

The Deconsolidation of Democracy in Times of Globalisation and Populism: What Role for International Legal Scholars?

(Draft paper to be completed)¹

1 Framing the Problem

We live in times of globalization and populism, and we do not know where we are headed to. Far from ushering in a new world order based on shared governance and uniting - as opposed to merely interconnecting - peoples and individuals of differing aspirations and creed, globalization has unleashed economic forces of impressive strength and reach.² In what resembles an economic arena more than an international community, notwithstanding areas of global governance,³ private actors - especially financial firms and transnational corporations - compete globally among each other and with States in providing services and opportunities. Acting more as benign ‘despots’⁴ rather than as machines wired for profits, these actors are capable of influencing public policies and, at times, gaining exemptions from civil and fiscal jurisdictions.⁵ Untamed, some of these private actors come to dominate entire fields.

By contrast, nation-States, especially some democratic States in the Western world, appear in difficulty.⁶ Various factors constrain States and limit their options in choosing desirable economic and social policies. These factors include a plethora of international

¹ This paper is not complete. This owes in part to the limits of the author in part to the difficulty of the topic. I am grateful in advance for comments and criticism. I can be reached at andrea.carcano@unimore.it

² Anne-Marie Slaughter, *A New World Order* (2004) 261-271.

³ Eyal Benvenisti, *The Law of Global Governance* (2014) 25-68.

⁴ See Doreen Lustig and Eyal Benvenisti, “The Multinational Corporation as ‘The Good Despot’ The Democratic Costs of Privatization in Global Settings”, 15 *Theoretical Inquiries in Law* 125 (2014).

⁵ Eyal Benvenisti and George W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ 60 *Stanford Law Review* 595 (2007). See also detailing the increasing efforts of Amazon in lobbying the US government: Spencer Soper, Naomi Nix, Ben Brody and Bill Allison, ‘Amazon’s Jeff Bezos Can’t Beat Washington, So he’s Joining the Influence Game’, Bloomberg, 14 February 2018 available at <<https://www.bloomberg.com/graphics/2018-amazon-lobbying/>> last accessed 15 February 2018.

⁶ As noted by James Crawford, we should ‘emphasize the legal distinction between States and, say, non-sovereign multinational companies that in many respects may be more powerful than the States with which they transact, especially when they are small or developing States’. James Crawford, *Chance, Order, Change: The Course of International Law: General Course on Public International Law* (2013).

agreements, and huge, increasing public debts subject to the volatility and interests of international markets. Albeit with a degree of generalisation, it seems fair to suggest that States do not control the economy, but that a global economy controls States.⁷

Unquestionably, economic globalization, that is, ‘the integration of markets across spaces’, contributed to bringing unprecedented growth to numerous States and novel opportunities to many individuals around the world.⁸ As the economist Francois Bourguignon has remarked, globalization made it possible for inequality to decrease between at least some countries, pulling several hundred million people above the threshold of absolute poverty.⁹ Yet, even if judged positively, the long-term (and unintended) consequences of economic globalization are to be considered and its own mutations over the years reflected upon.¹⁰ Not only did economic globalization pave the way for the 2007-08 financial crisis - the reverberations of which are still felt today across the globe -,¹¹ but it also produced winners and losers, causing a rise in inequality in certain countries.^{12 13} As Thomas Piketty has explained, in recent years inequality within countries has grown; it grows in a manner unheard of in the Western world; and it might grow further in the years to come.^{14 15}

In light of these and other developments, a snapshot of contemporary international society might capture a complex reality characterised not only by an overall increase in the wealth of countries (with exceptions, of course), but also by the gradual affirmation of a

⁷ Georges Soros defined Globalization amounts to the ‘free movement of capital and the increasing domination of national economies by global financial markets and multinational corporations’.

⁸ Philip Alston, ‘The Myopia of the Handmaidens: International Lawyers and Globalization’, 3 *EJIL* (1997), 435-448.

⁹ François Bourguignon, *The Globalization of Inequality*, (2015), at 1.

¹⁰ See in this regard, Robert Howse, ‘The Globalization Debate – A Mid-Decade Perspective’ 515-524, in *Research Handbook on Global Administrative Law*.

¹¹ ‘Left Behind: How to Help Places Hurt by Globalisation’, 425 *The Economist* 21 October 2017 at 11 and in the same issue see ‘In the Lurch’ at 19-24.

¹² Pierre-Marie Dupuy, ‘International Law: Torn Between Coexistence, Cooperation, and Globalization. General Conclusions’ 282 *EJIL* (1998) 282.

¹³ Ibid 118. *The Economist*, ‘Global Inequality: Shooting an Elephant’, 17 September 2016.

¹⁴ Bourguignon, *supra* note n. 8, at 128.

