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When at Loggerheads With Customary International Law: The Right to Run for Public Office and the Right to Vote

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WHEN AT LOGGERHEADS WITH CUSTOMARY INTERNATIONAL LAW: THE RIGHT TO RUN FOR PUBLIC OFFICE AND THE RIGHT TO VOTE

*Thompson Chengeta**

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“Populism, a nightmare state of democracy, can result in electing someone very foolish, or perhaps criminal, or even, perhaps, both.”¹

INTRODUCTION

For many years, scholars have been researching and discussing populism, from its contested definition to how it relates with other norms, such as democracy, constitutionalism, justice systems, human rights, and the media. The debate or discussion over populism has been renewed by the recent populist wave in Europe and America. Populist leaders, like Donald Trump, Julius Malema, Robert Mugabe, Marine Le Pen, and Recep Tayyip Erdogan have all, reported by various media outlets, publicly attacked human rights norms, international law, and international institutions, to an extent that some commentators believe that globalization and the human rights age have come to an end.² In Africa, populist leaders have been advocating for withdrawal from many international law institutions.³ China and Russia have also been attacking international institutions, along with the norms that have ensured world security and peace for decades. In that sense, some scholars observe that the future of international law is not only uncertain because of these developments, but is in fact severely threatened.

As part of what others perceive to be a post-human rights era and an age of populism, demagoguery characterizes the current political landscape across the globe where minorities and those who are perceived to be outsiders are targeted.⁴ For example, during his campaign, President Donald Trump verbally attacked

1. Gökmen Özgür, *Jan-Werner Müller, What Is Populism?* 2 MKTS., GLOBALIZATION & DEV. REV. 1, at 1 (2017) (quoting William Gibson book review).

2. See Kenneth Roth, *The Dangerous Rise of Populism: Global Attacks on Human Rights Values*, 1, 4–5 (2017), in WORLD REPORT 2017, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2017/country-chapters/dangerous-rise-of-populism>.

3. See *African Union Backs Mass Withdrawal From ICC*, BBC NEWS (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>.

4. See *id.*

and undermined migrants, Mexicans, people living with disabilities, and women.⁵ He also openly supported the idea of torturing terror suspects on the mere basis that it works, its prohibition by treaties and customary international law notwithstanding.⁶ Likewise, leaders like Robert Mugabe and Julius Malema have unashamedly taken racist stances in public, referring to white people as “pink noses” and a white journalist as a “thing.”⁷

While this article joins the debate on the challenges posed by the current form of populism to democracy, human rights, constitutionalism, international institutions, and international law in general, the main question that this article seeks to answer is whether electoral laws should give effect to human rights norms that are part of customary international law. Conversely, this article explores whether there is an international obligation on states to exclude from public office candidates who plan to violate such human rights norms.

Part I of this article will provide the definition of populism and discuss the political, economic, social, and cultural factors that have contributed to its rise. It will also assess the media’s contribution to the rise of populism, while noting that there is, in fact, a form of media populism that shapes the political realm where populists thrive. Part II will focus on the impact, or potential impact, of the current form of populism on democracy, human rights, and the international law notion of accountability. Part III will then discuss the relationship between populism and the justice system in areas such as penal law and the question of whether the death penalty should be retained. Finally, Part IV will explore whether there is an international law obligation on states to exclude from public office a populist candidate who promises, or plans to violate, a norm of customary international law, or that which is part of *jus cogens*. This Part will also examine the potential conflict between states international

5. See Roth, *supra* note 2, at 4, 5; Shirin Sinnar, *Human Rights, National Security, and the Role of Lawyers in the Resistance*, 13 STAN. J.C.R. & C.L. 37 (2017).

6. See G.A. Res. 39/46, art. 1, Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (Dec. 10, 1984); *see also* G.A. Res. 2200A (XXI), art. 7, International Covenant on Civil and Political Rights (Dec. 16, 1966).

7. See Sapa-AFP, *Keep Your Pink Nose Out, Mugabe Tells US*, IOL NEWS (July 19, 2013, 06:48AM); eNews Channel, *Julius Malema Insults BBC Journalist*, YOUTUBE (Apr. 8, 2010), <https://www.youtube.com/watch?v=Uj35x73sIVA>.

obligations when dealing with certain populists and their right to participate in an election and the right to vote.

I. DEFINITION, RISE, AND CAUSES OF POPULISM

This Part will discuss the definition of populism that will be used throughout the article. It will also articulate the factors that have influenced its rise in recent years.

A. Definition of Populism

Notwithstanding Francisco Panizza's words that it has become "a cliché to start writing on populism by lamenting the lack of clarity about the concept,"⁸ one must start by mentioning that although there has been an over-use of the term populism—with scholars like Cas Mudde and Cristóbal Kaltwasser recognizing it as "one of the main political buzzwords of the 21st century"⁹—there is no agreed upon definition. Ivan Krastev, a well-known analyst of democracy, has even referred to this as "the age of populism,"¹⁰ where the main political question may as well be "how a liberal democracy can function in an environment in which the elites [are] permanently mistrusted, regardless of what they do or how transparent the mechanisms of governing are."¹¹ Yet, no one can provide a definition of populism that is agreeable to everyone.

In current debates, the definition of populism is further obfuscated where the term is used not only to refer to demagoguery, but also by commentators and politicians for their own convenience.¹² In this sense, Jan-Werner Muller has noted that many times, the term "populism" is loosely used as a "synonym for 'anti-establishment' irrespective, it seems, of any political ideas."¹³ Thus, for example, both Donald Trump and Bernie

8. Francisco Panizza, *Introduction: Populism and the Mirror of Democracy*, in FRANCISCO PANIZZA, POPULISM AND THE MIRROR OF DEMOCRACY 1 (2005).

9. CAS MUDDÉ & CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION 1 (2017).

10. Ivan Krastev, *The Age of Populism: Reflections on the Self-Enmity of Democracy*, 10 EUR. VIEW, at 11, 13 (2011).

11. *Id.*

12. JAN-WERNER MULLER, WHAT IS POPULISM? 1 (2016).

13. *Id.* at 2.

Sanders were referred to as populists during the U.S. presidential election.¹⁴ To those who would immediately protest the categorization of Bernie Sanders as a populist, such a rejection is largely premised on their view that Sanders is a good man. Based on their understanding, a populist is a bad politician—maybe someone like Donald Trump, Robert Mugabe, or Recep Tayyip Erdoğan. Yet, in any democracy where leadership is decided by an election, it may be difficult to decide which politician is populist and which one is not, since every politician aspires to identify with the causes and grievances of the populace, or at least, to sympathize with people from whom he or she expects votes from. These difficulties have led Jan-Werner Muller to ask whether a populist is simply “a successful politician that one doesn’t like.”¹⁵ Similarly, Philippe Schmitter has noted that “to be called a ‘populist’ is to be insulted and, if possible, excluded from ‘respectable’ liberal democratic practice.”¹⁶ It is to no wonder why Cas Mudde has commented that the “term populism is often ascribed to politicians, but seldom claimed by them.”¹⁷

In general, when one thinks of a populist, one thinks of an “emotional” politician who is anti-elitism and establishment.¹⁸ Yet, criticizing the elite, or those who are in power, may constitute a characteristic of a populist, which does not alone qualify one as a populist.¹⁹ For the purposes of this article, populism refers to the politics of leaders who are anti-elites, anti-pluralist, and who hold a firm belief that “they alone represent the people.”²⁰ Due to this belief, anyone who challenges a populist is seen as challenging “the people.”²¹ It is in line with this understanding that the President of Turkey, Recep Tayyip Erdoğan,

14. *Id.*

15. *Id.*

16. Philippe Schmitter, *A Balance Sheet of the Vices and Virtues of Populisms*, 7 ROMANIAN J. POL. SCI. 5 (2007).

17. Cas Mudde, *Are Populists Friends or Foes of Constitutionalism?*, FOUND. L. JUST. & SOC’Y at 1, 2 (2013).

18. MULLER, *supra* note 12, at 2.

19. *Id.*

20. *Id.* at 3.

21. See Jason Burke, *Kenyan Supreme Court Annuls Uhuru Kenyatta Election Victory*, GUARDIAN (Sept. 1, 2017, 12:39 PM), <https://www.theguardian.com/world/2017/sep/01/kenyan-supreme-court-annuls-uhuru-kenyatta-election-victory>.

in challenging his opponents, asked: “[w]e are the people, who are you?”²²

In consideration of some of the abovementioned points, Cas Mudde has defined populism as follow:

[Populism is] an ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, ‘the pure people’ versus ‘the corrupt elite’, and which argues that politics should be an expression of the volonté générale (general will) of the people. Populism, so defined, has two opposites: elitism and pluralism.²³

Many scholars have embraced Mudde’s definition, noting populism as politics of “them versus us,” where the common poor people fight the elite or those perceived as the corrupt elite. Furthermore, while noting the absence of an agreed upon definition of populism, Özgür Gökmen has stated that a consideration of three questions, namely; “Who are the people?” “Who speaks for the people?” “How does populist identification occur?” can be discerned from Cas Mudde’s definition.²⁴ Answers to these three questions show that there is a considerable degree of consensus among scholars regarding what populist politics entail.²⁵ In explaining populist politics in the realm of the above questions, Jan-Werner Müller has noted the following:

[Their] claim to representation [of the people] is not an empirical one; it is always distinctly moral. When running for office, populists portray their political competitors as part of the immoral, corrupt elite; when ruling, they refuse to recognise any opposition as legitimate. The populist logic also implies that whoever does not support populist parties might not be a proper part of *the people*—always defined as the righteous and morally pure. Put simply, populists do not claim ‘we are the 99 percent.’ What they imply instead is ‘we are the 100 percent.’ For populists, this equation always works out: any remainder can be dismissed as immoral and not properly a part of the people

22. Jan-Werner Müller, *Trump, Erdogan, Farage: The AtTRACTIONS of Populism for Politicians, The Dangers of Democracy*, GUARDIAN (Sept. 2, 2016), <https://www.theguardian.com/books/2016/sep/02/trump-erdogan-farage-the-attractions-of-populism-for-politicians-the-dangers-for-democracy>.

23. Cas Mudde, *The Populist Zeitgeist*, 39 GOV’T AND OPPOSITION 541, 543 (2004); *see also* Özgür, *supra* note 1, at 3.

24. Mudde, *supra* note 23, at 543.

25. Özgür, *supra* note 1, at 3.

at all. *That's another way of saying that populism is always a form of identity politics.*²⁶

Such perceptions on who constitutes the people may as well be criticized. The term “the people” in modern day democracies is a plural construct of persons from diverse backgrounds and cultures. The failure of populist leaders to realize this fact presents a problem from the beginning.

In addition to the observation that populism is a form of identity politics, it has been argued elsewhere²⁷ that the current form of populism constitutes a politics of scapegoating. In Europe and America, populists are “quick to identify immigrants, religious minorities, refugees, foreign aid recipients, and the liberal establishment as the problem.”²⁸ In Africa, many African populists point to Western countries, white people, colonialism, and neo-colonialism as the source of their problems, excusing their own failed leadership.²⁹ To some degree, it is true that the current form of populism—especially in the United States—is, in fact, demagoguery. It is to that end that Marcelo Alegre has noted that in 2017, “demagoguery defines the populist approach, with the infantilization of the electorate, the poisoning of public debate, and an obsessive hegemonic ambition.”³⁰

B. Factors Responsible for the Populist Wave

Having provided a definition of populism and an explanation of what it entails, this subpart will briefly discuss some of the factors that have contributed to the rise of populism in recent years. Various scholars have already articulated the causes of

26. MULLER, *supra* note 12, at 3 (emphasis added); *see also* Özgür, *supra* note 1, at 3.

27. Thompson Chengeta, *African Populist Demagoguery, Constitutionalism and Human Rights*, AFR. J. OF COMP. L. 8 (forthcoming 2017); *see also* Schmitter, *supra* note 16, at 6.

28. Stephen Hopgood, *Fascism Rising*, OPEN DEMOCRACY (Nov. 9, 2016), <https://www.opendemocracy.net/openglobalrights/stephen-hopgood/fascism-rising>.

29. *See* HANDBOOK OF INTERNATIONAL DEVELOPMENT AND EDUCATION 398 (Pauline Dixon et al. eds., 2015); JULIAN MORRIS, SUSTAINABLE DEVELOPMENT 59 (2011); GEORGE B.N. AYITTEY, INDIGENOUS AFRICAN INSTITUTIONS 4 (2006).

30. Marcelo Alegre, *Populism and Human Rights: Oil and Water?*, SELA ANNUAL CONFERENCE 3 (2016) (unpublished manuscript), https://law.yale.edu/system/files/area/center/kamel/sela16_alegre_cv_eng.pdf.

populism.³¹ Thomas Greven has noted that an array of political, economic, social, and cultural discontentment has led to the rise of the current wave of populism.³²

Of the economic causes, Pippa Norris and Ronald Inglehart have noted that economic insecurity among certain citizens in America and Europe is contributing to negative populism.³³ Not only are many citizens economically insecure, but they feel socially deprived and left behind in modern economy.³⁴ The so called “left-behinds” or “less secure strata of society”—comprised mostly of unemployed, low-wage, unskilled, generally poor, and uneducated populations—have started to resent political classes and “elite politicians,” whom they believe are not protecting them from the immigrants they blame for unemployment, shrinking opportunities, and scarce resources.³⁵

The abovementioned economic discontentment has led to “the anti-establishment, nativist, and xenophobic scare-mongering exploited by populist movements, parties, and leaders.”³⁶ Essentially, politics has become the struggle of “them” versus “us.”³⁷ The disgruntled citizens find hope in populists and demagogues, who promise to address their economic grievances.³⁸ The appeal of populist leaders to society’s “left-behinds,” in terms of the modern economy and the control of the means of production, has been well captured by Steven Hopgood as follows:

31. See Pippa Norris & Ronald Inglehart, *Trump, Brexit, and the Rise of Populism: Economic Have-Not's and Cultural Backlash* (Harv. Kennedy School Fac. Res. Working Paper Series 2, 2016).

32. Thomas Greven, *The Rise of Right-Wing Populism in Europe and the United States: A Comparative Perspective*, FRIEDRICH-EBERT STIFTUNG 4 (2016), http://www.fesdc.org/fileadmin/user_upload/publications/Rightwing-Populism.pdf.

33. See Norris & Inglehart, *supra* note 31.

34. *Id.* at 2.

35. *Id.*; see also Senem Aydin-Düzgit & Fuat Keyman, *The Trump Presidency and the Rise of Populism in the Global Context*, ISTANBUL POL'Y CTR. 4 (2017), <http://ipc.sabanciuniv.edu/wp-content/uploads/2017/01/The-Trump-Presidency-and-the-Rise-of-Populism-in-the-Global-Context.pdf>.

36. Norris & Inglehart, *supra* note 31; see also Ewen Speed & Russell Mannion, *The Rise of Post-Truth Populism in Pluralist Liberal Democracies: Challenges for Health Policy*, 6 INT'L J. HEALTH POL'Y & MGMT. 249, 250 (2017).

37. Norris & Inglehart, *supra* note 31; see also Panizza, *supra* note 8, at 8; Stephen Coleman & Karen Ross, *The Media and The Public: “Them” and “Us” in Media Discourse*, J. MEDIA & COMM. RES. 177 (2010) (book review).

