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The Multilateral Human Rights System: Systemic Challenge or Healthy Contestation?

JOLYON FORD[†]

I. INTRODUCTION

The United Nations Human Rights Council ('the Council') is the peak global institution of the existing multilateral legal order on the promotion and protection of fundamental human rights. On June 19, 2018 the Trump administration announced that it would withdraw the United States' membership of the Council.¹ A year previously, relatively early in the Trump presidency, the administration had clearly signaled in the Council that it saw future US participation in that forum as potentially contingent upon certain reforms to the Council's membership and agenda.² Nevertheless, the June 2018 announcement came the day after the UN High Commissioner for Human Rights had made statements in Geneva, in a formal yearly-review speech to the Council, highly critical of US immigration detention policy in respect of its southern border (forced separation of children from undocumented arrival parents).³ Consequently, while the withdrawal announcement ostensibly related to foreign policy

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1. Michael Pompeo & Nikki Haley, Remarks on the UN Council (June 18, 2018) (transcript available at <https://usun.usmission.gov/remarks-on-the-un-human-rights-council/>).

2. Amb. Nikki Haley, Address to UN Human Rights Council (June 6, 2017) (transcript available at <https://geneva.usmission.gov/2017/06/06/ambassador-nikki-haley-address-to-the-u-n-human-rights-council>).

3. Zeid Ra'ad al Hussein (UN High Commissioner for Human Rights), 'Opening Statement and Global Update of Human Rights Concerns' UN Human Rights Council, 38th Session, Geneva, 18 June 2018, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23206&LangID=E>.

matters,⁴ some responses to the announcement explicitly emphasized its timing and so implicitly, on one reading, linked the withdrawal to political tactics in the context of intense immigration policy debate within domestic US politics.⁵

This essay explores some of the parameters and merits of a putative argument that the announcement of June 19, 2018 might most properly be understood as but one manifestation of a wider political backlash within the US (and indeed other Western democracies)⁶ against the multilateral human rights system epitomized by the Council. That line of argument—and the nature, validity and utility of the ‘backlash’ characterization or concept in international law and international relations more generally—were partly the subject of a Fall 2019 symposium to which this essay relates.⁷

There are two prongs to this argument, stylized here for sake of analysis. First, populist-nationalist political sentiment at home simultaneously fuels and is fanned by strident high-profile diplomatic critiques (or even rejections) of global bodies such as the Council.⁸ Seen this way, the Trump administration’s withdrawal from the Council, in the temporal context of criticism of its immigration policy, would appear to sustain a viable narrative of populist backlash against a key institution of global governance. Second, so the argument would run, the nature and force of this backlash constitutes a systemic threat to the future of the post-1945 rules-based international order, especially since it comes mostly from the

4. See *supra* note 2.

5. Jean Galbraith, *Contemporary Practice of the United States Relating to International Law*, 112 AM. J. INT’L L. 734, 745-46 (2018) (see for example the title of the piece ‘United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism about its Border Policy’).

6. This essay focuses on the U.S. in this context, since some other perceived challenges to the multilateral human rights system from other powerful states (such as China or Russia) are more obviously the continuation of longer-term trends, whereas Western democracies had hitherto largely supported that system (subject to the observations below that US ambivalence towards engagement with the UN human rights system is neither unanticipated nor necessarily new). This is an aside by the author.

7. See ‘The Populist Challenge to the International Legal Order’ Symposium, University of Maryland, 18 October 2019, https://digitalcommons.law.umaryland.edu/mjil_symposia/2019/; See also Mark Copelovitch & Jon C. W. Pevehouse, *International Organizations in a New Era of Populist Nationalism*, 14 REV. INT’L ORG. 169 (2019).

8. An attempt to define ‘populism’ is beyond the scope of this essay. For one overview: See Cristóbal Rovira Kaltwasser, et al., *The Oxford Handbook of Populism* (Oxford University Press, 2017); see also Copelovitch & Pevehouse, *supra* note 6, at 170-75.

superpower whose values-based rhetoric and leadership has perhaps done most to advance the global human rights agenda in the modern era. One can certainly debate whether this is an accurate account of the US human rights record abroad. However, the influence of this portrayal of the US as a global human rights champion along with the practical importance of US funding to such bodies explains the perceived significance of the US pulling out altogether from a peak institution, and so explains the search for ways to try to understand the move's implications.

