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LIBERAL INTERNATIONALISM AND THE POPULIST BACKLASH

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Liberal Internationalism and the Populist Backlash
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Abstract. A populist backlash around the world has targeted international law and legal institutions. Populists see international law as a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people. This turn of events exposes the hollowness at the core of mainstream international law scholarship, for which the expansion of international law and the erosion of sovereignty have always been a forgone conclusion. But international law is dependent on public trust in technocratic rule-by-elites, which has been called into question by a series of international crises.

An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War.² In Russia, Vladimir Putin has drawn on Russian nationalism to consolidate his control, allowing him to engage in violent foreign adventures in Georgia, Ukraine, and Syria. The European Union has been shaken by a debt crisis and a migration crisis, which have accelerated trends toward disintegration. In Hungary and Poland, nationalist governments with authoritarian aspirations have come to power. In the Netherlands, France, Germany, and other European countries, nationalist political parties have achieved high levels of popularity and political influence, while British voters have voted to exit the European Union. In Turkey, the government has launched a ferocious crackdown on the press and the political opposition. In the United States, Donald Trump has criticized numerous international organizations, including NATO, NAFTA, and the United Nations. His election reflects increasing isolationist sentiment among Americans. Trump, like populists in Europe and other countries, has criticized international institutions and norms, and seems likely to repudiate certain international norms and possibly treaties in the areas of trade, security, climate change, and the laws of war. In the Philippines, populist President Rodrigo Duterte has embarked on a scheme of extrajudicial killings in order to combat crime and consolidate his power. In China, President Xi Jinping's grip on government has strengthened, symbolized by the Central Committee's recent decision to name him "core leader" of the Party. In India, Prime Minister Narendra Modi preaches Hindu nationalism at the expense of the country's vast Muslim minority.

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² On recent trends in populism, see Pippa Norris, *It's Not Just Trump. Authoritarian Populism Is Rising Across the West. Here's Why*, Wash. Post. (Mar. 11, 2016) https://www.washingtonpost.com/news/monkey-cage/wp/2016/03/11/its-not-just-trump-authoritarian-populism-is-rising-across-the-west-heres-why/?utm_term=.b5d66ce1779c. And for a compendium of useful recent articles on the spread of populism around the world, see E.J. Graff, *Everything You Need To Know About The Worldwide Rise Of Populism*, Wash. Post (Nov. 10, 2016) https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/10/heres-what-we-know-about-the-spread-of-populism-worldwide/?utm_term=.c2c866a6a4b2.

Specific causes and circumstances vary across countries but the common theme is a challenge to the “establishment” or “elites” by outsiders on behalf of the common people or, in some cases, by insiders who claim a mandate from the common people.³ The establishment is portrayed as some combination of the following institutions and individuals: the traditional parties and their leadership; the government bureaucracy; business and labor leaders; and international bodies and their memberships. The populist leader argues that the establishment is “corrupt,” meaning that it either enriches itself at the expense of the people, or shows greater concern for foreigners or minorities than for the common citizen. In the most virulent cases, where populism verges on authoritarianism, the populist leader claims the mandate of the nation and denies that a legitimate political opposition exists or can exist.

Not all of the populist leaders have attacked international law. Xi and Modi, for example, have pursued conventional foreign policies—though China’s expansion in the South China Sea, which has involved numerous violations of international law, has sparked tensions with its neighbors and the United States. But this has less to do with populism than with traditional notions of state interest. Populism poses a threat to international law and order because international law is rule by technocracy, and relies on trust and mutual goodwill, while populists see corruption and advantage-taking all around them, and direct their ire at the experts. We see this in the rhetoric of populists, who frequently blame foreign influences and international institutions for the nation’s problems. In recent years, populists have targeted the European institutions, the International Monetary Fund, and the International Criminal Court, and they have mocked and belittled international legal norms, including human rights law and the laws of war, and the quasi-legal principle of humanitarian intervention.

It is too soon to tell whether this populist reaction will demolish the current international order, erode it, or flame out without causing any damage to international institutions. It is also possible that institutions will be strengthened and improved as a result of this trial by fire. The purpose of this paper is not to make predictions but to investigate causes, focusing on the failures of international law. I argue that the international law community has seriously misunderstood the evolution of international law, with the result that it is unprepared to comment on the populist backlash. Specifically, I argue that a common view held by these elites—that further international legal integration of the world is inevitable and beneficial, and that it enjoys the support of most ordinary people—has been refuted by events. Moreover, the populist reaction to international law may be traced to two essential features of international law—that it is *technocratic* and has been advanced by the *establishment*. Even if international law recovers, these features will remain a source of vulnerability.

In Part I, I discuss the dominant thinking in international law—what I have called elsewhere “global legalism.” In Part II, I show how this thinking both disregarded contradictory evidence long before the populist backlash, and cannot make sense of the backlash. In Part III, I discuss possible explanations for the recent turn of events, focusing on the relationship between populist thinking and international law.

I. The Invisible College

³ For valuable recent accounts, see Jan-Werner Müller, *What Is Populism?* (2016); John B. Judis, *The Populist Explosion: How the Great Recession Transformed American and European Politics* (2016).

The international law community—which sometimes calls itself the “Invisible College of International Lawyers”⁴—has been noticeably unprepared for the populist reaction. It has sat on the sidelines, largely mute, as events have unfolded. In the view of scholars and commentators who I have called “global legalists,”⁵ globalization is inevitable, and globalization requires ever greater international cooperation. In the words of Peter Spiro,

Massive material changes in the nature of global interaction—captured under the necessarily capacious umbrella of “globalization”—will inevitably overwhelm sovereigntist defenses, which, notwithstanding their constitutional pedigree and apparent gravity, are in the end incapable of stemming the tide.⁶

International cooperation takes place through law, and as international law expands, traditional notions of state sovereignty must contract. The process involves the proliferation of treaties; the expansion of customary international law and other free-floating legal norms, including human rights norms, that bind states without their consent; and the creation of international organizations, above all courts and monitoring bodies. International law strengthens its grip on states by infiltrating domestic institutions, including domestic courts, which increasingly defer to international norms, and even capturing the imagination of government officials and ordinary people, who believe that international law supersedes domestic law.