¹⁵ Ibid.

competitive, multipolar world order. This unfolding new world order appears fractured in its ideals and aspirations, and ‘between the ultra-rich and the middle and lower classes’.¹⁶

Discontent, protest and, at times, resistance define the response of the layperson—especially, but not exclusively, after the 2007-08 financial crisis. Alienated citizens who, for various reasons, did not benefit from globalization embraced populist movements and political parties (often leaning towards the far-right) that challenge globalization.¹⁷ What then surprises me to observe is that a process of economic globalization is accompanied by a process of political localisation¹⁸ rather than political integration.¹⁹ A quest for identity, recognition and economic security seems to nourish it.²⁰ Disappointingly, or perhaps only logically as a direct and opposite reaction to the policies of countries that spearheaded globalization, it is in some Western democratic countries that political localisation has gained momentum.

This paper purports to be an opportunity to reflect on these phenomena from an international law perspective in the belief that they are still somewhat neglected by international lawyers. It tries to sketch some of the possible consequences of globalization and populism on democratic governance and, by extension, on inequality and human rights. It offers some thoughts on the role - if any - that, from a theoretical perspective, international lawyers should play in the context of, and in response to, such sweeping economic and political processes.

¹⁶ Davos Theme of this year.

¹⁷ Jonathan Haidt, ‘When and Why Nationalism Beats Globalism’, 12(1) *The American Interest*, 10 July 2016. See also Jonathan Haidt, ‘The Ethics of Globalism, Nationalism, and Patriotism’ 9(3) *Minding Nature*: September 2016 V

¹⁸ For an analysis of these concept see Ian Greener, ‘Localization’ Encyclopaedia Britannica at <https://www.britannica.com/topic/localization>.

¹⁹ See in this regard Sasha Polakow-Suranski, ‘White Nationalism is destroying the West’, *The New York Times* 12 October 2017;

²⁰ Hyung Bok Chae, ‘Brexit: Is Britain Culpable?’ 10 *Journal of East Asia and International Law* (2017) 45.

2 Issue of Methodology

The chosen topic presents some ‘methodological’ challenges that require discussion, albeit briefly. With the term method I do not refer merely to the technique of my legal argumentation, but, more in deep, to the underlying ‘epistemological’²¹ choices on which the analysis rests and is guided by. In this section, I reflect on the ‘if’ and the ‘how’ of the topic to be addressed. At a later stage, when the project will have taken a more defined form, I shall complement it with some thoughts as to ‘why’ certain questions (as opposed to others) are worth the attention of the international lawyers.

As the topic is intrinsically interdisciplinary because it covers branches of social sciences ranging from economics to political philosophy to sociology,²² it could be argued that one way of dealing with the topic is to discard it precisely on the account of its not being ‘law’. This line of thinking, however, could border superficiality. It is only by taking on (relatively) new challenges - notwithstanding their complexity - that one can grasp their full interest and relevance for international law. In fact, as this paper tries to show, the discourse about globalization and populism does generate questions of sovereignty, democracy and human rights. How should non-legal issues, however, be dealt with by a legal scholar? One obvious problem is that of bias. Whether one is a constructivist, a structuralist, or a de-constructivist or something in the middle, no scholar is immune from his own moral, philosophical, and political preferences as situated within a specific temporal context and perspective. Law is itself part of bigger empires such as political theory and, ultimately, morality.²³ Yet, this circumstance is no cause for despair or for finding refuge in the warm blanket of noncommittal scepticism. It is the reason for a renewed commitment to

²¹ See Jean D’Aspremont, *Epistemic Forces in International Law* (2016) 177-198.

²² These ideas were present in Wolfgang Friedman, *The Changing Structure of International Law* (1964) 70.

²³ Ronald Dworkin, *Justice in Robes* (2006), at 34-35.

professional and thorough scholarship, humbled by awareness that the reader alone is the judge of one's arguments.

That clarified, the questions arises of whether the analysis of an interdisciplinary topic needs to be itself interdisciplinary. It can be argued, for instance, that only the simultaneous adoption of differing perspectives combining insights from a variety of social sciences would suffice to do justice to such complex topics. Perhaps, if one succeeds in so doing, the charges of 'reductionism' and over-simplification can be avoided. On the other hand, a purely interdisciplinary perspective, assuming that such an approach is feasible,²⁴ runs the risk of being indigestible as a dish with too many flavours. Moreover, the result might not suit the palate of the reader of a law journal. Compromise is thus needed. Accordingly, this paper seeks to be interdisciplinary in the sense of going beyond legal sources in the collected and scrutinised material. It adopts a more traditional legal approach to identify among the collected data those which are relevant for the theory and practice of international law and the ensuing reflection.

