

RECONCEIVING ENGAGEMENT WITH INTERNATIONAL LAW AND INSTITUTIONS IN A POPULIST ERA

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This article advances a conceptual framework to analyse patterns of recent state engagement and disengagement with international law and institutions in an era of populist backlash against the post-1945 liberal global order. The article examines the trend, across multiple constitutional democracies, of populist antagonism towards international law and supranational governance and the much-observed associated reflex by states with populist governments to disengage from, delegitimise or denounce treaty-based and other international institutions. Existing scholarship on the connection between domestic-level populism and multilateral-level state disengagement tends to lack empirical underpinnings. This article sets the stage for empirical work to fill this gap by constructing an analytical framework to map, measure and understand how states and other actors engage in international law and institutions. This original engagement framework enables scholarship to move beyond a static binary of either “engagement” or “disengagement” and assess the complex relationship between rhetoric and action in a populist era. The framework will facilitate future empirically grounded work evaluating how particular states have engaged with particular institutions over specific time periods. It further holds potential for wider application in evaluating modes of state engagement with international institutions more generally in mapping, measuring and understanding engagement with international law and institutions, whatever the primary drivers for such engagement might be.

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I INTRODUCTION

The recent rise of populism and increasing challenges to liberal institutions and the rule of law, notably within Western democratic states, has captured the attention of scholars and commentators. Citizens in these states, driven by worsening conditions of economic marginalisation and socio-political disempowerment both real and perceived, have pressured political representatives to redirect their attention and resources away from the global and towards more national concerns. Political leaders, in turn, have sought to catalyse and harness this sentiment, utilising strategies that are ‘populist’ in the sense that they are stridently nationalist, anti-globalist and anti-establishment, and undertaken on behalf of “the true people” (presented as a morally virtuous but neglected community with a shared national identity). On this account of populism, the common people’s legitimate needs and interests have been frustrated by illegitimate legal and institutional developments such as ‘human rights’ and ‘trade agreements’ created and imported by privileged, self-interested, out-of-touch elites.¹

This move towards populism in various democracies has generated scepticism about the legitimacy and utility of international law, its institutional architectures and bureaucracies, and the idea of an international legal order that constrains the “people’s will” as expressed in and by national democracies.² This scepticism has been pronounced in the United States (especially under President Donald Trump) and the United Kingdom (post-Brexit), influential Western powers with a longstanding commitment to, and core beneficiaries of, the post-1945 international legal order. Yet now populist leaders from these very states have sought to discredit, scapegoat, sideline or disengage from the international legal norms and institutions previously so useful to their countries’ foreign policy.³ They have pushed for withdrawal from or substantial curtailment of multilateral treaty regimes or institutions and dispute resolution mechanisms. They have attacked the fundamental normative premises of liberal accounts of democracy, human rights

¹ In a vast literature, see especially Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style, and Representation* (Stanford University Press, 2016); Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press, 2017); Jan-Werner Müller, *What is Populism?* (Penguin Books, 2017). For a recent working definition of ‘populism’ in the international law context, see Jolyon Ford, *Human Rights and Populism* (Routledge, 2024) ch 1.

² For our more extensive discussion of the broader populist backlash against the post-World War II framework of liberal norms and institutions, see Peter G Danchin et al, ‘Navigating the Backlash Against Global Law and Institutions’ (2021) 38 *Australian Year Book of International Law* 33. More recently, but without Daan Verhoeven, see Peter G Danchin et al, ‘International Law and the Rise of Populism’ (2025) 65(2) *Virginia Journal of International Law* 185.

³ See below Part II.

and the rule of law. And they have rejected the proposition that international norms should bind, or even influence, domestic decision-making.

These trends are reflected in the contemporary literature in the field. In 2017, Philip Alston portrayed the international legal and global human rights systems as under threat by ‘coalitions of would-be wreckers’.⁴ At the end of Donald Trump’s first presidency, Oona Hathaway suggested that the Trump administration had rejected international law and ‘waged an assault on international law unparalleled in the post-war era’.⁵ And in 2022, David Sloss argued that we have reached a ‘watershed moment’ in which the rules-based international order is ‘fraying’ and being nudged towards chaos, with populism being one of the threats that has ‘the potential to undermine or seriously erode that order’.⁶ If these scholarly accounts are accurate, populist antagonism towards international law and the accompanying reflex to disengage from international institutions represent a fundamental challenge to the collective action required to prevent and manage grave global threats and to the mechanisms for enabling such action.⁷

Yet *both* of these accounts of populism — as a virtuous force seeking to rein in the excesses of unaccountable global elites on the one hand, and as a wrecking ball bent on destroying the post-1945 framework for international cooperation on the other — warrant closer scrutiny. There is a need for better and more nuanced frames through which to observe and assess the contours, causes and consequences of populist backlash in the context of international law and institutions. There is also a need to enrich the debate with greater empiricism on how these supposedly uniform forces and dynamics play out in particular polities and institutions.⁸ In 2017, James Crawford chronicled various statements by world leaders that he considered deeply antagonistic to international law. However, he queried whether there was indeed ‘a pattern to all this’ and called for scholars to look for ‘underlying tendencies behind the “foreground noise”’.⁹

As Crawford’s query suggests, prevailing mainstream narratives of the nexus between populist movements and international institutions tend to be based on assumptions that are partial and piecemeal. There is a distinct absence of critical, empirically-based analysis of where and how international law and governance

⁴ Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9(1) *Journal of Human Rights Practice* hux007:1–15, 3.

⁵ Oona A Hathaway, ‘Reengaging on Treaties and Other International Agreements (Part 1): President Donald Trump’s Rejection of International Law’, *Just Security* (Blog Post, 2 October 2020) <<https://www.justsecurity.org/72656/reengaging-on-treaties-and-other-international-agreements-part-i-president-donald-trumps-rejection-of-international-law/>>, archived at <<https://perma.cc/E6B3-84VS>>.

⁶ David L Sloss, ‘Introduction: Preserving a Rules-Based International Order’ in David L Sloss (ed), *Is the International Legal Order Unraveling?* (Oxford University Press, 2022) 1, 1, 19.

⁷ For discussion of this question in the context of the COVID-19 pandemic, see Peter G Danchin et al, ‘The Pandemic Paradox in International Law’ (2020) 114(4) *American Journal of International Law* 598; Imogen Saunders, ‘Populism and Pandemics: Backlashes against International Law and COVID-19’, *ANU College of Law* (Essay, 23 July 2020) <<https://web.archive.org/web/20221209092031/https://law.anu.edu.au/research/essay/covid-19-and-international-law/populism-and-pandemics-backlashes-against>>, archived at <<https://perma.cc/YUQ6-BFD4>>.

⁸ For one discussion of this gap, see Johannes Plagemann and Sandra Destradi, ‘Populism and Foreign Policy: The Case of India’ (2019) 15(2) *Foreign Policy Analysis* 283, 284.

⁹ James Crawford, ‘The Current Political Discourse concerning International Law’ (2018) 81(1) *Modern Law Review* 1, 1–2.

have featured in populist politicking at the national level and, conversely, how domestic rhetoric within a state has affected multilateral engagement by that state. Pressing questions include: how and to what extent such narratives in fact shape how a given state engages at the supranational level? What empirical evidence might explain the effects of shifts in modes of engagement? How should we treat populist rhetoric about treaty commitments or other mechanisms in accounts of state practice in international law? Rather than assuming that the international legal order is the undeserving victim of populist attack, how might analysis take into account the ways in which prevailing patterns and structures of the international legal order might themselves be implicated in the rise of populism in democracies around the world?

The premise of this article is that there is an urgent need for new, empirically grounded scholarship on the relationship between the rise of populist backlash and the challenges facing the international legal order.¹⁰ While there are many aspects to this problem, this article focuses on the concept of engagement at the multilateral level by states with populist governments. This article seeks to make a contribution to such new scholarship by constructing an original analytical framework to map the variety of modes of state engagement, non-engagement and disengagement with or from international law and institutions.

This article proceeds in four parts. Part II outlines and interrogates the assumptions behind the post-2015 literature on populism and international law and demonstrates how empirically grounded work requires an analytical typological framework to map, measure and understand the full complexity of different modes of state engagement and disengagement in international law and institutions. This then provides a basis to evaluate supposed links between domestic-level populist politicking and patterns of state behaviour at the supranational level.

Part III constructs such an original analytical framework for characterising different postures (or modes of engagement) of states towards international law and institutions, enabling scholarship to move to a more nuanced understanding than would be possible in a binary frame of either “engagement” or “disengagement”. This framework comprises two spectrums of modes of engagement behaviour — from disengagement to engagement, and from destructive to constructive — as a means of charting various positions taken by states when participating, or refraining from participating, in international institutions and treaty regimes. We use our framework to illustrate and identify how state modes of engagement may shift over time and how populist rhetoric may not be accompanied by corresponding state action taken at the international level.

Part IV applies this framework to a series of sketched snapshots of engagement by populist states in international law and institutions. These snapshots are intended to illustrate the potential application and workings of the different quadrants and typology of the framework. Part V then reflects on some factors to be borne in mind in a forward research agenda deploying and refining the framework. Part VI concludes.

¹⁰ See this call, too, in Danchin et al, ‘Navigating the Backlash Against Global Law and Institutions’ (n 2) 76.

II DOMINANT ASSUMPTIONS AND THE MOVE TO EMPIRICISM

As discussed above,¹¹ much of the recent scholarly literature on populism and international law tends to cast international law and institutions as under assault from populism within national democracies.¹² This scholarship tends to be based on broad impressions and generalisations rather than supported by verifiable data in terms of where, whether and to what extent, for example, the rise of populist rhetoric about multilateralism and international law has in fact resulted in changes to the state's multilateral engagement, such as institutional or treaty regime withdrawal, disavowing of obligations or disengagement. Moreover, we identify in this body of literature three sets of dominant assumptions.

The first assumption is an impression across the literature that populism is “bad” and international law is “good”,¹³ and that it is self-evident that the international legal system is a rational, legitimate order in contrast to, and which needs to be reinforced against, the irrational threatening phenomenon of populism. In a parallel work we interrogate this tendency to see international law and institutions as passive victims unfairly subjected to populism as some kind of external social pathology.¹⁴ There we explore the ways in which the international order and its particular operation and effects, whether real or perceived, may themselves have contributed to the rise and traction of national populist politics. We also critically assess the assumption that disengagement or indeed engagement by populist states with aspects of the international legal architecture will be inherently “bad” or destructive to the “good” goals and artefacts of international law. Scholarship that does not assume that populism is inherently antagonistic to

¹¹ Alston (n 4) 1–3, 7; Hathaway (n 5); and Sloss (n 6) 19. Crawford (n 9) joined in sounding the alarm about populism's effect on international law, yet in other parts sought to downplay the threat at that time: at 1–2, 21–2.

¹² See, eg, Eric A Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 *Arizona State Law Journal* 795, 795; Kenneth Roth, ‘The Dangerous Rise of Populism: Global Attacks on Human Rights Values’ (2017) *Journal of International Affairs* 79, 79; Frederick V Perry, ‘The Assault on International Law: Populism and Entropy on the March’ (2018) 46(1) *Syracuse Journal of International and Comparative Law* 59, 61–3; César Rodríguez-Garavito and Krizna Gomez (eds), *Rising to the Populist Challenge: A New Playbook for Human Rights Actors* (Dejusticia, 2018) 12; Campbell McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’ (2019) 68(3) *International and Comparative Law Quarterly* 499, 500–1; Gerald L Neuman (ed) *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press, 2020); Anne Orford, ‘The Sir Elihu Lauterpacht International Law Lecture 2019: The Crisis of Liberal Internationalism and the Future of International Law’ (2021) 38 *Australian Year Book of International Law* 1, 7 (‘The Crisis of Liberal Internationalism’); Kristian Humble, ‘Populism and the Threat to International Law’ (2022) 11(3) *Laws* 50:1–12, 1–2; Vincent Charles Keating and Amelie Theussen, ‘Cum Haereticis Fides Non Servanda: International Law's Resilience in a Pluralistic World?’ in Trine Flockhart and Zachary Paikin (eds) *Rebooting Global International Society: Change, Contestation and Resilience* (Palgrave Macmillan, 2022) 215, 229–32.

¹³ For a counter view to this, see Dire Tladi, ‘Populism's Attack on Multilateralism and International Law: Much Ado About Nothing’ (2020) 19(3) *Chinese Journal of International Law* 369. See also below nn 14–15.

¹⁴ Danchin et al, ‘International Law and the Rise of Populism’ (n 2). See also Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser Press, 2019); Anne Orford, ‘International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment’ (2020) 35(3) *American University International Law Review* 427.

international law and institutions tends to be the exception,¹⁵ highlighting the prevailing implicit approach that populists are anathema and hostile to virtuous international law. An example is a counter-narrative, advanced by Quinn Slobodian, which argues that supposed populist anti-globalists such as Trump are themselves globalists who, where convenient, will selectively foreground, champion or use international law, its forums, mechanisms and legitimating effects to advance particular agendas.¹⁶

The second assumption in the literature is that there is an inevitable and necessary connection between populist rhetoric and action at the domestic level, and state behaviour at the international level.¹⁷ That is, the assumption that populism in the body politic automatically transmits in an unfiltered way to international-level talk and action, driving, invariably, state disengagement from regimes and institutions. This assumption is problematic in a number of ways. First, it is widely accepted in the politics and international relations literature on multi-level gaming that positions on certain issues domestically are not necessarily pursued in the same ways at the international level.¹⁸ Moreover, at both domestic and international levels it is not uncommon for rhetoric to run ahead of, or differently to, any action or attempted action. This heated rhetoric at the domestic level may or may not lead to strong action at that level or internationally. Similarly, strong rhetoric in international forums does not necessarily lead to similarly forceful action there or at home. Furthermore, a state's engagement or disengagement at the international level may vary greatly with respect to different multilateral institutions and at any particular moment in time.

The third assumption, closely related to the first, is that disengagement is necessarily or inherently destructive of the mandates and wider goals of international legal regimes and institutions, and that engagement is inherently supportive of them. Yet is it in fact the case that engagement by states in an era of populism is always constructive, and disengagement always destructive, of international institutions and regimes? To undertake such empirical work it is first necessary to construct a conceptual framework that might yield some kind of typology of engagement. The results of such empirical work can then be applied in terms of whether the above assumptions are substantiated, disaggregated or repudiated. Much will unavoidably turn on the conception of "constructive" or "destructive" being used.¹⁹ One important limitation of the prevailing literature,

¹⁵ See, eg, Alejandro Rodiles, 'Is There a "Populist" International Law (in Latin America)?' (2019) 49 *Netherlands Yearbook of International Law* 69; Janne E Nijman and Wouter G Werner, 'Populism and International Law: What Backlash and Which Rubicon?' (2019) 49 *Netherlands Yearbook of International Law* 3. See also Marcela Prieto Rudolph, 'Populism's Antagonism to International Law: Lessons from Latin America' (2022) 116 *AJIL Unbound* 346.

