Populism's Attack on Multilateralism and International Law: Much Ado About Nothing*

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Abstract

While international lawyers have not traditionally paid much attention to the phenomenon of populism, a recent upswing in the populist movements in governments around the world has led to an increase in the fascination of international lawyers with populism. On the whole, there seems to be a view that populism has negatively affected the communitarian and multilateralism of international law. This article interrogates this proposition. It comes to the conclusion that the proposition is based on an erroneous assumption about the state of international law. It concludes that populism is not a threat to international law, but that populist strategies against certain institutions and rules of international law are merely a reflection of international law's own limitations.

1. Introduction

1. The global rise in what has been termed "populism" has resulted in a fascination with the phenomenon, with a growing ream of literature dedicated to it. The rise (and continued popularity) of Donald Trump in the face of a bizarre series of public statements and alleged criminal behaviour, racism and sexism, the decision of the United Kingdom to exit from the European Union as well as Jacob Zuma's presidency in South Africa amidst growing scandals, are some examples of factors that have contributed to the fascination with the idea of populism.

2. For the most part, law, and in particular international law, has had only a

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marginal curiosity with the notion of populism. It has been mainly scholars from political science that have led the fascination with populism.[1] Indeed in political science, the interest on populism goes further back than recent times, and certainly further back than the era of Donald Trump and his administration.[2] Law's, and in particular international law's, reluctance to take up the fascination with populism is understandable. International law, addressing itself to the relationship between States, is not primarily concerned with the internal machinations of States, their governments and administrations. What we are interested in, as international lawyers, is how international law rules are made, what the content of those rules are, how they are to be understood, how they evolve and so on. The types of government, the policies of such governments in the making and interpretation of the rules, and the rhetoric employed by such governments to ascend to power are not typically questions that interest the international lawyer. Political scientists can ask empirical questions about the causes and effects of populism. But these are questions that lawyers, and certainly international lawyers, are ill-equipped to grapple with (as a rule I discourage my students from having empirical research questions in the design of their research proposals).[3] So the phenomenon of populism is not one that would typically fall within the peripheral vision of the international lawyer.

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1 Jan-Werner Müller What is Populism? (2016).

2 See, e.g. essays in Francisco Panizza (ed.) Populism and the Mirror of Democracy (2005); Michael L Conniff (ed) Populism in Latin America (Second Edition, 2012); Kenneth M Roberts "Neoliberalism and the Transformation of Populism in Latin-America" (1995) 48 World Politics 82; Ben Stanley "The Thin Theology of Populism" (2008) 13 Journal of Political Ideologies 95; Hans-Georg Betz Radical Right-Wing Populism in Western Europe (1994).

3 See Heike Krieger "Populist Governments and International Law" (2019) 30 European Journal of International Law 971, at 972-973 ("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.")

3. Yet, at least in recent times, international lawyers have begun to weigh in on populism and international law.[4] For the most part, the common view seems to be that populism has had (or is having) a negative impact on international law, at least normatively.[5] In particular, it seems generally accepted that populist governments undermine multilateralism and a new found solidarity on which international law is now based. In this short article I assess the assumption underlying the claim that populism undermines international law and multilateralism. In particular, I argue that the generally accepted view that populism is a threat to modern international law based on multilateralism and solidarity flows from an erroneous assumption about the state of international law at this moment in history. The article will begin by describing the different ways that the effects of populism *may* have manifested in international law. The article will then illustrate how these effects are not attributable to populism but, rather, are a reflection of self-interest and sovereignty which remain the bedrock of current international law. Finally, I offer some concluding remarks.

2. The Proposition that Populism Threatens Modern International Law and Multilateralism

2.1 General: The Proposition

4. There are varying understandings of the word populism in the literature.[6]

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4 For example, in 2019, the Netherlands Yearbook of International Law and the European Journal of International Law dedicated special issues to the topic.

5 Krieger (above n 3); Tamar Hostovsky Brandes "International Law in Domestic Courts in an Era of Populism" (2019) 17 International Journal of Constitutional Law 576; Marcela Prieto Rudolphy "Populist Governments and International Law: A Reply to Heike Krieger" (2019) 30 European Journal of International Law 997; Paul Blokker "Populist Governments and International Law: A Reply to Heike Krieger" (2019) 30 European Journal of International Law 1009.

6 See Rudolphy (above n 5), at 998, noting that populism is highly disputed and that it is diverse in its manifestation. See also Christine Schwöbel-Patel "Populism, International Law and the End of Keep Calm and Carry on Lawyering" (2018) 49 Netherlands Yearbook of International Law 97, at 99 ("Whilst it is ascribed with great confidence, there is also much debate about the nature of populism, including disagreement about its definition. Indeed, the proliferation of the term has led to a whole new economy of populism analysis.")

The term is often associated with anti-establishment politics regardless of any political, normative or policy issues.[7] It is for this reason that leaders with greatly varying ideologies, whether right-wing, like Donald Trump, or left-leaning like Bernie Sanders and Nicolás Maduro, can all be described as populist.[8] Yet sometimes it often appears that the term populist is reserved for movements that are to be despised. It is thus unsurprising that the word "populism" is often used as "derogatory term" and "mostly ascribed rather than … claimed."[9]

5. While, the purpose of this article is not to contribute to the debate on the meaning of populism, or even to identify a single definition of the concept,[10] it is necessary to identify a number of characteristics that seem to be generally accepted in the literature [11] *and* that have a bearing on international law.[12] First, populist movements are those that are said to be

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7 Müller (above n 1), at 1, who citing Ivan Krastev, says "it is far from obvious that we know what we are talking about" when speak of populism. He observes that we "simply do not have anything like a theory of populism and we seem to lack coherent criteria for deciding when political actors turn populist in some meaningful sense."

8 Ibid. The range of movements and leaders that can potentially be caught in the broad net of populism is exemplified by Kriege (above n 3), at 972 ("While the specific role of the USA in the global order has 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 and Venezuela. Populist movements exert considerable influence in France, Germany, the Netherlands and the United Kingdom (UK) as well as in Israel. All veto powers in the UN Security Council, except for China, are to some extent affected by what may be considered to be populist policies.")

