

The Concept of International Law in an Era of Populism

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Introduction

Nowadays, the world is experiencing a populist trend that is enhancing a nationalist viewpoint, which has contributed to the perception that international law is currently in a state of crisis.¹ The populist backlash around the world has targeted international law and legal institutions.² Populists attack international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people.³ Hence, the rise of populism has raised the legitimate concern whether populist governments might contribute to a broader crisis of international law.⁴ Widespread doubts and misgivings about multilateralism and international law, in general, are often attributed to the rise of populism.⁵ Populist leaders have criticised international institutions and norms, and seem likely to repudiate certain international norms and treaties in the areas of trade, security, and the laws of war.⁶

This essay should be understood against this background. Populism is not a legal concept and as such cannot be grasped legally.⁷ Rather, this essay explores how state behaviour that originates from a populist attitude affects international law. One major difficulty is that populists often use international law in political rhetoric. Hence, it is difficult to distinguish cases where the legal language is used as a political instrument from those where it is used to make a legal argument.⁸ This problem will be overcome by having an actor-centred approach to bridge the gap between political phenomena and their legal impact.⁹ Looking at populists as actors is conducive because it starts from the assumption that discursive practices, as well as political concepts, influence legally relevant practice and, thus, the overall development of international law.¹⁰ It is underscored that international law is a fragmented regime: international legal instruments and institutions have proliferated and resulted in a growing web of overlapping and non-hierarchically organized regimes.¹¹ This means it is difficult to speak of international law in general which is why this essay will specify which area or institution of international law is referenced.

This essay will strive to answer the following questions:

Why and how does populism challenge the very idea of international law? What are the effects of populist governments on international law? And what role might international law play in a populist era?

These questions will be answered in an abstract way. However, where appropriate, examples of populist actions will be used to illustrate the abstract arguments. This article argues that the conception of international law as the promotion of community interests based on a shared understanding of solidarity (more than merely a law of coordination) which developed throughout the 1990s is challenged by populists. This understanding of international law goes against the identity politics of populist governments. Even though, up to now populists have mainly threatened international law on the

¹ Heike Krieger, 'Populist Governments and International Law' (2019) 30 *European Journal of International Law* 971, 971.

² Tamar Hostovsky Brandes, 'International Law in Domestic Courts in an Era of Populism' (2019) 17 *International Journal of Constitutional Law* 576, 578.

³ Eric Posner, 'Liberal Internationalism and the Populist Backlash' (2017) 49 *Arizona State Law Journal* 795, 795.

⁴ Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 *Journal of Human Rights Practice* 1; Harold Hongju Koh, 'Is Trump's assault on international law working?' *Oxford University Press Blog*, (England, 11 March 2019), <<https://blog.oup.com/2019/03/trumps-international-law/>> accessed 24 March 2020.

⁵ Christine Schwöbel-Patel, 'Populism, International Law and the End of Keep Calm and Carry on Lawyering' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer 2018), 98.

⁶ Posner (n 3), 796.

⁷ Oliver Dörr, 'Völkerrechtliche Grenzen des Populismus?, Der amerikanische Präsident und das geltende Völkerrecht' (2018) 73 *Juristen Zeitung* 224, 231.

⁸ Maziar Jamnejad/Michael Wood, 'The Principle of Non-Intervention' (2009) 22 *Leiden Journal of International Law* 345, 347.

⁹ Krieger (n 1), 973.

¹⁰ Lauri Mälksöo, *Russian Approaches to International Law* (Oxford University Press, 2015), 2.

¹¹ Mark Pollack, 'Who Supports International Law, and Why? The United States, the European Union, and the International Legal Order' (2015) 13 *International Journal of Constitutional Law* 873, 883-884.

rhetorical level, this practice still negatively influences the environment in which international rules are interpreted.

First, as populism and international law are rather vague concepts, the article will state the applicable definitions for the purposes of this essay. Second, it will analyse why and how populists attack international law. Subsequently, the article will examine the effects of populism on international law. Finally, it will outline the role of international law in a populist era might be.