¹⁶ Quinn Slobodian, 'Trump, Populists and the Rise of Right-Wing Globalization' *The New York Times* (online, 22 October 2018) <<https://www.nytimes.com/2018/10/22/opinion/trump-far-right-populists-globalization.html>>, archived at <<https://perma.cc/KD9M-RBGQ>>, cited in Nijman and Werner (n 15) 10.

¹⁷ See, eg, David A Lake, Lisa L Martin and Thomas Risse, 'Challenges to the Liberal Order: Reflections on *International Organization*' (2021) 75(2) *International Organization* 225.

¹⁸ See, eg, Robert D Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42(3) *International Organization* 427. For works exploring how populism at the domestic level does not necessarily translate into shifts in policy or position at the international level, see below n 87.

¹⁹ See below Part V.

including its dominant assumptions of international law and institutions as axiomatically good and populism as equating to disengagement and destruction, is that it has tended not to be explicit about conceding its background normative commitment to a particular, and typically liberal, conception of what the international legal order should look like.²⁰ As a matter of international legal theory, this reflects the underlying fundamental contradiction in international law observed by David Kennedy decades ago that ‘individual nations find in socialization both the source of their identity and a threat to their existence’.²¹ A state may demonstrate respect for other states and international law by entering into and engaging with a treaty regime as an expression of solidarity and community; alternatively, it may withdraw from that regime or break off diplomatic relations as an expression of enmity and solitude. But equally, a state may enter into such a treaty regime as ‘an exercise of domination, either benign and paternalistic or oppressive’ or it may abandon or ignore that regime to enable another state or states to be independent as an expression of respect and solidarity.²² The result is that ‘we can never be sure from the behavior alone what attitude it represents. Nor can we choose among behaviors simply by “applying” our attitude’.²³

Before advancing our original engagement framework, we acknowledge that a comprehensive analysis of the relationship between populism and international law and institutions needs to address at least four key research questions around the broader concept of state engagement: First, what drives populism in domestic politics (‘drivers’)? Second, what are the pathways and actors through which such domestic drivers and dynamics come to shape state rhetoric and action at the supranational level (‘vectors’)? Third, what are the observable trends or traces of state rhetoric and action at the international level as these drivers are transmitted into diplomatic and statecraft activity (‘engagement’)? And fourth, how to develop evidence-based findings on the impact of patterns of state engagement or

²⁰ For more fine-grained and nuanced work that is the exception to this prevailing pattern, in addition to the works above nn 13–15, see Christine Schwöbel-Patel, ‘Populism, International Law and the End of *Keep Calm and Carry on Lawyering*’ (2019) 49 *Netherlands Yearbook of International Law* 97; Lucas Lixinski and Fabio Morosini, ‘Populism and International Law: Global South Perspectives’ (2020) 17(2) *Brazilian Journal of International Law* 56. See also Heike Krieger, ‘Populist Governments and International Law’ (2019) 30(3) *European Journal of International Law* 971; Marcela Prieto Rudolph, ‘Populist Governments and International Law: A Reply to Heike Krieger’ (2019) 30(3) *European Journal of International Law* 997. See generally Tanja A Börzel and Michael Zürn, ‘Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism’ (2021) 75(2) *International Organization* 282.

²¹ David Kennedy, ‘Theses about International Law Discourse’ (1981) 23 *German Yearbook of International Law* 353, 361.

²² Ibid 363.

²³ Ibid. Kennedy further analyses this contradiction in the context of national attitudes towards participation in international groups whereby group participation in international regimes and organisations is traditionally associated with ‘the ideal that national interests are somehow best met through community ... [and] submersion in the group’ and ‘going it alone is usually associated with the ideal of self-protection, and fear of just such submersion’: at 363–4. But again, this ‘pairing of ideals and behavior patterns’ may in fact reflect its exact opposite as those going it alone may be ‘attracted by their relationship with the broader international community rather than repelled by the group’ and states who choose group participation ‘may do so as an expression of fear rather than of solidarity’: at 364.

disengagement on the legitimacy or effectiveness of a global regime or institution ('effects')?

A full analysis of each is beyond the scope of this article. Rather, we are primarily concerned with the third of these questions: identifying the need for and constructing a framework to chart and analyse modes of state engagement with global institutions in the context of populism, as no such resource currently exists in the literature. We return in Part V to discuss the other remaining questions when we propose a comprehensive future research agenda that draws on this engagement framework.

III A TYPOLOGY OF ENGAGEMENT WITH INTERNATIONAL LAW AND INSTITUTIONS

Building on the above discussion, and as a pre-requisite to detailed analysis of how populism is shaping international legal activity and normativity, this part advances a typology of state engagement with international law and institutions. This posits a spectrum of observable behaviours or positions (both rhetoric and action) that states may employ.²⁴ Approaching engagement in this way offers new frames to enhance scholarship by enabling analytical characterisations of state (or other actor) interactions with international law and institutions in the context of populism that move us beyond a limited binary response scenario, consisting either of "engagement" or of "withdrawal".²⁵ In practice, states' modes or postures are generally more varied and dynamic than these two binary options. Our engagement typology therefore seeks to offer greater precision and analytical utility in terms of the variety of forms or positions such behaviours might take, while enabling analysis of how these may shift over time even during a single administration in any state, or vary from one institution to another (same state) or one state to another (same institution).

A meaningful framework must also conceive of engagement in broad terms, so as to include involvement in and behaviours around standard-setting and lawmaking (as opposed to how a state interacts with institutions or regimes once formed). Notably, the United States has a long history of deep engagement in the former, even when it does not join the latter, for example the US's significant role in the long process of negotiating and drafting the *United Nations Convention on the Law of the Sea* ('UNCLOS'), and the work towards the *Rome Statute of the*

²⁴ In part, this develops the continuum outlined in Jolyon Ford, 'Backlash against a Rules-Based International Human Rights Order? An Australian Perspective' (2020) 38 *Australian Year Book of International Law* 175, 182–3.

²⁵ See above Part I. See also Anna Novoselova's discussion of the state participation in international organisations in terms of the need for a more nuanced set of labels than "participation" or "withdrawal": Anna Novoselova, 'Disengagement from International Organisations: The Role of Domestic Politics' (PhD Thesis, Technical University of Munich, 2022).

International Criminal Court ('ICC'). The US is not a party to either,²⁶ but was deeply engaged with both.²⁷ Moreover, fulsome analysis of engagement for this same reason cannot be limited to engagement by state parties to a regime or members of an institution.

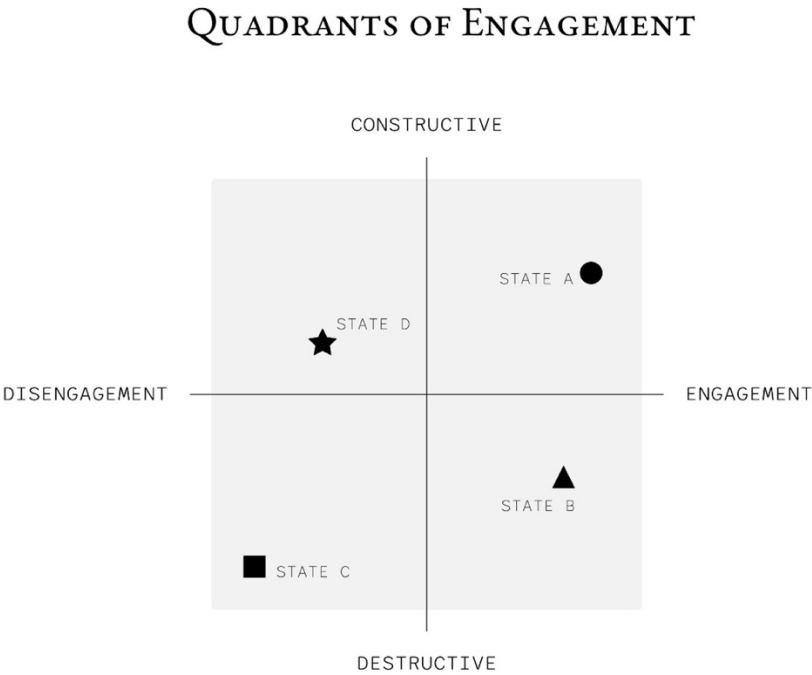
Figure 1 below presents the broad parameters of an original typology of different modes of engagement by states in international law and institutions, irrespective of the contextual variables set out in Part II (drivers, vectors, and effects). On the horizontal (x) axis, we chart from proactive deliberate disengagement from the legal order, regime or institution(s) (withdrawal of all interaction) at one extreme, through passive disengagement to non-engagement, then to passive engagement, and all the way across to proactive engagement. On the vertical (y) axis, we plot a negative to positive spectrum from bottom (destructive behaviours) up through obstructive ones, to supportive behaviours, to the top (constructive behaviours).

When these two axes are combined, four quadrants emerge, on which the type and quality of a state's engagement in any international institution can be plotted. Clockwise from top right, in its most simplistic form, these quadrants capture constructive engagement (State A), destructive engagement (State B), destructive disengagement (State C) and constructive disengagement (State D). Again, while the "populist backlash" debate is the immediate context for our discussion, this modes-of-engagement typology has utility where one is examining whether populism, or something else, or nothing in particular, has resulted in certain postures or shifts in posture. The framework's focus is typologizing engagement modes, primarily for the sake of facilitating further analysis and debate.

²⁶ For a list of parties to the *United Nations Convention on the Law of the Sea* and the *Rome Statute*, see 'United Nations Convention on the Law of the Sea', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en>, archived at <<https://perma.cc/L2AL-NWTF>>; 'Rome Statute of the International Criminal Court', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en>, archived at <<https://perma.cc/CH5R-QDJR>>. See below Part IV(B) for further discussion on how this behaviour may be captured by our framework.

²⁷ See below Part IV(B).

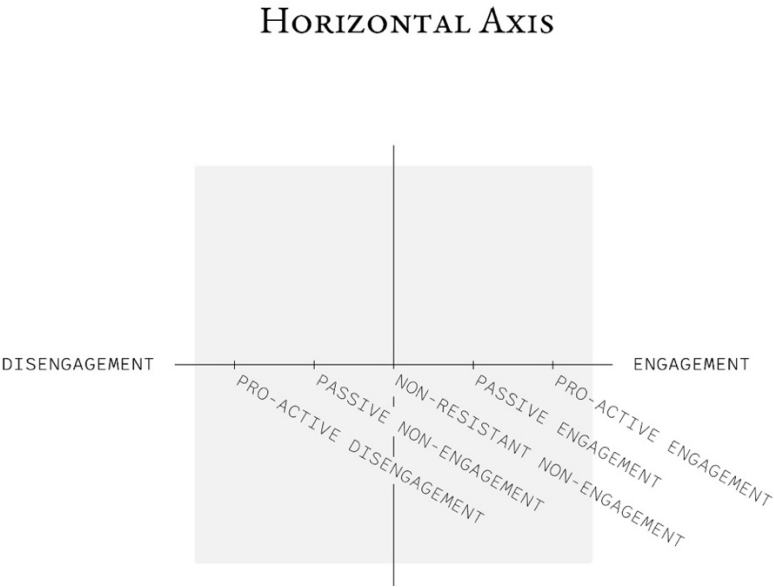
Figure 1



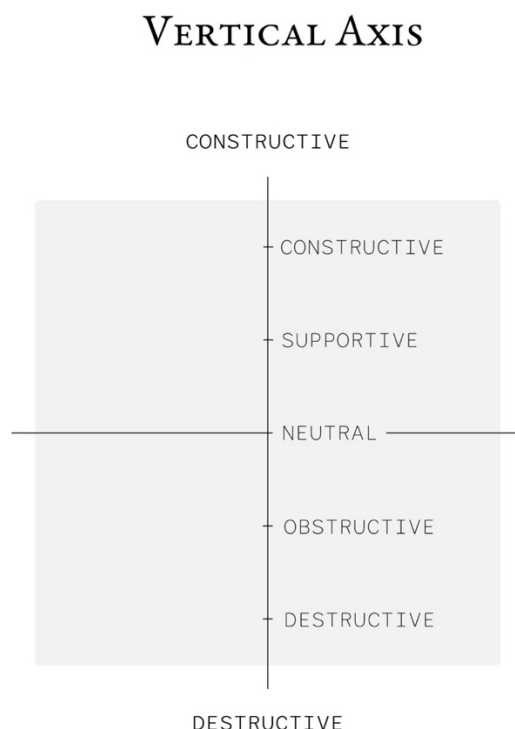
A Commentary on the Axes

Along the horizontal axis line from disengagement to engagement, we identify a spectrum of gradations from proactive disengagement at one extreme, to proactive engagement at the other, as follows (Figure 2):

Figure 2



Along the vertical axis line we also identify a spectrum of gradations, moving from constructive action at one extreme, to destructive action at the other, with supportive action and obstructive action sitting either side of the horizontal axis, as follows in Figure 3 below:

Figure 3

This vertical scale requires some elaboration, as the spectrum bookending adjectives constructive and destructive may suggest precommitment to certain values or assumptions, and/or a particular vision of the international regime (or legal order overall).

With this in mind, we define *constructive action* (and likewise *constructive omission*) as actions (or omissions) that fall into one or more of the following three categories: (1) actions/omissions that seek to achieve the stated purposes and principles of an international institution; (2) actions/omissions that seek to strengthen the capacity of an international institution to achieve its purposes and principles; or (3) actions/omissions that seek to promote the collective interests of member states in an international institution.

The concept of *supportive action* (and likewise *supportive omission*) we define as actions (or omissions) that fall into one or more of the following three categories: (1) actions/omissions that support the purposes and principles of an international institution; (2) actions/omissions that support the capacity of an international institution to achieve its purposes and principles; or (3) actions/omissions that support the collective interests of member states in an international institution.

The concept of *obstructive action* (and likewise *obstructive omission*), we define as actions (or omissions) that fall into one or more of the following three categories: (1) actions/omissions that seek to hamper efforts to support or promote the purposes and principles of an international institution; (2) actions/omissions that seek to hamper efforts to support or strengthen the capacity of an international institution to achieve its purposes and principles; or (3) actions/omissions that seek to hamper efforts to support or promote the collective interests of member states in an international institution.

