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Populism, the Pandemic & Prospects for International Law

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International Law – Rise or Decline?

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Populism, the Pandemic & Prospects for International Law

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Abstract:

Populism has fatally weakened the world's ability to respond to Covid-19, by undermining the capacity of the structures and mechanisms of international law to address the pandemic. The pandemic has exposed as a fallacy a key tenet of populism – to protect the 'people' of a nation from external forces, including international law. In fact international law, through the principle of self-determination, enshrines the ability of peoples to determine their own political organization. But this does not preclude agreement at the international level on matters of common interest to humanity as a whole that require community action. The prevention of infectious disease is just such a case, which states have long agreed could not remain solely the preserve of national polities, but requires a common international response. This paper, placing the current crisis in light of the development of international health law, critically examines the response of key populist governments to Covid-19 in order to address the larger issue of the implications of populism for the fate of international law.

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1. Introduction

‘They were counted; They were found wanting; They were divided.’¹

This paper considers the effect of the rise of what may be called ‘populism’ in a number of democratic states upon the capacity of the structures and mechanisms of international law to address the Covid-19 pandemic. Populism has been a striking feature of contemporary global politics. A key populist tenet has been its claim to protect the people against external forces. Despite this, surprisingly little attention has been paid to the implications of populism for international law. Its effects are now being put to the test under the extreme conditions of the global pandemic.

The rise of populism has fatally weakened the world’s ability to respond to the pandemic. Consideration of how and why this is so is important. There can be no cure without diagnosis. The experience of the pandemic has exposed to view important lessons both for the fate of populism and for the prospects for international law, which go much wider than international health law.

Yet health – specifically protection from communicable disease – is a critical case in point. It enables consideration of what should be expected from international law and how that fits with maintaining vibrant and distinct national societies without all the baggage of association with ‘hyper-globalization’² now carried by international economic law.

This paper argues that there is no essential opposition between ‘the people’ of a nation and international law. On the contrary, international law enshrines the principle of the self-determination of peoples at its heart. The internal dimension of self-determination empowers a people to make choices, even radical choices, about the future direction of their society. But this does not preclude agreement at the international level on matters of common interest to humanity as a whole that require community action. Such agreement does not inevitably entail a reduction in the scope for national self-determination. On the contrary, successful collective action may actually increase the solutions available to states that would not have been available otherwise. The prevention of infectious disease is just such a case, which states have long agreed could not remain solely the preserve of national polities, but must require a common international response.

In order to tackle this topic, the paper proceeds in five steps:

- (1) *Populism*: To consider the nature of the populist challenge to international law generally.
- (2) *World health – between international law and politics*: To understand a little of the forces that have shaped the contemporary system of international health law: a turn to an international law for pandemics that – even as it has embraced science – has never entirely been divorced from politics.
- (3) *Populism in the pandemic*: To look in very general terms at how the rise of populism actually affected the ability of states to respond effectively to the pandemic using the existing legal mechanisms.

¹ Book of Daniel 5:28.

² Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton 2012) 200.

(4) *Implications*: To consider the implications of this experience for the effect of populism on the operation of the international health system.

(5) *Prospects*: Finally, to address the prospects for international law more generally in light of the rise of populism and what may be said by way of response.

Before doing so, it is necessary to make three qualifications as to what the paper does not seek to do:

First, though some reference to specific examples is unavoidable, the point should not be seen as limited to any particular state. The argument highlights an approach to politics that has reached a number of democratic governments across the world. Although expressed in different ways, it is important to examine the common threads of that approach for their effect on international law.

Second, it is not suggested that populism is to blame for the pandemic. There is no simple cause and effect here. Plainly many factors have contributed to the ability of particular societies to address the health emergency. Nor should it be thought that, in focussing on ‘populist’ governments, the conduct of other states – wherever they sit on the authoritarian to liberal spectrum – is above criticism. Nevertheless there are particular reasons to focus on the response of ‘populist’ governments. This is not only because ‘populist’ governments of one hue or another currently dominate the top of a grim table that is the Worldometer survey of the countries with the most infections and deaths from the virus.³ It is also because populism has significantly weakened the collective ability of states to use the mechanisms of international law that have been developed to respond.

Third, international law is not, on its own, capable of ‘solving’ the pandemic and its manifold effects on human health, society and the economy. What it does do is to provide a structure through which these essential public goods can be delivered. In this time of crisis, it is necessary to pay renewed attention to its capacities to do so.

This makes it important to turn first to consider what might be meant by a populist challenge to international law.

2. The populist challenge to international law

a) What is ‘populism’?

‘Populism’ is not a legal term of art, a codified doctrine. It is itself a politically contested concept.⁴ For working purposes, this paper adopts political scientist Jan-Werner Müller’s approach in his book *What is populism?*⁵ This is to identify a set of three distinct claims with their own inner logic that, taken together, constitute populism as a particular approach to politics:

(1) *Anti-elitism*. In the first place, populism claims to speak for ‘the people’ against established elites. Established elites can take many forms. They can be found in the parts of the democratic state that

³ Worldometers, ‘Report Coronavirus Cases’, available at: <https://www.worldometers.info/coronavirus/#countries> (last accessed 9 October 2020).

⁴ Cas Mudde, ‘Populism: an ideational approach’ in: Cristóbal R Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford: OUP 2017) Ch. 2.

⁵ Jan-Werner Müller, *What is Populism?* (Philadelphia: U Penn Press 2016) 3.

are not elected: in the judiciary and the bureaucracy. They can also be found in the repositories of expert knowledge: in universities and in expert scientific or technocratic organizations.

(2) *Anti-pluralism*. In the second place, populism claims an exclusive entitlement to represent ‘the people’ and to determine the direction of society. It excludes all contrary views as illegitimate.

(3) *The identity of ‘the people’*. In the third place, populism defines its right to speak for ‘the people’ by determining who constitutes ‘the people’ and excluding all those others – whether they are within or outside the state – and treating them as enemies of the people.

In adopting this particular conception of populism, it is not suggested that every politician who successfully mobilises popular support to win a democratic majority for a programme of reform that disrupts the status quo is to be branded a ‘populist’ in the sense of embracing the approach here outlined.⁶ The concern here is with the effect of this particular brand of populism on the fabric of international law.

b) Internal and external dimensions

Constitutional lawyers have devoted much energy to examining the effects of populism on the internal constitutional systems of states, analysing: the assertion of authoritarian executive power; the politicization of the judiciary through intervention in appointments; executive limitations on the role of Parliament; tampering with elections through limits on voting rights and other political parties and covert manipulation of the electorate; and the hollowing out from the inside of the set of understandings or conventions that (whether one has a written or an unwritten constitution) constitute the real checks and balances in the constitution.⁷

All of this is very important, but it is not the focus of the present paper. Rather, the paper is concerned with the impact of populism on the international law plane. Here there is a striking difference. A key tenet of populism has been a form of exclusionary identity politics that, mobilizing popular sovereignty, creates a division between ‘the people’ and the other, seen in Hobbesian terms as the enemy outside.⁸ Populism makes a claim to sociological legitimacy – that society should not be controlled by external forces – that leads to a turn against ‘elites, supranational agreements, international judicial institutions or economic powers.’⁹ The result is a context in which ‘international law is invoked, but in what seems an increasingly antagonistic way, amounting often to a dialogue of the deaf.’¹⁰

⁶ Robert Howse, ‘Epilogue: in defense of disruptive democracy—a critique of anti-populism’ (2019) 17 *I.CON* 641 (‘Howse 2019’); Alejandro Rodiles, ‘Is there a ‘populist’ international law (in Latin America)’ in: Janne E Nijman & Wouter G Werner (eds), *Populism and International Law* (2018) 49 *Netherlands Yearbook of International Law* 69.

⁷ For a general survey of the internal constitutional and political dimensions see: Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford: OUP 2017).

⁸ Jan-Werner Müller, *What is Populism?* (London: Penguin Books 2017) 3.

⁹ Paul Blokker, ‘Populist Governments and International Law: A Reply to Heike Krieger’ (2019) 30 *European Journal of International Law (EJIL)* 1009, at 1012.

¹⁰ James Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern Law Review* 1.

Despite the central importance of the external face of populism, surprisingly little attention has been paid to its legal significance, in comparison to its internal constitutional implications.¹¹ Yet the populist challenge to international law is particularly concerned with the boundary between the international and the domestic, in which national sovereignty – linked with the popular sovereignty of ‘the people’ – is invoked as the key concept.

In legal terms, this means that the challenge presented by the external face of populism is about the way in which states interact on the plane of international law: in the discourse between states and in their engagement with and within international institutions. It is also about the relation between the internal law and institutions of the state on the one hand and international law on the other, because with executive aggrandizement at home goes unilateralism abroad.

c) Impact on international law: state practice & its academic supporters

On the plane of international law, the key tenets of populism find an easy purchase in criticism of its institutions and proscriptions. The decisions of international organizations and of international courts and tribunals can be cast as the attempts of an unaccountable global elite to control the direction of a sovereign ‘people’ from outside.