Mapping the Terrain – Terms and Definitions

The nature of populism and its definition has been the preoccupation of many scholarly debates.¹² Populism is a widely used, yet imprecise and highly disputed term, and often serves as a vague placeholder for various political phenomena that are considered to be anti-establishment.¹³ Müller defines populism as a political concept that creates two groups in the state: the morally pure, homogenous people and the immoral, corrupt elites. The first group must fight the latter.¹⁴ The populists claim to be the representative of the people and the only ones who recognize the true will of the people. Therefore, disqualifying any opposition is illegitimate and even undemocratic.¹⁵ Populism is therefore above all anti-elitist, anti-pluralist and is based on a moral claim to sole representation.¹⁶ This article will apply Besson's definition of international law which states that international law has to be defined as the legal order which aims to structure the interaction between entities participating in and shaping international relations.¹⁷

Why and How Populists Attack International Law

International Law as a Tool of the Globalised Elite

Populists draw the picture of international law being the instrument of global intellectual technocratic elite.¹⁸ They argue that elites across the world create interpret and enforce international law not as an incentive to benefit everyone or reflects the values of the global population, but to create international law that benefits themselves and reflects their values.¹⁹ Populists blame globalisation and international law for insecurity and economic dislocation in order to undermine the establishment elites who constructed them.²⁰ Populists have convincingly argued that international institutions (and the process of globalisation they have facilitated) have benefitted elites while leaving behind ordinary people.²¹ The anti-globalist sentiment appears strong and undercuts that the basic premise of some international law scholars that people internalize international law is questionable.²² By arguing that international legal rules are a creation of intellectual, technocratic elite that is out of touch with the real world, populists aim to delegitimize constraints that international law places on political decision-makers.²³

¹² See e.g. Rogers Brubaker, 'Why Populism?' (2017) 46 *Theory and Society* 357.

¹³ Cas Mudde/Cristóbal Rovira Kaltwasser, *Populism, A Very Short Introduction* (Oxford University Press, 2017), 9.

¹⁴ John B. Judis, *The Populist Explosion, How the Great Recession transformed American and European Politics* (Columbia Global Reports, 2016), 1-4; Jan-Werner Müller, *What Is Populism?* (Penguin Books, 2016), 1-7.

¹⁵ Müller (n 14), 20, 29.

¹⁶ Jan-Werner Müller, 'Was ist Populismus?' (2016) 7 *Zeitschrift für Politische Theorie*, 187.

¹⁷ Samantha Besson, 'Theorizing the Sources of International Law' in Samantha Besson/John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 163.

¹⁸ Krieger (n 1), 971.

¹⁹ Robert H. Bork, *Coercing Virtue, The Worldwide Rule of Judges* (Aei Press, 2003), 15-19; John O. McGinnis/Ilya Somin, 'Should International Law Be Part of Our Law?' (2007) 59 *Stanford Law Review* 1175, 1238-1239.

²⁰ Posner (n 3), 816.

²¹ Nina Pavcnik, 'How Has Globalization Benefited the Poor?' *Yale Insights*, (United States, 28 April 2009), <<https://insights.yale.edu/insights/how-has-globalization-benefited-the-poor/>> accessed 10 March 2020.

²² Posner (n 3), 805; Richard Wike, 'Global Opinion Varies Widely on Use of Torture Against Suspected Terrorists' *Pew Research Center*, (United States, 9 February 2016), <www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/> accessed 9 March 2020.

²³ Krieger (n 1), 971-972.

Ironically, however, international law has tried to limit the influence of some of the most powerful collective actors, states, and strengthen the international legal status of the same everyday individuals celebrated by populists. Human rights norms have sought to protect individuals from excessive governmental power and to give common people a protected international legal status.²⁴ Hence, this provides a potential point of intersection between the goals of populism and international law.

The current anti-elitism associated with populist backlash is more than a general antipathy towards international technocracy that is strongly associated with international law. The backlash against elites is placed in the context of powerful regional and international institutions that make seemingly undemocratic decisions. Particularly since the Global Financial Crisis, ordinary people have begun to doubt whether their politicians have a great deal of power in the face of global financial power players such as large corporate banks and multinational corporations. Critics drew the conclusion that only the very wealthy in western countries benefit from globalisation. Within this context, doubts and misgivings about multilateralism have fallen on fertile ground.²⁵

Furthermore, populists attack international law as rule by technocracy. The functioning of international law relies on trust and mutual goodwill, while populists see corruption and bribery everywhere and are critical of the role of experts.²⁶ Populists in various countries have often blame foreign influences and international institutions for their nation's problems.²⁷ In recent years, populists have targeted institutions such as the European institutions, International Monetary Fund, International Criminal Court, and mocked and belittled international legal norms, including human rights law.²⁸