Part II of this essay offers three ways to frame the June 2018 US announcement and subsequent withdrawal, from the perspective of the international legal order for the governance of human rights: (i) as above, as a new and systemic and potentially irreversible backlash connoting a possible existential disengagement crisis for this order; (ii) as a robust and notable but neither wholly novel nor systemically-significant development in a rules-based order that continues to muddle through; and (iii) as contestation and engagement that might be framed as potentially healthy for the future of the state-based global human rights system and its universalizing 'project'.

These framings relate to some different arguable ways to approach or interpret this action, rather than either (a) analysis of the conceivable domestic political or other *drivers or motivators* of that action, or (b) analysis of the *intended* or the *actual effects or impacts* of the withdrawal action on the institutional governance of human rights at the international / multilateral level. Yet, given the availability and objective relevance of these other ways of analyzing the 2018 withdrawal, Part III's discussion advances a number of qualifying or contextualizing observations about the three framings advanced here. The significance and complexity of those observations illustrate why this brief essay's ambitions must be limited. It attempts to scope, in a preliminary way, some aspects of a future research agenda around the content, empirical basis, and/or utility of the 'backlash' motif in relation to human rights governance at the international level.

Before proceeding, at least two possible broader perspectives (that is, broader than the human rights context) might be said to flow from the 2018 US withdrawal from the Council. One is that this might represent a much wider disengagement on the part of the US, beyond just the human rights sphere, from the paradigmatic institutions of global and multilateral governance on a whole range of

subject-matters.⁹ Another possible and indeed compatible perspective would see the Council withdrawal as indicative of a broader global trend of disengagement by many states from international institutions, that is, one limited neither to the US nor to the human rights institutional context.¹⁰

A full treatment of such perspectives lies well beyond the scope of this essay, which focuses on whether the stylized ‘backlash’ concept above is workable as a frame for examining US (dis)engagement with the Council and the constellation of related UN human rights institutions. Still, those broader perspectives are, on one level, somewhat inescapable. This is because the underlying genesis of or motivation for this essay was, in part, an interest in exploring whether the June 2018 withdrawal is best understood—from an international lawyer’s perspective, rather than a scholar of US political dynamics—as a narrow action (the significance of which is restricted to the particular perceived institutional governance problems within the Council), or as possibly representing some far wider dynamic (a broader US turn away from leading or even engaging with the rules-based international legal order more generally). This wider possibility potentially arises because the late 20th / early 21st century emergence into global significance of the institutions and discourse of human rights might be viewed as one metaphor or example of the ‘globalization’ meta-trend itself. If so, any ‘backlash’ against the multilateral human rights system might be capable of being characterized as illustrating and/or being driven by a far more general and profound reaction to and rejection of globalized governance institutions and approaches well beyond human rights.

II. FRAMING ANY US ‘BACKLASH’ AGAINST THE GLOBAL HUMAN RIGHTS SYSTEM

What follows are three non-exhaustive ways briefly to frame the event or announcement under consideration in terms of what it might represent—in a forward-looking rather than empirical or diagnostic sense—about US engagement with the international human rights

9. Caroline Fehel & Johannes Thimm, *Dispensing with the Indispensable Nation?*, 25 GLOB. GOVERNANCE 23, 24 (2019); see also Ionut Popescu, *American Grand Strategy and the Rise of Offensive Realism*, 134 POL. SCI. Q. 375, 376 (2019).

10. Catherine M. Brölmann et al., *Exiting International Organizations*, 15 INT’L ORG. L. REV. 243, 256 (2018); see also Inken von Borzyskowski & Felicity Vabulas, *Hello, Goodbye: When do States Withdraw from International Organizations?*, 14 REV. INT’L ORG. 169 (2019).

architecture in the current era and the consequences for that system.¹¹ The focus is not on how the 2018 withdrawal might be approached from the perspective of party or other politics in the US domestic context.

'Negative: Systemic Threat'

The introduction above outlines the thrust of this potential way to frame what June 2018 represents. It is captured in the materials introducing the Fall 2019 Symposium (referred to above), which stated that the “continued success [in the West] of populist ideas” and populism’s “deep skepticism of international law and institutions” poses “an urgent challenge” and indeed a “threat” to the global legal order.¹² On this approach, the US withdrawal constitutes ‘backlash’ conduct that cannot be characterized as mere critique of or discontent with an institution or status quo, but instead represents “fundamental resistance to and rejection of a system or institution of law” including “aggressive steps to resist the system and to remove its legal force.”¹³ The US posture on the Council is, viewed this way, a systemic rejection intended to deprive the multilateral system of its legal and political force and effect, and with possible serious and significant system-wide implications and effects.

