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Populism and International Law: What Backlash and Which Rubicon?

Nijman, Janne E.; Werner, Wouter G.

published in

Netherlands Yearbook of International Law 2018
2019

DOI (link to publisher)

[10.1007/978-94-6265-331-3_1](https://doi.org/10.1007/978-94-6265-331-3_1)

document version

Publisher's PDF, also known as Version of record

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citation for published version (APA)

Nijman, J. E., & Werner, W. G. (2019). Populism and International Law: What Backlash and Which Rubicon? In J. E. Nijman, & W. G. Werner (Eds.), *Netherlands Yearbook of International Law 2018: Populism and International Law* (pp. 3-17). (Netherlands Yearbook of International Law; Vol. 49). T.M.C. Asser Press/Springer. https://doi.org/10.1007/978-94-6265-331-3_1

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Chapter 1

Populism and International Law: What Backlash and Which Rubicon?



Janne E. Nijman and Wouter G. Werner

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Abstract This chapter introduces the theme of the volume, populism and international law, as well as its chapters. It does so by first discussing the Dutch political reality with its increasingly populist tendencies that was on the minds of the Editors when deciding to devote a volume to this theme. Subsequently, it explores briefly the many faces of populism and the different manifestations of the relationship between populism and international law. Rather than taking the so-called populist backlash against globalisation, international law and governance, at face value, this volume aims to dig deeper beyond mere ‘backlash’ rhetoric and wonders ‘what backlash are we talking about, really?’ While populism is contextual and contingent on the society in which it rises and its relationship with international law and institutions thus has differed likewise, this chapter’s historical reflections assist in our examination of what we find so dangerous about populism and problematic in

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its relationship with international law. It concludes by introducing the chapters individually and to some degree in relation to each other.

Keywords Populism · International law · Backlash · ‘Othering’ · Demagoguery

1.1 Introduction

On 23 October 2001, Pim Fortuyn accepted the nomination as the leader of the newly formed political movement ‘Liveable Netherlands’ (Leefbaar Nederland). In a very short period of time, Fortuyn had become a prominent figure in Dutch politics with idiosyncratic policy views, a provocative political style and a self-proclaimed vocation to protect the country from the dark sides of Islam. Most of all, however, Fortuyn presented himself as a leader, a figure that could take an ‘orphaned society’¹ by the hand and lead it out of the desert of neo-liberalism and multiculturalism. Fortuyn accepted the nomination in a style befitting his idea of politics: he looked into the crowd, saluted and said ‘at your service’—words that would obtain iconic status in Dutch politics. Within four months Fortuyn’s style and message proved too radical for the new movement, and he was forced to step down. He soon started his own movement, named after himself, and grew exponentially in the polls. When he was killed in May 2002, his movement was expected to become the biggest or second biggest faction in parliament.

A few years later (March 2014), Geert Wilders celebrates the victory of his ‘Freedom Party’ in the municipal elections in The Hague. At the end of his speech he directly turns to the audience and asks whether they would like more or less European Union. The crowd shouts back: ‘less, less, less!’ Wilders then asks whether they would like more or less social democrats, and solicits the same response. Finally, he asks whether they would like to see more or less Moroccans, with the crowd once more shouting back ‘less, less, less!’ Wilders looks amusedly at his supporters, saying ‘then we will arrange that’. His celebratory speech would form the basis for a criminal conviction for inciting discrimination by the Court in The Hague. The Court’s decision is currently under appeal. In the meantime, Wilders has referred to the case against him as another indication that the so-called liberal-progressive elite seeks to curtail the freedom of speech of those speaking out on behalf of the people.

Another five years later, Thierry Baudet celebrates the victory of his party in the provincial elections (which directly determine the composition of the Senate). Baudet’s speech follows the pattern set by Fortuyn and Wilders. He praises the supremacy of Western culture, for which he used the controversial term ‘boreal’ (thus echoing language popular in the alt-right movement). Yet, he laments and warns that this allegedly superior culture is undermined by elites at universities, the

¹ Fortuyn 2002.

media and government. He presents himself and his party/movement as rescuers of the betrayed people and as protectors of the endangered culture.

The three episodes are illustrative of many aspects of populism in the Netherlands today. Although both Fortuyn and Wilders are best known for their offensive Islam critique, their main target is broader and less well defined. They claim to stand up for the people who are betrayed by the elite, in need of a leader who is able to take action on their behalf. ‘At your service’, ‘We will arrange that’ are not just rhetorical phrases uttered at high political moments; they represent what both populist movements stand for. Baudet taps into this tradition, presenting himself as the one who protects ‘Western culture’ against internal and external enemies.