9 Schwöbel-Patel (above n 6), at 99.

10 For this reason, what is provided here is not a definition or even a description of populism. It is merely a broad-brush stroke identification of some characteristics that may assist in assessing the proposition that populism has a negative effect of international law.

11 These characteristics are drawn mainly from Müller (above n 1), at 1-2, but are equally present in many of the contributions on populism.

12 It is necessary to identify those elements that are relevant for international law discourse because, as Schwöbel-Patel (above n 6), at 99, observes the "preferred definition of populism often depends on what is at stake for the relevant commentator."

anti-elites, or anti-establishment.[13] Second, populism has been described as being anti-pluralist, which is to say that populists tend to play identity politics.[14] It is, in this sense, a strategy of "us versus them", in which populists "instrumentalize discourses of difference and equivalence in the service of [their] political aims."[15] For international lawyers, populism reflects "an inward-looking politics, which poses unique threats to the international law" order.[16] It is this international law order that said to be threatened, to which I now briefly turn.

6. The proposition that populism threatens international law is based on a particular articulation of the nature of international law at this historical moment. It finds resonance in the articulation of a question that pops up from time to time: whether international law (or in some cases the international rule of law) is on the decline (or is on the rise).[17] The assumption embedded in this question is that international law, at this time in history, has reached a normatively 'good' position and that this normatively good position is being threatened by the rise of populism and faces a decline. It is thus useful to say something about the state of international law against which populism is said to be a threat.

7. Classical international law is often portrayed as a network of bilateral relations, or put differently, classical international law is seen as being based

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13 See also Blokker (above 5), at 1010 who describes this characteristic as the "friend – enemy" view.

14 Müller (above n 1), at 2. See also Lukasz Gruszczynski and Jessica Lawrence "Trump, International Trade and Populism" (2018) 49 Netherlands Yearbook of International Law 19, at 22, defining populism as a "is a 'thin' ideology that can be combined with a variety of political positions, from nationalism to socialism to theocracy, so long as the political movement allows for a focus on the needs of the 'authentic people'." (emphasis added).

15 Gruszczynski and Lawrence (above n 14), at 22.

16 Schwöbel-Patel (above n 6), at 99.

17 See, e.g. Ingrid Wuerth "International Law in the Post-Human Rights Era" (2017) 96 Texas Law Review 279; Gregg Shaffer "A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations" (2018) 44 Yale Journal of International Law Online 37; Shirley Scott "The Decline of International Law as a Normative Ideal" (2018) 49 Victoria University Wellington Law Review 627; See also Georg Nolte Treaties and their Practice: Symptom of Rise or Decline (2019).

on bilateralism.[18] In this classical international law, State sovereignty and consent are central. This sovereignty-centred international law has been described as a legal order in which "States are nominally free" and "enjoy supreme authority over all subjects and objects within" their territories.[19] States are the centre, and their individual interests drive the content and development of international law.[20] The objective of this legal system, and the cooperation on which it is founded, is to enable each individual State to pursue and enhance its individually determined objectives and interests.[21] Under this system, where consent and sovereignty are king, the only real constraint on States is the ability to bargain, which in turn is dependent on the States' influence – influence itself is derived from military, economic and political power. This construction of international law sees rules of international law as being dependent not on any normative objectives, such as the pursuit of the common good, morality or values, but rather on the will of States.

8. Academic literature has suggested that the classical, state sovereignty-centred international law is giving way to a more value-based system of international law and that the idea of international law as a network of bilateralism is being replaced by a system based on community values and solidarity. Describing this shift in his now famous Hague Academy Lectures, former Judge of the International Court of Justice, Bruno Simma observed that international law was "overcoming the legal and moral

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18 Bruno Simma "From Bilateralism to Community Interest in International Law" (1994) 217 Recueil des Course de l'Academie d Droit International de la Haye 229, especially at 229-233.

19 David Held "The Changing Structure of International Law: Sovereignty Transformed?" in David Held and Anthony McGrew (eds) The Global Transformations Reader: An Introduction to the Globalization Debate (2003), 162.

20 Antonio Cançado Trindade has often criticised this conception of international law describing is an invented tradition. See, e.g. Antonio Augusto Cançado Trindade "International Law for Humankind: Towards a New Jus Gentium" (2005) 316 Recueil des Course de l'Academie d Droit International de la Haye 21, at 44, attributing the emergence of the "allegedly exclusive inter-State basis or dimension of international law" to the seventeenth century. This "strictly inter-State outlook of international law", according to Cançado Trindade, "paved the way to the excesses of State voluntarism ...".

21 See, Philip Allot Eunomia: New Order for a New World (1990), at 324.

deficiencies of" bilateralism inherent in the State-centred classical international law and was "maturing into a much more socially conscious legal order."[22] The legal system emerging to replace classical international law is one characterised by the "social responsibility and accountability" of its subjects.[23] John Dugard described this emerging international law as being premised on "a brave new world" in which "State sovereignty is no longer a factor … in which the community of personkind is governed by the rule of law … in which peace and human rights are secure and in which the energy of personkind is addressed toward resolving poverty and inequality."[24] This new vision of international law is one that is characterised by a commitment to solidarity[25] – that after all is the essence of community. It is because of this emergence of the new vision of international law, displacing the classical international law, that concepts and phrases such as "international community", "*erga omnes*" and "peremptory norms of general international law (*jus cogens*)" have assumed significance in international

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22 Simma (above n 18), at 234. See also Ernst-Ulrich Petersmann "From State Sovereignty to the Sovereignty of Citizens in the International Relations of the EU" in Neil Walker (ed) Sovereignty in Transition (2003), at 142. He quotes Kelsen, in Hans Kelsen Das Problem der Souveränität und die Theorie des Völkerrechts (1928), at 320, noting the "contradictions of an international legal theory which in an almost tragic conflict aspires to the height of a universal legal community erected above the individual States, but at the same time, remains a captive of the sphere of power of the sovereign State", and Wolfgang Friedman The Changing Structure of International Law (1964), observing that international law "reflects the state of society that is both desperately clinging to the legal and political symbols of national sovereignty and being pushed to the pursuit of common needs and goals"

23 Simma (above n 18) at 234.

24 Dugard (above n 50), at 731. See also generally Pierre Marie-Dupuy "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi" (2005) 16 European Journal of International Law 131; Gordon Christenson "Jus Cogens: Guarding Interests Fundamental to International Society" (1987-88) 28 Virginia Journal of International Law 585, at 587, speaking of "the embryonic notion of a world public order not exclusively controlled by nation-States, one that is foundational, guarding the most fundamental and highly-valued interests of international society".