'Neutral: Business as Usual'

An alternative possible lens would yield a far less dramatic diagnosis in terms of the future prospects of the international human rights system. This lens would discern largely continuity rather than change in US posture to participation in the Council, on which it has long been ambivalent, and/or see the withdrawal as a particularly robust but not entirely atypical form of systemic engagement and contestation. This robust contestation is (on this view) endemic and inevitable in something as inherently deeply political as a global body on human rights standards, but is a form of engagement on human rights and does not necessarily represent a threat to the future

11. For one framing exercise on the perceived backlash against international adjudication and state withdrawals from international dispute settlement mechanisms: See Joost Pauwelyn & Rebecca J. Hamilton, *Exit from International Tribunals*, 9 J. INT’L DISP. SETTLEMENT 679, 686 (positing five different outcomes from withdrawal or threatened withdrawal).

12. MARYLAND CAREY LAW, *supra* note 8.

13. See David Caron & Esm. . . Shirlow, *Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences*, in THE JUDICIALIZATION OF INTERNATIONAL LAW: A MIXED BLESSING?, 160 (Andreas Follesdal & Geir Ulfstein eds., 2018) (drawing on Cass R. Sunstein, *Backlash’s Travels*, 42 Harv. C.R.-C.L. L. Rev. 435 (2007)).

existence of the Council or the wider order it sits atop.

'Positive: Reform Opportunity'

Through a further alternative framing, what some might characterize as system-threatening 'backlash' behaviors are instead best understood as navigable and necessary challenges to a deeply flawed but otherwise resilient and adaptive system. These challenges were, on this approach, necessary for the system's legitimacy and effectiveness and may serve to stimulate international institutions, or at least the underlying human rights agenda that they relate to, in unforeseen beneficial ways (in terms of net objective progress on progressive realization of universal enjoyment of human rights).

III. EXPLORING CHARACTERISATIONS OF THE 2018 US WITHDRAWAL

In the June 19, 2018 press conference announcing and explaining the withdrawal decision, US Secretary of State Michael Pompeo stated that the Council had become, from the administration's perspective, "an exercise in shameless hypocrisy" with "some of the world's most serious [human rights] offenders sitting on the Council itself."¹⁴ The US Ambassador to the UN Nikki Haley added that the Council had become "a protector of human rights abusers and a cesspool of political bias" particularly in terms of "chronic bias against Israel."¹⁵ Mainstream media coverage tended to emphasize the anti-Israel bias dimension,¹⁶ and/or draw links to immigration policy,¹⁷ although in terms the June 19 announcement focused largely on the membership issue and did not, as such, mention the previous day's criticism in the Council of the

14. POMPEO & HALEY, *supra* note 6.

15. *Id.*

16. See Carol Morello, *U.S. Withdraws from U.N. Human Rights Council Over Perceived Bias Against Israel*, THE WASHINGTON POST (June 19, 2018 5:59 PM), [https://www.washingtonpost.com/world/national-security/us-expected-to-back-away-from-un-human-rights-council/2018/06/19/a49c2d0c-733c-11e8-b4b7-308400242c2e_story.html?; see also Gardiner Harris, Trump Administration Withdraws U.S. from U.N. Human Rights Council, NEW YORK TIMES \(June 19, 2018\), https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html](https://www.washingtonpost.com/world/national-security/us-expected-to-back-away-from-un-human-rights-council/2018/06/19/a49c2d0c-733c-11e8-b4b7-308400242c2e_story.html?; see also Gardiner Harris, Trump Administration Withdraws U.S. from U.N. Human Rights Council, NEW YORK TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html).