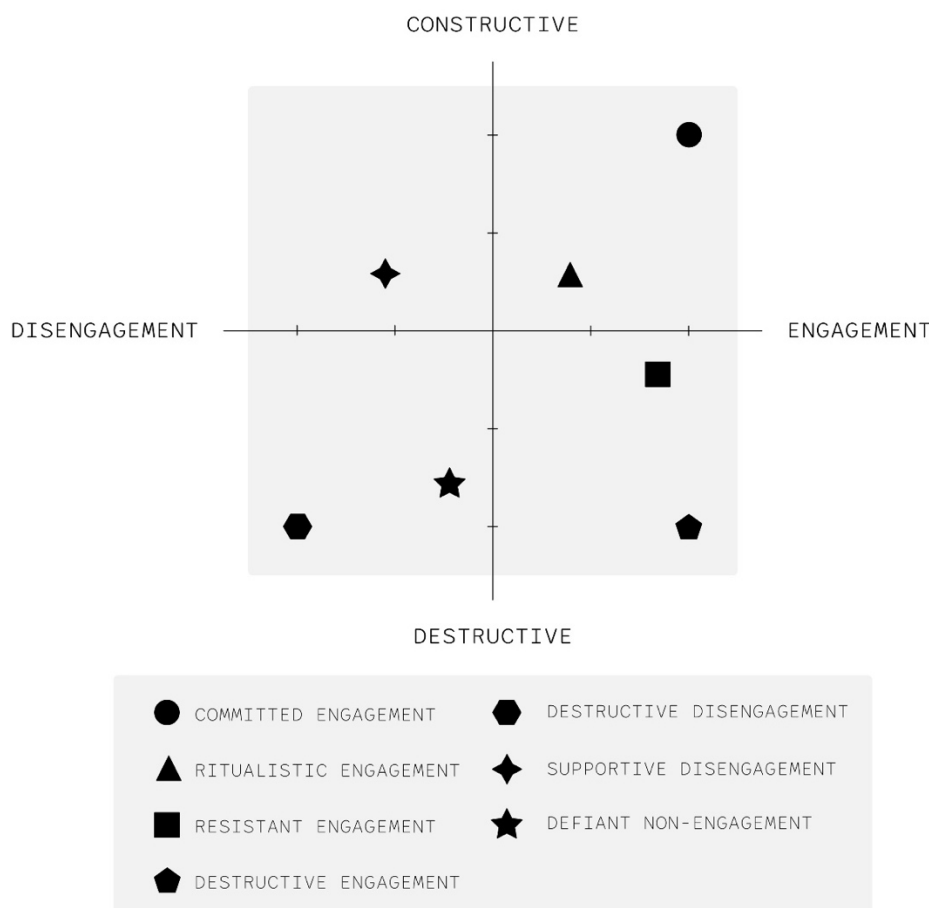
At the other end of the spectrum, we define *destructive engagement* (and likewise *destructive disengagement*) as engagement (or disengagement) that falls into one or more of the following three categories: (1) action that seeks to undermine the purposes and principles of an international institution; (2) action that seeks to weaken the capacity of an international institution to achieve its purposes and principles; or (3) action that seeks to promote the individual national interests of a member state, or those of a small minority group of member states, in an international institution, to the detriment of the collective interests of other member states.

B Populating the Quadrants

Above in Figure 1 we suggested that state engagement could be plotted in each quadrant. With more nuance, we can also plot a typology that describes these various positions that states may be properly described as inhabiting.

Figure 4

QUADRANTS OF ENGAGEMENT



1 Top Right Quadrant: Types of Constructive Engagement

‘*Committed engagement*’: the ideal posture, occupying the top right of the quadrant (maximum constructive engagement). It might connote a situation where

the state has (by all appearances) internalised the goals, values and rationale of the legal order and is proactive in words and conduct to advance these.²⁸

Ritualistic engagement: this posture is still in the upper-right quadrant but is passive engagement no more than halfway along the horizontal axis. It is low on the vertical axis (not non-constructive but perhaps not necessarily reaching the level of supportive). Here, the state's participation in or rhetoric on the regime or institution is rather perfunctory, "vanilla", merely formalistic, ceremonial and reiterative, yet largely superficial. This characterisation draws on ideas of 'regulatory ritualism' developed in relation to the UN Human Rights Council's ('UNHRC') Universal Periodic Review.²⁹ While ritualistic engagement can be problematic, this mode still sits in the top right quadrant because even fairly passive engagement in institutional rituals can, under some conditions, enculturate a non-committed actor towards a more internalised acceptance of the legal order and its values.³⁰

2 Bottom Right Quadrant: Types of Destructive Engagement

Resistant Engagement: behaviour that comprises engagement with the regime or institution but which is obstructive (defiance, resistance) might sit in this quadrant. The depth or intensity of engagement might situate it towards the right end of the horizontal axis. This example illustrates one dialectic use of the framework: not to plot positions on quadrants out of any attempt at immutable scientific precision, but so as to generate debate (and call for more empirical evidence) as to the most appropriate characterisation of a state's posture. This observation also illustrates how such an exercise can stimulate debate about the nature and quality and impact of particular modes and tones of engagement and reveal additional nuances. This is because we would posit that resistant engagement sit further to the right (the ideal on the horizontal axis) than ritualistic engagement. Why? The former may involve robust contestation (eg of the jurisdiction of a tribunal or mandate of a mechanism) but at least the state is proactively engaging, rather than exhibiting perfunctory, unconsidered, passive

²⁸ 'Committed engagement' might be viewed as similar to Harold Hongju Koh's concept (in a compliance context) of 'obedience' — internalised acceptance rather than 'mere compliance' or 'conformity' to law when convenient: Harold Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106(8) *Yale Law Journal* 2599, 2603. However, as conceived here it goes further than mere 'obedience'.

²⁹ For a full discussion of ritualism in state engagement with an international institution (the UN Human Rights Council), see Hilary Charlesworth and Emma Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rituals and Ritualism* (Cambridge University Press, 2014) 1. See also Benjamin Authers et al, 'Introduction' (2018) 9(1) *Humanity* 63. See also a review of some of the related literature on merely ceremonial engagement by states in Jolyon Ford and Claire Methven O'Brien, 'Empty Rituals or Workable Models? Towards a Business and Human Rights Treaty' (2017) 40(3) *UNSW Law Journal* 1223, 1228–32. See also an attempted distinction between performance and performativity in this context in Amy Maguire, Fiona McGaughey and Georgia Monaghan, 'Performance or Performativity? Australia's Membership of the United Nations Human Rights Council' (2019) 25(2) *Australian Journal of Human Rights* 317.

³⁰ See Charlesworth and Larking (n 29) 19–20.

participation or adherence.³¹ In this sense, the typology makes an assumption that engagement in and *of itself* has value for the health of the international legal order, including where it seeks to reform or indeed transform that order.

For example, Cynthia Banham labelled Australia's 2015 response to a UN Special Rapporteur process (which made a finding of torture in relation to prolonged immigration detention) as '[i]ndignation, not engagement'.³² Yet the function of a gradual typology is that it enables a somewhat more accurate or at least nuanced description. Here, a better characterisation might be *indignant engagement* since Australia hardly disengaged from the particular mechanism, indeed the contrary, even if its response was defiant or resistant (and so not fulsome and constructive committed engagement, ie seeking to implement the report's recommendations and openly accepting the prerogative of the mechanism to make such recommendations).³³

In this bottom-right quadrant we might plot any conduct that resembles Valerie Braithwaite's 'game playing' posture.³⁴ While, on one view, all diplomacy might be so characterised, by 'game playing' Braithwaite intended a 'combative agenda' by a stakeholder compared to the relative 'fatalism' that disengagement connotes.³⁵ For her, this is conduct to assert independence from and superiority over the institution in an ultimately dismissive or non-committed way while ostensibly appearing to be 'playing within the rules' and while not overtly undermining the body.³⁶ The state is highly engaged, but in a combative, defiant (but not disengaged) posture that goes beyond the inevitable (and indeed often healthy) contestation endemic to states' relationships with international institutions. This quadrant might also see another extreme in the bottom right-hand corner: '*destructive engagement*'. Here, a state is deeply engaged in the institution, but where the apparent end is not to reinforce, reform or even transform that institution, but to overwhelm it or entirely change its premises, purposes and values. As discussed below, a longer timeframe might reveal that what appeared to be destructive engagement (or disengagement) can instead be seen as a form of 'creative destruction', as where an influential state or states undermine a regime or institution but replace it with another one that furthers the thing's overall objectives (however and by whomever defined) more effectively.

³¹ 'Non-resistant non-engagement' is the midpoint of the spectrum. This includes indifference to the wellbeing of the regime or order but can also connote familiar debates (in the international legal compliance literature) about the distinction between lack of will and lack of capacity of some state diplomatic and bureaucratic apparatuses.

³² Cynthia Banham, 'Indignation, Not Engagement: Australia's Response to International Criticism of Asylum Seeker Detention', *Regarding Rights: Academic and Activist Perspectives on Human Rights* (Blog Post, 18 March 2015) <<https://web.archive.org/web/20190713124814/http://asiapacific.anu.edu.au/regarding-rights/2015/03/18/indignation-not-engagement-australias-response-to-international-criticism-of-asylum-seeker-detention/>>, archived at <<https://perma.cc/6YZX-JAHQ>>.

³³ For discussion of this example, see Ford, 'Backlash against a Rules-Based International Human Rights Order? An Australian Perspective' (n 24) 185–91.

³⁴ As developed in John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007) 295; Valerie Braithwaite, 'Defiance and Motivational Postures' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer Reference, 2014) 915, 917 ('Defiance and Motivational Postures').

³⁵ Braithwaite, 'Defiance and Motivational Postures' (n 34) 917.

³⁶ *Ibid.*

3 *Top Left Quadrant: Types of Constructive Disengagement*

This quadrant is more difficult to populate. It might contemplate a scenario where a state's withdrawal posture at Time 't' appears to be 'destructive disengagement' (below, bottom left quadrant). However, at Time 't+5 years' it may prove possible to characterise this (perhaps with infusion of a thicker account of 'constructive' on the vertical) as initial disengagement that was ultimately constructive or at least supportive, in that it stimulated other states and non-state actors (or a later administration of that disengaging state) to cooperate towards the goal.

This attempted plotting of constructive disengagement on the axes reinforces three things. First, the significance of time lapsing (a more dynamic temporal dimension to the framework). Second, the need to assess states' postures by reference to other states' postures and responses thereto (a more interactive, iterative dimension to the framework). Third, the difficulty of setting aside considerations such as intended effect or effect regardless of intent, again assessed neither in isolation of other states' postures nor frozen in time.

4 *Bottom Left Quadrant: Types of Destructive Disengagement*

'*Destructive disengagement*': This is posited as the least ideal scenario or quadrant. The state's administration (perhaps responding to or catalysing populist sentiment about unaccountable, out-of-touch globalist elites in a supranational human rights court) actively undermines the legitimacy and operations of the institution, before withdrawing altogether. The state is committed in the sense above, but to reducing the institution's legitimacy or effectiveness by reference to its mandate, so that one might characterise this as destructive. Other less extreme points might also be plotted within this quadrant (such as 'defiant non-engagement' near the middle of the horizontal but in the lower, negative half on the vertical axis) depending on the data, and on the distinction (below) between rhetoric and action.

C *Additional Considerations*

There are various practical difficulties in undertaking the sort of empirical work needed to discern what particular official positions were taken (whatever the populist rhetoric) by a state's representatives on a particular issue or within a specific institution. This is one aspect of a more general complex challenge — albeit one not unfamiliar to international law scholars — in terms of the possibility that there will often be considerable (and sometimes deliberate) ambiguity around assessing and categorising state practice. In this regard, and as we develop below, whether a form of conduct is properly characterised as engagement or disengagement, constructive or destructive, may be debatable and involve some subjectivities on the part of the actor undertaking the characterisation. Nevertheless, in the context of the shortcomings in the extant literature outlined in Part II, the framework provides a valuable starting point to facilitate analytical debate.

Some further commentary is warranted pertaining to the working characterisations outlined above. First, some of these plotted positions might overlap on a more nuanced analysis. For instance, a state's 'committed

engagement' might also be accompanied by fairly robust reformist impulses typical of more obstructive 'resistant' or 'defiant' postures, or at least be perceived by another state (or civil society, etc) as far less positive.

Second, the framework is particularly valuable when used to track postures and positions over time. This is because typically only time will tell if an apparent conditional or temporary disengagement is actually a more permanent or complete rejection of a treaty regime or institution. Such disengagement may be merely tactical manoeuvring catalysing more fulsome engagement at least in net terms by subsequent administrations or other states. Likewise, as above in relation to creative destruction, only a combination of time and one's particular perspective on what counts as progress in international law and governance will enable one to come to an assessment that a posture characterised for argument as destructive (of a treaty regime or institution) is properly viewed that way. State disengagement from Institution X could be a form of creative destruction. Especially if a longer time horizon is used, it could give rise to rival or alternative Institution Y, one that attracts greater degrees of committed engagement on our typology, or greater legitimacy, effectiveness and/or inclusivity. Likewise, disengagement characterised as "destructive" might result in states engaging with a competing subject-matter institution or legal order. Only time will tell, and such characterisations would typically require a theorised account of what is "good" (creative) destruction and competition/fragmentation.

Third, the focus here is on characterising engagement, but some distinction between form and substance might still be required where one seeks to contrast conduct at the supranational level (this typology) with implementing conduct at the national and sub-national level. This is because characterising, for example, how a state engages with the UN Human Rights Council in Geneva and its agenda as a multilateral matter might reveal little about its human rights conduct at home. Thus, a state might be highly engaged with the Council's agenda and comply with reporting and review procedures in multilateral arenas, yet be hostile or indifferent domestically to human rights, or incapable of implementing any policy or legislative agenda on this. This national/international distinction adds a further potential dimension to the typology.

Fourth, there is a distinction between apparent or intended impacts (to obstruct or destruct an institution or order), and the actual impact of these efforts. Thus, we could characterise State A's conduct as destructive disengagement with Institution X, yet A's influence on the trajectory of Institution X is negligible. In this way at least, the "backlash" idea needs to be refined to introduce the more nuanced idea of *attempted* backlash (which has little apparent effect on the legitimacy, or other indicators, of any institution). We return to the effects question in Part IV below.