25 Emmanuelle Jouannet "Universalism and Imperialism: The True-False Paradox of International Law?" (2007) 18 European Journal of International Law 379.

law.[26] The emergence of international criminal law, with the International Criminal Court as its epicentre, is said to be reflection of the fact that humanity and its well-being, and not the interests of States, are at the centre of the concerns of international law.[27] This new emerging international law is said to be underpinned by multilateralism as the vehicle to achieve its community objectives.[28]

9. It is this new international law, based on community values, solidarity and multilateralism that is said to be threatened by the rise of populism.[29] Indeed the argument is that the rise of populism will mean the return to the classical, morally deficient international law based on bilateralism.[30] The rise of populism, so the argument goes, is encouraging the revert back to an international law in which sovereignty and consent are king, and in which State are nominally free and constrained only by the power to bargain, which in turn is influenced by military, economic and political power.

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26 See, e.g. generally Ernest Petrič "Principles of the Charter of the United Nations: Jus Cogens" (2016) 7 Czech Yearbook of Public and Private International Law 1. On values and jus cogens see Commentary to Draft Conclusion 3 of the International Law Commission's Draft Conclusion on Peremptory Norms of General International Law (Jus Cogens), Report of the International Law Commission, Seventy-First Session, General Assembly Official Records, Supp No 10 (A/74/10), Chapter IV. See also Dire Tladi "The International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens): Making Wine from Water or More Water than Wine" (2020) 89 Nordic Journal of International Law 244, at 249 et seq.

27 See Gerhard Werle and Florian Jessberger Principles of International Criminal Law (Third Edition, 2014), especially at 33 et seq.

28 Antonio Cassese "A Plea for a Global Community Grounded in a Core of Human Rights" in Antonio Cassese (ed), Realizing Utopia: The Future of International Law (Oxford, 2012), at 139.

29 The spirit of this critique is also reflected in James Crawford "The Current Political Discourse Concerning International Law" (2018) 81 The Modern Law Review 1, at 21.

30 Schwöbel-Patel (above n 6), at 100 ("Populism is, in this interpretation, to blame for having shaken international law's poster child institutions, the United Nations (UN), the International Criminal Court (ICC), the World Trade Organization (WTO), even the International Court of Justice (ICJ), and of course the European Union (EU) as the most integrated regional form of multilateralism.")

2.2 Illustrations of Populism's Assault on New Vision of International Law

10. There is certainly sufficient evidence to empirically sustain the claim that populist leaders as described in the majority of literature emphasise sovereignty and the national interests of their individual States over the solidarity implied by the brave new world of John Dugard or the community interests that were advanced by Bruno Simma. Perhaps the best starting point in offering illustrations of how populist movements and leaders have attacked the international law system of solidarity and community interests are the policies of the Donald Trump administration towards international law since Trump is the posterchild for populism's effects on international law.[31]

11. Since being inaugurated, the Trump administration has levelled attacks, with varying degrees of viciousness, against an array of international institutions and multilateral frameworks established to advance the common good. Perhaps, the most infamous sign of Trump's offensive against international law has been the withdrawal of the US from the Paris Agreement. [32] The announcement of the withdrawal was swift, coming barely six months after Trump's inauguration and even before the time permitted for withdrawal under the Agreement.[33] What's more, the reasons advanced by the Trump administration for the withdrawal give credence to the proposition that populism seeks a return to classical international law in which sovereignty and consent trump all. Noting that he "was elected to represent the citizens of Pittsburgh, not Paris", the US President asserted that the decision to withdraw "from the agreement represents a reassertion

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[31] Just about every article on populism and international law written since Trump's election, has placed him front and centre as the face of populism's attack on international law. It is probably not a coincidence that the international lawyer's interest on populism arose after Trump's election.

[32] See for discussion Yong-Xiang Zhang, Qing-Chen Chao, Qui-Hong Zheng, Lei Huang "The Withdrawal of the United States and its Impact on Global Climate Change Governance" (2017) 8 Advances in Climate Change Research 213.

[33] Under Article 28(1) of the Paris Agreement, at "any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary." At the time of the announcement, the Agreement had

of America's sovereignty."[34] In addition to the Paris Agreement, Trump has also levelled attacks against the United Nations itself.[35] His administration has also launched nationalistic driven attacks on the World Health Organisation (hereinafter "WHO") and decided to suspend its funding to that organization in the height of Coronavirus Pandemic.[36] Subsequent to announcing that the United States would stop funding the WHO, the administration announced that the United States would be withdrawing from the WHO.[37] The United States also formally withdrew from the United Nations Educational, Scientific and Cultural Organisation (hereinafter "UNESCO") in 2017, effective 2019, on account of what it viewed as the anti-Israel posture adopted by UNESCO.[38] It has also

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not yet entered into force.

34 Statement by President Trump on the Paris Climate Accord, 1 June 2017, https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/ (accessed 13 April 2020). The statement is replete with language that suggests inward-looking, national interest first and lack of concern for the greater good – the elements of the international lawyers' criticisms against populism. To quote just two examples out of countless others, in his statement, Trump states that "[f]oreign leaders in Europe, Asia, and across the world should not have more to say with respect to the U.S. economy than our own citizens and their elected representatives" and that his "job as President is to do everything within [his] power to give America a level playing field and to create the economic, regulatory and tax structures that make America the most prosperous and productive country on Earth …"

35 Schwöbel-Patel (above n 6), at 98.

36 Dawn Kopecki and Berkley Lovelace, Jnr "Trump Blames WHO for Getting Coronavirus Pandemic Wrong, Threatens to Withhold Funding" 8 April 2020, https://www.cnbc.com/2020/04/07/trump-blames-who-for-getting-coronavirus-pandemic-wrong-threatens-to-withhold-funding.html (accessed 13 April 2020). On the suspension of the funding see Jessie Young "The US is Halting Funding to the WHO: What Does it Mean?" 15 April 2020 https://edition.cnn.com/2020/04/15/world/trump-who-funding-explainer-intl-hnk/index.html (accessed 15 April 2020).