To understand the radical albeit unquestioned nature of this vision, we can contrast it with the traditional, “Westphalian” view of international law. According to the Westphalian view, states are sovereign, which means that they are legally entitled to noninterference by other states. They can make binding legal commitments by voluntarily entering into treaties with other states, or by submitting to customary international law, which was also considered a voluntary process—where implicit consent through non-objection substitutes for explicit consent required for treaties. Even when states enter into treaties, however, their sovereignty remains intact. Domestic courts and other institutions are required to comply with treaty norms only if the government voluntarily promulgates the treaty as domestic law. If it does not, and if a state violates international law, then other states may resort to self-help.

The Westphalian view came under pressure from various directions. The Armenian genocide, the Holocaust, and other twentieth-century atrocities cast doubt on the moral and political sustainability of the non-interference principle. When a government massacres its citizens in large numbers, foreign countries may have little choice but to intervene—under pressure from their own citizens or because they fear that chaos in one country will spread across borders. Early efforts to embody this view in international law eventually led to an elaborate human rights legal regime consisting of treaties and a vast infrastructure of international

⁴ Oscar Schachter, *The Invisible College of International Lawyers*, *Nw. U.L. Rev.* 217 (1977). For a recent statement, see Santiago Villalpando, *The “Invisible College of International Lawyers” Forty Years Later*, ESIL Conference Paper No. 5/2013 (2013).

⁵ Eric A. Posner, *The Perils of Global Legalism* (2009).

⁶ Peter J. Spiro, *Sovereignism’s Twilight*, 31 *Berkeley J. Int’l Law* 307, 307 (2013); see also *id.* at 316 (“unstoppable international law”).

organizations.⁷ The catastrophic humanitarian devastation of the two world wars also gave rise to a demand for a supra-national institution that could block countries from going to war. The League of Nations, followed by the United Nations, resulted. With the start of the Cold War, the United States encouraged international cooperation in the west by establishing trade and investment institutions, and supporting European integration. At the end of the Cold War, a brief but powerful sense that the historical trajectory must end with an international confederation of liberal democracies led to enthusiastic support for universal international institutions that supported trade, democracy, peace, and human rights, demonstrated most powerfully by a greatly expanded commitment among Europeans to legal and institutional integration.

The Invisible College cheered these developments, and provided the legal arguments for them. But it faced a conceptual hurdle: traditional international law thinking heavily depended on the Westphalian notion of sovereign states who adjust their legal relations only through consent. On this view, human rights was a choice like any other; a state could refuse to ratify human rights treaties and could withdraw from them as long as it satisfied traditional notice requirements. Similarly, states could refuse to join international security bodies (as in the case of the United States and the League of Nations) or withdraw from them (the case of Germany and Japan during the interwar period). They could withdraw from or disregard the opinions of international judicial bodies. Such an international order could hardly be very robust.

The Invisible College addressed this problem in two ways—one legal and one sociological. First, an early generation of lawyers exploited a vulnerability in Westphalian legal doctrine, which was the ambiguous nature of consent. Governments had long recognized customary international law, which in theory (and according to legal doctrine) rested on consent but in practice reflected decisions made by governments long ago and not the consent of modern governments in any meaningful sense. Norms of customary international law often could be ginned up from scattered official statements and practices that expressed consent only in the most ambiguous terms. With such an elastic notion of consent already in place, lawyers could argue that countries had implicitly consented to human rights norms (by failing to openly defy them), and that they could be forbidden to withdraw from organizations and treaties once they had consented to join them. The high-water mark was the view that human rights norms had become “constitutionalized” as a result of governments’ supposed recognition that they would be bound by them for all eternity.⁸ Constitutionalized human rights norms would take precedence over other inconsistent provisions embodied in treaties that states subsequently negotiated.

Second, the most recent class of the Invisible College, in many cases influenced by academic theory and empirical methods from other disciplines, has argued that international law rests on the consent (or, more precisely, the views or preferences) of ordinary people and government officials.⁹ Citizens “internalize” international law and, using their influence as

⁷ See Eric A. Posner, *The Twilight of Human Rights Law* (2014), for a discussion. Samuel Moyn, *The Last Utopia Human Rights in History* (2012), provides a useful history.

⁸ See, e.g., *Ruling The World? Constitutionalism, International Law, and Global Governance* (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009) (especially Paulus and Kumm essays); Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (2009).

⁹ See, e.g., Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *Stanford L. Rev.* 1749, 1765 (2003). In U.S. scholarship, Harold Koh may be the most prominent advocate of this position. Harold

voters or officeholders, demand that their state follow international law, regardless of whether the government consents to it in the formal sense required by Westphalian doctrine. Consent remains a linchpin of international law but is moved from the level of government to the level of citizen.

Many legalist scholars realized that this view was in tension with the Westphalian notion of state sovereignty, but predicted for just that reason that Westphalian sovereignty would erode, or claimed that it had already eroded beyond recognition.¹⁰ Nations were reconceptualized as institutions that instrumentally created global public goods and advanced global values on behalf of global citizens rather than as embodiments of a particular national spirit. This idea merged with the main currents of academic ethics, which supported cosmopolitanism—the view that people’s loyalty should be to humanity as such rather than any particular tribal or national group—rather than nationalism, which was dismissed as primitive and morally indefensible.¹¹

A boost to this view was provided by European integration. For many years, roughly from the Treaty of Paris of 1951 to the Maastricht Treaty of 1992, European law was understood by academics on Westphalian principles as a type of treaty law based on the consent of states. This changed with the publication of a paper in 1991 by Joseph Weiler entitled *The Transformation of Europe*.¹² Weiler argued that political and economic integration had made “exit”—the withdrawal of any member state from the EU (as it was about to be called)—an impossibility, forcing member states to rely more on “voice,” that is, the institutional structures set up within that system, which were supervised and enforced by the European Court of Justice. The result was a transformation of Westphalian international law into a type of quasi-constitutional law. With the newly dominant role of the ECJ, rule-of-law values would, at least at the margin, displace power politics.

