# The Challenges of Populism: What Role for International Law Scholars?

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## 1. Framing the Problem

Far from ushering in a new world order based on shared governance and uniting – as opposed to merely interconnecting – peoples and individuals of differing aspirations and creed, economic globalisation has unleashed economic forces of impressive strength and reach[1]. In what resembles a competitive arena more than an international community, notwithstanding areas of global governance[2], private actors – especially financial firms and transnational corporations – compete for profit not only among each other, but also with public actors (such as States and international organisations) in the provision of 'public' services and opportunities. These actors are capable of influencing public policies and, at times, gaining exemptions from civil and fiscal jurisdictions, proffering themselves as benign 'despots'[3] rather than as machines wired purely for profit[4]. Untamed and benefiting from the open-ended means made available by technology, they spread worldwide, making it difficult, if not impossible, for domestic political actors to supervise them in the name of public interest.

Economic globalisation contributed to unprecedented growth in numerous States and has brought novel opportunities to many individuals around the world[5].

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[1] A.M. SLAUGHTER, *A New World Order*, Princeton, 2004, pp. 261-271.

[2] E. BENVENISTI, *The Law of Global Governance*, The Hague, 2014, pp. 25-68.

[3] See D. LUSTIG, E. BENVENISTI, "The Multinational Corporation as 'The Good Despot' The Democratic Costs of Privatization in Global Settings", in *Theoretical Inquiries in Law* 2014, p. 125 ff.

[4] E. BENVENISTI, G.W. DOWNS, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law", in *Stanford Law Review* 2007, p. 595 ff. See also details the increasing efforts of Amazon in lobbying the US government S. SOPER, N. NIX, B. BRODY, B. ALLISON, "Amazon's Jeff Bezos Can't Beat Washington, So he's Joining the Influence Game", Bloomberg, 14 February 2018, available at www.bloomberg.com.

[5] P. ALSTON, "The Myopia of the Handmaidens: International Lawyers and Globalization", in *European Journal of International Law* 1997, p. 435 ff.

DIRITTI UMANI *e* DIRITTO INTERNAZIONALE
vol. 14, 2020, n. 1, pp. 5-31


ISSN: 1971-7105

As economist Francois Bourguignon has remarked, globalisation made it possible for inequality to decrease between at least some countries, pulling several hundred million people above the threshold of absolute poverty[6]. Yet, even if judged positively, the long-term (and unintended) consequences of economic globalisation and its mutations over the years are to be considered precisely because of its wide-ranging effects on millions of people[7]. Not only did economic globalisation pave the way for the 2007-2008 financial crisis, the reverberations of which are still felt today across the globe[8], but it also produced winners and losers, causing a rise in inequality in certain countries[9]. Absent a global regulatory authority and genuine accountability, globalisation brought about an unexpected shrinking of rights and opportunities, particularly among young generations[10].

In light of these and other developments, a snapshot of contemporary international society might capture a complex reality characterised not only by an overall increase in the wealth of some countries, but also by the gradual affirmation of a competitive, multipolar world order. This unfolding new world order appears fractured in its ideals and aspirations, and «between the ultra-rich and the middle and lower classes»[11].

Discontent, protest and, at times, resistance define the response of the layperson – especially, but not exclusively, after the 2007-2008 financial crisis. Alienated citizens who, for various reasons, did not benefit from globalisation have embraced populist movements and political parties (often leaning towards the far-right) that challenge globalisation[12]. As such, the process of economic globalisation is accompanied by a process of political localisation[13] and democratic instability[14], rather than political integration[15]. A quest for identity[16], recognition and economic security

[6] F. BOURGUIGNON, *The Globalization of Inequality,* Princeton, 2015.

[7] See in this regard, R. HOWSE, "The Globalization Debate – A Mid-Decade Perspective", in *Research Handbook on Global Administrative Law*, p. 515 ff. See also M. COX, "The Rise of Populism and the Crisis of Globalisation: Brexit, Trump and beyond", in *Irish Studies in International Affairs* 2017, p. 9 ff.

[8] "Left Behind: How to Help Places Hurt by Globalisation", in *The Economist* 21 October 2017, p. 11 and in the same issue see "In the Lurch", p. 19 ff.

[9] P.M. DUPUY, "International Law: Torn Between Coexistence, Cooperation, and Globalization. General Conclusions", in *European Journal of International Law* 1998, p. 282 ff.

[10] See in this regard T. PIKETTY, *Capital in the Twenty-First Century*, Cambridge, 2014.

[11] WORLD ECONOMIC FORUM, "*Creating a Shared Future in a Fractured World*", World Economic Forum 23-26 January 2018, available at www.weforum.org.

[12] J. HAIDT, "When and Why Nationalism Beats Globalism", in *The American Interest,* 10 July 2016.

[13] For an analysis of these concepts see I. GREENER, "Localization", Encyclopaedia Britannica, available at www.britannica.com.

[14] G. SITARAMAN, "Economic Inequality and Constitutional Democracy" in M. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, p. 533 ff.

[15] See in this regard S. POLAKOW-SURANSKI, "White Nationalism is Destroying the West", in *The New York Times* 12 October 2017.

[16] F. FUKUYAMA, *Identity: The Demand for Dignity and the Politics of Resentment*, 2018, New York, pp. 50-104.

seems to nourish this process[17]. Hence, disappointingly, or perhaps only logically as a direct and opposite reaction to the policies of countries that spearheaded globalisation and the difficulties that more open societies face in a competitive global arena, it is in democratic countries that political localisation is gaining momentum[18].

This paper is an opportunity to reflect on these processes from an international law perspective. It seeks to understand what role, if any, international law should play in the context of, and in response to, such sweeping economic and political processes. It sketches out the main challenges that populism – similar to a sort of three-headed Cerberus – poses to mainstream international lawyers and human rights activists with long-held views, forcing us to think outside the box. The first challenge concerns the threat to liberal democracy, charged with being inefficient and unwilling or too weak to protect the interests and rights of the 'real people', as opposed to those of the elites or of ethnic and other kinds of minorities[19]. The second is the challenge to economic globalisation itself and the inequalities that it has brought about with all the ensuing consequences from a human rights perspective. The third may be defined as the challenge of 'national populism', which targets the liberal order in the name of national sovereignty[20]. As the latter more directly addresses fundamental principles of international law and requires international lawyers to think about the function of international law and international lawyers in the 21st century – a topic on which opinions are divided – some further analysis is proffered.

## 2. The Challenge of Populism to Liberal Democracy

While many States have benefited significantly from economic globalisation and have strengthened their position on the world stage, other States have reaped little or none of its benefits. Some liberal democracies in the Western world appear to be in difficulty[21]. It is not that the democratic State as a political and legal entity is in retreat in terms of power over its own citizens; it is rather the bond between governors and the governed that appears strained. To many citizens in the Western world, the State has become a disappointing institution and the perception of a loss

[17] H.B. CHAE, "Brexit: Is Britain Culpable?", in *Journal of East Asia and International Law* 2017, p. 27 ff.

[18] See R. EATWELL, M. GOODWIN, *National Populism: The Revolt Against Liberal Democracy*, London, 2011, p. 43 ff.; M. WOLF, "The Rise of the Populist Authoritarians", in *Financial Times* 23 January 2019; "League of Nationalists", in *The Economist* 19 November 2016, p. 51.

[19] A. HUQ, T. GINSBURG, "Democracy's 'Near Misses", in *Journal of Democracy* 2018, p. 16 ss. See also by the same authors "How to lose a Constitutional Democracy", in *University of California - Los Angeles Law Review* 2018, p. 78 ss.

[20] "The New Nationalism", in *The Economist* 19-25 November 2016, p. 9.

[21] As noted by J. CRAWFORD, we should 'emphasize the legal distinction between States and, say, non-sovereign multinational companies that in many respects may be more powerful than the States with which they transact, especially when they are small or developing States'. J. CRAWFORD, *Chance, Order, Change: The Course of International Law: General Course on Public International Law*, Pocketbooks of the Hague Academy of International Law, The Hague, 2013, p. 109.

of 'democratic governance' is growing[22]. Where I see a chink in the armour of some democratic States is in the State's difficulty in functioning effectively as a democratic governance institution, and in its (in)ability to simultaneously protect the security and rights of all its residents and thus ensure that the nation works with the State and not against it. Well-developed democratic States could thus fail their citizens and lose legitimacy. This manifests itself in disenchantment that takes the form of non-voting or voting protest movements, such as populist movements[23].

Populism is an idea with a long pedigree[24]. It surfaces intermittently through different historical periods associated with varying social phenomena[25]. The Oxford Dictionary of Politics indicates that populist beliefs involve the «defence of the (supposed) traditions of the little man against change seen as imposed by powerful outsiders»[26]. 'Populism' is used to define, often with a derogatory connotation, large protest movements expressing the grievances and disillusionment of ordinary people[27]. Populism, *inter alia*, led or at least contributed to the following: the victory of Donald Trump in the US Presidential elections (8 November 2016), the vote in favour of the United Kingdom leaving the European Union in the so-called Brexit referendum (23 June 2016), and the rise of various forms of populist governance in Europe[28].

[22] See in this regard the report "Democracy in Retreat" Freedom House 2019, available at freedomhouse.org.