D *Engagement: Rhetoric and Action*

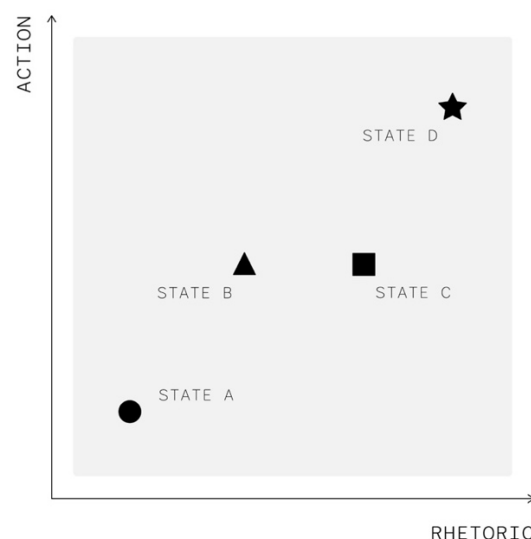
Up until this point our framework has treated engagement in a relatively monolithic way. However, and particularly in the context of the question of the impact of populism on international law, a useful framework needs also to distinguish between the rhetoric of states (actors representing states) and their actions. It is conceivable that in the rhetoric of its agents and representatives, State A displays all the hallmarks of "hot" populist scapegoating of an international legal regime or institution over a certain time period, yet in substance its

engagement in or with that regime or institution might be characterised as business as usual, or at least it does not manifest the rhetoric. The reverse may also be true. Only empirical study will reveal what the administration's approach actually was. Even so, a sophisticated conceptual framework may need to account for the scenario where (populist) rhetorical attacks on an institution's legitimacy or credibility are not accompanied by any particular substantive measures to undermine or discredit or defund it, yet where the rhetoric is as damaging as some of those substantive measures.

That is, just because State A's conduct was all hot air and their engagement was business as usual does not mean that their solely rhetorical attacks are immaterial in terms of the impacts or effects of different modes of engagement on different indicators, such as institutional legitimacy. For the purposes of framing different modes of engagement, our conceptual framework needs to cater for scenarios where *substance* (routine engagement) and *form* (populist rhetorical attacks) differ, where actions and words do not align. The framework should also account for different combinations of such a scenario, notably the reverse: no rhetoric, but in practice therefore significant efforts to undermine or various kinds of non-constructive disengagement or non-engagement. On this basis, one could begin to contrast conduct (actions) and rhetoric (words) in the manner illustrated in Figure 5 below.

Figure 5

RHETORIC AND ACTION

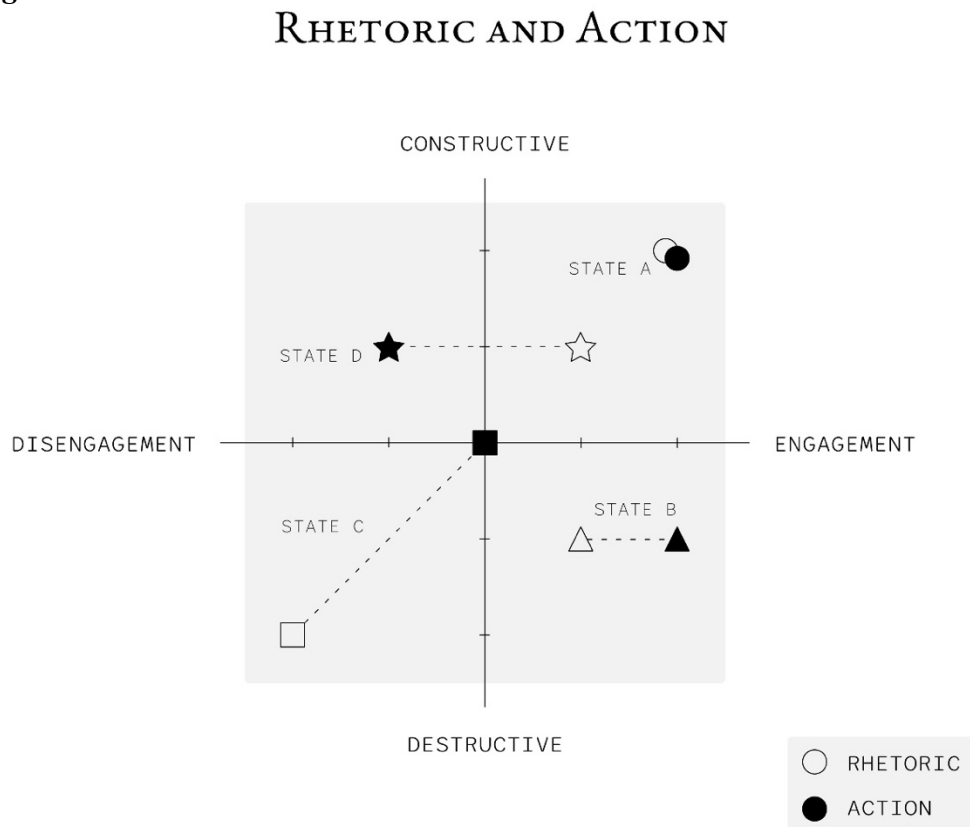


Here, State A's engagement both in terms of rhetoric and action is fairly low. State D in contrast has high levels of both engagement and rhetoric. State B and State C have different levels of rhetoric, but their *actions* of engagement are of the same intensity. This chart does not distinguish between the type of engagement: whether destructive, obstructive, non-obstructive or committed. Of course, more nuanced analysis could explore the fact that some populist rhetoric about an

international court or body is not intended to have any effect beyond domestic politics. As discussed above, we see the framework as useful for triggering, even if it cannot resolve, debate about complex interactions between intention (eg to undermine an institution) and effect in fact. Conversely, rhetorical attacks on an international institution may not be intended to have any effect at the level of international governance, yet analysis might suggest significant negative effects on a body's standing or effectiveness, however measured.

We can further plot a state's populist rhetoric and action on our four-quadrant framework graph, showing how the positions may either converge or greatly diverge. In the figure below (Figure 6), State A has convergent rhetoric and action, both situated in the top right constructive, proactive engagement quadrant. State B has rhetoric and action positions that are similar but not identical: the rhetoric is milder (obstructive, passive engagement) than the action (destructive, proactive engagement). States C and D show more divergence in their rhetoric and action behaviours: while State C's rhetoric is hot, its action is in fact neutral, non-resistant non-engagement. State D is supportive and somewhat engaged in rhetoric, but its action shows passive non-engagement.

Figure 6



IV APPLYING THE FRAMEWORK: SNAPSHOT EXAMPLES

In this Part, we illustrate the prospective utility of our engagement framework by sketching out its application to three real-world examples, namely: (a) engagement in the ICC by South Africa and the Philippines; (b) engagement in international treaty regimes by the US; and (c) engagement in the UN Security

Council ('UNSC') by Russia, the UK and the US on the Gaza crisis in late 2023. These sketches demonstrate how the framework can be used to map engagement in international law and institutions by both states with democratic populist governments and states with governments that are not typically characterised as either populist (eg US under Biden) or democratic (eg Russia).

A South Africa, the Philippines and the International Criminal Court

The way that the ICC has featured in the recent domestic politics of South Africa and the Philippines offers a snapshot of the engagement framework in the context of noticeably populist politicking in those two settings. In South Africa, early in the post-apartheid democratic transition (mid-1990s to mid-2000s), the ruling alliance, led by the African National Congress party ('the ANC'), had been a strong and vocal supporter of the *Rome Statute*.³⁷ However, by and from the mid-2000s the ANC-led alliance was one of the louder voices criticising the ICC (often with little distinction between the court and its prosecutorial arm) as unduly focused on African cases and conflicts, and something of a tool of Western neo-imperialism.³⁸ Supporters would no doubt tie these criticisms (which implied at times the need to disengage from the ICC) to the principled foreign policy of a leading voice of the Global South. Sceptics, for their part, might see this rhetoric as a function of the ANC — in a populist style — burnishing its Africanist or Global South credentials before other African states, as well as at home — as its political monopoly eroded and it sought to outflank populist electoral challengers such as Julius Malema's Economic Freedom Fighters party.³⁹ For the present purposes of illustrating the typology in a snapshot way, it is certainly arguable that South Africa's rhetoric about and interactions with the ICC reflect a peculiarly ANC variant of the populist anti-institutional and anti-elitist motif.⁴⁰ More directly, in the last decade visits (or proposed visits) to South Africa by serving heads of states against whom ICC arrest warrants were in place (Sudan's Omar al-Bashir,⁴¹ and more recently Russia's Vladimir Putin) put the ANC leadership

³⁷ J Andrew Grant and Spencer Hamilton, 'Norm Dynamics and International Organisations: South Africa in the African Union and International Criminal Court' (2016) 54(2) *Commonwealth and Comparative Politics* 161, 171–2; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

³⁸ See, eg, Lilian Chenwi and Franziska Sucker, 'South Africa's Competing Obligations in Relation to International Crimes' (2015) 7 *Constitutional Court Review* 199, 200–1; Franziska Boehme, "'We Chose Africa': South Africa and the Regional Politics of Cooperation with the International Criminal Court' (2017) 11(1) *International Journal of Transitional Justice* 50, 64; Grant and Hamilton (n 37) 174. For discussion of the relationship between the African Union and the ICC more generally, see Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, 'Africa and the International Criminal Court' (International Law Paper 2013/01, Chatham House, July 2013).

³⁹ See, eg, Sishuwa Sishuwa, 'Populism in Africa' in Yannis Stavrakakis and Giorgos Katsambekis (eds), *Research Handbook on Populism* (Edward Elgar Publishing, 2024), 444, 452; Robert Nyenhuis, 'The Political Struggle for "The People": Populist Discourse in the 2019 South African Elections' (2020) 58(4) *Commonwealth and Comparative Politics* 409, 411.

⁴⁰ See, eg, Danielle Resnick, 'Populism in Africa' in Cristóbal Rovira Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford University Press, 2017) 101, 107–12.

⁴¹ Boehme (n 38) 64–8.

under considerable pressure at home and abroad.⁴² For domestic, regional and global governmental and market audiences, Pretoria arguably needed to be seen to comply with orders of its own domestic courts (enforcing legislation that obliged the executive to enforce such warrants). On the other hand, for other domestic and sub-regional audiences it also needed to be seen to be maintaining its more populist, African nationalist narrative about hypocritical Western interventionism as exhibited by international institutions such as the ICC. By the mid-2010s, in the controversy around the visit to South Africa of al-Bashir, South Africa was stating its intention to withdraw from the court.⁴³ The executive government was litigating (unsuccessfully) to resist having to follow its domestic legislative procedures around ICC arrest warrants.⁴⁴

There has been considerable ANC and state institutional rhetoric and overtures for around a decade now, most recently in mid-2023 over the Putin warrant,⁴⁵ about withdrawing from the *Rome Statute* regime (and repealing or significantly amending related domestic implementation legislation). Yet despite all this, no such action has occurred and South Africa remains a party.⁴⁶ Indeed, in mid-November 2023, South Africa joined the *Rome Statute* art 14 referral of the situation in Gaza to the ICC Prosecutor's office.⁴⁷ This is hardly disengagement. Then, in December 2023, South Africa sought to be seen not as delegitimising international justice institutions but rather as championing international criminal law by initiating an action against Israel in the International Court of Justice (the ICC lacking jurisdiction in that instance).⁴⁸

It is open for debate as to whether Pretoria's rhetoric and diplomacy around the ICC has been more obstructive of that institution's purpose than supportive of it. This article's model is intended not to assert characterisations of engagement but to stimulate and give frames to such debate. Pretoria's mode of engagement was arguably mostly obstructive. Yet contrary to media and civil society criticism of

⁴² Carien du Plessis, 'South Africa Mulls Options on ICC Arrest Warrant for Potential Visitor Putin', *Reuters* (online, 1 June 2023) <<https://www.reuters.com/world/africa/south-africa-mulls-options-icc-arrest-warrant-potential-visitor-putin-2023-05-31/>>, archived at <<https://perma.cc/MXG5-VA7A>>.

⁴³ 'South Africa to Quit International Criminal Court', *The Guardian* (online, 21 October 2016) <<https://www.theguardian.com/world/2016/oct/21/south-africa-to-quit-international-criminal-court-document-shows>>, archived at <<https://perma.cc/C84Y-TQXM>>.

⁴⁴ *Minister of Justice and Constitutional Development v Southern African Litigation Centre* [2016] 3 SA 317 (Supreme Court of Appeal).

⁴⁵ See, eg, John Eligon, 'South Africa's Shifting Stance on a Sensitive Question: Quit the ICC?' *The New York Times* (online, 26 April 2023) <<https://www.nytimes.com/2023/04/26/world/africa/south-africa-icc-ramaphosa.html>>, archived at <<https://perma.cc/YL5D-R3TP>>.

⁴⁶ It cannot, of course, be assumed that ANC or alliance policy is necessarily adopted or implemented wholesale by diplomats and officials within the ANC-led government, but exploring that dynamic is beyond the scope of this stylised snapshot.

⁴⁷ Department of International Relations and Cooperation (South Africa), 'South Africa, Along With Like-Minded States, Submits Joint Referral of the Situation in Palestine to the ICC' (Media Statement, 17 November 2023) <<https://dirco.gov.za/south-africa-along-with-like-minded-states-submits-joint-referral-of-the-situation-in-palestine-to-the-icc/>>, archived at <<https://perma.cc/TV5D-BYM9>>.

⁴⁸ 'Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures', *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (International Court of Justice, General List No 192, 29 December 2023).

the ANC-led government (as walking away from the ICC it helped to found), it is difficult to label its position as one of disengagement. If anything, it has been among the most highly engaged ICC member states, precisely because of its attempts to modify the Court's (or, more accurately, the Prosecutor's) geographic focus and practice in relation to serving heads of states. It is possible to see Pretoria's position not wholly as mere populist posturing but as a principled one against the perceived risks, to political stability and peacebuilding, of prosecutorial overreach. Moreover, its 2016 argument for withdrawal was, on its face, based on a genuinely complex legal situation on which international law is not settled (South African domestic law recognises that serving heads of state enjoy full immunity from prosecution).⁴⁹ Its position might best be plotted (on Figure 5) as manifesting *resistant engagement*, or as State B in Figure 7, with the qualifier that South Africa's action in disengagement terms has fallen somewhat short of its rhetoric about leaving.

One can contrast this engagement pattern with another ICC member country critical of that institution, the Philippines. By contrast with Pretoria, Manila's position towards the ICC under populist President Rodrigo Duterte (2016–22) can be characterised as obstructive disengagement (or, perhaps, “destructive” in intent if not in effect).⁵⁰ The Philippines became a party to the *Rome Statute* in 2011.⁵¹ On 15 September 2021, the ICC's Pre-Trial Chamber granted the Prosecutor's May 2021 application to commence an investigation of crimes against humanity allegedly committed in the Philippines between 2011 and 2019 in the context of the so-called ‘war on drugs’ campaign.⁵² On 17 March 2018, the Philippines filed

⁴⁹ See, eg, *Implementation of the Rome Statute of the International Criminal Court Act 2002* (South Africa); *Diplomatic Immunity and Privileges Act 2001* (South Africa); *Foreign State Immunities Act 1981* (South Africa).

