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Heike Krieger

Populist governments and international law

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Populist governments and international law*

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Abstract:

The worldwide populist wave has contributed to a perception that international law is currently in a state of crisis. This article examines in how far populist governments have challenged prevailing interpretations of international law. The article links structural features of populism with an analysis of populist governmental strategies and argumentative practices. It demonstrates that, in their rhetoric, populist governments promote an understanding of international law as a mere law of coordination. This is, however, not entirely reflected in their legal practices where an instrumental, cherry-picking approach prevails. The article concludes that policies of populist governments affect the current state of international law on two different levels: In the political sphere their practices alter the general environment in which legal rules are interpreted. In the legal sphere populist governments push for changes in the interpretation of established international legal rules. The article substantiates these propositions by focusing on the principle of non-intervention and foreign funding for NGOs.

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1. Introduction

‘The eggheads who came up with this international law should turn on their TV’.² The quote from US President Trump epitomizes populist resentments against the international legal order: international legal rules are seen as a creation of an intellectual technocratic elite which is out of touch with the real world. The quote mirrors a sentiment that these rules disregard the interests of the ‘people’. By using a tone of defiance it aims to delegitimize constraints that international law places on political decision-makers.

The election of US President Trump has raised the concern that populist governments may not only represent a challenge for liberal constitutionalism at the national level³ but also contribute to a broader crisis of international law.⁴ The UN Secretary-General,⁵ the UN High Commissioner for Human Rights⁶ and the Secretary-General of the Council of Europe⁷ have identified populism as a serious challenge for human rights, democracy and the rule of law. While the specific role of the US in the global order brought the populist challenge for international law into the spotlight, comparable governmental practices and argumentative strategies can be found in numerous other countries, such as Bolivia, Ecuador, Hungary, the Philippines, Poland, Russia, Turkey or Venezuela.⁸ Populist movements exert considerable influence in France, Germany, the Netherlands, and the UK⁹ as well as in Israel.¹⁰ All veto powers in the Security Council except for China are to some extent affected by what may be considered as populist policies.

Some scholars doubt that focussing on populism contributes anything to an analysis of the current challenges for international law. They submit that the singular role of the US blurs the picture. After all, the US has a long history of not joining or leaving multilateral agreements and organizations. Therefore, the Trump administration’s approach could rather represent a continuation of US foreign policy than a radical change.¹¹ Comparing US policies with those in Hungary or Venezuela may also raise doubts as to whether the phenomenon of populism can be sufficiently delineated in order to serve as an analytical category. To focus on populism as a challenge for international law may therefore just distract from the structural shortcomings of international law. After all, the populist critique that globalization lacks legitimacy is shared by

² Smith, *Donald Trump dismisses ‘eggheads’ who developed international laws banning torture*, 22 March 2016, available at <http://www.businessinsider.de/donald-trump-brussels-attacks-waterboarding-2016-3?r=US&IR=T> (all internet sources have last been visited on 26 October 2018).

³ Müller, ‘Populism and Constitutionalism’ in C. Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (2017).

⁴ Alston, ‘The Populist Challenge to Human Rights’, 9 *Journal of Human Rights Practice* (2017), 1; Posner, ‘Liberal Internationalism and the Populist Backlash’, 49 *Arizona State Law Journal* (2017), 795.

⁵ UN Secretary-General’s remarks to the Human Rights Council, 27 February 2017.

⁶ UN High Commissioner for Human Rights, Speech delivered on 5 September 2016.

⁷ Secretary-General of the Council of Europe, Speech delivered on 24 January 2017.

⁸ Huq and Ginsburg, ‘How to Lose a Constitutional Democracy’, 65 *UCLA Law Review* (2018) 78, at 82.

⁹ Taggart, ‘Populism in Western Europe’ in C. Rovira Kaltwasser et al (eds), *supra* note 3, 248, at 256.

¹⁰ Hostovsky Brandes, ‘International Law in Domestic Courts in an Era of Populism’, *International Journal of Constitutional Law*, forthcoming.

¹¹ Alter, ‘The Future of International Law’, in D. Ayton-Shenker (ed.), *The New Global Agenda*, (2018), 25, at 30; Bosco, ‘We have been here before’, 70 *Journal of International Affairs* (2017), 9, at 11.

many academic observers.¹² Anyway, for a traditional legal analysis the challenge populism may represent is difficult to grasp. Lawyers are, in principle, not methodologically equipped for an empirically based analysis of the interrelatedness between globalization critique, the rise of populist policies and structural changes in international law. Based on their methodological toolkit lawyers can first and foremost only identify whether a legal rule comes into existence, changes its interpretation or ceases to exist.¹³ For the purpose of identifying structural changes in the international legal system it is neither necessary nor sufficient to evaluate whether a specific actor has contributed to these changes. Above all, an analytical focus on a particular actor cannot substantiate a claim that the law has indeed changed.

However, if lawyers want to assess whether a perceived crisis represents a more permanent turn in the development of international law they also need to take into account changes in the environment in which rules operate. Here actor-centred approaches are conducive because they start from the assumption that discursive practices as well as political concepts influence legally relevant practice and thus the overall development of international law.¹⁴ Thereby, actor-centred approaches can bridge the gap between political phenomena and their legal impact. Observations about significant actors which pursue policies and submit legal interpretations deviating from a formerly prevailing understanding, can explain changes and form a basis for an evaluation of the seriousness of the symptoms of a crisis. If there is a *prima facie* sense that political concepts challenge certain elements of international law a categorization of actors based on a definitional template can help to identify the pertinent impacts. What is decisive is to delineate a concept that offers some analytical guidance in identifying common characteristics between the policies of governments in countries such as Hungary, the United States, or Venezuela.¹⁵ Unlike in the case of National Socialist or Soviet doctrines of international law there exists no specific populist doctrine of international law which would forge a coherent systematic concept developed in scholarly writing. Therefore, any study of a populist approach to international law can only rely on a combination of structural arguments of what populism consists of and an empirical analysis of pertinent governmental practices and argumentative strategies.

The article argues, on the basis of such an actor-centred approach, that populist governments advance an understanding of international law as a law of coordination. However, their practices are not coherent, and the most robust challenges are confined to the level of rhetoric while in their legal practices an instrumental cherry-picking approach prevails (3.B). Their policies affect the current state of international law on two different levels: In the political sphere their practices alter the overall environment in which legal rules are interpreted (3.C.). In the legal sphere populist governments push for changes in the interpretation of established international legal rules. Since the current rise of populist governments is intrinsically linked to the world-wide spread of democracy and globalization in the 1990s their impact on international law is in particularly discernable where democracy and international law are interlinked. Populist governments, in particular, tend to reject emanations of global public opinion based on NGO participation because

¹² E.g. Bogdandy, 'Globalization and Europe', 15 *The European Journal of International Law* (2004), 885; Weiler, 'The Geology of International Law', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 547, at 561.

¹³ Krieger and Nolte, 'The International Rule of Law - Rise or Decline? Points of Departure', KFG Working Paper Series, No. 1 (October 2016), at 15; available at SSRN: <https://ssrn.com/abstract=2866940>.

¹⁴ L. Mälksöo, *Russian Approaches to International Law* (2015), at 2.

¹⁵ Cf. Huq, 'The People against the Constitution', 116 *Michigan Law Review* (2018), 1123, at 1132.

civil society weakens their claim to exclusively represent the people. Thus, the recent legislation regulating foreign-funding for NGOs can partly be traced back to populist governmental strategies. These efforts raise the question as to how international legal institutions can respond (3.D.).

2. What Constitutes a Populist Government?

Any analysis of the populist impact on international law is confronted with the problem that populism is a widely used, yet imprecise and highly disputed term. It often serves as a vague placeholder for various political phenomena which are considered to be anti-establishment.¹⁶ Daily political parlance proves the highly inconsistent use of the term populism. While populism in Europe was predominantly seen as a right-wing phenomenon, in the wake of the financial crisis some forms of left-wing populism gained ground, in particular in Greece and Spain.¹⁷ In Latin America populist movements are usually seen as left-wing movements with a socio-economic emphasis.¹⁸ The diversity of the phenomenon increases if one applies the term to certain political movements in Russia and the US in the 19th century.¹⁹ Moreover, it is difficult to distinguish populism from authoritarianism and nationalism. Thus, it is disputed whether the current Indian government should be qualified as a nationalist or populist government²⁰ while Russia can be seen as an authoritarian as well as a populist regime.²¹ Likewise, very different understandings of populism persist in academic literature. The divergence in the definitions reflects the difficulty to discern to what extent populism is an inherent element of a communitarian understanding of democracy²² whose emancipatory power allows to mobilize those excluded in society²³ or something that somehow deviates from democracy.