Recently, Yvonne Zonderop has argued how in The Netherlands the emptiness that came to define public space with the end of the so-called ‘*verzuiling*’² of Dutch society provided the space for populism to grow in.³ Over the last 15 years, Dutch populist movements have been mostly of a nationalist bent. Both Fortuyn and Wilders construct and subsequently operate in a triangle of a corrupted and self-serving elite, the betrayed ‘ordinary’ people and a leader standing up for them. Who counts as the elite is flexible and changes over time: it can be a coalition of liberals and social democrats, the European Union, the European Court of Human Rights, TTIP, the World Bank, refugee lawyers, judges, arbiters, bankers, the UN Committee on the Elimination of Racial Discrimination, the negotiators of the Marrakech Pact, climate scientists and climate activists, the media or anyone else. In a similar fashion, the particular form of betrayal of and threat to the people varies over time: often it is Islam, but it can also be multiculturalism, austerity, taxation, economic inequality, lack of proper housing, animal suffering, restrictions on smoking, or anything else. Who counts as the people is equally undetermined. They are defined in different terms depending on the topic and the enemy that has to be chastised: it could be those sharing Judeo-Christian values, but also a nation, or the ordinary people, the hard-working people, the forgotten people, or any other group. The only one who is clearly identified is the leader him- or herself: (s)he is the one making the speech act through which elite, betrayed people and leader are presented to an audience.

1.2 Populism and International Law

The three episodes described above also illustrate the starting point of this special issue on populism. Although those living in Europe tend to associate populism with right-wing politics, this link is historically and geographically contingent. Populism has been connected to a wide variety of political programs, and even within one and the same populist movement one can trace differences in policy preferences over

² Lijphart 1968.

³ See Zonderop 2018, at 49.

time. Rather than defining populism in terms of what it seeks to achieve substantively, we treat populism as a particular way of “‘doing politics” whose content is constructed in relation to the logic of differentiation and fracture’.⁴ A way of ‘doing politics’ that thrives on anger, fear and anxiety present in modern society; it engages in demagoguery to reach people’s emotions and in the practice of ‘othering’ rather than that it aims to serve the health and cohesion of the *civitas* or polity as a whole. The advantage of this approach of populism is that it treats populism as a ‘thin-centered ideology’⁵ that can be—and indeed, has been—linked to different political agendas. It also enables us to see populist tendencies within traditional political parties in The Netherlands and beyond. Populism as a style is copied by mainstream politicians; think for example of VVD political leader and Prime Minister Mark Rutte who accused the ‘white wine sipping elite in Amsterdam’ of not being fair to Donald Trump,⁶ (thus creating a self-proclaimed gap between himself—the Prime Minister—and the ‘elite’). Or think of the same Prime Minister’s ‘*pleur op*’ (‘piss off’) address to a group of Turkish-Dutch youth who intimidated other people when they demonstrated in favor of the Turkish government.⁷ It is also practiced, in the name of being ‘good populism’, by other parties, including the Christian Democrats.⁸ As the different chapters in this volume attest, populism comes in very different forms: leftist and rightwing, religious or agnostic, culturally conservative or libertarian, international law friendly and antagonistic to international law, racist or anti-racist, etc.

The many faces of populism also informed the choice of the editorial board for this special issue. The topic was selected in the course of 2017 when populist politicians and programmes of different kinds were on the rise. The election of Donald Trump to the White House, the British vote for leaving the EU, the rise of illiberal democracy in Hungary and Poland, the popularity of an authoritarian leader—President Rodrigo Duterte in the Philippines and Jair Bolsonaro in Brazil—, are all described as populist phenomena. In South Africa, the Economic Freedom Fighters (EFF) party are preparing for the presidential elections with a Leftist populist style. In India, President Modi mobilizes Hindu nationalism and China has declared President Xi Jinping to be their ‘core leader’. As we write this introduction in late 2018, Matteo Salvini has been elected in Italy, *Alternative für Deutschland* has 90 seats in the *Bundestag*, Geert Wilders and Thierry Baudet together have 22 seats out of 150 in the Dutch Parliament, and the ‘*gilets jaunes*’ are on the streets of France. In short, in 2018 Europe one out of four citizens votes for a populist party

⁴ Gruszczynski and Lawrence, Chap. 2 in this volume.

⁵ Mudde 2004, at 544.