38. Norris & Inglehart, *supra* note 31.

Is this how it begins? With rage, with the demands of the entitled millions who feel their birth right has been stolen, with those who claim ‘we built this country, we fought its wars, when is it our turn?’ Donald Trump . . . is the standard bearer for an increasingly familiar social coalition, angry white working-class men (and women) with weak formal education and weaker job prospects, along with disaffected white middle-class conservatives, many of them religious, who are furious that they lost the culture wars. We’ve seen this coalition before: it’s a breeding ground for fascism.³⁹

Likewise, Philip Alston, the United Nations Special Rapporteur on extreme poverty and human rights, has noted that the failure of the human rights corpus to effectively champion socio-economic rights with the same rigour as it does civil and political rights has played a role in the creation of the “left-behinds,” from which populists draw their supporters.⁴⁰ It is this “current choice whereby civil and political rights are privileged and economic and social rights are all but ignored [which just] works fine for the elites”⁴¹—the ones that are identified as the enemy by populists and their supporters. Alston notes that the human rights project may have been able to prevent some of the effects of populism if it had been all encompassing to the citizens of the world.⁴² Yet, human rights and its related institutions have largely been understood as only serving the minorities and the disadvantaged, leaving behind those who are perceived to be well-off. In that regard, people like Philip Alston—the elderly white males—are considered to be well-off and not in need of any help. According to Alston, however, “the reality is that the majority in society feel that they have no stake in the human rights enterprise, and that human rights groups really are just working for ‘asylum seekers,’ ‘felons,’ ‘terrorists,’ and the like.”⁴³

In the United States, those who have been feeling left out are likely the ones who voted for Donald Trump.⁴⁴ Thus, within the “left-behinds” spectrum, there are those who are economically

39. Hopgood, *supra* note 28.

40. Norris & Inglehart, *supra* note 31.

41. Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 9 (2017).

42. *Id.* at 4, 6.

43. *Id.* at 6.

44. Ron Dudai, *Human Rights in the Populist Era: Mourn then (Re)Organize*, 9 J. HUM. RTS. PRAC. 16, 19 (2017).

disadvantaged and those who feel human rights is not vigorous enough to vindicate their economic rights, thus tolerating economic powerlessness and oppression, while embracing economic dictators who feel excluded from the human rights project and governmental policies because of the assumption that they do not need any help. Makau Mutua has strongly criticized the human rights doctrine for ignoring economic powerlessness, especially on the African continent, stating that:

Fundamentally, the human rights corpus has no philosophy on money and whether, for example, the creation of a Bill Gates would itself be a violation of human rights norms. In political society, an absolute dictator would be impermissible under human rights norms and contemporary understanding of political democracy. Analogously, Bill Gates is the market equivalent of the political dictator although that is not how he is understood in a political democracy or by the human rights corpus. In fact, Gates is a celebrated and venerated individual, the pinnacle of success in society. Yet the existence of his economic empire, which he holds personally, is a radical perversion of any egalitarian or equitable notions of human dignity. . . . The multiplication of Gates by the number of other obscenely rich individuals and corporate interests yields a graphic over-concentration of power in the hands of a tiny majority. *It is very difficult, if not impossible, to articulate a plausible argument of how a system that permits such vast differences among citizens does not violate basic notions of human dignity.* The corpus must develop a defensible normative project to address economic and social arrangements and systems. . . . *The human rights movement's primary grounding and bias toward civil and political rights—and the impotence and vagueness of economic, social and cultural rights—is one of its major weaknesses . . . [h]uman rights corpus wrongly equates the containment of state despotism with the achievement of human dignity, so that it seeks the construction of a political society in which political tyranny—not economic tyranny—is circumscribed. But in so doing it sidesteps economic powerlessness—the very condition that must be addressed. . . .⁴⁵*

Of course, economic factors are closely related to political factors that have been contributing to the current wave of populism. For example, Peter Hall has observed that the current form

45. See Makau Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, 51 AFR. STUD. REV. 17, 31–32, 34, 35 (2008) (emphasis added).

of populism “has political roots in the convergence of party platforms—no one is listening to us”—essentially, there is no one to tell of economic, political, social, or cultural problems.⁴⁶

Nevertheless, in the political realm, security threats have made it easy for populists to claim that governments are failing to protect their own people.⁴⁷ Human Rights Watch’s Executive Director, Kenneth Roth, has indicated that the current form of populism—in particular, that which is fueled by Islamophobia—is a result of global terrorism, migration, and the influx of refugees.⁴⁸ The fear of terrorists and immigrants has led to “global attacks on human rights.”⁴⁹ Today, the common mantra of demagogues is that human rights norms are essentially a stumbling block for governmental efforts to defend citizens from terrorist threats.⁵⁰ It is in this sense that Philip Alston has also observed that the horrendous September 11th attack on the United States has created “an actual or constructed fear and hatred of foreigners or minorities,”⁵¹ which populist leaders exploit for their own political gain.⁵² After September 11th, many people in the United States, and across the globe, “are now widely convinced that security can only be achieved through making enormous trade-offs, whether in terms of freedom of movement, privacy, non-discrimination norms, or even personal integrity guarantees.”⁵³

46. Peter A. Hall, *Six Theses About Contemporary Populism*, Presentation at the Harvard University GEM Conference 7 (Apr. 19, 2017), https://gem.cid.harvard.edu/files/gem2016/files/hall_blyth_berglof_gem17.pdf.

47. See Roth, *supra* note 2, at 1.

48. *Id.*

49. *Id.*; see also RIKKE ANDREASSEN & KATHRINE VITUS, AFFECTIVITY AND RACE: STUDIES FROM NORDIC CONTEXTS 24 (2016); BENJAMIN MOFFITT, THE GLOBAL RISE OF POPULISM: PERFORMANCE, POLITICAL STYLE, AND REPRESENTATION 127 (2016); MARC ROSENBLUM & DANIEL TICHENOR, THE OXFORD HANDBOOK OF THE POLITICS OF INTERNATIONAL MIGRATION 12 (2012); CHARLES CLARKE, THE EU AND MIGRATION: A CALL FOR ACTION 1, 2 (2011), <http://www.cer.eu/publications/archive/essay/2011/eu-and-migration-call-action>.

50. Roth, *supra* note 2; see also PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS 390 (2013); RUSSELL ONG, CHINA’S SECURITY INTERESTS IN THE POST-COLD WAR ERA 124 (2013).

51. Alston, *supra* note 41, at 4.

52. Norris & Inglehart, *supra* note 31.

53. Alston, *supra* note 41, at 4.

There are also scholars who have explained the rise of current populism in what is termed the “cultural backlash thesis.”⁵⁴ Pippa Norris and Ronald Inglehart have argued that the current populist wave is a reaction by nationalistic citizens against “progressive cultural change.”⁵⁵ They argue that international norms—such as human rights—have resulted in a “silent revolution” that has seen “an intergenerational shift toward post-materialist values, such as cosmopolitanism and multiculturalism.”⁵⁶ In essence, certain privileges, cultural perceptions, and identities have been eroded, causing great discomfort in certain parts of populations.⁵⁷ Those who are disgruntled are, therefore, launching a counter-revolution in the name of populism. It is in the view of that perceived cultural erosion that most of the mantras of populists have “cleansing” connotations or restorative overtones. For example, while President Trump’s mantra was “make America great again,” supporters of Brexit chanted “we want our country back.”⁵⁸ Similar sentiments are present in African populism that are anti-Western, with African populists arguing for “African solutions to African problems.”⁵⁹

There is an obvious overlap of the abovementioned factors. In order to gain the support of the electorate, politicians capitalize on the prejudices of the populace, attacking political leadership that is condemned as corrupt and elitist, while at the same time, encouraging a belief that economic stagnation, crime, and security threats are the effects of migration, which governments are failing to deal with.⁶⁰ All of these issues subsequently play out in the media.

54. Norris & Inglehart, *supra* note 31.

55. *Id.* at 3.

56. *Id.*; see also BRENDON O’CONNOR, A POLITICAL HISTORY OF THE AMERICAN WELFARE SYSTEM: WHEN IDEAS HAVE CONSEQUENCES 159 (2004).

57. Norris & Inglehart, *supra* note 31, at 13–16.

58. MULLER, *supra* note 12, at 38; WILLIAM OUTHWAITE, BREXIT: SOCIOLOGICAL RESPONSES 91 (2017); HARRY MOUNT, SUMMER MADNESS: HOW BREXIT SPLIT THE TORIES, DESTROYED LABOUR AND DIVIDED THE COUNTRY 13 (2017).

59. LEO PANITCH & GREG ALBO, THE POLITICS OF THE RIGHT: SOCIALIST REGISTER 2016, 207 (2015); GUY MARTIN, AFRICAN POLITICAL THOUGHT 8 (2012).

60. EXPOSING THE DEMAGOGUES: RIGHT-WING AND NATIONAL POPULIST PARTIES IN EUROPE 1, 96, 346, 359 (Karsten Grabow & Florian Hartleb eds., 2013).

C. The Role of the Media

The media—in particular, social media—has played a very significant role in the rise of populism.⁶¹ Using case studies from four countries, Sven Engesser and others came to the conclusion that “social media gives the populist actors the freedom to articulate their ideology and spread their messages.”⁶² Through platforms such as Facebook, populists are able to “spread a fragmented ideology” of populism that is presented as the only solution to the disgruntled populace.⁶³

A number of news media outlets have jumped on the populist bandwagon, giving populist leaders much needed media coverage.⁶⁴ Just as much as terrorists use social media to disseminate their propaganda,⁶⁵ populists leaders employ social media for sensationalism, playing on the feelings of their targeted audiences.⁶⁶ More often, populists paint an apocalyptic image, reckoning that if something is not done to unseat current leadership more interested in the rights of terrorists and immigrants than the welfare of its citizens, there will be nothing left for the natives and their children.⁶⁷ In that regard, Cesare Pinelli has argued that in the contemporary era of populism, most citizens experience politics through the eyes and ears of the media, “judging politicians from afar and through distorted lens,” resulting in “disenchantment, even hatred, of politics and politicians.”⁶⁸

61. See MUDDE & KALTWASSER, *supra* note 9, at 114; TORIL AALBERG ET AL., POPULIST POLITICAL COMMUNICATION IN EUROPE 378 (2016); MARIA RANIERI, POPULISM, MEDIA AND EDUCATION: CHALLENGING DISCRIMINATION IN CONTEMPORARY DIGITAL SOCIETIES (2016).

62. Sven Engesser et al., *Populism and Social Media: How Politicians Spread A Fragmented Ideology*, 20 ROUTLEDGE INFO., COMM. & SOC’Y 1, 1 (2016). See generally COUNTERPOINT, SHAPING THE VOTE? POPULISM AND POLITICS IN THE MEDIA (2015), http://counterpoint.uk.com/wp-content/uploads/2015/04/counterpoint_compilation_010415.pdf.

63. Engesser et al., *supra* note 62, at 1.

64. AALBERG ET AL., *supra* note 61.

65. SIDDIK EKICI ET AL., COUNTERING TERRORIST RECRUITMENT IN THE CONTEXT OF ARMED COUNTER-TERRORISM OPERATIONS 89 (2016).

66. MARGARET ROBERTSON & PO TSANG, EVERYDAY KNOWLEDGE, EDUCATION AND SUSTAINABLE FUTURES: TRANSDISCIPLINARY APPROACHES IN THE ASIA-PACIFIC REGION 110 (2016).

67. See generally IMRAN AWAN, ISLAMOPHOBIA IN CYBERSPACE: HATE CRIMES GO VIRAL (2016).

68. Cesare Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 EUR. CONST. L. REV. 5, 7 (2011).

In addition, Gianpietro Mazzoleni has noted that there is a mutual influence between the media and the current form of populism.⁶⁹ In fact, he distinguishes between elite media and populist media. In the realm of media populism, some media outlets “provide sympathetic coverage to neo-populist movements,” where they focus on the “personality traits of political actors, on entertainment values, or on the details of conflicts, rather at the level of gossip, than at the level of serious analysis.”⁷⁰ This approach to populism, and its manner of reporting, has helped the populist agenda capture the attention of those who may have needed just a little persuasion to join the populist cause.

While it is true that the media cannot ignore what is newsworthy, the populistic media treats as most newsworthy those populists who are “defying the existing order, their abrasive language, their public protests, and the emotive issues brandished by charismatic leaders.”⁷¹ In some cases, even the mainstream media covers such news intentionally or unintentionally, giving populist leaders much needed media coverage. One of the major problems with repeated coverage is that it normalizes what society may have already rejected as bigotry. Populists are also given a platform to attack the mainstream media that criticizes them. Such media is condemned as “elitist” or what Donald Trump has dubbed “fake news.”⁷² In that regard, Alexandra Wilts has observed that President Donald Trump is “systematically trying to delegitimize the news as an institution because they won’t cover him the way he wants to be covered.”⁷³ The actions of Donald Trump are deliberate, as “he’s actively provoking

69. See Gianpietro Mazzoleni, *Media e populismo: Alleati o nemici?*, UNIVERSITÀ DEGLI STUDI 1 (Working Papers del Dipartimento di Milano, No. 4, 2004), http://www.sociol.unimi.it/papers/2004-3-3_Gianpietro%20Mazzoleni.pdf; see also Nicole Ernst, *Understanding Media Populism: An International and Intermedia Comparison*, NCCR DEMOCRACY 5 (2014), http://www.nccr-democracy.uzh.ch/intranet/doctoral_program/main/academic-program/compulsory-program-1/research-colloquium-1/papers-to-be-presented-18-september/ernst_nicole.pdf/.

70. Mazzoleni, *supra* note 69.

71. *Id.*

72. Haley Britzky, *Everything Trump Has Called “FAKE NEWS,”* AXIOS (July 9, 2017), <https://www.axios.com/the-outlets-and-topics-trump-deems-fake-news-2449858042.html>.

73. Alexandra Wilts, *Trump Calling Stories He Doesn’t Like ‘Fake News’ is Akin to State-Run Media*, INDEP. (Aug. 10, 2017, 2:59 PM), <http://www.inde->

people to distrust the news, to distrust information that doesn't come from him. This is what demagogues and despots do."⁷⁴ Likewise, during his time in power, Robert Mugabe victimized all media houses⁷⁵ that did not support his propaganda, while only tolerating those which painted him as the Messiah of Zimbabwe.⁷⁶

It can be argued, however, that while the media plays, or continues to play, a role in the rise of populism, the contribution of the media is dependent on several factors, such as whether the targeted audience already agrees with the position or statements by populists which, in most instances, are characterized by bigotry.

II. POPULISM AND HUMAN RIGHTS

Having discussed some of the factors contributing to the rise of populism and the role played by the media, this Part will discuss the implication of populism on democracy, human rights, and constitutionalism. Of course, the reason for considering the impact of populism on democracy is premised on the old argument that democracy is one of the preconditions for the enjoyment of human rights.⁷⁷

A. Populism, Liberal Democracy, and Human Rights

Many scholars have written on the impact of populism on liberal democracy. The question of whether populism can be reconciled with liberal democracy appears to be paradoxical because, in any democracy, the idea of appealing to the popular will and protecting their interests is not unimaginable. After all, a politician's popularity in his or her constituency is a precondition of

pendent.co.uk/news/world/americas/us-politics/donald-trump-fake-news-face-book-real-news-state-run-tom-rosenstiel-american-press-institute-a7886671.html.

