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### **SYMPOSIUM: PUBLIC LAW AND THE NEW POPULISM**

Tamar Hostovsky Brandes

### **International Law in Domestic Courts in an Era of Populism**

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## **International Law in Domestic Courts in an Era of Populism**

Tamar Hostovsky Brandes\*

### **Abstract**

This article examines the manner in which the rise of populism affects the use of international law by domestic courts. It argues that populism is likely to have a negative effect on the willingness of domestic courts to refer to international law. It further argues that although such response is understandable, it is regrettable, since incorporation of international law into domestic court rulings can serve as a counter-populism measure.

Maintaining international law as part of the domestic legal discourse is particularly important in a populist setting, for two reasons. First, where constitutionalism is overtaken by populists, international law can serve as an important source on which courts can draw to protect human rights. In addition, referral, analysis and application of international law are means of maintaining pluralism in legal and public debate and, accordingly, of enhancing democracy.

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## **Introduction**

This article examines the manner in which the rise of populism affects the use of international law by domestic courts. It argues that populism is likely to have a negative effect on the willingness of domestic courts to refer to international law. It further argues that although such response is understandable, it is regrettable, since incorporation of international law into domestic court rulings can serve as a counter-populism measure.

In most legal systems, the extent of referral to international law is subject to judicial discretion. The scope of discretion is particularly broad in the area of human rights, where parallel constitutional norms are usually available.<sup>1</sup> The extent of referral to international human rights law changes between different countries, different judges, and across time.

Populists often target international law and undermine its legitimacy and importance. The article argues that, as a result, the rise of populism is likely to have a negative impact on the willingness of courts to refer to and rely on international law. This applies not only to courts packed by populists, but also to courts that still enjoy independence. Courts under populist attacks, the article argues, are likely to prefer, where possible, to resort to legal sources that enjoy sound domestic legitimacy in order to minimize their exposure to criticism by populist leaders. When populists are in power, such criticism may translate to laws limiting courts' authority and independence.

The article argues that while the tactic of relying exclusively on domestic legal sources may shield courts from one particular line of criticism, overall, judicial refrain from referring to international law will strengthen populist trends and further weaken the courts.

Maintaining international law as part of the domestic legal discourse is particularly important in a populist setting, for two reasons. First, where constitutionalism is overtaken by populists, international law can serve as important source on which courts can draw to protect human rights. This need not necessarily imply that international law

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<sup>1</sup> Eyal Benvenisti and Alon Harel, *Embracing the Tension Between National and International Human Rights law: The Case for Discordant Parity* 15(1) INT'L. J. CONST. L. 36 (2017)

should override constitutional law, but rather that it can serve as source of interpretation for constitutional provisions, including those introduced by populists, in order to minimize violations of human rights as much as possible. In this respect, international human rights law fulfills its traditional role as a safeguard against a state's abuse of power, albeit in a more confined, limited manner than international law jurists usually envision.

The second reason for which incorporating international law into domestic legal discourse is important when populism is on the rise is the need to dismantle the polarized public discourse imposed by populists. In this respect, referral, analysis and application of international law are means of maintaining pluralism in legal and public debate and, accordingly, enhancing democracy.

Section two examines and analyzes the common stance of populist leaders on international law. Section three examines when and why judges choose to refer to international law, and suggests that in a populist climate, courts are more likely to refrain from relying on international law or referring to it. Section four argues that referral to international law by domestic courts can be an important counter-populism instrument. It argues that even limited application of international law within the context of constitutional interpretation can be valuable in alleviating some of the harm caused by populist legislation and by populist constitution-making, and that referral to international law is important as a means of enhancing pluralism in legal and public discourse.

### **1. Populism and international law**

International law and international legal institutions are often targeted by populist politicians. A few days after becoming president, Donald Trump declared his intention to withdraw from a series of international agreements, curtail the funding of international organizations, and expressed general contempt towards international law and its institutions. Jack Goldsmith referred to these actions as “the beginnings of the greatest presidential onslaught on international law and international institutions in

American history”.<sup>2</sup> In Europe, populist leaders turn their wrath, for the most part, against the European Union, calling for the protection of “national sovereignty” and “national interests” against “foreign intervention” representing “foreign interests”.<sup>3</sup> Similar statements have been made in other countries.<sup>4</sup>

Populists’ aversion of international law is built on a number of pillars. While it is debatable whether nationalism is a defining feature of populism, populist movements are often nationalist.<sup>5</sup> The source of political legitimacy, in populist discourse, is “the people”<sup>6</sup>, envisioned as an organic, single entity, which exists independently of the state. The will and interests of “the people” are both of ultimate moral importance, and, allegedly, the only legitimate basis for political action and law-making.

The supremacy of “the people” has been translated, in populist discourse, to the claim that the rights and interests<sup>7</sup> of “the people” are of ultimate value, and thus cannot legitimately be restricted or compromised. This claim has been raised by populist leaders in order to object to internal limitations on their actions by other branches of the

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<sup>2</sup> Jack Goldsmith, *The Trump Onslaught on International Law and Institutions*, LAWFARE, March 17, 2017, <https://www.lawfareblog.com/trump-onslaught-international-law-and-institutions>.

<sup>3</sup>The public debate regarding Brexit is an obvious example. More recently, Hungary’s Viktor Orban’s Government spokesperson accused Brussels of infringing upon Hungary’s sovereignty, stating that “Brexit should be a lesson”. *Hungary Ready to Fight European Commission*, DW, October 4, 2017, <http://www.dw.com/en/hungary-ready-to-fight-european-commission/a-40805133>. Another example is the series of clashes between the EU and Poland since the Law and Justice party came into power in Poland over issues such as court reform threatening the rule and the migration crisis and Polish Prime Minister Szydlo’s critique of “the elites in Brussels”. James Shotter, *Polish PM hails Pushbacks Against Deeper European Integration*, FINANCIAL TIMES, November 13, 2017, <https://www.ft.com/content/05942108-c55c-11e7-a1d2-6786f39ef675>

<sup>4</sup> Posner argues that “An upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War”. Eric A. Posner, *Liberal Nationalism and the Populist Backlash*, CHICAGO UNBOUND, [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2071&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2071&context=public_law_and_legal_theory).

<sup>5</sup> This is the case with respect to populist parties in Central-Eastern Europe, see Job E. Fox & Peter Vermeerch, *Backdoor Nationalism*, 51(2) EURO. J. SOC. 325 (2010). Bugaric Bojan, *Populism, Liberal Democracy, and the Rule of Law in Central and Eastern Europe*, 41(2) COMMUNIST AND POST-COMMUNIST STUD. 191 (2008)

<sup>6</sup> JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 20 (2016), Paul Blokker, *Populist Constitutionalism*, INT’L J. CONST. L. BLOG, May 4, 2017 <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>

<sup>7</sup> The lack of distinction between rights and interest is characteristic of populist discourse, and populists often talk about the “right of the people” and the “interests of individuals”.

government, such as courts. It has also been raised in objection to the external limitations on power set by international law and international institutions.