[23] Donald Trump in his inauguration gave voice to these feelings thus: 'For too long, a small group in our nation's Capital has reaped the rewards of government while the people have borne the cost. Washington flourished – but the people did not share in its wealth. Politicians prospered – but the jobs left, and the factories closed. The establishment protected itself, but not the citizens of our country. Their victories have not been your victories; their triumphs have not been your triumphs; and while they celebrated in our nation's Capital, there was little to celebrate for struggling families all across our land.' See "Remarks: The Inaugural Address", The White House, 20 January 2017, available at www.whitehouse.gov.

[24] Y. ALGAN, E. BEASLEY, D. COHEN, M. FOUCAULT, *Les origines du populisme*, Paris, 2019, p. 11 ff.

[25] Y. MÉNY, Y. SUREL (eds.), *Democracies and the Populist Challenge*, London, 2002, pp. 1-21. E. LACLAU, *On Populist Reason*, London, 2005, p. 175 ff.

[26] I. MCLEAN, A. MCMILLAN, *Oxford Concise Dictionary of Politics*, Oxford 3rd ed., 2009, p. 422.

[27] See J.B. JUDIS, "The Populist Explosion': How the Great Recession Transformed American and European Politics", in *Columbia Global Reports* 2016, pp. 13-17. J.W. MÜLLER, *What is Populism?*, Princeton, 2016, p. 7 ff.; C. MUDDE, C.R. KALTWASSER, *Populism: A very Short Introduction*, Oxford, 2017, p. 1 ff. See also A.-M. PAVEAU, "Populisme: itinéraires discursifs d'un mot voyageur", in *Critique* 2012, p. 84.

[28] See in this regard B. BUGARIC, A. KUHELJ, "Varieties of Populism in Europe: Is the Rule of Law in Danger?", in The Hague Journal on the Rule of Law 2018, p. 21 ff. J. ZIELONKA, *Counter-Revolution: Liberal Europe in Retreat*, Oxford, 2018. See also thorough analysis (particularly with reference to the Italian case) undertaken in L. CORSO, "When Anti-Politics Becomes Political: What can the Italian Five Star Movement Tell us about the Relationship between Populism and Legalism", in *European Constitutional Law Review* 2019, p. 462 ff. See also S. SETEU, "The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy Part of the Solution?", in *European Constitutional Law Review* 2019, p. 488 ff.; R. HEINISCH, "A Populist Victory in Austria. The Freedom Party Enters Government", *Foreign Affairs* 28 December 2017, available at www.foreignaffairs.com.

Populism as a protest movement is typical of democracies. It is within democracies that those grievances can be freely expressed. There is no populism as a political movement in authoritarian countries unless it is used by a given leader as an instrument of governance. It unfolds within democracies due to the combination of the freedom and pluralism that democracy allows and what Norberto Bobbio calls the «broken promises of democracy»[29]. These unfulfilled promises include the inability, for one reason or another, of elected representatives to accomplish what they promised during the elections or to give back to the electors what they expected[30]. As Samuel Issacharoff put it, populism «is a response to the perceived failure of democratic regimes to protect the labouring classes from economic dislocation»[31].

The use of the noun 'populism' is not, as a general rule, chosen by populist movements, which tend to identify themselves in light of the content of the political battles they fight. Non-populists, however, use it at times to cast a pejorative shadow over populist movements[32]. On this point, Robert Howse[33] cautions against tarnishing all political leaders and movements with the same populist label. Some of them are meritoriously popular, in the sense that they aim to regenerate politics by replacing *ancien régime* political ideas with new faces and ideas that are ultimately focused on issues of direct concern to the layperson. True, the risk of generalisation is high and so is that of misuse. Nonetheless, the label 'populism' is not an umbrella term that can be used for whatever political movement one happens to disagree with or disapprove of. If used properly, it refers instead to a social and political phenomenon with reasonably distinctive traits, as this section seeks to highlight, which help connect current political movements with previous movements[34]. Hence, it is a matter of assessing whether the term is used improperly or not. In fact, albeit with differing declinations from one case to another, populist movements, as they have manifested in recent years, share the traits of being anti-elitist, anti-pluralist, nationalist and anti-globalist. These aspects are discussed in turn.

Inspired by a Manichean vision of society, populism is a political concept building on the belief that a given society can be divided into two antagonistic

[29] J.W. MÜLLER, *What is Populism?*, cit., pp. 76-79.

[30] On the relationship between populism and democracy see B. MOFFITT, *The Global Rise of Populism*, Stanford, 2016, pp. 133-151.

[31] S. ISSACHAROFF, "Populism versus Democratic Governance", in M. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, p. 445 ff., pp. 462-463.

[32] Michael Cox suggests that 'Populism would thus seem to defy easy political pigeon-holing. But one thing most writers on the subject seem to be united. They don't much like it and have tended to approach the subject with a mixture of enormous surprise-who amongst them predicted Brexit and Trump in 2016 – mixed in with a strong dash of ideological distaste'. M. COX, "The Rise of Populism and the Crisis of Globalisation: Brexit, Trump and Beyond", in *Iris Studies in International Affairs* 2017, p. 9 ff.

[33] R. HOWSE, "Epilogue: in Defense of Disruptive Democracy – A Critique of Anti-Populism", in *International Journal of Constitutional Law* 2019, p. 641 ff.

[34] See on this aspect W.A. GALSTON, *Anti-Pluralism*: *The Populist Threat to Liberal Democracy*, New Heaven, 2018.

classes: the common people and the elites. The people are the sovereign of the political regime and the only legitimate interpreter of «social, economic and cultural dynamics»[35]. It is in itself construed as a political category capable of expressing the grievances of many individuals with one common voice of which populist leaders are the only legitimate interpreters[36]. For Laclau, the structural elements of populism consist of a set of «discursive resources» that aim at the restoration of the «primacy» of the people over the elites responsible for having «betrayed» the people by leaving their demands unfulfilled[37]. As such, populism, as also illustrated by a number of historical cases (from the ascent of Hitler to the Italian Communist Party under Togliatti's leadership)[38], is not a movement that can be associated *tout court* with a specific political family. The elites are depicted as incompetent and devious; the people are singled out as having a distinct «racial or ethnic identity», as a morally pure, homogeneous entity who deserve more than they have were it not for the elites' flaws[39]. The 'bad' elites have the same attitude in the reverse. They look down at populist movements as individuals who have enough and do not deserve more[40]. What they challenge is not merely the correctness of others' political policies, but also the legitimacy to rule of those who disagree with them. As one entity challenges the legitimacy of others to govern, a *dialogue de sourds*, involving little actual acknowledgement and responsiveness to each other's views, emerges between the 'elites' and 'populists'. This divide spreads, thereby affecting democratic governance, which is based on productive dialogue and compromise between an equally legitimate majority and minority[41]. With an exclusionary, anti-pluralistic mindset, minorities and foreigners can easily become a target, as can the institutions that protect their human rights[42]. In this regard, the Secretary General of the Council of Europe defined populists as «political forces which appeal to widespread public grievances while seeking to exclude other voices»[43] and expressed the fear that «democracies can go backwards» because populism damages democracy by «reducing political pluralism» and «undermining individual human rights and minority protection»[44]. Furthermore, populism tends to embrace direct

[35] C. MUDDE, C.R. KALTWASSER, *Populism: A very Short Introduction*, cit. pp. 9-16.

[36] E. LACLAU, *On Populist Reason*, London, 2005, pp. 223-238.

[37] *Ibid*., p. 176.

[38] *Ibid*., pp. 177-185.

[39] See in this regard D. KING, R. M. SMITH, "Populism, Racism, and the Rule of Law in Constitutional Democracy Theory", in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, p. 459 ff.

[40] W. BAGEHOT, "Power to the People", in *The Economist* 18 November 2017, p. 34.

[41] E. LUCE, "Democratic deficit", in *The Financial Times* 6 August 2017, p. 7.

[42] V. STOYANOVA, "Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights", in *European Journal of Legal Studies* 2018, p. 83 ff.

[43] T. JAGLAND, *State of Democracy, Human Rights and the Rule of Law: Populism – How Strong are European's Checks and Balances? Report by the Secretary General of the Council of Europe*, Council of Europe, Strasbourg, 2017, p. 4, available at edoc.coe.int.

[44] *Ibid*., p. 6.

sovereignty of the people as envisaged by Jean Jacques Rousseau[45]. It rests on the idea of the general will (*volonté générale*) as opposite to the will of everybody whereby members of parliaments are not representatives, but agents of the people. As agents of the people, fulfilling their requests becomes an imperative that needs to be translated into policy in accordance with populist wishes. Populist leaders assert a direct bond between the 'people' and their own entitlement to formulate and deliver policies designed to precisely satisfy the needs of the people directly supporting them[46]. The risk with this approach is that the delicate system of checks and balances glued together by constitutional arrangements that is the hallmark of liberal democracies is trumped by the predominance of the will of the people[47]. Though not properly defined, this will dominate over that of any other democratic institution and over that of those who disagree with it, albeit in a minority position.

