

Reconceiving Engagement with International Law in a Populist Era

Chief Investigators: Jeremy Farrall, Jo Ford, Imogen Saunders (ANU)

Partner Investigators: Peter Danchin (University of Maryland), Shruti Rana (Indiana University)

This project seeks to address the fundamental problem of how to reconceive engagement by states with the international legal order, in the face of a sustained populist backlash. The project proposes to develop a new analytical framework to evaluate the origins, impact and evolution of populist scepticism towards the legal norms and architecture of the international community. Expected outcomes include detailed empirical studies evaluating how, why and to what extent countries with populist leaders have undermined or disengaged from multilateral systems of international law and governance. The project's analytical and empirical findings will inform the development of evidence-based proposals to increase committed engagement by all states in the international legal order. The project has the following **aims**:

1. To construct an original analytical framework to map, measure and understand the way that states with populist governments have engaged (or disengaged) with the international legal order;
2. To undertake a rigorous, empirically-grounded evaluation of how and why states with populist governments have engaged (or disengaged) with efforts by the central international institutions promoting peace, trade, public health and human rights;
3. To develop evidence-based recommendations for reconceiving the terms of engagement in the international legal order by states and other actors, so that it is both more responsive to populist concerns and more resilient in its capacity to promote peace, trade, public health and human rights; and
4. To identify steps that Australia can take to promote greater engagement in the international legal order by states and other actors, thereby advancing the national interest in strengthening the rules-based international order.

Background: The rise of populism and illiberal democracy, especially in major Western states, has challenged the longstanding and widespread commitment of states to the rules-based international order (DFAT 2017). These phenomena have also eroded the traditional global leadership, in multilateral forums, of key global powers, including the United States (US) and the United Kingdom (UK). Populations in these states have responded to perceptions of economic and political disempowerment by pressuring political representatives to focus their energy domestically. In order to appeal to these domestic political forces, populist leaders have sought to target, scapegoat and disengage from the very international legal norms and institutions that were previously so useful to their foreign policy agendas.

In recent pilot research, the project team has described these actions as part of a broader backlash against the Post-World War II framework of liberal norms and institutions (Danchin et al 2020a). The UN's founders sought to balance the competing demands of national sovereignty and international order by enshrining them as core principles and purposes in the UN Charter. As critical international legal theorists have explained, modern international law seeks to cope with what appear to be opposing demands for individual freedom and social order by means of a paradox: on one hand, social order is legitimate only insofar as it protects individual freedom; but on the other, such freedom can be preserved only if there is a normatively compelling social order (Koskeniemi 2005). The populist backlash opposes this dialectic vision of international legal order in two ways. First, notions of popular sovereignty make claims of rational legal constraint on national sovereignty inherently problematic. Second, the expansion of universal human rights challenges notions of fundamental rights based on national sovereignty: and shifts to transnational governance are perceived not as a global rule of law but rather a project of imperial world domination (Cohen 2004).

This perception of national sovereignty as standing in direct opposition to the international legal order is exacerbated by the populist framing of international law as a project of an unaccountable globalist elite. While there are many conceptions of populism (Graber 2001) and indeed of backlash against legal systems (Sunstein 2007), a commonality is antithetical positioning to elitist ideas and initiatives (Nijman 2018) as well as prioritisation of popular sovereignty (Bugaric 2019). During the COVID-19 pandemic, this aversion to the elite has manifested as distrust of international organisations and the coordination and validation of scientific evidence that they provide (Saunders 2020b). Yet these actions go well beyond the immediate pandemic context. Populist movements and political parties thus advocate withdrawal from or severely curtailing multilateral treaty regimes and institutions; they assail the fundamental normative premises of liberal accounts of democracy, human rights and the rule of law; and they have stridently rejected on sovereigntist grounds the proposition that international norms should bind or influence domestic decision-making. Populist antagonism towards international law and the accompanying reflex to

disengage from institutions thus represent a fundamental challenge to the collective action required to prevent and manage grave global threats.