Additionally, international law is inherently pluralistic in nature and assumes that different countries have legitimate national interests, which seeks to promote cooperation, accommodation, and reconciliation. However, populists reject pluralism and have difficulty recognizing that the interests of foreign nations are also legitimate; or there is an inherent value in an international order that respects differences among nations. Populists tend to see foreign countries as rivals or enemies, and the international order as a series of contingent deals rather than a supranational system of law.²⁹

Furthermore, populists claim that international law is an illegitimate intervention in a state's sovereignty. By associating the people's will with state sovereignty, any norm that contradicts this will is violating the state's sovereignty.³⁰

Democracy Deficit

A huge drawback of the international legal system, especially the European system, has been what is commonly referred to as the 'democracy deficit'.³¹ This idea suggests that the public is not represented in the international level and does not have sufficient means to contribute democratically in the process of its content.³² The best evidence for the political weakness of the European system is survey data, which suggest that the effort to politically integrate never gained traction.³³ An interesting pattern is that less educated people have been less likely to identify as European or partially European than more educated people. This feeling of alienation is supporting the common view that European integration is,

²⁴ Aaron Fichtelberg, 'Populist Paranoia and International Law' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer 2018), 65.

²⁵ Schwöbel-Patel (n 5), 106.

²⁶ Posner (n 3), 796-797.

²⁷ András Derzsi-Horváth, 'Western Populism Is a Fundamental Threat to the Humanitarian System' *Guardian*, (England, 26 November 2016), <www.theguardian.com/global-development-professionals-network/2016/nov/26/western-populism-is-a-fundamental-threat-to-the-humanitarian-system> accessed 9 March 2020.

²⁸ Posner (n 3), 797.

²⁹ *ibid.*

³⁰ Brandes (n 2), 579.

³¹ McGinnis/Somin (n 19), 1193; Fritz Scharpf, *Crisis and Choice in European Social Democracy* (Cornell University Press, 1991).

³² McGinnis/Somin (n 19), 1177.

³³ Robert Rohrschneider, 'The Democracy Deficit and Mass Support for an EU-Wide Government' (2002) 46 *American Journal of Political Science* 463, 472.

and has always been, a project of and for the elites.³⁴ Populists rely on 'democracy deficit' to challenge international law.

Effects of Populism on International Law

Multilateralism, International Institutions and an International Community Structured Around Common Interests

The policies of populists affect the current state of international law on two different levels. In the political sphere, populist's practices alter the environment in which legal rules are interpreted. In the legal sphere, populist governments push for changes in the interpretation of established international legal rules.³⁵ Populist governments also tend to reject the emanations of global public opinion based on NGO participation because civil society weakens their claim to exclusively represent the people.³⁶

Populist governments advance an understanding of international law as a law of coordination.³⁷ In this iteration, international law does not aim to construct an international community but merely provides for a minimal order between independent states. These states refuse a substantive common value system and do not accept any higher authority. Hence, international law's function is reduced to keeping states peacefully apart and to organising common action in a situation where an issue cannot be managed effectively by each state alone.³⁸ Consequently, sovereign states are the relevant actors, and where international organisations are created, they mainly serve their member states' interests. Substantive rules focus on the protection of sovereignty, such as the principle of non-intervention, while law enforcement works on a bilateral basis, and the jurisdiction of international courts is subject to state consent.³⁹ Hence, populists oppose those elements of current international law that are built upon multilateral structures, international institutions and the concept of an international legal community based on common values.⁴⁰

International law reflects pluralist structures, meaning it assumes that a society is composed of a large variety of different groups with different interests and acknowledges diversity within societies. The political process of defining common goods must therefore be based on negotiations and compromise.⁴¹ International law is understood as a multilateral forum which offers a framework and a vocabulary through which highly differing actors can formulate their demands and claims, justifications and contestations for identifying common values and establish institutions to implement them.⁴² Populists, however, reject compromises.⁴³ Instead, populists favour bilateral or unilateral structures which seem to make it easier to realise populist agendas.⁴⁴ This tendency is illustrated by the focus of the current US administration on bilateral and regional trade agreements⁴⁵ and the bilateral vision of international law which is portrayed in political speeches by Hungarian Prime Minister Viktor Orbán.⁴⁶

³⁴ Posner (n 3), 807.

³⁵ Krieger (n 1), 973.

³⁶ *ibid.*, 973-974.

³⁷ *ibid.*, 973.

³⁸ Krieger (n 1), 978.