A common tactic employed by populists in order to oppose international institutions and the application of international law is to re-delineate the boundaries between “internal” and “external” matters. Interference with the former, they argue, is illegitimate, as it violates the state’s sovereignty.<sup>8</sup> Such claims have been made, for example, by Hungarian prime-minister Viktor Orban as the grounds for objecting the EU’s migration plan.<sup>9</sup> Donald Trump cited “reassertion of America’s sovereignty” as the justification for withdrawing from the Paris Climate Agreement.<sup>10</sup> In Israel, claims that foreign governments and the EU “blatantly intervene in Israel’s internal affairs” by contributing money to human right NGOs were the basis for a controversial law imposing special reporting requirements upon such NGOs.<sup>11</sup> By associating “the people’s will”, which populists claim to embody, with state sovereignty, any norm or measure that contradicts the former is presented as violating the latter. Populists therefore re-invoke the old, familiar critique of international law: that it is illegitimate intervention in state sovereignty.

The traditional, positivist response to this claim is, of course, that international law is created through state consent, either through treaties or through the creation of customary international law, and that the claim that it illegitimately infringes upon state sovereignty is thus unfounded.<sup>12</sup> This response, however, is only partly appealing to

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<sup>8</sup> While the scholarly writing on the “New Populism” currently focus on its intra-state effects, there is reason to be concerned regarding its implication for international stability. As the Russian claim to Crimea demonstrates, claims made in the name of “the nation” will not necessarily be confined to existing states’ borders.

<sup>9</sup> Nick Gutteridge, ‘No chance, Juncker!’ Hungary’s populist PM vetoes idea of single EU-wide migration policy, EXPRESS, June 20, 2017, <https://www.express.co.uk/news/politics/819135/Migrant-crisis-Hungary-PM-Viktor-Orban-rejects-idea-EU-asylum-system-refugees>. Similar claims have been made by Slovakia, Poland and the Czech Republic.

<sup>10</sup> Brian Conolley, *Living and Dying with Trump’s Sovereignty, or, On Withdrawal From Climate Change*, BLARB, June 7, 2017, <https://blog.lareviewofbooks.org/essays/living-dying-trumps-sovereignty-withdrawal-climate-change/>

<sup>11</sup> Jonathan Lis, *Despite Global Criticism, Israel Approves Contentious ‘NGO Law’*, HAARETZ, July 11, 2016, <https://www.haaretz.com/israel-news/1.730324https://www.haaretz.com/israel-news/1.730324>

<sup>12</sup>For example, in response the Dominican Republic’s claim that an Inter-American Court of Human Rights’ decision requiring it to provide identity cards to Dominicans of Haitian descent was a violation of its sovereignty, Robin Guittard of Amnesty International argued that since the Dominican Republic

those claiming that international legal institutions infringe upon state sovereignty. First, as Eric Posner notes, under contemporary international law, there are considerable limitations to states' ability to withdraw from certain treaties or object to customary law.<sup>13</sup> As a result, a state can find itself subject to norms to which, at that particular moment in time, it objects. Moreover, the source of friction is, often, not international norms themselves but the application of international law by international institutions and the extent to which states' interests are taken into account. For example, the claim that the ICJ did not sufficiently into account the state's security interests was the essence of Israel's response to the ICJ's advisory opinion regarding the legal consequences of the construction of a wall in the Occupied Palestinian Territories.<sup>14</sup> Similar responses are often made with regard to decisions of the ECHR or other EU bodies. International law is portrayed, in this regard, as a normative system furthering foreign interests and promoting them over the interests of states themselves.

Other responses to the claim that international law infringes upon state sovereignty focus on alternative notions of sovereignty, which encompass membership in the international community and commitment to human rights as its pillars.<sup>15</sup> While these ideas were embraced by many in the international legal community, in many states, they did not take hold among the general public. Populists build on public suspicion towards such ideas to portray them as calculated attacks on sovereignty and national interests, part of the struggle of "nations against globalists"<sup>16</sup>.

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recognized the authority of the court, the decision could not possibly violate the DR's sovereignty. Robin Guittard, *National Sovereignty v. Human Rights?*, HUFFINGTON POST, December 11, 2014 [http://www.huffingtonpost.co.uk/robin-guittard/human-rights-caribbean\\_b\\_6144058.html](http://www.huffingtonpost.co.uk/robin-guittard/human-rights-caribbean_b_6144058.html)

<sup>13</sup> For a critical review of what he views as the erosion of the notion of consent see Posner, *supra* note 4.

<sup>14</sup> Diana Bachur-Nir, *The ICJ: The Separation Wall and Settlements are Illegal*, YNET, July 10, 2004, <http://www.ynet.co.il/articles/0,7340,L-2944688,00.html> [in Hebrew]

<sup>15</sup> Kofi Annan, *Two concepts of sovereignty*, ECONOMIST, September 18, 1999,

<http://www.economist.com/node/324795>, John H. Jackson, *Sovereignty- Modern: a new Approach to an Outdated Concept*, 97 AM. J. INT'L. L. 782 (2003), Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J INT'L L. 28 (2004), Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20(3) EJIL 513 (2009), Eyal Benvenisti, *Sovereigns as Trustees of Humanity, on the Accountability of States to Foreign Stakeholders* 107(2) AJIL 295 (2013).

<sup>16</sup> Prime Minister Viktor Orban's State of the Nation Address, February 10, 2017

<http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-state-of-the-nation-address-20170214>.



However, there is more to the populist denunciation of international law than simply rejecting it as a form of foreign intervention. Populists denounce international law as an undemocratic, elitist project, and declare it, on this basis as well as on the basis of being “foreign”, as illegitimate. These claims are difficult to tackle and may even seem initially appealing because they build on existing, genuine critiques of international law, which have been recognized by jurists across the world. In this respect, the populist portrayal of international law is similar to populist critique of liberal democracy: it builds on real weaknesses and legitimate concerns, but offers a solution that is neither intended nor tailored to remedy such weaknesses.