There has been little research to date on the connections between the emergence of these populist political movements and the nature and evolution of the norms and institutions of the international legal order. Behind many of the non-liberal and anti-global positions we see articulated today, there is a growing desire to take back control of political authority, not only at the domestic level, but internationally, expressed in terms of reclaiming national sovereignty. Rather than interrogating these roots of populist backlash, there is a strong reflex in contemporary scholarship to reinforce or renew existing conceptions of legal and political order (Devereux 2021). This reflex ignores the need for political analysis and contextual understanding of the origins of these movements. There is an urgent need to explore the extent to which the incumbent international legal order may itself have acted as an incubator for authoritarian populism and illiberal democracy. Analytical and empirical research on the complex interrelations between these competing conceptions of normativity and authority is vital to any future international legal order capable of confronting global threats and re-establishing sustainable global cooperation.

The project therefore proposes to investigate how to reconceive *engagement* with the *international legal order* in an era of *populism*. We define key terms as follows: *The international legal order* includes the international legal frameworks, institutions and compliance tools that seek to regulate the behaviour of states in their relations with one another. *Populism* takes many forms, but core features include anti-elitism and prioritisation of popular sovereignty. *Populist backlash* describes resistance to, or rejection of, the international legal order by populist states. It includes intense and sustained disapproval of, disengagement from, and actions that attempt to remove legal force from, international law and institutions. *Engagement* encompasses the varying modes and means by which states interact with the international legal order, whatever their strategic or other motivation may be. It does not necessarily presume or prescribe a particular pattern or quality of interaction.

The project team seeks to conduct systematic empirical fieldwork to discover how the rise of populism in four democratic states of particular strategic interest to Australia, including two from the Indo-Pacific neighbourhood (India, Philippines) and two UN Security Council (UNSC) permanent members (UK, US), has affected the *engagement* of those populist states in the institutions within the *international legal order* tasked with advancing global peace (UNSC), trade (World Trade Organization (WTO)), public health (World Health Organization (WHO)) and human rights (UN Human Rights Council (UNHRC)). The proposed time period of analysis is from 2014 (marking the rise of contemporary populism in India, the first of the four focus states to elect a populist leader so-called) until 2025 (the final year of proposed empirical fieldwork).

Contribution to an important gap in knowledge or significant problem: The project contributes to gaps in knowledge concerning the significant problem of populist disengagement in the international legal order in two important ways. First, while the backlash against international law is not a newly observed phenomenon (Madsen 2018), the causes of populist backlash and its impact on international law remain largely undiagnosed (Danchin et al 2020a). One clear explanation for populist disengagement from international law is the populist tendency to reject supranational authority (Joyce 2020). However, other than Crawford's observation (2018) that backlash may sometimes be an appropriate response to overreach by international institutions, there is little scholarly analysis of the extent to which international law might itself be a causal factor in the rise of populism. The few existing examinations of the impact of the backlash on the international legal order have thus been largely one-sided in their focus on the impact of populism on international law, painting a partial and static picture of the ways that the international legal order is evolving in the face of populist antagonism. This project aims to address this gap in knowledge by developing an analytical framework to understand, map and evaluate the symbiotic and dynamic relationship between populism and international law. Second, while comparative international law scholars have questioned the extent to which international law is truly international (Roberts 2017), these insights have not yet been employed to investigate the similarities and differences between populist understandings of international law that are driving populist resistance to international law in different institutional contexts. By selecting four case study countries with different manifestations of populism, the project proposes to examine how differing national conceptions of international law and populism affect state engagement (or disengagement) with the international legal order. It thus employs the framework of comparative international law in a new way to address an important gap in knowledge.