17. See Sara Silverstein, *The Price of America's Withdrawal from the U.N. Human Rights Council: Ignoring Human Rights for Migrants Could Mean that Civil Rights Are Next*, THE WASHINGTON POST (July 19, 2018 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2018/07/19/the-price-of-americas-withdrawal-from-the-u-n-human-rights-council/>.

administration's border control policy.¹⁸

1. *No system-threat backlash (Framing A)?*

Politics scholars might conceivably seek to argue that the administration's action is best explained by, for instance, sensitivity to criticism of its immigration detention policies, or by reference to any related domestic political gains that might be had from attacking and withdrawing from a UN body. The backlash against the Council might perhaps be characterized as 'populist' in the sense outlined above,¹⁹ for instance in that it is calculated—whatever the 'consensus' or objective long-term national interest—to appeal politically to a nationalistic in-group nostalgic for a past when states were independent of criticisms framed in terms of international human rights law or at least immune from the related multilateral architectures and diplomacy of human rights.²⁰ Yet, this essay's perspective is one of international law, not US political science. From this perspective, one's intuitions as a human rights scholar might well be that the US withdrawal was a cynical play to domestic political audiences that risks damaging the global human rights agenda. Yet for the reasons now outlined it is difficult to portray the decision as representing a Type 'A' (above) systemic threat.

Official statements matter to international law in that under certain conditions they help to comprise the normative content of this legal system. In a joint statement, Secretary of State Michael Pompeo and Ambassador to the U.N. Nikki Haley, stated that the US "has *no opposition in principle to multilateral bodies* working to protect human rights [emphasis added]", a "critical objective that reflects America's commitment to freedom."²¹ They stated that the US did not intend a retreat from human rights commitments, but "on the contrary ... our commitment does not allow us to remain a part of a hypocritical and self-serving organization that makes a mockery of human rights."²² On its terms, this was an official expression of

18. See Nahal Toosi, *US Quits UN Human Rights Council*, POLITICO (June 19, 2018 6:56 PM CET), <https://www.politico.eu/article/human-rights-council-united-states-donald-trump-expected-to-withdraw/>; see *supra* note 2 (the announcement did note that the US would "not take lectures from hypocritical bodies", which might be understood as a reference to the 18 June speech in the Council).

19. See *supra* note 12.

20. Ted Piccone, *U.S. Withdrawal from U.N. Human Rights Council is "America Alone"*, Brookings (June 20, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/06/20/u-s-withdrawal-from-u-n-human-rights-council-is-america-alone/>.

21. See *supra* note 1.

22. *Id.*

commitment to human rights, and not (as in Type ‘A’ backlash, above) an act of “fundamental resistance to and rejection of” that system of law.²³ The June 19th announcement chronicled the US initiatives in and around the Council over 2017-2018, which was said by the administration to comprise “good-faith” efforts towards “major, dramatic, systemic changes” to reform the Council’s membership and agenda-setting procedures to address problems as perceived by the US as a Council member.²⁴ The announcement noted that the US would “keep trying to strengthen the entire framework of the UN engagement on human rights issues”.²⁵ While, of course, such official statements might conceivably be shown to be disingenuous, the withdrawal announcement on its terms does not smack of a fundamental rejection of the human rights system. For one thing, the US was withdrawing *its* membership, not denying the existence or relevance of a global legal order.²⁶ This is not necessarily to defend the administration’s approach but is merely to question whether this particular event is susceptible to characterization as a “threat to the global legal order.”²⁷ To argue that, one might have to argue that the Council and the global human rights system are synonymous, such that rejection of one involves rejection of the other; on one view, the US rejected membership of a particular institution, an architecture or artefact of human rights, not the normative framework thereof.

The Type ‘A’ framing of ‘systemic threat’ may also not be an appropriate approach because while US leadership and institutional funding still matters (i.e. has impact) in global governance, US disengagement from the Council may not in fact fundamentally undermine or disable that institution or deprive it of force in global affairs. There are three possible angles to this. First, the US is only one member state and its participation or even financing may not be ‘indispensable’²⁸ to the Council as a flawed but viable and now continuing part of the international legal and diplomatic system. Second, the Sunstein ‘backlash’ narrative²⁹ to some extent assumes that an irreplaceable global values leader has abandoned the human

23. See *supra* note 12.

24. See Haley, *supra* note 3.

25. *Id.*

26. Moreover, by withdrawing Council membership alone the US is not, did not in terms, and is not necessarily legally able to simply absolve itself of human rights obligations adhering to it in international law.