Such an approach leads the populist to reject outright the value of international institutions as the surrender of the sovereignty of the people to ‘an unelected, unaccountable global bureaucracy.’¹² Consider this recent statement from the President of the United States to the UN General Assembly (24 September 2019), in terms rather reminiscent of the *Cabaret* anthem:

The future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbours, and honor the differences that make each country special and unique.

The rise of populism has led to an increasing trend of outright withdrawal of states from important elements of the international legal system, facilitated in many otherwise democratic states by the exercise of an unfettered executive discretion to withdraw from international agreements.

This is a trend of which President Trump’s announced withdrawals from the Paris Agreement and the Iran Nuclear Accord – both so recently and painstakingly negotiated – are emblematic. Yet the evidence of withdrawal is in fact much more widespread.¹³ Examples include the United Kingdom’s Brexit withdrawal from the European Union; the increasing challenges of Member States of the Council of Europe to the jurisdiction of the European Court of Human Rights; and the withdrawal – both actual and threatened – of some states from the International Criminal Court.¹⁴

In each case, there is a striking similarity in one of the key strands in the arguments for withdrawal. Those objecting to the conferral of a power of decision on an international body charge that this is

¹¹ For important interventions on the international law impact see: Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1; Heike Krieger, ‘Populist Governments and International Law’ (2019) 30 *EJIL* 971; Nijman & Werner (eds), *Populism and International Law* (2018).

¹² Address of President Trump to the UN General Assembly, ‘Seventy-third session Official Records’ (25 September 2018), UN Doc A/73/PV.6, 17.

¹³ Campbell McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’ (2019) 68 *International & Comparative Law Quarterly* 499 (‘McLachlan 2019’).

¹⁴ *Ibid* 507–10.

contrary both to national sovereignty and to democracy. It is cast, as *The Spectator* memorably put it in relation to Brexit ‘a fight for the very sovereignty of our nation.’¹⁵ The power of decision, implementing the will of the people, must, they argue, be exercised only within the domestic polity. It cannot be ceded to an ‘unaccountable global bureaucracy.’

The campaign to undermine the impact of international institutions on national polities in the name of popular sovereignty at home has found ready support in an increasingly vocal neo-conservative part of the academy. Jens Ohlin shows persuasively in his book *The Assault on International Law* that the development of doctrines in US constitutional law that enhance executive discretion in foreign relations went hand-in-hand with scholarship that sought to undermine the determinate and binding character of international law.¹⁶

Nor are these trends limited to the United States. John Finnis, arguing that the executive in the United Kingdom has no obligation to abide by the state’s international law obligations writes:

International law remains, like it or not, a defective example of law. The criteria for its formation and identification remain opaque, controverted, and manipulable without redress.¹⁷

As David Dyzenhaus perceptively put it in an essay published this June drawing an explicit link between the ideological thought of Weimar-era Germany and Finnis and the neo-conservatives of the present day:¹⁸

Populism is not just a bull-in-china-shop way of doing politics. There is a theoretical tradition that seeks to justify strongman rule, an ideological school of demagoguery, one might call it, that is now more relevant than ever.

It is both incorrect and dangerous to contend that international law sits in opposition to the sovereignty of the people of a nation, or that it is anti-democratic. On the contrary, international law enshrines and protects the right of peoples to determine their political status and their economic, social and cultural development. But this does not preclude collective action to address common problems.

As will now be considered in Part 3, world health law shows that the national and the international are not set against each other. Nor does its technocratic reliance on medical science preclude the political role of states in the crafting of international health law and decisions.

3. World health: between international law and *Microbialpolitik*

Given the centrality of the World Health Organization to the contemporary discourse on the pandemic, it would be easy to assume that, like the Pyramids, it has been with us since time immemorial. In fact its creation and the current legal structure for the international control of

¹⁵ *The Spectator* (15 December 2018).

¹⁶ Jens David Ohlin, *The Assault on International Law* (New York: OUP 2015). For an early important essay calling attention to this trend see: Peter J Spiro, ‘The new sovereigntists, American exceptionalism and its false prophets’ (2000) 79 *Foreign Affairs* 9.

¹⁷ John Finnis, ‘Ministers, international law, and the rule of law’ (2 November 2015) *Judicial Power Project*, available at: <https://judicialpowerproject.org.uk/ministers-international-law-and-the-rule-of-law/>.

¹⁸ David Dyzenhaus, ‘Lawyer for the strongman’ (12 June 2020) *Aeon*.

pandemics are comparatively recent. That structure is the result of 170 years of engagement between law and what the author of the leading study, David Fidler, has atmospherically called *Microbialpolitik* – the political dynamics of dealing with the challenges posed by pathogenic microbes.¹⁹

In order to make an interim assessment of the point that had been reached prior to the present pandemic, this part proceeds in four steps:

- (1) To ask what preceded the WHO: what was the problem that states were trying to address and why did they turn to international law to do so?
- (2) To examine the drivers for the establishment of the WHO itself and its objectives.
- (3) To look at where and why international health law has moved outside the WHO.
- (4) Finally, to identify the key features of the centrepiece of the WHO's legal mechanism for addressing pandemics: the International Health Regulations 2005.

a) 19th Century experiments in international law

States in the second half of the 19th Century sought to create an international law for infectious diseases in response in particular to the threat posed by successive cholera epidemics. The picture is one of huge diplomatic effort: no fewer than ten diplomatic conferences and eight conventions. But this should not blind us to three points about this work that are of continuing significance:

In the first place, while a primary mechanism used to control the spread of such disease was quarantine, the real motivation of international cooperation was as much to limit the negative impact of national divergence in quarantine conditions on international trade as it was to improve health. As *The Lancet* commented, the fear engendered in particular by cholera could lead to the 'quarantine of the jungle.'²⁰ This critical equation is still reflected in the current text of the International Health Regulations.²¹

Secondly, health was an intensely *political* domain for the international engagement of states. Politics cut both ways: the fear of new diseases as well as the fear of economic losses caused by other states' reactions to infectious diseases;²² the conflict between the impulse towards national isolation and the facts of international life.²³ The result was that the efforts put into international cooperation had only limited effect. No international quarantine convention actually came into force until 1892, after half a century of diplomatic effort.²⁴ As Mark Mazower concludes:

Then as now with global warming, the existence of a commonly acknowledged problem was not enough to generate an effective bureaucratic response.²⁵

¹⁹ David Fidler, *International Law and Infectious Diseases* (Oxford: Clarendon Press 1999) 19 ('Fidler 1999').

²⁰ 'Cholera and hysteria', *The Lancet* 253:2 (29 November 1947).

²¹ Art 2 International Health Regulations (2005).

²² Fidler 1999, 52.

²³ Leonard S Woolf, *International Government* (New York: Brentano's 1916) 7.

²⁴ International Sanitary Convention (30 January 1892) 1893 GBTS No 8.

²⁵ Mark Mazower, *Governing the world: the history of an idea* (London: Penguin 2012) 111.

Thirdly, effective advances in international cooperation depended to a large extent on the improvement of domestic public health capabilities. There was and is an inescapable connection between the international and the national levels of health protection.

b) The World Health Organization

The first quarter of the 20th Century had seen multiple efforts to create a permanent health organization. But these efforts were fragmented. There were no fewer than four different such organizations in place by the end of the inter-War period. The reason for this diversity was '[p]olitics rather than epidemiology.'²⁶

In the great reorganization of international cooperation that took place at the end of WWII, all of this changed. Article 13(1)(b) of the UN Charter empowered the General Assembly to make recommendations for 'promoting international cooperation in the...health field.'²⁷ The new Economic and Social Council was endowed with responsibility in this field,²⁸ a responsibility that included, where necessary, establishing any new specialized agencies required for the purpose.²⁹

The focus on health was not initiated, as it so often had been in the past, by Western states seeking to combat perceived perils from the East. The resolution at San Francisco urging the creation of a new health agency was sponsored by Brazil and China, who saw improvements in health standards as emblematic of scientific modernity.³⁰ The Constitution of the new World Health Organization was signed in 1946.³¹ But it took a cholera outbreak in Egypt in 1947 and a swift and effective response on the ground by the WHO's Interim Commission to galvanise states to deposit sufficient ratifications³² to enable the WHO Constitution to come into force in 1948.

In a development that underscores the point that American isolationism is no recent development, the United States Congress agreed to join only on the basis of a joint resolution which provided that 'in the absence of any provision in the World Health Organization Constitution for withdrawal from the Organization, the United States reserves its right to withdraw from the Organization on a one-year notice.'³³ The World Health Assembly accepted its ratification on this basis.

The WHO Constitution represents a radical break with the past. As US President Truman had said in his remarks opening the conference that drafted the Convention:

²⁶ Fidler 1999, 48.

²⁷ Charter of the United Nations (26 June 1945, in force 24 October 1945), 1 UNTS 16 ('UN Charter').