Novelty/originality and innovation of the proposed research: The proposed research is novel and innovative in at least three ways. First, it seeks to develop a new analytical framework to map, measure, and understand the impact on the international legal order of disengagement by states with populist administrations, including how populist perceptions of shortcomings in international law's processes and mechanisms drive such disengagement. Second, the project proposes to compile a new empirical knowledge-base to facilitate this evaluation. Using findings from the

project's empirical phase, the team will develop insights that go beyond existing analysis of the populist backlash against international law, which has been either predominantly theoretical in nature (Danchin et al 2020a) or confined to studies of single institutions, such as particular international courts or arbitral bodies (Caron 2018; Voeten 2019). The project will thus provide both new empirical data on, as well as fresh theoretical analysis of, how populist regimes and international law engage (or disengage) with (from) each other, across multiple institutional contexts. Moreover, by employing an underlying framework of comparative international law in our empirical fieldwork design, our project aims to provide fine-grained and nuanced understanding of differing levels and modes of populist engagement with (and disengagement from) international law. Third, our work fills a gap in knowledge by being future-facing. We have recently suggested three possible ways that Australia and other actors might navigate the populist backlash against international law: (1) renew and reform; (2) retreat and realign; or (3) reimagine and recreate (Danchin et al 2020a). This project will develop these schematic prospective responses into practical, evidence-based proposals to increase the resilience, responsiveness and inclusivity of the international legal system while maintaining its integrity in terms of the cooperative vision encapsulated in the UN Charter. The team has recently observed the paradox that populist disengagement with international law tends to diminish options for, rather than reassert, expressions of national sovereignty (Danchin et al 2020b). Yet such actions simultaneously undermine the efficacy of international institutions (Danchin et al 2020a, Farrall 2021, Ford 2020, Saunders 2021). Given the denigration of both national and international systems by such actions, there is an urgent need to reconceive the terms of state engagement with international law so that it is more responsive to the needs and interests of states and other global stakeholders in convening and curating inter-state contestation, whilst ensuring that the international legal system maintains the capacity and resilience to promote international peace, trade, public health and human rights.

Hypothesis, theories and research questions

Hypothesis: The project's analytical enquiry begins with the hypothesis that the international legal order is a causal factor in the disengagement of populist states from international law and institutions. This is because that order is perceived by populists as failing (or contradictory) in its universalist promise to promote peace, trade, public health and human rights. Moreover, international law and institutions have evolved in such a way that they tend to substantiate, rather than repudiate, populist concerns underpinning the backlash.

Theories: The implication of this hypothesis is that the legal frameworks, institutions and compliance tools of the international legal order must be reconceived in order to maximise committed engagement (and minimise disengagement) by states with the international legal order. In order to interrogate this hypothesis, the project will draw on, and contribute to debates concerning, critical theories about the creation, implementation and enforcement of universal norms to promote peace, trade, public health and human rights through international law and institutions (e.g. Alvarez 2005, Charlesworth & Chinkin 2001, Koskenniemi 2005, Orford 2003). To obtain a nuanced understanding of the strengths and limitations of efforts to achieve global regulatory goals through formal legal orderings, the project will draw on the insights of responsive regulatory theorists and legal pluralists in terms of putting state interactions and contributions in the context of the multiple factors and actors that produce effective regulatory outcomes (Braithwaite 2002 & 2011, Drahos 2017). The project will also build upon theories of comparative international law (Roberts 2017) to question assumptions regarding the effects of domestic expressions of populism. The project represents an exciting opportunity to expand, adapt and apply these theories to understand the dynamic, symbiotic relationship between the rise of the populism and the evolution of the international legal order, as well as to enhance the levels of engagement of populist states and other relevant actors in that order.

Research questions: The following questions (RQs) will guide project enquiry:

RQ 1: Why and how have states disengaged from or undermined the international legal order in the period 2014-2025?

RQ 2: How do differing perceptions of international law affect how populist states engage in international institutions?

RQ 3: How do the structure, politics and changing nature of international law influence and affect domestic populism?

RQ 4: How might state interaction with the international legal system be reconceived so as to maximise forms of committed engagement, and minimise disengagement, in the pursuit of the international legal order's core objectives of promoting peace, trade, public health and human rights?

Case-study explanations: country fieldwork sites (India, Philippines, UK, US): The project proposes to study engagement in the international legal order of four prominent states with recent populist regimes and close trade and

diplomatic relations with Australia, namely India, the Philippines, the UK and the US. These states include two great powers that are UNSC permanent members (UK, US), as well as a major emerging Asian power and aspirational future UNSC permanent member (India) and a developing South-East Asian state (Philippines). All four states have traditionally exhibited strong engagement with the international legal order, and while each exhibit populist behaviour, the exact expression of this differs in each.