27. See MARYLAND CAREY LAW, *supra* note 8.

28. See Fehl & Thimm, *supra* note 10.

29. See Caron & Shirlow, *supra* note 14.

rights cause, with fatal consequences for that system. Yet since at least the 2003 invasion of Iraq and subsequent events, it is hardly obvious that the US has been highly influential or widely admired for its human rights record abroad. This US credibility deficit means that it does not follow necessarily that its Council withdrawal has or will cause other states to collapse in dismay and discouragement and themselves give up on the human rights cause. Third, a Type ‘A’ framing would perhaps assume that a powerful player has cut down a vital institution in its prime (so to speak). Yet the Council is routinely criticized by reputable pro-human rights activists for its many imperfections and failings.³⁰ In that sense, it is not obvious that the US withdrawal has fundamentally undermined (i.e. in a Type ‘A’ system-threatening way) what stature, influence or efficacy the Council might have enjoyed hitherto, precisely because the Council’s credibility was not particularly high. For one thing, it was not necessarily viewed as having resolved the many criticisms of its predecessor UN institution.³¹ A far more troubling scenario might be if the US was a credible and universally admired human rights champion that withdrew from (and withdrew support from) a flourishing institution that represented the epitome of a universal values-based community under law. Yet in that scenario the institution might well continue to operate well, in part because of the limits to US indispensability and to post-Iraq US credibility on international law (and human rights) outlined above. One might qualify this wider point. This is because human rights advocates critical of the Council might argue that principled participation therein and the maintenance of symbolic rhetorical support for such institutions still has value to the human rights project notwithstanding the Council’s problems.³² Yet such a debate is no longer about existential threat to a global normative system but about differing

30. See *Strengthening the UN Human Rights Council from the Ground Up*, HUMAN RIGHTS WATCH (April 23, 2018, 4:00 AM), <https://www.hrw.org/news/2018/04/23/strengthening-un-human-rights-council-ground> (discussing the position taken by leading transnational human rights non-governmental organizations not long before the June 2018 withdrawal). Some concerns expressed there are in practically identical terms to the concerns outlined in the June 19, 2018 withdrawal announcement. Haley *supra* note 2. For example, the “erosion of the Council’s credibility when States responsible for gross and systematic rights violations are elected as members”.

31. See Adam S. Chilton and Robert Golan-Vilella, *Did the Creation of the United Nations Human Rights Council Produce a Better “Jury”?*, 58 HARV. J. INT’L. L. 7 (2016).

32. See Hilary Charlesworth & Emma Larking, *Introduction: The Regulatory Power of the Universal Periodic Review*, in HUMAN RIGHTS AND THE UNIVERSAL PERIODIC REVIEW: RIGHTS AND RITUALISM (Cambridge University Press, 2014), for a powerful scholarly critique of a principal Council process that nevertheless notes the value of maintaining that process.

strategies for how, in institutional terms, best to give effect to the values and principles of that system.

Perhaps the only argument that Type ‘A’ ‘backlash’ proponents might have, then, is that by its symbolic exit (and more practically, its financial one), the US has irreparably and in a system-threatening way weakened the Council, or even the wider rules-based human rights order. Another version of this argument might be that the Council withdrawal cannot be seen in isolation from other US diplomatic conduct in international legal and institutional fields well beyond the human rights context, the cumulative effect of which is to threaten the very idea of the Rule of Law at the global level whether or not one is talking just in terms of human rights. I develop this idea below, but on both counts it is not glib to state that it is probably too soon to know.

2. ‘Silver lining’ analysis (Framing C)?

In co-announcing the withdrawal, US Ambassador Nikki Haley stated that the US would “continue to lead on human rights outside the misnamed Human Rights Council”, keep trying to strengthen the entire UN human rights framework, and “continue to strongly advocate for reform” of the Council, upon which “we would be happy to re-join it.”³³ Again, one need not be an apologist for any particular administration to observe that one way to frame the US action is not as a systemic threat, but as a catalyst and opportunity for reform. This is precisely so that the international human rights system (whether or not manifesting in this sort of Council or that) might more effectively and legitimately advance human rights respect, protection and remediation by states and others. Above, it was argued that one reason that the US withdrawal might not be system-threatening is that the reputation, and expectations, of the Council were not very high.