37 See Brianna Ehley and Alice Miranda Ollstein "Trump announces U.S. withdrawal from the World Health Organization" 29 May 2020 https://www.politico.com/news/2020/05/29/us-withdrawing-from-who-289799 (accessed 22 June 2020).

38 "U.S. and Israel officially withdraw from UNESCO" 1 January 2019 https://www.pbs.org/newshour/politics/u-s-and-israel-officially-withdraw-from-unesco (accessed 10 April 2020).

rendered useless the World Trade Organisation (hereinafter the "WTO") Appellate Body. Under the WTO Dispute Settlement Agreement, appointment of members of the Appellate Body is to be done by consensus,[39] with the result that each member of the WTO has an effective veto on the appointment of members. The US has refused to appoint any members to the Appellate Body, resulting in a situation where there are insufficient members for the Appellate Body to hear any appeals.[40] Attacks on the multilateral infrastructure have not been reserved only for those bodies to which the US is a party. The International Criminal Court (hereinafter the "ICC") has also been at the receiving end of US attacks. In response to suggestions that the Prosecutor may open investigations in Afghanistan and Palestine, with *potential* indictments against US and Israeli political and military officials, the United States threatened all sorts of actions, ranging from arrest of ICC officials, refusal of entry and denial of visas.[41] On 11 June 2020, the Trump administration followed through on its threats, issuing an executive order authorizing sanctions and visa restrictions against ICC personnel.[42]

12. While Trump is the poster-boy for the proposition that populism is a threat to the new international law of solidarity and community interests, his administration is by no means the only culprit that has been identified. The movement that called for the United Kingdom to reconsider its relationship with the European Union and that campaigned for the successful exist of the UK from the European Union, is also often identified as a

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[39] Art. 2(4) read with Art 17(2) of Annex 2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 17(2) provides that the Dispute Settlement Body "shall appoint persons to serve on the Appellate Body for a four-year term" while Article 2(4) provides that save where explicitly provided for decision of the Dispute Settlement Body shall be consensus.

[40] See generally Shaffer (above n 17). See also Amrita Bahri "'Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?" Institute of European Law Working Paper 03/29.

[41] "US Threatens International Criminal Court" 15 March 2020, https://www.hrw.org/news/2019/03/15/us-threatens-international-criminal-court (accessed 13 April 2020).

[42] See Jennifer Hansler "Trump Authorises Sanctions against International Criminal Court Officials", 14 June 2020, https://edition.cnn.com/2020/06/11/politics/icc-executive-order/index.html (accessed 24 June 2020).

manifestation of the insidious effect that populism has on international law.[43] The Syriza coalition in Greece which, in contrast to the Brexit movement, is more leftist-oriented, also campaigned for Greece's withdrawal from the EU for reasons that could be described as populist – reclaiming sovereignty.[44] South Africa's African National Congress too, at least under the deposed Jacob Zuma, was labelled as a populist movement.[45] It was under this ANC administration that South Africa withdrew from several treaties. In this respect, the failed attempt by South Africa to withdraw from the International Criminal Court has drawn much of the attention.[46] The Zuma administration has also been criticised for other decisions seen as undermining international institutions, including its decision to support the SADC decision to prevent the SADC Tribunal from hearing complaints by individuals.[47] Venezuela's withdrawal from the Inter-

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43 Schwöbel-Patel (above n 6), at 99 (" The UK's vote to leave the European Union, a regional multilateral treaty regime, was presented by the Brexit campaign's 'Take Back Control' slogan as a means to reclaim sovereignty"). See also Gruszczynski and Lawrence (above n 14), at 20; Kriege (above n 3), at 981. See further Brandes (above n 5), at 587-588 ("A backlash against international law exists not only in states controlled by populist leaders but also where nationalistic or populist politics play a more limited role. Thus, for example, a strong backlash against the ECtHR is taking place in the UK, where calls to leave the ECHR were made even prior to the Brexit referendum.")

44 Jon Stone "Syriza: Everything You Need to Know about Greece's New Marxist Governing Party", 26 January 2015, https://www.independent.co.uk/news/world/europe/syriza-everything-you-need-to-know-about-greece-s-new-marxist-governing-party-10002197.html (accessed 18 April 2020).

45 See, e.g. Louise Vincent "Seducing the people: Populism and the Challenge to Democracy in South Africa" (2011) 29 Journal of Contemporary African Studies 282;

46 Dire Tladi "South African Foreign Policy and the Justice-Peace" in Lesley Masters and Jo Ansie van Wyk (eds.) South African Foreign Policy Review: Vol 3 (2019); Hendrik Johannes Lubbe "Democratic Alliance v Minister of International Relations and Cooperation 2017 (3) SA 212 (GP) - Comments on the Al Bashir Cases" (2016) South African Yearbook of International Law 242.

47 Obonye Jonas "Neutering the SADC Tribunal by Blocking Individuals' Access to the Tribunal" (2013) 2 International Human Rights Law Review 294; Shane Meckler "A Human Rights 'Monster' that Devoured No One: The Far-Reaching Impact of Dismantling the SADC Tribunal" (2016) 48

American human rights architecture has also been identified as a manifestation of the populist threat to international law's communitarian and humanitarian ideals.[48] These are but examples of many cases that are often advanced as illustration of populisms threat to international law.[49]

3. Evaluating the Claim

13. The discussion in the previous section does provide *some* evidence of States led by, or influenced by, populist leaders, attacking multilateral institutions established under international law. Yet, does this justify the narrative that populism is a threat to the multilateral-based international law founded on communitarian values and solidarity. The big assumption which those advancing the proposition simply do not interrogate is whether *the thing* under attack by populism – this solidarity and communitarian values-based international law actually exists? Let us not forget, that even in classical, sovereignty-centred and consent-based international law, States did come together to adopt rules with normative content based on the pursuit of the common good. However, any such normative content was always the product of the consent of States derived from their bargaining power and in their national interest, and not from any pre-determined objectives of the legal system.[50] Even under classical international law, States cooperated,

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New York University Journal of International Law and Policy 1007. For a different view see Dire Tladi "The Constitutional Court's Judgment in the SADC Case: International Law Continues to Befuddle" 2020 Constitutional Court Review (forthcoming).