²⁸ Arts 55(b) & 62(1) UN Charter.

²⁹ Art 59 UN Charter.

³⁰ Marcos Cueto, Theodore Brown & Elizabeth Fee, *The World Health Organization: a history* (Cambridge: CUP 2019) 37-9 ('Cueto/Brown/Fee 2019').

³¹ Constitution of the World Health Organization (22 July 1946) 14 UNTS 185 ('WHO Constitution').

³² Art 80 WHO Constitution.

³³ Joint Resolution of the US Congress (14 June 1948) Public Law 643, 80th Congress.

[M]odern transportation has made it impossible for a nation to protect itself against the introduction of disease by quarantine. This makes it necessary to develop strong health services in every country which must be co-ordinated through international action.³⁴

The states parties responded by committing themselves to a progressive agenda that embraces the principle that 'The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States.'³⁵

Nor did they shy away from the radical consequence of this, particularly relevant in a pandemic, that:

Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, *is a common danger*.³⁶

In pursuit of this objective, the WHO Constitution endows its three organs with some special powers:

The *World Health Assembly* (the legislative body comprised of Member States) has 'authority to adopt regulations concerning...sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease.'³⁷ Such regulations 'shall come into force for all Members' save for Members that enter a specific rejection or reservation.³⁸

The *Executive Board*, which comprises persons 'technically qualified in the field of health' is empowered 'to take emergency measures...to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics....'³⁹

The *Director-General* may establish a procedure by agreement with Members permitting him to have direct access to national health departments.⁴⁰ Members undertake not to seek to influence him or his staff in the performance of his duties.⁴¹

All of this appears to establish the WHO as an 'almost perfect representation of an idea of elitist technocratic governance.'⁴² States confer on medical experts the power to take emergency measures in a pandemic and also commit to adopt regulations that provide common requirements directly applicable in Member States. Yet it would be a mistake to see it as rule by experts. On the contrary, the Constitution places the collective views of its 193 Member States,⁴³ equally represented in the World Health Assembly, at the centre of its operations.

³⁴ 'Message of welcome from President Truman' (First Meeting, 19 June 1946) in Summary Report on Proceedings Minutes and Final Acts of the International Health Conference held in New York from 19 June to 22 July 1946 (June 1948) 31.

³⁵ Preamble WHO Constitution, paragraph 3.

³⁶ *Ibid*, paragraph 5.

³⁷ Art 21(a) WHO Constitution.

³⁸ Art 22 WHO Constitution.

³⁹ Art 28(i) WHO Constitution.

⁴⁰ Art 33 WHO Constitution.

⁴¹ Art 37 WHO Constitution.

⁴² The phrase is that of Professor Helmut Aust, Freie Universität Berlin, which I gratefully acknowledge.

⁴³ However Taiwan is not a member and was not granted observer status at the 2020 session of the World Health Assembly.

The WHO Constitution also has its limits. The WHO was not established as a funding agency or a medical research centre (though it could network with such institutions).⁴⁴ It is not endowed with direct responsibility for regulating the critical interface between human health on the one hand and trade and transit on the other. Finally, it lacks real mechanisms to ensure Member State compliance and accountability.⁴⁵ The whole elaborate edifice relies on Member States assuming and performing their duties. In the case of pandemic control, this is a critical, and potentially weak link.

c) International health law elsewhere

In the second half of the 20th Century, much of the legal action on critical issues of international health law shifted elsewhere: in trade, transport, human rights and the environment.⁴⁶

The framers of the GATT had recognized as early as 1947 that a balance has to be struck between free trade and measures necessary for the protection of human health.⁴⁷ The question of where to strike this balance gained a great deal more specificity with the conclusion in 1994 (as part of the Marrakesh Agreement establishing the World Trade Organization) of an Agreement on the Application of Sanitary and Phytosanitary Measures.⁴⁸ This 'SPS Agreement' created its own regime for harmonization of measures together with a supervisory Committee.⁴⁹

Nor is trade competence limited to the WTO. The international specialized agencies that are responsible for transport (including those persons that actually operate the world's international trade: seafarers and aircrew) also developed an important role in the application of consistent international standards.⁵⁰

The progressive development of international health law moved beyond the WHO as a result of the elaboration of health as a human right in the International Covenant on Economic, Social and Cultural Rights.⁵¹ Further, the HIV/AIDS pandemic of the late 20th Century served to ignite the human rights dimension of treating a pandemic, which was progressed in a much wider set of international fora than the WHO.⁵²

⁴⁴ Cueto/Brown/Fee 2019, 45.

⁴⁵ Art 75, which provided for the submission of disputes between member states to the International Court of Justice has never been utilised. There have been two requests for an advisory opinion under Art 76: *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* [1980] ICJ Rep 73; *Legality of the use by a state of nuclear weapons in armed conflict* [1996] ICJ Rep 66. The second failed for want of jurisdiction, as being outside the scope of the WHO's activities.

⁴⁶ David Fidler, 'From international sanitary conventions to global health security: the new International Health Regulations' (2005) 4 *Chinese JIL* 325, 336 ('Fidler 2005').

⁴⁷ Art XX(b), General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 87.

⁴⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, Annex 1 to Marrakesh Agreement establishing the World Trade Organization (15 April 1994) 1867 UNTS 3.

⁴⁹ *Ibid* Arts 3 & 12.

⁵⁰ International Maritime Organization, 'Joint Statement IMO-ICAO-ILO on designation of seafarers, marine personnel, fishing vessel personnel, offshore energy sector personnel, aviation personnel, air cargo supply chain personnel and service provider personnel at airports and ports as key workers, and on facilitation of crew changes in ports and airports in the context of the COVID-19 pandemic', Circular letter No 4204/ Add. 18 (26 May 2020).

⁵¹ Art 12, International Covenant on Economic, Social and Cultural Rights (19 December 1966) 993 UNTS 3; CESCR General Comment No. 14, UN Doc E/C.12/200/4; Fidler 1999, Ch. 6.

⁵² Fidler 1999, 197-217.

The development of international environmental law since the 1970's also served to shift the debate about the protection of human health from the WHO to other fora⁵³ (though much of this development concerned non-communicable diseases⁵⁴).

d) The International Health Regulations 2005

All of these developments served to displace attention from the risk of pandemics in general and from the WHO as the principal international focal point for addressing them. The International Health Regulations, which were first adopted in 1951 as the principal tool for addressing pandemics, had remained limited in scope and ambition and languished in widespread non-observance.

It was the emergence of SARS in 2003, and the WHO's rapid and effective response under its then Director-General Gro Harlem Brundtland⁵⁵ that galvanized Member States to adopt a radical new set of International Health Regulations in 2005.

These Regulations are now the core document in international law's response to pandemics. They represent a decisive turn to legal regulation in the work of the WHO.⁵⁶

Their central concept is the declaration of a Public Health Emergency of International Concern (**PHEIC**), which is defined as:

'...an extraordinary event which is determined...

(i) to constitute a public health risk to other States through the international spread of disease and

(ii) to potentially require a coordinated international response.⁵⁷

States commit to notify the WHO within 24 hours of their assessment of public health information of all events that may constitute a PHEIC.⁵⁸ The WHO is also entitled to take into account reports from other sources; to assess these reports according to epidemiological principles; and to communicate this information to the State Party on whose territory the event is allegedly occurring.⁵⁹ The WHO must then communicate the information that it has received to other State Parties.⁶⁰

The Director-General determines whether the event does indeed qualify as a PHEIC. If so, he is to consult the state concerned.⁶¹ If he does not reach agreement with the relevant state, he is still empowered, after conferring with a WHO Emergency Committee to issue temporary recommendations.⁶²

⁵³ Fidler 1999, Ch. 8.

⁵⁴ Rory Gibb et al, 'Zoonotic host diversity increases in human-dominated ecosystems' (5 August 2020) *Nature*.

⁵⁵ Cueto/Brown/Fee 2019, 300.

⁵⁶ Jose Alvarez, 'The Impact of International Organizations on International Law' in: *Collected Courses of the Xiamen Academy of International Law 2017* (Leiden: Brill Nijhoff 2017) Ch. IV.

⁵⁷ Art 1 International Health Regulations 2005 ('IHR 2005').

⁵⁸ Art 6 IHR 2005.

⁵⁹ Art 9 IHR 2005.

⁶⁰ Art 11 IHR 2005.

⁶¹ Art 12 IHR 2005.

⁶² Art 49 IHR 2005.

e) Interim assessment

The International Health Regulations 2005 constitute a comprehensive attempt to create a structure that would enable a coordinated and effective response to pandemics. But it has not prevented them.