In order to use a sufficiently delineated analytical category the article applies a formal interpretation of populism based on the work of the political scientist Jan-Werner Müller. A formal approach allows to carve out to what extent the defining characteristics of populism pose a specific structural challenge for international law. The alternative approach offered by Mudde and Rovira Kaltwasser defines populism as a thin-centred ideology which hinges on elements of other ideologies.²⁴ However, focussing on underlying ideologies, such as right-wing nationalism, entails the risk to analyse the impact of these ideologies on foreign policy choices²⁵ instead of discerning the unique characteristics of populism which may lead to ruptures in the international legal order.

In a formal understanding populism is characterized by three defining features: an antagonistic anti-establishment attitude, an anti-pluralist stance and holistic exclusionary identity politics.²⁶

¹⁶ C. Mudde and C. Rovira Kaltwasser, *Populism: A very short introduction* (2017), at 9.

¹⁷ Katsambekis, 'The Populist Surge in Post-Democratic Times', 88 *The Political Quarterly* (2017), 202, at 203.

¹⁸ Mudde and Rovira Kaltwasser, *supra* note 16, at 31.

¹⁹ Cf. Mudde and Rovira Kaltwasser, *supra* note 16, at 22 et seqq.

²⁰ Jaffrelot and Tillin, 'Populism in India' in C. Rovira Kaltwasser et al (eds), *supra* note 3, 179.

²¹ Suggesting a populist character: J-W. Müller, *What is Populism* (2016), at 48; denying a populist character: March, 'Populism in the Post-Soviet States' in C. Rovira Kaltwasser et al (eds), *supra* note 3, 214, at 221; arguing, however, that Putin uses a populist rhetoric.

²² Mudde and Rovira Kaltwasser *supra* note 16, at 3 and 10.

²³ E. Laclau, *On Populist Reason* (2005); E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy* (2nd ed. 2001).

²⁴ Mudde, 'Populism: An Ideational Approach' in C. Rovira Kaltwasser et al (eds), *supra* note 3, 27, at 30.

²⁵ Verbeek and Zaslove, 'Populism and Foreign Policy' in C. Rovira Kaltwasser et al (eds), *supra* note 3, 384, at 395.

²⁶ Müller, *supra* note 21, at 3.

These stances translate into certain argumentative strategies and governmental practices. In the literature, there is apparently general agreement about the antagonistic character of populism and its anti-establishment attitude which opposes ‘the pure people’ and ‘the corrupt elite’.²⁷ Thus, populism relies on a distinction which divides society into a ‘morally pure and fully unified ... but ultimately fictional people’ and the establishment often conceived as the capitalist elite or the liberal elite.²⁸ In addition, populism possesses a decisively anti-pluralist stance. ‘Populists hold that those who don’t support them ... may not themselves properly belong to the people.’²⁹ Thus, they disqualify any opposition as illegitimate. From a procedural perspective populists pursue a holistic approach: Populist politicians assert that they can recognize the true will of ‘the people’ exclusively on their own.³⁰ Accordingly, populist politicians use the term ‘the people’ as a mystified social construct for justifying their ideas of change with ‘the people’ operating as a placeholder³¹ for interchangeable political ideas and social causes.³² What is decisive is the identity element in defining who ‘the people’ are and what ‘the people’ want. From a populist perspective there is only one singular common good which can be transferred into ‘a singularly correct policy that can be collectively willed.’³³ Thus, populism is not an ideology, not even a thin one, but a mindset or framework associated with certain governmental practices and argumentative strategies.

In states where populist parties rule alone, their strategies to govern often result in a process of constitutional retrogression implying a gradual transition from democracy to authoritarian regimes.³⁴ Populist governments often aim to ‘hijack’ national institutions³⁵ and to restrict the controlling functions of parliament³⁶ and courts.³⁷ They recurrently try to limit the freedom of the press and certain minority rights.³⁸ Populist politicians oppose civil society and tend to reject participatory processes of decision-making. This attitude renders political compromise and consensus difficult to reach.³⁹

For the purpose of this article populist governments are considered to be those governments in which parties that pursue populist politics rule alone, or in a coalition, or which are supported by populist parties in national parliaments so that populist politics directly impact on governmental activities. In academic literature and research reports the governments of Austria, Bulgaria, the Czech Republic, Denmark, Greece, Hungary, Italy, Latvia, Poland, Switzerland, and Slovakia are currently (October 2018) seen as populist within the EU.⁴⁰ Moreover, the governments of Bolivia, Ecuador (under President Correa), India, Israel, the Philippines, Russia, Turkey, the United States

²⁷ Mudde and Rovira Kaltwasser, *supra* note 16, at 6.

²⁸ Müller, *supra* note 21, at 19 et seq.

²⁹ Müller, ‘Capitalism in One Family’, 38 *London Review of Books* (2016), 10.

³⁰ Müller, *supra* note 21, at 20 and 29.

³¹ Laclau, *supra* note 23, at 96: ‘empty signifier’.

³² Katsambekis, *supra* note 17, at 204.

³³ Müller, *supra* note 21, at 26.

³⁴ Huq and Ginsburg, *supra* note 8, at 118; Scheppele, ‘Autocratic Legalism’, 85 *The University of Chicago Law Review* (2018), 545 et seq.

³⁵ Müller, *supra* note 21, at 4.

³⁶ Council of Europe, *Secretary General 2017 Report: Populism - How strong are Europe’s checks and balances?* (2017), at 6.

³⁷ Müller, *supra* note 21, at 45.

³⁸ Mudde and Rovira Kaltwasser, *supra* note 16, at 82 et seq.

³⁹ Müller, *supra* note 21, at 20; cf. Council of Europe, *supra* note 36, at 6.

⁴⁰ Cf. The Hague Centre for Strategic Studies, *The Rise of Populist Sovereignism* (2017), at 97.

and Venezuela have been categorized as populist or as applying populist governmental practices and argumentative strategies.

Populist governments present a particularly complex challenge since governmental practices often work ‘under cover of law.’⁴¹ Their manoeuvring in grey areas suggests that these governments are mostly aware that a turn to open authoritarianism would be too costly in terms of political reputation at the international level.⁴² Therefore, they do not flagrantly violate legal obligations but tend to use constitutional amendments, declarations of emergencies, or the enactment of new constitutions to change the existing constitutional frame.⁴³ As a result, populist strategies challenge the lawyer’s ability to distinguish bona fide from mala fide arguments. Within every constitutional system governments may violate legal obligations, enact constitutional amendments whose legitimate goals are contested, dishonour international obligations, or withdraw from international agreements. Thus, the tipping point where such practices seriously impair human rights, democracy and the rule of law is difficult to determine.⁴⁴ This problem is aggravated where populism gives voice to criticism of prevailing political or legal structures which could otherwise be overheard. After all, the unresponsiveness of ‘elites’ is often seen as a reason for the rise of populist movements within a state.⁴⁵ Globalization critique directed against democratic deficits of global governance is a case in point.

3. Contesting the 1990s Narrative of International Law

As the ‘Eggheads’ remark by President Trump exemplifies, the anti-elitist stance of populism often aims to oppose ‘the people’ with ‘the global technocratic elite’ so that populist governmental practices and argumentative patterns extend to the international level. They challenge certain elements and predominant interpretations of international law as they have developed after the end of the Cold War.

a) From ‘Open’ to ‘Closed’ Statehood?

Since the 1990s many international lawyers have shared a certain expectation that legal concepts, such as the rule of law, the right to democratic governance or universal human rights standards would constantly evolve more or less in one direction. International law seemed to have turned into a system which promotes community interests based on a shared understanding of solidarity. Multilateral treaties and highly institutionalized organizations offered a legal frame for global governance. It was seen to have moved beyond a law of coordination to a law which includes firmly established structural elements of cooperation.⁴⁶ Correspondingly, state sovereignty and its legal emanations, such as the principle of non-intervention, were seen to be losing relevance. The metaphor of the “end of history” signalled the end of the normative contestations within the international community which had characterized the era of the Cold War and the democratic constitutional model was spread as the dominant model of governance in constitution-making

⁴¹ Scheppelle, *supra* note 34, at 549.

⁴² Müller, *supra* note 21, at 50.

⁴³ Huq and Ginsberg, *supra* note 8, at 123; Scheppelle, *supra* note 34, at 549 et seq.

⁴⁴ Cf. Huq and Ginsberg, *supra* note 8, at 118.

⁴⁵ Mudde and Rovira Kaltwasser, *supra* note 16, at 109.