3 Globalization and Populism: Distinct yet Connected

Globalization and populism are two distinct phenomena in many respects. They are, however, arguably connected as both raise challenges for the proper functioning of democratic States. This is not to say that without globalization and populism democracy would necessarily be better off. It is rather to suggest that coordination between different processes and exigencies that emerge within the international society or within a State is needed to ensure a sort of constructive equilibrium between the international and the domestic level. In a generally

²⁴ Tanja Alberts, 'The Politics of International Law and the Perils and Promises of Interdisciplinarity' (2013) 26 *Leiden Journal of International Law*, 503-508 and J Klabbers, 'The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity' (2005) 1 *JILIR* 35.

anarchic international society, international law, if properly construed, is a framework that provides tools that can ensure more balance and coordination among opposing poles. To begin with, however, some terminological clarifications are in order.

A Populism

According to the Oxford Dictionary of Politics, populist beliefs involves the ‘defence of the (supposed) traditions of the little man against change seen as imposed by powerful outsiders [...]’.²⁵ ‘Populism’ is used to define, often with a derogatory connotation, large protest movements expressing the grievances and disillusionment of ordinary people.²⁶ Populism is an idea with a long history, which surfaces intermittently through different historical periods.²⁷ The dimensions of the phenomenon which, *inter alia*, led to, or at least favoured, the victory of Donald Trump in the US Presidential elections (8 November 2016) and to a vote in favour of leaving the European Union in the so-called Brexit referendum (23 June 2016) command reflection.

One of the features of populism is that it builds on the belief that society can be divided into two antagonistic classes: the common people and the elites.²⁸ The latter are depicted as incompetent and devious; the former as a morally pure, homogeneous and hard-working people that deserve more than they have. The elites are depicted as guilty of not delivering to the common people what they deserve. The ‘bad’ elites have the same attitude in

²⁵ Ian McLean and Alistair McMillan, *Oxford Concise Dictionary of Politics* (3rd ed. 2009), at 422.

²⁶ See John B. Judis, ‘The Populist Explosion’: How the Great Recession Transformed American and European Politics’ Columbia Global Reports 2016, 13-17. Jan-Werner Müller, *What is Populism?* (2016), at 7-11; Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A very Short Introduction* (2017), at 1-4.

²⁷ Judis, *supra* note 24, at 18-38.

²⁸ Mudde, *supra* note 24, at 9–16.

the reverse. They look down at populist movements and individuals who have enough and do not deserve more.²⁹

That which is protested against changes and depends, of course, on the historical and geographical context in which a movement arises. A ‘return to nationalism’ in the form of a retreat from all that is ‘international’ seems to be a common feature of contemporary populist movements. Such movements strongly criticise ‘banks and international finance’; ‘establishment elites’ such as the ‘Washington establishment’ or bureaucrats in Brussels or Frankfurt; and, of course, ‘immigrants and refugees’. Eric Posner writes that international law is also not immune from the challenge of populist movements because of its being ‘technocratic’ and ‘advanced by the establishment’.³⁰

Populism flourishes because of the freedom and pluralism that democracy allows and of what Norberto Bobbio calls the ‘broken promises of democracy’,³¹ that is, the inability of elected democrats to accomplish what they promised during the elections or to give back to the electors what they expected.³² In the case of authoritarian or despotic States, populism does not exist as an autonomous people’s movement. It might inspire and be associated with the political practice of the governing faction. In such contexts, populism becomes a political strategy employed by a specific type of leader who seeks to govern based on direct and unmediated support from the masses. Peronism, Poujadism and, more recently, Hugo Chavez’s ruling of Venezuela are examples that come to mind in this regard.

Not only is populism anti-elitist, but it is also anti-pluralist and exclusionary. It embraces direct sovereignty of the people as envisaged by Jean Jacques Rousseau. Populism

²⁹ Bagehot, ‘Power to the People’, *The Economist*, 18 November 2017, at 34.

³⁰ Eric Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017).

³¹ Muller, *supra* note 24, at 76-79.

³² On the relationship between populism and democracy see Benjamin Moffitt, *The Global Rise of Populism* (2016) 133-151.

rests on the idea of the general will (*volonté générale*) as opposite to the will of everybody, namely the idea that members of parliaments are not representatives, but agents of the people. Ernest Laclau considers populism a positive force for democracy because, unlike representative democracy, populism calls for direct engagement by the average individual to exercise his or her sovereignty as people.³³ Nonetheless, the question remains of how populist movements can govern democratically and effectively with such radical agendas. Moreover, it is not clear what limits are to the supremacy of the ‘people’. Ron Dudai perceptively remarks that while populism does not necessarily mean the bringing about of ‘policies which are antithetical to human rights’, it does ‘mean, among others, that the hitherto-more-or-less-established idea of the framework of universal human rights as constraining political decisions and majoritarian positions...is now explicitly rejected’.³⁴

Recent literature has focused on populism as a threat to democracy and human rights,³⁵ and rightly worries about its darker face: nationalism.³⁶ Philip Alston speaks perceptively of a ‘declining faith in democracy’³⁷ and subsequently asserts that there was ‘radical diminution in the support for democracy in many of the established democracies’ and ‘there is a growing openness to considering alternatives which might be seen to offer a happier future’.³⁸ This line of thinking seems to blame populism as the chief cause of the weakening of democracies. While it is true that populism hurts representative democracy if only for the reasons that it privileges direct democracy over representative democracy, the

³³ Ernesto Laclau, *On Populist Reason* (2005), at 169; Benjamin Moffitt, *The Global Rise of Populism* (2016) at 137–38.