Weiler’s academic view tracked the views of political elites in Europe and shaped academic scholarship on European law. It also, as Weiler himself advocated, provided a “model” for thinking about international law generally:

Both in its structure and process, and, in part, its ethos, the Community has been more than a simple successful venture in transnational cooperation and economic integration. It has been a unique model for reshaping transnational discourse among states, peoples, and individuals who barely a generation ago emerged from the nadir of Western civilization. It is a model with acute relevance for other regions of the world with bleak histories or an even bleaker present.¹³

Koh, Why Do Nations Obey International Law, 106 Yale L.J. 2599 (1997). For a recent restatement, see Mary Ellen O’Connell, *The Power and Purpose of International Law* (2008).

¹⁰ See e.g., Spiro, *supra*. For a major statement from the prior generation, see Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 Fordham L. Rev. 1 (1999).

¹¹ E.g., Peter Singer, *One World: The Ethics of Globalization* (2002).

¹² J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L.J. 2403 (1991). For a recent version of this argument, see Neil Walker, *Reframing EU Constitutionalism*, in *Ruling the World? Constitutionalism, International Law, and Global Governance* (Jeffrey L. Dunoff & Joel P. Trachtman eds. 2009).

¹³ Weiler, *supra*, at 2483.

The European “model” would play a role in justifying transnational legal orders, as scholars argued that the type of political and psychological transformation that took place in Europe could be, or actually had been, reproduced globally.¹⁴

Meanwhile, in the United States a parallel development seemed to reinforce the instincts of the Invisible College. In domestic law, courts had become increasingly open to legal arguments grounded in foreign or international law. For American legal academics, judges are infinitely higher-status than mere politicians. Judges can strike down statutes or interpret them narrowly, and create law through the common-law process. The stubborn provincialism of American lawmakers even at the height of globalization mattered little if judges frog-marched them along the path laid out by international law. An academic subculture developed to show that judges—by instinct and inclination, and as a result of their gluttony for boondoggles in foreign locations where they came under the influence of judges from other countries—were honorary members of the Invisible College even if they did not know it.¹⁵

Exhibit A in the U.S. was the Supreme Court’s citation to foreign and international law while defining the meaning of “cruel and unusual” in Eighth Amendment jurisprudence.¹⁶ But the real excitement took place outside the glare of the footlights. Scholars argued that courts implicitly and sometimes explicitly incorporated international law into domestic law in subtle but far-reaching ways: by interpreting ambiguous statutes in light of international law; by drawing on international law to invent new common law norms; by respecting foreign judgments and enforcing foreign law; by giving priority to treaties over inconsistent domestic law; and much else.¹⁷ And this pattern extended far beyond the borders of the United States. Many foreign countries incorporated international law into domestic law, at least presumptively, and the use of statutes based on universal jurisdiction proliferated throughout the world. These statutes authorized governments to prosecute foreigners for human rights violations regardless of the location of a violation and the nationalities of the victims and perpetrators.¹⁸ With international law flowing through so many cracks in the wall of sovereignty, it made little sense to think that walls between nations really existed, whatever jingoist senators from rural areas in the United States might say.

II. What Went Wrong?

A. Domestic Law

The story begins in 1997, when Curtis Bradley and Jack Goldsmith published an article contesting the claim, incorporated by legalists into the Restatement (Third) of Foreign Relations Law, that international customary law is automatically incorporated into U.S. federal common

¹⁴ Spiro, *supra*.

¹⁵ Anne-Marie Slaughter, *A New World Order* (2004), is the most influential statement of this view. Justice Breyer implicitly accepts it, or a perhaps watered down version of it, in a recent book. See Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (2015).

¹⁶ *Roper v Simmons*, 543 U.S. 551, 575-579 (2005).

¹⁷ Koh, *supra*, at 98. For a sober evaluation of the law, see Curtis A. Bradley, *International Law in the U.S. Legal System* (2015).

¹⁸ See Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around The World* (2012), <https://www.amnesty.org/en/documents/ior53/019/2012/en/>.

law.¹⁹ The Invisible College reacted with fury²⁰ but, as Bradley and Goldsmith showed, there was never much evidence for the legalist view in the first place.

Indeed, it turned out that there was not much evidence for any of the claims made by the Invisible College. True, courts enforced foreign judgments and occasionally interpreted statutes so as to avoid violating international law, but they had always done that—this was nothing new. Moreover, these were marginal doctrines, of little real-world significance. When the Bush administration engaged in counterterrorism operations of questionable validity from the standpoint of international law, the courts eventually pushed back, but only a little, and based on constitutional and statutory law, not international law.²¹ They have been silent on Obama’s drone assassinations.

The Invisible College also invested its energies in promoting the Alien Tort Statute, an obscure 1789 law that a U.S. court of appeals revived in the case of *Filártiga v. Peña-Irala*²² in 1980, when it held that the law provided a private cause of action for victims of human rights violations anywhere in the world, regardless of the nationality of the victim or perpetrator. Previously, human rights violations had never been the subject of private litigation in U.S. (or any country’s) courts, except when they overlapped with wrongful acts under ordinary domestic law, and sufficient contacts between victims, perpetrators, and the United States existed. The College expected that this statute would help bring human rights violators, and their corporate abettors, to their knees. Harold Koh called *Filártiga* the “*Brown v. Board of Education*” of transnational litigation, his term for human rights litigation.²³ But the Supreme Court later cut back on it, fearing that judicial knight-errants would cause frictions with foreign nations and interfere with U.S. foreign policy, which rarely paid much attention to the human rights records of its allies.²⁴

Another example concerns the status of decisions of the International Court of Justice in domestic law. Members of the Invisible College had argued that the decisions of international tribunals like the ICJ were binding in domestic litigation. But in a pair of cases, the Supreme Court held that ICJ holdings are not incorporated into domestic law, and that the president does not possess the authority to enforce them where he does not already have that power under domestic law.²⁵ These cases make it difficult for the United States to commit itself through domestic law to the rulings of international organizations.