⁴⁶ Wolfrum, ‘International Law’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2006), para. 49.

processes.⁴⁷ Simultaneously, there was a perception that democratic constitutionalism is open to international law and establishes legal structures that allow for compliance with international law.⁴⁸ The concept is embraced by the German constitutional law term *offene Staatlichkeit* ('open statehood').⁴⁹ Incentives for promoting such a model were seen to lie in the stabilizing factor international law exerts on states. It seemed to be a safety net for liberal democratic elites in newly established democracies. Against such a background a bond to international law was considered as an 'expression to a national identity, part of which is the commitment to a global community structured around universal values'.⁵⁰

However, this optimistic perception changed gradually. The impacts of globalization on local societies, such as climate change or the crises of global finance markets, have promoted the impression that the promises attributed to international law in the period after 1990 have not been fulfilled. Output legitimacy of international institutions based on expert knowledge as the traditional source of legitimacy seems increasingly flawed. Global governance is no longer seen as a redress against a negatively connoted concept of sovereignty but as a threat to a localized exercise of public power.⁵¹ The search for other sources of legitimacy for global governance pushed for two opposite yet intertwined discourses, both aiming at redefining the relationship between the global and local level: on the one hand, some voices promoted more idealistic approaches which examine whether and how democracy could provide legitimacy beyond the state and argued for diverse forms of individual or collective participation of different constituencies. On the other hand, democratic contestations of the dominant normative model originated from within democracies emphasizing democratic self-determination over international legal obligations.⁵² The criticism went beyond the traditional opposition between international law and national sovereignty but led to contestations of the concept of 'open statehood' 'when gained by a disenfranchisement of people and peoples'.⁵³ Instead of requiring faith in experts, a process of politicization was called for.⁵⁴ Thus, the idea that democratic states are open to and inevitably intertwined with global governance is increasingly contested.

This is where populism steps in. Current emanations of populism are seen by many political observers as a response to the failure of mainstream politicians to 'sell' the benefits of global governance to their constituencies and to have often pursued a delegitimizing discourse implying that political decisions were forced upon them by international institutions.⁵⁵ From such a perspective populist governments may just articulate legitimate concerns of significant parts of populations around the globe. Still, there is also a perception that populists are 'hijacking' arguments of globalization critique because it provides them with some additional legitimacy.⁵⁶

⁴⁷ K. L. Scheppele, *Worst Practices and the Transnational Legal Order* (2016), 9; available at: https://www.law.utoronto.ca/utfl_file/count/documents/events/wright-scheppele2016.pdf.

⁴⁸ Kumm, 'Democratic Constitutionalism Encounters International Law' in S. Choudhry (ed.), *The Migration of Constitutional Ideas* (2006), 256, at 273 et seqq.

⁴⁹ Amongst others: A. v. Bogdandy et al (eds), *Offene Staatlichkeit* (2008).

⁵⁰ Kumm, *supra* note 48, at 276 et seq.

⁵¹ Koskeniemi, 'What Use for Sovereignty Today?', 1 *Asian Journal of International Law* (2011), 61, at 63 and 65.

⁵² Mudde and Rovira Kaltwasser, *supra* note 16, at 1 et seq.

⁵³ Weiler, *supra* note 12, at 562.

⁵⁴ Koskeniemi, *supra* note 51, at 67 et seq.

⁵⁵ Mudde and Rovira Kaltwasser, *supra* note 16, at 117.

⁵⁶ Cf. Müller, *supra* note 21, at 56.

Due to the anti-elitist and anti-pluralist stance and the exclusionary form of identity politics, most observers question that populist globalization critique can be a corrective for international law in that it furthers legitimacy of global governance.⁵⁷ It is more likely that their impact pushes towards a re-emphasizing of more traditional elements of international law as they are embraced in the concept of a law of coordination.

b) Promoting a Law of Coordination

International law as a law of coordination is commonly described as a law which does not aim to construct an international community but merely aims to provide for a minimal order between independent states. These states do not accept any higher authority and refute any substantive common value system. In such an understanding, international law's function is reduced to keeping states peacefully apart and to organizing 'unilateral or common action where an issue cannot be managed effectively by each [state] alone'. Equally sovereign states are the relevant actors and where international organizations 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 jurisdiction of international courts depends exclusively upon state consent.⁵⁸ Populist governments promote such an understanding of international law by opposing those elements of current international law which are built upon multilateral structures, international institutions and the concept of an international legal community based on common values.

aa) Multilateralism

In view of its anti-pluralist nature, populism is likely to refute multilateralism. Pluralism assumes that a society is composed of a large variety of different groups with different interests and acknowledges diversity within societies. It assumes that the political process of defining common goods must be based on negotiations and compromise because the political process needs to balance competing interests.⁵⁹ International law reflects such pluralist structures. Multilateral fora offer a framework and a vocabulary through which highly differing actors can formulate their demands and claims, justifications and contestations for identifying common values and establishing institutions to implement them.⁶⁰ The populist rejection of compromise pushes against the pluralist nature of multilateralism. In contrast, bilateral or unilateral structures seem to make it easier to realize what a populist leader conceives as the common good.

The focus of the current US administration on bilateral and regional trade agreements⁶¹ bears witness to this tendency. In political speeches, Hungarian Prime Minister Orbán supports a bilateralist vision of international law. In quoting President Trump's phrase 'it is the right of all nations to put their own interests first', he approved that 'the era of multilateralism is at an end, and the era of bilateral relations is upon us.'⁶² Accordingly, some populist governments have paid

⁵⁷ Alston, *supra* note 4, at 4; Helfer, 'Populism and International Human Rights Institutions', iCourts Working Paper Series, No. 133 (2018), at 7 et seqq.

⁵⁸ Wolfrum, *supra* note 46, paras. 41-48.

⁵⁹ Mudde and Rovira Kaltwasser, *supra* note 16, at 8.

⁶⁰ A. Hurrell, *On Global Order* (2007), at 312-313.

⁶¹ US, The President's 2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program (March 2017), at 1 and 7.

⁶² Hungary, Prime Minister Orbán, Speech at the Lámfalussy Conference delivered on 23 January 2017.

much political attention to intensifying their bilateral relations with non-Western states, in the case of Hungary, for example, through concluding economy-related bilateral agreements with China, the Philippines and Vietnam.⁶³ Bilateral trade relations may also serve as an instrument to forge alliances with like-minded states. In 2018, for example, Venezuela and Turkey concluded a bilateral trade agreement⁶⁴ and Venezuela has reportedly moved its international gold reserves from Switzerland to Turkey⁶⁵ in order to escape the consequences of an EU human-rights-related sanctions regime which Switzerland had supported.⁶⁶ Even though the picture is blurred by the fact that a turn to bilateralism and mega-regional trade agreements has generally been observed in recent years⁶⁷ populist governments apparently promote this trend.

Moreover, the rejection of multilateralism does not seem to depend on its legal form. Where multilateral efforts contradict perceived national interests the lack of legally binding obligations does not seem to temper opposition. For instance, both the US⁶⁸ as well as Hungary⁶⁹ have announced that they will not join the Global Compact for Safe, Orderly and Regular Migration. The Global Compact which sets standards for cooperation in world-wide migration explicitly states that it is non-legally binding which in turn means that it cannot be considered to be an international legal agreement but only that it creates compliance expectations in the political sphere.

bb) International Institutions

The anti-establishment stance of populism furthers scepticism towards international institutions which may be depicted as manifestations of ‘the global technocratic elite’. In its 2012 political programme, the Latvian National Alliance ‘All for Latvia!’ – ‘For Fatherland and Freedom/LNNK’, for instance, advocated ‘a more aggressive policy in international organizations based on its national interests and existing legislation. The benefits of participating in specific international bodies, compared with the resources invested and eventual sovereignty constraints, should be seriously assessed’.⁷⁰

While in its current programme a more moderate tone is chosen, the alliance still emphasises that ‘the activities of Latvia’s representatives in international organizations will be based on the long-term defense of Latvia’s national interests’.⁷¹ According to a 2017 Hague Centre for Strategic Studies

⁶³ Hungary, Ministry of Foreign Affairs and Trade, Press Statement, 13 May 2017; Hungary, Ministry of Foreign Affairs and Trade, Press Statement, 27 March 2017; Hungary/Vietnam, Joint Press Statement, 10 September 2018.

⁶⁴ Venezuela, Ministerio del Poder Popular para Relaciones Exteriores, Press Statement, 4 October 2018.

⁶⁵ Reuters, *Venezuela says it is refining gold in Turkey following sanctions*, 18 July 2018, available at <https://www.reuters.com/article/venezuela-gold/venezuela-says-it-is-refining-gold-in-turkey-following-sanctions-idUSL1N1UE1DV>.

⁶⁶ Switzerland, Verordnung über Maßnahmen gegenüber Venezuela, SR 946.231.178.5, 28 March 2018.

⁶⁷ Altemöller, ‘Bilateralism and Unilateralism’, 13 *Global Trade and Customs Journal* (2018) 62.

⁶⁸ 112 *American Journal of International Law (AJIL)* (2018), at 311-313.

⁶⁹ Hungary, Ministry of Foreign Affairs and Trade, Press Statement, 24 July 2018. Both states were later joined by numerous other populist governments, see UN Doc. A/73/PV. 60, 19 December 2018.