⁵⁰ On framing Duterte as ‘populist’, see Richard Javad Heydarian, *The Rise of Duterte: A Populist Revolt against Elite Democracy* (Palgrave Macmillan, 2018); Ronald A Pernia, ‘Human Rights in a Time of Populism: Philippines under Rodrigo Duterte’ (2019) 19(3) *Asia-Pacific Social Science Review* 56; Richard Javad Heydarian, ‘Penal Populism in Emerging Markets: Human Rights and Democracy in the Age of Strongmen’, in Gerald L Neuman (ed), *Human Rights in a Time of Populism: Challenges and Responses* (Cambridge University Press, 2020) 130.

⁵¹ International Criminal Court, ‘The Philippines Becomes the 117th State to Join the Rome Statute System’ (Press Release ICC-CPI-20110830-PR717, 30 August 2011) <<https://asp.icc-cpi.int/press-releases/press-releases-2011/pr717>>, archived at <<https://perma.cc/46AJ-94YG>>.

⁵² On 26 January 2023, the Pre-Trial Chamber granted a request to resume this investigation. The ICC retains jurisdiction in relation to the period 2016–19 notwithstanding the withdrawal: see ‘Republic of the Philippines’, *International Criminal Court* (Web Page) <<https://www.icc-cpi.int/philippines>>, archived at <<https://perma.cc/D7QJ-8BCF>>. See generally ‘The Philippines’, *Coalition for the International Criminal Court* (Web Page) <www.coalitionfortheICC.org/country/philippines>, archived at <<https://perma.cc/G4ZH-43UL>>.

a notification of its withdrawal from the Treaty (which took effect one year later, on 17 March 2019).⁵³

In the early phases of his presidency, and including to cultivate support from the political left in the Philippines, Duterte did engage in some rhetoric critical of international governance (albeit most of this criticism was reserved for the US).⁵⁴ Later, and otherwise, attacks on international institutions were not a noticeable feature of his administration.⁵⁵ The approach to the ICC was very different. In its fulsome criticism of and withdrawal from the ICC, Manila was arguably not, perhaps unlike Pretoria, attempting to shift or reform the policy orientation of the institution except in relation to how the institution was impacting on its own domestic politics. That is, Manila's approach might be more difficult (than Pretoria's) to frame as one of principle. The incumbent administration was fairly clearly trying to insulate itself from political-legal risk, mostly at home, including by delegitimizing the ICC to a domestic audience. The Philippines' withdrawal from the ICC was not destructive of the institution itself, but it was (so to speak) destructive of that state's membership of it.⁵⁶ It would be represented in the bottom left of the quadrant in Figure 5.

Context and complexity of course militate against too simplistic a comparison of the South Africa and Philippines ICC stories. Yet one interesting factor to reflect on in this snapshot is a function of what we discussed earlier in terms of the assumption that "disengagement" is always more problematic (to advancing the aims and purposes of international law or an institution thereof) than "engagement". This is because South Africa's proactive engagement and non-withdrawal may, on one view, be understood to be far more damaging to the ICC (accompanied, as it had been, by the ANC and government's domestic and

⁵³ While outside the temporal scope of this case study, it should be noted that although the Philippines has not rejoined the ICC, it did not protest and indeed carried out the arrest of Rodrigo Duterte pursuant to an ICC arrest warrant on 11 March 2025: Office of the Prosecutor, 'Statement of the ICC Office of the Prosecutor on the Arrest of Former Philippine President Rodrigo Roa Duterte' (Press Statement, International Criminal Court, 12 March 2025) <<https://www.icc-cpi.int/news/statement-icc-office-prosecutor-arrest-former-philippine-president-rodrigo-roa-duterte>>, archived at <<https://perma.cc/YPF6-Y8SZ>>. This is potentially a softening of the Philippines stance towards the ICC, with cooperation rather than obstruction from Philippine authorities. However, the long-term implications for the Philippines' relationship with the ICC remain unclear, with the Philippines Senate opening an inquiry into the arrest on 17 March 2025: see 'Philippines Senate Launches Investigation into Duterte's ICC arrest', *Al Jazeera* (online, 17 March 2025) <<https://www.aljazeera.com/news/2025/3/17/philippines-senate-launches-investigation-into-dutertes-icc-arrest>>, archived at <<https://perma.cc/HLC6-CSP8>>.

⁵⁴ See, eg, Alfred W McCoy, 'A Rupture in Philippine-US Relations: Geopolitical Implications' (2016) 75(4) *Journal of Asian Studies* 1049, 1049–50.

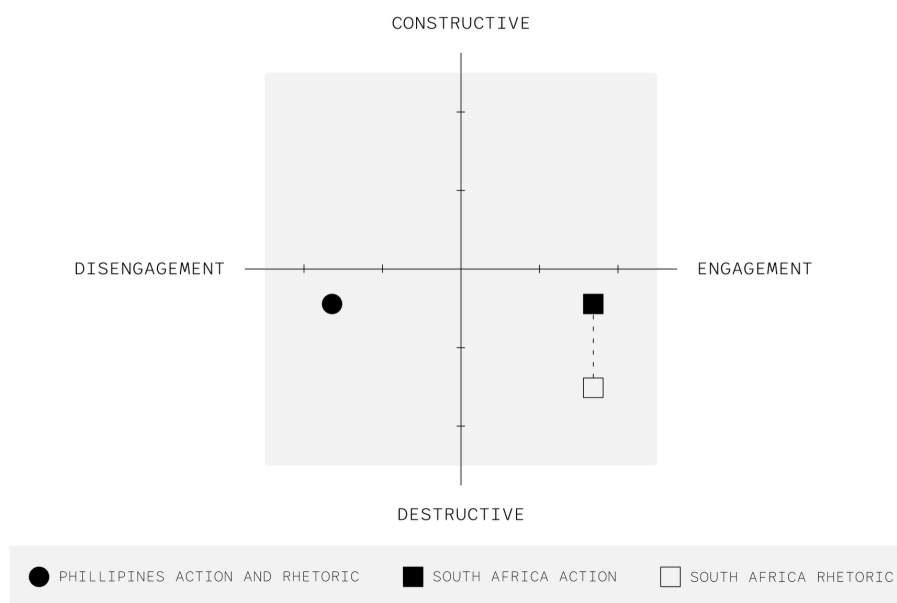
⁵⁵ A notable exception was Duterte's 2017 personal abuse of a UN Special Rapporteur in the context of criticism of his so-called 'war on drugs': Nestor Corrales, 'Duterte Hurls Expletives at Callamard after her Remark on Kian Slay' *Inquirer* (online, 28 August 2017) <<https://globalnation.inquirer.net/160053/duterte-callamard-war-on-drugs-kian-delos-santos-killings-expletive>>, archived at <<https://perma.cc/AYL4-DNSV>>. For a fulsome discussion of Duterte's approach to international organisations, see Nina Araneta-Alana et al, 'Populism and Institutional Fortitude: Philippine Engagement with International Law and Institutions during the Duterte administration' (2025) 15(2) *Asian Journal of International Law* (advance).

⁵⁶ See, eg, Jennifer Tridgell, 'The Departed: Implications of the Philippines' Withdrawal from the ICC', *Opinio Juris* (Blog Post, 12 April 2018) <<https://opiniojuris.org/2018/04/12/the-departed-implications-of-the-philippines-withdrawal-from-the-icc/>>, archived at <<https://perma.cc/64R7-49QM>>.

international rhetoric undermining the ICC's legitimacy) than the Philippines' outright disengagement and withdrawal. This is shown below in Figure 7. This observation arguably illustrates the potential utility of the typological framework to a research agenda on the impacts on institutions of such rhetoric and action by states and their leadership.

Figure 7

SOUTH AFRICA, PHILIPPINES AND THE INTERNATIONAL CRIMINAL COURT



B *The US and International Treaty Regimes*

It is also interesting to consider how the framework may operate outside the bounds of international institutions, and extend to international regimes more generally (but also to the process of supranational lawmaking and treaty negotiation, not just the operation of those regimes once in force). Here, we can consider the repeated practice of the US in being highly engaged in the formation of a treaty regime, and yet failing to ratify the treaty once it is completed. This behaviour in itself is challenging to classify: can engagement with the formation of a regime (including influence of the ultimate rules adopted) carried out with no intention of ever joining that regime ever be truly constructive? Or does non-membership always imply some level of if not destructive behaviour, at the least obstructiveness? The *UNCLOS*⁵⁷ and the *Rome Statute* (of the ICC) provide two contrasting examples of such behaviour. For both treaties, the US was deeply involved in the drafting process, but the current relationship with the regime created by the treaty varies. Earlier, in setting out the framework, we reflected on how a fulsome conceptualisation of multilateral engagement would normally need to include involvement in standard-setting and lawmaking at the international

⁵⁷ *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

level, not just interactions within a treaty regime or institution once this is established. These snapshot illustrations also reinforce how our typology may be useful in characterising engagement modes irrespective of whether populism is supposedly a driver of shifts in state posture: US non-ratification of *UNCLOS* or of the *Rome Statute* does not have an obvious “populism” explanation other than in the broadest (sovereigntist) sense, even if more recent US engagement with the ICC can be characterised as manifesting populist policymaking.

The US’s role in drafting *UNCLOS* is well known: the third UN Conference on the Law of the Sea which resulted in the adoption of *UNCLOS* was principally initiated by the US, and the US actively and supportively negotiated the text across the administrations of Richard Nixon, Gerald Ford and Jimmy Carter,⁵⁸ a position we would call committed engagement on our framework. Under President Ronald Reagan, the US did not join *UNCLOS* when it opened for signature, with the inclusion of Part IX on deep sea mining cited as the reason why.⁵⁹ Despite the ongoing non-ratification of *UNCLOS*, the US abides by its strictures and accepts the customary international law status in its domestic courts⁶⁰ and in international statements.⁶¹ This by itself would be something we could plot as supportive passive engagement: the US is not undermining the treaty regime, but by not ratifying, it is also unable to participate in treaty specific bodies and dispute settlement. However, US action regarding *UNCLOS* is not in fact limited to this passive support: the US actively engages in deliberate state practice in areas such as freedom of navigation to underscore and strengthen the customary status of *UNCLOS* rules.⁶² Further, the US State Department assesses the consistency of other states’ maritime claims with *UNCLOS* rules and publishes these assessments in its *Limits in the Seas* series.⁶³ While the hypocrisy of the US effectively appointing itself the judge of others’ conduct in regard to a treaty which itself has not ratified has not escaped commentary,⁶⁴ it nevertheless remains that the US’s

⁵⁸ John Norton Moore, *The Struggle for Law in the Oceans: How an Isolationist Narrative Betrays America* (Oxford University Press, 2023) 5–8.

⁵⁹ Ronald Reagan, ‘Statement on United States Actions Concerning the Conference on the Law of the Sea’ (Press Statement, 9 July 1982) <<https://www.reaganlibrary.gov/archives/speech/statement-united-states-actions-concerning-conference-law-sea>>, archived at <<https://perma.cc/L2C3-YKCB>>.

⁶⁰ Angelle C Smith, ‘Frozen Assets: Ownership of Arctic Mineral Rights Must Be Resolved to Prevent the Really Cold War’ (2010) 41(3) *George Washington International Law Review* 651, 672.

⁶¹ See, eg, Mark Simonoff, ‘Remarks at a UN General Assembly Commemoration of the 40th Anniversary of the Opening for Signature of the 1982 Law of the Sea Convention’ (Speech, United Nations General Assembly, 29 April 2022) <<https://usun.usmission.gov/remarks-at-a-un-general-assembly-commemoration-of-the-40th-anniversary-of-the-opening-for-signature-of-the-1982-law-of-the-sea-convention/>>, archived at <<https://perma.cc/3HJD-RSR2>>.

⁶² Department of Defense (US), ‘DOD Releases Fiscal Year 2023 Freedom of Navigation Report’ (Press Release, 8 May 2024) <<https://www.defense.gov/News/Releases/Release/Article/3769479/dod-releases-fiscal-year-2023-freedom-of-navigation-report/>>, archived at <<https://perma.cc/L2TG-ALW3>>.

⁶³ Office of Ocean and Polar Affairs (US), ‘Limits in the Seas’, *US Department of State* (Web Page) <<https://www.state.gov/limits-in-the-seas/>>, archived at <<https://perma.cc/9QZN-9EP9>>.

⁶⁴ See, eg, Robert Beckman, ‘On the United States, the UN Convention on the Law of the Sea and US Freedom of Navigation Operations’, *Fulcrum* (Long Read, 5 August 2022) <<https://fulcrum.sg/on-the-united-states-the-un-convention-on-the-law-of-the-sea-and-us-freedom-of-navigation-operations/>>, archived at <<https://perma.cc/FHZ9-R4ZU>>.

behaviour is edging more towards committed (constructive, proactive) engagement *despite* its non-ratification. The framework thus allows a more nuanced perspective on US engagement with *UNCLOS*.

The ICC situation is very different. The US–ICC relationship was described, at its low point, by then ICC President Chile Eboe-Osuji, as beyond ‘most ... unfortunate’ and characterised by ‘extraordinary threats’ by the US against the ICC which endanger the ‘the idea of rule of law and judicial independence’ more generally.⁶⁵ As with *UNCLOS*, the US delegation actively participated in negotiations for the *Rome Statute*, following from its leading role in establishing ad hoc international criminal tribunals for Rwanda, the former Yugoslavia and Sierra Leone.⁶⁶ Ultimately, however, the US’s unwillingness to subject its military to possible prosecution by the ICC for war crimes and crimes against humanity (having unsuccessfully tried to have both as ‘opt out’ provisions for jurisdiction)⁶⁷ resulted in no ratification. Since 1998, some US administrations have shown qualified support for the ICC: President Barack Obama for example, urged Kenya ‘to cooperate fully with the ICC investigation’ announced in 2010.⁶⁸ This could be plotted as supportive non-engagement. However, other administrations have not approached things this way. In 2020, following the Appeals Chamber’s authorisation of investigating alleged war crimes in Afghanistan (including by US troops), President Donald Trump placed visa restrictions and individual sanctions on ICC prosecutors and staff.⁶⁹ At this stage, the US position might be plotted as one of proactive but obstructive engagement. The executive order was subsequently revoked by President Joe Biden in 2021.⁷⁰ While the US continues to ‘disagree strongly with the ICC’s actions relating to the Afghanistan and Palestinian situations’ the stated US position is to address this through ‘engagement with all stakeholders in the ICC process’.⁷¹ Finally, and most recently, the US has shown greater supportive proactive engagement with the ICC following the issuing of an arrest warrant for President Putin in early 2023. Not

⁶⁵ Chile Eboe-Osuji, ‘The US and the ICC’ (Lantos Rule of Law Lecture, 14 November 2019) 3, 10, 12 <<https://www.icc-cpi.int/sites/default/files/itemsDocuments/191114-president-stat-us-and-icc.pdf>>, archived at <<https://perma.cc/SK9T-ALNB>>.