¹⁹ See Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997).

²⁰ See Harold Hongju Koh, Is Customary International Law Really State Law?, 111 Harv. L. Rev. 1824, 1850 (1998) (calling Bradley and Goldsmith’s view “bizarre”); Gerald L. Neuman, Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith, 66 Fordham L. Rev. 371 (1997).

²¹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008). While *Hamdan* involved an interpretation of international law, the source of law was statutory.

²² *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

²³ Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2366 (1991).

²⁴ See *Sosa v. Alvarez-Machain*, 542 US 692 (2004); *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013). As acknowledged even by Justice Breyer, a strong supporter of the ATS and the cosmopolitan spirit that the modern literature on the ATS embodies. See Breyer, *supra*.

²⁵ *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Medellín v. Texas*, 552 U.S. 491 (2008).

Observers might have understood that the Invisible College's interpretations of judicial practice were wildly at variance with popular opinion, and for that reason were not sustainable even if some judges were sympathetic to them. The Supreme Court's foreign-law opinions offended Americans who did not understand why foreign and international law should play a role in constitutional interpretation. Members of Congress and state legislators objected in the strongest terms to the notion that constitutional interpretation should be influenced by trends in foreign countries.²⁶ The Court, for the time being, seems to have taken heed. While it has not abandoned its Eighth Amendment jurisprudence, it has lost its enthusiasm for the general enterprise, mostly ignoring arguments grounded in foreign and international law in cases involving other parts of the Constitution, even while comparative-law professors furiously produce amicus briefs for the uninterested court.²⁷

The populist revival in the United States seems far removed from these obscure legal developments. It is quite unlikely that *Roper* or the early ATS decisions helped Sanders or Trump. And, indeed, the courts had rejected most of the claims of the Invisible College long before the 2016 election. But there is a lesson. Trump conducted his election campaign as a populist, and attacked many of the accomplishments of liberal internationalism—including the trade system, the web of military alliances, the climate treaty, and the principle of humanitarian intervention. In promising to torture terrorists, ban Muslims, and use other harsh measures to protect American security, he repudiated the human rights treaties and the laws of war. Although Trump has not—as far as I know—repeated traditional objections to the ICC, human rights treaties, and the like, it is hard to imagine that he will support them. The strength of anti-globalist sentiment, which took elites by surprise, and showed how out of touch they were with public opinion, also shows that the basic premise of the Invisible College—that people internalize international law—is questionable, to say the least.²⁸ Nationalism is as strong as ever. International law is seen as instrumental, not as an end in itself. Courts defy these fundamental elements of political psychology at their peril.

B. European Law

The European system was always hampered by the absence of strong democratic bona fides, known as the “democratic deficit” in the literature.²⁹ European integration began as a series of conventional treaties negotiated by the executives of the European countries and approved by their governments. To an extent that is unusual in international law, the treaties set up quasi-autonomous international institutions, including a court (the ECJ), a bureaucracy (the European Commission), and a governing council (the European Council). As the European

²⁶ This is just the latest iteration, going back to the Bricker Amendment.

²⁷ See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 *Duke L.J.* 891 (2008).

²⁸ Public Sees U.S. Power Declining as Support for Global Engagement Slips America's Place in the World 2013, Pew Research Center (Dec. 3, 2013) (<http://www.people-press.org/2013/12/03/public-sees-u-s-power-declining-as-support-for-global-engagement-slips/>) (finding that “support for U.S. global engagement, already near a historic low, has fallen further”). Most Americans appear to support the use of torture, which is forbidden by international law. See Pew Research Center, *Global Opinion Varies Widely on Use of Torture Against Suspected Terrorists* (Feb. 9, 2016) <http://www.pewresearch.org/fact-tank/2016/02/09/global-opinion-use-of-torture/>. For a nice demonstration of the fragility of public support for international law, see Stephen Chaudoin & Terrance Chapman, *Contingent Public Support for International Legal Institutions* (unpub. m.s. 2016).

²⁹ Fritz Scharpf, *Crisis and Choice in European Social Democracy* (1999).

system gained members and swallowed up larger areas of policy, these institutions became extremely powerful. They were, of course, entirely dominated by elites—highly educated, multilingual, cosmopolitan. Ordinary voters exercised influence mainly through the election of national leaders, who guided the European institutions or appointed officeholders. Voters gave little attention to the day-to-day politics of Europe, which mostly occurred behind closed doors.

To address the democratic deficit, European governments tried two major approaches. First, they created a European Parliament composed of representatives directly elected by the populations of the member states. The Parliament was given numerous legislative powers although not the power to initiate legislation. Second, they tried from time to time to obtain a popular mandate for the European Union by holding popular referenda to approve treaties, including a treaty signed in 2004 that would have created a European constitution.

But neither approach succeeded. The Parliament was not taken seriously by European voters, who seemed to be aware that its power was mainly symbolic. The constitutional treaty was rejected by the French and Dutch. Its supporters hastily reconfigured it as the Treaty of Lisbon. Under the law of the all the member states except Ireland, popular referenda were not necessary to ratify the treaty. In Ireland, voters initially rejected the treaty, then approved it after further revisions. Thus, the weakness of democratic support for European institutions was highlighted rather than cured.

The best evidence for the political weakness of the European system is survey data, which suggest that the effort to politically integrate never gained traction.³⁰ An important pattern, to which we will return, is that less educated people have been less likely to identify as European or partially European, than more educated people, supporting the common view that European integration is, and has been as, a project of the elites.