One of the most significant critiques of international law regards the allegedly undemocratic manner in which it is created, referred to as the “democratic deficit” of international law.<sup>17</sup> International law, it is argued, is created by governments exercising executive power, which set up institutions and mechanisms that are removed from the common people and are not subject to the principles of representative democracy. John O. McGinnis and Ilya Somin argue that international law is “less transparent than domestic legislation because citizens generally know less about the institutions through which international law is made than the institutions through which domestic law is enacted and find it more difficult to keep track of international than domestic norms”.<sup>18</sup> International law, they conclude, is “nontransparent and created by political actors with little or no electoral accountability”.<sup>19</sup>

The depiction of domestic elected representatives as self-serving elites, detached from the needs and interests of the ordinary people, is a central characteristic of populist discourse.<sup>20</sup> Müller explains that this claim appeals to public opinion because it builds on the what he terms “the broken promises of democracy”<sup>21</sup>, most importantly, the ability of the people to rule<sup>22</sup>, and on the gap the inevitably exists between the “ordinary

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<sup>17</sup> John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?* 59 STAN. L. REV. 1175, 1193 (2007).

<sup>18</sup> *Id.*, at 1194.

<sup>19</sup> *Id.*

<sup>20</sup> Although not everyone who is critical of elites is, of course, a populist. See MÜLLER, *Supra* note 6, at 101.

<sup>21</sup> *Id.*, at 101.

<sup>22</sup> *Id.*, at 76.

people” and the law. Because the gap between “the people” and the law is even greater with respect to international law, the portrayal of international law as an elitist project is especially appealing to public opinion.<sup>23</sup> It is not a coincidence that a central element of the anti-EU campaign of populist parties in central Europe has focused on emphasizing and nourishing public resentment towards the “elites in Brussels”.<sup>24</sup>

Finally, populists are, as Müller explains, anti-pluralists.<sup>25</sup> Populism does not allow for a variety of perspectives in either political and legal debate. The rejection of pluralism is directed first and foremost internally<sup>26</sup>, but any positions incompatible with those expressed by populists threatens their hegemony. In addition to the reasons specified above, then, populists oppose international law simply because it provides alternative perspectives and answers to social and legal questions, which often contradict the answers provided by populists themselves.

## **2. Courts, international law and populism**

In section one above I examined the essence of populist attacks on international law. In this section I turn to examine the manner in which courts operating in a populist climate respond to such attacks. In reviewing this question I refer to courts that have not yet been overtaken or packed by populists, as courts that have been overtaken can be expected to echo populists’ resentment towards international law.

The manner and extent to which domestic courts apply international law depends on the normative status of international law within the domestic legal system. Under the

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<sup>23</sup> This gap has been a main topic of debate with regard to the EU. See Posner, *supra* note 4, 8-10. Müller argues that the fact that populist claims may bring to light some real problems of liberal democracy does not render it corrective to such democracy (MÜLLER, *supra* note 6, at 103). The same can be claimed with regard to the populist depiction of international law. Notably, while populists emphasize the elitist nature of international law, they rarely refer to the more problematic facet of the “democratic deficit”, the fact that international law is created through compromised with authoritarian states (see John O. McGinnis & Ilya Somin, *supra* note 17). In addition, while they denounce existing international law and institution, populists generally fail to seriously offer an alternative to the existing international system.

<sup>24</sup> <http://www.westmonster.com/polish-pm-brussels-elite-are-out-of-touch/>

<sup>25</sup> MÜLLER *supra* note 6, see also Nadia Urbinati, *Democracy and Populism*, 5(1) CONSTELLATIONS 110 (1998).

<sup>26</sup> Urbinati describes populism as “collective resentment against the domestic enemies of the people”, Urbinati, *Id.*

traditional distinction between monism and dualism, this status differs between states in which international law is inherently part of the domestic legal order and states in which international law only becomes part of the domestic legal order through incorporation.<sup>27</sup> While the distinction between monism and dualism is still relevant, in particular in understanding the formal status of international law in a given state, it does not sufficiently explain the use or disuse of international law by domestic courts. Courts have developed judicial doctrines that justify referral to international law in cases in which it does not formally apply.<sup>28</sup> They have also developed doctrines that limit the application of international law in cases in which it formally does apply.<sup>29</sup> The decision to refer to international law is thus, to a large extent, a matter subject to judicial discretion.

The judicial discretion in applying international law is especially broad in areas in which there is an overlap between international law and domestic law, such as the area of human rights. Both international human rights law and domestic constitutional law cover the protection of individual rights.<sup>30</sup> When the scope of a particular rights is different in each of the two normative systems, a conflict between the two may arise.<sup>31</sup> A determination regarding the hierarchy between the two normative systems may be

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<sup>27</sup>J.G. Starke, *Monism and Dualism in the Theory of International Law* 17 BRITISH YEARBOOK OF INT'L L. 66 (1936).

<sup>28</sup> For example, many systems include a “presumption of compatibility” or “presumption of consistency” according to which domestic law should be interpreted, where possible, in a manner that does not contradict the state’s obligations under international law. See Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Right Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts* 31 BROOK. J. INT'L L. 341 (2005), ANDRÉ NOLKAEMPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW 6-10 (2011), Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries* 48 HEIDELBERG J. INT'L L., 163, 164 (1988), Note: *The Charming Betsy Canon, Separation of Powers and Customary International Law*, 121 HARV. L. REV. 1215 (2008), Gerrit Betlem and André Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EJIL 569 (2003)

<sup>29</sup> In the United States, for example, the distinction between self-executing treaties and non-self-executing treaties has developed in connection with the supremacy clause, and has been used, in various forms, to limit the domestic application of the treaties in the United States. See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AJIL 695 (1995).

<sup>30</sup> Benvenisti and Harel, *supra* note 1.

<sup>31</sup> *Id.*, Luzius Wildhaber & Stephan Breitenmoser, *The Relationship Between Customary International Law and Municipal Law in Western European Countries* 48 HEIDELBERG J. INT'L L., 163, 164 (1988), Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863, 1875 (2003).

warranted in these cases, and many domestic legal systems indeed define such a hierarchy. In other situations, however, the two normative systems may supplement each other. International law can be used, for example, as a source of interpretation of constitutional norms, often phrased in broad, open-ended terms.<sup>32</sup> In these situations, the extent of referral to international law depends, to a large extent, on a particular judge's attitude towards international law and her inclination to apply it.

There are various reasons for why judges prefer to resort to a certain legal source. One reason is the sociological legitimacy of such legal source. Drawing on the Weberian notion of legitimacy, Richard H. Fallon explains that "when legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a strong sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward".<sup>33</sup> Relying on legal sources perceived by public opinion as legitimate is a means of conferring legitimacy upon court rulings, and, accordingly, on courts themselves.<sup>34</sup>

The extent to which courts will turn to international law will thus depend, among other things, on the sociological legitimacy of international law among the courts' constituents.<sup>35</sup> Fallon explains that "decisions and institutions that enjoy high legitimacy with some groups may tend to lack sociological legitimacy among others".<sup>36</sup> Indeed, the sociological legitimacy of international law may be different among different audiences.