⁶⁶ For an overview of the US delegation’s negotiations, see David J Scheffer, ‘The United States and the International Criminal Court’ (1999) 93(1) *American Journal of International Law* 12.

⁶⁷ Ibid 18–19.

⁶⁸ Barack Obama, ‘Statement by President Obama on the International Criminal Court Announcement’ (Press Statement, The White House, 15 December 2010) <<https://obamawhitehouse.archives.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement>>, archived at <<https://perma.cc/NNA7-DWFB>>.

⁶⁹ *Blocking Property of Certain Persons Associated with the International Criminal Court*, Executive Order 13928, 85 Fed Reg 36139, (11 June 2020) <<https://www.federalregister.gov/documents/2020/06/15/2020-12953/blocking-property-of-certain-persons-associated-with-the-international-criminal-court>>, archived at <<https://perma.cc/RU3Z-439B>>.

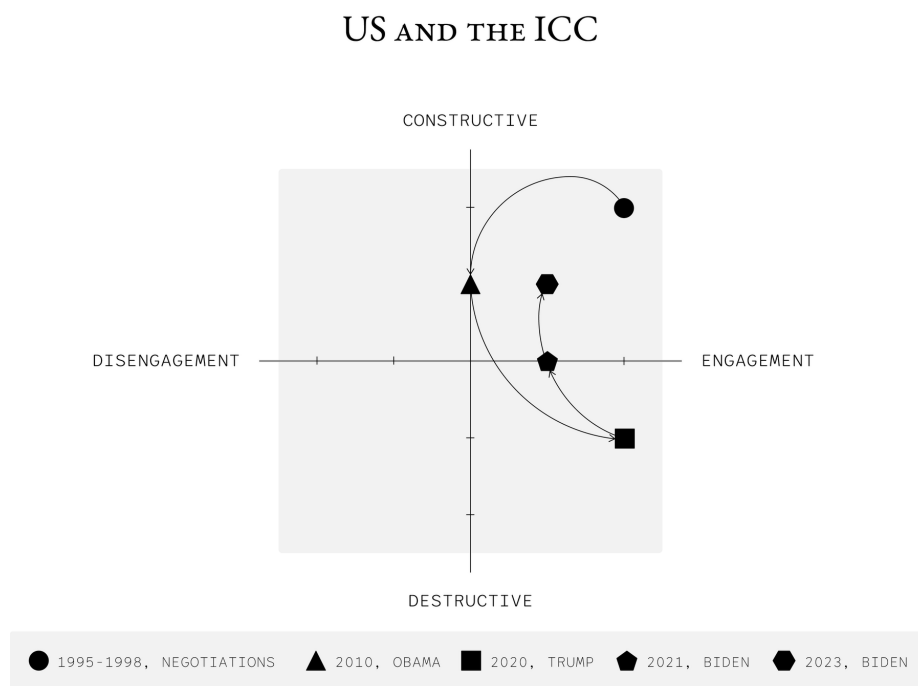
⁷⁰ Antony J Blinken, ‘Ending Sanctions and Visa Restrictions against Personnel of the International Criminal Court’ (Press Statement, 2 April 2021) <<https://2021-2025.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/>>, archived at <<https://perma.cc/EP3X-BC2D>>.

⁷¹ Ibid.

only did Biden endorse the warrant, he directed US agencies to share any evidence of Russian war crimes with the ICC.⁷²

The ICC snapshot thus shows the importance of the temporal aspect of our framework, with the US transitioning through committed proactive engagement (*Rome Statute* negotiations) to supportive non-engagement (the Obama administration), obstructive proactive engagement (Trump sanctions), neutral passive engagement (Biden administration) and finally supportive passive engagement (Biden administration). It also illustrates how within one institution or treaty regime, a state's engagement will shift on the basis of individual issues and administrations. This is shown graphically in Figure 8, below.

Figure 8



C *UK and US Engagement in the UN Security Council on the Gaza Crisis*

Our third snapshot considers two rounds of UNSC deliberations on the Gaza crisis in December 2023, with a specific focus on differences in the voting records of Russia, the UK and the US in Council decision-making on a proposed humanitarian ceasefire in hostilities between Israel and Hamas. In the first round, on 8 December, the Council failed to adopt a draft resolution due to the exercise of a veto by the US. In the second round, on 22 December, the Council adopted Resolution 2720.⁷³

⁷² Trevor Hunnicutt and Idrees Ali, 'Biden Orders US to Share Russian War Crimes Evidence with ICC', *Reuters* (online, 27 July 2023) <<https://www.reuters.com/world/biden-orders-us-share-russian-war-crimes-evidence-with-world-court-nyt-2023-07-26/>>, archived at <<https://perma.cc/6A59-38Z9>>.

⁷³ SC Res 2720, 9520th mtg, Agenda Items 50, 53 and 54, UN Doc S/RES/2720 (22 December 2023).

Article 24 of the *Charter of the United Nations* bestows upon the Council primary responsibility for the ‘maintenance of international peace and security’.⁷⁴ The Council’s mandate under Chapter VII of the Charter is to determine the existence of any threats to the peace, breaches of the peace, and acts of aggression, and to take appropriate action, including the application of sanctions and the use of force, to restore international peace and security. Both rounds of Council decision-making on Gaza sought to adopt decisions that would enable the Council to meet its primary responsibility under art 24.

In the first round, on 8 December 2023 the Council considered a draft resolution sponsored by 102 UN member states, including five Council members, two of which (China and Russia) were permanent members. The draft resolution noted the letter dated 6 December 2023 from the UN Secretary-General to the President of the Council, in which he urged the Council to take action to avert a humanitarian catastrophe and reiterated his urgent appeal for a humanitarian ceasefire.⁷⁵ It then demanded ‘an immediate humanitarian ceasefire’, reiterated ‘its demand that all parties comply with their obligations under international law’, and demanded ‘the immediate and unconditional release of all hostages, as well as ensuring humanitarian access’.⁷⁶ When the draft was put to the vote, it received 13 votes in favour, thus well above the threshold of 9 for the adoption of a resolution.⁷⁷ The other two Council members were permanent members, namely the UK and the US. The UK abstained, an action that, whilst not constituting an affirmative vote, has nevertheless — through consistent practice over decades — come to be acknowledged as no obstacle to adoption. The US, however, cast a negative vote, thus vetoing the proposed resolution.

In the second round, on 22 December 2023, the Council considered a draft resolution submitted by one of its elected members, the United Arab Emirates, which sought to pave the way for ‘a sustainable cessation of hostilities’ and a scale-up of humanitarian aid.⁷⁸ The draft was decidedly more lengthy and detailed than the 8 December text. Prior to the Council’s vote on the draft, Russia sought to strengthen para 2, which reaffirmed ‘the obligations of the parties to the conflict under international humanitarian law regarding the provision of humanitarian assistance’, demanded they ‘allow, facilitate and enable the immediate, safe and unhindered delivery of humanitarian assistance at scale directly to the Palestinian civilian population throughout the Gaza Strip’, and called for ‘urgent steps to immediately allow safe, unhindered, and expanded humanitarian access and to create the conditions for a sustainable cessation of hostilities’.⁷⁹ Russia’s proposal

⁷⁴ *Charter of the United Nations* art 24.

⁷⁵ For the draft resolution, see *Draft Resolution*, 78th sess, Agenda Items 50, 53 and 54, UN Doc S/2023/970 (8 December 2023) Preamble para 3 (*‘Draft Resolution of 8 December 2023’*). For the Secretary-General’s letter, see *Letter Dated 6 December 2023 from the Secretary-General Addressed to the President of the Security Council*, 78th sess, Agenda Items 50, 53 and 54, UN Doc S/2023/962 (6 December 2023).

⁷⁶ *Draft Resolution of 8 December 2023* (n 75) paras 1–3.

⁷⁷ *The Situation in the Middle East, including the Palestinian Question*, 78th year, 9499th mtg, Agenda Items 50, 53 and 54, UN Doc S/PV.9499 (8 December 2023) 3–4.

⁷⁸ *United Arab Emirates: Draft Resolution*, 78th sess, Agenda Items 50, 53 and 54, UN Doc S/2023/1029 (22 December 2023) paras 2–3.

⁷⁹ *Ibid* para 2.

was that the call for ‘urgent steps’ be replaced with a call for ‘a suspension of hostilities’.⁸⁰

According to established Council practice, when an amendment is proposed to a draft resolution, it must be voted on prior to the overall vote. Moreover, the voting procedure on amendments is the same as for resolutions as a whole, meaning that amendments can be vetoed by permanent members. In the voting on the amendment there were ten votes in favour, including Russia, four abstentions, including the UK, and one vote against, namely the US.⁸¹ Accordingly, Russia’s proposed amendment was rejected and the Council proceeded to vote on the draft resolution as a whole. In that vote, there were 13 votes in favour, including the UK. The two remaining votes were abstentions, cast by both Russia and the US.⁸²

In this snapshot, a provisional evaluation of the type of engagement by Russia, the UK and the US in the 8 December rejection of a draft resolution due to the veto, suggests a fascinating distribution of plot-points on the engagement spectrum (the X-axis). Russia, by voting in favour, would sit at the fully engaged end. The UK, by abstaining, would sit at the middle of the engagement spectrum, as neither fully engaged (like Russia and the other 9 members voting in favour of the ceasefire) nor fully disengaged. The location of the US, for its part, could conceivably be plotted as fully disengaged, as on face value it has prevented any action by the Council. However, the exercise of a veto by a permanent member is both a rare and Charter-provided event that generally indicates a high degree of engagement, typically in pursuit or protection of a matter of direct national interest. Thus, it would be more accurate to plot the US as highly engaged.

In terms of the nature of action, Russia’s affirmative vote is plotted at the constructive end of the spectrum from constructive to destructive action (Y-axis), and the UK’s abstention again places it in the middle of the spectrum, as it has neither endorsed nor stood in the way of Council action in accordance with its Charter mandate to maintain international peace and security. By contrast, we plot US action towards the destructive end of the Y-axis. This is because it falls into the third category of destructive engagement flagged in Part IV, namely ‘action that seeks to promote the individual national interests of one member state, or those of a small minority group of member states, in an international institution, to the detriment of the collective interests of other member states’.⁸³ This categorisation is reinforced by the vote count, where the US veto prevented an overwhelming majority (set against the US veto there were 13 affirmative votes and the UK abstention) from taking action. At the same time, we acknowledge that it could be considered provocative to categorise an exercise of the veto as “destructive”, for the US was not attacking the institution or mandate of the Council. Moreover, it was exercising a function provided for in the Charter. However, the strength of both our framework of engagement, as well as the typology of engagement underpinning it, is that it provides a starting point to simulate precisely these types of questions and contestation.

⁸⁰ *The Situation in the Middle East, including the Palestinian Question*, 78th year, 9520th mtg, Agenda Items 50, 53 and 54, UN Doc S/PV.9520 (22 December 2023) 4.

⁸¹ *Ibid* 4–5.

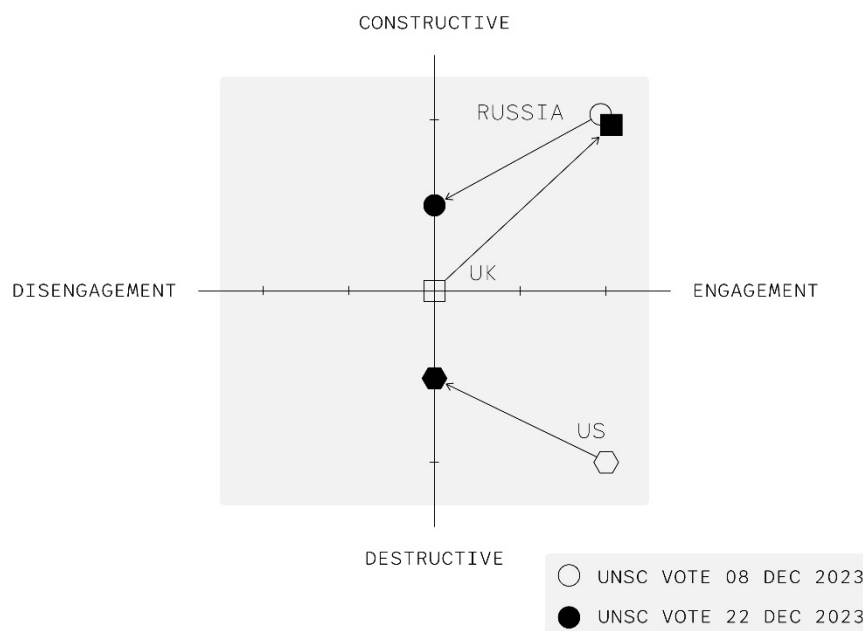
⁸² *Ibid* 5.

⁸³ See above Part III(A).

The 22 December 2023 adoption of Resolution 2720 allows us to plot the movement over time of the voting patterns of Russia, the UK and the US across both rounds of Council decision-making on the Gaza crisis. In this instance, on the X-axis we plot the UK as fully engaged, by virtue of its affirmative vote. Russia and the US, however, we plot as neither fully engaged nor fully disengaged, due to their abstentions. When it comes to the Y-axis, we plot the UK towards the constructive end of the spectrum, Russia as supportive, as despite the fact that it abstained from voting it had initially sought to strengthen the draft, and the US as mildly obstructive, balancing its veto of Russia's effort to strengthen the draft with the ultimate decision by the US to abstain rather than veto. This is shown below in Figure 9.

Figure 9

ENGAGEMENT IN THE UN SECURITY COUNCIL ON THE GAZA CRISIS BY RUSSIA, UK AND US



V A FORWARD-LOOKING RESEARCH AGENDA

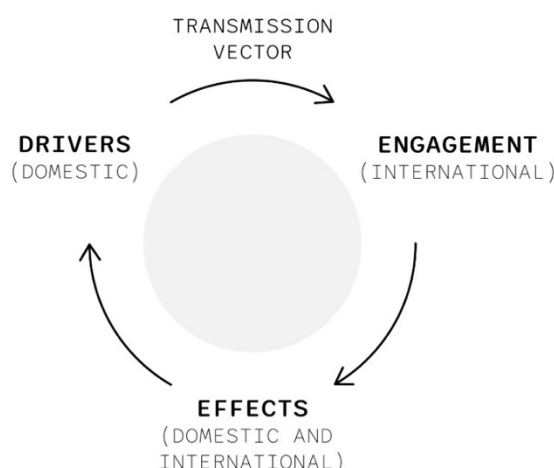
At the end of Part II, we flagged and set aside some potential questions that arise for any comprehensive study at the nexus of “contemporary populism”, “engagement/disengagement”, and “international law and institutions”. We now return to tease out some of these questions and considerations in ways that allow us to acknowledge some of the literature-sets that this article’s work has traversed, explore questions that we frame with the intention to inform further work both on developing and refining the engagement framework, and on enriching understanding more generally of international law and institutions in the context of populism. One way to approach such a research agenda, as briefly set out in Part II, is to conceive of it as composed of four elements: drivers, transmission vectors, modes of engagement and effects. While the typological framework

outlined in Parts III and IV is concerned only with engagement, it must ultimately be viewed in the context of these other elements.