In the United Kingdom, Prime Minister Cameron called for a referendum on whether Britain would remain in the EU. While a supporter of EU membership, he believed the referendum necessary in order to fight off challenges from within his party and UKIP, an independent party committed to exit. In 2016, voters approved the “leave” position by a slight margin. Meanwhile, significant populist movements in France, the Netherlands, Denmark, and even Germany reflect, to varying degrees, unhappiness with European institutions and a longing for a return to the era of national sovereignty. The European experiment is now in doubt.

What accounts for the crisis of the European system? The democratic deficit is not a sufficient explanation: the deficit has been a feature of the European system from the beginning. In the United Kingdom, longstanding worries that the UK and the continent were culturally and politically incompatible—as well as complaints that European bureaucrats dictated the size of cucumbers and that the ECJ struck down British penal and counterterrorism policies—were never sufficient to motivate departure though they did provide the basis for the Euroscepticism that eventually blossomed into the Leave campaign.³¹

³⁰ For early work, see Robert Rohrschneider, *The Democracy Deficit and Mass Support for an EU-Wide Government*, 46 *Amer. J. Pol. Sci.* 463 (2002).

³¹ See Benjamin Grob-Fitzgibbon, *Continental Drift: Britain and Europe from the End of Empire to the Rise of Euroscepticism* (2016).

The real failures were the euro crisis, which began in 2008, and the migration crisis of 2016. While the United Kingdom was not a member of the currency union, the euro crisis shook confidence in European institutions.³² The currency union was premised on greater political, economic, cultural, and regulatory integration than has ever existed. When the American financial crisis spread to Europe, it sparked banking and sovereign debt crises in the periphery, which in turn ignited a political crisis because governments could not agree on how the financial and economic burdens should be shared across Europe. In the end, the German government, the European Central Bank, officials of the European Union, and the IMF forced austerity on debtor countries in return for rescue loans and bailouts. The common currency was an elite-led policy from the start; the failure to manage the crisis was a failure of the elites as well; and the unpopular quasi-resolution was dictated by elites.

The migration crisis began in 2016 when hundreds of thousands of Syrians fled the civil war in their homeland, joining a stream of refugees from elsewhere in the middle east, who were heading for safety in Europe. After much dithering, the European governments admitted a huge number of migrants, straining the administrative and logistical capacities of the member states, particularly those around the periphery. Many Europeans feared that the wave of migration would bring terrorism and additional problems of assimilation, which had long been simmering. This unpopular decision fueled the European political crisis.

A major source of tension in both crises was the outsized role of Germany. With the largest and wealthiest economy, Germany took the lead in addressing the euro crisis. It therefore received most of the blame for austerity, which created an enormous amount of suffering in Greece and the other countries that received loans, while many economists argued that the policy was self-defeating. It was also Germany that took the lead in the migration crisis, and shouldered most of the responsibility for admitting the migrants. The democratic deficit took on ominous coloring. It was possible for Europeans to think that they ceded their political autonomy not to a remote but European bureaucracy, but to Germany.

The United Kingdom did not accept as many Syrian refugees as Germany and other countries did, and it was not directly affected by the euro crisis. But the failures in European governance—and the sense that European governance meant German governance—played a role in Brexit by giving new force to longstanding Euroscepticism and to fears of excessive immigration. With the undeniable fact of the democratic deficit, the European system depended on its reputation for technocratic governance, and the string of failures suggested that the reputation was undeserved.³³

Brexit might have been treated as an unfortunate detour on the way to fuller European integration. Indeed, integration remains popular throughout Europe despite the significant loss of

³² Jeffrey Frieden, *The Crisis, the Public, and the Future of European Integration* (unpub. m.s. 2015).

³³ For a paper showing that popular confidence in international institutions is a function of their effectiveness, see Lisa Maria Dellmuth & Jonas Tallberg, *The Social Legitimacy of International Organizations: Interest Representation, Institutional Performance, and Confidence Extrapolation in the United Nations*, *Rev. Inter'l Stud.* (forthcoming).

trust by the public in European institutions.³⁴ Just by surviving the euro and migration crises, the EU might gain strength. Indeed, the two crises have forced member states to cooperate more closely in banking regulation and border security.

But Brexit implies something more ominous. As Weiler noted, as far back as the early 1990s exit from the EU was regarded as unthinkable, and the political impossibility of exit was the premise of his claim of a “transformation” of European law from Westphalian to constitutional:

The closure of Exit, in my perspective, means that Community obligations, Community law, and Community policies were “for real.” Once adopted (the crucial phrase is “once adopted”), Member States found it difficult to avoid Community obligations. If Exit is foreclosed, the need for Voice increases.³⁵

Brexit throws the efforts to constitutionalize European law into doubt, and for this reason has grave political as well as legal implications. If continued membership is optional, then all members states can continuously bargain for additional privileges, further eroding the uniformity and strength of European law. Far from being internalized, as global legalists would have it, European law is becoming a bargaining chip between nations that are jealous of their sovereignty. Westphalia has returned.

C. International Law

As in the case of domestic U.S. foreign relations law and European law, the global legalist agenda was always accompanied by rumblings of discontent, even at its moment of greatest triumph. For international law, that moment was the decade of the 1990s. The cold war had just ended, apparently confirming the superiority of capitalism and liberal democracy. The west took the lead in insisting that all countries comply with human rights (by which was meant liberal democracy), using carrots (aid) and sticks (the threat of military intervention) to encourage countries to democratize and respect rights. The interventions in Yugoslavia were interpreted as democracy-promoting and gave rise to the “responsibility to protect” slogan, which raised the implicit specter of western-led military intervention in countries that did not respect the rights of their populations. International tribunals were created to prosecute serious human rights violations in the former Yugoslavia and Rwanda, and this effort culminated in the International Criminal Court of 1999. The International Monetary Fund became a tool for advancing the “Washington consensus”: when countries experienced debt or currency crises and needed loans, the IMF would come to the rescue conditional on market-based reforms in the borrower’s economy. The World Bank complemented this effort with “rule of law” aid projects that sought to liberalize the economies of developing countries. International trade was advanced through the WTO, NAFTA, and other trade agreements, which swept in an ever greater number of countries, and made deeper inroads against trade barriers.

