach to international terrorism to the balance between counter-terrorism efforts and human rights in the global war on terrorism suggest the mix of both strategies in the form of 'norm creep'. J. Jennion, 'Confronting China's International Counterterror Regime: Pay Attention to the SCO', *The Diplomat* (28 December 2021), available at https://thediplomat.com/2021/12/confronting-chinas-international-counterterror-regime-pay-attention-to-the-sco/.

promise and its 'last utopia'.[89] Seen in this light, the rise of authoritarian international law is more than a result of the authoritarian drive. As states behind liberal international law have failed to live up to aspirations for cosmopolitan ideals and universal rights,[90] the liberating promise as set out in international human rights law becomes hollow, only to elicit backlash that provides fertile ground for anti-liberal forces.[91] When the liberal promise is broken, international law's sovereigntist doctrinal basics – which Ginsburg characterizes as general international law – allow for the emergence of the authoritarian species at the expense of its liberal opponent in the international legal order.[92] The formation of authoritarian international law is thus symptomatic of, *inter alia*, the gap between international law's sovereigntist doctrinal basics and its 'universal liberating promise' for 'cosmopolitan humanism'.[93] Does this mean that international law's promise for cosmopolitan humanism is equidistant from its liberal and authoritarian species? My answer is 'no'.

It is true that not all the motley international human rights that give expression to international law's liberating promise are attributed to the states associated with liberal international law. The not-so-liberal new states emerging from decolonization deserve recognition for their role in bringing economic development and other social justice issues into international human rights law – which are now part and parcel of liberal international law, at least on the books[94] – although they also have their share of responsibility in breaking the promises of human rights.[95] Even the Soviet Union had once played a role in shaping the liberal legal architecture of international criminal justice before it engaged its Western ideological rivals in the long Cold War.[96] There is also no denying that liberal international law, especially international human rights law, has been used by its self-designated guardians in cynical ways to advance their anything but liberal goals.[97] Nevertheless, as the motley international human rights treaties exhibit, liberal international law – with its underlying liberalism that

[89] Koskenniemi, *supra* note 12, at 513; S. Moyn, *The Last Utopia: Human Rights in History* (2010). Such promises should not be taken for the 'purpose' of international law, which, if any, is to be derived from international law itself.

[90] See Koskenniemi, *supra* note 13, at 24–26.

[91] *Ibid.*, at 23–27.

[92] For China's influence in the Third World and its emphasis on classical principles of international law, see Anghie, *supra* note 76, at 46–47.

[93] Koskenniemi, *supra* note 12, at 513.

[94] S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018), at 98–113. For social and economic rights as part of the liberal political order, see Whelan and Donnelly, 'The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight', 29 *Human Rights Quarterly* (2007) 908.

[95] Compare Moyn, *supra* note 89, at 84–119, with R. Burke, *Decolonization and the Evolution of International Human Rights* (2010).

[96] See F. Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II* (2020).

[97] Here are some examples. For human rights and the civilizing mission of international law, see Anghie, *supra* note 75, at 114, 135; for a critique of the market-orientated construction of human rights from a law and literature perspective, see J.R. Slaughter, *Human Rights, Inc.: The World Novel, Narrative Form, and International Law* (2007); for the role of human rights in the moral justification of a market society, see J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019).

is accommodating of a wide range of conceptions of justice[98] – tends to be more aligned than its authoritarian contestant with international law's universal liberating promise for cosmopolitan humanism.[99] Thus, as the international legal order is driven further down the authoritarian road at the expense of the present balance between liberal and authoritarian international law, the worry is that the authoritarian forces on the international plane seem to parallel their domestic counterparts with a mission to transform the existing legal order.

Notably, international law had moved in the liberal or pro-democratic direction before authoritarian states gradually rose to end the liberal dominance in the past 20 years.[100] The international legal order coming out of the liberal dominance has worked to the benefit of democracies.[101] Thus, as the authoritarian forces are tilting the existing international legal order further away from cosmopolitan ideals, democracies are also undercut, if not endangered. From the authoritarian forces' continuing march on the international plane, can we infer that the existing international legal order requires defending itself because its identity is now at stake? Need the international legal order be defended in a way that corresponds to what has been said about militant democracy?

B *Representation without International (Militant) Democracy*

To answer the questions raised above, let us first consider whether international law is defined by democracy and thus requires a militant conception of democracy for self-defence. Arguments for the democratic character of international law rest chiefly on two bases. In the 1990s when one authoritarian regime after another was washed away by the democratic wave,[102] the right to democracy was seen as emerging from the global march of democracy.[103] Yet it eventually failed to materialize as a globally recognized international norm.[104] Scepticism abounds about the advocacy for the putative right to democracy in international law.[105] For one, the putative right to democracy raises concerns about whether it may result in a new exception to the principle

[98] See, e.g., J. Rawls, *A Theory of Justice* (1971); R. Nozick, *Anarchy, State and Utopia* (1974).

