The European Journal of International Law Vol. 30 no. 3
© The Author(s), 2019. Published by Oxford University Press on behalf of EJIL Ltd. All rights reserved. For Permissions, please email: journals.permissions@oup.com

Populist Governments and International Law: A Reply to Heike Krieger

Marcela Prieto Rudolphy*

Abstract

In this article, I argue that there are two main objections against Heike Krieger's view on what 'a populist approach to international law' entails. First, there are two methodological obstacles that counsel against constructing 'a populist approach to international law': populism varies significantly depending on its definition of 'the people' and international law is a fragmented regime. Second, the opposition between a 'law of coordination' and a 'law of cooperation' to which Krieger resorts is misleading, for it obscures the fact that the value of cooperation and coordination lies primarily in the values for which we coordinate and cooperate. As such, I argue that this opposition may make us partially blind to two important dangers that some forms of populism may pose right now: their cooperating to reshape international law and institutions according to (some) of their values and their refusing to cooperate or coordinate in the achievement of urgent goals. Nonetheless, I conclude that the precise shape of these dangers – as well as how to resist them – remains blurry if we do not pay proper attention to the ways in which different forms of populism define 'the people'.

Scholars, politicians and practitioners alike are worried about the rise of populism across the globe. Some worry about the crisis of constitutional democracy;[1] others worry about human rights.[2] In her article, Heike Krieger is concerned with the impact that populist governments may have on international law. She says that populists

* Fellow in Transnational Law, Gould School of Law, University of Southern California, Los Angeles; JSD candidate, New York University School of Law, USA. Email: mprieto@law.usc.edu. I am indebted to Gráinne de Búrca, Michaela Hailbronner, Felipe Jiménez and Sergio Verdugo for their helpful comments on previous versions of this article.

1 See, e.g., M. Graber, S. Levinson and M. Tushnet (ed), *Constitutional Democracy in Crisis?* (2018); Daly, 'Democratic Decay: Conceptualising an Emerging Research Field', 11(1) *Hague Journal on the Rule of Law* (2019) 9.

2 See, e.g., Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice* (2017) 1; K. Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values* (2017), at 79.

retreat from an understanding of international law as a 'law of cooperation' and advance instead a 'law-of-coordination' approach.[3] Populist governments, she claims, are likely to oppose multilateralism and to be sceptic towards international institutions. They might produce 'tensions with concepts of universalism and common interests of an international community based on international solidarity',[4] favouring instead 'particularized, culturally contingent value concepts contradicting the idea that a national identity could be formed around a commitment to a global community structured around universal values'.[5] She also worries about the effects that populist governments may have over international law, either by 'changing trends through changing perceptions' or by 'changing international law by changing national legislation'.[6] Finally, she thinks that it will be difficult to identify when populist governments are raising valid legal arguments and when they are using evasive legal tricks.[7] Here, she argues, we may find the biggest challenge for lawyers and international institutions.[8]

The rise of populism is indeed concerning, and Krieger is surely right in that we should think about its implications for international law. However, I have two main objections to how Krieger develops her view of the populist's approach to international law. First, unlike Krieger, I am sceptical that we can speak of a 'populist approach to international law': it would be more helpful to think about 'populist approaches to this and that area of international law'. And, second, the opposition between 'law of coordination' and 'law of cooperation', to which Krieger resorts, is somewhat misleading. As I will explain in Part 2, this opposition runs the risk of making us optimistic where we should be pessimistic, and pessimistic where we should be optimistic, about the impact and approach of populist governments towards international law. Additionally, and more importantly, it might make us partially unable to see two great dangers that populism might pose in the current context.

1 A Populist Approach to International Law?

As Krieger rightly notes, populism is a highly disputed term;[9] a specific 'populist doctrine of international law that would forge a coherent systematic concept developed in scholarly writing' does not exist;[10] and the phenomenon of populism is diverse in its manifestations.[11] In spite of these complications, she thinks we can ask and answer – if with difficulty – the very interesting question of what a populist approach

3 Krieger, 'Populist Governments and International Law,' in this issue, 971, at 973.
4 *Ibid.*, at 984.
5 *Ibid.*
6 *Ibid.*, at 987–996.
7 *Ibid.*, at 994.
8 *Ibid.*, at 994–995.
9 *Ibid.*, at 974.
10 *Ibid.*, at 973.
11 *Ibid.*, at 974.