On the other hand, Ernesto Laclau argues that populism may be a positive force for democracy. Democracy and populism are both built on the political idea of the 'people' as the legitimate holder of sovereignty. The construction of a people is *sine qua non* for democratic functioning[48]. Unlike representative democracy, populism calls for the direct engagement by average individuals to exercise their sovereignty as people[49]. The problem remains, however, that because this structural mindset is both neutral from existent forces and radical in its demand for change of power back to the people, populist discourse may be enlisted in the service of authoritarian regimes at both ends of the political spectrum[50]. According to Erica Frantz, developments worldwide in the past decade or so suggest that populist rhetoric among democratically-elected leaders served as launching pads for transitions to authoritarianism[51]. Interestingly, Frantz also remarks that while populist movements in the past may have reached positions of power by bypassing through clean breaks with democracy, current populists use democracy to «subtly

[45] See Y. MENY, Y. SUREL, *Par le peuple, pour le peuple*, Paris, 2000, pp. 188-189 and P. ROSANVALLON, *Le siècle du populisme*, Paris, 2020, pp. 151-158. See also N. URBINATI, *Me the People*, Cambridge, 2019, pp. 103-104.

[46] See generally M. CANOVAN, "Taking Politics to the People: Populism as the Ideology of Democracy", in Y. MÉNY, Y. SUREL (eds.), *Democracies and the Populist Challenge*, London, 2002, pp. 25-44 and D. KING, R.M. SMITH, "Populism, Racism and the Rule of Law", in *Constitutional Democracy in Crisis,* Oxford, 2018, pp. 462-463.

[47] See P. BLOKKER, "Populist Counter-Constitutionalism, Conservatism and Legal Fundamentalism", in *European Constitutional Law Review* 2019, p. 519 ff.

[48] E. LACLAU, *On Populist Reason*, cit. p. 169

[49] B. MOFFITT, *The Global Rise of Populism*, cit., pp. 137-38.

[50] K.L. SCHEPPELE, "The Opportunism of Populists and the Defense of Constitutional Liberalism", in *German Law Journal* 2019, p. 314 ff. See also B. BUGARIC, "The Two Faces of Populism: Between Authoritarian and Democratic Populism", *in German Law Journal* 2019, p. 390 ff. P. NORRIS, "It's Not Just Trump. Authoritarian Populism Is Rising Across the West. Here's Why", in *Washington Post* 11 March 2016.

[51] E. FRANTZ, *Authoritarianism: What Everyone Needs to Know,* Oxford, 2019, p. 99.

chip away at it»[52]. In such contexts, populism becomes a political strategy employed by a specific type of leader who seeks to govern based on direct and unmediated support from the masses. Peronism, Poujadism and, more recently, Hugo Chavez's ruling of Venezuela are examples in this regard[53].

Because of its divisive nature, it constitutes a threat to any form of representative democracy. The democratic State works because the majority of its people are willing to work together, and conversely fails if a country is divided into factions that do not respect each other. As such, the ruling elites need to reach out to the people through policies that show they are listening to the problems that are otherwise ignored. It is possible that democratic governance is unable to function and thereby blocks its capacity to keep the social contract with its citizens, and stops investment in education and innovation. This, in turn, makes a country regress and a democracy backslide, thus paving the way to authoritarian rule by organised minorities.

## 3. The Populist Challenge to Economic and Financial Globalisation

Recent literature has focused on populism as a threat to democracy and human rights[54], and rightly worries about its darker face: nationalism[55]. Philip Alston speaks perceptively of a «declining faith in democracy»[56] and consequently asserts that there has been «radical diminution in the support for democracy in many of the established democracies» and «a growing openness to considering alternatives which might be seen to offer a happier future»[57]. This line of thinking seems to blame populism as the chief cause for weakening democracies. While it is true that populism is at odds with and may harm representative democracy, as outlined in the previous section, not enough attention is paid to the role of economic and financial globalisation. The latter is the process that precedes populism and in part feeds it by bringing about the social conditions that affect the lives of ordinary people, creating the income inequality and a subsequent lack of opportunities that animate populist rants against both globalists and liberal democracy[58]. The claims of populists are numerous and vary along a political scale going from moderate to extreme. They cannot be fully understood, however, without understanding how much the extreme, largely

[52] G. HALMAI, "Populism, Authoritarianism and Constitutionalism", in *German Law Journal* 2019, p. 296 ff.

[53] See in this regard C. DE LA TORRE, "Left-Wing Populism: Inclusion and Authoritarianism in Venezuela, Bolivia, and Ecuador", in *Brown Journal of World Affairs* 2016, cit., p. 61 ff.

[54] P. ALSTON, "The Populist Challenge to Human Rights", in *Journal of Human Rights Practice* 2017, p. 1 ff.

[55] *Ibid.*, pp. 4-6.

[56] *Ibid.*, p. 4.

[57] *Ibid.*, p. 5.

[58] L. ELLIOTT, "Brexit is a Rejection of Globalisation", in *The Guardian* 26 January 2016. S. WANG, "Brexit's Challenge to Globalization and Implications for Asia", in *A Chinese Perspective Journal of East Asia and International Law* 2017, p. 47 ff. L. SUMMERS, "Voters deserve Responsible Nationalism not Reflect Globalism", in *The Financial Times* 10 July 2016.

ungoverned form of economic and financial globalisation, nourished by technological developments, directly threatens the level of job security and opportunities that were almost taken for granted only a few decades ago.

Globalisation is in many respects an old idea[59]. It resists, however, any single or simple definition due to its use in different contexts with differing purposes[60]. The sixth edition of the Shorter Oxford English Dictionary defines globalisation as the «action or an act of globalising»[61]. This suggests that globalisation is essentially a process that operates 'worldwide' and is pertinent to 'the whole world'. The French translation of globalisation is *mondialisation*, which the Larousse dictionary describes as the «*fait de devenir mondial, de se mondialiser*». The choice of the term *mondialisation* seems to denote a more neutral meaning than the correspondent French noun of *globalisation*, which is associated with the intent to spread something globally[62]. Globalisation is characterised by de-territorialisation, interconnectedness and social acceleration, and operates transnationally[63]. However, far from being a neutral spontaneous process and despite the non-committal and somewhat enticing terminology employed to describe the phenomenon, the pressing issue is to discern who the globalizers are, in which specific fields they operate, and what kind of impact they have on those globalised[64].

Legal scholars have identified different kinds of globalisation, including global governance and legal globalisation[65]. Eyal Benvenisti explains that State authorities increasingly delegate more «regulatory discretion to various forms of public and private, formal and informal institutions» and that «global governance now addresses almost all areas of public and private life, from the disarmament of weapons of mass destruction to setting food safety standards»[66]. Speaking of legal globalisation, Julian Ku and John Yoo are concerned with the influence of «foreign and international law in constitution interpretation»[67]. They worry that the US Supreme Court could usurp popular sovereignty by impermissibly importing foreign and international law norms into US constitutional jurisprudence, and argue that

[59] See in this regard K. O'ROURKE and H. G. WILLIAMSON, *Globalization and History: The Evolution of a Nineteenth-Century Atlantic Economy*, Cambridge, 2001, p. 1 ff.; T. DUNNE, C. REUS-SMIT, "The Globalisation of International Society", in T. DUNNE, C. REUS-SMIT (eds.), *The Globalization of International Society*, Oxford, 2017, p. 18 ff. H. JAMES, "New Concept, Old Reality", in *Finance & Development*, 2016, p. 18 ff.

[60] P. JAMES and M.B. STEGER, "A Genealogy of 'Globalization': The Career of a Concept", in *Globalizations* 2014, p. 417 ff.

[61] See the entry for 'globalisation' in A. STEVENSON, L. BROWN (eds.), *Shorter Oxford English Dictionary (Volume I)*, Oxford, 2007, p. 1109.

[62] See "Globalisation", Dictionnaire de français Larousse, available at www.larousse.fr.

[63] J.A. SCHOLTE, "Defining Globalisation", in *The World Economy* 2008, p. 1498 ff.

[64] See E. BENVENISTI, *The Law of Global Governance*, The Hague, 2014, p. 25. M.S. BARR, "Who's in Charge of Global Finance", in *Georgetown Journal of International Law* 2014, p. 1026 ff.

[65] P.J. SPIRO, "Sovereigntism's Twilight", in *Berkeley Journal of International Law*, 2013, p. 308 ff.

[66] E. BENVENISTI, *The Law of Global Governance*, cit. p. 25.

[67] J. KU, J. YOO, *Taming Globalization*, Oxford, 2012.

this process «represents another way that globalisation is affecting public law-making» and should therefore be tamed[68]. Gerry Simpson further speaks of the globalisation of international law, which aims to «establish a truly global (universal) international legal order»[69].