³⁴ Ron Dudai, Human Rights in the Populist Era: Mourn then (Re) Organize, 9 *Journal of Human Rights Practice* (2017) 16-21, at 17.

³⁵ P. Alston, ‘The Populist Challenge to Human. Rights, 9 *Journal of Human Rights Practice* (2017), 1–15.

³⁶ *Ibid*, at 4-6.

³⁷ *Ibid*, at 4.

³⁸ *Ibid*, at 5.

analysis seems incomplete. It does not pay enough attention to economic globalization, which is a phenomenon that precedes populism and in part feeds it.³⁹

B Globalization

Globalization is in many respects an ‘old idea’.⁴⁰ It resists, however, any single or simple definition as used in different contexts with differing purposes.⁴¹ The fifth edition of the authoritative Shorter Oxford English Dictionary defines ‘globalization’ as the ‘action or an act of globalising’.⁴² This suggests that globalization is essentially a process that operates ‘worldwide’ and is pertinent to ‘the whole world’.⁴³ The French translation of globalisation is ‘mondialisation’, which the Larousse dictionary describes as the ‘Fait de devenir mondial, de se mondialiser’. The choice of the term ‘mondialisation’ as opposed to ‘globalisation’ seems to give it a more neutral meaning rather than using the correspondent French noun of ‘globalization’, which comes from the verb ‘globaliser’, that is associated with the intent to spread something globally.⁴⁴

³⁹ Larry Elliott *The Guardian* Brexit is a Rejection of Globalisation, 26 January 2016. Shucheng Wang, ‘Brexit’s Challenge to Globalization and Implications for Asia’ 10(1) *A Chinese Perspective Journal of East Asia and International Law* (2017) 47-64. Larry Summers, ‘Voters deserve Responsible Nationalism not Reflect Globalism’, *The Financial Times*, 10 July 2016.

⁴⁰ Oxford Concise Dictionary of Politics, See also for a detailed analysis ‘Tim Dunne and Christian Reus-Smit, The Globalisation of International Society’ 2017, 18-40 in (Tim Dunne and Christian Reus-Smit eds) *The Globalization of International Society* (2017). Harold James, *New Concept, Old Reality* 53(4) *Finance & Development*, (2016)

⁴¹ Paul James and Manfred B. Steger, ‘A Genealogy of ‘Globalization’: The Career of a Concept’, 11(4) *Globalizations* (2014) 417-434.

⁴² Shorter Oxford English Dictionary, fifth edition vol 1. 1109. Definition

⁴³ Add French dictionary definition. <http://www.larousse.fr/dictionnaires/francais/mondialisation>.

⁴⁴ See for instance, Stéphane Laure, ‘La mondialisation ? À consommer avec modération’ 18 December 2017 available at <http://www.lemonde.fr/idees/> last access 25 January 2018. Also used is the French term ‘globalisation’ which concerns ‘Tendance des entreprises multinationales à concevoir des stratégies à l’échelle planétaire, conduisant à la mise en place d’un marché mondial unifié’ refers only to the ‘Tendance des entreprises multinationales à concevoir des stratégies à l’échelle planétaire, conduisant à la mise en place d’un marché mondial unifié’.

See <http://www.larousse.fr/dictionnaires/francais/globalisation/37156#UIZmcIHD5TU2iqMm.99>.

Globalization refers to fundamental changes ‘in the spatial and temporal contours of social existence’ due essentially to technological developments.⁴⁵ It is characterised by de-territorialisation, interconnectedness and social acceleration, and is a relatively long term process.⁴⁶ It is international, but does not operate only among nations; it operates transnationally.⁴⁷ Legal scholars have identified different kinds of globalization, including global governance and legal globalization.⁴⁸ Eyal Benvenisti explains that State authorities increasingly delegate more ‘regulatory discretion to various forms of public and private, formal and informal institutions’ and that ‘global governance now addresses almost all areas of public and private life, from the disarmament of weapons of mass destruction to setting food safety standards’.⁴⁹ Speaking of legal globalization, Julian Ku and John Yoo are concerned with the influence of ‘foreign and international law in constitution interpretation’.⁵⁰ They worry that the US Supreme Court could usurp popular sovereignty by impermissibly importing foreign and international law into US constitutional jurisprudence, and argue that this process ‘represents another way to that globalization is affecting public law-making’. And that therefore it should be tamed.⁵¹ And Gerry Simpson speaks of the globalization of international law, which has the aim to ‘establish a truly global (universal) international legal order’.⁵²

In the absence of a global sovereign and a global judiciary and in the presence of a pluralistic international society, however, the ‘global’ remains a notable exception more than a majoritarian pattern. In the sense of an effectively constraining political or legal authority

⁴⁵ Stanford Encyclopedia of Philosophy,

⁴⁶ Ibid.