⁷⁰ Latvia, National Alliance ‘All for Latvia!’ – ‘For Fatherland and Freedom/LNNK’ (TB/LNNK) (Version 4.1. 03.12.2012.), available at http://www.nacionalaapvieniba.lv/wp-content/uploads/2016/03/Nacionalas_apvienibas_VL_TB-LNNK_programma_v4.1.pdf.

⁷¹ TB/LNNK, Plašā programma 13. Saeimai, available at <https://www.nacionalaapvieniba.lv/programma/plasa-programma/>.

survey of foreign policy goals in the political programme of populist parties in Europe and the US, an explicit national interest driven policy is common to all the parties.⁷²

A populist strategy to ‘hijack’ institutions which ‘produce the “morally wrong” outcome,⁷³ is not readily available in highly institutionalized or nearly universal international organizations. Thus, in order to make sure that the populist understanding of the one common good will be realized, withdrawal becomes a serious policy option. Populist governments have withdrawn or threatened to withdraw from a number of international treaties. For instance, Venezuela notified the denunciation of the American Convention on Human Rights in 2012,⁷⁴ the Philippines announced the withdrawal from the International Criminal Court in 2018,⁷⁵ and UKIP was instrumental in the Brexit⁷⁶. However, the overall number of withdrawals has remained low and the most striking cases concern the United States.

While withdrawal may appeal to a particularly powerful state, such as the United States, other populist governments may prefer to remain within these institutions challenging or aiming to reform them from within. After all, membership in an international organisation also confers legitimacy and recognition globally.⁷⁷ For example, Hungary is a member of the ACT-Group advocating for a reform of the exercise of the veto power in the Security Council⁷⁸ and the Latvian alliance ‘For Fatherland and Freedom/LNNK’ supports UN Security Council reform calling for ‘openness, accountability and transparency’. It criticizes the ‘abusive ... exercise of the right of veto, bypassing the principles of the UN Charter⁷⁹ in line with what most human rights NGOs currently advocate.

As a further strategy populist governments may try to create alternative institutions which they can dominate more easily than established ones or where they can forge alliances with like-minded states. An example can be seen in Venezuela’s efforts to establish the Union of South American Nations (UNASUR). UNASUR was intended as a replacement for Mercusor and the Andean Community. Behind the rhetoric of interstate cooperation and economic integration observers submit that the establishment of UNASUR is nonetheless meant to further national priorities.⁸⁰ The Visegrad Group already formed in 1991 as a non institutionalized cooperation by the Czech Republic, Hungary, Poland and Slovakia has currently assumed the role of a platform for countering EU migration policies.⁸¹

Populist governments’ sceptical stance towards international organizations may significantly increase instances of non-compliance. If participation in international organisations is only acceptable for defending national interests, decisions of such institutions are likely to be

⁷² Hague Centre, *supra* note 40, at 76.

⁷³ Müller, *supra* note 21, at 39.

⁷⁴ Inter-American Commission on Human Rights, Press Release, 12 September 2012; Venezuela, Letter of the Minister of Popular Power for Foreign Affairs, 6 September 2012.

⁷⁵ The Philippines, Note verbale to the UN Secretary-General, 15 March 2018.

⁷⁶ Taggart, *supra* note 9, at 256.

⁷⁷ Cf. Müller, *supra* note 21, at 56.

⁷⁸ UN SC, Statement of Hungary, UN Doc. S/PV. 8175, 6 February 2018, at 26.

⁷⁹ TB/LNNK, *supra* note 71.

⁸⁰ K. J. Alter and L. R. Helfer, *Transplanting International Courts: Law and Politics of the Andean Tribunal of Justice* (2017), at 180.

⁸¹ Visegrad Group, Joint Declaration of Ministers of Interior, 26 June 2018.

disregarded where they are seen to conflict with such interests. This may not only be an issue of factual non-compliance but can also entail more far-reaching consequences for legal structures. For example, in its party programme, the Freedom Party of Austria (FPÖ) 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.'⁸² In a populist ductus, the programme acknowledges the prevalence of the interest of the Austrian population not the prevalence of the state interest. Such an approach would entail the consequence 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 which allows to bring national law in line with the international legal obligations of the state.

According to the 2017 survey of the Hague Institute for Strategic Studies 10 of 18 analysed parties 'state that national law has priority over international law and reject the jurisdiction of international courts'.⁸³ In view of the dualist doctrine on the relationship between international and national law this is a very broad and unspecified observation. Still, the most obvious conflict between populist stances and predominant interpretations of international law unfolds in the relationship with international (human rights) courts,⁸⁴ not least because of populist policies to alter the composition and structure of national constitutional courts and to limit civil rights. The concept of a constitutional or national identity has gained increasing relevance as an instrument to formulate opposition against international or supranational court decisions. While the concept has been applied by Constitutional Courts throughout Europe in the wake of the 2009 *Lisbon* judgment of the German Constitutional Court⁸⁵ and in the light of Art. 4 (2) TEU, its recent invocation in a number of judgments has raised concerns of abusive practices among academic observers. The Hungarian Constitutional Court, for instance, used the concept of national identity in a 2016 judgment in order to uphold the government's rejection of the EU's refugee relocation scheme.⁸⁶ Literature has criticised the judgment for abusing the concept as 'a justification for nationalistic political purposes'.⁸⁷ Another pertinent example concerns the Russian Constitutional Court. According to the 2015 amendments to the Constitutional Law on the Constitutional Court, the Court is competent to declare decisions of international courts as 'unenforceable' if they are incompatible with the 'fundamentals of the Russian constitutional system' and the 'human rights regime established by the Constitution'. As a consequence 'no actions/acts whatsoever' may be taken in order to implement the decision of an international court, in particular the European Court of Human Rights. Since this 'prevents the execution of [a] decision in any manner whatsoever in the Russian Federation', the Venice Commission, in an Opinion of 2016, has observed that 'the law is incompatible with the obligations of the Russian Federation under international law'.⁸⁸ The

⁸² FPÖ, Party Programme, 18 June 2011, available at <https://www.fpoe.at/themen/parteiprogramm/parteiprogramm-englisch/>.

⁸³ Hague Centre, *supra* note 40, at 77.

⁸⁴ Helfer, *supra* note 57, at 9.

⁸⁵ Germany, Constitutional Court, Judgment of 30 June 2009, BVerfGE 123, 267 – Lisbon.

⁸⁶ Hungary, Constitutional Court, Decision 22/2016. (XII. 5.) on the Interpretation of Article E (2) of the Fundamental Law, 30 November 2016.

⁸⁷ Halmai, 'National(ist) Constitutional Identity?' EUI Working Paper LAW 2017/08, at 17.

⁸⁸ European Commission for Democracy through Law (Venice Commission), *Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court*, Opinion no. 832/2015 of 13 June 2016, at para. 144.

Constitutional Court of Venezuela even advised its government to withdraw from the American Convention on Human Rights. In a 2008 judgment the Inter-American Court of Human Rights had found that Venezuela had breached the American Convention on Human Rights by expelling three judges and ordered their reinstatement. As a response the Supreme Court held that the Inter-American Court had overstepped its competences, that the judgment could therefore not be executed and urged the government to withdraw from the American Convention.⁸⁹ In these decisions, populist identity politics have already altered legal arguments on how to reconcile tensions between international and national law.

Beyond the strict legal realm, populist governments sometimes react to international institutions which criticize their policies by what may be called discursive attacks. A case in point is the dispute between the UN High Commissioner of Human Rights and the Hungarian government in 2018. In his opening speech to the 37th Session of the UN Human Rights Council the Commissioner referred to the Hungarian Prime Minister by stating that ‘xenophobes and racists in Europe are casting off any sense of embarrassment – like Hungary’s Viktor Orban...’.⁹⁰ In response, the Hungarian Minister of Foreign Affairs called for the resignation of the Commissioner since he ‘has behaved in a manner that is unworthy of his position, because “an international official with an excellent salary that is paid for by contributions from member states” cannot speak in this way, and cannot declare war on a democratically elected Prime Minister.... He noted that he felt it was pathetic and “unmanly” of the High Commissioner to have left the Human Rights Council chamber after reading his statement on Tuesday.’⁹¹

cc) An International Community Structured around Common Interests

Based on their holistic identity politics, populist stances are likely to produce tensions with concepts of universalism and common interests of an international community based on international solidarity. A populist approach is more likely to 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’.⁹² For preserving their identity policies populist governments will often rely on more traditional elements of international law. Their understanding promotes those international norms which protect state sovereignty and the *domaine réservé*– ‘the us’.

