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Populism and International Law:
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Editorial: Populism and International Law: Global South Perspectives

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The rise of populist governments around the world has been a source of concern for international legal scholars. As a result, the field of international law witnesses a range of academic publications analyzing recent populist movements and their impact on international law as we know it. These analyses have focused on different areas of international law and their institutions, such as trade,¹ environment,² human rights,³ labor⁴ and migration.⁵ Across these different contexts, populism has been equated with authoritarianism, and a fundamental challenge to a liberal international legal order.⁶ Further, international law is often approached in a binary/antagonistic fashion, either as a tool to ban populist-driven policies or as an instrument to allow such policies to thrive, and states are seen as part of a binary of either populist and challengers to international law, or democratic and favoring liberal internationalism.⁷ This scholarship therefore, while valuable, tends to miss more nuanced accounts of co-production of domestic regime (il)legitimacy and international ordering as part of a continuum that does not fit “either/or” accounts.

But this scholarship is valuable in highlighting that the resurgence of populism, and its ties to nationalism, taps into a dissatisfaction with those left behind by internationalism and elusive cosmopolitan elites.⁸ In other words, underlying the populist challenge to international law and institutions is a clear sense of how these have failed to or stopped serving the people they were designed to serve. Therefore, underlying the rejection there is a tangible and credible case for international law losing sight of one of its key missions, at least in a humanized reading of the field:⁹ to serve those most in need.

A prominent article published last year on populism and international law, primarily using examples from the Global North, posited that “populist governments affect the current state of international law on two different

¹ Tom Ginsburg, ‘Authoritarian International Law?’, *The American Journal of International Law*, vol. 114(2), 221-260 (2020), at 222

² Brian J Preston, ‘The End of Enlightened Environmental Law?’, *Journal of Environmental Law*, vol. 31(3), 399-411 (2019).

³ Nienke Grossman, ‘Populism, International Courts, and Women’s Human Rights’, *Maryland Journal of International Law*, vol. 35, 101-123 (2020). See also Ginsburg, 221

⁴ Laurence R Helfer, ‘The ILO at 100: Institutional Innovation in an Era of Populism’, *AJIL Unbound*, vol. 113, 396-401 (2019).

⁵ See for instance the final panel of a two-day symposium (October 17-18, 2019) by the Maryland Journal of International Law on the topic of ‘The Populist Challenge to the International Legal Order’, in which four speakers focused on human rights and migration, at https://digitalcommons.law.umaryland.edu/mjil_symposia/2019/.

⁶ Ginsburg, 224.

⁷ Ginsburg, 224 (but he also notes the artificiality of the binary he deploys).

⁸ Helfer, 400-401.

⁹ See generally Antonio Cassese, *The Human Dimension of International Law* (OUP, 2008).

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levels: in the political sphere, their practices alter the general environment in which legal rules are interpreted and, in the legal sphere, populist governments push for changes in the interpretation of established international legal rules.”¹⁰ The article maps this dual and ambiguous engagement, and, importantly, underscores populism’s call for change in international legal ordering. However, the article also assumes that populism will always be a challenge to international legal structures,¹¹ failing to account for popular sovereignty and the ability of populism to provide alternative accounts of international legal ordering,¹² as well as downplaying different definitions of “the people”.¹³

The ongoing pandemic also has a lot to say about the interaction between populism and international law. Attacks against accepted expertise embodied in international institutions, a common feature of populist regimes, have devolved into vociferous attacks against the World Health Organization. National minorities, protected by international legal regimes, are often blamed for the spread of the pandemic in countries in the Global South like India (where the government blames Muslims), Myanmar (the Rohingya), Turkey (LGBTIQ+ groups), and Malaysia (migrant workers).¹⁴ The pandemic thus creates an opportunity for populist governments to further challenge fundamental tenets of international law and institutions, in a bid to strengthen themselves at the expense of an international legal order they often demonized to begin with.

Despite this burgeoning literature, few analyses to date have focused on the relation between populist governments and international law in the Global South, rather focusing on historical regimes in the North, or, more recently, the rise of regimes in the United States and Eastern Europe. Characteristics traditionally asso-

ciated with populist policies – such as the “us versus them” approach, security, nationalism – are animated by different dynamics than those at play in the North. We sought to fill this gap in the literature through this special issue, which asked contributors whether it is possible to think differently about the relationships between populism and international law from and to the Global South. In other words, does the unique position of Global South countries experiencing populist governments offer different insights that could enlarge the universe of analysis related to authoritarian or illiberal governments and international law? Also, can the experiences of the Global South identify alternative roles to international law beyond the binarism already identified by academics in the North?

We invited submissions tackling these and other questions from a range of different perspectives, and the responses were illuminating, both in reinforcing and challenging our assumptions about the role of populism in international law. Our open call resulted in six different articles tackling distinct and complementary analyses. Taken together, we suggest, they offer original insight for the task of reimagining the relationship between populisms and international law.