³⁹ Rüdiger Wolfrum, 'International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Max Planck Institute, 2006), paras 41-48.

⁴⁰ Krieger (n 1), 979.

⁴¹ Mudde/Kaltwasser (n 13), 8.

⁴² Andrew Hurrell, *On Global Order, Power, Values, and the Constitution of International Society* (Oxford University Press, 2007), 312-313.

⁴³ Janne E. Nijman/Wouter G. Werner, 'Populism and International Law: What Backlash and Which Rubicon?' in Janne E. Nijman/Wouter G. Werner (eds), *Netherlands Yearbook of International Law* (Springer, 2018), 8.

⁴⁴ Krieger (n 1), 979.

⁴⁵ US President's 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program, Chapter I (2017), 1, 7; Christian Schaller, '«America First» – Wie Präsident Trump das Völkerrecht strapaziert', *Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit* (Germany, 2019), 11.

⁴⁶ Speech of Hungarian Prime Minister Orbán at the Lámfalussy Conference (23 January 2017).

As mentioned, the anti-establishment stance of populism furthers scepticism towards international institutions.⁴⁷ Even withdrawal becomes an option.⁴⁸ For instance, Venezuela gave notice of its denunciation of the American Convention on Human Rights (ACHR) in 2012.⁴⁹ While this may appeal to a particularly powerful state, such as the US, other populist governments may prefer to remain within these institutions challenging or aiming to reform them from within. For example, Hungary is a member of the ACT Group, which advocates for a reform of the veto power in the UN Security Council.⁵⁰

A further strategy of populist governments is the creation of alternative institutions that they can dominate more easily than established ones; or forge alliances with like-minded states. An example can be seen in Venezuela's efforts to establish the Union of South American Nations (UNASUR).⁵¹

Populist governments may be increasingly non-compliant with rules and dictates of international organisations. If states participate in international organisations only to defend their national interests, the decisions of such institutions are likely to be disregarded where they are regarded to be opposed to the individual nation's interests.⁵² For example, in its party programme, the Freedom Party of Austria puts Austria's international legal obligations under an explicit national interest reservation: Accepting and fulfilling international obligations may not be to the detriment of the Austrian population.⁵³ This entails that in cases where compliance with international law is detrimental to such interests, international law would be dispensed with at the national level. This would affect interpretative principles, such as the doctrine of *Völkerrechtsfreundlichkeit*, which requires the judge to apply an interpretation that allows national law to be brought in line with the international legal obligations of the state.⁵⁴ The most obvious conflict between populist agendas and predominant interpretations of international law unfolds in the relationship with international (human rights) courts.⁵⁵ The concept of a constitutional or national identity as an instrument to formulate opposition against international or supranational court decisions has gained increased relevance.⁵⁶ The rejected Swiss initiative (called *Selbstbestimmungsinitiative*) is an example for a negative attitude towards international courts, which aimed at establishing primacy of national over international law.⁵⁷

Populist strategies to withdraw from treaties or to create alternative institutions also affect the authority of existing institutions. These practices may increase scepticism as to whether an institution is capable of fulfilling its objectives, increased possibilities for forum shopping in order to reach politically desired outcomes and may ultimately render international institutions dysfunctional.⁵⁸ Discursive attacks on international institutions may also undermine their authority.⁵⁹ International courts become controversial in countries with strong populist movements⁶⁰ as they are part of the liberal international institutional order.⁶¹ The legal texts that international courts interpret advance core liberal objectives such as increasing civil liberties, and promoting the flow of goods and people across borders. International

⁴⁷ Wayne Sandholtz, 'Resurgent Authoritarianism and the International Rule of Law' (2019) 38 KFG Working Paper Series, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?" 1, 25.

⁴⁸ Fichtelberg (n 24), 47.

⁴⁹ Press Release of the Inter-American Commission on Human Rights, Doc. E-307/12, (12 September 2012).

⁵⁰ UNSC, Statement of Hungary, UN Doc. S/PV. 8175, (6 February 2018), 26.

⁵¹ Karen J. Alter/Laurence R. Helfer, *Transplanting International Courts, The Law and Politics of the Andean Tribunal of Justice* (Oxford University Press, 2017), 180.

⁵² Krieger (n 1), 982.

⁵³ Freedom Party of Austria, Party Programme, (18 June 2011), <www.fpoe.at/themen/parteiprogramm/parteiprogramm-englisch/> accessed 10 March 2020.

⁵⁴ Krieger (n 1), 982.