48 See for discussion Schwöbel-Patel (above n 6), at 105 ("Venezuela's withdrawal from the International Centre for Settlement of Investment Disputes (ICSID) Convention and the American Convention on Human Rights (ACHR), its announcement of withdrawal from the Organization of American States (OAS) and its notification of non-participation in proceedings against it at the ICJ have distinct populist features.").

49 As noted above, Krieger (above n 4), at 972 has also identified governments in Bolivia, Ecuador, Hungary, the Philippines, Poland, Russia, Turkey and Venezuela and movements exerting influence in France, Germany, the Netherlands and the United Kingdom (UK) and Israel as populists.

50 See John Dugard "The Future of International Law: A Huma Rights Perspective – With Some Comments on the Leiden School of International Law" (2007) 20 Leiden Journal of International Law 729, at 730 ("Traditional international law was seen as a system of neutral rules, equal in status, to which States had consented…").

and sometimes accepted obligations advancing the common good. Obligations arising from these cooperative arrangements, however, were freely assumed in the exercise of the sovereign rights of States and based on political and economic calculations. It seems to me that whatever our consternations about the increase in populist movements and their normative policies, the actions and rhetoric complained of is a reflection of, and is made possible by, the structure of international law as it currently stands. The populist movements are not a threat to international law, they are a reflection of it.

14. The US under Donald Trump has borne the brunt of the international lawyer's critique of populism, so it is appropriate to begin by comparing US conduct under previous administrations, including the more popular (as opposed to populist) American administration and one that is seen as more progressive, multilateralist and emblematic of the solidarity-based and communitarian based international law – the Obama Administration. I have always held the view that US foreign policy is consistent across political parties and presidents, what differs is the style.[51] It is the case that Trump has taken this policy to another level, but this is just a matter of degree and not substance – Trump's policy may best be described as US foreign policy on steroids.[52] Climate Change, one of the flagstone issues raised to show the dangers of populism, is a case in point. While it is true that Trump withdrew from the Paris Agreement, it is equally true that previous administrations did not join the Kyoto Protocol advancing very much the same rhetoric as Trump's statement announcing the withdrawal from the Paris Agreement. George W Bush, for example, in repudiating the Kyoto Protocol stated that he would not accept the Kyoto Protocol since it would "harm our economy

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51 A fictional Chief Prosecutor of the ICC in the novel Dire Tladi Blood in the Sand of Justice (2007), at 89, makes the following comparison between Barack Obama and George W Bush, which I believe to be accurate and applicable also to Trump: "It was kind of like Obama following GW Bush. Obama said, I will give you respect. He offered a 'listen and learn kind of leadership' as opposed to the bullying of Bush… The world loved Obama because he was the antithesis of Bush, yet, at least internationally, he pursued the same objectives."

52 Dire Tladi "Trump vs. International Law: Unilateral Use of Force" Opinio Juris 5 October 2018, http://opiniojuris.org/2018/10/05/trump-vs-international-law-unilateral-use-of-force/ (accessed 14 April 2020).

and hurt our workers."[53] Moreover, while the Obama administration is credited with a progressive attitude towards the need to address climate change, it should be recalled that that administration itself did not support the Kyoto Protocol.[54] Thus, the policies of Trump, the populist, is just an extension of longstanding US policy on climate change and international agreements – the Obama administration's participation in the Paris Agreement is discussed in the next paragraph.

15. The experience, at least so far, with climate change reveals yet another flaw in the proposition that populism undermines an international law which subjugates sovereignty in the interest of the common good. Climate change has been described as one of the most serious threats facing the world and its population.[55] Given the seriousness of the threat, the response of an international law system which places community interests above sovereignty and national interests would be an effective instrument capable of addressing the perils of climate change. Yet international law's response thus far has been nothing but disappointing. Seven years prior to the adoption of the Kyoto Protocol, the International Panel on Climate Change had determined that what was required to stabilise greenhouse gas emissions was "an immediate reduction in emissions from human activities of over 60%".[56] Yet the Kyoto Protocol provides a target of five percent reduction

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53 "Bush firm over Kyoto stance" 29 March 2001 http://edition.cnn.com/2001/US/03/29/schroeder.bush/index.html (accessed 15 April 2020).

54 See, e.g. "Obama's envoy for climate change casts doubt on Kyoto protocol" 19 September 2011, https://www.theguardian.com/environment/2011/sep/19/us-envoy-climate-change-emissions (accessed 15 April 2020).

55 See Philip E Hulme "Adapting to Climate Change: Is There Scope for Ecological Management in the Face of a Global Threat?" (2005) 42 Journal of Applied Ecology 784, at 785. See Nilufer Oral "Environmental Protection as a Norm of Jus Cogens: Is it Time?" in Dire Tladi (ed) Peremptory Norms of General International Law (Jus Cogens): Taking the Proverbial Car out of the Garage (forthcoming, 2021), at 19 ("Scientific reports leave no doubt that global temperature are rising due to human activities threatening potential catastrophic impacts on millions of people around the world….).

56 IPCC/UNEP Climate Change: The IPCC Scientific Assessment (1990), at xi.

of only some countries, and does so seven years later.[57] This target is grossly inadequate and illustrates that States (and not just those led by populist governments) were motivated not by the greater good (community interests and solidarity) but rather by "cost and economic feasibility" – the economic and political calculations so characteristic of classical international law.[58] The Paris Agreement is no more effective, probably less so, than the Kyoto Protocol.[59] The Agreement itself does not provide emissions reductions targets, leaving it to States to determine nationally their own targets.[60] Seo,

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57 Art. 3 of the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change provides that developed States "shall, individually or collectively, ensure that their aggregate anthropogenic" greenhouse gas emissions "do not exceed their assigned amount … with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels .."