⁶ VPRO, Buitenhof 13 januari: Mark Rutte, 13 January 2019, <https://www.vpro.nl/buitenhof/kijk/afleringen/2019/Buitenhof-13-januari-2019.html>, accessed 23 April 2019.

⁷ Mark Rutte addressed a group of Turkish-Dutch youth upon their obstruction of a Dutch national broadcasting camera crew reporting on them being out in the streets at the night of the military coup in Turkey. VPRO, Zomergasten, 4 September 2016.

⁸ BBC, Dutch election: Wilder’s defeat celebrated by PM Rutte, 16 March 2017, <https://www.bbc.com/news/world-europe-39287689>, accessed 24 April 2019.

according to The Guardian.⁹ As much of the rhetoric used by these politicians is anti-immigration, anti-global trade, anti-multilateralism, and climate change denialist, a volume that examines the relationship between current populism and international law seemed called for.

A surge of writings—ranging from articles and op-eds in international newspapers¹⁰ and magazines¹¹ to academic papers¹²—attempts to understand the populist backlash today. The public debate has come to focus on the question to what extent the ‘backlash’ present in populist politicians’ speech and programmes is rooted in socio-economic concerns—low wages and job insecurity—or in cultural or societal concerns—related to immigration, being looked down on by self-serving elites, or supremacy and lingering racism. Martti Koskeniemi recently argued that the current ‘backlash’ is reactionary, against the so-called 1960s liberal revolution (which continued after the 1960s, for example through the rise of human rights) in politics and international law.¹³ Similarly, Matthew Goodwin and Roger Eatwell, authors of *National Populism: The Revolt Against Liberal Democracy* (2018), argue that current national populism thrives on (i) distrust of politicians, the political system and representativeness; (ii) fear for the loss of a (cultural) way of life due to immigration and a change of societal (ethnic) composition; (iii) anxiety about income and job security; and (iv) an unsettling sense of being looked down on and left behind as a social or ethnic group compared to others in society.¹⁴ Obviously, these concerns are hard to disentangle. The role of (social) media, echo chambers, and fake news should moreover also not be ignored when one tries to understand the surge of populism. It is in our view significant that the rise of populism in the West coincides with the fall of social democracy—whereas in other parts of the world populism may be connected to a revival of leftist, redistributive

⁹ Their research shows that populists (far-left and far-right together) have tripled their votes in the past 20 years. P Lewis et al., ‘Revealed: one in four Europeans vote populist’, The Guardian, 20 November 2018, <https://www.theguardian.com/world/ng-interactive/2018/nov/20/revealed-one-in-four-europeans-vote-populist>, accessed 9 May 2019.

¹⁰ The Guardian has published a whole series on ‘The New Populism’, and in The Netherlands both leading newspapers NRC Handelsblad and the Volkskrant (repository ‘Populisme in Europa’) have been very active on the topic.

¹¹ See, for example Time Magazine’s 2016 Person of the Year was Donald Trump and with him ‘The Populists’ see S Shuster, ‘The Populists’, Time, <http://time.com/time-person-of-the-year-populism/>, accessed 9 May 2019.

¹² See for example Alston 2017; Posner 2017; Madsen et al. 2018; Ecker-Ehrhardt 2014.

¹³ Martti Koskeniemi, ‘International Law and the Far Right’, Fourth Annual T.M.C. Asser Lecture, 29 November 2018, <https://www.youtube.com/watch?v=zHRiBH2g15I>, accessed 9 May 2019, (written version forthcoming).

¹⁴ Koskeniemi is more ambivalent about the latter aspect. While he emphasises the backlash as being related to white male supremacy thinking, he argued that those in the populist movements do not want to be taken up into the dominant culture of cosmopolitanism, human rights, and liberal globalisation.

programs.¹⁵ In the aftermath of the 2008 financial crisis, which was confronted by spending a lot of public money to save private actors ‘too big to fail’ and therewith the financial-economic system. While coming from different backgrounds and angles, both Chantal Mouffe and Naomi Klein point to 2008 as crucial for the rise of ‘the populist moment’.¹⁶ They even call for a democratically constructed Leftist Populism to fight for equality, democracy, and social justice against Far Right and Trumpist populism in Europe and the US. Opening her pamphlet *For A Left Populism* (2018), Mouffe states ‘[w]e are witnessing a crisis of the neoliberal hegemonic formation and this crisis opens the possibility for the construction of a more democratic order.’¹⁷ Naomi Klein understands Trump as the ultimate hyperversion of the neoliberalist politics that dominated the past decades around the globe.¹⁸ From both we take a sense of urgency about the need to reconstruct the ‘people’ or *demos* unravelled by three decades of neoliberalist policies. Whether this should be done through a populist style, with alleged cleavages between ‘the people’ and ‘the elite’, is another question of course. Frankly, we find populism as a style profoundly disconcerting, as it thrives on divisions and plays with ‘othering’ in a dangerous way, putting pressure on the health of a democratic political society. However, rather than analyse the populist movements themselves and what explains their growth, this volume deals with the current relationship between international law and populism in its different manifestations. It means to dig deeper beyond mere ‘backlash’ rhetoric and wonders ‘what backlash are we talking about, really?’