Framing ‘C’ is thus the perspective—perhaps somewhat counter-intuitive for human rights advocates otherwise mostly critical of the US withdrawal—that the real threat to the UN human rights system was continuation of the status quo. Again, this is not to take the administration’s word for it in terms of the Council’s deep problems. It is because highly credible human rights scholars have portrayed the statist international human rights system (and the Council in particular) as, in part, an elaborate ritualistic set of rhetorical reporting and other performances often with little practical

33. See Haley, *supra* note 2.

significance for victims, participation in which serves to distance and insulate states from their responsibilities even as they reiterate their commitment to fulfil these.³⁴

On this narrative, if the system was to survive or certainly to flourish it needed and needs revitalization or reconfiguration, even very robust contestation and questioning of its legitimacy or effectiveness might only be productive. Again, it is probably too soon to say if the US action has had this stimulus effect. Yet the Trump administration's 'backlash' against the Council might trigger a degree of 'pushback' that invigorates the system globally, rather than the contrary. Alternatively, unless institutions and systems never change, a positive framing would see acts that are the possible incipient elements of a new international human rights system, not necessarily acts undermining an existing system. In his 2018 essay 'The Pushback against the Populist Challenge', Kenneth Roth—the Director of Human Rights Watch—argued that a fair assessment of the global prospects for human rights should 'induce concern rather than surrender', a 'call to action rather than a cry of despair'.³⁵ If empirically we have witnessed a 'backlash' against the human rights system by some Western states, we must also examine—insofar as this is possible—the empirical case for a corresponding 'pushback' (by some states, or some actors within the 'backlash' states) in support of this values-laden part of the rules-based international order. Yet where we then find ourselves debating 'pushback' against 'backlash'—and especially if we discern in empirical terms a reciprocal pattern (or even cycle) of 'backlash' and 'pushback'—we must ask if we are merely in a particularly challenging but non-systemic period of intense contestation, rather than existential systemic survival. Of course, we could see 'fundamental resistance' to law that is system-threatening in its intent, but not in its effect. We could call that unsuccessful or attempted Type 'A' backlash. This brings us to the other framing outlined.

3. *Continuity not Change (Framing B)?*

Focus on the withdrawal event may convey a 'shock' factor that obscures the possibility that this particular action is better viewed as exhibiting a degree of continuity rather than an outright change: a significant but not unexpected or exceptional development, rather

34. See Charlesworth & Larking, *supra* note 33, at 1.

35. Kenneth Roth, *The Pushback Against the Populist Challenge*, HUMAN RIGHTS WATCH (2018), <https://www.hrw.org/world-report/2018/pushback-against-the-populist-challenge>.

than a new fundamental system-rejection posture. Successive Republican administrations have expressed ambivalence (at best) about the Council and its pre-2005 predecessor, the UN Human Rights Commission, or at least about the nature and extent of US engagement with these institutions.³⁶ Indeed the George W. Bush administration voted against the establishment of the Council at all in the mid-2000s, on the grounds that it was not a credible body.³⁷ This position was one taken by an administration that was overt about US support for human rights and freedoms globally. Seen in this context it is thus not obvious that the later 2018 withdrawal decision represents an outright rejection of international law and international legal mechanisms as these relate to human rights. There may well be a question of whether withdrawal is an effective tactic of international diplomacy or pursuit of national or indeed shared international interests. Some have argued that the June 2018 decision was not particularly strategic,³⁸ comes with ‘steep costs’³⁹ or a too-high ‘price’,⁴⁰ was a ‘self-defeating’ move,⁴¹ or a ‘leadership mistake.’⁴² Yet seen in the above historical context it does seem rather harder to characterize the withdrawal as a threat to the maintenance of a global legal order around human rights, as opposed to one approach to that global legal order, upon which opinions will differ as to whether engagement and membership are better approaches.

There exists of course a significant caveat to this observation, adverted to above. If a superpower disengages from and de-funds the Council and does not in fact act on its undertaking to “continue to lead on human rights” in the global arena, it is possible to reframe the ‘continuity and contestation’ narrative as one more resembling the

36. See generally Am. J. Int’l L., *supra* note 6, at 746.

37. *Id.*

38. See von Borzyskowski & Vabulas, *supra* note 11, at 344.

39. Steven Feldstein, *The Steep Costs of America’s Exit From the U.N. Human Rights Council*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (June 22, 2018), <https://carnegieendowment.org/2018/06/22/steep-costs-of-america-s-exit-from-u.n.-human-rights-council-pub-76676>.

40. Sara Silverstein, *The Price of America’s Withdrawal from the U.N. Human Rights Council: Ignoring Human Rights for Migrants could Mean that Civil Rights are Next*, THE WASHINGTON POST (July 19, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/07/19/the-price-of-americas-withdrawal-from-the-u-n-human-rights-council/>.