58 Michael Bothe "The United Nations Framework Convention on Climate Change: An Unprecedented Multilevel Regulatory Challenge" (2003) 63 Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht 239, at 246 noting that the "target has been set rather low" and that there "are few environmental regulations where it is as clear as here that the regulation is inadequate." See also generally Robyn Eckersley "Ambushed: The Kyoto Protocol, the Bush Administration's Climate Policy and the Erosion of Legitimacy" (2007) 44 International Politics 306, especially at 311 et seq ("both climate change scientists and environmental NGOs have been the most vocal in drawing attention to the extreme modesty of the Kyoto targets relative to the scientific recommendations of what needs to be done ..") Moreover, when other factors such as the flexible mechanisms, it becomes clear that the common good of addressing the threat of climate change was not the primary motivation behind the architectural design of the Kyoto Protocol. See for discussion Dire Tladi Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments (2007), at 141 et seq. See also Prue Taylor "Heads in the Sand as the Tide Rises: Environmental Ethics and the Law on Climate Change" (2000/2001) 19 UCLA Journal of Environmental Law and Policy 247, at 259.

59 Incidentally, even the White House statement announcing the withdrawal from the Paris Agreement (above n 34) describes the Agreement as weak ("Even if the Paris Agreement were implemented in full, with total compliance from all nations, it is estimated it would only produce a two-tenths of one degree — think of that; this much — Celsius reduction in global temperature by the year 2100.")

60 See Art 3 of the 2015 Paris Agreement.

for example, observes that the Paris Agreement does not establish any quantitative amounts of emissions reductions nor an effective strategy for realizing the political aspirations of holding "global average temperature to well below 2°C".[61] Indeed even those that heap praise on the Paris Agreement, do not suggest that it is an effective agreement capable of protecting the earth from the ravages of climate change. Rather, the Paris Agreement, when it is praised, is praised as an illustration of diplomatic achievement and as a framework for potential future cooperation in addressing climate change.[62] The Obama administration's commitment to addressing climate change should therefore not be overstated. The Paris Agreement, and the commitments contained therein, simply reinforce that the current fabric of international law is one in which the common good is subjugated to the national interests and bargaining power of States.

16. I pause to note that many of the strategies employed by the Trump administration in the exercise of its bargaining position have been used by previous, less populist administrations of the United States. It has, for example, been noted that the United States, even under both the Bush and Obama administrations, had become disillusioned with the WTO Appeals Body and "increasingly challenged [the institution's] decisions against it and expressed its discontent by taking more aggressive positions in the AB selection process."[63] Thus the Trump administration's decision to filibuster the WTO Appeals Bodies' appointment process is merely an elevated strategy from previous, less populist administrations – again an illustration that the Trump administration's foreign policy is simply a continuation of

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61 See S Niggol Seo "Beyond the Paris Agreement: Climate change policy negotiations and future directions" (2017) 9 Regional Science Policy & Practice 121, at 129.

62 See, e.g. generally Wolfgang Obergassel, Christof Arens, Lukas Hermwille, Nico Kreibich, Florian Mersmann, Hermann E Ott and Hanna Wang-Helmreich " Phoenix from the ashes: an analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change – Part I" (2015) 27 Environmental Law and Management 243, where the Paris Agreement is described as "climate diplomacy masterpiece" (at 246), while also conceding that it "does not resolve anthropogenic climate change" and that, instead, what it does is that it "creates periodical political space that needs to be filled through national ambition." (at 248). See also Robert Falkner "The Paris Agreement and the New Logic of International Climate Politics" (2016) 92 International Affairs 1107.

63 See Shaffer (above n 17), at 40.

US foreign policy on steroids. Similarly, while populism is blamed for the US withdrawal from UNESCO, and will probably be blamed for the defunding of and exit from the WHO, it ought to be remembered that it was under the Obama administration that the United States first withheld funding from UNESCO due to the latter's decisions relating to Palestine.[64] Given the multilateral-friendly-Obama administration's response to UNESCO's admission of Palestine as a member, can there really be any doubt that any decision of the ICC to start active investigations in either the situation in Palestine or Afghanistan would have led to an aggressive response from any US administration, including that of Obama?[65]

17. This is not intended to be a critique of the Obama administration or any other administration of US. I have referred to the Obama administration because the narrative of a slide, or retreat from the nirvana of international law is often based on Trump and the contrast with the more international law-friendly Obama. However, it is not just successive US administrations – populist or not – which have adopted positions that do not promote a progressive, community-based and solidarity inspired international law. States, even in the post-classical international law, continue to be driven by national interests and use their bargaining powers not to advance community interest and solidarity but their own economic and political interests. Militarily powerful States have, contrary to a consistent

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64 See Ian Williams "Obama Will Rue his Lack of Principle on Palestine's UNESCO Membership" 1 November 2011, https://www.theguardian.com/commentisfree/cifamerica/2011/nov/01/obama-palestine-unesco-membership (accessed on 15 April 2020).

65 See on this question Dire Tladi "Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited" (2017) 60 German Yearbook of International Law 43, at 50-54. At 53-54, having discussed the length of the time that it has taken the ICC to assess whether to open investigations in Afghanistan, Iraq and Palestine, the following observation is made: "Is it not reasonable to conclude – as I have – that the Prosecutor genuinely wants to open investigations in these situations but is uncomfortable because of the political ramifications? In each of these three situations, opening up investigations would imply the real possibility of prosecuting nationals, and officials in particular, of very powerful States and their allies – the United States (US) in the situation in Afghanistan, the United Kingdom (UK) in the situation in Iraq, and Israel (the US's closest ally) in the situation in Palestine. Could this be the reason – I believe it is – that the Office of the Prosecutor hesitates in opening up investigations?"

jurisprudence by the International Court of Justice,[66] asserted a non-existent right to use force unilaterally in third States without the authorisation of the UN Security Council, whether on the basis of the dubious "unwilling or unable" doctrine or equally problematic humanitarian intervention, in such a broad manner that tends to undermine the collective security system underpinned by the Charter of the United Nations.[67] While much has been made (and rightly so) of Brexit, the truth is that the United Kingdom had always kept the EU at arm's length, through for example not joining Schengen Area – the European area in which passport and visa control is abolished – or the single Euro currency. Another example that could be referred to is the current negotiation process on a proposed treaty on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction.[68] The positions of many States in those negotiations are influenced not by solidarity but by economic interests.[69] For example, it is not surprising that it is those States that are opposed to, or seek to limit the scope of the proposed agreement, whether in whole or

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66 See Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v the United States of America), Judgment of 27 June 1986, ICJ Reports 1986, p 14; Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Judgment of 6 November 2003, ICJ Reports 2003, p. 161; Case Concerning the Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment of 19 December 2005, ICJ Reports 2005, p. 168; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p 136.