to international law looks like: the answer can 'rely on a combination of structural arguments of what populism consists of and an empirical analysis of pertinent governmental practices and argumentative strategies'.[12]

Unlike Krieger, I am sceptical that we can fruitfully identify anything like 'a populist approach to international law', especially if we are to, as Krieger suggests, partly rely on arguments about what populism is. There are two fundamental obstacles that counsel against this task. First, populism varies significantly depending on how 'the people' is defined. And, second, international law is a fragmented regime. My objections here are then primarily methodological: due to the variance of populism itself and the divergence between different areas of international law, I think it would be more useful to try and identify not 'a' populist approach to international law but, rather, different populist approaches to this or that area of international law.

Of course, that there is variance in populism and fragmentation in international law are well-known facts to the point of triviality. However, when attempting to identify what a populist approach to international law might look like, these two facts are particularly significant. As I will argue, there might be no such thing that we can usefully describe as 'a populist approach to international law': in order to construct such a description, fundamental differences would need to be ignored to the point of rendering the description mostly empty of content. The first difficulty, as mentioned earlier, concerns populism itself. In particular, the problem lies in the populist's definition of the 'people' and the role that this definition plays in shaping different variances of populism and the values that populists uphold.

In order to understand why the definition of the people is important in identifying a populist approach to international law, we must first have a sense of what populism is. Krieger opts for Jan-Werner Müller's definition of populism in order to 'carve out to what extent the defining characteristics of populism pose a structural challenge for international law'.[13] Populism, as Krieger explains, has been characterized by Müller as a distinct discursive phenomenon with a core claim: populists claim that they and only they properly represent the authentic people.[14] Thus, populism is both anti-elitist and anti-pluralist.[15] It opposes a morally pure and fully unified – although fictional – people to elites, while claiming exclusive moral representation of the people.[16]

According to this definition, both anti-elitism and anti-pluralism are common to all forms of populism. Thus, we would expect a populist approach to international law to share these traits. Unfortunately, the answer is more complicated than this: the fact that populists are generally anti-pluralist and anti-elitist will not tell us much about their approach to international law. In order to determine the targets of the populist's anti-pluralism and anti-elitism, we need to know who the people are. Yet, it

[12] *Ibid.*, at 973.

[13] *Ibid.*

[14] Müller, 'Populism and Constitutionalism', in C. Rovira Kaltwasser *et al.* (eds), *The Oxford Handbook of Populism* (2017) 590, at 591.

[15] *Ibid.*, at 593.

[16] *Ibid.*, at 593; J.W. Müller, *What Is Populism?* (2016), at 9–16.

is precisely in the definition of what constitutes the people where populists will differ significantly,[17] for who the people are (and want) can be defined according to many criteria, such as ethnic markers, work or social class. Hence, Müller explains, populism might be nationalist or chauvinist. Or it might not be.[18]

Only by knowing the answer to the question of who the people are can we figure out who the elites are, what values populists will want to exclude and what values they will want to uphold – that is, what populists will be anti-pluralist about and which elites populists will be against. And only by knowing the answers to these questions will we know the populist's approach to international law, for this approach is primarily shaped and driven by who the people are. Therefore, it becomes impossible to generally describe a populist approach towards international law without oversimplifying or arriving at an incoherent result: we are limited to speaking of different populist approaches to international law. This point is supported by Bertjan Verbeek and Andrej Zaslove's work. They have argued that populists' foreign policy preferences will expectably differ based on 'their different assessment of the impact that the international environment will have on their own understanding of who the pure people are'.[19] It is thus a mistake, Verbeek and Zaslove argue, to equate populism with anti-cosmopolitanism, nationalism, isolationism or protectionism.[20]

Of course, foreign policy preferences are not the same as international law approaches, which are Krieger's concern. Yet they are inevitably related. Thus, I do not think we can conclude, as Krieger does, that populist governments generally oppose multilateralism, are sceptical towards international institutions or advance a law of coordination (although there are additional reasons against the latter part of this conclusion, which I will explain later). What we should expect is a range of positions – from isolationist policies to more open ones – determined by how different types of populism define the people[21] and by how any given position is seen to advance the interests of the people so defined. That is, we might expect radical right-wing populism to be more isolationist and left-wing populism to have a more social cosmopolitan orientation while favouring economic protection.[22]