74. *Id.*

75. See *Zim Court Scraps Daily News Ban*, MAIL & GUARDIAN, (Mar. 14, 2005, 12:59 PM), <https://mg.co.za/article/2005-03-14-zim-court-scraps-daily-news-ban>.

76. See FRANCIS MACHINGURA, THE MESSIANIC FEEDING OF THE MASSES: AN ANALYSIS OF JOHN 6 IN THE CONTEXT OF MESSIANIC LEADERSHIP IN POST-COLONIAL ZIMBABWE 220 (2012).

77. See U.K. FOREIGN & COMMONWEALTH OFF, HUMAN RIGHTS AND DEMOCRACY: THE 2011 FOREIGN AND COMMONWEALTH OFFICE REPORT 118 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35439/hrd-report-2011.pdf.

him or her winning elections. It is in that sense that Felix Onyiego, in his defence of Tanzanian President, John Magufuli, who was “accused” of being a populist, argued that “Magufuli is not a populist but simply a popular president.”⁷⁸

While there may be no agreement on the definition of populism, most scholars commenting on the subject agree that populism, especially in its current form, is “a ‘democratic disorder,’ a ‘pathology of democracy,’ and a ‘paranoid style of politics.’”⁷⁹ Before explaining further why populist politics is hard—if not impossible—to reconcile with liberal democracy, it is worthwhile to start by noting the views of scholars like Philippe Schmitter, who argue that there are some virtues of populism which are in the interest of democracy.⁸⁰ For example, he claims that since populists draw their “support across or with disregard for the lines of cleavage that are embodied in existing political formations,”⁸¹ it means that they can do away with sclerotic partisanship and disintegrate collusive party systems that are not good for liberal democracy.⁸² Furthermore, because populists appeal to neglected issues and grievances of the “left-behinds,” they have a potential of getting the “aloof citizens” to participate in the electoral process—which is essential for any democracy.⁸³ For that reason, Cristóbal Rovira Kaltwasser has suggested further empirical investigations into populism, on the basis that populism may turn out to be corrective to democracy.⁸⁴

Now that populism can find its roots in the democracy theory, Ivan Krastev has described the current form of populism as “the self-enmity of democracy.”⁸⁵ It is for that stronger reason that launching a critique against a populist leader is not always easy, unless the leader patently engages in bigotry and demagoguery. In explaining populism as an enemy of democracy that attacks from within, Jan-Werner Muller has commented as follows:

78. Felix Onyiego, *Magufuli Not a Populist But Simply a Popular President*, DAILY NATION (Oct. 23, 2016), <http://www.nation.co.ke/oped/Letters/Magufuli-not-a-populist-but-simply-a-popular-president/440806-3426540-12vnt8t/>.

79. Mudde, *supra* note 17, at 3.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. See generally MUDDE & KALTWASSER, *supra* note 9.

85. Krastev, *supra* note 10, at 11.

The danger to democracy today is not some comprehensive ideology that systematically denies democratic ideals. The danger is populism—a degraded form of democracy that promises to make good on democracy's highest ideals ('let the people rule!'). The danger comes, in other words, from within the democratic world—the political actors posing the danger speak the language of democratic values.⁸⁶

One of the main reasons why the current form of populism cannot be reconciled with democracy is that it is “an exclusionary form of identity politics” that is opposed to the fundamental tenets of democracy that “requires pluralism and the recognition that we need to find fair terms of living together as free, equal, but also irreducibly diverse citizens.”⁸⁷ Thus, in view of the divisive nature of populist politics, Peter Hall has argued that it “undermines the tolerance and solidarity essential for well-functioning democracy.”⁸⁸

There is no doubt that democracy thrives when there is a representative system that guarantees the rights of both the majority and the minority. Yet, populist politics may not accommodate or function well within representative systems. To this end, it has long been observed that representative systems are necessary for their purposes of protecting citizens from “temporary errors and delusions [that are] stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, [who] may call for measures which they themselves will afterwards be the most ready to lament and condemn.”⁸⁹ To balance the interests of the majority and those of the minority, liberal democracy is characterized by majoritarian and non-majoritarian institutions—for example, elected members of parliament and non-elected judges in the judiciary.⁹⁰ Yet, “populists claim that Parliament is the sole legitimate authority to be obeyed in a democracy” and, as such, “attack non-majoritarian institutions on the ground of their lack of democratic legitimacy.”⁹¹ It is along these lines that Kenya’s President, Uhuru Kenyatta stated, after the Supreme Court of Kenya

86. MULLER, *supra* note 12, at 6.

87. *Id.* at 3.

88. Hall, *supra* note 46, at 9.

89. See DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY 192 (1996).

90. DANIELA PREDA & DANIELE PASQUINUCCI, THE ROAD EUROPE TRAVELED ALONG: THE EVOLUTION OF THE EEC/EU INSTITUTIONS AND POLICIES 295 (2010).

91. Pinelli, *supra* note 68, at 15.

annulled the 2017 presidential elections on the grounds that there were electoral irregularities: “I disagree with it [the Supreme Court decision] because, as I have said, millions of Kenyans queued, made their choice and six people, [the judges], have decided that they will go against the will of the people.”⁹²

The development and refinement of liberal democracy has seen the emergence and strengthening of certain political procedures and limitations that are essential in governance. Yet, as observed by Paul Blokker, populists consider the proceduralism of liberal democracy to be not only cumbersome and artificial, but also a constraint on the true political will of the people.⁹³ In fact, as indicated by Nadia Urbinati, populists prefer unmediated relations between leaders and the citizens.⁹⁴ In arguing that democracy cannot survive under populist governments, Marcelo Alegre notes that populism is characterized by an “exacerbation of personalistic leaderships [and] dynastic governments seeking to perpetuate in power.”⁹⁵ Along the same lines, it has been noted that in populist politics, the populist leader is in a way “the people,” since the grievances and unfulfilled demands of the group that identifies itself as “the people” crystallise “around the name of popular leaders.”⁹⁶ In most cases, such populistic governments are characterized by official propaganda that demonizes opposition and discourages criticism of the government, ultimately undermining the tenets of constitutional democracy.⁹⁷ The kind of populism that produces eternal leaders is most evident in Africa, where it has destroyed many democracies with leaders like Robert Mugabe, who ruled for more than thirty-seven years.

It is not surprising, therefore, that Patricia Chiantera-Stutte has concluded that populism is “a political style which aims at

92. Felix Njini & Michael Cohen, *Kenyan Court Nullifies President Kenyatta's Election Victory*, BLOOMBERG POLITICS (Sept. 1, 2017), <https://www.bloomberg.com/news/articles/2017-09-01/kenya-s-top-court-nullifies-president-kenyatta-s-election-win> <https://www.bloomberg.com/news/articles/2017-09-01/kenya-s-top-court-nullifies-president-kenyatta-s-election-win>.

93. Paul Blokker, *Populist Constitutionalism*, I-CONNECT (May 4, 2017), <http://www.iconnectblog.com/2017/05/populist-constitutionalism/>.

94. Nadia Urbinati, *Democracy and Populism*, 5 CONSTELLATIONS 110, 116 (1998).

95. Alegre, *supra* note 30.

96. See ERNESTO LACLAU, ON POPULIST REASON 192 (2005).

97. Alegre, *supra* note 30, at 4.

attacking the centre of the democratic system.”⁹⁸ If populism cannot be reconciled with democracy, it is likely that it cannot be in the interests of human rights. Vijay Nagaraj has indicated that when considering the relationship between human rights, international human rights law, and its institutions, one has to ask: “What have populist approaches to human rights cost us?”⁹⁹ That question may be easily answered by considering Philip Alston’s comment in relation to the current form of populism in America and Europe, which he characterizes as “nationalistic, xenophobic, misogynistic, and explicitly antagonistic to all or much of the human rights agenda.”¹⁰⁰ Along the same lines, Kenneth Roth has noted that populist demagogues paint a picture of human rights as stumbling blocks to the efforts of the government to protect its own citizens.¹⁰¹

From the beginning, a consideration of the above views makes one agree with Steven Hopgood, who argues that it is impossible to reconcile populism and human rights.¹⁰² In the age of populism, democracy is embattled, and in such a battle, “human rights are too compromised by their association with the very liberal elite—exactly the elite that the Putin/Trump/Brexit coalition hates—to be a principal mobilizing banner.”¹⁰³ For many populists, and their supporters across the globe, “human rights are a shell game pushed by cosmopolitan liberals to steal the nation away from its legitimate, mainly white, heirs.”¹⁰⁴ In the United States, some supporters of Donald Trump argue that “human rights were not heralds of a new era of fair shares for all but a way to steal the inheritance of real Americans.”¹⁰⁵ Thus,

98. Patricia Chiantera-Stutte, *Populist Use of Memory and Constitutionalism: Two Comments*, 6 GERMAN L.J. 391, 392 (2005); see also Margaret Canovan, *Taking Politics to the People: Populism as the Ideology of Democracy*, in DEMOCRACIES AND THE POPULIST CHALLENGE 25 (Yves Surel & Yves Mény eds., 2000); Yves Surel, *The Constitutive Ambiguity of Populism*, in DEMOCRACIES AND THE POPULIST CHALLENGE 1 (Yves Surel & Yves Mény eds., 2000).

99. Vijay Nagaraj, *Human Rights and Populism: Some More Questions in Response to Philip Alston*, 9, J. HUM. RTS. PRAC. 22, 23 (2017).

100. Alston, *supra* note 41, at 1–2.

101. Roth, *supra* note 2.

102. Hopgood, *supra* note 28.

103. *Id.*

104. *Id.*

105. *Id.*

in the view of many populists, it is no wonder why Marcelo Alegre has indicated that the relationship between the current form of populism and human rights is similar to oil and water.¹⁰⁶

Theoretically, populism threatens the following four aspects of the foundations of human rights, namely: that human rights are individualistic and universal, that human rights limit state sovereignty, that human rights are part of a global moral-political movement, and that human rights have their foundation in the equal dignity of every human being.¹⁰⁷ The naturalistic view that human rights are inherent to all human beings encompasses the idea that human rights are individualistic and universal—concepts that can easily clash with some aspects of populistic politics.¹⁰⁸ Human rights notions of individualism and universalism demand the recognition and protection of persons in their individual capacity as humans who are worthy.¹⁰⁹

Yet, contrary to the idea that human rights ought to protect each person in his or her own right, populism “assigns moral status to supra-individual entities, as the people, the nation, the class, the race, etc.”¹¹⁰ Thus, in view of the fact that “populism rests on a holistic vision, which revolves around the concept of people,” it is likely that protection of persons in their individual capacity will diminish, or has already been diminishing, with the election of populist leaders into power.¹¹¹ Furthermore, most populistic sentiments challenge the universalistic nature of human rights in favor of relativism, a notion that threatens minority rights, like those of the LGBTI communities.¹¹² It is in that sense that Csaba Sándor Tabajdi has noted that “minority groups are particularly endangered by extremism and populism

106. Alegre, *supra* note 30.

107. *Id.* at 12–25.

108. *Id.* at 13; REIS A. MONTERO, ETHICS OF HUMAN RIGHTS 389 (2014).

109. See WILLY MOKA-MUBELO, RECONCILING LAW AND MORALITY IN HUMAN RIGHTS DISCOURSE: BEYOND THE HABERMASIAN ACCOUNT OF HUMAN RIGHTS 122 (2016).

110. Alegre, *supra* note 30, at 13. See also B.M. Oomen, *A Serious Case of Strasbourg-Bashing: An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands*, 20 INT'L J. HUM. RTS. 407 (2016).

111. Alegre, *supra* note 30, at 19.

112. HUM. RTS. WATCH, WORLD REPORT 2013: EVENTS OF 2012, 28 (2013), https://www.hrw.org/sites/default/files/wr2013_web.pdf.

because of their strongly nationalist, chauvinist, and xenophobic character.”¹¹³

With regards to the question of whether populism can be reconciled with the view that human rights has its roots in respecting the equal dignity of every human being,¹¹⁴ it may be that these two concepts are irreconcilable. It is hard, if not impossible, to reconcile aspects of populism—those that categorize people into the “real moral people” and the immoral—who by all intentions and purposes, are not “people.” For many populist leaders, the fact that someone is an immigrant, is not a national, is of another religion, or even of a different opinion, presents a ground to deny that person equal dignity. Human dignity, as understood in international human rights law, refers to “the humanity of a person,” a “humanity [which] expresses the conception of a person as an end and rejects viewing her as a mere means.”¹¹⁵ When populists scapegoat sexual minorities, immigrants, people of color, and others, they see them as a mere means to gaining political power. This is against human dignity, which has long served as the framework of society.¹¹⁶ It is in that sense that Aharon Barak has emphasized that the right to dignity must be understood as an important right, stating that it is “a framework right and a mother right,” and all the other rights are “daughter rights that gather together under its wings.”¹¹⁷

While various scholars have written on dignity as the foundation of human rights,¹¹⁸ Aharon Barak goes further, arguing that dignity is the foundation of society.¹¹⁹ Following some historical catastrophes—some of which are similar in nature to the current

113. Csaba Sándor Tabajdi, *Minorities and Populism*, in DEMOCRACY, POPULISM AND MINORITY RIGHTS 94 (Hannes Swoboda & Jan Marinus Wiersma eds., 2008).

114. See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 191, 147 (2011); John Tasioulas, *Towards a Philosophy of Human Rights* 65 CURRENT LEGAL PROBS. 7 (2012).

115. AHARON BARAK, HUMAN DIGNITY xxiv (2015).

116. *Id.*

117. *Id.* at 156, 160, 252.

118. See generally EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 25 (2002); JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS 13–47 (Meir Dan-Cohen ed. 2012); MICHAEL J. MEYER & WILLIAM A. PARENT, THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 2 (Michael J. Meyer & William A. Parent eds., 1992); CHRISTOPHER McCRUDDEN, UNDERSTANDING HUMAN DIGNITY (2013).

119. See BARAK, *supra* note 115, at 104–105.

tide of populism—there has been “a constitutionalization of human dignity as a value or as a right.”¹²⁰ Not only is dignity understood as a social value representing positive aspects of man, such as respect, glory and honour,¹²¹ but it is also underpinned by morals and ethics of humanity.¹²² When it comes to morals, ethics, and humanity, populism is hollow.

Many constitutions across the globe contain the right to dignity¹²³ or its constitutional value, which is understood to be broader than the right to dignity itself.¹²⁴ In many countries, human dignity is used for constitutional interpretation, where the interpretation that is in line with human dignity is always preferred.¹²⁵ Likewise, as a foundation of all other rights, human dignity is a source of limitation to other rights.¹²⁶ In that sense, all other rights are protected for the purposes of furthering the protection of human dignity.¹²⁷ This would mean that in circumstances where dignity clashes with other rights, it is the preservation of human dignity that takes precedence.¹²⁸ Yet, populism does not give way to any notion that is short of the will of the

120. *Id.*

121. See Drucilla Cornell, *Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence*, 2008 ACTA JURIDICA 18 (2008); BARAK, *supra* note 115, at 3.