67 See for discussion Mary Ellen O'Connell, Christian Tams and Dire Tladi The Trialogues on War and Peace: Vol I Use of Force Against Non-State Actors (series editors: Anne Peters and Christian Marxsen) (Cambridge, 2019).See also Aniel de Beer and Dire Tladi "The Use of Force against Syria in Response to Alleged Use of Chemical Weapons by Syria: A Return to Humanitarian Intervention?" (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 205.

68 As an anecdote, I might point out that having been involved in the process towards this new treaty in different capacities between 2006 and 2020, I have found the position adopted by the US delegation to be more progressive (emphasis on the relativity of the phrase!) under the Trump administration than under any other US administration.

69 See essays in David Freestone (Ed.) Conserving Biodiversity in Areas beyond National Jurisdiction (2019) for a description of the issues as well as general positions of States.

in part, that enjoy significant economic benefit from activities in the ocean. In respect of these negotiations on marine biological diversity, the EU and its member States are an interesting case in point. While the EU supports the treaty being negotiated, in respect of sharing of benefit from the exploitation of marine genetic resources in the areas beyond national jurisdiction, the EU does not support a benefit sharing regime, and instead supports a freedom of the high seas principle or "first come, first serve" approach. Indeed, States that have a dominant proportion of registered patents over products derived from marine genetic resources have generally resisted the promotion of a common heritage or benefit sharing regime in respect of the exploitation of marine genetic resources.[70] Of course, these positions are said to be underpinned by legal and policy arguments: in respect of the sharing of benefits arising from the exploitation of marine genetic resources, for example, it is often said that any benefit sharing regime in respect of such resources would be contrary to the UN Convention on the Law of the Sea or would stifle scientific innovation. Similarly, in respect of the use of force in self-defence position, it is argued that these positions are consistent with customary international law. But the populist positions described in 2.2 are also, for the most part, based on international law: international law, for example, permits States to withdraw from treaties. The merits or demerits of these arguments are immaterial. What is material is that threats to solidarity and community values do not only come from populist movements. They are inherent part of the system of international law, and are reflected in the behaviour of all States in any given time.

18. What is said above should not be read as an endorsement of policies promoted by populist movements, including the Trump administration:

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[70] Sophie Arnaud-Haond, Jesús Arrieta and Carlos Duarte "Marine Biodiversity and Gene Patents" (2011) 25 Science 1521, at 1522 ("that "claims associated with marine genetic resources originated from only 31 out of 194 countries of the world" and that "[t]en countries own 90% of the patents deposited with marine genes, with 70% belonging to the top three …"). See also Robert Blasiak, Jean-Baptiste Jouffray, Colette Wabnitz, Emma Sundström and Henrik Österblom "Corporate Control and Global Governance of Marine Genetic Resources" (2018) 4 Science Advances 1, 2 ("[e]ntities located or headquartered in three countries registered more than 74% of all patents associated with MGR sequencing: Germany (49%), USA (13%) and Japan (12%). This figure rises to more than 98% when one considers the top ten countries").

quite the contrary. However, the proposition that populism threatens modern international law – the international law that is said to be based on the pursuit of the common good and solidarity – is premised on a fundamental flaw: there is no such international law. International law remains inexorably tied to State sovereignty and national interests. While, the current system of international law has been described as one "characterised by greater solidarity, which still flirts with the idea of sovereignty while at the same time seeking to surpass it in favour of a common good",[71] it would probably be more accurate to say that the system remains based on sovereignty, flirts with solidarity, and seeks to pursue the common good if the common good can be made consistent with the national interests of those with greater bargaining power. More importantly, whatever progressive international agreements are arrived at are based on the consent of States and arrived at through bargain in which States are motivated by national interest.

19. Poverty is the best example of the posture of international law towards solidarity. We live in a world in which 736 million people live in "extreme poverty", defined as persons living below USD 1.90 a day,[72] with more than 2 billion people living in poverty that is apparently not extreme.[73] If international law was reflective of Dugard's "brave new world" in which "State sovereignty is no longer a factor" and which was driven by "peace and human rights" and in which solidarity and community goals were central, international law would direct itself much more to poverty eradication, and do so in a more direct way.[74]

20. Yet poverty eradication is not a goal of international law, much less an obligation. While there are policy instruments, such as the Sustainable Development Goals, which include the eradication of poverty as an objective,[75] there is no duty under international law for States to cooperate

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71 Jouannet (above n 25), at 387.

72 World Bank Group Piecing Together the Poverty Puzzle: Poverty and Shared Prosperity (Washington, DC: 2018), at 1.

73 Id., at 8.

74 Schwöbel-Patel (above n 6), at 106 ("A complex web of institutions and norms has failed at redistribution of opportunities and wealth, with international lawyers at the helm.")

75 Transforming Our World: The 2030 Agenda for Sustainable Development, 25 September 2015 (A/Res/70/1), Sustainable Development Goal 1 ("End

to eradicate poverty and certainly no such an obligation to end poverty. The international treaty most closely connected with the eradication of poverty, the International Covenant on Economics, Social and Cultural Rights, suffers from severe constraints. For example, socio-economic rights are generally couched not as immediately and absolutely enforceable rights, but rather as obligations on the State to progressively realise the rights, and, moreover, such rights are subject to resource constraints of each individual State.[76] Second, the rights in the ICESCR are couched as rights owed by a State to the population in its own territory.[77] If international law were based on solidarity and the pursuit of the common good, then the obligations to promote socio-economic rights would not be subject to political borders. If poverty eradication is a common concern, and solidarity is a leitmotif of international law, then developed countries should be bound to at least contribute to the eradication of poverty also in poor countries.

21. Not only does international law not direct itself towards poverty eradication, there is little indication that it (or its institutions) makes an effort to alleviate the effects of poverty. In the midst of the Coronavirus pandemic, the rules of *this* international law permit those States with resources to hog those resources because it is in their national interest to do so – solidarity can take a backseat.[78] International economic law, for

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poverty in all its forms everywhere").