In the absence of a global sovereign and a global judiciary, and in the presence of a pluralistic international society, the 'global' as a realm of public function remains, however, a notable exception more than a majoritarian pattern. In the sense of an effective constraining political or legal authority over the will of individual States (let alone multinational corporations), global governance is still rather restricted. As noted in the introduction, the 'public' seems to be often absent in a growing neoliberal[70] international society notwithstanding specific but limited areas of public governance. For instance, Mark Beeson and Stephen Bell observe that the «financial and banking systems remain too large, too complex, and riddled with system risk-taking incentives», which put the whole economic system at some risk[71]. While there is a network of formal institutions such as the International Monetary Fund, and informal «bureaucratic, standard setting bodies» such as the Basel Committee on Banking Supervision, the International Organization of Securities Commissioners (IOSCO) and the International Association of Insurance Supervisors (IAIS), their ability to control and direct events remains limited. Michael Barr explains that such arrangements did not work «to say the least» as the «most recent form of globalization consists of the attempt to eliminate all transaction costs, such as barriers that hinder trade, foreign-exchange restrictions and capital controls»[72], in order to form an «open» and «borderless» world economy[73]. It has resulted in the unprecedented and ever-expanding process of financialisation of the world economy, which tied the hands of democracies without providing them with «adequate safety nets»[74]. At least in part, States' sovereignty was as a result narrowed in the sense of choices available to them to adopt policies more fitting to their specific needs, and to set regulations and legal standards differing from those agreed upon internationally[75]. Such a hyper-disembedded globalised economy poses limits on the 'public' and social policies that democracies, also financially

[68] *Ibid*., p. 252.

[69] G. SIMPSON, "The Globalization of International Order", in T. DUNNE, C. REUS-SMIT (eds.), *The Globalization of International Society*, Oxford, 2017, p. 283.

[70] Neoliberalism may be defined as «a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong property rights, free market, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices». D. HARVEY, *A Brief History of Neoliberalism*, Oxford, 2005, p. 2.

[71] M. BEESON, S. BELL, "The Impact of Economic Structures on Institutions and States", in T. DUNNE, C. REUS-SMIT (eds.), *The Globalization of International Society*, Oxford, 2017, p. 295.

[72] *Ibid*.

[73] *Ibid*.

[74] *Ibid*., p. 178.

[75] D. RODRIK, *Straight Talk on Trade*, Oxford, 2018, p. 18.

constrained by their borrowing on international markets[76], may implement[77]. However, no parallel expansion of democratic space at the regional or global level accompanied these processes[78]. As well put by Adalberto Perulli, «the changes brought about by economic globalisation have radically challenged the capability of national legal systems to come up with adequate rules to govern the new dimension of the markets»[79].

Interestingly, once the institutional and normative conditions for the development of a world economy have been put in place and markets have therefore reached a sufficient degree of integration, economic globalisation does not need a global sovereign to thrive and can energise itself. Hyper-globalisation, for those accepting Rodrik's terminology, has allowed a vast chasm to develop between the reach of financial markets and the scope of their governance[80]. This has prompted an imbalance between the role of private and public actors, which is tilted in favour of the former. Speaking of this imbalance, Phillip Alston, in his capacity as special rapporteur, has remarked that «The neoliberal policies encapsulated in the 1980s-era Washington Consensus can be seen, especially in retrospect, to have greatly exacerbated economic insecurity, whether or not that was the intent»[81]. Privatisation was promoted even in relation to what were once seen[82] as «basic State functions, such as prisons, education and security»[83].

Finally, a peculiarity of economic (hyper-)globalisation is its unevenness. As a competitive process, it rewards and affects distinct players in distinct ways. It produces varied consequences in different places depending on the disparities between one State and another. Indeed, some countries, including some democratic ones, have been capable of thriving in times of globalisation[84], while some demo-

[76] M. BEESON, S. BELL, "The Impact of Economic Structures on Institutions and States", cit., p. 295.

[77] According to L. SUMMERS, «Even as globalisation increases inequality and insecurity, it is constantly and often legitimately invoked as an argument against the viability of progressive taxation, support for labour unions, strong regulation and substantial production of public goods that mitigate its adverse impacts». L. SUMMERS, "America Needs to Make a New Case for Trade", in *The Financial Times* 27 April 2008.

[78] S. MEINHARD, N. POTRAFKE, "The Globalization - Welfare State Nexus Reconsidered", in *Review of International Economics* 2012, pp. 271-287.

[79] A. PERULLI, "Globalisation and Social Rights", in W. BENEDEK, K. DE FEYTER, F. MARRELLA (eds.), *Economic Globalisation and Human Rights*, Cambridge, 2009, p. 127.

[80] RODRICK, *The Globalization Paradox*, cit.

[81] Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/35/26 of 22 March 2017, para. 4.

[82] *Ibid*.

[83] Report of the Special Rapporteur on Extreme Poverty and Human Rights on Privatization and Its Impact on Human Rights, UN Doc. A/73/396 of 26 September 2018, paras. 81-82.

[84] I. DE SOYSA, K.C. VADLAMANNATI, "Does Being Bound Together Suffocate, or Liberate? The Effects of Economic, Social, and Political Globalization on Human Rights, 1981-2005", in *Kyklos* 2011, p. 44.

cratic countries have not. Joseph Stiglitz argues that «poorly managed trade liberalization, has contributed to deindustrialization, unemployment, and inequality»[85]. Stiglitz calls for «fairer international rules» because the advocates of globalisation are wrong in arguing that «globalization has played no role in the plight of the large parts of the population [in the US] that have seen their incomes stagnate or decline, and that it's just technological progress that's to blame» since globalisation did affect both «jobs and wages»[86].

Populism is in some respects a consequence of the kind of globalisation described thus far. It cannot be disjointed from it, let alone dismissed, as it would simply be a pathology internal to some democratic countries due to their leadership's flaws, or the narrow visions and petty egoism of some of their citizens. It is in part the voice of those left behind by a global, and not necessarily fair, competitive process. In fact, while it is difficult to quarrel with the value of economic globalisation as an objective worth pursuing in and of itself as instrumental to global welfare – something international lawyers have supported[87] – the problems connected with it are relevant from a human rights perspective justifying the populist challenge.

Some of these problems are known; some have emerged more recently. Traditionally, there has been the 'delocalisation of production' whereby globalised companies could, to a greater or lesser degree, bypass domestic labour regulations and the scrutiny of trade unions by transferring their seats of production to certain foreign countries enabled by the elimination or reduction of trade barriers. In these situations, conditions for their workers often remain unknown to the wider public[88].

Notwithstanding the efforts made in this regard, the accountability of multinational corporations for human rights violations remains limited[89]. Lee McConnell opines that «State power has dramatically declined over the course of the last century, leading to a position of relative corporate impunity»[90]. He finds that «Many developing States are incapable of effectively safeguarding the human rights of their populations» out of the fear «that such activity might stem the flow of foreign

[85] J. STIGLITZ, *People, Power, and Profits*, New York, 2019, p. 89.

[86] *Ibid*., p. 82.

[87] P. ALSTON, "The Myopia of the Handmaidens: International Lawyers and Globalization", in *European Journal of International Law* 1997, pp. 435-448. See also S. SÜR, "The State between Fragmentation and Globalization", in *European Journal of International Law* 1997, p. 421 ff.

[88] J. STIGLITZ, *People, Power, and Profits*, cit., p. 189.

[89] B. SANTOSO, "Just Business – Is the Current Regulatory Framework an Adequate Solution to Human Rights Abused by Transnational Corporations", in *German Law Journal* 2017, vol. 18(3), p. 534 ff. See for further analysis and a broader perspective F. MARRELLA, "Protection internationale des droits de l'homme et activités des sociétés transnationales", in *Collected Courses of the Hague Academy of International Law* 2017, vol. 385, p. 188 ff.

[90] L. MCCONNELL, "Assessing the Feasibility of a Business and Human Rights Treaty", in *International and Comparative Law Quarterly*, 2017, p. 144 ff.

direct investment»[91]. Furthermore, courts have proved reluctant to hear cases concerning «extraterritorial conduct, and the complex corporate structures established by many business actors»[92]. The international mobility of firms, individuals and capital also restricts a State's ability to choose the taxation structure that best reflects its needs and preferences[93].

Perhaps the most recent and tangible problem for the layperson is the growth in inequality within nations. As put by Oxfam International, «There is no getting away from the fact that the biggest winners in our global economy are those at the top»[94]. Oxfam's research revealed that «over the last 25 years, the top 1% have gained more income than the bottom 50% put together» and that «since 2015, the richest 1% has owned more wealth than the rest of the planet»[95]. The same report concluded that «By any measure, we are living in the age of the super-rich, a second 'gilded age' in which a glittering surface masks social problems and corruption»[96]. According to Thomas Piketty, «a stronger, bigger and more efficient social State is needed to prevent the establishment of a patrimonial ruling class and to promote social justice that gives each citizen a fair chance»[97]. He also proposes a global taxation treaty, creating uniform conditions for the taxation of capital to avoid a race between different countries to have the lowest taxation rates to attract foreign capital and investment[98]. The International Monetary Fund has also called for «greater progressivity» in taxation, namely «higher marginal tax rates on top income earners» and the adoption of «redistributive fiscal policies»[99]. At present, however, the adoption of fiscal policies by democracies to reduce inequality is met with serious political and practical obstacles[100].

In light of the consequences of economic and financial globalisation and the processes of privatisation associated with them, all amplified by technological developments, populism can be regarded as a wakeup call to confront issues that are tangible and worrisome in terms of human rights, regardless of what one thinks of the overall process of economic and financial globalisation. Nevertheless, the response from a human rights perspective is not an easy one. Philip Alston suggests

[91] *Ibid*.

[92] *Ibid*.

[93] See L. SUMMERS, "A Strategy to Promote Healthy Globalisation", in *The Financial Times* 4 May 2008, available at www.ft.com.