David Fidler warned back at the turn of the Century that a combination of rising international trade and travel; deteriorating national public health capacity; and unprecedented environmental problems that provide pathogenic microbes with fertile conditions were creating a ‘new pathology for the globalization of public health.’⁶³ Does this then mean that humanity is condemned as Camus put it in *The Plague* to ‘a never ending defeat’?⁶⁴

The picture sketched above does not indicate any absence of international legal regulation. On the contrary, the international law of pandemics presents a rather dense web, even if it shares the character of much contemporary international law of being fragmented amongst different legal instruments and agencies.

Reviewing whether these legal arrangements are adequate is important in itself. Yet there is one striking message relevant to the theme of this paper that emerges from the WHO’s own conclusions, reviewing the SARS epidemic and Ebola in 2015.

In 2003, in the wake of its successful intervention in the SARS epidemic, the WHO concluded that ‘[o]ne of the most important lessons learned to date is the decisive power of high-level political commitment to contain an outbreak even when sophisticated control tools are lacking.’⁶⁵ By contrast, the handling of the Ebola epidemic in 2014 revealed an absence of effective leadership and coordination. The WHO itself was widely seen as missing in action during the early months of the outbreak. But Member States compounded the problem by enacting a diversity of national measures that did not follow the WHO recommendations and lacked a scientific or public health justification.⁶⁶ The decisive difference was high-level political commitment to coordinated international action.

The whole elaborate system of the International Health Regulations hinges on Member State compliance: in early notification; provision of information; and cooperation in implementation. That in turn depends upon a political will to coordinated action for the common good.

In reflecting on the present pandemic, it is important to focus attention on the extent to which the growth of populism undermined the effectiveness of a globally coordinated response of states, to which it is now necessary to turn in Part 4.

4. Populism in the pandemic

a) The position of the WHO

In considering the record of the present pandemic, this paper does not seek to investigate its source, the timeliness of China’s initial disclosure and the appropriateness of the WHO’s first response. There

⁶³ Fidler 1999, 17.

⁶⁴ Albert Camus, *The Plague* (London: Hamish Hamilton 1948) 121.

⁶⁵ WHO statement of 18 June 2003, “Update 83 – One hundred days into the outbreak” available at: https://www.who.int/csr/don/2003_06_18/en.

⁶⁶ David Fidler, ‘Epic failure of ebola and global health security’ (2015) 21 *Brown J World Affairs* 180, 189-190.

are serious questions to be asked about all of this. That is why the World Health Assembly, when it met in May 2020 adopted a resolution (proposed by a large number of states⁶⁷) in which it decided to initiate an ‘impartial, independent and comprehensive evaluation...to review experience gained and lessons learned from the WHO-coordinated international health response to COVID-19.’⁶⁸ On 9 July 2020, the Director-General appointed Helen Clark and former President of Liberia, Ellen Johnson Sirleaf, to chair an independent panel to implement that decision, which is requested to present an interim report as soon as November of this year. Separately, the Assembly also requested the Director-General ‘to identify the zoonotic source of the virus and the route of introduction to the human population, including the possible role of intermediate hosts.’⁶⁹

The purpose of this paper is rather different. It is to consider the implications of the rise of populism for the response of democratic states to the pandemic as it unfolded. For this purpose the key dates on which the WHO gave advice to member states are the following:

(1) On 5 January 2020, the WHO first issued to member states an event notice under the IHRs about a cluster of cases of pneumonia of unknown cause in Wuhan.

(2) On 30 January 2020, the WHO declared a Public Health Emergency of International Concern. This (as has been seen) is the critical decision point under Article 12 of the International Health Regulations that notifies and engages the responsibilities of all other Member States.

(3) On 24 February 2020, ‘well within the time-frame, as James Meek has commented, ‘to make a meaningful difference in Britain, the US, Brazil or Italy’,⁷⁰ the WHO-China Joint Mission recommended that other countries with Covid-19:

1. Immediately activate the highest level of national Response Management protocols to ensure the all-of-government and all-of-society approach needed to contain COVID-19 with non-pharmaceutical public health measures;
2. Prioritize active, exhaustive case finding and immediate testing and isolation, painstaking contact tracing and rigorous quarantine of close contacts.⁷¹

(4) 11 March 2020, when the Director-General (with 118,000 reported cases in 114 countries) declared that coronavirus had become a pandemic and stated:

‘...all countries can still change the course of this pandemic.

If countries detect, test, treat, isolate, trace, and mobilize their people in the response, those with a handful of cases can prevent those cases becoming clusters, and those clusters becoming community transmission.

Even those countries with community transmission or large clusters can turn the tide on this virus.

...

⁶⁷ WHO, Seventy-Third World Health Assembly, ‘COVID-19 response’ (18 May 2020) A73/CONF./1 Rev. 1.

⁶⁸ WHO, Seventy-Third World Health Assembly, ‘COVID-19 response’ (19 May 2020) WHA73.1, 9(10).

⁶⁹ Ibid, 6(6).

⁷⁰ James Meek, ‘The Health Transformation Army’ (2020) 42 *London Review of Books* 13.

⁷¹ WHO, ‘Report of the WHO-China Joint Mission on Coronavirus Disease (Covid-19)’ (24 February 2020).

The challenge for many countries who are now dealing with large clusters or community transmission is not whether they **can** do the same – it's whether they **will**.⁷²

b) Populist responses

In considering the response of populist governments in democratic states, no claim is made to exhaustive coverage. Though some concrete examples are inevitable, the focus is not on the acts or omissions of particular politicians of the moment, but on understanding the effect of populism as a more general political approach on the global response. This means accepting that there have been very significant variations in responses by governments.⁷³

One distinction that may be made is between populist responses that have used the pandemic to extend executive power in other spheres (which Pozen and Scheppele in a recent article call 'executive overreach'⁷⁴) and those characterised by under-reach.

Overreach: Some populist leaders have used the pandemic in order to enhance their power at home. One such widely reported example is that of Hungary, where Prime Minister Orbán first instituted a state of emergency, and then passed an Enabling Act in Parliament, enabling him to rule by decree during the pendency of the pandemic – the determination of when that end is reached to be made by the Prime Minister.⁷⁵ In this instance, the claim of the populist to defend the nation is used to justify the assumption of draconian powers that both respond to the pandemic and, at the same time (and under cover of the pandemic), to pursue other unrelated objectives against opponents of the government at home. Exposing this kind of example to criticism is important. It is familiar territory for the lawyer, because it concerns excess of power by the executive in ways that affect basic human rights.

Under-reach: The phenomenon with which the present paper is especially concerned is where the populist leader takes the opposite approach in which he fails to use the legal powers and mechanisms developed to address a pandemic and instead pursues an unilateral course, which diverges from that mandated by international agreement.

Such a contrarian stance is apparently irrational. Yet it has been a distinctive feature of the responses of some populist leaders in democratic states in the current pandemic. On closer inspection, executive under-reach of this kind in fact fits with the key tenets of populism outlined earlier and has particularly important implications for the relation with international law. Here the United States and the United Kingdom deserve particular attention as illustrative of the point.

The Global Health Security Index, published in October 2019, rated the United States and the United Kingdom no. 1 and no. 2 respectively in the world in their ability to address 'infectious disease

⁷² WHO, 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020' (11 March 2020) available at: <https://www.who.int/dg/speeches>.

⁷³ Giorgos Katsambekis & Yannis Stavrakakis (eds), *Populism and the Pandemic: a Collaborative Report* (Thessaloniki: Populismus Interventions No 7 2020) ('Populismus Report 2020').

⁷⁴ David Pozen & Kim Lane Scheppele, 'Executive Underreach, in Pandemics and Otherwise' (2020) 14-664 *American Journal of International Law (AJIL)* (pub. forthcoming) available at: <https://ssrn.com/abstract=3649816>, 6-8 ('Pozen & Scheppele 2020')

⁷⁵ Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers' (6 April 2020) *Verfassungsblog*, available at: <https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/>.

outbreaks that can lead to international epidemics and pandemics⁷⁶ Yet both are (along with Brazil, India and Mexico) unfortunately at the time of writing in the top five states for total deaths from the virus.⁷⁷ How has this happened? Though there are many differences between the position in the two states, the common element is the effect of populism.⁷⁸

United States: The salient facts in the United States significantly predate the current pandemic and are registered first within the domestic sphere. As early as 2018, President Trump had cut \$1.35 billion in funding for the Prevention and Public Health Fund at the Centers for Disease Control and Prevention (CDC) – the world’s leading centre in the field of communicable diseases. Later that year, the National Security Council disbanded its global health security team, in each case despite specific warnings about the risks of a pandemic and the effect of the loss of capability on America’s ability to respond.⁷⁹

Following the Chinese imposition of a *cordon sanitaire* around Wuhan on 20 January 2020 and the definitive confirmation of human transmission, President Trump’s initial response was that he was not worried at all. He said: ‘We have it totally under control,’ praising the response of President Xi in China, despite the advice of his National Security Advisor on 9 February 2020 that ‘[w]e face a significant probability of a serious pandemic coronavirus event in the US that may extend well into 2021.’ President Trump spent February hosting rallies across the country each attracting thousands of attendees. On 24 February he tweeted: ‘The Coronavirus is very much under control in the USA....CDC and World Health have been working very hard and very smart. Stock Market starting to look very good to me!’ On 28 February, he stated: ‘One day it’s like a miracle, it will disappear.’