⁵⁵ Laurence R. Helfer, 'Populism and International Human Rights Institutions: A Survival Guide' in Gerald L. Neuman (ed), *Human Rights in a Time of Populism, Challenges and Responses* (2019, forthcoming); iCourts Working Paper Series, no. 133 (2018), Duke Law School Public Law & Legal Theory Series, no. 2018-50, available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202633> accessed 10 March 2020, 9.

⁵⁶ Krieger (n 1), 982.

⁵⁷ Swiss Initiative *Schweizer Recht statt fremde Richter*, BBI 2016 7091.

⁵⁸ Mikael Rask Madsen/Pola Cebulak/Micha Wiebusch, 'Backlash against International Courts' (2018) 14 International Journal of Law in Context 197, 197, 200, 209, 211.

⁵⁹ *ibid.*, 112.

⁶⁰ Erik Voeten, 'Populism and Backlashes against International Courts' (2019) 20 Perspectives on Politics 1, 2.

⁶¹ *ibid.*, 6.

courts often hand down judgements that clash with populist narratives about whose rights deserve to be protected.⁶²

Additionally, characterised identity politics, populists are likely to produce tension with concepts of universalism and common interests of an international community based on international solidarity.⁶³ A populist approach will favour particularized, culturally contingent value concepts contradicting the idea that a national identity could be formed around a commitment to a global community structured around universal values.⁶⁴ In order to preserve the identity politics, populist governments focus on more traditional elements of international law. They promote international norms that protect state sovereignty and the *domaine réservé*.⁶⁵ This development can be illustrated by both speeches President Trump delivered before the UN General Assembly in 2017⁶⁶ and 2018⁶⁷ which demonstrate that the current US administration pictures an international legal order that resembles a law of coordination rather than a law of cooperation.⁶⁸ His speeches demonstrate focus on sovereignty, security and prosperity, rather than the rule of law, democracy, and human rights, which have become a marker for the progress of international law in the 1990s.⁶⁹ In his 2017 speech, Trump draws a picture of an international order focused on independent nations and claims the nation-state remains the best vehicle for prosperity. As a consequence, the whole speech ignores concepts of international solidarity in line with the anti-pluralist stance of populism. Moreover, Trump explicitly refutes elements of global governance as well as the idea of any power-limiting role of international law.

However, practice suggests that it is too far-fetched to assume that populist governments reject all concepts of common interests. For example, Hungary is a member of the Group of Friends of the Responsibility to Protect (R2P) and supports R2P-related initiatives at the UN.⁷⁰

The populist focus on sovereignty also fosters what observers have called “respatializing power”⁷¹ and thus reinforces the image of closed statehood. The protection of states’ borders through legal and physical control becomes a visible symbol for sovereignty-based identity politics that explains the prominent role that migration policies play for populist governments in their criticism of global governance.⁷² It is empirically difficult to pin down the extent populist governments have directly influenced European immigration policies. However, diverging indirect effects are acknowledged in political science literature.⁷³ There are indications that populist migration discourses have contributed to a securitization of immigration that also affects the broader legal framework.⁷⁴

⁶² Voeten (n 60), 6.

⁶³ Krieger (n 1), 984.

⁶⁴ Mattias Kumm, ‘Democratic Constitutionalism Encounters International Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 227.

⁶⁵ Krieger (n 1), 984.

⁶⁶ UNGA, Address by Mr. Donald Trump, President of the United States of America (Address by President Trump 2017), UN Doc. A/72/PV.3, (19 September 2017), 10.

⁶⁷ UNGA, Address by Mr. Donald Trump, President of the United States of America (Address by President Trump 2018), UN Doc. A/73/PV.6, (25 September 2018).

⁶⁸ See Wolfgang Friedmann, *The changing structure of International Law* (Steven & Sons, 1964).

⁶⁹ Krieger (n 1), 985.

⁷⁰ UNGA, Statement of Hungary, UN Doc. A/72/PV. 100, (25 June 2018), 9.

⁷¹ Aristotle Kallis, Populism, ‘Sovereignism, and the Unlikely Re-Emergence of the Territorial Nation-State’ (2018) 11 Fudan Journal of Humanities and Social Science 285, 287.

⁷² *ibid*, 295 ff.

⁷³ Bertjan Verbeek/Andrej Zaslove, ‘Populism and Foreign Policy’ in Cristóbal Rovira Kaltwasser et al. (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017), 396.