The rumblings of discontent took many forms. There was significant, even violent, opposition to free trade, including the Seattle riots of 1999. The deregulation of international

³⁴ Frieden, *supra*.

³⁵ Weiler, *supra*, at 2423.

capital flows resulted in currency and sovereign debt crises in numerous countries. The records of the Yugoslavia and especially the Rwanda tribunals left much to be desired—the tribunals were incredibly slow and expensive, and prosecuted very few people. The United States refused to ratify the treaty creating the International Criminal Court. Indeed, the notion that global legalism was triumphant was always hard to reconcile with the position of the United States, which frequently refused to ratify major treaties, including human rights treaties, and the Law of the Sea treaty.³⁶

But the turning point was 9/11. Since then, global legalism has stumbled from one disaster to another. These include: the collapse and reorganization in 2006 of the UN Human Rights Commission, which had been taken over by human-rights abusing countries; the illegal and unsuccessful Iraq War of 2003; the legally controversial and unsuccessful military intervention in Libya of 2011; the illegal Russian military interventions in Georgia in 2008 and in Ukraine in 2014; U.S. counterterrorism policy, including torture, detention, and drone-based assassination, much of which was in flagrant violation of, or in tension with, the human rights treaties; the Eurozone crisis, which began in 2008 and is continuing; the migration crisis in Europe; the failure to stop the humanitarian catastrophe in Syria; the collapse of the Arab Spring; the limited accomplishments of the ICC and the withdrawals from that institution by several African countries along with a strong signal of Russian displeasure with it.³⁷ The WTO process has ground to a halt, thanks to the backlash against international trade and worries about sovereignty.³⁸

As if none of this was going on, Spiro, writing in 2013, argued that “international actors have been able to make the United States pay for perceived human rights violation in the anti-terror context.”³⁹ His only evidence is the decision by European governments to withdraw permission from the CIA to operate “black sites” on their territory. But refusal to cooperate with a program is not the same thing as retaliation. The Europeans and the U.S. government disagrees about all kinds of things; the United States has never dictated the behavior of its allies. No international actor has made the United States “pay” for torture, assassination, and other human rights violations. Spiro, like Koh and other global legalists, exaggerate the scope of international legal cooperation by portraying the United States as an outlier which alone is powerful enough to break the law and even then is constantly being reined in at the margins by (unidentified) “international actors.” On the contrary, most other countries engage in this behavior themselves, and in any event need the United States for counterterrorism help more than the United States needs them. To all appearances, cooperation continues to flourish.

Indeed, in that respect the story is not entirely bleak. Cooperation on counterterrorism is one of two bright spots in international cooperation after 9/11, the other being progress toward combatting climate change, albeit in the weakly institutionalized Paris Agreement. There have

³⁶ For a general discussion, see Posner, *Perils*, supra.

³⁷ Owen Bowcott, *Rising Nationalism Leaves International Criminal Court at Risk*, *The Guardian* (Dec. 29, 2016) https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-international-criminal-court-at-risk?CMP=share_btn_tw.

³⁸ On the resurgence of protectionism (disguised as nontariff barriers), see Fredrik Erixon & Razeen Sally, *Protectionism Is on the Rise*, <http://voxeu.org/debates/commentaries/protectionism-rise>; WTO, *Report on G20 Trade Measures* (2016), https://www.wto.org/english/news_e/news16_e/g20_wto_report_june16_e.pdf.

³⁹ Spiro, supra, at 319.

also certainly been specific diplomatic agreements that benefited the countries involved (like the U.S.-Iran nuclear agreement), as there always are. International tribunals of various sorts—mostly regional—continue to decide cases, and the vast bureaucracies in the UN, World Bank, IMF, and in various regional institutions, continue to do their work. But the tribunals aside, these types of international cooperation are of the traditional Westphalian type: the momentum toward global legalism is gone.

We can summarize this backward movement by noting that international security—as embodied in the UN charter’s prohibitions on use of force—and human rights are the two most significant pillars of international law since the end of the Cold War. And both are in shambles. The United States and Russia have repeatedly violated the use of force prohibition. And human rights have worsened over the last decade.⁴⁰ Meanwhile, tribunals and other international institutions are contributing little to international order, and there have been no major efforts to advance international legalization for more than a decade.

Meanwhile, international economic cooperation is also in decline. Here, we should point out something that most debates about international law leave out: the persistent unhappiness of major developing countries with what they regard as their coercive and unfair treatment under the major international economic institutions—including the austerity policies of the IMF, and the trade policies of the WTO.⁴¹

Combine these events with the populist backlashes within countries and the overall impression is one of significant backsliding and retrenchment—something that no member of the Invisible College has, as far as I am aware of, predicted or even discussed as realistic possibilities. What went wrong? The simple answer is that the benefits of globalization—greater wealth and freedom—failed to materialize as promised, with most of the gains going to a small fragment of the global elite, or to vast populations of workers in places like China, with cheaper consumer goods in the west failing to compensate people in their minds for the economic dislocation they experienced.⁴² Human freedom has not advanced since 2000, and has very likely declined. Meanwhile, the costs of globalization turned out to be massive. These costs included the spread of international terrorism, disease (such as the SARS epidemic), and economic instability, represented above all by the financial crisis of 2007-2008, whose causes and effects were global in nature. As in the 1930s, the natural reaction has been to abandon global commitments in favor of familiar tribal and national loyalties. But modern international law, born out of that era, was supposed to prevent a return to it by binding nations ever more closely together. Why did that not happen?