[99] See Mégret, 'International Law as a System of Legal Pluralism', in P.S. Berman (ed.), *The Oxford Handbook of Global Legal Pluralism* (2020) 532, at 539.

[100] Ginsburg, *supra* note 71.

[101] *Ibid*., at 101–123; *cf*. Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order', in Fox and Roth, *supra* note 67, 199.

[102] S.P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1993).

[103] See generally Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46; see also Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in Fox and Roth, *supra* note 67, 239; Koh, 'The Right to Democracy: Introduction to the 1998 Human Rights Report', in *United States Department of State Country Reports on Human Rights Practices for 1998*, vol. 1 (1999) xv.

[104] Ginsburg, *supra* note 71, at 103–106.

[105] For critical views, see S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2003); Varayudej, 'A Right to Democracy in International Law: Its Implications for Asia', 12 *Annual Survey of International and Comparative Law* (2006) 1; Marks, 'What Has Become of the Emerging Right to Democratic Governance?', 22 *EJIL* (2011) 507. For scholarly engagement with the right to democracy or democratic governance from a wide range of perspectives, see Fox and Roth, *supra* note 67; R. Burchill (ed.), *Democracy and International Law* (2006); see also Fox and Roth, 'The Dual Lives of "The Emerging Right to Democratic Governance"', 112 *AJIL Unbound* (2018) 67.

of non-intervention in international law, raising the risk of the hegemonic interference in domestic affairs.[106] For another, it is questioned for undercutting the inclusive character of international law.[107] Once international law is wedded to democracy, it turns away from aspirations for universality and ceases functioning as a common language. Without it, the states are denied the medium in which they can negotiate mutual accommodation for their conflicting interests.[108] Thus, even if calls for democracy in international law have resurged recently,[109] the attempt to align the international legal order with democracy remains as contested as it was in the 1990s when the right to democracy was first floated.[110]

The second line of argument for the democratic character of international law essentially speaks to the question of identity. It is argued that, as the legal framework governing interstate relations, international law is democratic in that all states are supposedly included in its making.[111] As reflected in the three primary sources of international law,[112] states participate in international law-making by becoming contracting parties to treaties; with their individual state practices and the attendant *opinio juris* in the development of customary international law; or through their domestic legislation or case law in the formation of 'the general principles of law'.[113] While treaties are only binding on the contracting parties,[114] international law seemingly results from the participation of all states in terms of the making of customary international law and the general principles of law.[115] This volitional,

[106] Compare Byers and Chesterman, '"You, the People": Pro-Democratic Intervention in International Law', in Fox and Roth, *supra* note 67, 259, with Roth, 'The Illegality of "Pro-Democratic" Invasion Pacts', in Fox and Roth, *supra* note 67, 328; see also Mitchell and Diehl, 'Caution in What You Wish For: The Consequences of a Right to Democracy', 48 *Stanford Journal of International Law* (2012) 289.

[107] See, e.g., Slaughter, *supra* note 101, at 227.

[108] See Koskenniemi, *supra* note 12.

[109] Rasulov, '"From the Wells of Disappointment": The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship', 32 *EJIL* (2021) 17; see also Besson, 'Sovereignty, International Law and Democracy', 22 *EJIL* (2011) 373, at 382.

[110] See Roth, 'The Trajectory of the Democratic Entitlement Thesis in International Legal Scholarship: A Reply to Akbar Rasulov', 32 *EJIL* (2021) 49.

[111] See generally Besson, 'Sovereignty', in *Max Planck Encyclopedia of Public International Law* (2012); *cf*. Besson and Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation', 9 *Jurisprudence* (2018) 504.

[112] Statute of the International Court of Justice 1945, 33 UNTS 993, art. 38 (1) (a)–(c) ('[t]he general principle of law recognized by civilized nations' in article 38(1)(c) is referred to as 'the general principles of law' in the following. For a discussion of its relationship with 'the general principles of *international* law', see Bjorge, 'General Principles of Law Formed within the International Legal System', 72 *ICLQ* (2023) 845 (emphasis added).

[113] For the identification of the 'general principle of law' through comparative law, see Ellis, 'General Principles and Comparative Law', 22 *EJIL* (2011) 949. But see Bjorge, *supra* note 112.

[114] Multilateral law-making treaties are seen as taking on 'constitutional' character. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg Journal of International Law* (2004) 547, at 549.