[94] D. HARDOON, "Policy Paper: An Economy for the 99%", Oxfam International, 16 January 2017, p. 3, available at www.oxfam.org.

[95] *Ibid*., p. 2.

[96] *Ibid*.

[97] T. PIKETTY, *Capital in the Twenty-First Century*, Cambridge, 2014, pp. 471-492.

[98] See L. SUMMERS, "A Strategy to Promote Healthy Globalisation", in *The Financial Times* 4 May 2008.

[99] International Monetary Fund, *Fiscal Monitor* (October 2017), Executive Summary, at IX.

[100] T.B. EDSALL, "Why it is So Hard for Democracy to Deal with Inequality?", in *New York Times* 15 February 2018. See also, reflecting on some of these obstacles, T. PIKETTY, *Capital et idéologie*, Paris, 2019, pp. 769-795.

that the «human rights community has had little to offer in response to the profound challenges associated with deep economic insecurity», with the consequent risk that the human rights system will «proceed in a zombie mode»[101]. It is «cumbersome, lacking in agility, and poorly placed to develop new thinking», but «it will need to do so if it is to remain relevant»[102]. This should give international lawyers much to think about for us to keep up with the challenges of our times.

## 4. The Challenge of National Populism to 'Globalism'

Because of its challenges to elitism and its nativism stance, populism poses a serious challenge to international law, the legitimacy of international organisations including international courts[103] and tribunals and the personnel working for them[104]. Populist movements strongly criticise, among others, the liberal international order and «bureaucrats in Brussels or Frankfurt»[105]. They trace a sort of demarcation line between 'internal' and 'external' matters as if the foreigner would be at best irrelevant and at worst hostile. To be fair, however, this critique does not cover all aspects of international law. It seems to boil down to challenges in three distinct yet connected areas: the legitimacy of technocratic elites, the growth of a cosmopolitan international law and, more generally (but also more puzzlingly as the challenge has gained support among some States), the international liberal order often referred to as the Western liberal order. These aspects shall be dealt with in turn.

Populists see international law as a device used by global elites to dominate policy making for their own benefit at the expense of the common people[106]. What populist movements challenge is precisely the existence of a good will among the elites as if they were taking advantage of the laypeople through the vocabulary and self-conferred legitimacy of experts and pundits. From this perspective, populism poses a threat to international law and order because international law accepts technocratic rule and is based on the principles of good will and good faith. Moreover, the challenge is not merely to their being *élites*; it is to the assumption underlying their work, namely that globalisation and further international legal integration of the world are inevitable and desirable. From a populist perspective, the

[101] Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/35/26 of 22 March 2017, para. 7.

[102] *Ibid*.

[103] E. VOETEN, "Populism and Backlashes Against International Courts", in *Perspectives on Politics* 2019, pp. 1-16. K.J. ALTER, J.T. GATHII, L.R. HELFER, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", in *European Journal of International Law* 2016, p. 293 ff.

[104] See generally N. MARIN and B. MANOVA, "The Rise of Nationalism and Populism in Liberal Democracies as a Challenge for Public International Law", in *Finnish Yearbook of International Law* 2015, p. 175 ff.

[105] E. POSNER, "Liberal Internationalism and the Populist Backlash", in *Arizona State Law Journal* 2017, p. 795 ff.

[106] *Ibid*.

'global' is synonymous with 'globalism' in a reductive sense. That perspective takes issue with the existence not of a mere belief, but of an ideology embracing globalisation and the ensuing global order, which consider these processes inevitable notwithstanding their adverse impact on ordinary people.

The issue of the role of international bureaucracies also resonates among international lawyers. There is a realisation that choices of domestic concern and impact are made by «unelected external aspects» to which significant power has been transferred[107]. In a brilliant monograph, Guy Fiti Sinclair describes the World Bank as a «Global Governor» that, through a wide repertoire of management techniques, can influence the behaviour of governments[108]. Philip Alston similarly notes that social security and social protection have been «transformed, including through the explicit policies of the World Bank and the International Monetary Fund, into a minimalist notion of social safety nets»[109].

From a different perspective, Tamar Hostovsky Brandeis suggests that because «international law is often undermined by populist politics», domestic courts should use it as a shield and guarantee of pluralism[110]. Hence, international law could serve as a tool for interpreting both constitutional norms and general legislation in a manner that minimises reforms enacted by «populists in power»[111]. She also calls for stronger «incorporation of international law into domestic legal decisions» as «a way of maintaining pluralism in legal and political discourse»[112]. This approach seems, however, to be biased in the reverse as if international law would be automatically a force for good, with populism a threat to repel as opposed to being, as I have argued earlier, the symptom of a deeper malaise.

Populist movements, as noted, do not reject international law in its entirety and it would be excessive to treat populist ideology as «hostility towards international legal norms»[113]. For instance, Alejandro Rodiles remarks that there is a populist approach to international law in Latin America, which is not parochial, such as Evo Morales's efforts to advance an «emerging global law of nature» that can coexist with other views of international law[114]. That said, it remains that rather often populist movements do identify themselves as sovereigntists in the US and Europe. They fight in the name of the supremacy of their own peoples over international constraints, advocating a parochial if not isolationist version of international law,

[107] G.F. SINCLAIR, *To Reform the World*, Oxford, 2017, pp. 274-275.

[108] *Ibid*.

[109] Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/35/26 of 22 March 2017, para. 4.

[110] T. BRANDEIS, "International Law in Domestic Courts in an Era of Populism", in *International Journal of Constitutional Law* 2019, p. 576 ff.

[111] *Ibid*.

[112] *Ibid*.

[113] A. FICHTELBERG, "Populist Paranoia and International Law", in *Netherlands Yearbook of International Law* 2018, p. 63 ff.

[114] A. RODILES, "Is there a 'Populist' International Law (in Latin America)?", in *Netherlands Yearbook of International Law* 2018, p. 7 ff.

which, of course, clashes with the liberal cosmopolitanism advocated by leading international lawyers. In line with this latter cosmopolitan mindset, Eyal Benvenisti has recently spoken of «the responsibilities that sovereigns are inherently bound by»[115]. He seems to be saying that States are doing well, but are somewhat 'egoistic'. Benvenisti therefore argues that we are morally required to reconceive of sovereignty in a way that understands States to have obligations towards strangers beyond their borders and also compels them to take foreigners' interests into account «even absent specific treaty obligations»[116]. The idea is to hold sovereigns as 'agents of humanity'. He calls for «a set of other-regarding obligations beyond national boundaries, obligations that sovereign States are required to assume *qua* sovereigns»[117]. This approach is arguably the nightmare of any real populist. It clashes against the basic populist premise, which conversely insists that each State should take better care of its own people rather than try to solve the problems of somebody else.

While insisting on one's sovereignty can be a mere act of patriotism and defence of one's home on the international stage, the fact remains that the sovereigntist vision often has strong links with nationalism. Far from being a merely parochial approach, national populism is both a defensive and offensive claim. Nationalism is not negative in and of itself. It may be regarded simply as «a political principle, which holds that the political and the national unit should be congruent»[118]. Nationalism becomes a problem, as often it does, when the strength that such an ideal attracts is unleashed not merely for the betterment of one specific people, but against another people, ethnic group or minority as a justification for one's actions against self-perceived injustices and threats[119]. In Central and Eastern Europe, populist governments have successfully used «xenophobic nationalist» convictions against liberal democracies[120]. They challenge the cosmopolitan dimension of international law as an illegitimate intervention in State sovereignty. Even countries such as China and India are in the «throes of a nationalist revival»[121].

When populist rhetoric merges with nationalism, the result is national populism. As national populism then goes beyond the rallying cry of political parties and movements and is incorporated into official State policy, the matter becomes of direct concern for international lawyers. One consideration is the populist claim against all that is foreign. Quite another is the formulation of an alternative view of the international liberal order underlying national populism leading it to rant

[115] E. BENVENISTI, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders", in *American Journal of International Law* 2013, p. 295 ff.

[116] *Ibid*., p. 296.

[117] *Ibid*. See also on this point B. STRAUMANN, "Early Modern Sovereignty and Its Limits", in *Theoretical Inquiries in Law* 2015, p. 424 ff.

[118] See the entry for 'nationalism' in I. MCLEAN, A. MCMILLAN, *The Concise Oxford Dictionary of Politics*, Oxford, 2009, pp. 357-359.

[119] *Ibid*.

[120] Y. MOUNK, *The People vs. Democracy*, Cambridge, 2019, pp. 197-199.

[121] *Ibid*., p. 198.

against 'globalism'. A few days after his inauguration, US President Donald Trump declared his intention to withdraw from a series of international agreements and curtail the funding of international organisations, expressing general contempt toward international law and its institutions. For Jack Goldsmith, these actions were «the beginnings of the greatest presidential onslaught on international law and international institutions in American history»[122]. Trump cited the «reassertion of America's sovereignty» as the justification for withdrawing from the Paris Climate Agreement. In a speech at the annual opening of the UN General Assembly, he stated: «We reject the ideology of globalism, and we embrace the doctrine of patriotism» because «Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from other, new forms of coercion and domination»[123]. One could argue that these words represent a form of legitimate defence of one nation's interest against hegemonic forces, which international law does not adequately oppose. Nonetheless, revealing the antagonistic side of nationalistic claims, what followed a few months later was the opening of a trade war with China whose end is not in sight at the time of writing.