⁴⁷ Jan Aart Scholte, ‘Defining Globalisation’, *The World Economy* (2008) 1471-1502 at 1498-99.

⁴⁸ Peter J. Spiro, ‘Sovereignism’s Twilight’, 31(1) *Berkeley Journal of International Law*.

⁴⁹ Eyal Benvenisti, *The Law of Global Governance* (2014), at 25.

⁵⁰ Julian Ku, John Yoo, *Taming Globalization* (2012).

⁵¹ Ibid at 252.

⁵² Gerry Simpson, ‘The Globalization of International Order’ in Tim Dunne and Christian Reus-Smit (eds) *The Globalization of International Society* (2017) 265, at 283.

over the will of individual States, global governance is still a rather restricted phenomenon though by no means insignificant has scholars have explained.

What instead is by no means restricted and seems to have a true global and effective reach is economic globalization, which includes financial globalization. Although not a new phenomenon,⁵³ the distinct modalities and forms in which contemporary economic and financial globalization occur are striking.⁵⁴ According to the economist Dani Rodrik, contemporary globalization is to be defined as a process of ‘hyper-globalization’ that commenced in the 1980s when the ideological balance took a decisive shift in favour of markets and against governments.⁵⁵ This form of extreme globalization is based on the attempt to eliminate all transaction costs, such as barriers that hinder trade, foreign-exchange restrictions and capital controls.⁵⁶ It is the result of policy choices aimed at removing public restrictions on the movement of resources between countries to form an ‘open’ and ‘borderless’ world economy and unprecedented and constantly growing process of financialisation of the world economy.

Interestingly, once the conditions for the development of a world economy are in place and markets have reached a degree of integration, economic globalization does not need a global sovereign to thrive and energises itself. While not self-creating, economic globalization as we witness it in recent years, is self-growing. It grows not only because of global trade of course, the ingenuity and ambition of myriad private actors operating within and above States but also, through the capitals made available by global finance. What this process brings about is new phenomena that impact on life of States such as market forces. Market forces are

⁵³ See Kevin H. O’Rourke and Jeffrey G. Williamson, ‘Once More: When did Globalisation Begin?’ *European Review of Economic History* 9, 109-117, definition at 109. Kevin H. O’ Rourke and Jeffrey G. Williamson, *Globalization and History* (2001).

⁵⁴ Alston, 442-443.

⁵⁵ Dani Rodrik, *The Globalization Paradox* (Oxford University Press 2011) 190-200.

⁵⁶ Ibid.

bigger than each of the actors operating within them and seemingly unstoppable by single countries. A key problem with this (hyper) version of economic globalization is that ‘market forces’ have primacy over States and a logic of their own that certainly does not factor in the welfare of nations, let alone democratic States. Hyper-globalization has allowed a vast chasm to develop between the reach of financial markets and the scope of their governance.⁵⁷ This prompted an imbalance between the role of private and public actors, which is tilted in favour of the former.

Finally, a peculiarity of economic (hyper) globalization is its unevenness. As a competitive and global process, it rewards and affects distinct players differently. Accordingly, it produces varied consequences in different places because of the disparities between one State and another. Indeed, some countries, including some democratic ones, have been capable of thriving in times of globalization,⁵⁸ while some democratic countries have not. And yet within democratic countries, it has inflicted strong blows.

Populism is in some respects a consequence of the hyper globalisation that we witnessed in recent years and thus cannot be disjoined by it, let alone dismissed, as it would simply be a pathology internal to some democratic countries due to leadership’s flaws on one side and narrow visions and petty egoisms on the other. It is in part the voice of those left behind by a competitive process though not necessarily to a fault of their own. The next section expands on these thoughts.

4 The Vulnerability of the Democratic State

⁵⁷ Rodrick, *supra* note n. 54, at.

⁵⁸ Indra de Soysa and Krishna Chaitanya Vadlamannati, ‘Does Being Bound Together Suffocate, or Liberate? The Effects of Economic, Social, and Political Globalization on Human Rights, 1981-2005’ 64(1) *Kyklos* (2011) 20, at 44.