[115] Notably, customary international law is not always universal in terms of applicability. Compare D'Amato, 'The Concept of Special Custom in International Law', 63 *AJIL* (1969) 211, with Helfer and Wuerth, 'Customary International Law: An Instrument Choice Perspective', 37 *Michigan Journal of International Law* (2016) 563, at 572. The universality of 'the general principles of law of civilized nations' has long been contentious, to the say the least. See Anghie, *supra* note 75, at 226–243.

universal character remains indispensable to a democratic rendering of the international legal order.[116]

The problem with this democratic characterization of international law is its conflation of democracy and representation. Although modern democracy is mostly representative, representative democracy is not the only institutional manifestation of democracy.[117] Moreover, representation is distinct from democracy, conceptually and institutionally. As Hanna Pitkin's classic work points out, representation can be considered in terms of 'standing for' or 'acting for'.[118] In the former strand, even a demagogic leader can be seen as representative as a democratically elected legislature.[119] Moreover, as the history of parliamentary institutions shows,[120] an unelected multimember legislative chamber is far from a democratic parliament as we know it, but it is nonetheless representative in terms of its law-making function.[121] Against this conceptual and institutional backdrop, the process of international law-making is apparently representative since no state is supposed to be left out.[122] Still, it does not quite tell us whether international law-making is democratic.

Strictly speaking, international law remains centred on interstate relations.[123] Despite the increasing role of individuals in some international matters, such as minority protection, armed conflict and foreign investment,[124] in contrast to states, they are far from subjects in international law-making. Given the discrepancies in interest between the world community and individual states, the complex relationship

[116] See Pettit, 'Legitimate International Institutions: A Neo-Republican Perspective', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 139; Christiano, 'Is Democratic Legitimacy Possible for International Institutions?', in D. Archibugi, M. Koenig-Archibugi and R. Marchetti (eds), *Global Democracy: Normative and Empirical Perspectives* (2011) 69; Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law', in S. Besson and J. d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (2017) 724. Compare Besson and Martí, *supra* note 111, with Besson, 'State Consent and Disagreement in International Law Making: Dissolving the Paradox', 29 *Leiden Journal of International Law* (*LJIL*) (2016) 289. For a discussion of the relationship between the volitional character of international law and democracy, see Chemillier-Gendreau, 'Consent as a Guarantee of the Democratic Legitimacy of International Law', in S. Besson, *Consenting to International Law* (2023) 296.

[117] For a classical discussion, see Leibholz, 'The Nature and Various Forms of Democracy', 5 *Social Research* (1938) 84; see also Landemore, 'Deliberative Democracy as Open, Not (Just) Representative Democracy', 146(3) *Dædalus* (2017) 51.

[118] H.P. Pitkin, *The Concept of Representation* (1967).

[119] See Kuo, 'Against Instantaneous Democracy', 17 *I•CON* (2019) 554, at 558–561; N. Urbinati, *Me the People: How Populism Transforms Democracy* (2019).

[120] D. Boucoyannis, *Kings as Judges: Power, Justice, and the Origins of Parliaments* (2021).

[121] J. Waldron, *Law and Disagreement* (1999), at 56–60. The unelected upper chamber of the British Parliament – the House of Lords – can be seen as part of this legacy. See also Kelso, 'Reforming the House of Lords: Navigating Representation, Democracy and Legitimacy at Westminster', 59 *Parliamentary Affairs* (2006) 563.

[122] But see Anghie, *supra* note 75, at 223–235.

[123] See Crawford, 'Democracy and the Body of International Law', in Fox and Roth, *supra* note 67, 91, at 98. Although international law also applies to both the IO-state relations and the relations between IOs, both are derivatives of interstate relations as IOs themselves result from interstate relations.

[124] See generally A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, translated by J. Huston (2016).

between the national community and individuals and the gap between a government and its citizens, the volitional participation of states in international law-making cannot be considered democratic in a meaningful way as far as individuals are concerned.[125] Moreover, with international law reaching a wide range of matters traditionally considered domestic concerns – from civil rights, to environmental protection, to corruption – individuals' lack of direct access to international law-making poses an acute challenge of democracy to the international legal order.[126] Worse, notwithstanding international law-making's representative character, inequality among states in international decision-making still exists in the foundational organizations of the post-World War II international legal order such as the United Nations Security Council and the International Monetary Fund.[127] Taken together, international law has long suffered from a double democratic deficit.

Having distinguished the respective pertinence of representation and democracy to international law-making, we can now affirm that international law-making itself is representative of the diverse views held by individual states.[128] Yet, from representative international law-making, it would be a leap of logic to infer that international law is democratic in character. With the non-democratic character of international law revealed, it is no wonder that the concept of militant democracy is absent from the debate stirred by the emergence of authoritarian international law alongside the established international legal regimes. Apart from the question of the absent international militant democracy, however, it remains to be addressed whether there exists something at the core of the international legal order that requires defending in a way that is akin to constitutional self-defence.