Hence, to use an example provided by Krieger, it should come as no surprise that Hungary and Poland actively support the protection of religious and ethnic minorities (particularly, Christian minorities in North Africa and the Levante):[23] these minorities are part of the people in Hungary's and Poland's version of populism. Or take the opposition to multilateralism that Krieger expects. Contrary to this expectation, left-wing populists in Latin America have aimed at uniting countries in the region (the

17 Müller, *supra* note 14, at 593; Müller, *supra* note 16, at 19.

18 Müller, *supra* note 16, at 19.

19 Verbeek and Zaslove, 'Populism and Foreign Policy', in Rovira Kaltwasser *et al.*, *supra* note 14, 384, at 391–393.

20 *Ibid.*, at 395.

21 *Ibid.*

22 *Ibid.*

23 Krieger does suggest that this may be due to the alignment between the populists' identity politics and human rights obligations. Krieger, *supra* note 3, at 986.

Latin American 'people') against the USA and the international regime it has created and promoted, constructing rival international organizations, such as the Bolivarian Alliance of the Americas,[24] and other 'populist international alliances' might be on the horizon, as we will see below. Finally, populists who borrow from market liberalism will also tend to endorse economic multilateralism (for example, Berlusconi's Go Italy!), at least when it benefits them.[25]

While Krieger acknowledges some of these examples, which defy what she expects a populist approach to international law to look like,[26] she attributes the difficulties in drawing a coherent picture to 'ideological, geographical, and historical contingencies'.[27] Meanwhile, I take them to provide evidence of the methodological impossibility of constructing 'a populist' approach to international law without paying due attention to the variance and relevance of how different forms of populism define the people and how this definition will determine the populist's approach to international law. In other words, if we ignore the importance of who the people are under different varieties of populism, we will either arrive at a description that erases certain kinds of populism altogether or at a description that is unable to say anything else than, say, populists may be against multilateralism or for it. The latter, of course, would not be very useful.

There is, however, an important caveat to make here. The kind of populism that is predominant in Europe, where Krieger is based, is right wing and nationalist. And, perhaps, some of Krieger's claims are more readily applicable to this kind of populism. Nevertheless, Krieger's scope seems broader than nationalist and right-wing varieties of populism, for she wants to embark on the difficult task of disentangling populism from nationalism and authoritarianism[28] and to discern the 'unique characteristics' of populism, not just of its underlying ideologies, such as right-wing nationalism.[29] However, as I have argued, I am sceptical that this can be done at all.

The second methodological difficulty in thinking about the populist's approach to international law concerns international law. It is not only that the populist's approach to international law will differ depending on who the people are. It is also that international law itself is, in many ways, a fragmented regime: international legal instruments and institutions have proliferated and resulted in a growing web of overlapping and non-hierarchically organized regimes.[30] This means that it will be difficult to speak of an approach to international law in general; we might be better off speaking of an approach to this or that area or institution of international law.[31]

[24] Verbeek and Zaslove, *supra* note 19, at 393.

[25] *Ibid.*, at 394.

[26] She mentions, for instance, Venezuela's efforts to establish the Union of South American Nations. Krieger, *supra* note 3, at 981.

[27] *Ibid.*, at 986.

[28] *Ibid.*, at 974.

[29] *Ibid.*, at 975.

[30] Pollack, 'Who Supports International Law, and Why? The United States, the European Union, and the International Legal Order', 13 *International Journal of Constitutional Law* (2015) 873, at 883–884.

[31] *Ibid.*, at 883–884.

In other words, it may be that nationalist populism will fiercely oppose international human rights law dealing with immigration, asylum, non-discrimination and so on. Meanwhile, other areas of international law will be of little concern to the populist: think about the ordinary life of international law, which deals with postal and telephone conventions, airline safety, time zones and so on.[32] And other areas might even be of value to populist governments in advancing their interests – that is, the interests of 'the people'. Now, it might be that some areas of international law will suffer more than others at the hands of some forms of populism. It would thus be a significant step in studying the relationship between populism and international law if we could identify which areas would be more and less affected and why. Unsurprisingly, I think this effort should start by distinguishing between different varieties of populism.