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<sup>32</sup> For a comparative evaluation of the role of international law in constitutional interpretation see: Benjamin Oliphant, *Interpreting the charter with International Law: Pitfalls and Principles*, 119 APPEAL 105 (2014), Justin Gleeson SC, *The Australian Constitution and international law* 40 ABR 33 (2015), Gerald L. Neuman, *The United States Constitution and International law: The Uses of International Law in Constitutional Interpretation*, 98 A.J.I.L. 82, 90 (2004), Gerrit Betlem and André Nollkaemper, *Giving Effect to Public International Law and European Community Law before Domestic Courts: A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EJIL 569 (2003).

<sup>33</sup> See Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

<sup>34</sup> Or Bassok explains that "The sociological-legitimacy difficulty captures the Court's inability to sustain its sociological legitimacy if the public perceives it as unconstrained by the law and deciding cases according to the Justices' own political opinions". Or Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239 (2011).

<sup>35</sup> *Id.*

<sup>36</sup> Fallon, *supra* note 33, at 1795.

I argued elsewhere that domestic courts addressing international audiences, in particular, international legal audiences, are likely to rely on international law, since such reliance enhances the legitimacy of their decisions among this audience. This applies, I argued, both in cases in which courts invalidate their state's actions and in cases in which they uphold such actions.<sup>37</sup> An international audience is likely to find it difficult to evaluate a decision based exclusively on domestic law. Moreover, where a decision appears to contradict international law, its domestic rationale will be of little interest to an international audience. International law provides a shared set of standards for evaluation of states' actions by the international community.<sup>38</sup> Basing decisions on international law is thus a means of establishing the legitimacy of the state's actions internationally. It is also a means of establishing the legitimacy of judges and their decisions among those Oscar Schachter referred to as the "invisible college of international lawyers".<sup>39</sup>

Relying on international law will, in most cases, not have the same effect on domestic audiences. Indeed, in some circumstances, where public trust of the domestic law-making process is low, relying on international law may enhance the legitimacy of court decisions.<sup>40</sup> In most situations, however, the opposite is correct. As argued above, international law is often perceived as external, foreign-imposed set of norms. Domestic law, on the other hand, and constitutional law specifically, are, arguably, the embodiment the people's will, and while there are heated dispute regarding their application and interpretation, their basic legitimacy is, overall, stronger than that of international law.<sup>41</sup> For an audience that perceives domestic law as "its" law, a decision

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<sup>37</sup> Tamar Hostovsky Brandes, *The Declining Status of International Law in the Israeli Supreme Court's Decisions Concerning the Occupied Territories* (unpublished manuscript, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3076843](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3076843))

<sup>38</sup> Although the Court, may, of course, interpret international law in a manner that accommodate the state's interests, it is possible for jurists familiar with international law to recognize such manipulation and scrutinize the Court's decisions.

<sup>39</sup> Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW U.L. Rev. 217 (1977).

<sup>40</sup> Anne Marie Slaughter argues that: "Whether persuasive authority from abroad is in fact persuasive at home will vary sharply from country to country" Anne-Marie Slaughter, *A Global Community of Courts*, 44(1) HARV. INT'L L.J. 191, 201 (2003).

<sup>41</sup> Benvenisti and Harel, *supra* note 1, at 8. McGinnis & Somin, *supra* note 17.

that rests on domestic law will enjoy stronger legitimacy than a decision based on international law.

In a populist political climate, where international law is constantly attacked, the sociological legitimacy of international law is likely to decline. In a previous article I examined elaborately the case-law of the Israeli Supreme Court concerning the Occupied Palestinian Territories in the past decade, and compared it to the decade that preceded it.<sup>42</sup> The decade between the mid-1990's and the mid 2000's was characterized by extensive referral of the Israeli Supreme Court to international law, in particular in cases that concern the Occupied Territories. In an article published in 2004, Daphne Barak-Erez noted the growing reliance on international law and argued that international law was becoming significant especially with regard to matters that generate interest among the international community, and, in particular, in decisions that referred to the Occupied Territories.<sup>43</sup> This indicates, I argued, that the reliance on international law was, at least partially, a result of the Court addressing an international audience in addition to its domestic audience.

International law is still the governing law in the Occupied Territories according to the accepted legal paradigm in Israel, and the Court still formally applies it in decisions that concern the Occupied Territories. However, in the past decade the Court has employed a combination of strategies to minimize its referral to international law. In a growing number of situations, the Court avoids substantive discussion of international law and substitutes international norms with domestic Israeli norms, despite that fact that formally, Israeli law does not apply in the Occupied Territories.<sup>44</sup> This is done not only in opinions that uphold the state's actions, but also by judges that oppose it. For example, in the latest series of cases concerning the legality of house demolitions performed in the Occupied Territories, constitutional law, rather than

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<sup>42</sup> Hostovsky Brandes, *supra* note 37.

<sup>43</sup> Daphne Barak-Erez, *The International Law of Human Rights and Domestic Law: a Case Study of an Expanding Dialogue*, 2 ICON 611, 642 (2004).

<sup>44</sup> The Israeli Supreme Court has long applied Israeli administrative law in the Occupied Territories as supplemental to international law of occupation. In recent years, however, the Israeli constitutional norms have also been applied, and the balance between the different normative regimes has shifted in favor of domestic law. See discussion in Hostovsky Brandes, *supra* note 37, at p. 10.

international law, was applied as the primary legal framework.<sup>45</sup> Writing a minority opinion opposing a demolition, justice Mazuz suggested that the preferred route for limiting the practice of house demolitions was, perhaps, not through international law, but through Israeli constitutional law.<sup>46</sup> Neither Mazuz nor the other judges applying Israeli constitutional law provided a coherent justification for applying Israeli constitutional law in these cases.

There are various possible explanations for why the Court has reduced its reliance on international law in cases that regard the Occupied Territories.<sup>47</sup> The shift away from international law, I argued, can be attributed, at least in part, to the rise of populism in Israel and, specifically, to the populist attacks on the Court. Proposals to limit the Court's power have been raised frequently in the past decade. These include, among others, proposals to reform the nomination process of Supreme Court justices in a manner that will accord more power to politicians, proposals to limit the ability of the Court to conduct judicial review of legislation, and proposals to assign petitions of Palestinians from the Occupied Territories to the Administrative Courts rather than to the Supreme Court.<sup>48</sup>

The initiators of the above-mentioned bills argue that the Court must be restrained since it has exceeded its authority and illegitimately encroaches upon the government's ability to govern. They argue that the Court, an unelected body, interferes with the will of the people manifested through Knesset legislation, and that the Knesset

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<sup>45</sup> See, for example, justice Naor's opinion in H CJ 7040/15 *Chamad v. Commander of the IDF Forces in the West Bank* and Justice Vogelman's opinion in the case of H CJ 5839/15 *Sider v. Commander of the IDF Forces in the West Bank*

<sup>46</sup> H CJ 7220/15 *Aliwa v. Commander of the IDF Forces in the West Bank* (December 1, 20015), section 4 of the opinion of Justice Mazuz.