The discussion of international law-making has indicated that the international legal order rests on the participation of states. All states are supposedly represented in the formation of international law, regardless of their constitutional regimes. The representative character of international law-making speaks to the value of pluralism in the international legal order.[129] Is pluralism the identity of international law? Let us start by comparing the state of international law and its domestic parallel. As has been noted, in the domestic context, the identity to be preserved under the idea of constitutional self-defence is substantive. Much of what constitutes the substance of the constitutional identity of constitutional democracy can also be found in international law.[130] For example, fundamental rights, social rights and the basic principles of the rule of law have all found their way into various international legal instruments,

[125] See Marks, *Riddle of All Constitutions*, *supra* note 105, at 76–100; Chemillier-Gendreau, *supra* note 116, at 305–313.

[126] Chemillier-Gendreau, *supra* note116, at 305–306; Paulus, 'The International Legal System as a Constitution', in Dunoff and Trachtman, *supra* note 16, 69, at 95–96.

[127] Viola, Snidal and Zürn, 'Sovereign (In)Equality in the Evolution of the International System', in S. Leibfried *et al*. (eds), *The Oxford Handbook of Transformations of the State* (2015) 221, at 222.

[128] This is not to say that what comes out of international law-making is representative.

[129] See B.R. Roth, *Sovereign Equality and Moral Disagreement* (2011), at 24; Krisch, 'Pluralism', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019) 691; see also Mégret, *supra* note 99, at 538.

[130] See Paulus, *supra* note 126, at 90–107.

including the various international human rights treaties.[131] Yet it is one thing to say that international law admits human rights, the rule of law or democracy; it is quite another to say that such values constitute the identity of the international legal order.[132] Instead, as suggested above, such substantive values are associated with liberal international law, which has taken shape within the framework governed by general international law. Taking this into account, if there is such a thing as identity that justifies international law's self-defence, it must be part of general international law instead of liberal or authoritarian international law.

Among the basic principles of international law that constitute general international law, referred to in section 3, is sovereignty.[133] Apart from its jurisprudential role in giving formal identity and systematic character to international law,[134] sovereignty takes on normative significance under the principle of sovereign equality.[135] Despite ambiguities surrounding the meaning of pluralism in the international legal order,[136] the principle of sovereign equality gives shape to pluralism in international law.[137] If so, to defend pluralism as the identity of international law amounts to upholding the decentralized and horizontal international legal order of which state sovereignty is the lynchpin.[138] To frame pluralism here as some substantive value that gives purpose to international law and justifies defending it in a way that is akin to constitutional self-defence makes little sense.

A more promising way to render pluralism in international law substantive and, thus, suitable for self-defence is to draw on its value as an ethical doctrine.[139] In this way, some resonance can be found between pluralism and liberalism.[140] Even so, pluralism in international law is no parallel to liberalism in constitutional law that requires constitutional self-defence. As discussed in section 2, liberalism comprises substantive values that may require constitutional self-defence by means of militant democracy. Instead of lending itself to international anarchy, pluralism in international law is

[131] See Gardbaum, 'Human Rights and International Constitutionalism', in Dunoff and Trachtman, *supra* note 16, at 233, 235–236; see also W.A. Schabas, *The Customary International Law of Human Rights* (2021), at 18–21.

[132] *Jus cogens* norms seem to suggest an exception. In light of their narrowly defined content, it is hard to see how they give identity to the international legal order. *Cf.* Paulus, *supra* note 126, at 88–89.

[133] See the text accompanying note 74 above.

[134] Whether international law is a system has long been at the centre of the jurisprudential debate about international law. Compare Hart, *supra* note 31, at 213–237, with H. Kelsen, *Introduction to the Problems of Legal Theory*, translated by B.L. Paulson and S.L. Paulson (1992), at 107–108. Defenders of international law as a system do not all assume a hierarchical structure, which is characteristic of a municipal legal system. See Paulus, *supra* note 126, at 72–75. For ambiguities about the systematic character of international law and its relevance to some contemporary issues, including fragmentation, see Michaels and Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law', 22 *Duke Journal of Comparative and International Law* (2012) 349, at 349–350.

[135] Roth, *supra* note 129, at 53–92.

[136] Tasioulas, 'Parochialism and the Legitimacy of International Law', in M.N.S. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundations of International Law* (2011) 16, at 33–38.

[137] Roth, *supra* note 129, at 53–92.

[138] Paulus, *supra* note 126, at 75.

[139] Tasioulas, *supra* note 136, at 33–34.

[140] See the debate in Crowder, 'Pluralism and Liberalism', 42 *PS* (1994) 293; Berlin and Williams, 'Pluralism and Liberalism: A Reply', 42 *PS* (1994) 306; see also Mégret, *supra* note 99, at 539.

moderated and tied to the commitment to '*one* global legal order'.[141] Here, we see the two faces of international law: pluralism and universalism. Through the latter, the pluralist international legal order is brought closer to some 'common ethos of liberalism'.[142] The problem is that what substantiates 'the one' pluralism-rooted global legal order still comes from units of ethical pluralism – that is, states.[143] As an ethical doctrine, pluralism in international law remains anything but a substantive identity suitable for being defended in a way that is akin to constitutional self-defence.