76 To this end, Article 2(1) of the ICESCR provides as follows: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.". See for discussion, generally, Asbjørn Eide, Catarina Krause and Allan Rosas (eds) Economic, Social and Cultural Rights: A Textbook (1995);

77 See Elif Askin "Economic and Social Rights, Extraterritorial Application" Max Planck Encyclopedia of Public International Law (2019). See especially para 3 ("Traditionally, States owe human rights obligations, including economic and social rights obligations, to their own population within their [own] territories.". Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, at para 112.

78 Jane Bradley "In Scramble for Coronavirus Supplies, Rich Countries Push Poor Aside" 9 April 2020,

example, has often been criticised as elevating the interests of the wealthy over those of the poor.[79] Many years ago, in a report to the Human Rights Commission – the predecessor to the Human Rights Council – Oloka-Onyango and Deepika Udagama described the WTO rules as "grossly unfair and even prejudiced" and a "veritable nightmare" for "certain sectors of humanity" in particular those from developing countries.[80] There is very little evidence that the WTO today, places the interests of the poor any higher than when these criticisms were levelled. Sometimes, on the surface, international law rules seem geared towards improving the circumstances of the poor, yet when the layers are pulled back, the reality is much less impressive. An example of the latter is the number of provisions on capacity-building and technology transfer in international environmental instruments.[81] The capacity-building and transfer of technology provisions in these instruments are generally subject to the conclusion of specific agreements and arrangements and do not create specific obligations on any

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https://www.nytimes.com/2020/04/09/world/coronavirus-equipment-rich-poor.html (accessed 16 April 2020).

79 Barbara Stark "Jam Tomorrow: A Critique of International Economic Law" Chios Carmody, Frank Garcia and John Linarelli (eds) Global Justice and International Economic Law: Opportunities and Prospects (2014), at 262; Nicole Hassoun "Free Trade, Poverty and the Environment" (2008) 22 Public Affairs Quarterly 353, at 369. See also Marjorie Cohn "The World Trade Organisation: Elevating Property Interests Above Human Rights" (2001) 29 Georgia Journal of International and Comparative Law 427, at 427 ("WTO's raison d'être is the elevation of property interests above the protection of human rights."); Nii Lante Wallace-Bruce "Global Free Trade and Sustainable Development: Two Steps Forward in the WTO?" (2002) 35 Comparative and International Law Journal of Southern Africa 236, at 237 noting that there "is concern in some quarters that the WTO's push for growth in global trade is being at the expense of important social issues including poverty reduction and sustainable development.".

80 J Oloka-Onyango and Deepika Udagama The Realisation of Economic, Social and Cultural Rights: Globalisation and its Impact on the Full Enjoyment of Human Rights (preliminary report to the Commission on Human Rights), E/CN.4/Sub.2/2000/13, para 13-15.

81 See for discussion Henrik Österblom, Colette C.C. Wabnitz and Dire Tladi "Towards Ocean Equity" A Blue Paper Commissioned by the High-Level Panel on Sustainable Ocean Economy (2019), at 19, noting that capacity-building provisions in the UN Convention on the Law of the Sea are qualified.

State to transfer technology and build capacity.[82]

22. I should explain that I do not mean to suggest that international law is bad or evil. Quite the contrary. International law is neither good nor evil. It is a tool in the hands of those with influence (read power).[83] Those with the influence, the power, will yield it – the word "it" is purposefully used ambiguously to refer to either power or international law – for either good or bad. I might be described as one of those international law that believe that international law, at least in its current form, "cannot save the world" but I also accept that it "can make small differences".[84] Whether those small differences are for the good or the bad ultimately depends on those that wield *it*.

4. Conclusion

23. In the recent years international lawyers have a developed a new-found fascination with populism and its impact on international law. This fascination has various sources but has largely been driven by the rise of Donald Trump and his attacks on institutions of international law. Specific attacks by the Trump administration against institutions of international law have included the withdrawal from international agreements and institutions such as the Paris Agreement and UNESCO, defunding of the WHO and threats to exit from it, the blocking of the appointment of members of the WTO Appeals Bodies and making threats against other institutions such as the International Criminal Court. Other examples of populist-initiated attacks against international institutions and international organisations include Venezuela's withdrawal from the Inter-American human rights machinery, South Africa's failed attempt at withdrawal from the ICC and

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82 See e.g. Art. 266 of the 1982 UN Convention on the Law of the Sea.

83 See Cerdric Ryngaert, Erik J. Molenaar and Sarah MH Nouwen "Introduction" 'What is Wrong with International Law'?" in Cerdric Ryngaert, Erik J. Molenaar and Sarah MH Nouwen (eds.) What Wrong with International Law: Liber Amicorum AHA Soons (2015), at 4, quoting Martti Koskenniemi "International Law and Hegemony: A Reconfiguration" (2004) 17 Cambridge Review of International Affairs 197, at 198, stating international law is "a process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made."

84 Andre Nollkaemper "Fred Soons: A Pragmatic Trust in International Law" in Ryngaert, Molenaar and Nouwen (above n 83), at 6.

Brexit. These attacks against international institutions have led some international lawyers to claim that populism constitutes a threat to the communitarian and solidarity-based international law which is founded on multilateralism. This article has, however, argued that the fascination with populism and its effect on international law has been misplaced.

24. This article is neither a critique nor an endorsement of populist movements, their policies or their effect on international law. Rather, the article suggests that the proposition that populism is a threat to community values-based international law is flawed because no such international law exists. International law remains sovereignty-centred and consent-based, with States continuing to act in their own interests. Solidarity, in particular solidarity with the disadvantaged, plays very little role in the making of international law. Common goals, such as the protection of the environment, play some role but only if these do not negate essential national interests of the powerful. In other words, community interests, when reflected in international law instruments are simply the outcome of bargaining in a State-centric, sovereignty-based system of international law. Seen from this perspective, the populist-inspired policies against multilateral institutions described above are merely a continuation of the pursuit of national interests that is the hallmark of current international law, which is still centred on sovereignty but flirts with solidarity and the pursuit of the common good. If we want a solidarity-based international law, we should demand it and work towards it. Romanticizing the current system, and blaming populism, not matter how dreadful populism may be, will not bring us to the brave new world that we long for.