III. What Accounts for the Backlash?

The answer to this question is speculative but clues lie about, and they can be put together into a suggestive theory. The overwhelming impetus to backlash lay in popular opinion across countries. Many ordinary people, left behind by globalization, have united in their

⁴⁰ Posner, *Twilight*, *supra*.

⁴¹ See Mark Blyth, *Austerity: The History of a Dangerous Idea* (2015).

⁴² See Binyamin Appelbaum, *A Little-Noticed Fact About Trade: It’s No Longer Rising*, *N.Y. Times* (Oct. 30, 2016), <https://www.nytimes.com/2016/10/31/upshot/a-little-noticed-fact-about-trade-its-no-longer-rising.html>.

opposition to further international legalization. They have lost faith in international institutions (as illustrated best by Europe) and in the national leaders who supported them. They now seek new national leaders who will advance the national interest rather than global ideals.

The backlash should not come as a complete surprise. As we saw, worries about the democratic deficit in Europe are as old as European integration. While most scholars supported European integration, either because they believed that the democratic deficit was mythical, or that the benefits of integration exceeded any costs to democracy,⁴³ the dissenting view persisted if only because it was impossible to ignore the evidence.⁴⁴ Public opinion surveys showed that many Europeans distrusted European institutions. European politicians successfully ran on anti-Europe campaign promises. Voters in some European countries rejected the European constitution and the Lisbon Treaty. And pro-integration mainstream leaders took the democratic deficit seriously enough to try to address it by strengthening the European Parliament. Brexit only ratified a longstanding worry.

In the United States, the debate took place in a lower key. The United States is not bound by any international institutions whose strength and authority is comparable to that of the European institutions. Indeed, the United States has disproportionate influence over most major international institutions, and nearly always can protect itself with veto rights. However, from time to time, a relatively minor question of international law erupted into public consciousness. The possibility that the International Criminal Court could have jurisdiction over American soldiers provoked Congress to pass a law in 2002 that appeared to authorize a military invasion of the Netherlands if an American was ever held for trial.⁴⁵ *Roper* and related cases caused a public outcry, leading some state legislatures to pass statutes that blocked courts from relying on “foreign law.”⁴⁶ The American political system is suspicious of human rights treaties, and the Senate has become increasingly reluctant to give its consent to any treaty at all—although this is partly an artifact of a 2/3 majority rule and the disproportionate influence of rural populations in that body.

The academic debate in the United States also received little attention. In the 1990s, no one thought in terms of a democratic deficit. The dominant view was that international law was good, and therefore judges, bureaucrats, and other officials should use it as much as possible to bind the United States.⁴⁷ Yet dissenting views were aired from time to time. In 2003, Robert Bork argued that incorporation of international law into domestic constitutional law by the courts violates the “rule of law” by depriving the people of influence over policy through legislation.⁴⁸ In 2005, Jeremy Rabkin argued that this style of “global governance” violated Westphalian

⁴³ See, e.g., Weiler, *supra*; Andrew Moravcsik, In Defence of the “Democratic Deficit”: Reassessing Legitimacy in the European Union, 40 *J. Common Market Stud.* 603 (2002).

⁴⁴ Scharpf, *supra*.

⁴⁵ American Service-Members’ Protection Act 22 U.S.C. § 7401 (2002).

⁴⁶ National Conference of State Legislation, 2015 Foreign Law Legislation (Oct. 15, 2015)

<http://www.ncsl.org/research/civil-and-criminal-justice/2015-legislation-regarding-the-application-of-foreign-law-in-state-courts.aspx>.

⁴⁷ Slaughter, *supra*; Koh, *supra*. For a recent statement by a political scientist, see Karen Alter, *The New Terrain of International Law: Courts, Politics, Rights* 335-66 (2014).

⁴⁸ Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (2003).

sovereignty as well as democratic principles.⁴⁹ In a 2007 article, John McGinnis and Ilya Somin argued that international law lacks a democratic pedigree because it reflects compromises with foreign states, most of them authoritarian, and therefore American courts should not incorporate it into domestic law unless Congress and the president has authorized them to.⁵⁰ And in 2012, Julian Ku and John Yoo argued that this style of judicial activism violated the U.S. Constitution.

McGinnis and Somin see international law as the work of global elites.⁵¹ They argue that elites across the world create, interpret, and enforce international law, and that their incentives are not to create international law that benefits everyone or reflects the values of the global population, but to create international law that benefits themselves and reflects their own values. However, in allowing that international law should be enforceable if incorporated by Congress and the president, McGinnis and Somin missed an important feature of the political landscape. The president and members of Congress are members of the elites themselves. The populist backlash against international law encompasses international law with impeccable democratic credentials like NAFTA and the WTO system, both of which were incorporated into domestic law by the president and Congress.

Still, in their normative argument we see a germ of a positive theory of international backlash. Any type of international cooperation involves centralization. A greater distance is opened up between the ordinary people and the decisionmakers with effective power. As centralization occurs, more valuable public goods can be created, but agency costs increase as well. Since ordinary people cannot observe whether the decisionmakers act for the public interest, they can only accept on faith the assurances of their national leaders. When people's ordinary experience contradicts the assurances of those leaders, they lose faith in them. This is what happened as a result of the financial crisis and the ensuing global recession—especially as ordinary people learned that only the very wealthy in western countries have benefited from globalization, while most people have been harmed or unaffected. This last fact seems to confirm the suspicion that global and national decisionmakers act in the interests of the elites, not of the ordinary people. While this idea is a simplification, it has enough basis in fact to produce significant political resonance, igniting the global populist backlash.

Thus, in Europe and the United States, international institutions have provided a convenient target for populists, as have the national leaders who have supported them. The populists have been able to blame globalization and international law for insecurity and economic dislocation as a way to undermine the establishment elites who constructed them. The populists can make a powerful argument, supported to some extent by scholarly research, that the international institutions—or the process of globalization they have facilitated—have benefited the elites while leaving behind ordinary people.