India: Since 2014 Prime Minister Narendra Modi has governed by encouraging and unleashing extremism centred on a re-invigorated populist Hindu nationalism that portrays itself as both anti-elite and anti-pluralist (Destradi & Plagemann 2019). On the global stage, India has increasingly resisted cooperation in trade and environmental fora, while manoeuvring around global norms and institutions to flex its power in Asia.

Philippines: After 2016, populist President Rodrigo Duterte assailed liberal institutions, encouraging attacks against human rights groups and threatening to abolish the national Commission on Human Rights (Pernia 2019). Internationally, he has obstructed efforts by UN officials to investigate human rights violations (Webb 2019).

UK: Prime Minister Boris Johnson has consolidated a UK-style populism that goes beyond the single issue of Brexit (Flinders 2020). Yet the impact of Brexit continues to reshape the UK's relationships not just with the EU but the rest of the world. The Brexit vote also brought to the fore deep divisions within the Union, for example between Scottish nationalism and Johnsonian populism. The project seeks a nuanced perspective on the UK populist backlash as it relates to international law by undertaking fieldwork in London and Edinburgh as well as at EU institutions in Brussels.

US: The US retreat from international institutions and the populist attacks on these bodies under the 2016-2020 Trump presidency is well documented (Danchin et al 2020a). Under President Biden, the US is already re-engaging in a number of the institutions it abandoned. However, the deep political divisions that erupted in the populist storming of the US Capitol in January confirm the continuing relevance of the US as a rich site for data collection on the ongoing effects of the populist backlash both under Trump and Biden, and US perspectives on the relationship between populism and the international legal order.

Case-study explanations: institutional fieldwork sites: The project seeks to evaluate the engagement of the four focus states in the international institutions tasked with promoting peace, trade, public health and human rights. English is the dominant working language in all four institutions.

- The **UNSC** has primary responsibility for the maintenance of international peace and security (UN Charter, Art. 24). Its powers include promoting peaceful settlement of disputes, as well as taking coercive measures to maintain or restore international peace ((UN Charter, Chapters VI, VII). While the impact of populism on this theatre of high global politics has been less evident than on the other two focus institutions, the Security Council's failure to take or support assertive action in the face of COVID-19 reflected a weakening commitment by unease by its populist permanent members the UK and the US in the utility/desirability of responding collectively to global problems.
- The **UNHRC** was created in 2006 to replace the Human Rights Commission, had gained a reputation for ineffectiveness and harbouring human rights abuser states in its membership. The new UNHRC procedures thus required that: a candidate state's rights record be considered during elections; members be suspended if they commit gross and systematic human rights violations; and all states undergo Council scrutiny of their human rights performance every four years through the Universal Periodic Review process. Populist regimes have been highly critical of UNHRC attempts to monitor their rights records. The US, key in setting up the UNHRC, withdrew from it in 2018, the Trump administration accusing it of being ineffective and protecting human rights abusers.
- The **WHO** was at the epicentre of controversy as the COVID-19 crisis unfolded, illustrating all too clearly the consequences of the failure of cooperative multilateralism to halt the escalation of a global pandemic. The intense criticism levelled at WHO by the Trump administration, compounded by the US withdrawal of funding, represented the culmination of populist scapegoating of expert knowledge and global governance bureaucracies.
- The **WTO** was the site of extreme backlash at the hands of the US Trump administration, which blocked the appointment of Appellate Body members, effectively robbing the WTO's dispute settlement mechanism of its legal force (Saunders 2021). The WTO system could not withstand this development, so a solution was sought outside the institution with the creation of the temporary Multi-Party Interim Appeal Arbitration Agreement (MPIA). While 22 WTO members have joined the MPIA (including the EU, China and Australia) there are notable exceptions including all four of the case study countries identified in this project.