122. BARAK, *supra* note 115, at 5; BETRAM MORRIS, *THE DIGNITY OF MAN* 57 (1946); Abraham Edel, *Humanist Ethics and the Meaning of Human Dignity*, in *MORAL PROBLEMS IN CONTEMPORARY SOCIETY: ESSAYS IN HUMANISTIC ETHICS* 227, 233 (Paul Kurtz ed., 1969); Rachel Bayefsky, *Dignity, Honour, and Human Rights: Kant's Perspective*, 41 *POLITICAL THEORY* 809 (2013); Thomas W. Platt, *Human Dignity and the Conflict of Rights*, 2 *IDEALISTIC STUD.* 174 (1972); Jeff Malpas, *Human Dignity and Human Being*, in *PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION* 19 (Jeff Malpas & Norelle Lickiss eds., 2007); Paulo C. Carbonari, *Human Dignity as a Basic Concept of Ethics and Human Rights*, in *DIGNITY AND HUMAN RIGHTS: THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 35 (Berma K. Goldewijk et al. eds., 2002).

123. See, e.g., GRUNGESETZ [GG] [BASIC LAW], *translation* at http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.); BARAK, *supra* note 115, at 12.

124. BARAK, *supra* note 115, at 13.

125. *See id.* at 69.

126. *Id.* at 11.

127. ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* 18 (2013).

128. ROBERT ALEXY & JULIAN RIVERS, *A THEORY OF CONSTITUTIONAL RIGHTS* 63, 64 (Julian Rivers trans., 2002).

people. The characterization of populism with bigotry and attacks on other people's dignity, therefore, erodes human rights from its core.

With developments in international human rights law, state sovereignty has become understood as including the duty of the state to protect the rights of its citizens.¹²⁹ If a state fails to do so—or engages in the violation of such rights—other states can refuse to respect the sovereignty of that state and intervene to protect the victims.¹³⁰ Some commentators regard this approach as the “global scope” of human rights, where “the violation of human rights is sufficient cause for legitimate mobilization on a global scale.”¹³¹ This notion has seen the emergence of norms such as the Responsibility to Protect.¹³² Yet, populists have strong views on nationalism and share strong sentiments against intervention into other states’ politics or their own. It is in that sense that Marcelo Alegre has noted that the growth in populism will see a “systematic reaffirmation of the principle of non-interference,” which will result in “a weakened notion about the scope of the international system of protection of human rights.”¹³³

Most of the aforementioned arguments, which postulate that populism is a threat to human rights, are more directly applicable to civil and political rights. What of socioeconomic rights? Does populism pose the same threat? Now that it has been indicated above that one of the reasons explaining the rise to power of many populist leaders and governments is their promise to remedy the economic grievances of citizens, one would expect that the policies of populist governments are friendly to socioeconomic rights. This, however, may not be the case. During campaigns, many populists claim that they will implement a redistributive policy on the means of production. Case studies in Africa and Latin America have shown that such a redistributive claim does not materialize into any meaningful achievement once populists get into power.¹³⁴ For example, the populist dicta-

129. DAN KUWALI, THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(H) INTERVENTION 86 (2011).

130. *Id.*

131. Alegre, *supra* note 30, at 14.

132. Kuwali, *supra* note 129, at 86.

133. Alegre, *supra* note 30, at 19.

134. *Id.* at 6.

tor, President Robert Mugabe, promised economic glory to justify most of his policies that interfered with citizens' rights.¹³⁵ In 2000, when his ZANU PF government invaded and seized white farms without compensation, he claimed that he was acting in the name of the people of Zimbabwe, and that such farms would benefit the general populace.¹³⁶ One of Robert Mugabe's main arguments was that white farmers—the ones viewed as the "elite" in the African populism equation—were owning too many farms per person.¹³⁷ He therefore invaded the farms, claiming that he would implement a fair "land redistribution programme."¹³⁸ Seventeen years later, most of the farms that were seized now belong to Mugabe, his friends, and senior ZANU PF officials, some of whom own more than ten farms.¹³⁹

Julias Malema, the leader of a political party in South Africa, the Economic Freedom Fighters (EFF), has made it clear that he emulates Robert Mugabe, insofar as redistribution of land from the white minority to the black majority is concerned.¹⁴⁰ In the Preamble of the Founding Manifesto of the EFF, it is made clear that the objective of the EFF is to "locate the struggle for economic emancipation within the long resistance of South Africans to racist colonial and imperialist, political, economic, and social domination."¹⁴¹ The EFF clearly identifies itself as "a radical, leftist, anti-capitalist and anti-imperialist movement with an internationalist outlook anchored by popular grassroots formations and struggles," aimed at the reclaiming of natural re-

135. See generally CHARLES LAURIE & STEPHEN CHAN, THE LAND REFORM DECEPTION: POLITICAL OPPORTUNISM IN ZIMBABWE'S LAND SEIZURE ERA (2016).

136. See generally *id.*

137. See generally *id.*

138. See generally *id.*

139. Grace Machoko, *Land Reform Programme—The Truth*, CONTINENTAL NEWS NETWORK (July 31, 2011), <https://allnewsnetwork.wordpress.com/2011/07/31/2036/>; see also CHARLES LAURIE & STEPHEN CHAN, THE LAND REFORM DECEPTION: POLITICAL OPPORTUNISM IN ZIMBABWE'S LAND SEIZURE ERA 2–3 (2016).

140. See Ngwako Modjadji, *Juju Vows to Follow Mugabe's Policies*, CITIZEN (Feb. 8, 2013, 5:00 AM), <https://citizen.co.za/news/south-africa/10439/juju-vows-to-followmugabes-policies/>.

141. *Founding Manifesto*, ECON. FREEDOM FIGHTERS, pml. (2013), http://docs.wix-static.com/ugd/35f96d_57165ce79697410490666379d53f2c04.pdf www.effonline.org/eff-founding-manifesto.

sources, such as land and mines from white people, without compensation.¹⁴² While there are justifications in a land reform program or economic redistribution in South Africa, the challenge, just in Zimbabwe and anywhere else, is not only that in the hands of a populist leader—one who does not respect any constitutional constraints—minority rights are at the mercy of the majority, but also that populist leaders seldom deliver on their promises of economic emancipation.¹⁴³ As in the case of Robert Mugabe, many can only “emancipate” their own pockets.¹⁴⁴

In the same regard, Donald Trump has failed on his campaign promise to “drain the swamp” of corrupt American elites. U.S. Senator, Elizabeth Warren, has commented as follows on Donald Trump’s promise:

He promised to shake up our corrupt political system, right?

After all, when President Elect announced his campaign, he called out the politicians who are controlled fully by lobbyists, by the donors and by the ‘special interests.’ He promised that he will ‘drain the swamp’ in Washington DC. [After he got elected], big surprise! Trump is not ‘draining the swamp,’ nope. He is inviting the biggest, ugliest ‘swamp monsters’ in the front door and he is turning them loose on our government and on our economy.¹⁴⁵

In light of the above, if populists cannot guarantee or ensure the enjoyment of socioeconomic rights that they have promised, then “the reduction in the content and scope of civil and political rights that populism proposes seem[s] to be gratuitous, nothing more than a useless sacrifice.”¹⁴⁶ It becomes senseless to “accept a regimen with less freedom without minimum guarantees—which populism cannot offer—[where there is no] advance in economic justice.”¹⁴⁷ When populists fail to uphold these promises

142. *Id.* ¶ 26.

143. See Max du Preez, *Mugabe No Hero of Africa*, IOL NEWS (Sept. 2, 2014, 7:39 AM), <https://www.iol.co.za/pretoria-news/opinion/mugabe-no-hero-of-africa-1744350>.

144. *Id.*

145. See Reflect, *Elizabeth Warren DESTROYS Trump’s “Drain the Swamp” Lie*, YOUTUBE (Nov. 17, 2016), <https://www.youtube.com/watch?v=r1jV7Q6Ff7A>; OFFS. OF SENATORS ELIZABETH WARREN & SHELDON WHITEHOUSE, PRESIDENT TRUMP’S DRAIN THE SWAMP REPORT CARD (2017), https://www.warren.senate.gov/files/documents/2017_07_20_Trump_Drain_the_Swamp_Report_Card.pdf.

146. Alegre, *supra* note 30, at 6.

147. *Id.*

and do not respect human rights or democracy, the question then becomes whether or not they can be held accountable. Can constitutionalism's checks and balances act as a bulwark against the excesses of populist leaders?

B. Populism, Accountability, Constitutionalism, Checks and Balances

Accountability and responsibility are not only important in governance, but also in international law. Where leaders refuse to be accountable or take responsibility for their failures or infractions of the law, in this case, violations of human rights, the law becomes nothing but the proverbial *brutum fulmen*—a harmless thunderbolt.¹⁴⁸ Steven Ratner has correctly noted that the purpose of law, both at the domestic and international level, is “not only in setting standards for governments, non-state actors and their agents, [but also in] prescrib[ing] the consequences of a failure to meet those standards.”¹⁴⁹ Human rights norms and standards are meaningless if leaders refuse to abide by them or simply ignore them.¹⁵⁰ Accountability and responsibility of populist leaders is fundamental because it is inherently connected to the victim’s right to a remedy.¹⁵¹ It is a settled norm of international human rights law that victims of violations have a right to a remedy.¹⁵² The state has a corresponding duty to provide victims with remedies.¹⁵³

Now that populists believe that they represent “the people” in whatever decisions they make, or that, in fact, they are the embodiment of “the people,” the idea of being above the law, especially the laws that are considered to lack democratic legitimacy derived from “the people,” resonates with many populists. It is

148. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 47 (2009).

149. STEVEN RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBURG LEGACY 3 (2009).

150. ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 292, 293 (2009).

151. *Id.*

152. *Id.*

153. See INT'L L. COMM’N., DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, art. 5 (2001), http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; U.N. Human Rights Comm., *General Comment No. 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, ¶ 8 (May 26, 2004).

difficult, therefore, to demand accountability or responsibility based on international law or international human rights norms that some of the populists consider to be foreign and immoral. The attitude of some populist leaders, that of not respecting international human rights law, international institutions of accountability, and enforcement mechanisms, is not only a threat to the rights of citizens within the borders of a country concerned, but is also a menace to the maintenance of peace and security at the international level and across the globe.¹⁵⁴

There are scholars who have written on the relationship between populism and various facets of constitutionalism and accountability. The whole or main idea behind constitutionalism is “the idea of legal constraint of coercive state power.”¹⁵⁵ In this regard, the constitution as the supreme law of the land, plays a fundamental rule. Yet, the idea that ultimate power and authority is derived from the constitution may not sit well with many populists, whose view is that nothing is more important, or can supersede, the general will of the people.¹⁵⁶ Cas Mudde notes that “populism is an extreme form of majoritarianism” that cannot be reconciled with “constitutionalism [which] limits both popular sovereignty and majority rule.”¹⁵⁷ Most populists in power refuse the inclusion of minority rights in constitutions based on majoritarianism, and they seek to use constitutions to limit powers of non-majoritarian institutions.¹⁵⁸ Cas Mudde has also described the relationship between populists, constitutions, and constitutional judges as opportunistic.¹⁵⁹ Where the constitution supports their viewpoints, they embrace it; where it does not, it is condemned as a product of the corrupt elite.¹⁶⁰ Of course, the question may be what happens when a populist leader does not have a problem with a constitution? Does it mean that in those circumstances, the populist leader can respect the constitution and by extension, some forms of constitutionalism?

154. See JOHN JONES & STEVEN POWLES, INTERNATIONAL CRIMINAL PRACTICE 2 (2003).

155. See Mudde, *supra* note 17, at 4.

156. *Id.* at 1.

157. *Id.*

158. See *id.* at 1.

159. See *id.* at 14.

160. *Id.*

As noted by Cristóbal Rovira Kaltwasser, the fact that a populist leader does not have a problem with the provisions of a certain constitution does not mean that the populist leader will respect it or agree to be held responsible for its provisions.¹⁶¹ For example, populists may object to unelected bodies, such as the judiciary or supranational institutions, interpreting the constitution and holding them accountable.¹⁶² In this sense, populist leaders heavily criticize judicial interpretation of constitutions. Likewise, when constitutional judges rule in their favor, populists praise them as standing for the people, when they do not, they are condemned as agents of the elites, subverting the will of the people. As previously mentioned, the recent comments from President Kenyatta, following the Supreme Court of Kenya's decision on the validity of the 2017 Kenyan elections, are telling in this regard.

Theoretically, when one takes into consideration that many constitutions across the globe start with the phrase "we the people," and are supposedly "an expression of the people's views and values," one could potentially argue that many constitutions are populist or potentially populist.¹⁶³ Yet, studies carried out by scholars like Mila Versteeg have shown that "the world's constitutions are not meaningfully supported by the people they represent and that the global practice of constitution-making can be characterized as an exercise in unpopular constitutionalism."¹⁶⁴ Constitutions, one would note, are largely influenced by international norms that have been accepted by civilized nations.¹⁶⁵ In protest of international norms' influence on constitutions, Versteeg notes that populist leaders can make or amend constitutions to "serve as unique and defining statements of national ideals and popular values," and in the process, "flout universal human rights norms or well-established principles of constitutional design."¹⁶⁶ Thus, in fact, constitutionalism and its norms are

161. Cristóbal R. Kaltwasser, *Populism vs. Constitutionalism? Comparative Perspectives on Contemporary Western Europe, Latin America, and the United States*, FOUND. L., JUST. & SOC'Y 6 (2013).

162. *Id.*

163. Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L. J. 1133, 1133 (2014).

164. *Id.*

165. JOANNE WALLIS, *CONSTITUTION MAKING DURING STATE BUILDING* 50–51 (2014).

166. Versteeg, *supra* note 163.

largely shaped by international norms and universal right norms—the universality of which populists denounce.¹⁶⁷

With this obvious conflict of ideology and perception, can constitutionalism's checks and balances, such as courts, act as a bulwark against populists? While Tjitske Akkerman has noted that there is "reason to be concerned about the pressures that populist parties put on constitutional checks and balances,"¹⁶⁸ Peter Hall has boldly stated that "populist leaders dismantle the checks and balances on which liberal democracy depends."¹⁶⁹ Populists firmly believe that all legislative power belongs to the people or to parliament who are elected by "the people," and as such, "balancing power via non-elected judges, for instance, is therefore contrary to populist principle."¹⁷⁰ As a result, most populist leaders do not respect the principle of separation of powers between the executive, judiciary, and legislature. In its 2017 Report, the Council of Europe asked whether checks and balances in Member States are strong enough to counter the challenges posed by populism.¹⁷¹ The answer given in the study report is non-affirmative, noting, among other things, that "national judiciaries [are] open to political influence [by populists] and fuelling public perceptions of interference in the judicial process and bias among individual judges."¹⁷² To the same effect, Marcelo Alegre notes that populist politics "weaken controls on the state, whether the judiciary or other regulatory agencies, including international controls, with the attendant risk to the protection of human rights."¹⁷³

With these challenges notwithstanding, some commentators have expressed hope that courts—especially constitutional courts—might act as a bulwark against populists' excesses.¹⁷⁴ In this regard, one can refer to the decision of the Ninth Circuit,

167. WALLIS, *supra* note 165.

168. Tjitske Akkerman, *Populism and Democracy: Challenge or Pathology?*, 38 ACTA POL. 147, 155 (2003).

169. Hall, *supra* note 46, at 9.

170. Akkerman, *supra* note 168.

171. See Thorbjørn Jagland, *State of Democracy, Human Rights and the Rule of Law Populism—How Strong are Europe's Checks and Balances?*, COE 7 (2017), <https://www.coe.int/en/web/portal/-/populism-how-strong-are-europe-s-checks-and-balances->.