That is, we should study right-wing and nationalist populism's approach to different areas of international law separately from, say, left-wing populism as it exists in Latin America. It would not be surprising if these two approaches to international law varied significantly, for the 'people' in Latin American left-wing populism are pointedly not the same as the 'people' in right-wing populism in Europe. Ultimately, this might mean shifting the focus to what Krieger and some of the literature refer to as the 'underlying ideologies'[33] of populism rather than focusing on populism itself. This, I think, would be a welcome change.

To summarize, I doubt we can speak of a populist approach to international law without knowing more about the substantive commitments of the different populist parties – which are given by the definition of the people – and without specifying the area of international law with which we are concerned. In other words, we cannot generally conclude that populists will oppose multilateralism or be sceptical towards international institutions. We need to know, first, what populists' commitments are and, second, what multilateralism and institutions are about: as long as populists think that multilateralism and institutions further the interests of the people, however defined, they will support them. Krieger thinks of this approach as 'cherry-picking'.[34] And she is right, in the sense that populist governments will choose to endorse only what they see as benefiting the people; in the same way that democratic governments, for instance, will likely choose to endorse institutions and agreements that promote democracy and not otherwise. Populists, as Müller points out, are not generally against institutions: they only object to those institutions that fail to produce what they consider the morally correct outcome.[35] We must thus be careful not to read the populist's practice of 'cherry-picking' as incoherent: populists are committed to their understanding of the people – not to human rights in general, not to international law in general and, for that matter, not to anything in general unless it is what the people, fictional as they may be, want.

[32] This is what Jeremy Waldron calls the 'dense thicket of rules that sustain our life together'. Waldron, 'Cosmopolitan Norms', in S. Benhabib and R. Post (eds), *Another Cosmopolitanism* (2006) 83, at 83–84.

[33] Krieger, *supra* note 3, at 975; see also Mudde, 'Populism: An Ideational Approach' in Rovira Kaltwasser *et al.*, *supra* note 14, 27, at 28–30; Verbeek and Zaslove, *supra* note 19, at 384–386.

[34] Krieger, *supra* note 3, at 973; 996.

[35] Müller, *supra* note 16, at 37.

2 Populism, Coordination and Cooperation

My second disagreement with Krieger lies on the distinction she draws between an understanding of international law as a 'law of coordination' and as a 'law of cooperation'. Krieger thinks that populist governments advance an understanding of international law as a 'law of coordination' as opposed to a 'law of cooperation'. By 'law of coordination', she means 'a law that does not aim to construct an international community but merely aims to provide for a minimal order between independent states', whereby the principles of sovereignty and non-intervention hold a central place.[36] International law, she argues, was seen to have moved beyond this paradigm and into one of a 'law of cooperation'. The principles of state sovereignty and of non-intervention were losing relevance, and international law 'seemed to have turned into a system that promotes community interests based on a shared understanding of solidarity',[37] where the existence of a community of states and values is presumed.[38]

I think that this opposition between a 'law-of-coordination' approach and a 'law-of-cooperation' approach is misleading in two important ways. First, it is mistaken in its description of the progress of international law: I do not think international law has moved away from what Krieger identifies as a 'law-of-coordination' approach. And, second, it is misleading in that it does not properly distinguish between coordination/cooperation and the aims for which we coordinate and cooperate. This confusion has important implications, as we will see, in how we evaluate the populist's approach to international law and its dangers.

On the first point, my more pessimistic take is that the trend of international law towards what Krieger, relying on Rüdiger Wolfrum's work, describes as a 'law of cooperation' is mostly the reflection of a desire rather than an accurate description of either the development of international law or a radical change in legal technique.[39] Of course, I do not deny that during the 20th century international law progressed in new and different ways. Rather, my point is that the aspirations of an international law based on cooperation and built around the 'values of the international community' never really coalesced into widespread legal change. As Wolfrum himself acknowledges, the term 'cooperation' has never been defined by an international treaty,[40] and there is no general legal duty to cooperate.[41] Moreover, there is no legal obligation of solidarity among states nor any shared understanding, even among international lawyers, of what a unified conception of community interests or values

[36] Krieger, *supra* note 3, at 978; R. Wolfrum, 'International Law', in *Max Planck Encyclopedia of Public International Law* (2006), para. 42.