Seen in this light, the emergence of authoritarian international law barely indicates that the international legal order is taking an authoritarian turn. Rather, it gives expression to the strong pluralism embedded in international law after the liberal dominance came to an end.[144] The absence of calls for militant democracy on the international plane amid the global authoritarian wave reflects the uniqueness of the authoritarian challenge beyond the domestic constitutional landscape: the coexistence of distinct normative species resulting from the emergence of authoritarian international law at the end of the liberal dominance essentially gives away the open, pluralist character of the international legal order.[145] Instead of a substantive identity that justifies internationalization of constitutional self-defence, pluralism in international law reveals the limits in drawing an analogy between the constitutional and international legal order. With the limitation of constitutional analogy brought to light, the problem with current advocacy for democracy vis-à-vis the growing authoritarian influence on the international plane will soon come to the fore.

4 What If Militant Democracy Goes International? Keeping the Promise Alive between Militant Democracies and the Duarchy

As discussed above, the concept of militant democracy that has made constitutional scholars sweat in conceiving of constitutional self-defence is virtually absent on the international plane due to the non-democratic international legal order. Yet the non-democratic character of international law does not suggest that democracy is missing in the international legal order.[146] Just as in the constitutional universe where militant democracy has pervaded constitutional democracies in practice, despite the anxiety over its tension with the ethos of liberal democracy,[147] the defence of democracy has been taken to the international arena although without adopting the label of militant

[141] Mégret, *supra* note 99, at 539 (emphasis in original).
[142] *Ibid.*
[143] *Ibid.*, at 540–541.
[144] But see Dixon and Landau, 'Abusive Internationalism? On Democracies and International Law', 116 *AJIL* (2022) 889.
[145] Roth, *supra* note 129, at 273–290.
[146] For a discussion of the elevated status of democracy in the regional international law of Europe, Africa and Latin America, see Ginsburg, *supra* note 71, at 124–185.
[147] See Bourne and Rijpkema, 'Militant Democracy, Populism, Illiberalism: New Challengers and New Challenges', 18 *EuConst* (2022) 375.

democracy.[148] Where such democracy advocacy will lead us can be better appreciated by looking back at the road we have travelled.

Drawing on the empirical evidence, Ginsburg notes that international law had moved in the pro-democratic-liberal direction before the rise of authoritarian influence in the international arena.[149] It was the time when liberal democracies effectively steered the direction of the international legal order unchallenged, suggesting that the dominant values of the international legal order reflected those held by the steering states in the development of international law. This is no surprise since the state still holds the key to international law-making, despite the perceived decline of the Westphalian system.[150] It follows that a state's character as reflected in its constitutional regime exerts substantial influence on its participation in the international legal order. Considering the outsized influence of the leading states – or, rather, hegemons – on the workings of the international system, it is fair to say that, when the leading states' character changes or when the old leadership gives way to new hegemons, international law finds itself in new circumstances, and changes.[151] Thus, the emergence of authoritarian international law is not so much the change of the identity of the international legal order as the result of the replacement of one hegemon with another.

With the liberating promise as embodied in international human rights law broken, the legitimacy of liberal dominance and its hegemons is gradually undermined, driving the insurgency against liberal internationalism closer to nationalism.[152] Capitalizing on its newfound economic and political prowess, China as the long-time champion of nationalism and anti-colonialism in the international arena fills the void amid criticisms of Western liberal hypocrisy.[153] As a 'new great power', China is in a position to reshape international law with the strategy of 'norm entrepreneurship'.[154] While China emerges as a new hegemon and authoritarian nationalism is on the rise in various democracies, the international legal order is tilted away from universalism, which is reminiscent of 'the common ethos of liberalism'.[155] No wonder the challenge posed by the emergence of authoritarian international law to the international legal order and the considered response are viewed through the lens of China-US relations.[156] Seen in this light, the defence of democracy verges on reasserting liberal values, if not the USA's leading role in the world order,[157] and it becomes problematic.

[148] See sources cited in note 26 above.

[149] Ginsburg, *supra* note 71.

[150] Cassese and Condorelli, 'Is Leviathan Still Holding Sway over International Dealings?', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 14.

[151] W.G. Grewe, *The Epochs of International Law*, translated by M. Byers (2000); *cf.* Cai, *supra* note 77, at 20–25.

[152] Koskenniemi, *supra* note 13, at 3–5.

[153] Anghie, *supra* note 76, at 49, 63.

[154] See *ibid.*, at 46–50; Cai, *supra* note 77, at 101–154.