⁷⁴ Krieger (n 1), 986.

Changing International Rules by Changing National Legislation

If populists challenge the domestic rule of law, this is directly connected to the international rule of law through substantive values and norms that are the basis for both domestic and international legal orders. The erosion of the domestic, rights-oriented rule of law, therefore, weakens the international rule of law as well.⁷⁵ Populist governments influence international law by pushing for changes of the interpretation of specific international legal rules – in particular, by changing pertinent national legislation.

An important example concerns legislation regulating foreign funding of NGOs.⁷⁶ Those academic voices that have advocated for introducing elements of democracy into global governance rely on NGOs as the representatives of global public opinion.⁷⁷ NGOs are seen as increasingly deterritorialized actors spreading human rights norms, rule of law and democracy.⁷⁸ Based on their anti-establishment stance, populist governments want to restrict NGO activity as well as the tendency to resist the spread of global norms through civil society.⁷⁹ Opposition from within civil society creates a moral and symbolic problem for populists, insofar as it undermines their claim to exclusive moral representation of the people.⁸⁰ Hence, they apply argumentative strategies to demonstrate that civil society is influenced and manipulated by external powers. With this policy, they present transnational NGOs as foreign agents. This antagonistic rhetoric aims to denounce any legitimacy of global public opinion or transnational participatory democracy. Therefore, populist governments promote and re-emphasis on a broader understanding of states' *domaine réservé*, aimed at restricting foreign funding for NGOs. Also, they foster non-intervention discourses.⁸¹

The development of stricter regulations against NGOs has already started in the early 2000s as a backlash against democracy promotion in China and Russia.⁸² The Venice Commission holds that most of the member states of the Council of Europe do not regulate foreign funding for NGOs.⁸³ However, an empirical study in 2013 examined 98 countries worldwide and found that 39 restrict such funding while 12 even prohibit it.⁸⁴ Most of the restrictions are directed against human rights NGOs.⁸⁵ For example, Venezuela enacted a Law on Defence of Political Sovereignty and National Self-Determination in 2010 which entirely forbids political parties and NGOs involved in political or human rights matters to receive foreign funding.⁸⁶ The restriction of funding for NGOs might contribute to an extensive interpretation of what constitutes political interference in the *domaine réservé*.⁸⁷

⁷⁵ Sandholtz (n 47), 5.

⁷⁶ Krieger (n 1), 989.

⁷⁷ E.g. Hauke Brunkhorst, 'Globalising Democracy without a State: Weak Public, Strong Public, Global Constitutionalism' (2002) 31 *Journal of International Studies* 675, 680 ff.; Jürgen Habermas/Jacques Derrida, 'Nach dem Krieg' *Frankfurter Allgemeine Zeitung*, (Germany, 31 May 2003), <www.faz.net/aktuell/feuilleton/habermas-und-derrida-nach-dem-krieg-die-wiedergeburt-europas-1103893.html> accessed 21 March 2020, 33 ff.

⁷⁸ Brunkhorst (n 77), 680, 682.

⁷⁹ Timothy M. Gill, 'The Venezuelan Government and the Global Field: The Legislative Battle over Foreign Funding for Nongovernmental Organizations' (2016) 31 *Sociological Forum* 29, 34.

⁸⁰ Müller (n 14), 48.

⁸¹ Krieger (n 1), 991.

⁸² Thomas Carothers, 'The Backlash against Democracy Promotion' (2006) 85 *Foreign Affairs* 55, 56.

⁸³ European Commission for Democracy through Law (Venice Commission), Hungary – Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad, Opinion 889/2017, (20 June 2017), para 14.

⁸⁴ Darin Christensen/Jeremy M. Weinstein, 'Defunding Dissent: Restrictions on Aid to NGOs' (2013) 24 *Journal of Democracy* 77, 80.

⁸⁵ Aziz Huq/Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *University of California Los Angeles Law Review* 78, 50.

⁸⁶ La Asamblea nacional de la República bolivariana de Venezuela, Ley de defensa de la Soberanía política y autodeterminación nacional, no. 960, (22 December 2010).

⁸⁷ Krieger (n 1), 992.