Speaking from the pages of the Financial Times, Russian President Vladimir Putin detected a shift (which he views with favour) in the political balance of power from traditional Western liberalism to national populism, fuelled by «public resentment about immigration, multiculturalism and secular values at the expense of religion»[124]. Another example of the emergence of a sovereigntist approach to international law is provided by the 2016 Russia-China Joint Declaration on Promotion and Principles of International Law. This Declaration describes the two countries' understanding of the global legal order and addresses issues such as State sovereignty, the use of force and terrorism. Both countries express their full support for «the principle of non-intervention in the internal or external affairs of States» and condemn as a violation of this principle any interference by States in the internal affairs of other States with the aim of forging a change of legitimate governments[125]. The Declaration also states that they «share the view that good faith implementation of generally recognized principles and rules of international law excludes the practice of double standards or imposition by some States of their will on other States»[126]. It considers the imposition of unilateral coercive measures not based on international law as an example of such a practice. On one hand, the 2016 Declaration can be read as a reiteration of classical international law based

[122] J. GOLDSMITH, "The Trump Onslaught on International Law and Institutions", in *Lawfare* 17 March 2017, available at www.lawfareblog.com.

[123] See "Remarks by President Trump to the 73rd Session of the United Nations General Assembly", White House 25 September 2018, available at www.whitehouse.gov.

[124] L. BARBER, H. FOY, "Putin Heralds Russia's Return to the Top Table", in *Financial Times* 28 June 2019, p. 7.

[125] See the text and commentary in K. ANDERSON, "Text of Russia-China Joint Declaration on Promotion and Principles of International Law", in *Lawfare* 7 July 2016, available at www.lawfareblog.com.

[126] *Ibid*.

on the principle of sovereignty as the pillar for the coexistence and cooperation of States. As such, the Declaration even mirrors in significant part the well-known General Assembly Resolution 2625[127]. On the other hand, the 2016 Declaration might also constitute an example of a backpedalling from international law as it has evolved since 1970. Unlike this Resolution, the Declaration was adopted by only two States, not by the UN General Assembly. Similar to its predecessor, the Declaration worryingly does not mention the protection of human rights, despite the tectonic shifts within international law in the second part of the twentieth century. While in 1970 the absence of the concept of human rights, even though already present in the UN Charter, may have been due to the still embryonic phase of the system of human rights protection, such absence almost 50 years later in defiance of all the developments that unfolded in the interim period is striking. If this is taken to suggest a new direction of international law whereby the principle of sovereignty and non-interference trumps that of respect for human rights, it may pose a major challenge to international law in its current content.

## 5. The Challenges of Populism and Scholars

### 5.1. Nature and Seriousness

For some scholars, populism is a disease in and of itself that threatens the long-term survival of liberal democracies[128], and ought to be curbed or cured by the unflinching reassertion of constitutional democratic values through, for instance, public education[129] or a more active judicial role[130], For others, populism is a symptom of the malaise cutting through democratic societies. From this perspective, it may be bluntly regarded as a 'wakeup call' prompting us to realise that we live in imperfect democracies that ought to be perfected by properly identifying and responding to pressing issues[131]. From an international law perspective, populism presents a composite challenge to some of the defining aspects of contemporary international law as a cosmopolitan discipline, as the global law of an international community ideally based on the recognition and protection of the human rights of all. This stratum of international law adds to the more traditional and parochial

[127] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/2625 (XXV), 24 October 1970.

[128] K.L. SCHEPPELE, "The Opportunism of Populists and the Defense of Constitutional Liberalism", cit., pp. 325-331.

[129] T. FOURNIER, "From Rhetoric to Action – a Constitutional Analysis of Populism", in *European University Institute Law Working Papers* 2018, vol. 8, p. 1 ff.

[130] W. FRIEDMANN, *The Changing Structure of International Law*, Columbia, 1964, pp. 60-71. See also G.I. TUNKIN, *International Law*, 1986, pp. 136-147.

[131] O. DOYLE, "Populism; A Health Check for Constitutional Democracy", in *German Law Journal* 2019, p. 407.

dimension of international law centred on the principles of sovereignty and coexistence among equal nations[132]. The challenges of populism present an opportunity to reflect upon the health of international law and its institutions in an effort to determine whether changes are needed and, if so, what those changes should be.

Unquestionably, populists are to be taken seriously. This is because of the width of their claims, and the widespread support they have continued to gain as the current international political climate remains interwoven with difficulties and uncertainty. If one seeks to listen beyond the noisy and seldom-articulated rhetoric employed by populist movements, there is a genuine quest to rectify assumptions and choices which have adversely impacted on certain nations and communities. Discarding populist challenges as negligible just because one disagrees with them, or on the assumption that certain people 'do not get it', would be a tribute to superficiality.

One may, for instance, disagree, as the current writer does, with national populism's stance against the international liberal order. Yet, the arguments supporting it can hardly be ignored. Those countries that mostly built and upheld the international liberal order have also been, in certain cases, its principal transgressors. For instance, the illegal invasion of Iraq coupled with the notorious human rights violations that occurred at Abu Ghraib, which have never really been accounted for, are telling in this regard. These instances constitute the epitome of double standards as the US (and, to a lesser extent, the UK) acted as if they were entitled to do what they would never have consented to others doing and, as such, asserted the right to be free from the very obligations they themselves had been setting.

Taking populists seriously is not the same as embracing them, let alone accepting them at face value as if any argument tendered were automatically true. In a sense, the challenges of populism are reminiscent of a much older debate between parochialism and cosmopolitanism, or, in other words, between particularism and universalism. Mortimer Sellers identifies cosmopolitan standards as based on universal reason, while nations are parochial communities, seeking to remain free and independent[133]. The challenges of populism in a contemporary perspective are nonetheless different in kind and breadth. Judging from their content and the way they are raised, the challenges of populism do not fully qualify as economical or legal challenges. They are political and subjective complaints pertaining to factual realities that have to do with, *inter alia*, some of international law's basic tenets. They are based on a political interpretation of a reality, directed to unveil the perceived unjust way domestic and international actors exercise power within and above a given social community. They are also, of course, subjective. Populist claims spread unevenly around the globe and gain support in some countries, while failing in others. Within the same country, the support for populist causes may shift from one location to another and from one group of people to another. This also means

[132] See in this regard E. JOUANNET, *The Liberal-Welfarist Law of Nations: A History of International Law*, Cambridge, 2012, pp. 189-302.

[133] M.N.S. SELLERS, "Parochialism, Cosmopolitanism and Justice", in M.N.S. SELLERS (ed.), *Parochialism, Cosmopolitanism and the Foundations of International Law,* Cambridge, 2011, p. 253 ff.

that they are selective. Not all injustices and losses of opportunity enter the populist agenda, but only those embraced by populist leaders as affecting a given group. Hence, there may be (or *rectius* there are) issues that significantly affect communities – such as terrorism, the use of drugs or climate change – that do not make it onto the list of populist grievances, despite their considerable gravity.

### 5.2. The Responses of Scholars

From a theoretical perspective, various kinds of analytical frameworks could be proffered to appraise and respond to the challenges of populism. These are outlined in turn.

One preliminary approach could be to discard the challenges of populism precisely on account of their not being 'law'. They are not couched in the familiar terms of disputes over a question of law or fact. They are, as noted, political demands that are difficult to comprehend with the level of precision lawyers are accustomed to. Like eels, they are quick at swimming forwards and backwards. To adequately gauge their complexity calls for an interdisciplinary approach. Even so, because populist claims seek to narrow the purview of international law, the challenges of populism must also be the object of appropriate legal reflection rather than neglect.

That said, caution is necessary in order not to bestow undue prominence on the populist voice. Inquiring whether populist claims are true, or more accurately what is really true about them, is mandatory as with any political and subjective claim. This is all the more so when they are discussed from an academic/scientific perspective. Truth should not be the first casualty in the confrontation between populism and international law. There is no shortage of claims and charges in the dictionary of populist movements, but the same cannot be easily said with the factual data and information backing those charges. As put by Veronika Bílková, populist claims present a reality that is «too simplified and incomplete»[134]. Moreover, Lukasz Gruszczynski and Jessica Lawrence aptly inform us that US President Trump, albeit a populist by many accounts, does not really reject the neoliberal approaches that had such an active role in fostering globalisation[135]. Quite to the contrary, he appears to support an international order as a «market space governed by the same rules as the business sphere», where the State is but a competitor pursuing its own interests in a global market[136]. As such, the global is rejected not because of being the 'kingdom' of the elites unfavourable to ordinary people, but only insofar as it constrains the ability of a State to compete effectively.

A third approach could consist of entering directly into the merits of the populist arguments in relation to international law. Some scholars have tried to do so,

[134] V. BÍLKOVÁ, "Populism and Human Rights", in *Netherlands Yearbook of International Law* 2018, p. 143 ff., 143-144.

[135] L. A. GRUSZCZYNSKI, J. LAWRENCE, "Trump, International Trade and Populism", in *Netherlands Yearbook of International Law* 2018, p. 19 ff.