<sup>47</sup> For a full discussion of such possible reasons see Hostovsky Brandes, *supra* note 37.

<sup>48</sup> Revital Hovel, *Right-wing Israeli Ministers Introduce Plan Targeting High Court's Powers*, HAARETZ, September 15, 2017, [www.haaretz.com/israel-news/.premium-1.812425](http://www.haaretz.com/israel-news/.premium-1.812425) For survey and discussion of proposed bills see: Nadiv Mordechai and Yaniv Roznai, *A Jewish and (Towards Hybrid) Democratic State? Constitutional Retrogression in Israel* (MD. L. REV., Forthcoming), Gila Stopler, *Constitutional Capture in Israel*, Int'l J. CONST. L. Blog, Aug. 21, 2017, at: <http://www.icconnectblog.com/2017/08/constitutional-capture-israel>, Alon Harel and Noam Kolt, *Constitutionalism in the Shadow of Populist Rhetoric* (unpublished manuscript).

and government must restore their power.<sup>49</sup> In particular, members of the Netanyahu's right-wing coalition have insinuated that the Court does not give due regard to the interests of "the people", referring, by this term, to the Jewish majority. In response to a decision that limited the ability of the state to detain asylum seekers, Ayelet Shaked, Minister of Justice, recently announced that the Court accords too much weight to individual rights and does not give enough weight "our national missions, our history, our identity". "Zionism" she stated, "will not continue to bow down to a universal system of individual rights".<sup>50</sup> "If the Zionist idea were truly on the Court's table" she concluded, the ruling may have been different.<sup>51</sup>

In a reality of ongoing accusations directed at the Court regarding its alleged lack of commitment to national interests, it is understandable why the Court would shy away, when conducting judicial review, from relying on international law, and prefer to rely on domestic legal sources. Integrating international and comparative legal sources into judicial review can expose the Court to further attacks, on the grounds that it limits the state's action based on illegitimate, external standards. In an environment in which the Court's authority to conduct judicial review is undermined, incorporating international law into the process of judicial review may be perceived by the Court as inviting unwarranted criticism, which may translate to laws weakening its status.

The exposure of the Court to political attacks is particularly significant when the matter at stake is perceived as involving important national interests or values.<sup>52</sup> This may explain why, despite the fact that the formal legal framework that applies in the Occupied Territories is still, as indicated above, the international law of occupation, in past decade the Court has minimized the explicit discussions of international legal norms in its rulings regarding the Occupied Territories. The referral, instead, to

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<sup>49</sup> Revital Hovel, *Justice Minister Shaked: Government Must Return to the People's Control*, HAARETZ, May 18, 2015, <https://www.haaretz.com/israel-news/1.656999>

<sup>50</sup> Revital Hovel, *Justice Minister Slams Israel's Top Court, Says it Disregards Zionism and the Jewish Majority*, HAARETZ August 29, 2017 <https://www.haaretz.com/israel-news/1.809617>

<sup>51</sup> *Shaked: Zionism Will Not Bow Its Head*, Channel 2 News, August 29, 2017 [http://www.mako.co.il/news-military/politics-q3\\_2017/Article-5bbb4572d5e2e51004.htm](http://www.mako.co.il/news-military/politics-q3_2017/Article-5bbb4572d5e2e51004.htm) [in Hebrew]

<sup>52</sup> Shaked has recently stated, in relation to the standing petition against the Land Regularization Law, that "the Court will not decide the future of the Settlement Enterprise" <http://5tjt.com/justice-minister-high-court-wont-decide-future-settlement-enterprise/>.



domestic legal sources allows the Court to examine issues that arise in the Occupied Territories as if they were internal Israeli issues, in a manner that coincides with the current political discourse in Israel.

The Israeli case study demonstrates that where public opinion is hostile towards international law<sup>53</sup>, it is probable that courts will respond by reducing their use of international law. Posner argues that a similar development took place in the United States. The U.S. Supreme Court's Eighth Amendment opinions citing international and foreign law "offended Americans", he claims, and the Court appeared to respond by ignoring, for the most part, arguments based on foreign and international law in areas other than Eighth Amendment jurisprudence.<sup>54</sup>

Although the exact extent to which courts are influenced by public opinion is a matter of debate, in a populist climate, the decision whether to use international law is one in which courts are especially prone to take into consideration public sentiment. First, when politicians threaten to employ means such as court-packing or limiting the Court's authority, and when the courts' legitimacy is constantly undermined, courts become vulnerable, and are likely to be more sensitive to public opinion. Second, the decision to use or refrain from using international law allegedly concerns reasoning more than outcome. If courts can reach the same outcome based on domestic law rather than on international law, without paying the price involved for relying on international law, they may understandably be reluctant to expose themselves to what they would view as unnecessary criticism.

### **3. International law as a counter-populism instrument**

Even if populism may lead to a decline in the referral to international law, why is this a problem? As long as courts perform judicial review of state actions, apply valid law and act as guardians of democracy and human rights, why should we be concerned about the fact that they do not rely on international law in the course of doing so? Answering this

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<sup>53</sup> For discussion of the public opinion in Israel see Hostovsky Brandes, *supra* note 37.

<sup>54</sup> Posner, *supra* note 4, at 10.

question is important because, as others have argued, domestic law often enjoys not only stronger sociological legitimacy, but also stronger normative legitimacy than international law. If a parallel norm is available in international law and in domestic law, it is arguably not only legitimate but preferable that courts rely on the latter.

In this section I attempt to refute this claim and argue that in a populist climate, courts should make conscious efforts to incorporate international law into their decisions. I present two arguments for why ensuring that international law, and, in particular, international human rights law, continues to be part of the domestic legal discourse, should be perceived as a counter-populism instrument and thus be part of the judicial response to populism. The first argument is that in certain instances, domestic referral to international law may serve as a means for mitigating some of the harm caused by populist constitutionalism. The second argument focuses on the importance of maintaining a plurality of sources and perspectives within legal discourse as a means of strengthening democracy.