[155] See also Ginsburg, *supra* note 71, at 240–282. For the relationship between ethos of liberalism and universalism, see Mégret, *supra* note 99, at 539.

[156] Ginsburg, *supra* note 71, at 282–287; see also Cai, *supra* note 77; but *cf.* Anghie, *supra* note 76, at 49–50.

[157] See Mastanduno, 'Liberal Hegemony, International Order, and US Foreign Policy: A Reconsideration', 21 *British Journal of Politics and International Relations* (2019) 47.

I hasten to add that the open, pluralist character of the international legal order as identified above does not mean that liberal democracies should only engage in the development of international law as if it is business as usual. They are as legitimate as their authoritarian counterparts to shape the international legal order in line with their common goals.[158] On the other hand, pluralism or openness in the international legal order does not suggest that liberal democracies are free to do whatever it takes to mould international law according to their shared values.[159] Yet, as 'like-mindedness' and the like increasingly become the code words for the US-led self-identified democracies to push back the global authoritarian wave,[160] what is emerging seems to be a replay of the Holy Alliance of the 19th century, only this time to defend (liberal) democracies – or, rather, the interests of liberal democracies[161] – instead of dynastic legitimacy.[162]

Speaking of the 'community for democracies' idea and the nascent projects organized around the biannual Summit of Democracies, convened by the USA,[163] Ginsburg rightly questions the plausibility of such democratic alliances in terms of the diversity among democracies.[164] It should be noted that the challenges posed by such democratic alliances to international law go beyond issues of practicality, as pointed out by Ginsburg. Even if the so-called like-minded democracies could set aside their differences and get united around the common cause of resisting the authoritarian march, their inter-democracy alliance would further deepen the current division in the international legal order. International law would only see another fragmentation as a result of the division between authoritarian and liberal forces.[165] Going down that road, the international legal order would find itself surrounded by militant democracies, among others. Moving beyond the constitutional orders, the idea of militant democracy seems to lend an inadvertent hand to the 'like-minded democracies' on the conceptual front in their competition with the perceived authoritarian coalition, only to mould the international legal order into a hardening authoritarian versus like-minded democratic division.[166] This is a great disservice to international law.[167] Then what is the road ahead?

158 *Cf.* Hurd, 'Legal Games – Political Goals', 114 *AJIL Unbound* (2020) 232. The problem is that the common goals of liberal democracy may be neither liberal nor democratic. See sources cited in note 97 above.

159 See Dugard SC, 'The Choice before Us: International Law or a 'Rules-Based International Order'?', 36 *LJIL* (2023) 223.

160 See 'Biden-Harris-Administration's National Security Strategy', *supra* note 26; see also Forsby, 'How "Like-Mindedness" Became the Key Attribute of the China Containment Strategy', *The Diplomat* (9 February 2023), available at https://thediplomat.com/2023/02/how-like-mindedness-became-the-key-attribute-of-the-china-containment-strategy/.

161 Dugard, *supra* note 159, at 226.

162 See M. Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* (2010), at 80–89.

163 Ginsburg, *supra* note 71, at 294–295.

164 *Ibid.*, at 295–296.

165 Concerns over the fragmentation of international law surfaced amid the rise of specialized legal regulations and organizations. See Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007) 1.

166 *Cf.* Forsby, *supra* note 160.

167 Dugard, *supra* note 159.

Ginsburg's prognosis of the emergence of authoritarian international law alongside other species of international law answers the question with assorted policy proposals. His preferred response to the increasing authoritarian influence on international law comprises components of preservative support for civilian liberal movements and pro-democratic regional organizations,[168] engagement with authoritarian states through cooperation in areas of common concerns,[169] (indirect) containment of authoritarian forces through existing legal regimes[170] and multilateralism.[171] Obviously, these suggestions do not exhaust the options for liberal democracies. Nevertheless, they give away the underlying thinking behind the proposals that are focused on the authoritarian challenge facing the international legal order, without risking an unholy alliance of militant democracies *vis-à-vis* the authoritarian forces. Specifically, some of Ginsburg's proposals – preservative support and multilateralism – are aimed at fortifying democratic forces;[172] others – engagement and indirect containment – are meant to de-escalate the tension between liberal and authoritarian forces.[173] Taken together, seeking coexistence or, rather, maintaining the balance between liberal and authoritarian forces in the international arena underpins this 'third way'. The question is whether international law will be less fragmented in that managed balanced world. A closer inspection of this third way suggests that it will not be.

Engagement through cooperation in areas of common concerns and (indirect) containment through existing legal regimes are only able to reclaim some islands that would allow the liberal and authoritarian states to coexist in the tumultuous ocean of the fragmented international legal order. Preservative democracy support for regional organizations and sticking to multilateralism in dealings with fellow (liberal) democracies also fall short of bringing the world together. Rather, their focus is on democratic solidarity. Ultimately, the third way is a function of the China-US relationship that underpins the new international order.[174] Coexisting with a Sinocentric Eastphalia, the Westphalian system evolves as a 'duarchy' whose sustainability depends on the balance of power between two co-ruling hegemons: China and the USA.[175] Is this as good as we can get amidst the emergence of authoritarian international law? Can international law help itself out?