172. *See id.*

173. Alegre, *supra* note 30, at 1.

174. See Alon Harel, *Courts in a Populist World*, VERFASSUNGSBLOG (Apr. 27, 2017), <http://verfassungsblog.de/courts-in-a-populist-world/>.

which set aside President Donald Trump's ban on nationals from certain Muslim countries traveling to the United States.¹⁷⁵ In this sense, courts are seen as rising "above the disputes which divide the public"¹⁷⁶ and refraining from "descending into the arena of public debate,"¹⁷⁷ not concerning themselves with whether their "ruling will be applauded by some of the public and utterly or vehemently rejected by others."¹⁷⁸ It is in the same vein that the Supreme Court of Israel observed that a judge "must avoid market-ethic pragmatism" where he or she is influenced by "distorted views rampant in society."¹⁷⁹ In warning against judges being influenced by populist influences, one court observed that "[o]ur legal education, our judicial experience and our faith in the law give us composure even, in the midst of the turbulent mood which surrounds us. We are guided by principles and fundamental values, not transient spirits of the times."¹⁸⁰

Nevertheless, Juan Gonzalez has argued that in an era of populism, if courts confront populist leaders head-on, they will probably lose.¹⁸¹ There are many examples of courts which have been dismantled or judges who have been reshuffled after ruling against certain leaders. The Southern African Development Community Tribunal (SADC) is a good example of a regional court that was victimized for going against African populist sentiments.¹⁸² After failing to find local remedies in Zimbabwe, white farmers, who were deprived of land through unconstitutional means, approached the then SADC tribunal seeking a

175. See *Washington v. Trump*, 847 F.3d 1151, (9th Cir. 2017); *R v. Secretary of State* [2017] UKSC 5, [2016] NIQB 85, <https://www.supremecourt.uk/cases/docs/uksc-2016-0196-judgment.pdf>; *Democratic Alliance v. Min of Int. Relations & Others*, 2017 (3) SA 212 (GP) (S. Afr.), No. 83145/2016.

176. HCJ 390/79, *Duwekat v. Government of Israel*, 47(4) 210 (1993) (Isr.), HCJ 390/79.

177. *Id.*

178. *Id.*

179. *Swissa v. Attorney General*, (1994) Isr. SC 48(2) 749 (1994) (Isr.).

180. *Zarzevsky v. The Prime Minister*, HCJ 1635/90.

181. Juan Gonzalez, *Working Well is the Best Strategy: Judges Under Populism*, VERFASSUNGSBLOG.DE (May 3, 2017), <http://verfassungsblog.de/working-well-is-the-best-strategy-judges-under-populism/>.

182. See generally Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. QUARTERLY 870 (2013).

remedy.¹⁸³ The SADC tribunal ruled in favor of the white farmers.¹⁸⁴ The SADC tribunal was condemned by Robert Mugabe and other African leaders as a racist court that was perpetuating neo-colonialism to the detriment of black Africans.¹⁸⁵ As a result, the court was dismantled by the SADC leaders.¹⁸⁶

Likewise, Uhuru Kenyatta, after the Supreme Court of Kenya recently ruled against him, argued that the Court was subverting the “will of the people,” and that he was going to “fix” the Court.¹⁸⁷ President Kenyatta’s statements also reinforce the argument that populists undermine courts and judges because they are not elected and, as such, their exercise of power is illegitimate. Addressing a rally after the 2017 Kenyan presidential election had been annulled by the Kenyan Supreme Court, President Uhuru Kenyatta stated that, “[w]e shall revisit this thing. We clearly have a problem. Who even election you? Were you? We have a problem and we must fix it.”¹⁸⁸ If Kenyatta wins the forthcoming election, it is likely that the judges who decided the case will face political pressure from Kenyatta’s government. Thus, while there is no doubt that courts have a role to play as far as restraining populist leaders, they can also become victims of the machinations of populist regimes.

It is also worthwhile to note some of the comments from Ron Dudai. He argues that the current wave of populism is not necessarily the prime “cause of the current sense of crisis for human rights.”¹⁸⁹ Rather, he argues that populism has only brought to the forefront longer and wider trends that have been weakening human rights.¹⁹⁰ In support of Dudai’s argument, Vijay Nagaraj

183. See Precious N. Ndlovu, *Campbell v Republic of Zimbabwe: A Moment of Truth for The SADC Tribunal*, 1 S.A.D.C. L.J. 63 (2011).

184. See generally Nathan, *supra* note 182.

185. See Peter Fabricus, *Selfish JZ Allowed Mugabe to Kill SADC Tribunal*, IOL News (March 3, 2012, 2:22 PM), <https://www.iol.co.za/news/africa/selfish-jz-allowed-mugabe-to-kill-sadc-tribunal-1479714>.

186. See generally Nathan, *supra* note 182.

187. See *Kenya Election: Kenyatta Vows to ‘Fix’ Court as Win Quashed*, BBC (Sept. 2, 2017), <http://www.bbc.com/news/world-africa-41136478>.

188. See *Kenya President Says Problem With Judiciary Must Be Fixed, Vows to “Revisit” After New Election*, REUTERS (Sept. 2, 2017, 7:18 AM), <https://af.reuters.com/article/commoditiesNews/idAFL8N1LJ0AR?feedType=RSS&feedName=kenyaNews>.

189. Dudai, *supra* note 44, at 17.

190. *Id.*

notes that one of such factors weakening the human rights project is the selective accountability for human rights violations across the globe, and the attempt of the human rights project to cover everything.¹⁹¹ In the same vein, Dudai notes as follows:

Human rights are not just under direct attack from [populists]: the human rights currency was exposed as insufficient to purchase many goods; it transpired that many do not respect this currency; some started using other currencies which appear stronger in gaining these goods; the value of the human rights currency was diminished by over-printing; and the trust in it has been reduced by what appear to be too many counterfeit human rights currencies being circulated by its opponents.¹⁹²

Of course, the limitation of the above argument is that there is no specification for which “rights” the “human rights currency” is not supposed to buy. In general, there is no principled argument why the human rights spectrum should not be widened, as long as what is covered falls within human entitlements or rights.

III. POPULISM, NATIONAL, AND THE INTERNATIONAL JUSTICE SYSTEM

Outside democracy, constitutionalism, and human rights, populism also interrelates and plays a visible role with national and international justice. There is also literature—albeit scant—discussing the impact of populism on the justice system, in particular, criminal justice systems, both at the domestic and international level. Justice systems intersect with, and play an important role in themes such as accountability, protection of human rights, and constitutionalism.¹⁹³ Populism in other aspects of life, such as the criminal justice system, is even thought to have heralded the current form of populism being witnessed today.¹⁹⁴ In their discussion of penal populism, John Pratt and Michelle Miao posit that “penal populism should be understood as only a convenient incubating phase in which populist forces

191. Nagaraj, *supra* note 99, at 22–23.

192. Dudai, *supra* note 44, at 18.

193. ANTHONY AMATRUDO & LESLIE WILLIAM BLAKE, HUMAN RIGHTS AND THE CRIMINAL JUSTICE SYSTEM 2 (2014).

194. John Pratt & Michelle Miao, *Penal Populism: The End of Reason*, CRIMINOLOGY COLLECTIVE 2 (2017), <https://www.criminologycollective.nz/wp-content/uploads/2017/02/Penal-Populism-End-of-reason-2017.pdf>.

found vigour and strength before flowing much deeper into mainstream society from that gestation.”¹⁹⁵ To that end, “penal populism was only a warning of the much greater chaos that was to come when populism was fully unleashed.”¹⁹⁶

It is common in populist campaigns to hear the mantra “I will get tough on crime.”¹⁹⁷ President Donald Trump repeatedly talked of America as being infested by undocumented immigrants who are committing crimes, promising to deal with them.¹⁹⁸ Likewise, in his campaign, President Rodrigo Duterte of the Philippines promised “to rid the country of crime and drugs by killing thousands of criminals.”¹⁹⁹ It is in that sense that Will Jennings and others have referred to penal populism as the politicization of crime by populists and their parties.²⁰⁰

The fundamental question, however, is whether populist sentiments influence the justice system in a positive or negative manner. It is a common cause that public punitive opinion influences populist policy, as far as criminalization and incarceration are concerned. What is worrisome, however, as noted by John Pratt and Michelle Miao, is that when penal populism succeeds, it “undermines the very kernel on which modern punishment has been built: the way in which, from the time of the enlightenment, science, rationality and expert knowledge were expected to outweigh emotive, uninformed common-sense, thereby ensuring that reason outweighed anti-reason in the development of penal policy.”²⁰¹ The result of that, for example, is the imposition of long prison terms that are not supported by scientific reasons for the purpose of punishment.²⁰²

195. *Id.*

196. *Id.* at 2.

197. Mike Hough, *Populism and Punitive Penal Policy*, 49 CRIM. JUST. MATTERS, at 4 (2002).

198. See *Promises about Immigration on Trump-O-Meter*, POLITIFACT, <http://www.politifact.com/truth-o-meter/promises/trumpometer/subjects/immigration/> (last visited Mar. 23, 2018).

199. See Adrian Chen, *When a Populist Demagogue Takes Power*, NEW YORKER (Nov. 21, 2016), <https://www.newyorker.com/magazine/2016/11/21/when-a-populist-demagogue-takes-power>.

200. WILL JENNINGS ET AL., PENAL POPULISM AND THE PUBLIC THERMOSTAT: CRIME, PUBLIC PUNITIVENESS AND PUBLIC POLICY, CARDIFF.AC.UK (2016), <http://sites.cardiff.ac.uk/epop2015/files/2016/02/Penal-Populism-and-the-Public-Thermostat-Crime-Public-Punitiveness-and-Public-Policy-Will-Jennings.pdf>.

201. Pratt & Miao, *supra* note 194, at 2.

202. *Id.*

One of the areas where penal populism has been playing an influential role relates to the place of capital punishment in modern society. Regardless of lack of conclusive evidence that the death penalty has any deterrent effect, penal populism has ensured the retaining of the death penalty in many penal systems across the globe.²⁰³ For example, in China, Michelle Miao has noted that “as an instrument for the authorities to govern the country in the name of the people, capital punishment functions as a tool for political struggles.”²⁰⁴ The Chinese government imposes the death penalty for certain crimes in a bid to meet Chinese people’s demands for justice, revenge, and equality, all while enhancing its political legitimacy in the process. In that regard, “the death penalty serves as a populist mechanism to strengthen the resilience of the authoritarian party-state by venting public anxiety and resentment towards social problems.”²⁰⁵ Therefore, to gain popularity and power, populists are “tapping into the public’s seemingly punitive stance on crime for their own electoral advantage, by manipulating this with extravagant promises about what more punishment will achieve,”²⁰⁶ while at the same time criticizing the perceived “elite political class,” who are seen as protecting criminals at the expense of the citizens.

The above narrative is correct in relation to counter-terrorism laws, especially those related to interrogation and rights of terror-suspects. It is in the realm of penal populism that President Rodrigo Duterte of the Philippines promised to be tough on crime, even if it meant violating the right to life.²⁰⁷ Likewise, Donald Trump promised his supporters that he would approve torture of terror-suspects, even if it meant offending *jus cogens* norms, regardless of the plethora of expert opinion that torture does not work.²⁰⁸ In this regard, the value of expert opinions and

203. *See id.*

204. Michelle Miao, *Capital Punishment in China: A Populist Instrument of Social Governance*, 17 THEORETICAL CRIMINOLOGY 233, 233 (2013).

205. *Id.*

206. Pratt & Miao, *supra* note 194, at 8.

207. *See* Chen, *supra* note 199.

208. Stephanie Boland, *Memo to President Donald Trump: Torture Doesn't Work*, NEW STATEMAN (2017), <http://www.newstatesman.com/politics/uk/2017/01/memo-president-donald-trump-torture-doesn-t-work>; John Bohannon, *Scientists to Trump: Torture Doesn't Work*, SCIENCE MAG. (2017), <http://www.sciencemag.org/news/2017/01/scientists-trump-torture-doesn-t-work>.

international norms on the criminal justice system is not only distrusted, but is viewed as another form of elitism that should be met with outrage and derision.²⁰⁹

Although not limited to the criminal justice system, some scholars have also discussed what is termed judicial populism. While courts may act as a bulwark against populists, it may also be that courts negatively influence the justice system, especially where courts choose to embrace populism.²¹⁰ Judges may be influenced by public opinion and may be worried more about personal reputation than institutional reputation.²¹¹ Some judges may have political interests or may want to ride with the popular wave, where they are praised as heroes. Thus, in relation to the right to non-discrimination on the grounds of sexual orientation, one Israeli court noted that the case was to be “decided on the basis of the accepted social outlooks.”²¹²

Populism can also be seen as influencing and affecting the International Criminal Court (ICC), especially the attitude towards one of the leading institutions of international criminal law. Notwithstanding various attempts made by scholars and organizations to dismantle and debunk the view that the ICC is targeting African states,²¹³ populist African leaders and the African Union (AU) continue to peddle the idea that the ICC is an arm of neo-imperialism.²¹⁴ The AU has passed resolutions asking African states not to cooperate with the ICC.²¹⁵ A number of African states have formally noted their intention to withdraw

209. Pratt & Miao, *supra* note 194, at 9.

210. Or Bassok, *The Supreme Court at the Bar of Public Opinion Polls*, 23 CONSTELLATIONS 573, 573 (2016), <https://philpapers.org/rec/BASTSC-3>.

211. *See generally* BAUM LAWRENCE, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOUR (2009).

212. HCJ 721/94 *El Al Israeli Airlines Ltd. v Danilovich*, PD 749 (1994) (Isr.).

213. *See* SOUTHERN AFRICA LITIGATION CENTRE, INTERNATIONAL CRIMINAL JUSTICE AND AFRICA THE STATE OF SOUTHERN AFR. LITIG. CTR., PLAY (2016), <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/International-Criminal-Justice-and-Africa.pdf>.

214. *Id.*; *see also*, PIERRE HAZAN & SARAH DE STADELHOFEN, JUDGING WAR, JUDGING HISTORY: BEHIND TRUTH AND RECONCILIATION 161 (2010).

215. *See* African Union, Assembly/AU/Dec.296(XV), Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/10(XV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/10(XV) (2010).

from the ICC.²¹⁶ It is in this sense that Evelyn Ankumah has described a “populist pessimist movement that just condemns and opposes the ICC and its role in Africa.”²¹⁷ Nevertheless, although there are many scholars who are of the view that populism exerts negative influence on the justice system, both at the national and international level, there are other scholars, like Julia Quilter, who argue that in certain circumstances, populism plays a positive role.²¹⁸ She argues that, “populism can produce forms of citizen engagement in the criminal justice context that are new and progressive.”²¹⁹ To make this point, she used the 2012 Australian case study of the killing of Thomas Kelly in Sydney.²²⁰ In that particular case, “a populist campaign powerfully realigned political allegiance to call for, and achieve, real and enduring action from the New South Wales Government in addressing alcohol-related violence.”²²¹

While there is literature discussing the relationship or impact of populism on many disciplines and fields, such as democracy, human rights, constitutionalism, international criminal law, and the media, there is no substantial literature discussing populist policies that are contrary to customary international law and the duties of states in that respect. There are, however, populist policies that do in fact contradict international law obligations.