The interrelatedness between the *domaine réservé* and a state's constantly evolving human rights obligations has prompted an interpretation for states to rely on a narrow margin of appreciation under human rights law in order to delineate their *domaine réservé* and to define what constitutes an illegal interference.⁸⁸ Thus, in principle, any legislation complying with a state's human rights obligations can define a state's *domaine réservé*.⁸⁹

Questioning the 1990s Narrative of International Law

Since the 1990s, international law seems to have turned into a system that promotes community interests based on a shared understanding of solidarity. This has constituted not only a system of rules, principles, and concepts at regional and global levels, but also a normative ideal.⁹⁰

Multilateral treaties and highly institutionalized organizations offered a legal framework for global governance.⁹¹ There was a perception that democratic constitutionalism was open to international law and that it established legal structures that allowed for compliance with international law.⁹² However, this optimistic perception changed gradually. The impacts of globalisation on local societies, such as climate change, have heightened the impression that the promises attributed to international law in the period after 1990 have not been fulfilled.⁹³ Global governance is increasingly understood as a threat to a localised exercise of public power.⁹⁴ The current rise of populism is seen by many political observers as a response to the failure of mainstream politicians to raise awareness on the benefits of global governance. Rather, a delegitimising discourse takes place implying that political decisions were forced upon states, and ultimately the people, by international institutions.⁹⁵

Populist governments contribute to an overall perception of decline of the 1990s narrative by acting against the rule of law, democracy, and human rights protection at the national level as well as fostering an understanding of international law as a law of coordination. Moreover, populist governments are not the only actors who are contesting the 1990s narrative of international law. Their contestations and rejections are shared by the agendas of autocratic regimes.⁹⁶

Role of International Law in a Populist Era

After having analysed the effects of populism on international law, the next question is what its role in a populist era consists of.

From a legal positivist perspective, a significant part of the current challenge for international law appears to be confined to the level of rhetoric.⁹⁷ Neither political speeches nor party programmes directly translate into legally relevant acts that could challenge international law. Politics of withdrawal are in line with consent-based international law and an important incentive for states to accept binding treaties in the first place.⁹⁸ Nevertheless, the political discourse and the political environment that surround international law impact this overall development as they may influence the perceptions of its status and precipitate a larger-scale retreat into nativism and unilateralism.⁹⁹ For decades, a withdrawal from major multilateral treaties seemed to be a taboo, with very few exceptions. However, recent

⁸⁸ Georg Nolte, 'Art. 2 (7) UN-Charter' in Bruno Simma et al. (eds), *The Charter of the United Nations, A Commentary*, (Volume I, 3rd edn., Oxford University Press, 2013), 298 para 42.

⁸⁹ Krieger (n 1), 993.

⁹⁰ Shirley V. Scott, 'The Decline of International Law as a Normative Ideal' (2018) 49 *Victoria University of Wellington Law Review* 627, 627.

⁹¹ Wolfrum (n 39), para 49.

⁹² Kumm (n 64), 273 ff.

⁹³ Krieger (n 1), 977.

⁹⁴ Martti Koskeniemi, 'What Use for Sovereignty Today?' (2011) 1 *Asian Journal of International Law* 61, 63, 65.

⁹⁵ Mudde/Kaltwasser (n 13), 117.

⁹⁶ Krieger (n 1), 988.

⁹⁷ *ibid.*, 987.

⁹⁸ *ibid.*

⁹⁹ James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern Law Review* 1, 22; Krieger (n 1), 987.

practices have affected this perception and have thus opened space for states to quit multilateral agreements, which in turn makes the international order appear more fluid and reversible.¹⁰⁰

Analysing how populism affects international law enables us to identify the weaknesses and structural shortcomings of international law.¹⁰¹ After all, the populist critique that globalisation lacks legitimacy is shared by many academics as well.¹⁰² However, due to the anti-elitist and anti-pluralist stance, as well as the exclusionary form of identity politics, some observers question that populist globalisation critique can be corrective for international law in that it furthers the legitimacy of global governance.¹⁰³

International institutions controlling legislative acts of populist governments, for example the Venice Commission, need to take into account that concerns raised by governments may be legitimate and address issues where law reform is required as a corrective for negative and unintended consequences of globalisation. Human rights institutions have to carefully examine where a legitimate aim, per se, is only used as a pretext. In order to question whether a law's purpose is legitimate, they have to take into account the overall context and, in particular, the circumstances under which the law was drafted.¹⁰⁴ Hence, the fact that populists criticize international law should be seen as an opportunity to re-evaluate the law and identify the legitimate concerns in order to improve the international legal system.