This special issue is also informed by another concern voiced in the editorial board. All too often, populism is defined in negative terms only, as a threat to a, in principle, benevolent international law. In international and European law scholarship, today’s populism is generally discussed as a ‘backlash’ against—most notably—globalisation.¹⁹ Globalisation backlash is then understood to thrive on critique of economic globalisation or of cultural globalisation, or a mixture of the two. Either way, both critiques have contributed to the recent politicization and contestation of international law and global governance institutions (TTIP and TPP, WTO, EU, G20 to name just a few). Populist politicians have indeed turned against multilateralism beyond economic globalisation, for example against the multilateral Paris Agreement on Climate Change or the Global Compact on Migration. In international law scholarship, national populism is also discussed in relation to the backlash against international courts and tribunals and against international human rights. Resistance across the globe against international courts has been related to a

¹⁵ See also M Goodwin, ‘National populism is unstoppable – and the left still doesn’t understand it’, *The Guardian*, 8 November 2018, <https://www.theguardian.com/commentisfree/2018/nov/08/national-populism-immigration-financial-crisis-globalisation>, accessed 9 May 2019; Martti Koskenniemi ‘International Law and the Far Right’, Fourth Annual T.M.C. Asser Lecture, 29 November 2018.

¹⁶ Mouffe 2018, at 1.

¹⁷ *Ibid.*

¹⁸ Klein 2017.

¹⁹ See Alston 2017; Posner 2017; Madsen et al. 2018; Ecker-Ehrhardt 2014.

widespread and ‘pronounced scepticism against universalism’, against the multilateral mind-set that grounds international law and international organisations, but as such it needs further unpacking.²⁰ Alston insightfully observes how ‘[t]he main characteristic of the new populist-authoritarian era is disdain for social conventions, a currency on which respect for human rights norms has long been heavily dependent. The devaluation of that currency opens up immense horizons for the enemies of human rights.’²¹ Of course, it is important to critically scrutinize the arguments used by populist movements and to see whether their critique of multilateralism and international human rights protection makes sense. The chapter by Veronika Bílková in this volume is a good example of such debunking of populist critiques. Her chapter takes up three critiques of human rights often used by populist movements and shows how their concerns are unfounded.

However, while it is important to critique populist narratives on international law, this should not be the sole angle of the populism debate in international law. It is also important to examine international law’s possible role in creating the conditions under which populist movements can thrive. This is done in a number of chapters, most explicitly in the chapter by Christine Schwöbel-Patel. Schwöbel-Patel analyses how international institutions have been implicated in creating socio-economic conditions that have become breeding grounds for populist critiques of the elite. Schwöbel-Patel’s analysis hints at the ways in which international institutions may have contributed to Branko Milanović’s so-called ‘elephant graph’. This graph has become the placeholder in international legal scholarship for the explanation of populism through economic globalisation backlash.²² It arguably shows that populist voters of the middle class in developed countries may indeed be the losers of economic globalisation. Taking a global approach, Milanović studies the effects of globalisation on real income (distribution) across the globe by means of a large data set—‘almost 600 household surveys from approximately 120 countries in the world covering more than 90% of the world population and 95% of global GDP’.²³ He concludes that ‘rising national inequalities, despite being accompanied by lower global poverty and inequality, may turn out to be difficult to manage politically.’ Populist movements then are understood to surf the sense of ‘relative loss’ of income position, which is dominant in many societies around the globe. This sense of loss is then read as being behind the turn against globalisation and against multilateral order generally. Critically examining the role of international law in relation to the rise of populism is, maybe strangely enough, not that far from Eric Posner’s argument in ‘Liberal

²⁰ See for example Madsen et al. 2018.

²¹ Alston 2017.