[37] Krieger, *supra* note 3, at 977.

[38] Wolfrum, *supra* note 36, para. 41.

[39] Koskeniemmi, for example, speaks of 'the illusion that the 1990s constituted an exceptional moment of liberal opportunity'. Koskenniemi, 'Epilogue: To Enable and Enchant – on the Power of Law', in W. Werner, M. De Hoon and A. Galan (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 393, at 405.

[40] Wolfrum, 'International Law of Cooperation', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2010), para. 2.

[41] *Ibid.*, paras 5, 25.

might look like.[42] The rise of ethnic and cultural pluralism – both within nation-states and globally – has been experienced in international law's discourse as the fragmentation of international law into pragmatic parallel regimes,[43] and it makes consensus on shared values even more difficult. Finally, much of the structure and content of international law remains 'in a form bequeathed by the bilateral model',[44] and much of international law is developed and enforced in the traditional ways.[45]

The shift towards what Krieger understands as a 'law of cooperation', in other words, never came to be: it was just a 'far more ambitious ethos'.[46] In the same decades when the International Criminal Courts for Rwanda (ICTR) and for the former Yugoslavia (ICTY) were being established, along with several hybrid tribunals and even the International Criminal Court, in what may have seemed like a turn towards cooperation, failures abounded. There was never any form of international accountability for crimes related to colonialism nor for Russia's many crimes during the Cold War era;[47] the ICTY and the ICTR in many ways stand as testaments to the ineptitude and failure of the West to stop atrocities as they happened;[48] inequality has risen considerably without international law being able to do much about it;[49] action to stop climate change has been glacial in its pace, with President George Bush withdrawing from the Kyoto Protocol already in 2001;[50] and the much touted 'fight against impunity' eventually waned,[51] just to name a few examples.

This pessimism, in turn, provides reasons to be slightly more optimistic than Krieger. Where she sees a likely regression towards a law of coordination, driven by populist governments, I see what has been the case for quite a while: an expected, although

[42] Besson, 'Whose Constitution (s)? International Law, Constitutionalism and Democracy', in J.L. Dunoff and J.P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009) 381, at 394–395; Zemanek, 'International Law Needs Development: But Where To?' in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (2011) 793, at 799; Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 553, at 558–559.

[43] De Búrca and Gerstenberg, 'The Denationalization of Constitutional Law', 47 *Harvard International Law Journal* (2006) 243, at 246.

[44] Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law', in Fastenrath *et al.*, *supra* note 42, 79, at 81.

[45] Charney, 'International Law-Making in a Community Context', 2 *International Legal Theory* (1996) 38, at 45.

[46] Lustig and Weiler, 'Judicial Review in the Contemporary World: Retrospective and Prospective', 16 *International Journal of Constitutional Law* (2018) 315, at 325.

[47] Bloxham and Pendas, 'Punishment as Prevention? The Politics of Punishing Génocidaires' in D. Bloxham and A.D. Moses (eds), *The Oxford Handbook of Genocide Studies* (2010) 617, at 626; Arthur, 'How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice', 31 *Human Rights Quarterly* (2009) 321, at 342.

[48] G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000), at 283.

[49] See S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018).

[50] Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997, 37 ILM 22 (1998); Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 72 *University of Chicago Law Review* (2005) 469, at 470.

[51] See D. Tolbert, *Is the International Community Abandoning the Fight against Impunity?* (2015), available at www.ictj.org/debate/impunity/opening-remarks.

not necessarily desirable, push and pull between a dominant approach (coordination) and an emerging, yet still fragile, trend (cooperation). The danger, however, might be that the populist's 'pull' will be too strong and make the international regime collapse or the fragile trend of cooperation disappear. In this regard, the good news is that the international regime, both in its coordination and cooperation approaches, might be more resilient than we think against the onslaught of a few governments. Indeed, there are now many actors, institutions and agreements in the international arena that might help keep the current order in place.[52] More importantly, populist governments, so far, have not contested that there is something that we call international law. They complain that some of it is wrong, that it does not benefit the people or that 'eggheads' invented it.[53] This is bad, of course, but it is also quite the accomplishment that even populists accept that there are legal constraints at the international level; that even they agree that there is something we all call 'international law'.[54]