### *3.1 Populist Constitutionalism and International Law*

Populists in power employ domestic law, including constitutional law, to promote their goals and weaken the democratic nature of the state. This phenomenon has been described as “constitutional capture”<sup>55</sup>, “constitutional retrogression”<sup>56</sup>, “abusive constitutionalism”<sup>57</sup> or “populist constitutionalism”.<sup>58</sup> The exact content of each of these terms varies, but they are all based on the observation that one of the characteristics of the “new populism” is the manner in which populists, once in power, enact legislation and employ mechanisms of constitutional change to weaken democracy.<sup>59</sup> While authoritarian leaders are usually assumed to be hostile towards constitutionalism, Paul

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<sup>55</sup> Blokker, *supra* note 6., PAUL BLOKKER, NEW DEMOCRACIES IN A CRISIS? A COMPARATIVE CONSTITUTIONAL STUDY OF THE CZECH REPUBLIC, HUNGARY, POLAND, ROMANIA AND SLOVAKIA (2013). Jan Werner Muller, Rising to the Challenge of Constitutional Capture, EUROZINE, March 21, 2017 <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>

<sup>56</sup> Aziz Z. Huq & Tom Ginsburg, How to Loose a Constitutional Democracy 65 UCLA L. REV. (2018) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2901776](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2901776)

<sup>57</sup> David Landau, Abusive Constitutionalism, 47 U.C. DAVIS L. REV. 189 (2013).

<sup>58</sup> Blokker, *supra* note 6.

<sup>59</sup> Landau, *supra* note 57, at 189.

Blokker argues that the relationship of populists with constitutionalism is actually more complex. “Populists in power”, he explains, “engage in intense reform (and abuse) of the existing constitutional arrangements, in contrast to the idea that populism consists of a merely oppositional, anti-political phenomenon”.<sup>60</sup>

Populist constitutionalism poses unique threats to democracy and human rights, and generates difficult challenges for courts striving to respond to such threats. In a reality in which liberal constitutional safeguards are unavailable or are being limited, courts must develop and apply an alternative arsenal of measures in order to counter populist law-making. International law, I argue, is one of the tools available to domestic courts in mitigating the negative effects constitutional capture has on democracy and on human rights.

There are, of course, domestic legal doctrines that allow courts to respond to abusive constitutionalism. The most significant is the doctrine of unconstitutional-constitutional amendment, which allows courts to strike down constitutional amendments where such amendments violate either explicit and implicit limitations on constitutional amendment.<sup>61</sup> Under the unconstitutional-constitutional amendment doctrine, courts can declare as invalid constitutional amendments that violate fundamental principles, including democracy, the rule of law, and the protection of human rights.<sup>62</sup>

The doctrine of unconstitutional-constitutional amendment has been applied in response to populist constitutional amendments, in particular with regards to constitutional amendments that target institutional democratic structures.<sup>63</sup> While the

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<sup>60</sup> Blokker, *supra* note 6.

<sup>61</sup> For review of the Unconstitutional Constitutional Amendment doctrine see YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS (2017), Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada, 41 QUEEN'S L. J. 143 (2016), THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT (Richard Albert, Xenophon Contoades & Alkmene Fotiadou Eds., 2017), Rosalind Dixon and David Landau, *Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment*, 13(3) INT'L J CONST. L. 606 (2015), Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011).

<sup>62</sup> ROZNAI, *id.*

<sup>63</sup> The decision of the Supreme Court of Colombia to invalidate a constitutional amendment allowing is often brought up as example.

doctrine is gaining growing recognition as an important instrument in set of judicial tools available to courts responding to populist constitutionalism<sup>64</sup>, it has some significant limitations. As David Landau explains, current doctrine may not be applicable to constitutional replacements, which are distinguished from constitutional amendments, and thus may be under-inclusive.<sup>65</sup> The more significant limitation, however, derives from the fact that invalidating constitutional amendments is an radical judicial measure, which should be reserved for extreme situations.<sup>66</sup> While populist constitutionalism creates the conditions in which it would, arguably, be most justified to apply the unconstitutional-constitutional amendment doctrine, the same conditions may make it especially difficult for courts to do so. A court must enjoy a sound social status in order to be able to invalidate constitutional amendments without repercussions.<sup>67</sup> However, in populist public climate, courts' legitimacy is often undermined, and manifestations of judicial activism may bear a price. As Michaela Hailbronner and David Landau rightly observe, "head-on collisions between courts and populist leaders are likely to end badly for courts".<sup>68</sup> Invalidating constitutional amendments may render a court vulnerable to attacks and to measures that threaten to weaken it. Multiple invalidations may increase this risk, as populist leaders are likely to address them as indication of a need to restrain the court and as an excuse for imposing measures aimed at limiting its authority. While the unconstitutional-constitutional amendment doctrine is an important and potentially effective doctrine for responding to populism, real-politik considerations may limit the situations and the number of times courts can apply it.

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<sup>64</sup> Landau, *supra* note 57, at 234. Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 1002 (2011)

<sup>65</sup> Landau, *supra* note 57, at 217. Landau argues that court practice indicates that the doctrine may not only be under-inclusive, but also over-inclusive, since courts to "to find more and more parts of the constitution to be "basic". *Id.*, at 238.

<sup>66</sup> Gary J. Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1799 (2004)

<sup>67</sup> Andrew Arato notes that "courts will be most successful in opposing populism where they enjoy strong support from civil society initiatives" Arato, Andrew: *Populism and the Courts*, VERFBLOG 2017/4/25, <http://verfassungsblog.de/populism-and-the-courts/>, DOI: <https://dx.doi.org/10.17176/20170425-082356>.

<sup>68</sup> Michaela Hailbronner & David Landau, *Introduction: Constitutional Courts and Populism*, INT'L J. CONST. L. Blog, Apr. 22, 2017, at: <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/>

For the same reasons, my claim that international law should be incorporated into constitutional review does not imply that courts can or should rely on international law in order to invalidate constitutional amendments. Theoretically, supra-national principles can also be relied upon as a source for limiting constitutional amendments, just as they can be relied upon for invalidating contradicting legislation. However, as Yaniv Roznai argues, the doctrine of constitutional unamendability is based primarily on “internal supra-constitutional principles”.<sup>69</sup> Relying on international law in order to invalidate a constitutional change is far from being common practice. Where international law is invoked as a basis for invalidating constitutional amendments, it is because domestic law accords it a preferred status over constitutional law.<sup>70</sup>

I argued above that in a populist climate relying on international law and applying the unconstitutional-constitutional amendment doctrine will each, separately, expose a court to attacks that may ultimately weaken it. Combining the two together increases the odds of such attacks and the repercussions courts may face.