Former National Security Advisor to President Trump, H.R. McMaster, together with the former Director of the National Economic Council, Gary Cohen, formulated the most outspoken opposition to the idea of an international community pursuing common interest: ‘the world is not a “global community” but an arena where nations, nongovernmental actors and businesses engage and compete for advantage’.⁹³

⁸⁹ Tribunal Supremo de Justicia de Venezuela (Sala Constitucional), Sentencia n° 1939 del 18 de Diciembre de 2008 (Exp. 08-1572); Helfer, *supra* note 57, at 9; Huneus and Urueña, ‘Treaty Exit and Latin America’s Constitutional Courts’ 111 *AJIL Unbound* (2017), 456.

⁹⁰ UN High Commissioner for Human Rights, Opening Statement of the 37th session of the Human Rights Council, 26 February 2018.

⁹¹ Hungary, Ministry of Foreign Affairs and Trade, Press release, 7 March 2018.

⁹² Kumm, *supra* note 48, at 277.

⁹³ McMaster and Cohn, ‘America First Doesn’t Mean America Alone’, *Wall Street Journal (Europe Edition)* 1 June 2017, A11.

Both speeches President Trump delivered before the UN General Assembly in 2017⁹⁴ and 2018⁹⁵ respectively demonstrate that the current US administrations draws a picture of the international legal order which resembles a law of coordination rather than a law of cooperation.⁹⁶ A populist ductus shines through the 2017 speech. The word ‘people’ is used 50 times often combined with emotionally enriched adjectives, such as ‘decent people’, ‘good people of Iran’, ‘innocent people’, or ‘powerful people’. Thereby, the speech reflects the populist ‘moralistic imagination of politics ... that sets a morally pure and fully unified people ... against’ the establishment.⁹⁷ The speech directly refers to the populist idea of liberating the victimized people:

For too long, the American people were told that mammoth multinational trade deals, unaccountable international tribunals, and powerful global bureaucracies were the best way to promote their success. But as those promises flowed...others gamed the system and broke the rules. And our great middle class, once the bedrock of American prosperity, was forgotten and left behind...⁹⁸

From a populist reading of the US political system President Trump then deduces his understanding of his foreign policy doctrine ‘America first’:

The greatest part of the United States Constitution is its first three beautiful words. They are: “We the people.”... In America, the people govern, the people rule, and the people are sovereign...

In foreign affairs, we are renewing this founding principle of sovereignty. Our government's first duty is to its people, to our citizens - to serve their needs, to ensure their safety, to preserve their rights, and to defend their values.

As President of the United States, I will always put America first, just like you, as the leaders of your countries will always, and should always, put your countries first.... As long as I hold this office, I will defend America’s interests above all else.⁹⁹

His speech is a clear affirmation of a national interest driven foreign policy. It focuses on separation, autonomy of political communities and ‘closed statehood’ – a perspective which he underlines with an explicit reference to the Monroe Doctrine in his 2018 speech.

US President Trump turns the triad of rule of law, democracy and human rights, which has become a marker for the progress of international law in the 1990s, into a triad of sovereignty, security and prosperity. While the speech refers 22 times to sovereignty it only explicitly mentions the notion ‘human rights’ once. Trump draws a picture of the global order focussed on ‘independent nations’. While he sees room for international cooperation ‘rooted in shared goals, interests, and values’, he explicitly claims that ‘the nation-state remains the best vehicle for elevating human condition’. As a consequence, the whole speech ignores concepts of international solidarity in line with the anti-pluralist stance of populism. If populist policy is pursued ‘for the sake of a moral, hardworking “us”

⁹⁴ UN GA, Address by Mr. Donald Trump, President of the United States of America, UN Doc. A/72/PV. 3, 19 September 2017, 10.

⁹⁵ UN GA, US President Donald Trump, Remarks to the 72nd Session of the United Nations General Assembly in New York, 25 September 2018, as prepared for delivery.

⁹⁶ Cf. W. Friedmann, *The Changing Structure of International Law* (1964).

⁹⁷ Müller, *supra* note 21, at 19 et seq.

⁹⁸ Address by President Trump, *supra* note 95, at 14.

⁹⁹ *Ibid.*, at 11.

and not for the immoral... “them”,¹⁰⁰ solidarity elements of international law need to be rejected. If from a populist perspective ‘there is only one common good and one way to represent it’, any diverging community interest and any deliberative process to define it seems flawed. Thus, when referring to World War II as the momentum leading to the establishment of United Nations, President Trump stresses the parallel national interests of the participating nations, not the common cause of world peace uniting them. This may be read as an expression of scepticism towards any idea of common interests of an ‘international community’ – a word which is not used once. President Trump’s speech draws a picture of the international legal order reminiscent of the founding period of the UN to which the speech frequently refers. Moreover, President Trump explicitly refutes elements of global governance as well as the idea of any power-limiting role of international law. This approach becomes even more outspoken in his 2018 speech when he denounces the ICC and continues to state:

We will never surrender America’s sovereignty to an unelected, unaccountable global bureaucracy. America is governed by Americans. We reject the ideology of globalism, and we embrace the doctrine of patriotism. Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from new forms of coercion and domination.

The picture of an international legal order which emerges from both speeches reduces its function to coordinating parallel or conflicting interests. States seem to be free to respond unilaterally to disruptions of that order: While rights of states to defend their national interests are emphasised, corresponding duties towards other states are scarcely mentioned.

However, practice suggests that it would be too far-fetched to assume that populist governments reject all concepts of common interests. Mirroring its engagement with the ACT-Group Hungary is member of the Group of Friends of the Responsibility to Protect (R2P) and supports R2P-related initiatives at the UN.¹⁰¹ Poland, for instance, demonstrate a comparable attitude.¹⁰² Bolivia, Ecuador and Venezuela, in contrast, are opposed to the concept of R2P considering it to be an instrument of or pretext for illegitimate intervention.¹⁰³ Thus, a coherent picture is difficult to draw because of ideological, geographical and historical contingencies.

The populist focus on sovereignty based on holistic identity politics also fosters what observers have called ‘respatialising power’¹⁰⁴ 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 which explains the prominent role that migration policies play for populist governments in their criticism of global governance.¹⁰⁵ While it is empirically difficult to pin down to what extent populist governments have directly influenced European immigration

¹⁰⁰ Müller, *supra* note 21, at 48.

¹⁰¹ UN GA, Statement of Hungary, UN Doc. A/72/PV. 100, 25 June 2018, at 9.

¹⁰² UN GA, Statement of Poland, UN Doc. A/72/PV. 100, 25 June 2018, at 24.

¹⁰³ Bolivia and Ecuador, Statements at the UN GA Informal Interactive Dialogue on R2P, 6 September 2016; Venezuela, Statement at the UN GA Informal Interactive Dialogue on R2P, 6 September 2017.

¹⁰⁴ Kallis, ‘Populism, Sovereignism, and the Unlikely Re-Emergence of the Territorial Nation-State’, 11 *Fundan Journal of Humanities and Social Science* (2018), 285, at 287.

¹⁰⁵ *Ibid.*, at 295 et seq.

policies, diverging indirect effects are acknowledged in political science literature.¹⁰⁶ There are indications that populist migration discourses have contributed to a securitization of immigration also affecting the broader legal framework. A case in point is the legal regime for search and rescue at sea. Comparing practices in the EU and Australia, literature has observed ‘a shift in State practice in the interpretation and application of [pertinent] international norms’ in the Law of the Sea towards securitization, militarization and criminalization endangering the formerly predominant humanitarian objectives of the regime.¹⁰⁷

However, populist identity politics also transgress the border paradigm. Where international human rights obligations align with their identity politics governments may promote these rules. For instance, within the United Nations, Hungary and Poland actively support efforts for the protection of religious and ethnic minorities, in particular Christian minorities in North Africa and the Levante.¹⁰⁸ Moreover, in view of national minorities outside its territory, Hungary also promotes European minority protection regimes.¹⁰⁹ But the impact remains ambiguous. The initiative of the Austrian government to offer dual citizenship to members of the German-speaking minority in Southern Tyrol has initiated a political dispute between Italy and Austria in 2018.¹¹⁰

c) Changing Trends by Changing Perceptions

From a legal positivist perspective, a significant part of current challenges for international law appears to be confined to the level of rhetoric. Neither political speeches nor party programmes directly translate into legally relevant acts challenging international law. Politics of withdrawal are in line with consent-based international law and an important incentive for states to accept binding treaty rules in the first place. Moreover, withdrawal of a state party can be preferable to non-compliance since constant and symbolic non-compliance might also weaken the legitimacy of an institution. In principle, a threat of withdrawal can be an instrument to overcome a standstill within international organisations and to push for law-reform. Still, in a recent article, James Crawford, warned against ‘the increasing rhetoric of scepticism against international law’ because it ‘may precipitate a larger-scale retreat into nativism and unilateralism’.¹¹¹ Indeed, international lawyers should be aware that the political discourse and the political environment which surround international law are highly relevant for its overall development because they may influence perceptions of its state.