⁴⁹ Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (2005).

⁵⁰ John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?* 59, *Stanford L. Rev.* 1175 (2007).

⁵¹ As they note, following Bork, *supra*; Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004). For a defense of international law that argues that it protects minorities, akin to John Hart Ely's theory of judicial review, see Anupam Chander, *Globalization and Distrust*, 114 *Yale L.J.* 1193 (2005).

While Europe does not have a history of populism in the way that the United States does, the anti-European parties—UKIP in Britain, Law and Justice in Poland, the People’s Party in Denmark, the National Front in France, Syriza in Greece, and many others—bear the hallmarks of populism. They claim (not always wrongly) that problems in their countries are due to corruption at high levels of government, caused by an establishment consisting of cosmopolitan elites, who disregard the well-being of ordinary people. The right-wing populists are nationalist, and either endorse or flirt with racist and xenophobic positions, while left-wing populists like Syriza seek wealth redistribution. Like populists throughout history, they make promises they can’t keep, or vague promises that mean little, and use sometimes violent or vulgar language that appeals to the crowd and burnishes their anti-establishment credentials. And they draw support from less educated people who feel left behind and vulnerable to the influx of workers and immigrants, and the threats of terrorism and economic dislocation.⁵²

In the United States, Donald Trump rode to victory on his anti-internationalism as well. He attacked international institutions, including the UN, the WTO, and NATO; repudiated America’s longstanding commitment to free trade; and advocated a nationalistic, isolationist position, while blaming the elites on left and right for failing to defend American interests. He attacked international treaties, human rights, and the laws of war. His anti-elitism, along with his anti-immigrant stance, marked him out as a populist like the European leaders.

What does the populist backlash mean for the dominant theory of the Invisible College, the one that says that people have “internalized” international law? There was never much evidence for this view,⁵³ but if it is correct, then some mechanism must explain why people who have internalized international law might come to reject it. One possibility is that internationalization is just a form of deference to authority. People internalize international law just to the extent that they defer to the views of government officials who support it. When divisions open up among political leaders, this deference ceases. Another possibility is that internalization occurs only as long as people are satisfied with their level of well-being and attribute it to international law. When economic dislocation strikes, people are liable to blame all sources of authority. Both of these views, however, suggest that internalization was never the right word to begin with. People see international law in instrumental terms, and support it when it seems to benefit them. When globalization and international legal integration coincided with economic growth, people supported it; now they do not.

Conclusion

⁵² See J Müller, *supra*; Judis, *supra*.

⁵³ Very limited research has been done on popular opinion and international law, but there is at best mixed evidence that people have become more favorable to international cooperation over the decades. See, e.g., Pippa Norris, *Confidence in the United Nations: Cosmopolitan and Nationalistic Attitudes* (unpub. m.s. 2006); Gallup, United Nations, <http://www.gallup.com/poll/116347/united-nations.aspx>. The World Values Survey also shows no clear trend in support for international law or institutions. See World Values Survey (1995-1998) Wave Three, <http://www.worldvaluessurvey.org/WVSDocumentationWV3.jsp>; World Values Survey (1999-2004) Wave Four, <http://www.worldvaluessurvey.org/WVSDocumentationWV4.jsp>; World Values Survey (2005-2009) Wave Five, <http://www.worldvaluessurvey.org/WVSDocumentationWV5.jsp>; World Values Survey (2010-2014) Wave Six, <http://www.worldvaluessurvey.org/WVSDocumentationWV6.jsp>.

Globalization is not looking so inevitable these days. Historical perspective explains why global legalists should not have displayed so much confidence in their predictions. As is well known, an earlier globalization took place in the late nineteenth and early twentieth centuries. It ended with World War I, which ushered in a period of isolation and nationalism that persisted until the end of World War II. One can identify still earlier periods of globalization cycles: the Roman empire followed by its fragmentation in the second half of the first millennium; the high middle ages, unified (in Europe) under the Church, followed by the Reformation and the religious wars; and then the age of empires, which was deeply shaken by nationalist movements in the nineteenth century, though collapse of most of the empires did not occur until the twentieth. In all these cases, globalization is a process by which political power is centralized at a high level—in a city, a nation, or a group of nations, which set and enforce policy for a much larger area. Globalization halts and collapses when the center loses this power. We see, in other words, periods of centralization and periods of decentralization over the world or large areas of it, just as we see periods of centralization and decentralization within countries and at even lower levels of administration. Only history will tell, but the current period, starting in 2001, seems to be (so far) a gradual period of slowing centralization, which may or may not eventually unwind. If we must look for a pattern, the pattern we find is cyclical rather than linear.

What could account for this cycle? Pressure for centralization arises because of the gains from public goods being generated at an ever larger scale. This pressure always exists, but the right circumstances—technological, political, demographic—are needed to channel it into greater international cooperation. During the great periods of centralization, trade, investment, and migration flourish, generating wealth. All of these activities require order, and order is best kept by a hegemon (like Rome, or Imperial Britain for the high seas), or by cooperation among a small number of major powers. The problem is that whatever empire, nation, or group keeps order also can use its power to channel most of the benefits of order to itself—either by choosing rules that benefit it, or by demanding tribute. When these transfers become too large—or are simply perceived as being too large—resentments build, and so do the pressures for decentralization, which may also be assisted by technological change that favors local autonomy rather than centralization. People demand autonomy for smaller-scale groups whose leaders they can trust. When the centers of power resist, wars may result. But they may accommodate as well.

In the modern era, the problem was less that a hegemon like the United States seized an excessive share of the gains from international cooperation, than that elites in all countries supported forms of international cooperation that benefited them and harmed the masses or were perceived to harm the masses. This process was accompanied by a great deal of self-serving propaganda that the elites themselves may even have believed, with the members of the Invisible College participating as unwitting servants of power.