I do not argue, then, that international law should or can be applied in order to supersede populist constitutional law. This implies that domestic referral to international law may not be, in itself, a sufficient measure for responding to laws or constitutional amendments that impose institutional changes, enable court packing or violate human rights so blatantly, that the only way to alleviate the violations is by invalidation. International law may be relevant, however, in responding to either legislation that violates human rights or to more sophisticated, subtle forms of constitutional amendments, that are open to interpretation. Clauses that refer to constitutional identity or fundamental values could be open to such interpretation. For example, the proposed Basic Law: Israel as the Nation State of the Jewish People<sup>71</sup>, has the potential of violating equality as well as other rights of the Arab-Palestinian minority in Israel, including the right to self-determination. Even if the Court does not invalidate it (and it is unlikely that it would, should it pass as a Basic Law), incorporating international human law into the Law’s interpretation could be used by the Court to

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<sup>69</sup> ROZNAI, *supra* note 61, at 100

<sup>70</sup> *Id.* at. 98.

<sup>71</sup> Basic Law: Israel as the Nation State of the Jewish People.  
[www.justice.gov.il/StateIdentity/InformationInEnglish/Documents/BasicLawBill.pdf](http://www.justice.gov.il/StateIdentity/InformationInEnglish/Documents/BasicLawBill.pdf)

minimize such potential violations. Integrating international standards into judicial review as a source of interpretation of domestic norms in such cases may serve as means of mitigating some the harm cause by populist constitutionalism and populist legislation.

The most direct way to incorporate international law into constitutional review would be to apply a “presumption of compatibility” with international law to constitutional norms, interpreting constitutional norms, where possible, in a matter that is compatible with international law. Incorporating international law into the process of constitutional review would allow courts to rely on international human right standards when examining the constitutionality of legislation and when interpreting constitutional amendments. For example, section 2 of the proposed Basic Law: Israel as the Nation State of the Jewish People determines that “The Right of national self-determination in the State of Israel is unique to the Jewish People”<sup>72</sup>. Subjecting the interpretation of this section to international law could ensure that it is not applied in a manner that violates either collective or individual rights of the Arab-Palestinian minority.

Although applying a presumption of compatibility may be the most effective way to incorporate international law into constitutional review, it may not be a viable option when responding to populist lawmaking, considering that it is controversial even in non-populist settings.<sup>73</sup> However, even according international law a more modest role in the process of constitutional interpretation can still be of value in responding to populism. Drawing on Vicki Jackson’s “Engagement Model”<sup>74</sup>, courts may turn to international law for general principles, as an additional source for supporting a decision formally based on domestic values, or as a justification for preferring constitutional interpretations that support human rights over other possible interpretations.

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<sup>72</sup> *Id.*

<sup>73</sup> *Supra* note 32.

<sup>74</sup> Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005)

The constraints described above may raise doubts regarding the ability of domestic application of international law to be an effective instrument in responding to populist attacks on democracy and human rights. I believe that in spite of these constraints, and although incorporation of international law into constitutional interpretation cannot, on its own, remedy such attacks, it can play a meaningful role in courts' response to populism. Populist attacks on democracy and abusive constitutionalism are difficult to tackle because they are built on a combination of mechanisms, each of which, on its own, would not necessarily be problematic. Judicial response to such attacks must also be multilayered. Incorporating international law into constitutional review is but one layer in such response. The role of international law in this regard, and, in particular, of international human rights law, is to perform its traditional role: limit the ability of state to violate human rights<sup>75</sup>, albeit in a more restricted manner than international jurists usually envision.

### *4.2 International law and Pluralism*

The second reason for which incorporating international law into judicial decisions is especially important when populism is on the rise is rooted in the populist rejection of pluralism and the implications a monolithic public discourse has for democracy.

The rejection of pluralism is a main feature of populism.<sup>76</sup> Populists claim to be the sole true representatives of a unitary people. Opponents are labeled as enemies, and competing opinions depicted as illegitimate.<sup>77</sup> Since populists pertain to embody the people's will, public deliberation and debate is not deemed as a necessary part of the process of establishing or revealing such will.<sup>78</sup> Populist rhetoric is based, to a large extent, on a Schmittian friend-enemy distinction. Since those opposing populists' acts and initiatives assume the role of enemies, opposition may end up fueling the polarized

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<sup>75</sup> Benvenisti and Harel, *supra* note 1.

<sup>76</sup> MÜLLER, *supra* note 6. Marc F. Plattner, *Populism, Pluralism and Liberal Democracy*, 21(1) J. DEMOCRACY 81 (2010).

<sup>77</sup> MÜLLER, *supra* note 6, at 101.

<sup>78</sup> David Marquand, *Populism or Pluralism? New Labour and the Constitution, Mishon Lecture*, [http://www.phil.vt.edu/HTML/events/Fall2005\\_gradconf/matusek.pdf](http://www.phil.vt.edu/HTML/events/Fall2005_gradconf/matusek.pdf).

public discourse on which populism thrives. This does not imply, of course, that populists should not be opposed. Rather, it suggests that we should pay attention to this side effect and seek to address it.

The association of pluralism with liberal democracy is widely recognized in the literature. Marc F. Plattner explains that “although the authors of the *Federalist* do not use this word, pluralism would clearly seem to fit the concept of liberal-democratic politics they advocate”.<sup>79</sup> Under Madison’s model, he explains, pluralism is a safeguard against the tyranny of the majority.<sup>80</sup> Pluralism is also a central feature of deliberative theories of democracy.<sup>81</sup> Robert A. Dahl famously argued that “organizational pluralism is ordinarily a concomitant, both cause and effect, of the liberalization and democratization of hegemonic regimes”.<sup>82</sup> The erosion of pluralism is, thus, a step away from democracy towards authoritarian forms of government.

Maintaining an open public discourse which allows for diverse perspectives is essential in enabling pluralism, responding to populism and protecting democracy. Courts can contribute their share, within the limited realm of legal discourse, by consciously including a plurality of perspectives and sources in their judgements. One way of doing so is by referral to comparative and international legal sources.

The goal of referring to international and comparative law, in this regard, is to enhance pluralism by facilitating a discourse in which different perspectives are discussed and presented as legitimate, even if they are, ultimately, not adopted. Various types of engagements with international law can contribute to this goal: courts may use international law in order to interpret constitutional provisions in a manner that limits states’ violations of rights, as discussed above. They may refer to international law in order to strengthen and support a decision based on domestic law, emphasizing the

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<sup>79</sup> Plattner, *supra* note 76, at 89.

<sup>80</sup> *Id.*, The *Federalist* no. 10.

<sup>81</sup> Joshua Cohen lists pluralism as one of the five elements of deliberative democracy. See Joshua Cohen, *Deliberation and Democratic Legitimacy* <http://philosophyfaculty.ucsd.edu/faculty/rarneson/JCOHENDELIBERATIVE%20DEM.pdf>.