To many citizens in the Western world, the democratic State is nowadays a disappointing institution. The perception of the loss of ‘democratic governance’ is growing, and the bond between the State and the nation is under strain. Where I see a chink in the armour of some democratic States is with their difficulty in functioning effectively as democratic governance institutions and in their ability to simultaneously protect the security and rights of all their residents, and thus in ensuring that the nation works with the State and not against it. As remarked by Roberto Stefan Foa and Yascha Mounk, signs of ‘democratic deconsolidation’, such as the ascent of ‘antisystem parties movements’ or politicians jostling with consolidated rules for partisan advantage, are increasingly prevalent in European countries in particular.⁵⁹

A *The Impact of Hyper-Globalization and Populism on Democracies*

In international affairs and international law scholarship, the term ‘failed State’ is generally used where there has been a breakdown of law and order, such as in the case of protracted internal conflicts. The term ‘vulnerability’ does not appear often in international law literature. Vulnerability is the diminished capacity of an individual or group to anticipate, cope with, resist and recover from the impact of a natural or man-made hazard. The author believes it worth using ‘vulnerability’ in the case of democratic States to highlight the precariousness of democratic governance and how potentially stronger forces, such as globalization and, to some extent, populism, might harm this democratic governance in one way or another.⁶⁰ To be sure, this state of affairs has much to do with the way political and economic leaders behave and how citizens respond. Faulting local leaders, however, is not enough. Other factors are at stake.

⁵⁹ Roberto Stefan Foa and Yascha Mounk, ‘The Danger of Deconsolidation’ 27(3) *Journal of Democracy*, 14-17.

⁶⁰ *Journal of Democracy*, 12. See 118-20

According to economists, economic globalization – in the form it has assumed in recent years characterised by ‘hyper-globalization’ and nourished by global finance - is at odds with democratic governance and impinges on it.⁶¹⁶² Dani Rodrik writes that the problem with the ‘hyperglobalization agenda’ is that it ‘clashes with democracy for the simple reason that it seek not to improve the function of democracy but to accommodate commercial and financial interests seeking market access at low cost’. Among the various reasons that can be put forward for this, a few can be briefly recalled here despite their technical complexity.

Democracies in the Western world embraced and supported economic and financial globalization, but the process went somewhat awry. They placed limits on their own sovereignty in the belief that a global economy would provide mutually beneficial situations for themselves and others and thus contribute to global welfare. Reliance upon the free market, deregulation, minimal government and minimal international regulation are all ideas that prompted the growth of globalization, but ultimately backfired. Markets are not self-regulating, nor self-stabilising and are motivated by short-term interests, which do not coincide with those of nations, let alone democratic nations.⁶³ Moreover, as Beeson and Bell remark the ‘financial and banking systems remain too large, too complex, and riddled with system risk-taking incentives’, which means putting the whole economic system at some risk.⁶⁴

And while there is a network of formal institutions such as the International Monetary Fund, and informal ‘bureaucratic, standard setting bodies’, such as the Basel Committee on Banking Supervision, the International Organization of Securities Commissioners (IOSCO),

⁶¹ Dani Rodrik, *The Globalization Paradox* (2011) 190-200. Stiglitz, 171-179.

⁶² Stiglitz, *The Prices of Inequality* (2012) 181.

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⁶⁴ Mark Beeson and Stephen Bell, ‘The Impact of Economic Structures on Institutions and States’ in *The Globalization of International Society* (2017) 284-303, at 295.

and the International Association of Insurance Supervisors (IAIS), their ability to control and direct event is limited. Professor Michael Barr explains that such arrangements did not ‘work, to say the least, as the most recent financial crisis’ and that ‘despite efforts of political leaders such as the establishment of the 2009 Financial Stability Board, there is ‘still much more substantive work to do’ in order to reduce ‘the chances of another devastating global financial crisis’.⁶⁵

According to Dani Rodrik, the chosen regulatory economic framework seemed to have tied the hands of democracies without providing them adequate safety nets.⁶⁶ Economic globalization required political choices by the States. At least in part, this meant repressing nation States’ sovereignty to set different regulations, impose different legal standards and - in the case of certain European Union Member States - print their own currency.⁶⁷ While there has been a restriction on the domestic articulation of policy preferences or, in international law terms, a State’s sovereignty, there has not been a parallel expansion of democratic space at the regional/global level so that all interests could be represented. In fact, while economic globalisation seemed to be an objective worth pursuing in and of itself as instrumental to global welfare, it is not clear how single States can be adequately protected by what remains ultimately a competitive process. In a competitive process, where everyone public or private actor is enabled to do what is best for himself and restrained only by minimal regulation, there cannot be a maximisation of global welfare, there is an inherent reduction of it in favour of those who compete better. As noted by Beeson and Bell governments in the major economies

⁶⁵ Michael S. Barr, ‘Who is in Charge of Global Finance’ 45 *Georgetown Journal of International Law* (2014) 971-1027, at 1026.

⁶⁶ Dani Rodrik, at 178.