²² B Milanović, The greatest reshuffle of individual incomes since the Industrial Revolution, VOX, 1 July 2016, <http://voxeu.org/article/greatest-reshuffle-individual-incomes-industrial-revolution>, accessed 23 April 2019.

²³ Ibid.

Internationalism and the Populist Backlash'. Posner argues that 'the international law community has seriously misunderstood the evolution of international law, with the result that it is unprepared to comment on the populist backlash. Specifically, [he] argue[s] that a common view held by these elites—that further international legal integration of the world is inevitable and beneficial, and that it enjoys the support of most ordinary people—has been refuted by events. Moreover, the populist reaction to international law may be traced to two essential features of international law—that it is *technocratic* and has been advanced by the *establishment*.'²⁴

However, it would be too simplistic to assume that populism is necessarily against international law. As is shown most extensively in the chapter by Alejandro Rodiles, populist movements in Latin America have often actively promoted international treaties and different forms of transnational cooperation. And as most other chapters indicate, populist movements frequently invoke international law, for example where they appeal to the need to protect sovereignty, self-determination or even individual human rights. In this context, it is also interesting to examine the rhetoric used by Donald Trump more closely, as is done in the chapter by Jessica Lawrence and Lukasz Gruszczynski, as well as the chapter by Aaron Fichtelberg. Both chapters show that Trump's 'paranoid style' (Fichtelberg) is combined with the use of arguments that fit a neo-liberal agenda very well. This echoes arguments recently made by Quinn Slobodian, author of *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard 2018), who pointed out on the front page of the *New York Times*: 'Populists are also globalists'.²⁵ While President Trump canvassed against 'the ideology of globalism' and 'unelected, unaccountable global bureaucracies'—language that reminds us inadvertently of the critique of managerialism—in a recent speech at the United Nations, his policies are globalist in a free market fundamentalism and anarcho-capitalism kind of way. Slobodian points out this comes down to a new version of 'alter-globalisation'. A version of globalism that, unlike the social movement that protested, for example, against the World Trade Organisation in Seattle in 1999—and global multilateral institutions more generally—to demand more attention for labour conditions, the environment and growing social inequality, is good for finance and trade but harsh on (migrating) people and the middle class. Slobodian's point that a populist leader like Trump may rally with anti-globalism language while in fact it is a very selective anti-globalism that followers possibly misread as it clearly means to serve large corporates by contributing to an international order developed to protect free capital and trade rather than people from precarious situations.

²⁴ Posner 2017, at 2.

²⁵ Q Slobodian, Populists are also globalists, *New York Times*, 23 October 2018, print edition, at 1 and 11.

1.3 Historical Perspective

Populism definitely entered US politics with the foundation of the People's Party in 1891. Aaron Fichtenberg includes a genealogy of populism in the US in his chapter and so here we merely refer to the 1935 novel by Sinclair Lewis that captures American populism of the 1930s: 'It can't happen here'.²⁶ A counter-factual novel about FDR losing—rather than winning the Presidential elections—from a populist politician, who favours Hitler and Mussolini in Europe and brings similar political practices and anti-internationalism to the USA. 'It can't happen here' may be read as a warning for US citizens and politicians to prevent populist backsliding; against the background of today's Trumpianism it is a sour read.

While the term 'populism' is nineteenth-century,²⁷ populism as a political style is of course at least as old as the roads to Rome (or rather older when we think of the politics of Greek Antiquity and Aristotle's theory of rhetoric and demagoguery).²⁸ The brothers Gracchus (c. 140–120 BCE) claimed to represent the people and canvassed as tribunes of the plebs with a populist style against the Roman aristocratic elite with a programme of land reform.²⁹ The Senate became divided between the *populares* and the *optimatis*.³⁰ Cicero left us observations on the populist style of tribune of the plebs, Clodius, and on how the Roman *Res Publica* collapsed into populist tyranny by Julius Caesar. This collapse of the political system and the (mis)rule by the Roman political elite was surely not instantaneous, yet marked ultimately by Caesar crossing the Rubicon in 49 BCE.³¹ With this crossing, Caesar entered Rome with his Legion, thereby committing an act of war according to Roman law. He seized power, put the rule of law aside, plunged Rome into civil war and made tyranny a fact of life. With this crossing, the Rubicon became known as 'the point of no return' but more than that the legendary physical, material frontier came to symbolise a profound political border. The image for a political system in regression, losing a healthy political culture, ignoring the widening gap between the people and the elite, succumbing ultimately to a strong and charismatic leader or demagogue, who relied on force to grab power under the pretext of being the true servant of the interests of 'the people'.