<sup>82</sup> Robert A. Dahl, *Pluralism Revisited*, 10(2) *COMPARATIVE POLITICS* 191, 197 (1978)



similarity between the two normative systems. They may also refer to international law in order to reject it and explain the differences between international law and domestic law in a particular case.<sup>83</sup> Jackson emphasized the contribution engagement with comparative and international law can make to the result of judicial decisions. My claim is that, in addition to such contribution, engagement with international law is important because it opens and enriches the legal discourse, enabling the existence of public debate which contains various positions and perspectives. While international law enriches public debate through its own prism, its inclusion in public debate may assist in securing a space in which domestic dissent can also be heard.

It is debatable whether, in regular times, when democracy is not threatened, such educational task is or should be the accorded to the courts. In addition, the claim that referral to international law enhances democracy may appear counterintuitive, considering the controversies regarding the democratic legitimacy of international law itself. Populism, however, threatens democracy in manners in which existing institutions and mechanism struggle to address. When populism is on the rise, facilitating legal pluralism is one way of countering populist capture of the public sphere. Referring to international and comparative legal sources is, thus, a form of resistance to the populist attack on the democratic values.

I argued above that referring to international law in domestic legal decisions may cause friction between courts and the legislator, and now argue that courts should, nonetheless, make conscious efforts to include international law in their decisions. One way of minimizing friction is by integrating international law into less controversial cases, in which the political price for referring to international law is relatively low.

Thus, for example, despite the general shift away from international law in the case law of the Israeli Supreme Court, international law played a central role in a recent

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<sup>83</sup> Jackson suggests that “sources are seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others”, Jackson, *supra* note 74. See also: Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999)

decision of the Israeli Supreme Court regarding the state's duty to provide prison inmates adequate living space.<sup>84</sup> The majority opinion, delivered by Justice Rubinstein upon his retirement from the Court, is based on two pillars: international and comparative law, and Jewish law.

It is perhaps predictable that Justice Rubinstein, who identifies as religious, chose to elaborate on the importance of Jewish law. The extensive referral to international and comparative law, is, however, more surprising. Although the state objected to reliance on international and comparative sources, Rubinstein referred to them extensively, explaining that the referral to international and comparative sources was warranted as the living conditions of inmates raised “a universal question of human dignity”.<sup>85</sup> The decision demonstrates awareness of the public opinion towards international law and addresses such opinion: in referring to the decisions of the Human Rights Committee, for example, Rubinstein explains that the Committee is responsible for the implementation of the ICCPR, and that “this is not the Human Rights Council, known for its discriminatory treatment towards Israel”.<sup>86</sup> This statement can be read as an attempt to convince the decision's audience that the international sources referred to are legitimate.<sup>87</sup>

In many cases, of course, international law cannot be reconciled with other sources, including with domestic law.<sup>88</sup> My claim is not that international law should only be referred to when it coincides with domestic law. Rather, I wish to demonstrate that even under difficult political conditions, courts can find opportunities to introduce international law into their rulings without being sanctioned afterwards.

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<sup>84</sup> HCJ 1892/14 *Association of Civil Rights v. Minister of Internal Security*

<sup>85</sup> *Id.*, para 48.

<sup>86</sup> *Id.* para 51.

<sup>87</sup> It is quite possible that the purpose of the referral to international law in the above-discussed decision is to balance the reliance on Jewish law and make it more palatable to those who object to according it a significant status in Israeli law. This does not change the fact. However, that the decision presents international law as a legitimate legal source which shares values not only with Israeli law but also with Jewish law.

<sup>88</sup> There is always the possibility of applying distorted international law in order to legitimize the state's actions.

## International Law in Domestic Courts in an Era of Populism

One might doubt whether there is any real value in referring to international law under such conditions. I answer in the affirmative. In an environment in which the legitimacy of all norms other than those introduced by populists is undermined, every decision that refers to international law as a legitimate legal source is valuable in breaking the friend-enemy distinction, broadening the scope of legal discourse and enriching public debate by creating and maintaining pluralistic spaces. A rich, pluralistic legal and public discourse dismantles the isolating, alienating discourse promoted by populists. In this regard, incorporating international law into domestic legal rulings is a means of nurturing conditions that allow a variety of perspectives to be debated and, eventually, enable dissent.

International law is but one mean for enhancing and maintaining pluralism, and it is neither a sufficient nor the only mean. Comparative law, for example, can also be an important source for this purpose. International law, however, has two relevant advantages over comparative law. First, in many legal systems, there is a sounder formal basis for referring to international law than for referring to comparative law, either through domestic recognition of international law or through doctrines of interpretation. Even if such doctrines are not regularly applied to constitutional law, they allow the court to anchor its actions in doctrines that already exist in the system, rather than to appear as initiating new doctrines for the purpose of resisting the legislator. Second, despite the controversial status of international law, discussed above, referral to international law, especially if presented as communal law created by all states, may be less controversial than the referral to comparative law, and the political price of relying on it may be, accordingly, lower.

Finally, while I focused in this article on the role of courts in integrating international law into the domestic legal discourse, it is important to note that this discourse is not shaped by courts alone, but also by lawyers, academics and politicians. Even if courts refrain from referring to international law, the other actors can, allegedly, still invoke it. However, if courts ignore international law, the incentive of the other actors, in particularly practitioners, to invest resources in researching international law and developing arguments based on international law is significantly reduced. Over time, the

familiarity of legal actors with international law will diminish, and the process of legal isolation enhanced. Reversing such a process is possible, but would take considerable time and is not easily done. A judicial choice to refrain from referring to international law may thus affect the entire legal eco-system.

#### 4. Conclusion

International law is often delegitimized by populists, who portray it as external, foreign set of norms detached from “the people”. Domestic courts may respond to such claims by reducing their referral to international law, in attempt to shield themselves from criticism, and apply only comparable domestic norms, where available. As the Israeli test case demonstrates, this may result in a significant decline in the status of international law in domestic law, in particular with regards to politicized, highly contested matters. While this response may be understandable, I argue that it is regrettable. International law has an important role in populist times. First, international law can serve as a source for interpreting both constitutional norms and legislation in a manner that minimizes, as much as possible, the harm caused by laws and constitutional changes enacted by populists in power.<sup>89</sup> In addition, incorporation of international law into domestic legal decisions is a way of maintaining pluralism in legal and political discourse and, accordingly, a means for protecting democracy. I argue that courts should be particularly attentive to the latter role of international law in countering populist discourse, and make conscious efforts to include international law in their decisions.

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<sup>89</sup> I focus on the ability of domestic courts to employ international law in responding to populism. For suggestions of how international institutions may respond to populism see: Jan Werner Müller, *Rising to the Challenge of Constitutional Capture*, EUROZINE, March 21, 2014 <http://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/>.