⁶⁷ Dani Rodrik, *Straight Talk on Trade* (2018), at 18.

have not fundamentally questioned the scope and scale of their financial sectors and structural power they possess.⁶⁸

Moreover, a hyper globalised-economy as we have witnesses in recent years⁶⁹, in influencing the amount of capital available to countries, poses limits on the ‘public’ policies that democracies may implement. As noted by Lawrence Summers, there is a trade-off between globalization and public policies that tend to be in favour of the former for a number of reasons considering the better option to ensure global welfare.⁷⁰ Thomas Rixen put it thus:

Reregulation is hampered by intensive jurisdictional competition...Governments fear to loose internationally mobile financial activity to competitor states. They are not able to solve the collective action problem to curb or ease competition among each other because they are influenced or even captured by domestic financial interest groups.⁷¹

Some examples of these difficulties are in order. First of all, as noted by Thomas Piketty, it is true enough that imposing heavy taxation on a country’s highest income earners could reduce inequality and prevent economic or political instability. Also the the International Monetary Found has called for ‘greater progressivity’ in taxation, namely ‘higher marginal tax rates on top income earners’ and the adoption of ‘redistributive fiscal policies’.⁷² At present, however, the adoption of fiscal policies by democracies to reduce inequality meet with serious obstacles.⁷³ Governments and political parties depend upon financial contributions from the financial sector. They also rely on the jobs created by the financial sector. Firms and wealthy individuals may lobby policy-makers also through

⁶⁸ Mark Beeson and Stephen Bell, ‘The Impact of Economic Structures’ in *The Globalization of International Society* (2017) 284, at 295

⁶⁹ Stephanie Meinahrd and Niklas Potrafke, ‘The Globalization-Welfare State Nexus Reconsidered’ 20(2) *Review of International Economics* (2012), 271-287.

⁷⁰ According to Larry Summers ‘Even as globalisation increases inequality and insecurity, it is constantly and often legitimately invoked as an argument against the viability of progressive taxation, support for labour unions, strong regulation and substantial production of public goods that mitigate its adverse impacts. Lawrence Summers, ‘America Needs to Make a New Case for Trade’, *The Financial Times*, 27 April 2008.

⁷¹ Quote to be checked. Thomas Rixen, ‘Why Reregulation after the Crisis is feeble: Offshore Financial Centers, Shadow Banking and Jurisdictional Competition’, 7(4) *Regulation and Governance*, 435-459 at 436.

⁷² International Monetary Fund, *Fiscal Monitor* (October 2017), Executive Summary, at IX.

⁷³ Thomas B. Edsall, ‘Why it is So Hard for Democracy to Deal with Inequality?’ *New York Times*, 15 February 2018.

electoral contributions, or leave a country if taxes are too high and find refuge in ‘tax heavens’. As such, the international mobility of firms, individuals and capital also restricts a nation’s ability to choose the tax structure that best reflects its needs and preferences. This is accompanied, in the absence of a global taxation treaty creating uniform conditions for the taxation of capital, by a race between different countries to have the lowest taxation rates to attract foreign capital and investment.⁷⁴

Moreover, by transferring production to different countries, corporate entities could easily bypass domestic labour regulations through which democracies protect their own citizens and ensure their welfare. While corporations benefit, democracies do not because their citizens have reduced working opportunities, and workers endure substandard conditions or worse, which are accepted regardless of their compliance with human rights standards (that are often not strict enough) for lack of any better options. Globalised companies are thus able to bypass domestic labour regulations, while trade unions have no say in the conditions for their workers, which are unknown to the wider public.⁷⁵ In a globalised economy, trade unions are side-lined, and there is no political authority tasked with ensuring stability of labour, including good wages, a decent work environment and employment security. There is also no mechanism of accountability for human rights violations by multinational corporations.⁷⁶

Finally, highly indebted governments are increasingly dependent on credit supplied by financial markets.⁷⁷ The financialisation of sovereign debts exposes States to pressure from

⁷⁴ See Lawrence Summers, ‘A Strategy to Promote Healthy Globalisation’, *The Financial Times*, 4 May 2008.

⁷⁵ 191.

⁷⁶ Benny Santoso, ‘Just Business – Is the Current Regulatory Framework an Adequate Solution to Human Rights Abused by Transnational Corporations’ *German Law Journal*, vol 18 03, 534.

⁷⁷ Besson and Bell, soprano note, at 295

markets via rating agencies, and subjects them to external control and speculation. Markets can pull money out of a country overnight because of their openness. [to be expanded upon].