My next set of concerns about the opposition between a 'law of coordination' and a 'law of cooperation' is different. The first one is that this opposition obscures the fact that coordination is also cooperative. Coordination simply cannot be maintained if we do not cooperate. In that sense, coordination also presupposes some common interests – at least, the interest in maintaining the coordinative scheme. Thus, the coordination approach to international law described by Krieger also requires some common interests: it cannot exist without them. And this is how we get to my second – and more important – concern about the opposition between coordination and cooperation: this opposition obscures that there is little that is inherently preferable about cooperation. We do not primarily value cooperation or coordination for their own sake: we value them based on what we can cooperate and coordinate for. What really matters, what is really at stake, as we will see below, is what states are willing to coordinate and cooperate for. Indeed, when Krieger anticipates that populists will tend towards a law of coordination, and when I argue that international law as a law of cooperation never came to be, neither of us is really concerned about coordination or cooperation as such but, rather, with what these approaches, as described by Krieger, are substantively committed to: in the first case, an international system where the principles of sovereignty and non-intervention hold a central place; in the second case, a system where solidarity and certain community interests and values dominate.

Precisely because the distinction that Krieger draws between a 'law of coordination' and a 'law of cooperation' obscures these two facts, it runs the risk of making us fail to see what I think are two great dangers posed by populist governments. The first danger is not, as Krieger suggests, that populists will embrace a law-of-coordination approach

[52] Hathaway, *supra* note 50, at 472; H.H. Koh, *The Trump Administration and International Law* (2019), at 141.

[53] Krieger, *supra* note 3, at 971.

[54] Illustrative of this are US President Donald Trump's remarks on stopping a strike against Iran for not being proportionate. M.D. Shear, H. Cooper and E. Schmitt, 'Trump Says He Was "Cocked and Loaded" to Strike Iran, but Pulled Back', *New York Times* (21 June 2019), available at www.nytimes.com/2019/06/21/us/politics/trump-iran-attack.html.

(and what Krieger sees as its related rejection of multilateralism and 'closed statehood mentality'). In fact, the risk is the complete opposite. For Krieger seems to think that the populists' advancement of a law of coordination and its related rejection of multilateralism and 'closed statehood' mentality are bad things. However, if she were right – and, as I said at the beginning, I have my doubts about whether we can construct something like a 'populist approach to international law' – this would actually be a good thing (or better than the alternative). For the real risk is truly a fearsome thing: it is populist governments cooperating towards the dismantling of international institutions and the international legal regime to set up new alliances and an alternative framework. And an international law committed towards some of the values of populist governments would be a catastrophe. Indeed, Philip Alston has already worried about what he calls 'coalitions from hell' emerging from the current populist momentum.[55] And, within the context of the European Union (EU), Alexander Clarkson has warned us about the development of a 'shared ideological agenda among far-right activist networks' in an attempt to reshape, rather than dismantle, the EU.[56] It is the promotion of 'a darker vision of Europe', as he calls it.[57]

In other words, if we rely too much on the opposition between coordination and cooperation and, thus, think that populists favouring a view of international law as mere coordination is a bad thing, we will be unfoundedly optimistic and fail to see what is worse: populists forming illiberal coalitions. And we would fail to see this precisely due to the opposition between a 'law of coordination' and a 'law of cooperation', which draws attention to the seeming differences between coordination and cooperation and distracts us from what is important: the goals we cooperate and coordinate to achieve. The opposition between coordination and cooperation, in and of itself, will tell us nothing. If the populists' preferred approach to international law as a law of coordination implies, as Krieger suggests, that governments will attempt to avoid armed conflict and try to maintain peace, and that they will attempt to organize common action when issues cannot be managed effectively by each state alone,[58] these predictions are good news. And they are good news not because states will use a coordination approach to international law but precisely because of the aims (which we value highly). Yet, if some populist governments will form 'coalitions from hell' to reshape international institutions so that they mirror their values, we will be rightly concerned: again, not because they are choosing a cooperation approach to international law – which they might be – but, rather, because of what they might cooperate for.

Finally, if we focus too much on the distinction between cooperation and coordination and on the populists' seeming preference for a coordination approach, we might fail to see a second danger: what Krieger refers to as the danger of populist governments' aiming to reduce international law to an instrument for furthering national

[55] Alston, 'Dialogue on Human Rights in the Populist Era', 9 *Journal of Human Rights Practice* (2017), at 3.