[136] *Ibid*.

though the results are often more political rather than legal answers. They seem to accept the gist of the populist claims, or at least some of them, and argue for the need to rid international law of its perceived flaws, which populism brings to the fore. Heike Krieger argues that the populist threat cannot be ignored as a mere temporary phenomenon because populist governments present «a very fundamental challenge to international law and its institutions», which «require[s] the international lawyer to reflect on what needs to be preserved and what should be altered in the years to come»[137].

Martti Koskenniemi suggests that in order to come «to terms with the backlash against the rule of law today» it is necessary to rethink choices made in the 1990s. In those years, «human rights shook hands with the global expansion of economic and expert governance», resulting in a bargain that today ought to be rethought to stress that the «capacity to file a human rights complaint» does not «suffice to offset the afflictions of life in an underclass targeted by unending austerity»[138]. Somewhere along these lines, Christine Schöwbel-Patel argues that populism is «symptomatic of an international law which is deeply committed to neoliberal capitalism»[139] and therefore international lawyers would do well to consider the «structural issues which populism's appeal exposes», which can open a space for challenging and rethinking «multilateralism in favor of an internationalism of solidarity»[140]. According to Schöwbel-Patel, it is not so much populism that is the cause of the backlash against multilateralism, as populism emerges where «there is extreme inequality between the economic and political elites and the rest»[141]. Upon a detailed analysis of the populist challenges to international law, Eric Posner argues that international law as it stands is not «immune from the challenge of populist movements» because of its being «technocratic» and «advanced by the establishment»[142].

Last but not least, the view articulated by Anthea Roberts in her highly acclaimed monograph deserves attention[143]. In the concluding section of that monograph, Roberts provides guidance to international lawyers in a world no longer dominated by Western liberalism. Noting that «In a growing number of Western states, populism has challenged globalism and nationalist and anti-immigration rhetoric is on the rise» Roberts suggests that «international lawyers need to be sensitive to these dynamics»[144]. She argues that «Rather than seek to find some Archi-

[137] H. KRIEGER, "Populist Governments and International Law", in *European Journal of International Law* 2019, p. 996.

[138] M. KOSKENNIEMI, "Imagining the Rule of Law: Rereading the Grotian 'Tradition'", in *European Journal of International Law* 2019, p. 17 ff.

[139] C. SCHÖWBEL-PATEL, "Populism, International Law, and the End of Keep Calm and Carry on Lawyering", in *Netherlands Yearbook of International Law* 2018, p. 97 ff.

[140] *Ibid*.

[141] *Ibid*.

[142] E. POSNER, "Liberal Internationalism and the Populist Backlash", cit.

[143] A. ROBERTS, *Is International Law International?*, Oxford, 2015.

[144] *Ibid*., p. 323.

medean international midpoint», international lawyers' role is to facilitate interaction and understanding between the national and the transnational by understanding the perspectives of those coming from diverse backgrounds and holding diverse views[145]. For Roberts, international lawyers «should build bridges between different communities through civil and respectful dialogue and exchange»[146].

What surprises me to observe in the above passages is that all the authors are somewhat open to embracing the gist of populist contentions without much filtering. The question of whether some of the problems lamented by populists are due to shortcomings and breaches of rules and principles by political actors or by individuals abusing their position of privilege within international institutions is not really discussed. It is almost as if these questions are somewhat *passé*, with new and different kinds of questions being prioritised. Additionally, no attempt is made to challenge the populist views by pointing to their lack of proposals for meaningful alternatives to the system of principles and institutions they appear to despise. By contrast, the cited scholars are not shy about highlighting the limits of international law and international lawyers as if the main problem were with the law and its disciples, and not with those that could be transgressing it. This is quite a sobering analysis. It reveals skepticism in international law and international lawyers, and an abundance of subjectivism bordering on politics. Many arguments are henceforth produced, but only a tiny fraction is agreed upon. Because of the diversity of the opinions advanced, it could thus be said that, apart from self-criticism, there is not much agreement among international lawyers on what should be done against the challenges of populism. One wonders whether this response, in addition to being due to the objective complexity and difficulty of the issues at hand, has something to do with the way we have come to think about international law in recent years.

## 6. What Way Forward?

Writing in 1995, Thomas Franck noted that we «live in a post-ontological era» whereby «international lawyers are now free to undertake a critical assessment» of the contents of international law[147]. This meant asking not whether international law was law *per se* (as Herbert Hart had famously asked in *The Concept of Law*)[148]; but whether it was effective, understood, enforceable and – most importantly – whether it was fair[149]. Critical legal studies (CLS)[150], a well-known branch of legal philosophy originating in US academia and inspired by American legal realism,

[145] *Ibid*., p. 324.
[146] *Ibid.*, p. 325.
[147] T. FRANCK, *Fairness in International Law and Institutions*, Oxford, 1995, p. 6.
[148] H. HART, *The Concept of Law*, Oxford, 1995 2nd ed., pp. 213-236.
[149] *Ibid*.
[150] See R.M. UNGER, *The Critical Legal Studies Movement*, Cambridge, 1986, in particular pp. 563-601.

embraced the invitation, taking it to an altogether different level[151]. Under the spell of David Kennedy's[152] and Martti Koskenniemi's[153] innovative scholarship, the CLS intellectual approach spread from its popularity at the domestic level to nourish the «New Stream» of public international law[154]. This stream grew into a river, to the extent that Jan Klabbers recently noted that «'the newstream' has become the mainstream, if not politically then at least academically»[155]. In consequence, questions concerning what the correct answer to a given legal issue is or whether international law has been breached in a given instance seem somewhat *passé,* almost left at the margin of academic discourse despite their centrality for practising lawyers as well as States.

Instead, attacks on the biases, flaws and limits of international law (and international lawyers) and the sins of its past are routinely heard at conferences and lectures, and published in well-esteemed journals. Rightly, CLS alerts us to how the structure hidden behind and within the law may entrench existing power relationships or forms of domination and exploitation, which the law serves, instead of providing objective standards as claimed by its disciples[156]. International law is not then free from politics because far from being a neutral set of rules as formalists may suggest, it requires political choices among equally valid arguments that may vary from one interpretation to the other, leaving it structurally indeterminate[157] and as such prone to different uses and abuses[158]. CLS cautions against the trap of assuming that law is automatically a force for good that as such should be applied universally and urges us to develop a sensitivity to «the uses to which it [international law] is put» or has been put in its past[159].

The CLS's critique is enlightening in several respects. It is useful to deconstruct international law before it can be reconstructed on a stronger basis. It is also an intellectual armour that can shield one against the ever-present threats of formalism and dogmatism, by showing that international law is not the solution to the world's problems, but can also be part of the problem in itself. It reminds international lawyers to be humble and to avoid considering legal truths «as self-evidently

[151] See A. BIANCHI, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford, 2016, pp. 134-151.

[152] D. KENNEDY, "A New Stream of International Legal Scholarship", in *Wisconsin Journal of International Law* 1988-1989, p. 1 ff.

[153] M. KOSKENNIEMI, "Politics of International Law", in *European Journal of International Law* 1990, p. 4 ff.

[154] See A. BIANCHI, cit., pp. 150-151.

[155] J. KLABBERS, "What Happened to Gramsci? Some Reflections on New Legal Realism", in *Leiden Journal of International Law* 2015, pp. 469, 471.

[156] See A. ANGHIE, "Domination", in J. D'ASPREMONT, S. SINGH, *Concepts for International Law*, Cheltenham, 2019, p. 222 ff.

[157] On the concept of 'structural indeterminacy', see C. MILES, "Indeterminacy", in J. D'ASPREMONT and S. SINGH, *Concepts for International Law,* Cheltenham, 2019, p. 452 ff.

[158] M. KOSKENNIEMI, *From Apology to Utopia*, Cambridge, 1989, p. 596.

[159] *Ibid*., p. 617.

correct and applicable»[160], enabling them to raise methodological doubts and philosophical questions rather than hiding in the comfort zone of established practices by habit or tradition.

Still, the downside of this line of thinking is that the more one stresses the political dimension of international law, the more he may run into the field of relativism and subjectivism, and hence into the empire of politics. Martti Koskenniemi rightly notes that law is not justice. Less convincingly, he adds that the space between law and justice is filled by politics[161]. It does not necessarily have to be so. Positing that all that goes beyond the black letter of the law is politics may itself be a formalist approach and deprive the status of law from all the life that an interpreter injects into it at the interpretation stage. For instance, Herbert Hart, while insisting on the separation of law, morals and politics, accepts as a necessary and valid feature of any legal system that the open texture of the law leaves a space of discretion to the interpreter to strike a reasonable balance between competing claims[162]. For Ronald Dworkin, the interpretative phase itself is law even if nourished by one's moral principles as something substantially distinct (and to be kept distinct) from one's policies[163].

Insisting on the indissoluble link between international law and politics and on reducing what is not the black letter of law to mere politics, CLS's approach brings to an end the effort to disenfranchise law from politics within the field of international law pioneered by Hans Kelsen[164]. Once the umbilical cord between politics and law is sewn up again, however, the risk is that international law would become sort of ancillary to politics, as it was in the 19th century, or be doomed to irrelevance when confronted with the force of its stronger parent, that is, politics. Why should one listen to lawyers if what they preach ultimately, is, in essence, not the cogency of the applicable law, but the validity of their own 'political' interpretations?