Then, in March, the US President abruptly changed tack to shift the focus to the international sphere. On 11 March 2020, the President abruptly suspended travel from Europe (but not from the UK). He finally declared a national emergency on 13 March 2020, declaring ‘I don’t take responsibility at all.’ By 7 April, the President had threatened to withhold funding from the WHO, claiming that it ‘had called it wrong’. By 18 May, President Trump claimed in a letter to the WHO Director-General that the WHO had ‘consistently ignored credible reports of the virus spreading in Wuhan in early December 2019 or even earlier, including reports from the *Lancet* medical journal.’⁸⁰ This prompted the Editor of the *Lancet* to issue a statement denying this allegation; confirming that the first reports that it had published about the coronavirus were on 24 January 2020; and that Trump’s allegation was ‘damaging to international efforts to strengthen international cooperation to control this pandemic.’⁸¹ On 6 July 2020, the US Administration notified its intention to withdraw from the WHO, invoking the reservation entered by Congress when it had joined the Organization in 1948.

⁷⁶ Global Health Security Index, available at: <https://www.ghsindex.org/about>.

⁷⁷ Worldometers, ‘Report Coronavirus Cases’, available at: <https://www.worldometers.info/coronavirus/#countries> (last accessed 18 August 2020).

⁷⁸ Gavin Yamey & Clare Wenham, ‘The U.S. and U.K. Were the Two Best Prepared Nations to Tackle a Pandemic – What Went Wrong?’ (1 July 2020) *Time*, available at: <https://time.com/5861697/us-uk-failed-coronavirus-response/>.

⁷⁹ Timeline details sourced in: Ryan Goodman & Danielle Schulkin, ‘Timeline of the Coronavirus Pandemic and U.S. Response’ (9 September 2020) available at: <https://www.justsecurity.org/69650/timeline-of-the-coronavirus-pandemic-and-u-s-response/>, (last updated 9 September 2020).

⁸⁰ The White House, ‘Letter to Dr. Tedros- Director General of the WHO’ (18 May 2020) available at: <https://www.whitehouse.gov/wp-content/uploads/2020/05/Tedros-Letter.pdf>.

⁸¹ Statement from the Editor of *The Lancet* (19 May 2020) available at: <https://twitter.com/TheLancet/status/1262721061361254401/photo/1>.

The President's position on the international plane was matched by his record of dissent and division at home in which he: failed to coordinate the supply of medical equipment nationally, forcing states to bid against each other for scarce equipment; espoused quack 'cures' for the virus; encouraged civil dissent from the efforts of state governors to enforce lockdowns; and proceeded with his own election rallies in defiance of medical advice.⁸²

President Trump's approach cannot be treated as an isolated example. Other populist leaders have emulated it. In Brazil, President Bolsonaro's response to the virus 'mirrors President Trump's in many respects.'⁸³ Dismissing the virus as 'hysteria' or 'a little cold'⁸⁴ he has refused to support social distancing, lock-down or quarantine measures and undermined the efforts of others to introduce them.

United Kingdom: The position of the United Kingdom was and is very different. It has continued to support the WHO and to underline the importance of international cooperation to fight the virus.⁸⁵ Yet there are also some important elements from the initial response of the Johnson Government to the emergence of the pandemic that are relevant.

Mr Johnson's Government had been elected on 12 December 2019 in a landslide victory, which was fought on the slogan 'Get Brexit done.' The Brexit campaign was itself emblematic of populism.⁸⁶ It characterized Britain as undermined by foreigners, notably immigrants from other parts of the European Union. It opposed the application of EU law as being the imposition of foreign law on the British people.

Seen in this light, 'Brexit day' – the date on which the United Kingdom would definitively leave the Union – was a watershed moment. It was a consummation of the defining move of populism vis-à-vis international institutions, namely exit. With the unerring timing that only the hazards of real life can produce, Brexit day was 31 January 2020: one day after the WHO declared coronavirus to be a global health event of international concern; and the day on which the first two cases of the virus in the United Kingdom were announced.⁸⁷ It is difficult to imagine a less propitious time for a new government to confront an emerging pandemic.

The body established in the UK to advise the Government on pandemics is the Scientific Advisory Group for Emergencies ('SAGE'). SAGE began meeting on the coronavirus on 22 January 2020.⁸⁸ It held eighteen meetings until the United Kingdom Government finally announced a full national lockdown two months later on 23 March 2020. SAGE is composed primarily of scientists. However, minutes that have recently been disclosed show that two of the Prime Minister's advisors attended its meetings

⁸² Pozen & Scheppele 2020, 10.

⁸³ Ibid, 10-11; Thomás Zicman de Barros, 'Brazil' in: Populismus Report 2020, 18-20.

⁸⁴ Jair Bolsonaro, 'Pronunciamento Oficial do Presidente da República' (24 March 2020) available at: <https://youtu.be/VWsDcYK4STw?t=90> (1:30-3:40); cited in: Zicman de Barros, ibid, 19.

⁸⁵ Prime Minister's Office, 'PM call with Dr Tedros, Director- General of the World Health Organization: 8 July 2020' (8 July 2020) available at: <https://www.gov.uk/government/news/pm-call-with-dr-tedros-director-general-of-the-world-health-organization-8-july-2020>.

⁸⁶ McLachlan 2019.

⁸⁷ GOV.UK, 'Daily cases by date reported' ('Daily cases by date reported') available at: <https://coronavirus.data.gov.uk>.

⁸⁸ Scientific Advisory Group for Emergencies, 'SAGE meetings, January 2020' (26 June 2020) available at: <https://www.gov.uk/government/collections/sage-meetings-january-2020> ('SAGE meetings, January 2020').

in March: Mr Dominic Cummings and Mr Ben Warner.⁸⁹ Mr Cummings had been Campaign Director of 'Vote Leave' and is Mr Johnson's Chief Advisor. Mr Warner assisted in the computer modelling for both 'Vote Leave' and the Conservative Party's 2019 election campaign. The minutes do not disclose the role that either advisor played in these meetings or in the Government decisions taken following them. They indicate that SAGE acted largely on scientific advice, but that this was generated domestically within the UK. The supporting papers disclose almost no reference to WHO guidance.⁹⁰

On 12 March 2020 – one day after the WHO Director-General's announcement of a pandemic, with its unequivocal advice – Public Health England discontinued community testing.⁹¹ On 14 March, a group of over 500 British scientists issued a '[p]ublic request to take stronger measures of social distancing across the UK with immediate effect.'⁹² They concluded that '[g]oing for "herd immunity" at this point does not seem a viable option, as this will put NHS at an event stronger level of stress, risking many more lives than necessary.'⁹³ By the time the national lockdown was imposed on 23 March 2020, there were 793 daily cases in England, as compared to 99 cases on 12 March.⁹⁴

5. Implications

a) International engagement: The Disunited Nations of coronavirus

Surveying the global response to the pandemic some nine months into it and with the end nowhere in sight is fraught with difficulty and uncertainty. Yet one thing is clear. At least at the multilateral level,⁹⁵ there has been minimal evidence of a coordinated international response. This has not been because the Director-General and Secretariat of the WHO have been missing in action. Nor it is because states failed to confer using the multilateral forum of the World Health Assembly. Rather it is because each state has gone its own way in responding to the virus, resulting in what *The Guardian Weekly* accurately described in its headline as '[t]he disunited nations of coronavirus.'⁹⁶ Not all of this can be laid at the door of populism alone, but the weak state of international cooperation is sobering.

Some of the evidence for this is the following:

⁸⁹ Mr Cummings attended on 5 March 2020; Mr Warner attended all five meetings from 5 to 18 March 2020 in: SAGE meetings, January 2020, available at: <https://www.gov.uk/government/collections/sage-meetings-march-2020>.

⁹⁰ The paper 'Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand' considered at the SAGE meeting on 16 March 2020 refers at 13 n16 to the WHO-China Joint Mission Report, but only in the context of household transmission. It does not refer to the Report's overall recommendations (available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891862/S0057_SAGE16_Imperial_Impact_of_NPIs_to_reduce_Mortality_and_Healthcare_Demand.pdf).

⁹¹ Scientific Advisory Group for Emergencies, 'Fifteenth SAGE meeting on Wuhan Coronavirus (Covid-19) - 13 March 2020' (29 May 2020) available at: <https://www.gov.uk/government/publications/sage-minutes-coronavirus-covid-19-response-13-march-2020>.

⁹² 'Public request to take stronger measures of social distancing across the UK with immediate effect' (14 March 2020) available at: http://maths.qmul.ac.uk/~vnicosia/UK_scientists_statement_on_coronavirus_measures.pdf.

⁹³ *Idem*.