Centring on policies, Ginsburg's third way seems to suggest that international law falls silent on its own current condition. Policy choices appear to hold the key to its future as international law is always entangled with politics. Yet what kind of policy

[168] Ginsburg, *supra* note 71, at 297–300.

[169] *Ibid.*, at 300-02.

[170] Ginsburg notes the collateral effect of containing the authoritarian encroachment on independent media in the investor-state arbitrations concerning media takeovers in Turkey and Ukraine. See *ibid.*, at 302–304.

[171] *Ibid.*, at 304–305.

[172] Discussing multilateralism, Ginsburg seems to suggest that democracies can support each other in multilateral fora. *Ibid.*

[173] Notably, indirect containment as I call it takes place via the existing legal regimes. Investor-state arbitration under international investment law is Ginsburg's prime example of this approach. *Ibid.*, at 302.

[174] See *ibid.*, at 291–292, 285–287.

[175] *Ibid.*, at 245–252.

choices can bring international law closer to its promise for cosmopolitan humanism is not just a matter of political decision. As Ginsburg acknowledges, authoritarian international law is identified in 'the *normative* development that specifically enhances authoritarianism'.[176] It is the normative side of the international order – that is, international law – that informs my answer: 'Yes, international law can help itself.'

As discussed in section 3, international organizations (IOs) and other less formal intergovernmental mechanisms are instrumental to the development of authoritarian norms.[177] Yet this is no evidence of the 'Chinese (authoritarian) exceptionalism' among historical attempts to reshape the international legal order.[178] Rather, it illustrates the importance of the institutional dimension of international law. Ginsburg's third way sheds light on how liberal democracies can better influence institutions in the face of authoritarian international law through policies. Apart from policies on strategic manoeuvring, multilateralism and, more importantly, universalism inherent in IOs and other international institutions set out the norms of institutional engagement by all states.[179] Through this lens, the USA's lack of engagement with, or complete withdrawal from, multilateral fora is not only a strategic blunder that contributes to the current normative development of international law.[180] Choosing unilateralism over multilateralism[181] is also a betrayal of universalism and international law itself.[182] Seen in this light, re-engagement in the established universal IOs deserves more attention not only for policy reasons; it is also demanded by the normative imperative to keep international law's universal liberating promise alive.

The normative imperative to keep international law's universal liberating promise takes us beyond institutions. As suggested in section 3, authoritarian international law arises when international law's universal promise for cosmopolitan humanism is broken. Abused in cynical ways, democracy, human rights and other progressive causes recognized in international law barely offer the hope for emancipation. These liberal values are indeed what international law has promised to those who have yearned for liberation.[183] And this remains unchanged, despite the emergence of authoritarian international law. Yet international law cannot keep its universal liberating promise just by providing more promises or making the wish list longer. To keep the hope for emancipation alive, international law must find a way to deliver its promise. The question is that, in the Westphalian world that is still wearing the 'state

[176] See Ginsburg, *supra* note 11, at 231 (emphasis in original).

[177] John Dugard raises concerns about the erosion of international law by the 'rules-based international order' championed by Western states, which seems to rest on 'tacit agreements'. Dugard, *supra* note 159, at 230.

[178] Cai, *supra* note 77.

[179] *Cf.* Abbott and Snidal, 'Why States Act through Formal International Organizations', 42 *Journal of Conflict Resolution* (1998) 3, at 24.

[180] See also G.J. Ikenberry and D.J. Lim, *China's Emerging Institutional Statecraft: The Asian Infrastructure Investment Bank and the Prospects for Counter-hegemony* (2017).

[181] Bolton, 'Is There Really "Law" in International Affairs', 10 *Transnational Law and Contemporary Problems* (2000) 1; Rubenfeld, 'Unilateralism and Constitutionalism', 79 *New York University Law Review* (2004) 1971.

[182] Dugard, *supra* note 159, at 231–232.

[183] Moyn, *supra* note 89.

veil',[184] there seems to be only so much that international law can do in its own right to turn its promise for cosmopolitan humanism into reality.[185]

Notably, the universal liberating promise for cosmopolitan humanism transcends international law itself. It is also at the core of the constitutional project of freedom and progress.[186] Through this lens, the law of cosmopolitan humanism is situated in a pluralist normative universe – that is, a *nomos*[187] – wherein both international law and domestic constitutional orders find themselves.[188] In this larger normative universe, international law's universal liberating promise of cosmopolitan humanism may see itself come to fruition beyond the limits of the traditional territory of international law. As manifested in the constitutional landscape from the global South and beyond, social and economic rights are not mere programmatic guidelines.[189] Carried out innovatively, they can make real-world structural impact,[190] including rebuilding the relationship between the government and the people on trust.[191] Partnering with domestic constitutional orders, international law may find a way to continue to contribute to emancipation in the face of the authoritarian push against its liberal constituents.