IV. POPULISM AND CUSTOMARY INTERNATIONAL LAW

As indicated above, during his campaign, Donald Trump promised his supporters that he would approve waterboarding or torture for terror suspects. He particularly noted as follows:

216. The states that have indicated their intent to leave the ICC include South Africa, Burundi, and Gambia, while countries such as Nigeria and Cameroon are opposing. Emmanuel Igunza, *See African Union Backs Mass Withdrawal from ICC*, BBC News (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-38826073>.

217. African Legal Aid (AFLA), *THE INTERNATIONAL CRIMINAL COURT AND AFRICA: ONE DECADE ON*, at xi (Evelyn Ankumah ed., 2016).

218. Julia Quilter, *Populism and Criminal Justice Policy: An Australian Case Study of Non-Punitive Responses to Alcohol-Related Violence*, 48 AUSTL. & N.Z. J. CRIMINOLOGY, 24, 25 (2015).

219. *Id.*

220. *See Thomas Kelly Died From Fall After Punch*, ABC NEWS (July 15, 2012, 6:32 PM), <http://www.abc.net.au/news/2012-07-16/thomas-kelly-died-from-fall-after-punch/4132088>.

221. Quilter, *supra* note 218.

They said what do you think of waterboarding? I said I like it a lot but I don't think it is tough enough. You have to fight fire with fire. Would I approve waterboarding? You bet your ass I would approve it, in a heartbeat. And don't tell me torture doesn't work, torture works.²²²

The main discussion in this Part will relate to a state's international law obligations when faced with a populist demagogue who promises to violate norms of customary international law and those part of *jus cogens*. It will start, however, by commenting on whether the current form of populism not only means the end of the human rights age, but also the importance of international law as contemplated by some scholars.

Before that discussion, however, it is interesting to note that when one questions why the United States did not disqualify Donald Trump from the presidential race on the basis of his promises to violate human rights and norms of *jus cogens*, the reply from some commentators is that what Donald Trump and other populists say during campaigns is just rhetoric. Once in power, however, populist leaders will not make good on their promises—and even if they want to, existing checks and balances cannot allow them—and as such, no harm is done. To that, Jan-Werner Muller has responded as follows:

Populists can govern as populists. This goes against the conventional wisdom which holds that populists protest parties cancel themselves out once they win election . . . populists governance exhibits three features: attempts to hijack the state apparatus, corruption and 'mass clientelism' (trading material benefits or bureaucratic favours for political support by citizens who become the populist clients); and efforts systematically to suppress civil society.²²³

Having already discussed the limitations of checks and balances, for some norms of *jus cogens*, such as prohibition of torture, it may not matter whether the actual torture is carried out in the future, as the threat of torture itself is prohibited.

The question then becomes, is the exclusion of such populist leaders the only effective solution? If so, is such exclusion sanctioned in international law, or better still, does it exist as an in-

222. MSNBC, *Donald Trump Says Torture 'Absolutely Works.'* YOUTUBE (Jan. 26, 2017), <https://www.youtube.com/watch?v=UIGqktVKtNA>.

223. MULLER, *supra* note 12, at 4.

ternational obligation on states? From the beginning, it is interesting to note Jan-Werner Muller's argument that "excluding populists from debate altogether (is not) a viable option since it simply responds to the populist will to exclusion by excluding the populist."²²⁴ Muller's approach is supported by Philippe Schmitter, who also argues that "any effort to exclude them [populists] from competition would be worse than the damage they could potentially produce."²²⁵

Of course, Muller and Schmitter's arguments are grounded in politics and the idea that participation in political debates is essential for any liberal democracy.²²⁶ This article, however, makes arguments in the confines of the law, particularly customary international law.

A. Does Populism End the Importance of International Law and the Human Rights Era?

Do the challenges posed by the current wave of populism to human rights and the continued disrespect of international law mean that international law has lost its lustre and that we should abandon it? It is of course inevitable to have this discussion because customary international law, the main subject of this Part, is included in international law. Not only have scholars suggested that we are currently facing "the end-times of human rights"²²⁷ or that we should find other tools to fight populism outside the human rights framework,²²⁸ but that general norms of international law are losing their importance in the populist age.²²⁹

According to Steven Hopgood, "what seemed like a dawn is in fact a sunset,"²³⁰ as "the foundations of universal liberal norms

224. *Id.* at 4.

225. Schmitter, *supra* note 16, at 10.

226. AJUME H. WINGO, *VEIL POLITICS IN LIBERAL DEMOCRATIC STATES* 19 (Cambridge Univ. Press, 2003).

227. See Hopgood, *supra* note 28; STEVEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 1 (2015).

228. Samuel Moyn, *Trump and the Limits of Human Rights*, OPEN DEMOCRACY (Nov. 14, 2016), <https://www.opendemocracy.net/openglobalrights/samuel-moyn/trump-and-limits-of-human-rights>.

229. HOPGOOD, *supra* note 227, at 1; see also Hopgood, *supra* note 28.

230. *Id.*; HOPGOOD, *supra* note 227.

and global governance are crumbling.”²³¹ With President Trump’s victory, Hopgood even suggests that “human rights activists should devote themselves to the morass of domestic politics, not international law and norms.”²³² To the same effect, Ingrid Wuerth has noted that we are “already in the post-human rights era of international law, meaning that the enforcement and expansion of human rights through binding international law will decline.”²³³ Wuerth even appears to give up on international law’s usefulness in human rights protection, reckoning that “a turn away from using international law to promote human rights—whether or not the first best choice in an ideal world—creates an opportunity to strengthen other vitally important norms of international law.”²³⁴ Hopgood has explained that international law is losing its position on the global scale because of the prevalence of unremedied human rights violations across the globe, the failures of the ICC, failure of the international norm of Responsibility to Protect in various countries, and the recent election of populist demagogues like Donald Trump, which he views as “the latest pieces of evidence not of transient misfortunes but of fatal structural defects in international humanism.”²³⁵ Eric Posner, on the other hand, has argued that the “denigration” of international law and disintegration of rules-based international order is due to “populist backlash around the world [that] has targeted international law and legal institutions”²³⁶ on the basis that “international law is a device used by global elites to dominate policymaking and benefit themselves at the expense of the common people.”²³⁷ According to Posner, in the face of the current wave of populism, the idea of one world under international law, international institutions, and secular human rights, is evading humanity.²³⁸

231. *Id.*

232. *Id.*

233. Ingrid Wuerth, *International Law in the Age of Trump: A Post-Human Rights Agenda*, LAWFARE (Nov. 14, 2016), <https://www.lawfareblog.com/international-law-age-trump-post-human-rights-agenda>.

234. Wuerth, *supra* note 233.

235. HOPGOOD, *supra* note 227, at 1.

236. Eric Posner, *Liberal Internationalism and the Populist Backlash* 1 (U. Chi. Law Sch. Pub. Law and Legal Theory Working Paper No. 606, 2017), <https://ssrn.com/abstract=2898357>.

237. *Id.*

238. *Id.*

In noting its position on the challenges that are posed by populism to the “rules-based international order,” the U.K. government has also expressed “concerns about globali[z]ation; and pushback from other countries at the United Nations (UN) against the International Criminal Court, and against concepts such as the Responsibility to Protect [and] human rights norms.”²³⁹ It emphasized that such rules have provided the bedrock of security for many countries, including the United Kingdom.²⁴⁰ Such security is threatened by the current wave of populism. International law and order also face threats from states that seek to expand their global power. Ulrich Speck argued that populist leaders who are leading ‘revisionist’ powers, like China and Russia, not only want to change international politics, but also the international legal order, which they consider to be skewed against them. He argues that for Beijing and Moscow, the current international system, in its current form, is unacceptable.²⁴¹ He notes as follows:

Both China and Russia would like to see the authoritarian system they have built at home mirrored in international relations: an internationalised ‘power vertical,’ to borrow a Putinist concept, in which strong countries command and the weak obey. Small countries such as Vietnam or the Philippines have to accept that China demands primacy in the South China Sea; Russia’s neighbours such as Ukraine have to accept orders from Moscow. The idea of international order they have in mind is multipolar, not multilateral: instead of a system built on the idea of equality of states, they want a hierarchical order dominated by a few major states. The liberal order, based on the consensus between largely sovereign, equal states, is standing in the way of their designs.²⁴²

There is no doubt that populism presents challenges to international law in general. This does not mean, however, that the international community should give up on international law.

239. See Gov’t of the U.K., *Populism and Nationalism: Implications for the International Order*, (2017) House of Lords 17/02, 3 (Jan. 12, 2017), <http://researchbriefings.files.parliament.uk/documents/LLN-2017-0002/LLN-2017-0002.pdf>.

240. *Id.*

241. See Ulrich Speck, *The Crisis of Liberal Order*, AM. INTEREST (Sept. 12, 2016), <https://www.the-american-interest.com/2016/09/12/the-crisis-of-liberal-order/>.

242. *Id.*

Arch Puddington and Tyler Roylance have already warned that “when universal values and international law are cast aside, global affairs are governed by force.”²⁴³ It is crucial, therefore, to emphasize the importance of international law in all of this.

Finally, it is interesting to note that when scholars postulate that the “force” of international law is no more, that we are in a post-human rights era or that the human rights age is over, they presuppose that there has been a golden age of human rights or that international law has never faced challenges in the past. Such presuppositions cannot be further from the truth. For example, the human rights project has always faced catastrophes and challenges, from horrendous genocides to egregious crimes against humanity, where thousands, if not millions, of innocent children, women, and men were slaughtered. It is in this light that Ron Dudai criticizes the view that the human rights age in the United States ended with the election of populist leader Donald Trump. In that regard, he observes as follows:

While we’ll undoubtedly miss the Obama Administration, it was the one to make Guantanamo permanent, to expand the unaccountable international assassinations programme, and to ultimately stand idly by as the greatest catastrophe of our generation—the horrors of Syria—unfolds. . . . In short, there never was a human rights golden age which Trump et al. are now ending.²⁴⁴

Of course, while one agrees with Dudai, it is also important to note that the rise of populist demagogues in Western democracies, like the United States, is a cause of serious concern when one considers that in the past, Western democracies—albeit their weaknesses as pointed out by Dudai—have not only been exemplary to many governments across the globe, but have acted as a counterweight against dictators by exercising pushbacks against the excesses of the said dictators.²⁴⁵ It is in this regard that Philip Alston notes that with the rise of populist demagogues in Europe and America, “the prospect of effective pushback in the future is now evaporating before our eyes.”²⁴⁶ In

243. Arch Puddington & Tyler Roylance, *Populists and Autocrats: The Dual Threat to Global Democracy*, FREEDOM HOUSE 25 (2017), https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf.

244. Dudai, *supra* note 44, at 16–17.

245. Alston, *supra* note 41, at 3.

246. *Id.*

other words, international law is missing states that have been, to some degree, participating in the enforcement of international norms. As further discussed by Alston, what is important in all these discussions is not to give up on the basic principles of international law and human rights.²⁴⁷

B. “Speaking Freely” Against Customary International Law Norms

Donald Trump freely expressed that he supports torture and that he would approve its use on terror suspects, regardless of the fact that prohibition of torture is not only part of customary international law, but *jus cogens*.²⁴⁸ There is no doubt that freedom of expression plays a critical role during elections. Of course, it is paradoxical to talk about populists’ freedom of expression, as Marcelo Alegre has noted that, “populist governments often restrict freedom of expression, raising the costs of being in the opposition.”²⁴⁹ Politicians—and everyone else—should be free to discuss their ideas and visions, even if doing so challenges the constitutional framework of their country. A line, however, must be drawn. Should a candidate for public office be allowed to attack democratic principles and human rights norms, especially those that are part of customary international law, all in the name of freedom of expression? Did the United States violate its international obligation by allowing Donald Trump to run for public office after he promised to violate a norm of customary international law?

Every state party to the Convention Against Torture (CAT) has an obligation to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.”²⁵⁰ In terms of the CAT, “no exceptional circumstances whatsoever” can justify torture.²⁵¹ As such, the prohibition of torture is an absolute and non-derogable

247. *Id.* at 2.

248. THOMAS WEATHERALL, JUS COGENS, INTERNATIONAL LAW AND SOCIAL CONTRACT 235 (2015).

249. Alegre, *supra* note 30, at 1.

250. G.A. Res. 39/46, *supra* note 6.

251. *Id.*

right.²⁵² Steven Greer has explained the importance of the prohibition of torture and the rationale behind its absoluteness as follows:

The view that there can be no exception to the right not to be tortured is based on the moral assumption that torture is inherently, and self-evidently, the worst violation of human dignity and autonomy, the worst kind of subordination, objectification, and forced self-betrayal of or by the defenceless, and the worst kind of harm or suffering capable of being inflicted upon anyone including killing them.²⁵³

Thus, President Donald Trump's suggestion that the United States needs "to fight fire with fire," particularly terrorism, cannot justify acts of torture or threats of torture.²⁵⁴ There must always be a remedy for victims of torture,²⁵⁵ and those responsible must be punished.²⁵⁶ While President Donald Trump clearly promised to revive torture in the United States, no sanctions were imposed on him. In many cases, courts have held that a threat of torture can amount to torture, since the prohibition of torture covers both physical pain and mental suffering.²⁵⁷ For example, the Inter-American Court of Human Rights observed

252. See G.A. Res. 217 (III) A, art. 5, Universal Declaration of Human Rights (Dec. 10, 1948); Eur. Ct. H.R., European Convention on Human Rights art. 3, November 4, 1950, E.T.S. 005 [hereinafter ECHR]; G.A. Res. 2200A (XXI), *supra* note 6, at 175; African Charter on Human and Peoples' Rights art. 5, Oct. 21, 1986, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf; Inter-Am. Comm'n H.R., Inter-American Convention on Human Rights art. 5(2), Nov. 22, 1969, 9 I.L.M. 673 (1970). See also General Comment Number 20, Committee of the Red Cross on Civil and Political Rights ¶ 3; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 3(1)(a), Aug. 12, 1949, 75 U.N.T.S. 287.

253. Steven Greer, *Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International Human Rights Law?*, 15 HUM. RTS. L. REV. 101, 107 (2015); see also Sumner B. Twiss, *Torture, Justification, and Human Rights: Toward an Absolute Proscription*, 29 HUM. RTS. Q. 346, 365 (2007); Cheryln Chang, *The Absolute Prohibition on Torture: Extra-Legal Action and Ex Post Ratification*, UCL JURIS. REV. 27, 28–31 (2007).

254. MSNBC, *supra* note 222.

255. Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535, 1546–51 (2009).