It is worth noting how these factors are interrelated and may be cyclical. Indeed, we suggest that, just as the domestic drivers shape and affect international engagement, which in turn causes effects (both domestic and international), those very effects may feed back into the drivers. Thus, as we have argued previously,⁸⁴ and explored recently elsewhere,⁸⁵ rather than conceiving of research that explores in a singular linearity how populist forces shape international legal discourse and action, there is work to be done on how the real or perceived or portrayed effects of state engagement in international institutions may conversely be a factor informing the rise of populism. This can be represented as a dynamic relationship below in Figure 10.

Figure 10

DRIVERS, ENGAGEMENT AND EFFECTS



What follows is discussion of aspects of these elements for the purposes of further elaborating considerations relevant to maximising the engagement framework's contribution to analysis of the wider "populism and international law" puzzle.

A *Drivers: A Quick Note on Manifestation*

There are a number of factors that may drive domestic populism. We have set out some for illustrative purposes in Table 1 below. However, there is a related question here of how, and in what degree and ways and forms, domestic populist politics come to include a focus on events or actors or issues at the supranational level. That is, how do international law, institutions and bureaucracies feature and manifest in populist narratives typically intended mostly for a domestic audience? One answer to this question may be that the "othering" that populism usually

⁸⁴ Danchin et al, 'Navigating the Backlash against Global Law and Institutions' (n 2).

⁸⁵ Danchin et al, 'International Law and the Rise of Populism' (n 2).

employs finds easy point scoring with a non-domestic scapegoat.⁸⁶ Conversely, some literature explores whether and in what form and degree of traction or potency populist impulses and dynamics within electoral politics actually come to manifest (or not) at the foreign policy level.⁸⁷

B *Transmission ‘Vectors’: Actor Multiplicity and Issue Contestation*

It will not have escaped attention that the framework put forward here is oriented to only one set of actors on the international level (states). The conduct of international relations of course involves a whole multiplicity of actors — public and private, corporate and civic — whose activities and narratives contribute in various ways to agendas, processes and outcomes. Thus, there is scope to enrich engagement analysis by an awareness of the roles of non-state actors, the agency and reflexive roles of the institutions under consideration, and the role of sub-national levels of government in terms of their influence on engagement by the state. For one thing, such a plurality of actors help to shape the modes of engagement of states and vice-versa. Likewise, when we explore how to understand varying modes of state engagement with international institutions, we do so conscious that the latter are not passive entities receiving state engagement postures. In exercising their agency, these institutions’ responses to state positions, rhetoric, overtures and action are of course relevant to (and partly constitutive of) the aggregate situation or outcome. One could plot and attempt to characterise modes of engagement of such non-state actors and activity in the same way as we have done with states.

In a somewhat similar vein, a comment is necessary on the distinction between states (as the subjects and relatively permanent features of international law) and the governments that administer them at any one time. By focusing on state conduct in this model we are also, of course, conscious that states are governed at any one time by governments or regimes with varying claims to enjoying a domestic-level foreign policy consensus. While our model looks at states as actors, and plotting modes or positions on charts can give the impression that those positions are fairly stable or solid, this too requires an important clarification. The attempt to capture and plot states’ positions and modes of engagement at the international level should not be taken as suggesting that there is not significant contestation, at the domestic level (within and outside of the government/regime), as to what should be the approach to be adopted to international law and institutions. Indeed, this article’s focus on populism as a factor shaping state engagement assumes the existence of just such contestation.

A whole future research agenda arguably arises in terms of analysing what we called the *transmission mechanisms* between domestic-level populist forces,

⁸⁶ The same reasoning explains why many populist leaders focus on borders as a tool of exclusion: see, eg, José Javier Olivas Osuna, ‘Populism and Borders: Tools for Constructing “The People” and Legitimizing Exclusion’ (2024) 39(2) *Journal of Borderlands Studies* 203.

⁸⁷ On how populist electioneering may not necessarily result in foreign policy shifts: see, eg, Angelos Chrysogelos, ‘Is There a Populist Foreign Policy?’ (Research Paper, Chatham House, March 2021). See also Sandra Destradi, Johannes Plagemann and Hakkı Taş, ‘Populism and the Politicisation of Foreign Policy’ (2022) 24(3) *British Journal of Politics and International Relations* 475; Angelos Chrysogelos et al, ‘New Directions in the Study of Populism in International Relations’ (2023) 25(4) *International Studies Review* viad035:1–23.

factors and drivers and how these manifest in the state's modes of engagement at the international level. This is, ultimately, an empirical question. Conceivably, an interesting and provocative paradox might arise when one studies how such political phenomena and messages were transmitted, mediated, filtered or distorted "up" to the international engagement level. The potential paradox is as follows. Central to the contemporary populism phenomenon is the prevalence of critical narratives about distrust and suspicion among "the people" of assumed secretive globalist elite governance networks and agendas that have already set the rules of the game to perpetuate their status. This can be contrasted, as Anne Orford has done in a populism context,⁸⁸ with the valorisation by international law scholars of the work of a dedicated 'invisible college'⁸⁹ of state legal advisors and others. These champions of international law's civilising mission are, on this account of things, quietly and faithfully working to advance the universalist liberal international legal project.

Yet what if empirical research around *transmission mechanisms* between the domestic and the international revealed that elites in this college were (even in good faith) working to filter out populist pressure targeting international governance so as, for example, to minimise damage to an international institution or treaty regime? If this was happening, it would constitute a paradox that helps reveal the tension between the "liberal" and the "democratic" in the composite 'liberal democracy'. The potential paradox is that in order to protect or promote liberalism and mitigate the effects of supposedly illiberal democratic populism, such elites might behave in what are ultimately undemocratic ways (not giving effect to electorally-mandated political preferences to disengage from an institution, for example). At least this would be conduct that is not particularly responsive to the democratic impulses we might characterise as 'populist'. If so, such actors could be seen as unwittingly playing directly into the very stereotypes and suspicions that feature in the populist critique of contemporary technocratic elites and their roles in global governance.

C 'Engagement': Further Theorising the Concept

One contribution of Part III's framework is to help in moving the "populism and international law" literature beyond the binary of state responses at the supranational level of either "remain engaged" or "disengage". In the present part as we scope aspects of a further research agenda, one area is to further theorise engagement in this respect. Our focus in this article is advancing the literature through a typology of what different postures states experiencing populist politics appear to adopt towards international law and institutions, and identifying shifts over time in these positions. However, we did this conscious of extant work that might in a forward research agenda have some bearing on further theorisation, or on adding empirical insights thereto. For example, some work potentially relevant to engagement focusses on the means by which domestic dynamics may have influenced international-level positions and behaviours — identifying the transmission paths and mechanisms of the domestic-international legal-political

⁸⁸ Orford, 'The Crisis of Liberal Internationalism' (n 12) 13–16.

⁸⁹ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72(2) *Northwestern University Law Review* 217, 217, cited in Orford, 'The Crisis of Liberal Internationalism' (n 12) 15.

dynamic⁹⁰ — as well as the reverse (how international norms and commitments shape domestic-level policy and political options and actions).⁹¹

There are other sets of literature that do not directly bear on the engagement issue but which inform the broader group of four elements, outlined above, in any comprehensive analysis of populism and international law. For instance, considerable scholarship of course exists on why and how states join, engage with, or leave international regimes and institutions.⁹² Such questions go more to the first element (drivers, including domestic manifestations).⁹³ Our framework also factors in scholarship that explores the positions of international organisations in *responding* to state withdrawal or robust contestation.⁹⁴ For example, and in particular, Gisela Hirschmann explores three types of bureaucratic responses by international organisations to state contestation: ‘inertia, ie no response; adaptation, ie introducing institutional changes to maintain the support of the challenging member state(s); and resilience-building, ie developing organisational capacities to limit contestation by member states’.⁹⁵ Hirschmann characterises various modes of action that might be adopted by such institutions (‘hunkering down, negotiation, framing, coalition-building, shaming and professionalization’), theorising that three factors inform the variation, in fact, in ways that international organisations respond to a state’s contestation: the organisation’s threat perception, the position and actions of other member states, and bureaucratic leadership of the organisation.⁹⁶ Such work offers rich potential ways in which to

⁹⁰ See, eg, James D Fearon, ‘Domestic Politics, Foreign Policy, and Theories of International Relations’ (1998) 1 *Annual Review of Political Science* 289. See generally Helen V Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton University Press, 1997).

⁹¹ See, eg, Jeffrey T Checkel, ‘International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide’ (1997) 3(4) *European Journal of International Relations* 473.

⁹² See, eg, Catherine M Brölmann et al, ‘Exiting International Organizations: A Brief Introduction’ (2018) 15(2) *International Organizations Law Review* 243; Inken von Borzyskowski and Felicity Vabulas, ‘Hello, Goodbye: When Do States Withdraw from International Organizations?’ (2019) 14(2) *Review of International Organizations* 335.

⁹³ We can put aside the distinct legal question — a question of comparative domestic constitutional and foreign relations law principally — of what the legal requirements are of initial engagement, continuing engagement or disengagement from an international institution or treaty regime. For an example of this sort of work, see Paul Craig, ‘Engagement and Disengagement with International Institutions: The UK Perspective’ in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) 392. See also Hannah Woolaver, ‘From Joining to Leaving: Domestic Law’s Role in the International Legal Validity of Treaty Withdrawal’ (2019) 30(1) *European Journal of International Law* 73.

⁹⁴ See, eg, Tim Heinkelmann-Wild and Vytautas Jankauskas, ‘To Yield or Shield? Comparing International Public Administrations’ Responses to Member States’ Policy Contestation’ (2022) 24(3) *Journal of Comparative Policy Analysis: Research and Practice* 296. See also Jennifer Gronau and Henning Schmidtke, ‘The Quest for Legitimacy in World Politics: International Institutions’ Legitimation Strategies’ (2016) 42(3) *Review of International Studies* 535.

⁹⁵ Gisela Hirschmann, ‘International Organizations’ Responses to Member State Contestation: From Inertia to Resilience’ (2021) 97(6) *International Affairs* 1963, 1964 (emphasis omitted). See also Gisela Hirschmann, ‘Crisis Management in International Organisations: The League of Nations’ Response to Early Challenges’ (2024) 37(5) *Cambridge Review of International Affairs* 573.

⁹⁶ Hirschmann, ‘International Organizations’ Responses to Member State Contestation: From Inertia to Resilience’ (n 95) 1964.

supplement our typology of state engagement with international institutions with typologizing responses by those institutions in an era of populism.

There are myriad ways that states can choose to project their policy on multilateralism. In the literature are typologies or quasi-typologies of different possible or ideal postures, for example from “dominance” to “disengagement” in international negotiations.⁹⁷ Such work is beyond this article’s scope, yet the foreign policy and international negotiation strategy literature reminds us that some engagement or disengagement postures are not necessarily principled final positions but merely interim strategic or tactical moves.⁹⁸ That is, some positions (which may, for example, appear to point to irreversible disengagement) are better seen as calculated to generate certain reactions from others. An apparent disengagement position may thus prove later in time to have been nothing more remarkable than a form of statecraft or negotiating tactic, rather than intended to reinforce or undermine an international legal regime or institution. Whether such postures have a reinforcing or undermining (or other) intention or effect are separate questions and not our focus. Here we are not as such interested in states’ discernible motives (intention) or observable impacts (effects), nor are we concerned with how deliberate, coherent or successful their strategy position might be. Rather, we have advanced a typology to map how we might characterise state behaviours (words and conduct), against the backdrop of an assumed hypothesis that populism has driven shifts in state approaches to international law and administration.

Finally, in future work to more fully theorise postures of engagement by states in the context of populism, we think that regulatory theory offers potentially helpful insights into conceiving a typology of positions adopted by states (and indeed civic, corporate or other actors on the international scene, including secretariats of international organisations in response to member state activity). This is so even if only empirically based work can give confirmation, substance and/or nuance to these characterisations. The typology in Part III drew in part upon Braithwaite’s categorisation of the differing motivational postures of entities subject to regulation, namely ‘*Game-playing*’ (subject’s engagement is contingent and highly strategic); ‘*Disengagement*’ (subject is unresponsive to regulatory interventions or overtures); ‘*Resistance*’ (subject is engaged with the regulator or scheme, but defiantly so); ‘*Capitulation*’ (subject is responsive but without internalisation or commitment); and ‘*Commitment*’ (subject embraces and pursues the regulatory goal and process).⁹⁹

The regulatory strategy dilemma is thus how to move actors towards ‘*Commitment*’. In a somewhat similar vein, Christine Oliver outlines a potentially useful (for our purposes) typology of possible ‘strategic responses to institutional processes’ comprising five possible postures: ‘acquiescence’, ‘compromise’, ‘avoidance’, ‘defiance’ and ‘manipulation’.¹⁰⁰ However, both the Braithwaite and

⁹⁷ See, eg, Benjamin Miller, ‘International Systems and Regional Security: From Competition to Cooperation, Dominance or Disengagement?’ (1995) 18(2) *Journal of Strategic Studies* 52.

⁹⁸ For one now-dated discussion of ‘strategic disengagement’, see Earl C Ravenal, ‘The Case for Strategic Disengagement’ (1973) 51(3) *Foreign Affairs* 505.

⁹⁹ Braithwaite, Makkai and Braithwaite (n 35) 291.

¹⁰⁰ Christine Oliver, ‘Strategic Responses to Institutional Processes’ (1991) 16(1) *Academy of Management Review* 145, 152.

Oliver spectrums require refinement if we are to capture the full variety of conceivable modes of engagement. One reason is that these typologies put emphasis on motive, whereas our primary interest is mode. Braithwaite's "game-playing" (much like Oliver's "manipulation") may be less a particular observable mode or manner of engagement and more related to motives: a state might employ game-playing whether it is disengaged or engaged with an international legal order or institution. Hence, if it displays deep commitment to that order, this might be a function of game-playing, rather than genuine internalisation of the values (etc) of that order, or it could be a function of a mix of intentions and motives. Braithwaite's scheme also requires refinement in that it does not cater for perfunctory or ritualistic engagement that cannot be characterised as either 'capitulation' or 'resistance'.¹⁰¹ Likewise, Oliver's typology needs refinement for our purposes. Its most severe posture, of "defiance", does not go far enough, as a state can be fully engaged with an institution whilst maintaining a defiant posture. The Oliver typology does not accommodate more extreme disengagement postures canvassed by Cass R Sunstein's formula of system-rejecting 'backlash', such as rejection, exit or withdrawal.¹⁰² Moreover, at the other end, Oliver's most positive characterisation (mere "acquiescence") does not capture a posture of fulsome, internalised, committed engagement. This analysis gives an indication of the fruitful future work that might be done in developing our framework by further theorising modes of engagement by reference to these sorts of bodies of work.