41. See Piccone, *supra* note 21, at 1.

42. Michael Posner, *Why U.S. Withdrawal from the Human Rights Council is a Dangerous Leadership Mistake*, FORBES (June 19, 2018, 5:50 PM), <https://www.forbes.com/sites/michaelposner/2018/06/19/u-s-withdrawal-from-the-un-human-rights-council/#a40f4c0de2ba>.

existential Type ‘A’ framing. This might be so if we avoid framing ‘backlash’ as a single event or impact imploding a system, and adopt a more nuanced, time-lapse approach whereby systems come under threat or are not supported or repaired or reformed or replaced, and a legal order falls apart less perceptibly over time.⁴³ If, in addition to its Council withdrawal, the US also disengages from and de-funds a significant number of non-human rights global institutions on everything from oceans governance to trade to peacekeeping, one could not continue to examine only the human rights context in isolation.

In this sense, the rules-based international order may be less like a ‘fragmented’⁴⁴ bundle of net international commitments and memberships and more like an integrated ecosystem underpinned by a single normative commitment. If the US posture on the Council is replicated across that ecosystem, and mimicked by allies and enemies alike, the Type ‘A’ threat framing might begin to look more like a viable scenario. Moreover, the framing of systemic threat might be misleading in an ‘all or nothing’ sense. The threatened collapse of a legal order might not eventuate and the legal order might survive, yet it might be considerably damaged. It might crumble, decay, mutate or be appropriated in ways that are deeply problematic in terms of the shared goal of ‘more peaceful and inclusive societies’ in the 2030 UN Sustainable Development Goals.

IV. CONCLUSION

Framing exercises such as undertaken here give rise to complex and probably insurmountable empirical questions about what might really be the causes, proper characterizations, and effects of events such as US withdrawal from the Council, or trends such as weakness in the UN human rights system. This essay has not attempted such empiricism, which is always accompanied by the risk of the blindness associated with first framing a problem and then going to look [only] for evidence of that problem. The complexity of attempting causation or correlation in global affairs should, in particular, suggest a need for caution in relation to supposed links between domestic political forces and actions or trends in global governance. The ‘pushback’

43. See James Crawford, *The Current Political Discourse Concerning International Law*, 81 *THE MOD. L. REV.* 1, 21 (2018).

44. See Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report to the 58th Session of the International Law Commission*, UN Doc. A/CN.4/L.682 (Apr. 13, 2006).

motif reminds us that we must avoid an ‘all or nothing’ frame of reference, since it is entirely conceivable that backlash and/or backslide on human rights in some geographies or spheres of activity might be accompanied by objective advancement of the ‘net’ human rights project in others. Moreover, the timeframe for assessing impacts might significantly alter one’s assessment of particular events. Meanwhile, the framing exercise imports a rather obvious normative choice, here to frame system-collapse as ‘negative’ and revitalization of the UN architecture as ‘positive’. Concepts such as ‘backlash’ may obscure that what counts as ‘progress’ or ‘backsliding’ is likely to be deeply contestable and contested.

There are winners and losers of globalization, and winners and losers of backlash and anti-backlash pushback. There may be upsides, in terms of regenerative effects, to serious strains on the rule of law and human rights institutions. This is especially so if we are prepared to see apathy and complacency (in the West hitherto) as being as big a threat to those values and systems as any deliberate sinister attempt to undermine them. Finally, one way to conceptualize a ‘backlash’ is that it implies a reaction that is expected or foreseeable, explicable, understandable or even legitimate, and possibly a response to someone or something over-reaching. It may be that academic scholars in the intellectual global elite need to be careful about a framing that suggests that a regrettable ‘backlash’ phenomenon is being driven by certain reactive neo-conservative and/or neo-liberal forces, without examining our own complicity in a system that may be viewed (rightly or not) variously as patronizing, unresponsive, over-promising, or empty-gestured. This is not just to remind us that what is dismissed as ‘populist’ may also be ‘popular’ at least in majoritarian terms. It is to remind us that we must not just decry attacks on the rules-based order from within Western democracies. We must also seek to understand how we might have lost the public’s support in explaining, more digestibly and persuasively, the supposedly ‘universal’ and ‘self-evident’ benefits of that order.