Populists might also affect the use of international law in domestic courts: under populist attacks, courts are likely to prefer, where possible, resort to legal sources that enjoy sound domestic legitimacy in order to minimize their exposure to criticism from populist leaders.¹⁰⁵ In these situations, international law should serve as an important source for courts to protect human rights as international law serves as a source of interpretation for constitutional provisions. Also, international law can dismantle the polarized public discourse imposed by populists highlighting respect, analysis and application of international law as a means of maintaining pluralism in legal and public debate and, accordingly, enhancing democracy.¹⁰⁶

Populists employ domestic law, including constitutional law, to promote their goals and weaken the democratic nature of the state.¹⁰⁷ This has been referred to as 'constitutional capture'.¹⁰⁸ International law is one of the ways in which courts can counter populist law-making. Hence, international law is one of the tools available to domestic courts in mitigating the negative effects constitutional capture has on democracy and human rights.¹⁰⁹ International law can be used in responding to either legislation that violates human rights or to more sophisticated, subtle forms of constitutional amendments that are open to interpretation. Incorporating international human rights law into the law's interpretation could be used by the court to minimize potential violations. Also, referring to international law enhances pluralism by facilitating a discourse in which different perspectives are discussed and presented as legitimate, even if they are, ultimately, not adopted.¹¹⁰ Hence, international law plays a crucial role when incorporated into domestic legal rulings as it allows for a variety of perspectives to be debated and, eventually, enabling dissent.¹¹¹

¹⁰⁰ Krieger (n 1), 987.

¹⁰¹ *ibid.*, 972.

¹⁰² See e.g. Joseph H. H. Weiler, 'The Geology of International Law – Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 547, 561; Armin von Bogdandy, 'Globalization and Europe: How to Square Democracy, Globalization and International Law' (2004) 15 *European Journal of International Law* 885.

¹⁰³ Alston (n 4), 4; Helfer (n 55), 7 ff.

¹⁰⁴ Krieger (n 1) 995.

¹⁰⁵ Brandes (n 2), 577.

¹⁰⁶ *ibid.*, 577.

¹⁰⁷ *ibid.*, 589.

¹⁰⁸ Paul Blokker, 'Populist Constitutionalism' *Blog of the International Journal of Constitutional Law* (4 May 2017), <www.iconnectblog.com/2017/05/populist-constitutionalism/> accessed 23 March 2020.

¹⁰⁹ Brandes (n 2), 589.

¹¹⁰ *ibid.*, 594.

¹¹¹ *ibid.*, 595.

In times of populist governments, international law as a safeguard for core rights is more essential than ever. So far, not even populist governments have contested that international law exists. They complain that some of it is wrong, that it does not benefit the people, or that the elite invented it.¹¹² However, it is quite an accomplishment that even populists accept that there are legal constraints at the international level which underlines its importance as a protector of fundamental rights, both, on the international level and on the domestic level.¹¹³ On the international level, its task is to prevent itself from being increasingly limited and restricted and on the domestic level, in a populist state; it can help the courts as an interpretational tool in order to mitigate the negative impacts of populist legislation.

Conclusion

The questions posed earlier in the article can be answered thus: Populists attack international law because the international legal system, as it developed after the 1990s, is based on values and concepts such as international solidarity which go against the identity and nationalistic politics of populists. Populist governments' attitude towards international law hinges on an instrumental approach and a rhetoric-based principled opposition that, if enacted in practice, would significantly change international law's nature as it has developed after 1990. In general, populists promote a concept of international law as a law of coordination and aim to reduce it to an instrument for furthering national interests.

This populist concept of international law also impacts the interpretation of the relationship between international and national law; the latter should prevail where international law is seen to be detrimental to the nation's interest. So far, populists mainly manifest their agendas in political speeches and party programmes; withdrawal or non-participation still remains the exception. Most efforts to influence the development of international law or to escape its restrictions remain within the legal limits imposed by international law. Beyond rhetoric and symbolism, the instrumental approach of populist governments fosters cherry-picking according to their policy preferences. This contributes to a perception of populist governments as backsliders in relation to the development that international law made after the end of the Cold War. It furthers the impression that international law is currently in a state of crisis.¹¹⁴ Nevertheless, international law has an important role to play in a populist era by acting as a safeguard for the protection of fundamental human rights.

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¹¹² Krieger (n 1), 971.

¹¹³ Marcela Prieto Rudolph, 'Populist Governments and International Law: A Reply to Heike Krieger' (2019) 30 The European Journal of International Law 997, 1005.

¹¹⁴ Krieger (n 1), 996.