Even withdrawals which are in line with international law contribute to such a change of perception. For decades a withdrawal from major multilateral treaties seemed a taboo with very few exceptions. Recent practices have affected this perception and have thus opened space to quit

¹⁰⁶ Verbeek and Zaslove, ‘Populism and Foreign Policy’ in C. Rovira Kaltwasser et al (eds), *supra* note 3, 384, at 396.

¹⁰⁷ Ghezalbash, Moreno-Lax, Klein and Opeskin, ‘Securitization of Search and Rescue at Sea’, *67 International and Comparative Law Quarterly* (2018), 315, at 319/349 et seq.

¹⁰⁸ Hungary, Intervention by the Permanent Representative on the occasion of the side event Peace, Reconciliation and Justice, 2 November 2017; UN GA, Address by Mr. Andrzej Duda, President of the Republic of Poland, UN Doc. A/72/PV. 5, 7, at 10.

¹⁰⁹ Seventh Forum on Minority Issues, Statement by Deputy State Secretary for International Cooperation of the Ministry of Foreign Affairs and Trade of Hungary, 25 November 2014.

¹¹⁰ Bell, *Austria-Italy passport row tests Europe's populist allies*, BBC News, 21 October 2018, available at <https://www.bbc.com/news/world-europe-45888287>.

¹¹¹ Crawford, ‘The current political discourse concerning international law’, 81 *The Modern Law Review* (2018), 1, at 22.

multilateral agreements which in turn makes the international order appear more fluid and reversible. Simultaneously, practices of withdrawal invoke the historic example of the League of Nations. The decline of the League was partly attributed to the high number of withdrawals. Altogether 17 states withdrew from the League during its existence. A comparison of the current development with 1930s looms in the background.

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 apt to fulfil its objectives, they increase possibilities for forum-shopping to reach politically desired outcomes, and they may ultimately render international institutions dysfunctional.¹¹² Discursive attacks on international institutions may also undermine their authority.¹¹³ Populism is sometimes associated with a certain form of communication strategy which strives to receive public attention by breaking certain conventions. There is tendency to use 'provocative statements and violent attacks on opponents'.¹¹⁴ One may doubt that such forms of provocation are confined to populist strategies. The 1960 shoe-banging incident in the UN General Assembly may be quoted as a famous counter-example. Soviet statesman, Khrushchev, had allegedly hit a shoe on his desk in response to the criticism of the human rights situation in Eastern Europe. Anyway, where international institutions criticize human rights violations they must be prepared for robust debates. It may raise the legitimacy of international organizations when disputes leave the realm of legal and diplomatic conversation and open up to broader more robust political discourses. Still, where negative public discourses are shaped by populists' antagonistic stances and their tendency to delegitimize opponents, they entail a danger of escalation. Again, historical reminiscence of the 1930s suggests that delegitimizing international institutions may just be a prequel to an even more serious crisis.

Eventually, the broader political context contributes to the perception of a crisis. Many of the states with populist governments emerged from authoritarian regimes after the end of the Cold War and first embraced democratic constitutionalism and an understanding of open statehood. Hungary is the first state whose status has been reduced by Freedom House from a 'consolidated democracy to a 'semi-consolidated' one.¹¹⁵ Since they are seen as 'backsliders' to the rule of law, democracy and human rights protection at the national level,¹¹⁶ populist governments contribute to an overall perception of decline of the 1990s narrative. With fostering an understanding of international law as a law of coordination they reinforce this impression. Moreover, populist governments are not the only actors who are contesting the 1990s narrative of international law. Their contestations and rejections are reinforced by the agenda of autocratic regimes. The most prominent example may be seen in the Joint Declaration on the Promotion of International Law, issued by the Russia and China on 25 June 2016. The Declaration which, inter alia, highlights the sovereign equality of all states, the principle of non-intervention, and state consent as the basis of

¹¹² Madsen, Cebulak and Wiebusch, 'Backlash against international courts', 14 *International Journal of Law in Context* (2018), 197, at 200, 209 and 211.

¹¹³ *Ibid.*, at 212.

¹¹⁴ Mudde and Rovira Kaltwasser, *supra* note 16, at 4; cf. Manucci, 'Populism and the Media' in C. Rovira Kaltwasser et al (eds), *supra* note 3, at 471.

¹¹⁵ Scheppele, *supra* note 34, at 574 note 103; Freedom House, *Nations in Transit* (2015), available at: https://freedomhouse.org/sites/default/files/FH_NIT2015_06.06.15_FINAL.pdf.

¹¹⁶ Scheppele, *supra* note 47, at 8.

international law may also be seen as a claim to understand international law as a law of coordination.

General perceptions about the state of the legal order and its political environment presumably have a greater impact on the development of international law than of national law. Given that there is no centralised legislator and only a rudimentarily centralised judiciary, customary international law and interpretations of treaty law emerge in a partly empirical process and depend on normative evaluations by numerous different actors with diverging competences, such as states, courts or academics. Thus, a normative evaluation of a certain practice will often only be qualified as a trend. The identification of trends and the direction they take as well as the claim as to which trend will prevail, will be influenced by the perception of the overall context and political discourse.¹¹⁷ An impression of backsliding may exert a chilling effect on such interpretative processes. Thus, changes in the political environment and discourse may affect international law in that they set the frame against which lawyers formulate their assumptions about the development of the international legal order and the interpretation of its rules.

d) Changing International Rules by Changing National Legislation

Populist governments also push 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 for NGOs. Admittedly, populist governments are not alone in imposing legal restrictions on foreign funding. Not only authoritarian states, such as China,¹¹⁸ but also liberal democracies, such as Australia,¹¹⁹ enact pertinent legislation. However, this observation makes the case of foreign funding regulation a particularly fitting one since it is characteristic for populist governments that their governmental strategies move in grey areas. Their criticism may address a valid point, but the objectives pursued, as well as the manner in which change is brought about, remain ambiguous both in terms of legitimacy and legality. In particular, the manner in which foreign funding for NGOs is regulated by certain states illustrates the specific populist impact on international law. Populist governments have been at the forefront of the pertinent developments and have apparently influenced each other, as well as other states. The example demonstrates their role in contesting settled standards to give room for processes of norm change.

aa) Transnational NGOs between Global Public Opinion and the Principle of Non-Intervention

Those academic voices which have advocated for introducing elements of democracy into global governance rely on NGOs as representatives of global public opinion. German political thinkers, such as Jürgen Habermas and Hauke Brunkhorst¹²⁰ have emphasized the creation of 'global democracy backed by a global civil society'.¹²¹ They discerned a global public in the making¹²² based

¹¹⁷ Cf. Krieger and Nolte, *supra* note 13, at 5 et seq.

¹¹⁸ China, Order No. 44 of the President of the People's Republic of China, effective on 1 January 2017.

¹¹⁹ Australia, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017.

¹²⁰ E.g. Habermas and Derrida, 'Nach dem Krieg', *Frankfurter Allgemeine Zeitung*, 31.05.2003, at 33 et seq.; Brunkhorst, 'Globalising Democracy Without a State' 31 *Journal of International Studies* (2002), 675, at 680 et seq.

¹²¹ Peters, 'Dual Democracy' in Klabbers et al. (eds), *The Constitutionalization of International Law* (2009), 263, at 314.

¹²² Brunkhorst, *supra* note 120, at 689.

on transnational media of communication and transnational networks of NGOs. NGOs were seen as increasingly deterritorialized actors spreading human rights norms, rule of law and democracy.¹²³ At the level of the UN, this perception was reflected in the 2004 Cardoso Report which advocated participatory democracy globally:

Public opinion has become a key factor influencing intergovernmental and governmental policies and actions. The involvement of a diverse range of actors, including those from civil society and the private sector, ..., is not only essential for effective action on global priorities but is also a protection against further erosion of multilateralism.¹²⁴

Such an understanding of the legitimizing effect of civil society at the global level calls for a democratic rule of law-based public sphere at the national level composed of political parties, NGOs and other social movements as well as free media and established constitutional guarantees of freedom of opinion, assembly and association.¹²⁵ To achieve these preconditions after the end of the Cold War transnational political influences were exerted openly through publicly funded agencies and NGOs.¹²⁶ As a consequence, the principle of non-intervention lost relevance. Indeed, since the principle of non-intervention addresses states, private foreign funding would not fall under the prohibition while indirect government funding raises opaque questions of attribution. With the end of the Cold War the principle of non-intervention also lost much of its normative grip. It served a central purpose in a bipolar international order based on sharp ideological controversies between two models of how government should be organized.¹²⁷ In such a context, the prohibition of non-intervention could be used as a tool to obstruct opposing ideological influences and thus be seen to contribute to minimizing tensions between the two blocks. With the 'end of ideological confrontation' in 1990 not only increasing processes of globalization¹²⁸ but also the impression that only one normative model for organising state power remained made non-intervention look out-dated.¹²⁹

Populist governments re-inforce the claim to non-interference. On the bases of their antagonistic anti-establishment stance and their holistic identity politics populist governments share the goal of restricting NGO activity as well as the tendency to resist the spread of global norms through civil society.¹³⁰ 'For them, opposition from within civil society creates a particular moral and symbolic problem: it potentially undermines their claim to exclusive moral representation of the people'.¹³¹ Thus, they apply argumentative strategies to demonstrate that the civil society in their state is not representing the view of 'the people' but is influenced or even controlled by external powers. With this policy they aim to make their holistic vision of 'the people' a reality¹³² and describe transnational NGOs as foreign agents. The antagonistic rhetoric exerts symbolic effects in order to

¹²³ *Ibid.*, at 680 and 682.