In “Between Science and populism: the Brazilian response to COVID-19 from the perspective of the legal determinants of Global Health”, Deisy Ventura and Jameson Martins look at the way localized populism maneuvers global crises, particularly the COVID-19 global pandemic, where scientific expertise, often downplayed by populist regimes, forms the backbone of international responses.¹⁵ They focus on the responses by different levels of the Brazilian government, measuring those responses against the legal determinants of Global Health. They engage with two provocations raised for this Special Issue: first, whether the preventable catastrophic 120 thousand-death toll, led by a populist government, offers different insights that could enlarge the universe of analysis related to authoritarian or illiberal governments and international law; and second, whether some elements of the Brazilian response to the pandemic signal alternative roles to international law beyond binarism, that is either as a tool to ban populist-driven policies or as an instrument to

¹⁰ Heike Krieger, ‘Populist Governments and International Law’, *The European Journal of International Law*, vol. 30(3), 971–996 (2019), 973.

¹¹ Krieger, 996.

¹² Paul Blokker, ‘Populist Governments and International Law: A Reply to Heike Krieger’, *The European Journal of International Law*, vol. 30(3), 1009–1016 (2019), 1009.

¹³ Marcela Prieto Rudolph, ‘Populist Governments and International Law: A Reply to Heike Krieger’, *The European Journal of International Law*, vol. 30(3), 997–1008 (2019), 997.

¹⁴ ‘No vaccine for cruelty: The pandemic has eroded democracy and respect for human rights’, *The Economist International Edition* (17 October 2020), at <https://www.economist.com/international/2020/10/17/the-pandemic-has-eroded-democracy-and-respect-for-human-rights>.

¹⁵ ‘How Trump and Bolsonaro Broke Latin America’s Covid-19 Defenses’, *The New York Times* (27 October 2020), at <https://www.nytimes.com/2020/10/27/world/trump-bolsonaro-coronavirus-latin-america.html>.

allow such policies to thrive. They conclude that “the Brazilian response to Covid-19 provides a clear example of the risks populism poses to international relations and in particular to international law, inasmuch as international treaties, institutions and recommendations are ignored or heavily blamed, precisely when most needed.” As they also point out, this type of response to a global pandemic raises an additional challenge to developing countries: by consciously alienating itself from the global health institutions, Brazil disengages from coordinated science-based protocols and from aligning with other like-minded countries to resist policies designed by the great powers that end up harming countries in the Global South. The situation could be even worse in Brazil if it were not for the strategic use of domestic law to resist populist-driven federal policies. Thus, this particular analysis shows that the success of populist policies at the federal level – which in the present case equates with the failure to meet Global Health standards – can be at least partially constrained by domestic laws. It also shows how sharing of power domestically can act as a check on populism. Therefore, we should not neglect the role of domestic law in assessing the impact of populist policies on international law, with sub-state entities playing a promising role through their formal and informal engagement with international legal norms and regimes.

In “Populism, Environmental Law, and the Post Pandemic Order”, Alessandra Lehmen invites us to think about the relationship between populist policies and international environmental law with particular repercussions in the Global South. Lehmen argues that environmental law, given its intimate connection to science, is especially prone to being antagonized by populist governments who tend to be averse to science and science-based global environmental pacts. While she does not focus on responses against populist governments in order to advance environmental concerns, she notes that the adverse effects of unsound environmental policies have a greater impact on the peoples of the Global South, especially the most vulnerable amongst them, such as Indigenous communities. Her article also connects the populist threat against the environment to the ongoing COVID-19 health crisis. Given the intrinsic relationship between global health and the environment, she hypothesizes that a widespread health emergency could potentially change the public’s risk perception so significantly that populist politics would no longer be

able to eschew the environmental agenda and its public health implications. This part of Lehmen’s argument, compared to Ventura and Martins’s, puts more faith in the people rather than the law, and offers a pathway for engagement with populism that relies on its own internal logic (popular sentiment and perceptions), rather than a relatively externally-imposed system of legal rules that act as a constraint on (popular) power.

In “Populism and the Evangelical church in Latin America: how anti-LGBTI forces tried to stop the Colombian peace agreement,” Julia Assmann de Freitas Macedo and Fabrízio Conte Jacobucci make a compelling case of different articulations between populism and international law arising in Latin America, and the ways in which populist groups can manufacture an “other” and deploy “anti-other” sentiment to pursue agendas that have very little to do with said “other”. They explore the relationship between right-wing populism and the neo-Pentecostal Evangelical churches, focusing on the anti-LGBTI discourse emanating from this relationship in contemporary Colombia and argue that right-wing populists have been antagonizing the “people” against an imaginary LGBTI foe and using religious jargon and support to mobilize the masses against gender identity and sexual orientation achievements in the region. The Pentecostal Evangelical churches in Latin America have been instrumental for right-wing political elites to bridge their gap with the masses. As Macedo and Jacobucci successfully argue, the 2016 peace agreement referendum in Colombia became a platform for advancing and repudiating LGBTI rights, and the subsequent rejection of the Colombian peace agreement is a case in point of the sharp opposition and “us vs them” narrative of right wing populists and the instrumental use of the neo-Pentecostal church against the LGBTI agenda.