International law can help itself by reconceiving of the normative imperative of universalism as embodied in international institutions that are indispensable to its functioning. Transcending the current limits of constitutional analogy as has been revealed in the discussion of the internationalization of militant democracy, international law may find a *nomos* of universalism through an alignment with constitutional orders. Embedded in this universal but pluralist *nomos*, a new constitutional analogy offers hope for making good on international law's promise for cosmopolitan humanism in a 'rooted' form.[192]

5 Conclusion

International law has long been seen in a progressive light, moving towards the achievement of the common goals of humanity.[193] Among the goals guiding the

[184] Besson, 'The Authority of International Law: Lifting the State Veil', 31 *Melbourne Journal of International Law* (2009) 343.

[185] *Ibid.*, at 361.

[186] See Preuss, *supra* note 22; *cf.* Koskenniemi, *supra* note 13, at 27.

[187] For this non-Schmittian conception of *nomos*, see Cover, 'The Supreme Court, 1982 Term – Foreword: *Nomos* and Narrative', 97 *Harvard Law Review* (1983) 4, at 4–6; see also Kuo, 'Whither Judicial Dialogue after Convergence? Finding Transnational Public Law in *Nomos*-Building', 19 *I•CON* (2021) 1536, at 1549–1557.

[188] See N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010).

[189] H. Alviar García, K. Klare and L.A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2015).

[190] Liebenberg and Young, 'Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?', in Alviar García, Klare and Williams, *supra* note 189, 237.

[191] D. Vitale, *Trust, Courts and Social Rights: A Trust-Based Framework for Social Rights Enforcement* (2024).

[192] See Ackerman, *supra* note 23; Appiah, *supra* note 23, at 213–270.

[193] See Kennedy, 'The Mystery of Global Governance', in Dunoff and Trachtman, *supra* note 16, 37, at 43–63.

progression of international law is the rule of law, which has even been framed in constitutional terms again in the golden era of international law following the end of the Cold War.[194] Yet, as a new cold war is looming, international law is seen to be veering off the course of the rule of law, suggesting the emergence of authoritarian international law that dashes the assumed teleological, progressive outlook in international legal reasoning.[195] In contrast to recent efforts to reframe and reform international law through constitutional analogy, the concept of militant democracy that has resurged as the focal point in planning constitutional self-defence has been missing in the discussion of how international law can avert going down the authoritarian road. This discrepancy between constitutional orders and international law amid this global authoritarian wave guides what I have argued in this article.

To make sense of the puzzling absence of the concept of militant democracy on the international plane, I have first taken up the relationship between constitutional self-defence and militant democracy. It turns out that not all appeals for constitutional self-defence raise the question of constitutional ethos in the same way that the call for militant democracy does. Drawing on this analytical point, I have further argued that the concept of militant democracy presupposes a democratic and normative version of constitutional ordering. Compared to the prevalence of the concept of militant democracy in the discussion of the self-preservation of constitutional democracies, its absence on the international plane reveals the non-democratic character of the international legal order. Moreover, it speaks to the lack of substantive identity in international law that would justify defending in a way that is akin to constitutional self-defence. This is where the current constitutional analogy in conceiving of the international legal order reaches its limits.

Despite its apparent absence on the international plane, the concept of militant democracy is susceptible to internationalization as the emerging authoritarian versus like-minded democratic division hardens. Concerned by the unsettling effect on the international legal order of calls for an alliance of (militant) democracies, I take up the (want of) internationalization of militant democracy ahead of time in this critique. Through critical engagement with the imaginary constitutional analogy in international law – an international version of militant democracy – I have shown the current limits of this international-constitutional analogy. Yet, from there, a promising constitutional analogy emerges that may give fresh impetus for the universalism of international law.

International law is neither liberal nor authoritarian, while both liberal and authoritarian constituents find themselves in the international legal order – a testament to the universalism of international law. This is why international law is aligned with cosmopolitan humanism and universal rights. Yet this universal liberating promise becomes a source of frustration if it is just a hollow hope with no prospect of being turned into reality. Transcending its current limits, international

[194] *Ibid.*

[195] Ginsburg, *supra* note 11, at 223–224.

law can see its affinity with domestic constitutional orders in the quest for cosmopolitan humanism through a project of universal progress. With this realignment of international law and the constitutional project of progress, we may only be inching towards the emancipatory goal but nonetheless progressing in a rooted and hopeful way.