256. Gäfgen v. Germany, App. No. 22978/05, 2010 Eur. Ct. H.R. 25, 35, ¶¶ 123–124.

257. See *id.* at 28; see also CCPR, General Comment No. 20, art. 7; Greer, *supra* note 253; Rep. of the Committee Against Torture, 90, U.N. Doc. A/45/44, at 3 (1990).

that threatening a person with torture causes moral anguish, which may amount to psychological torture.²⁵⁸ Torture is even a crime against humanity and a war crime during armed conflict,²⁵⁹ which shows just how serious it is. It does not matter whether a candidate for public office will make good on his or her promise to violate a norm of customary international law. Just in as much as inchoate crimes like incitement to genocide are punishable,²⁶⁰ a promise or plan by a presidential candidate to violate a *jus cogens* norm is sufficient to disqualify them from a presidential race.²⁶¹

As already noted, the prohibition of torture is part of customary international law and is a norm of *jus cogens*.²⁶² Without doubt, “there exist today universal revulsion against torture”²⁶³ and “the prohibition against torture imposes on states obligations *erga omnes*, that is, obligations owed towards all other members of the international community.”²⁶⁴ In the case of *Prosecutor v. Furundzija*, the court commented on the prohibition of torture as follows: “Because the importance of the values it protects, this principle has evolved into a peremptory norm or *jus*

258. See *Baldeón-García v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), no. 147, ¶ 119 (Apr. 6, 2006); *Maritza Urrutia v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 92 (Nov. 27, 2003); *Tibi v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) no.7, ¶ 47 (Sept. 7, 2004); *see also* *Soering v. Uruguay*, Comm. No. 74/1980, U.N. Doc., 7 July 1989, Series A Vol. 161, ¶ 111; *Miguel Angel Estrella v. Uruguay*, Comm. No. 74/1980, U.N. Doc. CCP/C/OP/2. CCP/C/OP/2, 93, ¶ 8(3), 10 (March 29, 1983).

259. Rome Statute of the International Criminal Court, art. 7–8, July 17, 1998, 2187 U.N.T.S. 90.

260. See LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 189 (2010).

261. See *Refah Partisi v. Turkey*, App. No. 41340/98, 41342/98, 41343/98, 41344/98 Eur. Ct. H.R. (2003) [hereinafter Welfare Party Case].

262. See *Al-Adsani v. United Kingdom*, App. No. 35763/97 Eur. Ct. H.R., ¶¶ 30–31 (2001); ASSOC. FOR THE PREVENTION OF TORTURE & CENTER FOR JUSTICE AND INT'L LAW, TORTURE IN INTERNATIONAL LAW, A GUIDE TO JURISPRUDENCE 6 (2008); Greer, *supra* note 253, at 8; Erika De Wet, *The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law*, 15 EJIL 97, 97–98 (2004); and EVANS AND MORGAN, PREVENTING TORTURE: A STUDY OF THE EUROPEAN CONVENTION FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 62–64 (1998).

263. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶ 147 (Int'l Crim. Trib. For the Former Yugoslavia, Dec. 10, 1998).

264. *Id.* ¶ 153.

cogens that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules.²⁶⁵ Now that norms of *jus cogens* are hierarchically higher than any other rights or state obligation,²⁶⁶ President Donald Trump's support of torture should have necessitated his disqualification from the presidential race. Further, in terms of Article 10 (2) of the CAT, state parties shall ensure that the rule on the prohibition of torture is included in the rules or instructions that govern the duties and functions of "persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment . . . [including public officials]."²⁶⁷ For that reason, a candidate for public office who plans or promises to violate norms of customary international law, in particular, those that are *jus cogens*, must be disqualified from running for public office. Although this disqualification limits the right of the concerned candidate to participate in politics, and the right to vote of those who would otherwise have voted for him or her, such a limitation is justifiable, meant to pursue a legitimate aim, necessary, and proportionate.²⁶⁸ The European Court of Human Rights (ECHR) has ruled that a measure taken by a state to limit certain rights of citizens, to reflect generally recognized rules of international law, or to comply with customary international law is necessary, as it pursues a legitimate aim and "cannot in principle be regarded as imposing a disproportionate restriction" on the enjoyment of rights.²⁶⁹

C. State Obligation to Exclude Anti-Human Rights Candidates from Election

In addition to the fact that the prohibition of torture is a norm of *jus cogens*, there is a basis in international law for a state to exclude an anti-human rights candidate from running for public office. Under customary international human rights law, states

265. *Id.* ¶ 153.

266. MATTHEW H. KRAMER, TORTURE AND MORAL INTEGRITY: A PHILOSOPHICAL ENQUIRY 2–19 (2014).

267. G.A. Res. 39/46, *supra* note 6, at 115–16.

268. *Al-Adsani v. United Kingdom*, *supra* note 262, ¶ 56.

269. *Id.*

are the bearers of international human rights obligations.²⁷⁰ A state is responsible for human rights violations, where such violations are committed by state organs, such as the judiciary, legislature, executive, and its bureaucracy.²⁷¹ Even where a state agent—for example, a police or administrative officer—acts outside his authority, the state is still responsible if such agent purportedly acted in his official capacity.²⁷² States have an international obligation to prevent human rights violations,²⁷³ and such an obligation includes taking the necessary measures to exclude from public office candidates who plan to implement policies that are inconsistent with human rights norms once they assume public office, in particular, those that are part of customary international law.

States have obligations to respect, ensure, protect, promote, and fulfil the human rights of citizens and persons within their jurisdiction. To respect human rights, a state must not interfere with the enjoyment of rights. In order to protect citizens' rights, a state must protect citizens from actions of private parties by taking positive action in the facilitation of the enjoyment of rights.²⁷⁴ A state is responsible for actions of non-state actors if it fails to exercise due diligence or take reasonable measures to prevent, punish, investigate, or redress such violations.²⁷⁵ Thus,

270. DANIEL MOECKLI ET AL., INTERNATIONAL HUMAN RIGHTS LAW 120 (2014); REBECCA COOK, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 229 (2012).

271. INT'L L. COMM'N., *supra* note 153, ch. IV.E; *see also* MOECKLI ET AL., *supra* note 270, at 123.

272. INT'L L. COMM'N., *supra* note 153, art. 7; *see also* Sarma v. Sri Lanka, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000, ¶¶ 9(2)–9(5) (July 31, 2003).

273. OLIVIER SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 453 (2014); DINAH SHELTON & PAOLO CAROZZA, REGIONAL PROTECTION OF HUMAN RIGHTS, VOLUME 1 578 (2013); JUAN CARLOS, THE RIGHTS OF VICTIMS IN CRIMINAL JUSTICE PROCEEDINGS FOR SERIOUS HUMAN RIGHTS VIOLATIONS 88 (2013).

274. *See* U.N. Off. High Commissioner for Hum. Rts., *International Human Rights Law*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (last visited Sept. 17, 2017).

275. Human Rights Committee General Comment 31, ¶ 8; FRANCISCO MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW: TREATIES, CASES, AND ANALYSIS 71 (2006); MOECKLI ET AL., *supra* note 270, at 124; *see also* KJETIL LARSEN, THE HUMAN RIGHTS TREATY OBLIGATIONS OF PEACEKEEPERS 128 (2012); ANURADHA KUMAR, HUMAN RIGHTS 274 (2002); *Velasquez Rodriguez v.*

there is a general agreement in international practice²⁷⁶ that “an omission by [a] state can constitute a human rights violation, even if the actual harm was inflicted by private parties.”²⁷⁷

Before occupying public office, candidates are private citizens. Thus, a demagogue who plans to violate human rights norms that are part of customary international law does so as a private person or entity. Thus, it is an actionable omission for a state not to disqualify the candidacy of such a person from election, as the United States and other countries have done. For a state to be found liable for human rights violations based on an omission, there should be some action realistically expected from the state,²⁷⁸ since not every non-action of a state qualifies as an omission.²⁷⁹ There must be a clear wrongful act or omission attributable to the state and in violation of its international obligation.²⁸⁰ Where there is a clear obligation, a state is expected “to do all that can reasonably be expected to prevent human rights abuses by private parties.”²⁸¹ It has been observed that “the expectation upon a state increases if the state knows, or should have known, that a person or entity poses a risk to another’s enjoyment of human rights.”²⁸² In the classic example of

Honduras, Inter-Am. Ct. H.R. (ser. C), no. 4, ¶ 172 (July 29, 1998); U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS., INTERNATIONAL HUMAN RIGHTS LAW AND THE ROLE OF THE LEGAL PROFESSIONS: A GENERAL INTRODUCTION 17, <http://www.ohchr.org/documents/publications/training9chapter1en.pdf>.

276. MARTIN ET AL., *supra* note 275, at 71.

277. NIRAJ NATHWANI, RETHINKING REFUGEE LAW 60 (2003); BURNS WESTON & ANNA GREAR, HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 175 (2016).

278. *Id.*; see also MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 170 (2013); MOECKLI ET AL., *supra* note 270, at 124.

279. NATHWANI, *supra* note 277, at 60; MOECKLI ET AL., *supra* note 270, at 119. Further, in international human rights law, “a state is clearly not responsible for every act or omission which harms human rights.” See MARIA ERIKSSON, DEFINING RAPE: EMERGING OBLIGATIONS FOR STATES UNDER INTERNATIONAL LAW? 190 (2011).

280. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 48 (2015); MOECKLI ET AL., *supra* note 270, at 119.

281. MOECKLI ET AL., *supra* note 270, at 124; see also NATHWANI, *supra* note 277, at 60; WESTON & GREAR, *supra* note 277, at 175.

282. MOECKLI ET AL., *supra* note 270, at 124; see also Osman v. United Kingdom, (2000) 29 EHHR 245, ¶ 116; see also SERAC v. Nigeria, Comm. No. 155/96 (2002); Opuz v. Turkey (2010) 50 EHHR 28; A v. United Kingdom (1999) 27 EHHR 611; FRANCESCO FRANCIONI & NATALINO RONZITTI, WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 85 (2011).

Donald Trump, where he categorically promised to approve torture in violation of a norm of *jus cogens*, it can be argued that a clear obligation to prevent that violation arose. The non-disqualification of his candidature, therefore, is an actionable omission, which was in violation of the obligations of the United States to promote human rights, protect the rights of citizens, and prevent violations.

D. Implications of Excluding Candidates from Running for Public Office

Excluding a candidate from running for public office, for whatever reason, presents a *prima facie* case of conflict of interests or rights. In the present case, there is a potential conflict between important rights, such as the right to vote, participate in the politics of one's country, freedom of expression, and state obligations to protect citizens from actions of private parties. It should be noted that in balancing competing interests,²⁸³ rights can be

283. Obbo and Another v. Attorney-General (2004) AHRLR 256 (UgSC 2004) ¶¶ 28–31; *see also* OLIVIER DE SCHUTTER, INTERNATIONAL HUMAN RIGHTS LAW: CASES, MATERIALS, COMMENTARY 517 (2014); ALISON BRYSK, GLOBALIZATION OF LAW AND HUMAN RIGHTS: FROM NORMS TO FULFILMENT 68 (2013).

limited for the common good,²⁸⁴ for a legitimate aim,²⁸⁵ for necessity,²⁸⁶ for proportionality,²⁸⁷ and if justified in a democratic society²⁸⁸ in order to remain consistent with the constitution and international law.²⁸⁹

1. Freedom of Expression, the Right to Participate in Politics, and the Right to Vote

The international community has long realized the importance of the rights to vote and participate in an election. The rights to vote and participate in an election are provided for in many international and regional treaties, such as the International Covenant on Civil and Political Rights (ICCPR),²⁹⁰ the Universal Declaration of Human Rights,²⁹¹ the American Convention on Human Rights,²⁹² the ECHR,²⁹³ the Arab Charter on Human Rights,²⁹⁴ and the African Charter on Human and Peoples' Rights.²⁹⁵ Article 25 of ICCPR specifically provides as follows:

284. Kemai and Others v. Attorney General and Others (2005) AHRLR 118 (KeHC 2000) ¶ 40; *see also* BRIAN STILTNER, RELIGION AND THE COMMON GOOD: CATHOLIC CONTRIBUTIONS TO BUILDING COMMUNITY IN A LIBERAL SOCIETY 152 (1999); JATINDRA KUMAR, HUMAN RIGHTS LAW AND PRACTICE 31 (2016).

285. Ndyanabo v. Attorney-General (2002) AHRLR 243 (TzCA 2002) ¶¶ 18, 33–37, 40, 41, 44; HELEN FENWICK, CIVIL LIBERTIES AND HUMAN RIGHTS 726 (2009).

286. Media Rights Agenda and Others v. Nigeria (2000) AHRLR 200 (ACHPR 1998) ¶¶ 64–71; ALEX CONTE, HUMAN RIGHTS IN THE PREVENTION AND PUNISHMENT OF TERRORISM: COMMONWEALTH APPROACHES: THE UNITED KINGDOM, CANADA, AUSTRALIA AND NEW ZEALAND 313 (2010).

287. MICHEL ROSENFIELD & ANDRÁS SAJÓ, THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 740 (2012); Attorney-General v. 'Mopa (2002) AHRLR 91 (LeCA 2002) ¶ 33.

288. TOM CAMPBELL, PROTECTING HUMAN RIGHTS: INSTRUMENTS AND INSTITUTIONS 154 (2003); Amnesty Int'l and Others v. Sudan (2000) AHRLR 297 ¶¶ 59, 80,

http://www.achpr.org/files/sessions/26th/comunications/48.90-50.91-52.91-89.93/achpr26_48.90_50.91_52.91_89.93_eng.pdf.

289. Civil Liberties Org. v. Nigeria (2000) AHRLR 186 (ACHPR 1995) ¶ 15; BERTRAND RAMCHARAN, THE RIGHT TO LIFE IN INTERNATIONAL LAW 257 (1985).

290. G.A. Res. 2200A (XXI), *supra* note 6, art. 25.

291. G.A. Res. 217, *supra* note 252, art. 21.

292. American Convention on Human Rights art. 23, Nov. 22, 1969, 1144 U.N.T.S. 123.

293. ECHR, *supra* note 252, art. 11.

294. Council of the League of Arab States, Arab Charter on Human Rights, Sept. 15, 1994, *reprinted in* 18 HUM. RTS. L.J. 151 (1997).

295. African Charter on Human and Peoples' Rights, *supra* note 252, art. 13.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and *without unreasonable restrictions*:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) *To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*²⁹⁶

According to General Comment 25 on the right to participate in public affairs, voting rights, and the right of equal access to public service, “Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”²⁹⁷ As a result, states are strongly urged to refrain from excluding candidates from running for public office where there are no justifiable reasons. To that end, General Comment 25 provides that “[t]he effective implementation of the right and *the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. . . . Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements.*²⁹⁸

Further, there is no doubt that freedom of expression plays an integral part in elections and effecting citizens’ rights to vote and participate in politics.²⁹⁹ In this regard, General Comment 25 notes that “freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.”³⁰⁰ Thus, “in order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues

296. International Covenant on Civil and Political Rights art. 25, Dec. 12, 1966, 999 U.N.T.S. 171 (emphasis added).

297. The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, CCPR/C/21/Rev.1/Add.7 ¶ 1 (Dec. 07, 1996) [hereinafter General Comment No. 25]

298. *Id.* ¶¶ 15, 17 (emphasis added).

299. See *United Communist Party of Turkey and Others v. Turkey* 26 E. H. R. R. 121, 147 (1998) [hereinafter *United Communist Party of Turkey case*]; ECHR, *supra* note 252, ¶¶ 42–43.