It might be argued therefore that CLS's laudable effort, as pursued by the New Stream, to rescue international law from the utopia of formalism and the excesses of objectivism may have led it into the opposite pole of an apology for subjectivism. This is worrisome as it seems to be the nightmare of any system of rules and principles deserving to be called law. A structurally indeterminate law can hardly limit conduct or be an effective enabling device[165]. If not reconstructed on a more solid basis, it can only be a language of coordination among different aspirations and

[160] See BÍLKOVÁ, cit., p. 172 and ALSTON, "The Populist Challenge to Human Rights", cit., p. 11.

[161] M. KOSKENNIEMI, "What is International Law for?", in M. EVANS, *International Law*, Oxford 5th ed., 2018, p. 47.

[162] H.L.A. HART, *The Concept of Law*, Oxford, 1961, pp. 124-136.

[163] R. DWORKIN, 'The Model of Rule I' in *Taking Rights Seriously*, Cambridge, 1978, pp. 38-57.

[164] See in this regard J. VON BERNSTORFF, *The Public International Law Theory of Hans Kelsen*, Cambridge, 2011.

[165] On the concept of 'structural indeterminacy', see C. MILES, "Indeterminacy", in J. D'ASPREMONT and S. SINGH, *Concepts for International Law,* Cheltenham, 2019, p. 452 ff.

interests, a grammar to guide conversation, but not a constraining framework equally binding the Gullivers and the Lilliputians of this world[166].

Indeed, to one's dismay, the genius of CLS stops there where it is most needed at the moment of enlightening the path forward, ensconced instead behind an 'it is not my job' reply[167]. Perhaps from a CLS perspective, it may not be possible to provide answers on how to tackle current challenges because entering the province of what Jacques Derrida calls the «undecidable»[168] forces one to make decisions inexorably imperfect destined to be themselves criticised. Despite this, by professing agnosticism and not engaging in a *grand dessin* of reconstruction, CLS borders on cynicism by indirectly aiding and abetting the perpetuation of the *status quo*, in spite of the serious charges raised against it. Philip Alston notes, for instance, that «critical scholarship is formulaic, and unfocused in meaningful or instructive ways on the real challenges that confront us and on the challenges that are becoming more and more real by the day in our world»[169].

That being so, perhaps once the lessons of CLS have been duly learned not much would be lost in moving forward and imagining a different philosophy for the international law of the 21st century. This would be one that aims towards more objectivity in the sense of a truer law without falling into the trap of objectivism, so as not to leave one's rights and duties to hang on the uncertainty of a structurally indeterminate law. With a constructive mindset, international law can help to foster integrity and fairness in an international society thirsty for shared ideas and uniform parameters for the protection of all of its members. Constructive does not necessarily mean that it is for lawyers, let alone academic lawyers, to shape the will of States in light of universal parameters as if what is different should be necessarily treated equally. It is about offering ideas on the basis of one's professional expertise, as a concerned citizen participating in the life of his community, to remedy existing lacunae and flaws.

The starting point should be refocusing on the 'objective' dimension of international law based on what States have agreed to and signed. The State practice after World War II demonstrates that international law has come a long way through an outstanding process of codification to develop a comprehensive normative set, including numerous norms of binding substantive and procedural law.

[166] See in this regard the notion of international law by DAVID KENNEDY: «International Law is not a bundle of rules governing relations among states. International law is a profession, a discipline, in which people …pursue projects, projects of affiliations or disaffiliation, of commitment and aversion, or power and submission – pursue them with its shared vocabulary, through the apparatus of shared professional practices and institutions. As they do so, they lay behind them the evidence of shared and individual styles». D. KENNEDY, "Tom Franck and the Manhattan School", in *New York University Journal of International Law and Politics* 2003, p. 397 ff., pp. 398-399.

[167] G. ABI-SAAB, "Remarks by Georges Abi-Saab", in *Proceedings of the American Society of International Law Annual Meeting* 2005, p. 218.

[168] S. CRITCHLEY, J. DERRIDA, E. LACLAU, R. RORTY, 'deconstruction and pragmatism', 1996, pp. 52-53.

[169] ALSTON, "The Populist Challenge to Human Rights", cit., p. 13.

Within its substantive dimensions, it contains 'communitarian values' rooted in ideas on which most States have, by and large, agreed since the aftermath of World War II and still continue to do so even in the time of sovereigntism. To this effect, Judge James Crawford has perceptively analysed international law in the post-World War II era to argue that:

> Adjustments may be necessary to respond to perceived inequalities or injustices […] but we should also be wary of the increasing rhetoric of skepticism towards international law. Over time, this may precipitate a larger-scale retreat into nativism and unilateralism. We should be ready to defend the communitarian values of international law against this possibility[170].

In light of this constructive mindset aptly capturing the idea that certain «communitarian» values[171] have been consolidated within international law in recent years, addressing the challenges of our times from a legal perspective becomes all the more relevant and necessary. These «communitarian values» were not forged by the 'establishment', by 'self-interested elites' nor merely by 'hegemonic States'. They emerged from and because of the ashes of World War II and the spirit of cooperation that developed as a result. They had been agreed upon, not exported from the West to the East or from the North to the South, although some countries unsurprisingly played a stronger role than others. The 'structural bias' imbued in that international law was the political understanding that cooperation, albeit imperfect, remained the only way through which most nations could both coexist and prosper. As explained by Wolfgang Friedman, international law after World War II was a law of co-existence and cooperation[172]. By contrast, CLS does not seem to pay sufficient attention to the transformation international law underwent after World War II, evolving from the rather permissive, malleable and scarcely enforced body of norms that preceded it and that paved the way to injustices during the colonial era and World War II. It was, for instance, principles of international law such as the right to self-determination that justified the process of decolonisation.

In view of the foregoing, confronting challenges as complex, far-reaching and multifariously problematic as those raised by populist movements entails, at least, two specific undertakings for international lawyers as scholars. One is more theoretical, and the other more practical. From a theoretical perspective, the challenge is to develop an international legal philosophy that construes international law more

[170] J. CRAWFORD, "The Current Political Discourse Concerning International Law", in *Modern Law Review* 2018, p. 1 ff.

[171] These concern (i) 'restrictions on the use of force except in individual or collective self-defence or with the authorisation of the Security Council'; (ii) 'the development of an international law of human rights'; (iii) 'the elaboration of rules of international humanitarian law'; (iv) 'the regime of refugee protection'; (v) 'cooperative action against terrorism'; (vi) 'the world regime of free trade'; (viii) 'a diffuse system of environmental protection'; (ix) 'the regulation of ocean spaces'; (x) 'the development of international criminal law'; and (xi) 'a regime of nuclear non-proliferation'. *Ibid*., pp. 4-6.

[172] W. FRIEDMAN, *The Changing Structure of International Law*, London, 1964, pp. 60-74.

as law in the sense of a limit to the *raison d'État* and the power of other international actors rather than as politics. According to Anthea Roberts, international lawyers ought to act somewhat as diplomats establishing dialogues with different communities[173]. How should they do so without transforming themselves into something beyond their calling as lawyers? Pursuant to an ideal and functional separation of roles, international lawyers are required to be more the engineers building solid bridges for diplomats and politicians to walk through. To be viable, the bridges must hinge on something true and correct to the greatest possible extent. This requires, first of all, using available tools to correct and perfect existing legal structures as well as to make the case for new rules, principles and institutions where existing ones are deemed unfair or insufficient. It also calls for pointing out breaches of international law wherever and whenever they happen, regardless of the political power of their perpetrators. Part of this thinking also involves a re-evaluation of the role of cooperation among States, as States remain the main political and social actors with the power to develop public policies and public laws, nationally and internationally, in response to the predominance of global private interests.

From a practical perspective, the populist challenge requires focusing on empirical cases to discover the multiple faces of this movement and to point to specific contemporary case studies where international law is part of the problem because its norms are unfair or insufficient. This also would enable us to assess the essence and truth of the facts that animate populist demands and to see what response, if any, international law in its current state can provide in a given context, or whether new institutions and fairer or more detailed norms are to be proposed.

The ideal set of tasks briefly sketched here is by no means easy to attain. There is much to reconstruct. Legal philosophers and well-rounded social engineers are called for and ought to join forces.

**ABSTRACT. The Challenges of Populism: What Role for International Law Scholars?**

Taking stock of the impact that economic globalisation has on the growth of inequality within nations and the connected articulation of a variety of new political demands, this paper reflects on the significance of populist claims from an international law perspective. It identifies three challenges that populism poses to international lawyers and human rights activists. The first challenge concerns the threat to liberal democracy, charged with being unable to protect the interests and rights of the 'real people' as opposed to those of the elites. The second is the challenge to economic globalisation itself, and the inequalities that it has brought about with all the ensuing consequences from a human rights perspective. The third may be defined as the challenge of 'national populism', which targets the international liberal order in the name of a parochial version of national sovereignty. The paper argues that the complexity of these challenges poses not only practical but also theoretical problems concerning, *inter alia*, the philosophy of international law and the function of international lawyers in the twenty-first century.

*Keywords*: globalisation; populism; elites; liberal democracy; international lawyers; legal philosophy.

[173] A. ROBERTS, *Is International Law International?*, cit., p. 324.