Long after the actual crossing, the Rubicon has become a placeholder in political thought to capture a fundamental crossing of a political society and its leadership from a healthy, rule of law based political society or *Rechtsstaat* to rule by law and force by an autocratic leader. Every age and every political society has its own Rubicons looming on the horizon.

²⁶ Lewis 1935.

²⁷ Kaltwasser et al. 2017, at 2.

²⁸ Urbinati 2017, at 578.

²⁹ Vervaeet 2016, at 233; Von Ungern-Sternberg 2006, at 89–109.

³⁰ Vervaeet 2016, at 223.

³¹ Von Ungern-Sternberg 2006, at 104.

This is not the place to provide a global history of populism, nor to give an overview of populism in international legal scholarship throughout the ages. Populism is contextual and contingent on the society in which it rises, its relationship with international law and institutions has differed likewise.

Yet, today's national populism is often compared to the developments in Europe during the 1920s and 1930s in an attempt to warn against leaving xenophobia and racism uncontested.³² History will never repeat itself, but historical knowledge does make us more conscious about our own times.

At the time, the fear for young European democracies to lapse into 'mobocracies'—the tyranny of the majority or masses—was tangible in all disciplines. Hans Kelsen immediately comes to mind, not just his dispute with Carl Schmitt over Weimar,³³ but also his life as a constitutional jurist in Vienna amidst what he called in a letter to Renato Treves 'the politically polluted atmosphere of [his] time'.³⁴ Polluted by fear and rage, by the othering of minorities, and by the conscious construction of enemies leading to (civil) war.

The 1920s and 1930s were in Vienna like in many other European cities the days of *Stimmungsdemocratie* and demagogic politics, of (nationalist) *Kriegbegeisterung* and *Massenwahn*. Elias Canetti wrote the socio-psychological study *Masse und Macht* (1960) triggered by being trapped in a crowd protesting in front of the Viennese Hall of Justice and its judiciary,³⁵ among which constitutional court judge Hans Kelsen probably inside that same building on that same day.³⁶ Obviously, the German and Italian democracies were in crisis and slid into fascism. This concern for democracy marked at the time the attitude of many artists and intellectuals, among which international lawyers, towards 'the people'. There were those who—in line with Wilsonianism and a general spirit of democratisation—valued the voice of 'the public' as the voice of Reason. Others were inclined to understand the people as 'The Public Phantom', to use Walter Lippmann's 1925 title, or as the dehumanised 'mass' personifying irrationality.³⁷ Sigmund Freud published *Massenpsychologie und Ich-analyse* in 1921 and Albert Einstein asked him in the open letter *Warum Krieg?* (1932): 'Wie ist es möglich, dass sich die Masse [...] bis zur Raserei und Selbstaufopferung entflammen lässt? Die Antwort kann nur sein: Im Menschen lebt ein Bedürfnis zu hassen und zu vernichten.'³⁸ Karl Mannheim published *Mensch und Gesellschaft im Zeitalter des Umbaus* (1935)

³² E.g. the 2018 Abel Herzberg Lezing by Minister Sigrid Kaag.

³³ E.g. Dyzenhaus 1997; Jacobzson and Schlink 2000.

³⁴ Kelsen 1999, at 172.

³⁵ Canetti 1980, at 274–282.

³⁶ Nijman 2004, at 157.

³⁷ Nijman 2004, at 84–243.

³⁸ Einstein asks Freud: 'Wie ist es möglich, dass die soeben genannte Minderheit die Masse des Volkes ihren Gelüsten dienstbar machen kann, die durch einen Krieg nur zu leiden und zu verlieren hat', and 'Wie ist es möglich, dass sich die Masse durch die genannten Mittel bis zur Raserei und Selbstaufopferung entflammen lässt? Die Antwort kann nur sein: Im Menschen lebt ein Bedürfnis zu hassen und zu vernichten.'

about the problems of modern mass society being insufficiently addressed by the democracy of the Weimar Republic. In *Die geistige Situation der Zeit* (1932), Karl Jaspers captured the ambivalence of European intellectuals towards ‘the people’, their doubt and concerns about democracies under pressure of populism and/or mass-induced political psychology:

The essential problem of the political history of our time is whether the masses of mankind can be democratised, whether average human nature is such as to enable each to accept his share of responsibility as a citizen equally aware with all others of what he is doing, and ready as a part of his daily life to take his share in deciding fundamental political issues.³⁹