One particular avenue for enriching our understanding of engagement in the context of populism is the scope for research, both conceptual and empirical, on the relationship between 'engagement' and 'compliance' in these contexts.¹⁰³ Here we have asked 'how did State X *engage* with international law and institutions during a populist period?' But other research might take the answer to this question and map it against a different question which we have not addressed here: 'whatever characterisation one gives to its engagement, how did State X *comply*, during this period, with the underlying norms and mechanisms to which those institutions relate?' This sets up a potentially interesting variable, for instance where State X spoke of and demonstrated a certain degree of non-engagement or disengagement with institutions, yet over the same period showed fulsome compliance with the treaty regime, dispute mechanism and/or normative

¹⁰¹ See Charlesworth and Larking (n 29) 10–1.

¹⁰² See Cass R Sunstein, 'Backlash's Travels' (2007) 42(2) *Harvard Civil Rights-Civil Liberties Law Review* 435, 435; David Caron and Esmé Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press, 2018) 159, 160.

¹⁰³ Of course, a significant literature exists on why states comply with international law itself, including typologies of forms of compliance: Herbert C Kelman, 'Compliance, Identification, and Internalization: Three Processes of Attitude Change' (1958) 2(1) *Journal of Conflict Resolution* 51. See, eg, Koh's distinction, in his explanatory typology of state compliance postures, between 'coincidence', 'conformity', 'compliance' and 'obedience': Koh (n 29) 2600, 2603. See also Markus Burgstaller, *Theories of Compliance with International Law* (Martinus Nijhoff Publishers, 2005) 3–4: distinguishing the concept of 'compliance' from notions of 'commitment, obligation, implementation, and effectiveness'. See also Jose E Alvarez, 'Why Nations Behave' (1998) 19(2) *Michigan Journal of International Law* 303, 304–10; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

framework to which that institution related. The reverse scenario might also obtain.

Picking up again on Part II's discussion, in sketching a forward and fuller research agenda, one could envisage elaborating on or applying our framework to include questions of *drivers*, *compliance* and *effects*, as set out in Table 1's crude hypothetical example:

Table 1: Country: A (dates: 2018 to 2020)

<i>Institution</i>	<i>Engagement</i>	<i>Actions/ words?</i>	<i>Drivers?</i>	<i>Compliance score?</i>	<i>Effect?</i>
Institution 1 UNSC	Resistant engagement	Rhetoric only	Foreign policy goal	100%	Positive reform by others
Institution 2 UNHRC	Ritualistic engagement	Actions only	Not clear	80%	None discernible
Institution 3 World Trade Organization	Conditional withdrawal	Both	Election (populism)	0%	Negative
Institution 4 World Health Organization	Committed engagement	Neither	Industry pressure	100%	Neutral
Other institution (eg ICC)	Indifferent non-engagement	Neither	Not clear	Not clear	Negative

One could envisage importing a compliance score or rating (or proxy of these) from another source where this exists, for example a credible institution-specific civil society watchdog. Even crude compliance measures such as domestic legal-policy enactment or implementation of a UNSC resolution, or the orders accompanying the judgment of a supranational decision-making body, might at least give a touchstone for debate around any contrast between a state's *engagement* with that institution (both actions and words) and its *compliance* with its normative orderings or schemes. As noted, such an exercise might reveal interesting patterns, for example, an apparently highly engaged-obstructive or disengaged-unsupportive state in terms of its evident engagement patterns with an international institution that nevertheless consistently complies with the relevant normative regime overseen or associated with that institution.

Beyond scholarly audiences or applications for such a figurative representation, there may be policy utility in an era of populism, within the administration of State B, Corporation C or Civic Coalition D, towards developing such a snapshot. Such representations might conceivably foster internal conversation (within B, C or D) about responsive or reflexive policy positions vis-à-vis State A's modes of engagement or patterns of compliance, so as to attempt to influence this. Again, drawing on the engagement axes model, such a snapshot table could include other evaluative indicators (such as the trajectory in which the particular posture was trending over or at the end of the time under consideration). Indeed, if a scholar or policy analyst imports their own "thick" content for the vertical axis (ie they have a normative or strategic conceptualisation of what is constructive to their goals

and from *their* perspective), they can begin to plot positions for various actors on the four quadrants. For example, an Australian diplomat can plot various Association of Southeast Asian Nations ('ASEAN') countries' postures by reference to Australia's official conception of what would be constructive or destructive from Australia's perspective, and plot trending trajectories as other actors shift over time. By extension, the diplomat could begin to strategise how to try to shift other actors upwards and across (ie to the top right quadrant on Figure 4).

D 'Effects': Normative Assumptions and Goals

In charting a typological framework of engagement, our question here has been: "How has engagement by Administration X in State A with the international legal order and some of its institutions and regimes changed during what is perceived as the populist era?" It has not been the effects question: "What — if any — effects did this mode of engagement or disengagement have on the legitimacy and/or effectiveness of this body, and how (and by whom) are such things to be measured?" Yet plotting engagement modes on quadrants can give rise to the question of whether there is an ultimate empirical (and probably values-laden) question sitting in the wings or beyond the modes of engagement question. Is one mapping engagement or disengagement for its own sake (ie merely observing patterns)? Or is this an attempted precursor for, or indicator of, something else, for example an effort to assess commitment to the international legal order, or to explore further questions about what impact or significance might be of differing modes of engagement?

Enquiry into effects (for example, the effects of proactive disengagement on an institution's legitimacy and effectiveness) carries at least some normative assumptions, concern or commitment. We have already seen this in elaborating the vertical axis in the modes of engagement framework (ie the spectrum from constructive through to destructive engagement). Proponents of a certain status quo in power dynamics in international affairs would be inclined to label State X's contestation as "not constructive engagement", yet we might see that this is merely a way of saying "this mode of engagement is threatening to our interests in that status quo". Both in setting up an axis of constructive and destructive and in coming up with criteria by which to characterise impacts or effects there is perhaps no way to avoid some degree of normative commitment. As we argued in Part II, what scholars of populism and international law *can* do is to be more transparent and self-aware of this in framing their assessments of how populism affects international law (and vice versa).

Scholarship seeking to understand what might contribute to a more legitimate, effective and inclusive international legal order should therefore make such value assumptions explicit. This is not merely to make the obvious and basic point about implicit normative assumptions. It is because at the heart of the perceived backlash against international law and global institutions are deep and undoubtedly valid questions about what the 21st century international legal order does or should look like, as well as whom it does or should serve. Scholarship that laments state (populist or other) contestation with aspects or artefacts of the international legal order must be alert to the risk that it nostalgically idealises some prior status quo (when international law and institutions were in a supposedly healthier state) and

seeks to return to the prior form without a critical analysis of its problematic and perhaps contradictory or self-destructive aspects.

Our own approach is about ‘reconceiving’¹⁰⁴ or re-imagining engagement, conscious that other “re-” words one might use, such as revitalising or reinvigorating the international legal order might carry with them various assumptions about returning to or restoring some status quo.¹⁰⁵ This would be problematic not only because this previous, supposedly more-ideal era, might have only been ideal for some actors in international or domestic systems and deeply resented by others. It would also be problematic because it would raise complex scholarly questions about what baselines, expectations and success criteria are used for positing the end point that engagement seeks, or for reaching positions about what constitutes “good” engagement or disengagement (let alone “good” impacts thereof).

In our work, we proceed on the basis of our interest in forms and degrees of engagement (and, in separate work, the effects of these), which is not underpinned by a desire to learn what is required (for example) to “return” to any particular idealised status quo. The engagement/disengagement framework does not presuppose any particular state of play, nor seek to advance a progress narrative or ideal future trajectory of international relations, in which one type of engagement is to be preferred over another. Still, it does not pretend to lack any normative commitment altogether. It is a scholarly undertaking premised on commitment to generating insights that might help, in whatever way, in efforts towards achieving the goals of international cooperation as stated in the preamble to the *Charter of the United Nations* in 1945.¹⁰⁶ Hence, our starting point on what constitutes constructive engagement action is founded on the expectation that constructive engagement will promote or support the purposes and interests of the institution in which engagement is being evaluated, and/or it will prioritise the general collective interests of the member states of that institution over the specific interests of one or a few. As we refine the framework, we will also explore and articulate the extent to which our characterisation of constructive (or, indeed, destructive) engagement and dis- or non-engagement (in their various forms) represents a commitment to a non-minimalist conception of the rule of law in the conduct of international relations and international governance.¹⁰⁷

Consideration of effects also necessitates considering the *impact* of rhetoric. In Part III we discussed how the framework needed to account for the distinction between state rhetoric (for example, about disengagement) and particular conduct following up on this. A state completely and very publicly disagreeing with a ruling, opinion or recommendation is, of course, not the same as denying the very

¹⁰⁴ See our Australian Research Council funded project ‘Reconceiving Engagement with International Law in a Populist Era’: ‘DP220101584 — The Australian National University’ *Australian Research Council Data Portal* (Web Page) <<https://dataportal.arc.gov.au/NCGP/Web/Grant/Grant/Dp220101584>>, archived at <<https://perma.cc/S8PQ-T32B>>.

¹⁰⁵ In this regard, see Ford’s caution in *Human Rights and Populism* (n 1) 136–7.

¹⁰⁶ *Charter of the United Nations* Preamble.

¹⁰⁷ A fuller discussion of this lies beyond this paper’s intended scope, however, see Jeremy Farrall and Terence Halliday, ‘Transnational Legal Order through Rule of Law? Appraising the United Nations Security Council, 1990–2022’ (2023) 8(1) *UC Irvine Journal of International, Transnational and Comparative Law* 27, 35.

authority or legitimacy of the institution that made those interventions, even if it is not an ideal response of “committed, constructive engagement”. Yet if our model is to address nuance effectively, we must consider how to assess whether repeated discrediting, dismissal or disregard of institutional outcomes or overtures is tantamount to seeking to deprive the mechanism of legal effect, and so a form of disengagement. In principle, enough rejection or delegitimisation of individual reports, rulings or similar of institutions might become tantamount to rejection of the institutions themselves. On the other hand, even very robust contestation and debate about the shape and future of a legal order or mechanism might not only be unsurprising. Rather, it might also be healthy either in net terms (states are contesting and shaping the ever-changing international legal order, not rejecting it) or from certain states’ or movements’ perspectives.¹⁰⁸ Meanwhile, effects analysis of the relative impact of rhetoric and action will need to be able to make defensible claims about how to measure whether apparent attempts to undermine (etc) an institution actually have that effect, and from whose perspective this might be considered. This is somewhat related to our comments earlier on how to give future (empirically based) engagement analysis more texture in the sense of how best to approach what will be an inevitable degree of selectivity and variability by states in their engagement or non-engagement or disengagement (of various forms) with respect to different particular parts of any international legal order.

VI CONCLUSION

In this article we have argued that caricatures of populism as either essentially virtuous or as a form of institutional wrecking ball reveal the shortcomings of the existing literature. The assumption that engagement is a binary notion, whereby states either engage or disengage, obscures the reality of engagement behaviour as more nuanced, shifting and multifaceted. Many of the assumptions commonly advanced in the literature do so with little or no empirical evidence. These shortcomings demonstrate the need for a dynamic analytical framework to map, measure and understand the complexities of how engagement by states in international law and institutions operates in fact. The original analytical framework advanced in this article can be used to generate the empirical base required to chart the complexities and nuances of engagement in international law and institutions by states with populist governments.

In addition, the discussion in Part V(B) above on elite technocratic governance provides a vantage point to explore how the international legal order might have helped bring on the populist backlash against itself, and is not necessarily just a passive, virtuous victim of unwarranted populist attack. The conceptual framework on modes of engagement must arguably be approached on the basis of a particular consciousness of the dynamic, reciprocal relationship between domestic-level populism and the international legal order. Too static a model or approach might look only at how domestic political dynamics may have shaped differing and shifting state postures and modes of state engagement towards

¹⁰⁸ An example is the Third World Approaches to International Law movement which as James Gathii writes ‘sees the potential of reforming if not remaking international law for the greater good’: James Thuo Gathii, ‘The Agenda of Third World Approaches to International Law (TWAIL)’ in Jeffrey L Dunoff and Mark A Pollack (eds), *International Legal Theory: Foundations and Frontiers* (Cambridge University Press, 2022) 153, 166.

institutions and regimes at the international level. The prevailing literature on “populism and international law” has this upwards and outwards orientation: populism is bad and irrational, international law is good and rational, let us study the impact of the former on the latter so as to rescue and protect the latter.

Yet the reverse direction of causal relation is potentially just as significant and must be part of any comprehensive analysis. Scholarship needs also to account for how the decisions or conduct (or the perceived behaviour and approach) of those representing international institutions might *themselves* have given credence and substance to the populist backlash, or more broadly contributed to the conditions in which populist messaging has genuine political traction at the domestic level. National-level populism may have shaped modes and manners of engagement with supranational bodies, but the reverse may well be true, too. The actions of those global bodies or, for instance, narratives about how and for whom they function might also be a non-trivial factor influencing domestic political debate and conduct.¹⁰⁹ Rather than interrogating these roots of populist backlash, there is a strong reflex in contemporary scholarship to reinforce or renew existing conceptions of legal and political order. This reflex ignores the need for political analysis and contextual understanding of the origins of these movements. There is an urgent need to explore the extent to which the incumbent international legal order may itself have acted as an incubator for populism and far-reaching challenges to existing conceptions of representative democracy and the liberal rule of law.¹¹⁰

¹⁰⁹ In this regard: see, eg, Klaus Dingwerth et al, ‘International Organizations under Pressure: Introduction’ in Klaus Dingwerth et al (eds), *International Organizations under Pressure: Legitimizing Global Governance in Challenging Times* (Oxford University Press, 2019) 1, 1–18; Catherine E De Vries, Sara B Hobolt and Stefanie Walter, ‘Politicizing International Cooperation: The Mass Public, Political Entrepreneurs, and Political Opportunity Structures’ (2021) 75(2) *International Organization* 306.

¹¹⁰ See generally Danchin et al, ‘International Law and the Rise of Populism’ (n 2).