⁹⁴ 'Daily cases by date reported', available at: <https://coronavirus.data.gov.uk>.

⁹⁵ Cf. the EU coordinated response finally achieved by the European Council in July 2020: European Council, 'Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020)–Conclusions' (21 July 2020) EUCO 10/20.

⁹⁶ *The Guardian Weekly*, 'The Disunited Nations of Coronavirus' (7 August 2020) 203 *The Guardian Weekly* 8.

(1) *Quarantine of the jungle*: States agreed under Article 43(3) IHR to inform the WHO of the public health rationale and scientific information for any additional health measures, which significantly interfere with international traffic and are not covered by a WHO recommendation within 48 hours of their implementation. There is little evidence that they have done so. On the contrary, states have gone their own way, implementing a vast diversity of different national requirements reminiscent of the ‘quarantine of the jungle’ that bedevilled 19th Century attempts to address pandemics. Such is the resulting maze that the WHO has been reduced launching a research website in conjunction with Georgetown Law Center, the ‘Covid-19 Law Lab’,⁹⁷ that tracks 190 states’ different national laws. This is about as far from producing an internationally agreed model for compliance as could be imagined.

(2) *Vaccine nationalism*: Nor has adequate progress been made on securing equitable access to vaccines or other medicines developed to treat Covid-19. GAVI, the Global Alliance for Vaccines and Immunisation (a joint project between the WHO and other international organizations and private charities) has created a mechanism for access to Covid-19 tools. But, despite valuable support from a number of countries, it is still unclear whether it will receive sufficient support from higher income countries, or whether ‘vaccine nationalism’ will take precedence.⁹⁸ The importance of this cannot be underestimated. It is not only a matter of ensuring basic equity amongst the global population, particularly those most at risk from the virus. None of us can expect to be properly protected unless the disease is stamped out widely.

It is also a basic matter of reciprocity. After the avian flu outbreaks in 2006, Indonesia refused to share virus specimens with the WHO. The government claimed that drug companies would use this information to produce vaccines that Indonesia could not afford.⁹⁹ Developing state mistrust deepened during the H1N1 pandemic. It was only assuaged by the negotiation within the WHO of the Pandemic Influenza Preparedness Framework, concluded in 2011.¹⁰⁰ This links the sharing of the virus samples and genetic information to benefit sharing. But it is a non-binding instrument. How the rest of the world handles the present pandemic will affect the willingness of countries in which future viruses may arise to cooperate.

(3) *Peace and security*: Nor is the failure to cooperate limited to the health field. On 23 March 2020, the UN Secretary-General called for a global humanitarian ceasefire in light of the pandemic.¹⁰¹ It took until 1 July 2020 for two of the permanent members of the Security Council to be able to reach agreement with the other members on a resolution to that effect.¹⁰² The text as finally adopted, in

⁹⁷ COVID-19 Law Lab, available at: <https://covidlawlab.org>.

⁹⁸ Ngozi Okonjo-Iweala, ‘Covid vaccine strategy must consider need as well as wealth’ (24 August 2020) *Financial Times*, available at: <https://www.ft.com/content/02f721f4-141d-4066-8a0e-c6ed04739ba6>; As of 14 October 2020, following an extension to the commitment deadline, 80 higher income economies had joined the COVAX Facility. The list includes New Zealand, the United Kingdom and the European Commission on behalf of the member states of the EU. It does not include the USA.

⁹⁹ David Fidler, ‘The WHO Pandemic Influenza Preparedness Framework: a milestone in global governance for health’ (2011) 306 *JAMA The Journal of the American Medical Association* 2, 200.

¹⁰⁰ WHO, ‘Pandemic influenza preparedness framework: for the sharing of influenza viruses and access to vaccines and other benefits’ (2011) available at: https://apps.who.int/iris/bitstream/handle/10665/44796/9789241503082_eng.pdf;jsessionid=653445C7B4EE2DC1898632315A643041?sequence=1.

¹⁰¹ UN News Peace and Security, ‘COVID-19: UN chief calls for global ceasefire to focus on “the true fight of our lives”’ (23 March 2020) available at: <https://news.un.org/en/story/2020/03/1059972>.

¹⁰² UN Security Council, ‘Resolution 2532 (2020)’ (1 July 2020) UN Doc S/Res/2532; see also: Security Council Report, ‘Global Governance post-COVID-19’ (31 August 2020) available at: <https://www.securitycouncilreport.org/monthly-forecast/2020-09/global-governance-post-covid-19.php>.

contrast to the General Assembly resolution adopted on 2 April 2020,¹⁰³ makes no mention of the crucial role of the WHO.

b) The populism narrative

Not all of this can be laid at the door of populism; nor can the populist response be treated as uniform. Yet it is striking to what extent the populist narrative has undermined the basic legal tools of multilateral cooperation, both within the framework of the WHO and outside. As Stewart Patrick concludes:

Ascendant populism and nationalism have weakened the domestic foundations for multilateral cooperation by empowering authoritarian despots and weakening public support for liberal internationalism. Global public health...has suddenly become a terrain of political combat, crippling the world's response to the pandemic.¹⁰⁴

Populism has fuelled a basic mistrust of expertise, especially as personified in the WHO itself – as an ‘almost perfect representation of an idea of elitist technocratic governance.’ On this narrative, the WHO itself must be blamed for the pandemic as US Secretary of Health Azar did at the World Health Assembly when he stated: ‘There was a failure by this organization to obtain the information that the world needs, and that failure cost many lives.’¹⁰⁵

At the same time, it has reinforced a sense of nativism: of the nation against a foreign foe. In this, the foreign state and the international organization have to be linked together as joint agents of harm to the people, as it so explicitly was in Azar's statement to the WHA.¹⁰⁶

The populist claim is that the WHO has adopted expansive goals by way of ‘mission creep’ and that the task of combating Covid-19 must fall to ‘national health departments—not an international organization’, supported at best by a limited agency like Interpol.¹⁰⁷ Implicit in such a claim is that national health departments have the capacity to address a global pandemic. Yet it is precisely this claim that must now be questioned in the light of the failure of political leadership in the states in the world that were thought to be the best prepared to fight a pandemic.

Nor can the WHO be accused of mission creep in this respect. On the contrary, the founding member states of the WHO, supported by President Truman, endorsed in 1946 the proposition that: ‘Unequal development in different countries in the promotion of health and control of disease, especially communicable disease, *is a common danger*’, which can only be addressed if the development of national health systems coordinated through international action is a common concern.

¹⁰³ UN General Assembly, ‘Global solidarity to fight the coronavirus disease 2019 (COVID-19): Resoulution’ (3 April 2020) UN Doc A/RES/74/270.

¹⁰⁴ Stewart Patrick, ‘When the System Fails: COVID-19 and the Costs of Global Dysfunction’ (2020) 99 *Foreign Affairs* 4, 40 & 46 (‘Patrick 2020’).

¹⁰⁵ Alex Azar II, ‘USA WHA73 Plenary Statement’ (18 May 2020) available at: <https://geneva.usmission.gov/2020/05/18/world-health-assembly-73-u-s-plenary-statement/>.

¹⁰⁶ Ibid: ‘In an apparent attempt to conceal this outbreak, at least one member state made a mockery of their transparency obligations, with tremendous costs for the entire world. We saw that the WHO failed at its core mission of information sharing and transparency when member states do not act in good faith’.

¹⁰⁷ The Editorial Board, ‘How WHO Lost Its Way’ (16 May 2020) *Wall Street Journal*, citing Roger Bate of the American Enterprise Institute.

Jose Alvarez concludes:

No state can expect to protect its population solely on the basis of measures at the border conducted with the assistance of an Interpol-styled organization. Continued progress on controlling the spread of COVID-19 and optimal care for those who are sick depends on global comprehensive research now organized by the WHO.

...

[W]hat ails the WHO is not its prescient vision of the multifaceted right to health, its recognition of the complexity of global health threats, or its fact-backed approach to pandemic response. It is that it and its members have fallen short on fulfilling that ambitious vision.¹⁰⁸

The final part of this paper shifts the focus from the immediate implications of populism in the pandemic to a larger and ultimately even more important question: What does the experience of populism have to tell us about the prospects for international law? Given that, as suggested at the outset, populism as a political approach is centrally concerned with the relation between the nation and the world outside, does it in fact offer an alternative way of doing international law? How might one respond to the set of contemporary popular concerns in democratic states, which populist leaders have turned to their political advantage?

6. Prospects

a) The ascendancy of international law and the backlash

In a recent lecture on ‘International law and the far right’, Martti Koskenniemi argues that the real object of the current backlash is a ‘*cultural war*’ against the values and priorities associated with the “international”.¹⁰⁹ At the heart of the objection is ‘that global power does not at all present itself as values or preferences – as conventional politics – but as knowledge.’¹¹⁰ Yet, as he points out, each international regime is not only about knowledge. It also expresses a value, a powerful ethos or project to advance. In the result ‘globalization meant the rise of expert power that is coy about its political priorities.’¹¹¹ He suggests that the growing ambition of international law since the 1990’s has served to reduce the scope for societies to make their own real political choices about social goods.