There was an oscillation between contempt and appreciation of ‘the people’. Concerns about populist demagoguery endangering democracies impacted many international legal scholars of the 1920s and 1930s. The (methodological) individualism that arose in a number of different international legal theories is not a coincidence. With collective (political) creeds all around and ‘mass’ sentiments polluting increasingly the political and legal systems of Europe, the role of the individual, her rights and responsibilities, in international law moved to the forefront of the debate.⁴⁰ With the polluted politics in mind, Kelsen was among the most explicit opposers of any anthropomorphical thinking in law, rejected any kind of State sovereignty or State will (*‘ein Phantom’*) and argued for the sovereignty of the law only. His scholarship on international law is one fine example of how a political context defined by populism may influence international legal thought.⁴¹ Here it merely serves as a case in that point.

1.4 Papers Introduced and Summarised

As we set out above, this volume treats populism as a specific way of doing politics that is not necessarily tied to any substantive political program. What populists want and how people, elite and leader are constructed, is dependent on the political context in which they operate. For this reason, our aim has been to have chapters on different regions in the world. Unfortunately, we lost our chapter on (South) Asian populism. All the more unfortunate, since there is quite some literature arguing that this is a different kind of populism⁴² and thus it would have been great to explore its particular relationship with international law and governance. Still, our volume covers populism as it has occurred in rather different places in Latin America,

³⁹ Jaspers 1932.

⁴⁰ See Nijman 2004, pp. 84–243.

⁴¹ Nijman 2004; Von Bernstorff 2010.

⁴² See, for example, the discussion by Joshua Kurlantzick (J Kurlantzick, Southeast Asia’s Populism Is Different but Also Dangerous, Council on Foreign Relations, 1 November 2018, <https://www.cfr.org/article/southeast-asias-populism-different-also-dangerous>, accessed 9 May 2019); also Kenny 2018.

Africa, Europe, and North America. In addition, several chapters examine the way in which international institutions have (or have not) responded to challenges by populist movements.

This NYIL starts with the chapter by *Lukasz Gruszcynski* and *Jessica Lawrence*, who critique the idea that Trumpian populism is opposed to neoliberalism. Although the list of free trade promoting treaties bashed by the Trump administration is impressive, his government still buys into a set of core markers of neoliberalism: (a) the centrality of the market; (b) the idea that self-interest is the driving force among agents; and (c) the idea that government is there to facilitate markets as best as it can. In other words, Trump links his distinctive political style to economic agendas that are not substantially different from those of his conservative predecessors. His critique of the (global) elite, Lawrence and Gruszcynski argue, should not be mistaken for a communitarian project. Instead, it implies a refocusing of neoliberalism, not a rejection of the competitive logic that underlies it. Where the competitive logic is curtailed, it is for the protection of corporate interests, not for the benefit of the betrayed people on whose behalf Trump claims to speak.⁴³

Where Gruszcynski and Lawrence focus on the substantive program propagated by the Trump government, *Aaron Fichtelberg* draws attention to populism as a political *style* with a strong emotive side/feature. What sets Trump's populism apart from earlier US manifestations of populism (e.g. Andrew Jackson, agrarian populism or George Wallace), Fichtelberg argues, is a politics of paranoia. Following Robins and Post, Fichtelberg defines political paranoia as a style characterized by guardedness, suspiciousness, hypersensitivity and isolation. This trait runs through all policy fields and also impacts Trump's dealing with international law. Compared to previous governments, including those with populist and nationalist inclinations, the Trump government shows an unprecedented hostility towards existing international law and cooperation. International norms and institutions are not just to be ignored if they prove diametrical to US interests, they are to be treated as a betrayal of the American people, unless proven otherwise. However, in line with the paranoid style of governing, resentment against international norms is significantly less strong (or absent) when the international 'deals' have been undertaken by the leader himself.⁴⁴

That populism can be tied to very different substantive agendas is evidenced by the chapter by *Alejandro Rodiles*, which sketches the history of populist dealings by government with international law in Latin America. He takes the reader from the 1940s (Peron), via the 1970s (return of Peronismo and the initiatives by the Echeverria government in Mexico) to the 21st century 'New Latin America Left'. Although the specific manifestations of populism of course vary per country and period, Rodiles traces some commonalities between the different forms of populism. First, populism in Latin America tends to be left-wing and lacking the

⁴³ Gruszcynski and Lawrence, Chap. 2 in this volume.