¹²⁴ GA Res. 58/817, 11 June 2004, at 7.

¹²⁵ Peters, *supra* note 121, at 314.

¹²⁶ Damrosch, 'Nonintervention and Nonforcible Influence over Domestic Affairs', 83 *AJIL* 1989, 1, at 18.

¹²⁷ See Scheppele, *supra* note 47, at 9.

¹²⁸ Jamnejad and Wood, 'The principle of non-intervention', 22 *Leiden Journal of International Law* (2009), 345, at 346.

¹²⁹ Scheppele, *supra* note 34, at 559.

¹³⁰ Gill, 'The Venezuelan Government and the Global Field', 31 *Sociological Forum* (2016), 29, at 34.

¹³¹ Müller, *supra* note 21, at 48.

¹³² Müller, *supra* note 21, at 48 et seq.

denounce any legitimacy of global public opinion or transnational participatory democracy. Therefore, populist governments foster the re-emergence of non-intervention discourses and promote a re-emphasis of a broader understanding of states' *domaine réservé* aiming, inter alia, to restrict foreign funding for NGOs.

bb) Re-emergence of Non-intervention Discourses

Of course, a more frequent use of the principle of non-intervention in political statements does not necessarily lead to changes in the interpretation of customary international law. The difficulty to 'distinguish cases where the language of 'non-intervention' is used as political rhetoric from those where it is used to make a legal argument' has been a long-standing challenge for legal interpretations.¹³³ Where statements are, however, accompanied by pertinent legislation the scope and content of a rule might change.

(1) Restricting Foreign Funding for NGOs

The development to enact stricter regulations against NGOs is seen to have started already in the early 2000s as 'backlash against democracy promotion' in China and Russia.¹³⁴ While the Venice Commission holds that most of the Member states of the Council of Europe do not regulate foreign funding for NGOs,¹³⁵ an empirical study in 2013 examined 98 countries world-wide and claimed that 39 restrict such funding while 12 even prohibit it.¹³⁶ Most of the restrictions are apparently directed against human rights NGOs.¹³⁷ Russia, Hungary, and Venezuela are among the front-runners of these developments.

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, inter alia, receive foreign funding.¹³⁸ According to Art. 1 it applies to 'groups that promote, defend, spread, or inform citizens ... about the full exercise of their political rights.'¹³⁹ Earlier Russian and Chinese legislation is said to have influenced the enactment of the pertinent law.¹⁴⁰

In 2012, the Russian Federation enacted a 'Law on Foreign Agents of the Russian Federation.'¹⁴¹ The Law creates the legal status of a 'foreign agent' for NGOs receiving funding from abroad and participating in political activities. The Law stipulates an obligation to register which is accompanied by a sanctioning system. Such organisations are required to display the label 'foreign agent' on every publication they make available. As justification President Putin uses a populist argumentative strategy: 'No one has the right to speak for all of Russian society, especially those

¹³³ Jamnejad and Wood, *supra* note 128, at 347.

¹³⁴ Carothers, 'The Backlash against Democracy Promotion', 85/2 *Foreign Affairs* (March/April 2006), 55, at 56.

¹³⁵ European Commission for Democracy through Law (Venice Commission), *Hungary – Opinion on the Draft Law on the Transparency of Organizations receiving support from abroad, Opinion 889/ 2017 of 20 June 2017*, at para. 14.

¹³⁶ Christensen and Weinstein, 'Defunding Dissent', 24 *Journal of Democracy* (2013), 77, at 80.

¹³⁷ Huq and Ginsburg, *supra* note 8, at 50.

¹³⁸ La Asamblea nacional de la República bolivariana de Venezuela, Ley de defensa de la Soberanía política y autodeterminación nacional No 960, 22 December 2010.

¹³⁹ Quoted after Gill, *supra* note 130, at 32.

¹⁴⁰ Gill, *supra* note 130, at 31 et seq. and 36 et seq.

¹⁴¹ Law No. 121-FZ 'On Amendments to Legislative Acts of the Russian Federation regarding the Regulation of the Activities of Non-Commercial Organizations Performing the Functions of a Foreign Agent', 13 July 2012.

who are directed and financed from abroad and thus serve the interests of others(...).¹⁴² Russian representatives are quoted to have advanced the principle of non-interference as a justification for the regulation.¹⁴³

Probably influenced by the Russian example, the Hungarian Parliament adopted a Law on the Transparency of Organisations Receiving Support from Abroad in June 2017.¹⁴⁴ The Law establishes an obligation to register for associations and foundations which obtain more than 7.2 million forints (around 24.000 Euro) foreign funding. In addition, it creates reporting and disclosure obligations, above all the obligation to put the label ‘civic organisation funded from abroad’ on publications. While the Hungarian legislator does not apply the term ‘foreign agent’ in the law, in the debates accompanying the legislative process Hungarian politicians used the term frequently. The Venice Commission was explicitly concerned about the effect of such a usage on the Hungarian society and doubted that within this context the term ‘organisations receiving support from abroad’ would be a neutral one.¹⁴⁵

(2) Foreign Funding as Political Interference in the *Domaine Réservé*?

Such an interconnected change of practice as in the cases of Venezuela, Russia and Hungary may contribute to an interpretation of what constitutes a political interference in the *domaine réservé* and thus a violation of the principle of non-intervention. Despite its central position in traditional international law the exact contours of the principle of non-intervention have remained fluid. The interrelatedness between the *domaine réservé* and a state’s constantly evolving human rights obligations prompts an interpretation according to which states can rely on their margin of appreciation available under human rights law in order to delineate their *domaine réservé* and to define what constitutes an illegal interference.¹⁴⁶ Thus, in principle, any legislation complying with a state’s human rights obligations can define a state’s *domaine réservé*. Political interference is a broad concept encompassing miscellaneous situations where one state influences the internal political processes of another. Pertinent activities may differ considerably in terms of intensity and coerciveness.¹⁴⁷ They include forms of indirect interference, inter alia through political subversive means. On this basis the concept of political interference is usually delineated according to different categories of cases.¹⁴⁸

There is so far no established international jurisprudence on restrictions of foreign funding for NGOs. Cases against the Russian legislation are pending before the European Court of Human

¹⁴² Speech given by President Putin at a meeting with officers from the Federal Security Service (FSB) in February 2013.

¹⁴³ European Commission for Democracy through Law (Venice Commission), *Opinion on Federal Law No 121-FZ on Non-Commercial Organizations (‘Law on Foreign Agents’), on Federal Laws No. 18-FZ and No. 147-FZ and on Federal Law No. 190-FZ on making amendments to the Criminal Code (‘Law on Treason’) of the Russian Federation*, Opinions No. 716-717/2013 of 27 June 2014, at para. 13.

¹⁴⁴ Hungary, Law on the Transparency of Organisations receiving support from abroad (T/14967 of 7 April 2017), adopted on 13 June 2017; English translation: Venice Commission, Opinion No. 889 / 2017, CDL-REF(2017)031.

¹⁴⁵ See Venice Commission, *supra* note 135, at para. 24.

¹⁴⁶ Cf. Nolte, ‘Art. 2 (7) UN-Charter’ in Simma et al (eds), *The Charter of the United Nations: A Commentary* (3rd ed., 2013), at MN 42.

¹⁴⁷ Jamnejad and Wood, *supra* note 128, at 368.

¹⁴⁸ Kunig, ‘Intervention, Prohibition of’ in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008), para 6.

Rights (ECHR)¹⁴⁹ but general standards may provide some orientation. According to the Nicaragua judgment funding for violent insurrectionary opposition groups constitutes an illegal interference.¹⁵⁰ In the case of non-insurrectionary political parties, state practice has not been very clear but has apparently evolved since the 1980s.¹⁵¹ In 2007, the ECHR confirmed that the prohibition on the funding of political parties by foreign states and foreign political parties is 'necessary for the preservation of national sovereignty' and thus compatible with Article 11 of the Convention.¹⁵²

In case of NGO funding the Council of Europe (CoE) has issued a number of recommendations and advocates different standards than for political parties. Thus, CoE Recommendation CM/REC(2007)14 states that

50. ...NGOs should be free to solicit and receive funding ... not only from public bodies in their own state but also from institutional or individual donors, another state or multilateral agencies, subject only to the laws generally applicable to customs, foreign exchange and money laundering and those on the funding of elections and political parties.