The current pandemic has been claimed by both sides in this ‘cultural war’ to vindicate their position. For the populist, it confirms that faith in the expertise of international organizations is misplaced. It is said that, if the WHO was so omniscient, why did it not prevent the pandemic? It is claimed that the advice that it gave was dilatory, contradictory and unclear. An organization driven by expert science was not infallible. It turned out – just as they had always suspected – to be a political institution, prey to being co-opted by other mendacious member states for their own political ends.

For the internationalist, the WHO is not the problem. Rather, the failure of a political will to unified action amongst Member States has stymied its effectiveness. The pandemic has been vastly

¹⁰⁸ José E. Alvarez, ‘The WHO in the Age of the Coronavirus’ (July 13, 2020) 20-30 *NYU School of Law - Public Law Research Paper*, available at: <https://ssrn.com/abstract=3659572>.

¹⁰⁹ Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (TMC Asser Press 2019) (‘Koskenniemi 2019’) 5.

¹¹⁰ *Ibid* 11.

¹¹¹ *Ibid* 15.

exacerbated by the failure of populists to take the very measures that the WHO advised on the basis of the best scientific knowledge available to it at the time and to abide the international obligations that Member States had themselves drafted and voluntarily assumed in the International Health Regulations. If the WHO did not exist, it would be necessary for states to create it. Only a global organization can effectively address a global pandemic.

So it is now necessary to consider on a broader canvas whether populism does in fact offer an alternative vision for the manner in which states are to interact on the international plane and how the international lawyer might respond to it.

Koskenniemi argues that '[t]he backlashers do not care for reform – there is no real program, no policy engagement with international institutions (apart from “exit”).'¹¹² Observing the recent trajectory of populism across wide range of issues and institutions – in the environment, human rights, trade and international criminal law – there is certainly powerful evidence for the proposition that the main populist strategy is withdrawal from multilateral cooperation in pursuit of a conception of the common interest of the international community.¹¹³

Is there more to it than that? For the populist, the key claims are to the exercise of sovereignty and the freedom to exercise political choices that this confers. The proposition advanced here is that these claims need to be taken seriously, but, for the reasons that I shall now develop, it is a fallacy to consider that they are set against international law.

b) Sovereignty modern & the principle of self-determination

Modern international lawyers have a tendency to regard the sovereignty of states as something of an embarrassment – an inconvenient truth. In the last edition of *Oppenheim* that he edited in 1955, Hersch Lauterpacht concludes a passage on '[t]he problem of sovereignty in the twentieth century' with the optimistic suggestion that 'progress in International Law, the maintenance of international peace and, with it, of independent national States, are in the long run conditioned by a partial surrender of their sovereignty.'¹¹⁴ Forty years later, Louis Henkin concluded in 1995 that 'for legal purposes at least, we might do well to relegate the term sovereignty to the shelf of history as a relic from an earlier era.'¹¹⁵ James Crawford insists in 2005 that the term sovereignty as a legal term can only mean 'the totality of powers that States may have under international law. By contrast, as a political term its connotations are those of untrammelled authority and power and it is in such discourse that the term can be problematic.'¹¹⁶

The view of international lawyers that sovereignty is unhelpful in legal terms stands in stark contrast to its persistence. This is not only in international political discourse, in which Brexit is cast as 'a

¹¹² Ibid 25.

¹¹³ James Crawford, 'The Current Political Discourse Concerning International Law' (2018) 81 *Modern Law Review* 1; McLachlan 2019.

¹¹⁴ Lassa Oppenheim & Hersch Lauterpacht (eds), *International Law: A Treatise*, 8th ed. (London: Longmans, Green & Co 1955) 122-4 at 70.

¹¹⁵ Louis Henkin, *International Law: Politics and Values* (Dordrecht: Martinus Nijhoff Publishers 1995) 10.

¹¹⁶ James Crawford, *The Creation of States in International Law*, 2nd ed. (Oxford: OUP 2006) 33.

fight for the very sovereignty of our nation;¹¹⁷ and President Trump claims that ‘[t]he future belongs to sovereign and independent nations [...]’.¹¹⁸

Sovereignty also finds its way into international legal discourse. The Beijing Declaration adopted by the first South-South Human Rights Forum in 2017 resolves that: ‘The international community’s concern for human rights matters should always follow the international law and the universally recognized basic norms governing international relations, *of which the key is to respect national sovereignty*...’¹¹⁹

The comparative failure of international lawyers to engage with the concept of sovereignty, in both its internal and external aspects, may, as John Jackson presciently warned in 2003, actually promote the persistence of populist fictions such as ‘the notion that absolute power is concentrated at the head of a nation-state.’ Jackson argued that an attempt to bury the concept of sovereignty ‘without adequate replacements could lead to a situation in which pure power prevails: that, in turn, could foster chaos, misunderstanding, and conflict, like Hobbes’ state of nature, where life is “nasty, brutish, and short.”’¹²⁰

Jackson was writing at a time of great expansion in the ambition of international institutions and was driven by a perception of the entirely new set of pressures that this was creating for ‘nation-state governments trying to deliver the fruits of their important achievements to their constituents.’¹²¹ He was concerned about the effect of exercises of sovereignty on the plane of international law on the maintenance of popular sovereignty in national constitutions. Seen in this light, the rise of populism has simply exposed to view what Blokker calls a ‘deeper, intrinsic tension in the post-war international legal order between democratic self-government on the one hand, and a universalistically understood international regime, on the other.’¹²² As Aust and Kleinlein argue: ‘Sovereignty often serves as a placeholder for constitutional values, in particular domestic democratic self-determination.’¹²³

International law resists conflating the question of the sovereignty of a state on the international plane with the ‘constitutional lawyer’s question of supreme competence within a particular State.’¹²⁴ At the same time, there is a strong strain in foreign relations law, which finds its philosophical origins in John Locke’s idea of the ‘federative power’ that would leave the conduct of foreign relations in the hands of the executive.¹²⁵ On the face of it, these two claims seem to contradict rather directly the notion, now so widely exploited by the populist leaders, of the importance of a direct link between ‘the people’ and the exercise of independent sovereignty on the international plane, for which the Brexit referendum is emblematic.

¹¹⁷ *The Spectator* (15 December 2018).

¹¹⁸ Address of President Trump to the UN General Assembly, ‘Seventy-fourth session Official Records’ (24 September 2019), UN Doc A/74/PV.3, 11.

¹¹⁹ Art 8, Beijing Declaration adopted by the First South-South Human Rights Forum (8 December 2017) available at: http://www.xinhuanet.com/english/2017-12/08/c_136811775.htm (emphasis added).

¹²⁰ John H Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97 *AJIL* 782, 794.

¹²¹ *Ibid*, 797.

¹²² Paul Blokker, ‘Populist Governments and International Law: A Reply to Heike Krieger’ (2019) 30 *EJIL* 1009, 1012.

¹²³ Helmut Philipp Aust & Thomas Kleinlein, ‘Introduction’ in: Aust & Kleinlein (eds), *Encounters between Foreign Relations Law and Public International Law—Bridges and Boundaries* (Cambridge: CUP forthcoming 2021).

¹²⁴ James Crawford, *The Creation of States in International Law* 2006, 33.

¹²⁵ John Locke, *Two Treatises of Government*, Second Treatise (London 1690) 147.

A closer focus on the relation between the domestic and the international dimensions of sovereignty shows that there is indeed a close link between ‘the people’ and *international* sovereignty, but not in the way that the populists suggest. In his highly original monograph *Sovereignty* published in 1927, Hermann Heller argued for the indivisibility of sovereignty. He wrote:

If a state is sovereign, it is the universal decision-making unit in its territory; the existentiality of the decision-making unit prohibits splitting sovereignty into the sovereignty of a state law and a separate international law sovereignty. [...] The highest independent decision-making power is always the mark of one and not two facts.¹²⁶

In his view, it was essential to liberate the idea of the sovereign person from the ‘bloodlessness’ of a ‘conceptual phantom labelled the state.’¹²⁷ He located sovereignty in the people as the body politic, but, distancing himself from Carl Schmitt’s conception of a ‘voluntaristic dictatorship’, he insisted that the people may only govern through the appointment of representatives, ‘juristically dependant magistrates’ that represent the common will.¹²⁸ This is the point that was so clearly vindicated by the UK Supreme Court in its two *Miller* decisions upholding the sovereignty of Parliament in the Brexit context, both as lawmaker and as supervisor of executive power.¹²⁹

How, then, can this domestic constitutional law point be connected with international law in a way that supports the idea of an *indivisible* sovereignty? The answer lies in one of the most central organizing principles of the post-War system of international law: the principle of self-determination. The principle is enshrined in the United Nations Charter, one of the principal purposes of the Organization being ‘respect for the principle of equal rights and the self-determination of peoples.’¹³⁰ It has been subsequently developed through law-making resolutions of the General Assembly on Colonial Peoples¹³¹ and on Friendly Relations¹³² and as the first human right in the International Covenants.¹³³ No single principle has more profoundly transformed the international legal system.¹³⁴ As ‘one of the essential principles of contemporary international law’,¹³⁵ it gives rise to an obligation *erga omnes*, which all states have a legal interest in protecting.¹³⁶

¹²⁶ Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law*, English translation of the 1927 original edition, edited and introduced by David Dyzenhaus (Oxford: OUP 2019) 140.