⁴⁴ Fichtelberg, Chap. 3 in this volume.

xenophobic attitudes that characterise many right-wing populist movements elsewhere. Secondly, their stance towards international law is overall supportive, in particular when it comes to regional forms of integration and legal cooperation. Their rejection of neo-liberal forms of international cooperation should not be mistaken for a cynical stance towards international law; instead, they illustrate how well a populist political style can be combined with a positive attitude towards international law.⁴⁵

Rodiles' analysis ties in quite nicely with *Christine Schwöbel-Patel's* analysis of the relation between populism and international law. According to Schwöbel-Patel, there is a tendency in international scholarship to treat populism as a threat to international law. While this may not always be incorrect, it is at least incomplete. International structures and agents have helped to uphold inequalities within and among nations, thus making it easier for populists to create a sense of betrayal by an international elite. In addition, Schwöbel-Patel argues, not all populism is right wing or against international law *per se*. She calls upon her fellow international lawyers to turn to forms of populism that have helped to critique the neo-liberal assumptions of several international institutions, while remaining faithful to the ideals of international cooperation and solidarity.⁴⁶

Edwin Bikundo's chapter focuses on the self-understanding of the Mungiki, a group that has been engaged in repeated cycles of political violence in Kenya. The name 'Mungiki' stands for 'masses' or 'multitude', and the group indeed sees itself as a mouthpiece of the oppressed Kenyan people. In order to enact their role as liberators, they engage in what Bikundo calls a 'Faustian pact' to do good through evil. Interestingly, this language was also adopted by the counsel of Francis Muthaura in his case before the ICC. The counsel argued that the case as presented by the Prosecution read like 'a deal with the devil' between the government and 'a criminal, a lamentable, an invidious group'. Yet, Bikundo argues, international criminal law is unable to do justice to the nature of the Mungiki, because it speaks of the people, but lacks a conception of the people as an acting political subject.⁴⁷

Veronika Bilková directly takes up some of the critiques of human rights brought up by several populist movements. In particular, she seeks to refute three critiques of human rights often brought up by populist movements. The first is the security argument, claiming that security concerns should trump human rights. The second is the legitimacy argument, which states that human rights favour particular groups instead of the general population. The third is the democracy argument, which claims that human rights are against the will and interest of the majority in a national political community. Bilková acknowledges that populism seldom rejects the notion of human rights altogether. She also shares some of the concerns voiced by populists when it comes to human rights. However, she also argues that the

⁴⁵ Rodiles, Chap. 4 in this volume.

⁴⁶ Schwöbel-Patel, Chap. 5 in this volume.

⁴⁷ Bikundo, Chap. 6 in this volume.

critiques are simplified and exaggerated, and rooted in the myth of a self-serving elite that betrays the innocent people.⁴⁸

Rene Urueña shows how populism is taken up by an initially religious rather than political movement like the Evangelical Christians in Latin America. Moving from the private into the public sphere, they claim protection of their beliefs by ‘freedom of expression’ while in fact they engage in ‘othering’ the members of the LGBTQI community and beyond that in reshaping the democratic public order. The LGBTQI community is affected by the Evangelical-driven populism in a classical way, namely that struggles for individual rights challenge legal systems and their legitimacy and so LGBTQI rights are another example of the response.⁴⁹

Lys Kulamadayil’s chapter relates to the discontent with global economic law and governance through a critical analysis of the World Bank’s 2017 World Development Report on *Governance and the Law* (WDR17). WDR17 was published in the midst of political struggles where populist styles and nationalistic agendas were pushed in relation to issues such as migration, economic development, distributive justice and environmental policies. As a result, the WDR17 itself became part of the ideological struggles between economic liberalism and economic nationalism. In this context, Kulamadayil’s chapter focuses on the role of law envisaged in the report. She shows how the WDR17 understands law as a means to ensure commitment, coordination and cooperation as well as a way to constrain power, prescribing behavior and facilitating contestation. She points to the Report’s ‘remarkably enthusiastic appraisal of law and its ability to steer governance in a way that it would effectively achieve security, equity and growth in a society.’⁵⁰ Populist and economic nationalists, however, see - in her view - law more in terms of its instrumental value, while questioning the benefits of commitment, cooperation and contestation per se. The underlying issues here may not be the governance functions of law per se, but rather the policies and practices it supports. That is, those of the liberal economic ordering.

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⁴⁸ Bilková, Chap. 7 in this volume.

⁴⁹ Urueña, Chap. 8 in this volume. See also on these cultural political struggles and the development of human rights Reus-Smit 2011.

⁵⁰ Kulamadayil, Chap. 9 in this volume.

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