300. See General Comment No. 25, *supra* note 297, ¶¶ 8, 12.

between citizens, candidates and elected representatives is essential.”³⁰¹ It has also been noted that freedom of expression entails freedom to receive and impart not only “information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”³⁰² One of the famous statements of the French philosopher Voltaire is on freedom of expression, where he states, “I disapprove of what you say, but I will defend to the death your right to say it.”³⁰³ In the same vein, the ECHR has observed that the principal characteristic of democracy is freedom of expression, since “democracy thrives on freedom of expression.”³⁰⁴

Given the importance of freedom of expression and the right to participate in the politics of one’s country, the question becomes whether, in the United States, Donald Trump’s opinions and statements against human rights should have disqualified him from the presidential race. The question becomes more complicated when one considers the fact that nations have the right to change and amend their constitutions, including rights that are protected therein, and states can withdraw from human rights treaties or those that have a direct implication on the protection of human rights.³⁰⁵ Therefore, if it is in the purview of a state or nation to amend its constitution and to withdraw from an international treaty, is there any justification to exclude a candidate who expresses his or her plans to amend the constitution and do away with certain rights when he or she assumes office? The question can be answered by considering the framework of the limitation of rights. It is important, however, to make clear that the stakes are different when a candidate for public office speaks against or plans to violate a norm of customary international law

301. General Comment No. 25, *supra* note 297, ¶ 25.

302. *See* *Handyside v. United Kingdom*, Judgment, Dec. 7, 1976 (ser. A) No. 5493/72, ¶ 24,

<http://hudoc.echr.coe.int/eng?i=001-57499>; *Jersild v. Denmark*, Judgment, Sept. 23, 1994 (ser. A) No. 298, 19 E. H. R. 1, 15 (1995), ¶ 37.

303. *See* KEITH WERHAN, *FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 114 (2004).

304. *United Communist Party of Turkey and Others*, *supra* note 299, ¶ 57; *see also* PETER KEMPEES, *A SYSTEMATIC GUIDE TO THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: 1997–1998*, 469 (2000).

305. *See* Emmanuel Igunza, *African Union Backs Mass Withdrawal From ICC*, BBC NEWS (Feb. 1, 2017), <http://www.bbc.com/news/world-africa-3882607>.

or *jus cogens*. Even states cannot excuse themselves from customary international law and norms of *jus cogens*.

2. Limitation of Rights

Whenever there is a *prima facie* conflict of rights, fair balancing is inherent in the binding effect of international human rights law instruments that are signed and ratified by a state.³⁰⁶ More so, “the search for fair balance between conflicting interests may be universally inherent in [human rights] adjudication.”³⁰⁷ In some cases, courts will seek “a just balance between the protection of the general interest of the community and the respect due to fundamental human rights.”³⁰⁸

General Comment 25 provides that the right to participate in the politics of one’s country, or the right to hold public office, may be limited on grounds that are justifiable, objective, reasonable, and established by law.³⁰⁹ In those circumstances, “states parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.”³¹⁰ Paragraph 17 of General Comment 25 is instructive. It provides that while “political opinion may not be used as a ground to deprive any person of the right to stand for election,” this is “without prejudice to paragraph (1) of [A]rticle 5 of the Covenant [ICCPR].”³¹¹ Article 5(1) of the ICCPR provides that “[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein.”³¹² For that reason, while Donald Trump has a right to freedom of expression, such right may not be used to harm others, worse still, to attack human rights norms that are part of customary international law. Even states do not have that right in international law.

306. JONAS CHRISTOFFERSEN, FAIR BALANCE: A STUDY OF PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 198 (2009).

307. *Id.*

308. Belgian Linguistic Case (A/6) 1 E. H. R. R 252, 253, Merits, July 23, 1968, (ser. A) No. 6, Case 4/73, at 32; *see also* Nold, Kohlen-und Baustoffgroßhandlung v. Comm'n of the European Cnty, ECR, 1974 E. C. R.

309. General Comment No. 25, *supra* note 297, ¶ 4, 15.

310. *Id.* ¶ 15, 18

311. *Id.* ¶ 17.

312. G.A. Res. 2200A (XXI), *supra* note 6, art. 5(1); *see also* General Comment No. 25, *supra* note 297, ¶ 27 (emphasis added).

Furthermore, the limitation on the rights to vote and run for public office is not something new. In fact, it was approved by the ECHR in the *Welfare Party case*.³¹³ Leaders of the Welfare Party made it clear, on many occasions, that they were against secularism, as guaranteed in the Turkish Constitution, and promised to “establish the supremacy of the Koran through a holy war (jihad) and that Muslims should therefore make donations to Refah [the Welfare Party] rather than distributing alms to third parties.”³¹⁴ Furthermore, one of the Members of Parliament belonging to the Welfare Party also clearly and publicly stated that “[w]e shall certainly call to account those who turn their backs on the precepts of the Koran and those who deprive Allah’s Messenger of his jurisdiction in their country.”³¹⁵

In January 1998, after hearing arguments from both parties, the Constitutional Court of Turkey dissolved the Welfare Party because of its anti-secularism rhetoric and campaign.³¹⁶ Further, some leaders of the Welfare Party were banned from active politics.³¹⁷ While noting the importance of freedom of expression and political opinion, the Constitutional Court of Turkey noted that secularism is an indispensable condition of democracy in Turkey³¹⁸ and a political party whose leadership pursues “activities aimed at bringing the democratic order to an end . . . us[ing] its freedom of expression to issue calls to action to achieve that aim,” is not protected by the Constitution and human rights treaties.³¹⁹ Leaders of the Welfare Party approached the ECHR, alleging that the dissolution of the Welfare Party was a violation of Article 11 (1) of European Charter on Human Rights, which guarantees freedom of assembly. The question considered by the Court was whether the dissolution of the Welfare Party could be justified in terms of the limitation provided for in Article 11 (2) of the European Charter, which provides as follows:

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in

313. Welfare Party Case, *supra* note 261, ¶¶ 63, 64.

314. *Id.* ¶ 12.

315. *Id.* ¶ 33.

316. *See id.* ¶ 23.

317. *See* Chris Morris, *Turkey’s Welfare Party is Banned*, BBC NEWS (Jan. 16, 1998, 3:20 PM), <http://news.bbc.co.uk/2/hi/despatches/48001.stm>.

318. *See* Welfare Party Case, *supra* note 261, ¶ 25.

319. *See id.* ¶ 40.

a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.³²⁰

The Grand Chamber of the ECHR held that the dissolution of the Welfare Party was not only “prescribed by law,”³²¹ but was necessary in a democratic society, proportionate, met a pressing social need, and was meant for a legitimate aim of protecting the rights and freedoms of others.³²² More importantly, the Grand Chamber held that a state has a right to “impose on its serving or future civil servants, who will be required to wield a portion of its sovereign power, the duty to refrain from taking part in the Islamic fundamentalist movement,”³²³ or other activities that undermine human rights and democratic institutions. Thus, while candidates for public office or political parties are within their political rights to suggest, promote, or plan to change the law or the legal and constitutional structures of their nations, they can only do so under the following two conditions:

Firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds.³²⁴

A fortiori, as a matter of the law, no one has the right to conduct themselves, speak or plan to destroy the rights or freedoms

320. ECHR, *supra* note 252, art. 11(2) (emphasis added).

321. Welfare Party Case, *supra* note 261, ¶ 64.

322. *Id.* ¶ 67, 135.

323. *Id.* ¶ 94; *see also Yanasik v. Turkey*, no. 14524/89, Commission Decision, Jan. 6, 1993, DR 74 D. R. 22, 27.

324. Welfare Party Case, *supra* note 261, ¶ 98; *see also Herri Batasuna and Batasuna v Spain*, nos. 25803/04 and 25817/04, ¶ 79, Eur. Ct. H. R. 321, 329, (2009) [hereinafter Batasuna Case]; *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, ¶ 49, Eur. Ct. H. R. 395, 412 (2002); *Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, ¶ 97, Eur. Ct. H. R. 273, 303IX; *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, Reports 1998-III Eur. Ct. H. R. 1238, 1256-57, ¶¶ 46-47.

of others.³²⁵ To the same end, “no one must be authori[z]ed to rely on [human rights] provisions in order to weaken or destroy the ideals and values of a democratic society.”³²⁶

The same arguments were considered in the *Batasuna* case, which considered a Spanish law on political parties imposing an obligation to respect democratic principles and human rights.³²⁷ Section 9 (2) (a) of the Spanish law provides that a political party shall be dissolved if it is involved in “systematically violating fundamental freedoms and rights by promoting, justifying or excusing attacks on the life or integrity of the person, or the exclusion or persecution of an individual by reason of ideology, religion, beliefs, nationality, race, sex or sexual orientation.”³²⁸ It has been made clear that the purpose of the law is neither to inhibit freedom of expression and association nor to paralyze doctrines that call the Spanish constitutional framework into question. Rather, it is to deal with “those whose political activity is based on an accommodation with violence, political support for terrorist organisations or violation of the rights of citizens or democratic principles.”³²⁹

Likewise, in Resolution 1308, the Council for Europe has recognized the need to regulate the activities of political parties in Member States and where there is need, disqualify or dissolve a political party “that uses violence or threatens civil peace and the democratic constitutional order of the country.”³³⁰ Therefore, there is a limitation on what one can say or do during their presidential campaign or campaign for public office. World leaders like President Donald Trump have crossed the line, with the United States allowing it.

325. See *Communist Party (KPD) v. Germany*, 1 Y. B. Eur. Conv. H.R. 222 (July 20, 1957).

326. Welfare Party Case, *supra* note 261, ¶ 99.

327. Juan Carlos I, Spain’s Institutional Law no. 6/2002, sec. 9(1) (Ley Orgánica 6/2002 de Partidos Políticos, 154 Official State Gazette art. 9(1) (2002) (Spain) [hereinafter Spain’s Institutional Law]; *see also* *Batasuna Case*, *supra* note 324, ¶ 12.

328. Spain’s Institutional Law, *supra* note 327, sec. 9(2)(a).

329. *Batasuna Case*, *supra* note 324, ¶ 12.

330. Eur. Parl. Ass., *Restrictions on Political Parties in the Council of Europe Member States*, 1308th Sess., Doc. No. 9526, Res. 1308, sec. 11(ii) (2002), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17063&lang=en>.

CONCLUSION

It can be noted that while there are various factors that have contributed to the rise of populism, the media has played a huge role in the dissemination of populist propaganda and ideology. There is no doubt that the current wave of populism challenges and undermines liberal democracy, human rights, and constitutionalism. Furthermore, in various ways, populism influences the justice system when populists seek to please their constituencies by aligning with the public sense of justice or when judges ride the populist momentum. In this populist age, it is important to emphasize that international law authorizes states to disqualify anti-human rights candidates from running for public office. In certain circumstances, especially those involving human rights norms that are part of customary international law, there is a state obligation to exclude those who plan to violate them. Of course, such exclusion limits certain rights, such as freedom of expression, the right to vote, and the right to run for public office. These limitations, however, are justified by necessity, since it pursues a legitimate aim and is proportionate to the threat posed.

The argument and suggestion that anti-human rights candidates must be excluded from running for public office goes to the root of democracy and protection of human rights. Public officials play a fundamental role in the promotion, protection, and realization of human rights. The conduct of public officials, especially those occupying powerful offices, influence and affect the public.³³¹ It is important, therefore, that those who occupy public offices respect human rights. As was noted in one Indian case, “for democracy to survive, it is essential that the best available men should be chosen as people’s representatives for proper governance of the country. This can be achieved through men of high moral and ethical values.”³³² In a nutshell, the following words by Justice Dipak Misra are of essence:

331. International Centre for Policy and Conflict & 5 others v. Attorney-General [2013] eKLR, ¶ 133, http://www.kenyalaw.org/Downloads_FreeCases/552of2012.pdf; see also COUNCIL OF EUROPE, SERIOUS CRIME AND THE REQUIREMENT OF RESPECT FOR HUMAN RIGHTS IN EUROPE: PROCEEDINGS 16 (1997).

332. People’s Union for Civil Liberties and Another v. Union of India and Another, [2013] 12 S.C.R. 283, 319 (India).

In a respectable and elevated constitutional democracy, purity of election . . . sanctity of individual dignity, sacrosanctity of rule of law . . . credibility of institutions, integrity and respectability of those who run the institutions [is] absolutely significant, in a way, imperative. They are not only to be treated as essential concepts and remembered as glorious precepts but also to be practised so that in the conduct of every individual they are concretely and fruitfully manifested.³³³

As has been noted in this article, some may argue that even if a populist demagogue is elected, he or she may not be able to implement their campaign plans because checks and balances exist in constitutional democracies. That is not a strong argument, however, as populist demagogues have in the past undermined democratic institutions by packing them with sympathizers. In a clear case where a political candidate promises and plans to violate important norms of human rights, he or she must be excluded from running for public office.

Furthermore, to formulate effective solutions to the challenges that are posed by populism to human rights, as discussed in this article, it is important to understand the root cause of populism and the nature of the danger it poses to human rights. As has been observed by Philip Alston, for example, “the human rights movement needs to develop a spirit of introspection and openness. Historically, it has not responded well to criticism.”³³⁴ It is in that light that Makau Mutua has observed the following:

The human rights movement is presented by its scholars and advocates as above politics. . . . They paint it as a universal creed driven by nobility and higher human intelligence. The idiom of human rights is tinged with metaphors and language that suggests eternity or a final resting point in human history. The basic human rights documents are not presented as either instrumentalist, utilitarian, experimental, or convenient. Rather, the authors speak as though such documents are the final truth. This elusive, yet lofty, idealism is almost biblical in its forbidding language. It implies that questioning its doctrine is perverse and unwelcome. The reality, however, is that human

333. Krishnamoorthy v. Sivakumar & Others, No.1478 (S. Ct. India 2015).

334. Alston, *supra* note 41, at 4.

rights norms address mundane human problems and are routine politics.³³⁵

For that stronger criticism, Alston notes the need for the human rights community “to devote more time and effort to being persuasive and convincing, rather than simply annunciating our principles as though they were self-evidently correct and applicable.”³³⁶

A good example that has been cited in this article is the idea that populism is thriving because of socioeconomic challenges that the human rights project has failed to address. It is important, therefore, for the human rights corpus to start taking socioeconomic rights as full-fledged human rights, which, just like civil and political rights, need the “essential elements of recognition, institutionalization, and accountability.”³³⁷ Furthermore, in the age of populism, human rights NGOs need to understand that there can never be a substitute for strengthening human rights protections at the domestic level. For that reason, it is necessary that NGOs and activists start to “have less of an extractive character (extracting information and leaving) and focus more on building or complementing national capacity.”³³⁸ It may also be important for activists to start taking into account the fact that human rights—while playing a very important part in society—are not a panacea, as they need to work hand in glove with other disciplines to achieve a better future for all.³³⁹ These ideas are critical in mapping the way forward because the challenges that are posed to human rights, as have been discussed in this article, are also the result of weaknesses in the human rights project.

335. Makau Mutua, *The Transformation of Africa: A Critique of the Rights Discourse*, in INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT 910 (Felipe Gómez Isa & Koen de Feyter eds., 2009); see also Mutua, *supra* note 45.

336. Alston, *supra* note 41, at 11.

337. *Id.* at 9.

338. *Id.* at 8.

339. Dudai, *supra* note 44, at 17.