The Explanatory Memorandum to the Recommendation adds that 'such donations should not be subject to ... to any special reporting obligation.'¹⁵³ This interpretation is currently challenged by those states which claim that their human rights' margin of appreciation covers a right to enact legislation limiting foreign funding for NGOs based on different justificatory strategies. The success of their attempts depends on the resilience of international structures in maintaining formerly consented interpretations.

cc) The Challenge for International Institutions: Identifying Evasive Legal Arguments

Many observers consider Hungary to be a prime example for populist strategies to broadly act within the framework of a constitutional democracy and its international obligations yet to alter the defining features of democratic constitutionalism that embraces 'open statehood'.¹⁵⁴ Such a strategy challenges the lawyer's ability to identify where populist governments raise valid legal arguments in order to promote law-reform or where they employ 'evasive legal tricks'.¹⁵⁵ Thus, the official justification for the Hungarian Law - in line with the standards set by the CoE's resolutions - invokes the need to protect the political and economic interests of the country and to counter money-laundering and financing of terrorism by furthering transparency. Moreover, after criticism

¹⁴⁹ ECtHR, *ECODEFENCE and others v. Russia and 48 other applications*, Appl. No. 9988/13. All ECtHR decisions are available online at: <http://hudoc.echr.coe.int/>.

¹⁵⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Reports (1986), 14, at 119 para. 228.

¹⁵¹ Jamnejad and Wood, *supra* note 128, at 368.

¹⁵² ECtHR, *Parti Nationaliste Basque – Organisation Regionale d'Iparralde v. France*, Appl. No. 71251/01, Judgment of 7 June 2007, at para. 47; Fislser Damrosh, *supra* note 126, at 43.

¹⁵³ Council of Europe, *Explanatory Memorandum to Recommendation CM/Rec (2007) 14 of the Committee of Ministers to member states on the Legal Status of Non-Governmental Organizations in Europe*, para. 101; Principle 7 of the Venice Commission-OSCE Joint Guidelines on Freedom of Association (2014), CDL-AD(2014)046, at 18 para. 32.

¹⁵⁴ Amongst others Scheppele, *supra* note 34, at 549.

¹⁵⁵ Scheppele, *supra* note 47, at 5.

by the CoE¹⁵⁶ the Hungarian Parliament adopted the Law responding to some of the issues raised. The Venice Commission accepted that these amendments improved the law but considered the amendment to be insufficient to meet Hungary's human rights obligations.¹⁵⁷ Of course, there is per se nothing specific about violating human rights by legislation which imposes disproportionate sanctions or exerts discriminatory effects. Such human rights violations may occur in any constitutional democracy and can be rectified in judicial processes. Hungary responded to the criticism of the Venice Commission by accepting certain international criticism but demonstrated that the government continues to consider its claim to regulating foreign-funding of NGOs as politically legitimate as well as legally realizable.

As a consequence, the Hungarian Law poses a specific challenge for human rights institutions because, first, the aim to guarantee transparency in order to stop money-laundering or financing of terrorism complies prima facie with the CoE standards. Secondly, the assumption that transparency is only desirable to stop criminal activities is in itself increasingly contested because transparency about foreign funding is considered to be a guarantee for political accountability. Accordingly, one can observe considerable changes in the reasoning of the Venice Commission when comparing its approaches in the cases of Russia in 2014 and Hungary in 2017. While the Venice Commission's statements on the Russian law applied the standards of CoE Recommendation CM/REC(2007)14,¹⁵⁸ it now accepts that 'the aim of ensuring transparency of civil society organisations in order to prevent undue foreign political influence' may be legitimate.¹⁵⁹

Thus, international institutions controlling legislative acts of populist governments need to take into account that claims raised by these governments may have a legitimate core and address issues where law-reform is required as a corrective for negative and unintended consequences of globalization. Otherwise the identification of 'evasive legal arguments' may become a slippery slope when rejecting contestations of dominant legal interpretations. Human rights institutions have to carefully scrape out where a per se legitimate aim is only used as a pretext. In order to question that 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. Delineating whether such a law crosses the tipping point and can be considered to be legally evasive poses an argumentative burden. To meet this burden, human rights institutions can rely on those elements of human rights protection which allow to take the overall context into account. They include the prohibition of unjustified discrimination or the criterion of creating a 'chilling effect' through a regulation on the freedom of speech. The Venice Commission relies on both elements in the cases of Russia and Hungary.¹⁶⁰

But what maybe more difficult to claim is that a per se legitimate aim is affected by political debates within a state that have a strong populist undertone. Where the limit of criminal law is not crossed it is difficult to take a particular political environment into account. Of course, the ECHR might question whether a certain legitimate aim is truly pursued.¹⁶¹ Examples concern cases where

¹⁵⁶ Council of Europe, Parliamentary Assembly Resolution 2162 (2017), 27 April 2017.

¹⁵⁷ Venice Commission, *supra* note 135, at paras. 63 and 64.

¹⁵⁸ Venice Commission, *supra* note 143, at para 27.

¹⁵⁹ Venice Commission, *supra* note 135, at para 66.

¹⁶⁰ Venice Commission, *supra* note 135, at para. 65.

¹⁶¹ See B. Baade, *Der Europäische Gerichtshof für Menschenrechte als Diskurswächter* (2017), at 131 et seq.

court proceedings were inconclusive because contradictory legal evidence in procedure existed¹⁶² or where the interference could not attain the goal pursued and would thus not serve the legitimate aim pursued.¹⁶³ A per se legitimate aim may also be falsely claimed where the factual basis for an executive or legislative measure is obviously insufficient. But the Court has so far been hesitant to deduce from the conduct of the parliamentary proceedings or the public debate surrounding a legislative process that a legitimate aim was falsely advanced. Thus, in the case of *S.A.S. v. France* on the prohibition of the burkha in public places in France the Court was only 'very concerned by ... certain Islamophobic remarks [which] marked the debate which preceded the adoption of the Law.'¹⁶⁴ But the court did not question the legitimate purpose of the law on these grounds. In the long run the structural specifics of human rights may lead to the question to what extent the individual rights-based approach of international human rights adjudication is apt to respond to challenges posed by populist governments because the broader context, such as other legislative or constitutional changes, cannot sufficiently be included in the review of a specific human rights violation. As a consequence, these limitations may make monitoring and reporting procedure more important in the years to come.

4. Conclusion: Between Principled Opposition and Cherry-picking

Populist governments' attitude towards international law oscillates between an instrumental approach and a rhetoric-based principled opposition which, if enacted in practice, would significantly change international law's nature as it has developed after 1990. Populist governments promote a concept of international law as a law of coordination and aim to reduce international law to an instrument for furthering national interests. This approach also impacts upon the interpretation of the relationship between international and national law: the latter should prevail where international law is seen to be detrimental to the interests of the population. So far, such very fundamental rifts between international law and the defining characteristic of populism predominantly materialize in political speeches and party programmes. Withdrawal or non-participation gain high attention among international audiences but still remain 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 although some instances of non-compliance, in particular in the field of human rights protection, have exerted a strong symbolic impact. Beyond rhetoric and symbolism the instrumental approach of populist governments fosters cherry-picking according to their policy preferences which may be influenced by ideological approaches as well as historical or geographical contingencies. There are also indications that populist governments occasionally ally in order to circumvent existing structures, to promote their agenda within international organizations or to change predominant interpretations of international law.

All this contributes to a perception of populist governments as backsliders in relation to the move which international law made after the end of the Cold War and furthers the impression that international law is currently in a state of crisis. One may be tempted to interpret this development as a temporal occurrence which will eventually not affect the overall (progressive) development of international law. One may even hail such turbulences as a way to bring about long-awaited reforms of the international legal order which may not be so progressive, after all. Or one can

¹⁶² ECtHR, *Kasparov vs Russia*, Appl. No. 53659/07, Judgment of 3 October 2013, at §§ 48-56.

¹⁶³ ECtHR, *Smith and Grady vs United Kingdom*, Appl. No. 33985/96 and 33986/96, Judgment of 27 September 1999, at § 74.

¹⁶⁴ ECtHR, *S.A.S. v. France*, Appl. No. 43835/11, Judgment of 1 July 2014, at § 149.

simply ask whether the 1990s end of ideological confrontation lead international lawyers to overestimate the move international law had made and assume that ‘the end of ideologies’ is now substituted by ‘the end of illusions’. But all these considerations cannot hide that populist governments present a very fundamental challenge to international law and its institutions and require the international lawyer to reflect what needs to be preserved and what should be altered in the years to come.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.