In the midst of these difficulties, populism escalates problems rather than contributing to their solutions. Populist movements raise problems that real and are worth listening to and discussing. Yet, by putting economic globalization and democratically-elected representatives in the same basket of criticism makes it more difficult to find viable solutions. Populist movements challenge globalization, but they remain victims of their own insurgent approach. What they challenge is not merely the correctness of others' political policies, but also the legitimacy to rule of those who disagree with them. As one entity challenges the legitimacy of others to govern, a dialogue of the deaf between 'elites' and 'populists' arises and spreads, thereby affecting democratic governance, which is based on productive dialogue and compromise between an equally legitimate majority and minority.⁷⁸ This is all the more so in a contemporary perspective whereby the technocratic complexity of governance requires contributions from all components of a community.

Populism has the merit of putting out there the limits of an economic and financial system that is unfair in many respects as, inter alia, the 2007-2008 crisis showed and the above make considerations help to make clear. From another perspective, populism is a problem because it contributes to widening the wounds that globalization caused in vulnerable democracies and in not solving them. As such, what populism can contribute to cause is the downfall of already vulnerable democratic States because of its divisive nature, unless representative democracies are capable of taming populist movements by adopting some of these movements' agendas or entering into political alliances with them.

⁷⁸Edward Luce, 'Democratic deficit' *The Financial Times*, 6 August 2017, at 7.

B *Questions of Sovereignty and Protection of Human Rights*

In view of all the foregoing considerations, when looked at from an international law perspective, the question arises of whether ‘hyper’ economic globalization is a threat to the sovereignty of States, and particularly to the sovereignty of democratic States. This is not a concern out of a concept of sovereignty as a value in and of itself to protect the independence of a States. It is place the accent on the rather different question of whether hyper-globalization harms the effort of democratic States to create opportunities for their citizens in the fulfilment of their human rights. In so doing, it also poses problems from a human rights perspective as citizens not belonging to the elites may be denied opportunities that they could otherwise have had. If these concerns are justified, the argument could be made that democratic States should take measures to tame the hyper form of globalization rather than merely accepting it as a *fait accompli*, or as part of the ‘common goods’ which could also be beneficial to tame populism critique. The role of international lawyers would be to indicate whether decisions in this sense would be legally justifiable and why. To do a constructive mindset on the function of international law is necessary.

Hence, before trying to answer these and other questions, it is worth asking whether the questions the author flagged are indeed the ‘right’ questions to be asked by international lawyers and so clarify why the chosen inquiry is worth pursuing. This depends, of course, on the role one envisages for international scholars and for international law. As the debate on these issues have been grown in recent years among international lawyers and prompted a process of reflection and self-reflection, which however is still in state of flux, it may be appropriate to clarify one’s stance before proceeding any further.

5. *The Role of International Scholars/Lawyers*

A *Constructors of the Global Village*

Writing in 1995 Thomas Franck noted that we ‘live in a post ontological era’ and that therefore ‘international lawyers are now free to undertake a critical assessment of its content’,⁷⁹ which meant asking not whether international law was law but whether it was fair, effective, understood enforceable, and most importantly whether it was fair.⁸⁰ Critical legal studies (CLS) welcomed the invitation but took it to an altogether different level. CLS gained momentum in international scholarship. Relentless attacks on the flaws and limits of international law and the sins of its past are routinely heard at conferences and lectures. Its scope is to raise awareness about the forces operating behind the law so one would not fall into the trap that law is automatically something good as policy-makers and other can use it both ways. Once we have learnt of the inevitable bond between international law and politics, however, and that law can be an instrument of hegemony as the critical legal studies scholars insist, there is no much that we may lose in moving forward. This is necessary to prevent looking at the challenges of the future with the eyes directed towards the past. This all the more so considering that critical legal studies is yet to produce an agenda for the betterment of international law. International law did not become fairer, more effective or more enforceable over the years. On the contrary, one is left with the impression that international law scholarship have become less authoritative, more ‘political’, cynical and sceptical. This is a dangerous path because international law should be strengthened. International law is not only a grammar; it is both substantive and procedural law. Within its substantive dimensions, it contains ‘constitutional values’ in the sense of ideas on which most States have, by and large, agreed upon. From the pages of the *Modern Law Review*, Judge Crawford argues that:

⁷⁹ Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 6.

⁸⁰ *Ibid.*

Adjustments may be necessary to respond to perceived inequalities or injustices...but we should also be wary of the increasing rhetoric of skepticism towards international law. Over time, this may precipitate a larger-scale retreat into nativism and unilateralism'. We should be ready to defend the communitarian values of international law against this possibility'.⁸¹

I agree. With this mindset and correct analysis of what the gist of international law stands for and the idea that certain values have gained prominence – essentially being tantamount to constitutional values - because of the wide support they enjoy (despite breaches of them) among States, today's challenges could be more fruitfully addressed. International law is not the solution of international problems, but it should not be doomed to irrelevance because its disciples are too busy atoning or in a perennial self-reflection modality.

To be continued...

⁸¹ James Crawford, 'The Current Political Discourse Concerning International Law' 81(1) *Modern Law Review* 1-22, at 22.