Another seemingly autochthone feature of the relationship between populist governments and international law is presented by Lucas Tasquetto and Joao Roriz in their article titled “*Deus em Davos*”: *o direito internacional entre reacionários e neoliberais no governo Bolsonaro*” [“God in Davos: international law between conservatives and neoliberals in Bolsonaro’s government”]. Looking at the case of Brazil under the presidency of Jair Bolsonaro, the authors unveil and challenge a potential contradiction of the Brazilian administration concerning the (mis)uses of the international law and politics discourses. On the one hand, Tasquetto and Roriz note that Bolsonaro’s administration refers to international

law and multilateral institutions as a threat to traditional and domestic values. This criticism often appears under the notion of “globalism,” and sustains claims of nationalism. On the other hand, international law and multilateral institutions are welcome in Bolsonaro’s government to justify the adoption of policies that lie at the heart of the neoliberal economic order – structural reforms, privatization and trade liberalization. While these two approaches at first appear to be in conflict, Taschetto and Roriz argue that they depend on each other to exist. As such, they add additional layers to the relationship between international law and populism, suggesting that international law may be easily retooled to serve apparently contradictory goals within the exact same populist government, and thereby confirming a trend of modes of engagement of populist governments with international law noted in Heike Krieger’s largely Eurocentric article discussed above.

The last two papers of this Special Issue deal with China, and the contemporary China/Hong Kong bilateral relations. In “Chinese Populism in the 1920s, Extraterritoriality and International Law”, Wanshu Cong presents a defence of populist movements, making the case for populism’s emancipatory potential of mobilising resistance against repression and correcting systemic injustice. Cong chooses the populist movements in China against extraterritoriality and imperialism in the 1920s. Drawing on Laclau’s theory, Cong analyses why and how exactly these movements could be considered populists. In addition, the direct and indirect consequences of Chinese populism are examined to understand its impacts not only on the revision of unequal treaties and the dismantling of extraterritoriality, but more broadly on the development of international law. Thus, unlike the other papers that integrate this Special Issue that look to the present and take a critical tone in relation to how some far-right governments in the Global South are mobilizing law to dismantle established international liberal consensus, Cong’s article illustrate a particular historical context in 1920 China where populist-like responses were the only effective way to dismantle particular formulations of international law that served only to sustain oppressive practices against China. This article serves as a powerful reminder that populism, historically and its heart, is about democratic will, and holds within emancipatory potentials that we are too quick to dismiss because of populism’s dismissal of the established (liberal) global legal order. Populism

at its core is about contestation, and it needs to be taken seriously, even if not necessarily at face value: underlying current populist regimes’ rejection of the internationalist project from which liberal internationalists tend to defend international law is a sentiment of dissatisfaction with how international law has left behind important segments of the population. In the past, it has been the entire Global South; now, it seems to be parts of the Global South who do not speak the language of cosmopolitan internationalism.

Last but not least, Juan Enrique Serrano Moreno’s “Administrative Autonomy without Political Autonomy: the application of the ‘one country two systems’ model in Hong Kong” invites us to reflect on what a fully-fledged “authoritarian international law” might look like. The Hong Kong Special Administrative Region possesses administrative autonomy and has its own political system based on the rule of law, elections, and protection of fundamental rights. However, as noted by Serrano, the democratization of institutions has been overshadowed by China’s central government by, *inter alia*, intervening in free elections and more recently having instituted an “ideological screening” to Hong Kong’s electoral candidates. Thus, Serrano argues that Hong Kong’s administrative autonomy is not matched by an effective political autonomy and, as such, the “one country two systems” model, conceptualized at its inception as a limited democracy has indeed been converted into a liberal authoritarian regime. In other words, in the name of one version of current institutionalized populism, a key feature of the very definition of populism, the will of the people, is under attack.

Serrano Moreno’s contribution is thus a stark reminder that populism’s potential for contestation can only be realized if the people is front and center, and, like the lesson in Macedo and Jacobucci, people should not be divided internally either to fabricate “otherness”. Populism, to the extent it holds emancipatory potential *vis-à-vis* international norms and regimes, needs to embrace cosmopolitanism’s principled embrace of minorities and democracy. More than a rejection of cosmopolitanism, therefore, populism is at its best when it works alongside cosmopolitanism; the problem is in specific actors tapping into populist rhetoric and strategies and using cosmopolitanism to drive wedges that facilitate their pursuit of power, losing sight of utopianism to which every government, populist, cosmopolitan, or otherwise, should aspire: to serve the people for their emancipation and well-being.

These papers do not resolve the debate, of course. They are further fuel to an important and ongoing conversation that will keep on happening for a while, in which international law's legitimacy and purpose are called into question and reassessed. There is a lot more to be said about the populist challenge to international legal structures, of course, as there is about resisting the temptation to seek a pre-populist idealized international legal status quo as a response. Populism is a challenge to international law, perhaps even an existential threat; but it can also be a transformative tool, a means through which the claims of a global south that has been excluded from setting the foundational norms and structures of international law can be heard anew. It is up to us to decide whether to dismiss or use the opportunity created by populism to answer to the important claims behind the explosive rhetoric. We hope the articles in this issue offer some elements to keep the conversation going in the Global South, and wish you a happy reading.

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