[56] A. Clarkson, 'Thought Populists Want to Kill the EU? It's Worse Than That', *Politico* (1 August 2019), available at www.politico.eu/article/populist-attitude-to-eu-matteo-salvini-far-right/.

[57] *Ibid.*

[58] Krieger, *supra* note 3, at 978; Wolfrum, *supra* note 36, para. 42.

interests.[59] Although Krieger rightly anticipates this risk, I think it is better understood as a refusal to cooperate or coordinate altogether in the pursuit of urgent goals. The main problem that this refusal might pose is that successfully acting only based on individual self-interest is often collectively self-defeating.[60] Or, in simpler terms, it is very often true that if each individual does what will be better for himself, or his family, or his loved ones, the outcome will be worse for everyone.[61] When the sea is overfished, it can be better for each fisher to try to catch more fish, but worse for each of them if they all do.[62] When the world is on the verge – or even in the midst – of a climate emergency, it can be better for each country not to control its greenhouse gas emissions but worse for each if they all do not.[63]

We thus have a problem in need of a solution. As Derek Parfit notes, this problem is even greater at the international level and even more so when the solution is opposed by some ruling group.[64] Political or legal solutions – such as making the self-interested choice impossible or costlier through taxation or penalties or making the altruistic choice more attractive by establishing rewards[65] – are not alternatives readily available at the international level if states are self-interested and thus do not agree to them (that is, if they refuse to coordinate or cooperate).

Our best alternative, it seems, is to make populist governments realize that acting only on their interests – the people's interests – will often be worse for everyone, the people included. It is in all of our interests, including theirs, that we solve these dilemmas – that is, that we cooperate and coordinate to reach a solution that is better for all of us. Often, the people cannot thrive while the rest languish. International law will be the most obvious way in which to solve this.[66] It does not matter whether a coordination or cooperation approach is preferred, but it must be done. Coordination might be good enough, but coordination is already quite demanding. As Jeremy Waldron notes, action in concert is not easy: '[I]n fact, when it actually takes place, action-in-concert is something of an achievement in human life', for it requires some common interests.[67] It requires that we agree to coordinate and that we agree on what to coordinate for. Unfortunately, this might be more than what some populist governments

[59] Krieger, *supra* note 3, at 996.

[60] D. Parfit, *Reasons and Persons* (rev. edn, 1987), at 56.

[61] *Ibid.*, at 59.

[62] *Ibid.*, at 62.

[63] Both Trump's and Bolsonaro's environmentalist policies seem to rest partially on the first assumption – that is, that it will be better for each not to control its greenhouse gas emissions. See, e.g., M. Tutton, 'Why Brazil's Jair Bolsonaro Has Environmentalists Worried', *CNN* (5 January 2019), available at www.cnn.com/2019/01/05/americas/bolsonaro-amazon-global-warming/index.html; L. Parker and C. Welch, '6 Reasons Why U.S. Paris Reversal Won't Derail Climate Progress', *National Geographic* (1 June 2017), available at https://news.nationalgeographic.com/2017/05/trump-climate-change-paris-agreement-california-emissions.

[64] Parfit, *supra* note 60, at 63–65.

[65] *Ibid.*, at 63–65.

[66] Alter, 'The Future of International Law', in D. Ayton-Shenker (ed.), *A New Global Agenda: Priorities, Practices, and Pathways of the International Community* (2017) 25, at 35.

[67] J. Waldron, *Law and Disagreement* (2004), at 42.

will be willing to do, if they are short-sighted and fail to see that some of the people's interests are also our interests.

Ultimately, relying on the opposition between coordination and cooperation might leave us partially blind to these dangers. Indeed, the two dangers I have identified have little to do with whether populist governments choose a coordination over a cooperation approach to international law and everything to do with the goals they may pursue (or refuse to) and the interests they may share. In fact, the dangers are that some populist governments might coordinate or cooperate to reshape international law and institutions according to their values and that they might refuse to coordinate or cooperate on urgent matters. But we must be aware that the precise shape of these dangers – and how to resist them – remains blurry if we do not pay attention to who the people (allegedly) are.

****

Heike Krieger continues the debate with a Rejoinder on our EJIL: Talk! blog.