¹²⁷ *Ibid*, 104, 106.

¹²⁸ *Ibid*, 108.

¹²⁹ UK Supreme Court (UKSC), *R (Miller) v. Secretary of State for Exiting the European Union* (2017) UKSC 5, [2018] AC 61; *R (Miller) v. Prime Minister* (2019) UKSC 41 [2020] AC 37.

¹³⁰ Art. 1(2) UN Charter.

¹³¹ UNGA, ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’ (14 December 1960) UN Doc. A/RES/1514 (XV).

¹³² UNGA, ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ (24 October 1970) UN Doc. A/RES/2625 (XXV), (‘Friendly Relations Declaration’).

¹³³ International Covenant on Economic, Social and Cultural Rights, New York City, 16 December 1966, entered into force 3 January 1976, 993 UNTS 3, Art. 1; International Covenant on Civil and Political Rights, New York City, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, Art. 1(1): ‘All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.

¹³⁴ James Crawford, *The Creation of States in International Law* 2006, Ch. 3; Marcelo Kohen, ‘Self-Determination’ in: Jorge Viñuales (ed), *The UN Friendly Relations Declaration at 50* (Cambridge: CUP 2020) Ch. 7.

¹³⁵ ICJ, *East Timor (Portugal v Australia) Judgment* [1995] ICJ Rep 90, [29].

¹³⁶ ICJ Advisory Opinion, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (25 February 2019) [180].

Self-determination creates an express link between international law and the ‘people’ who are and remain the holders of the right.¹³⁷ Self-determination as a legal principle has both driven the emergence of new states and limited the validity of attempts to create new states that do not meet its criteria. But for present purposes, its significance lies in its enduring application *internally* within the framework of an existing state.¹³⁸ Here, international law supports the essential connection between the internal and the international role of self-determination: between the people and their right to determine their political organization.¹³⁹

This is important because the international law principle of self-determination is no populist’s charter, licensing the autocratic leader to invoke the will of the majority to the exclusion of the human rights of individuals. Its expression in international law is always coupled with the duty to promote universal observance of human rights and to ensure that the government of the state represents ‘the whole people belonging to the territory without distinction as to race, creed or colour.’¹⁴⁰

What internal self-determination does entail, however, is the ongoing possibility of real and effective political choice and change, even disruptive change, as a result of democratic decision-making within particular societies.¹⁴¹

c) The accommodation of competing political values in international law

What does this mean for the second element of the claim: the relation between international law and the power inherent in self-determination to make *political* choices about competing priorities and values? Koskenniemi argues that the boundary between internationalism and sovereignty as abstract categories cannot be fixed in a general way. It is always necessary to know what solution is preferred in any particular substantive field. There may be profound disagreement about that and international law *as law* cannot itself resolve that disagreement.¹⁴² The question is political and requires a political resolution.

This point goes only so far. True it is that there are often hard choices to be made between competing values and priorities. No legal system, whether national or international, can hardwire in all the answers to those choices ahead of the point of decision. The making of such choices depends upon human decisions, which can only be made in the light of the facts as they then appear to be.

Yet the dichotomy that Koskenniemi presents is misleading if and to the extent that it suggests that law and politics inevitably sit in opposition to each other; that political choices must remain the domain of national politics and not the international arena; or that states are incapable of enshrining some choices amongst competing priorities in law, including in international law. The

¹³⁷ For a recent exploration of this idea in the context of election interference see: Jens David Ohlin, *Election Interference* (Cambridge: CUP 2020) Ch. 4: ‘The Promise of Self-Determination’.

¹³⁸ Supreme Court of Canada (SCR), *Reference re Secession of Quebec* [1998] 2 SCR 217, 282 at [126].

¹³⁹ German Federal Constitutional Court, *Lisbon Treaty* (2009) 2BvE 2/08, 220–228; Helmut Aust, ‘Fundamental rights of states: constitutional law in disguise’ (2015) 4 *Cambridge JICL* 521.

¹⁴⁰ Friendly Relations Declaration, principle 5, paragraph 7.

¹⁴¹ Howse 2019.

¹⁴² Koskenniemi 2019, 28.

subject matter that we are considering today – the response to communicable disease – illustrates the point.

As demonstrated in Part 3, the protection of human health from pandemics has long been a value that states have sought to pursue through cooperation on the international plane. It predates by decades (if not a century) the flowering of international law experienced in the 1990's. Yet it would be a mistake to see this as the triumph of expert-driven technocracy, insulated from geo-politics.¹⁴³ On the contrary, pandemics have always been political. Precisely because a pandemic involves a communicable disease transmitted across borders, it necessarily engages the political relations between states. Furthermore, it requires states to balance competing priorities: notably the balance between the protection of human health and the facilitation of trade and traffic.

The crucial advance that was made on the adoption of the WHO Constitution in 1946 was the recognition by all states that pandemics represent a common danger, which makes the capacity of national health systems in individual member states the concern of all states. To this extent, then, all member states did make a choice about the relation between the national polity and the international arena. They agreed, in a remarkable show of unanimity, that pandemics require an international response, and could not remain the preserve of national polities.

This choice did not have the effect of removing the requisite balancing between protection of human health and other values from the arena of political decision. On the contrary, Article 2 IHR states plainly that the purpose of the Regulations is 'to prevent, protect against, control and provide a public health response to the international spread of disease *in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.*' This formulation requires a decision to be taken about the appropriate form and scope of recommendations in the light of the facts. True it is that states delegate the power of decision to the Director-General acting on the advice of the Emergency Committee.¹⁴⁴ Member States retain their supervisory power over the WHO through their participation in the World Health Assembly.

The conclusion is that international law in this field does not enshrine in stone tablets the absolute priority of one value over another. It indicates international agreement on an important common value, and then creates a mechanism by which decisions on the balance to be struck between that value and other values are to be taken.

The fact that protection from a pandemic is necessarily a collective action problem does not mean that a collective response inevitably entails a reduction in the scope for national self-determination. On the contrary, successful collective action may actually increase the solutions available to states that would not have been available otherwise.

Nor should it be assumed that this mechanism cannot operate in an era of rising geo-political rivalry between Great Powers; that politics will inevitably overwhelm law in the international arena, in health as in other fields. One of the paradoxes of international law in the 20th Century is that some of its most enduring instruments – the Vienna Conventions on the Law of Treaties and on Diplomatic and Consular Relations; the Law of the Sea Convention; the Treaties on Outer Space and on Nuclear

¹⁴³ Contrary to the view expressed in Patrick 2020, 46.

¹⁴⁴ Art 49 IHR 2005.

Weapons; the Friendly Relations Declaration and the Human Rights Covenants – were all concluded at a time of intense Great Power rivalry, precisely because the two Cold War powers recognized that they both needed international law to set the rules of engagement between them and to prevent catastrophe.¹⁴⁵

Of course, contests of geo-political rivalry may do great damage to, even destroy, the mechanisms of international cooperation. But it is a dangerous fallacy to argue, as both Carl Schmitt¹⁴⁶ and E H Carr did in the late 1930's, that (in Carr's words) there is in international affairs an 'absence of an accepted view of the general good of the community as a whole overriding the particular good of any individual member of it.'¹⁴⁷

The experience of the present pandemic suggests otherwise. The interest of the international community as a whole to cooperate in the advancement of human health in order to mitigate or prevent the spread of infectious disease is also in the particular interests of each country. This does not mean that the WHO or any other international institution is infallible or immune from criticism or reform.

What the pandemic does show is that populism can offer no better alternative vision for the interaction of peoples on the international plane. The whole vast elaborate machinery for international cooperation that we have created can only ever be as good as the *political* leadership for collective action that supports it. That is what the Preamble to the UN Charter means when it expresses the desire of the peoples of the United Nations '*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.*'

The grave disservice that populism has done is to undermine respect for international law generally within democratic societies at the very time when humanity has needed it most.

¹⁴⁵ Shabtai Rosenne, 'Codification revisited after 50 years' (1998) 2 *Max Planck Yearbook of United Nations Law* 1.

¹⁴⁶ Carl Schmitt, 'The Turn to the Discriminating Concept of War' (1937) in: Timothy Nuan (ed. trans.) *Writing on War* (Polity Press 2011) 50.

¹⁴⁷ Edward H Carr, *The Twenty Years' Crisis 1919–1939* (London: Macmillan 1939) 182.

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International Law.

The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

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