

International Law:

Less Confrontation, More Cooperation

by Ralph Janik

The second term of Donald Trump is shattering the fundamentals of international law. The reasons are obvious, the list of worrisome statements, plans and actions is long: The president of the still-most powerful country in the world has openly ignored the prohibition of the use of force when he stated that Ukraine started the war with Russia (not even Putin himself made such an absurd claim) while proposing that Russia should keep the territory it conquered in 2014 (Crimea and parts of Eastern Ukraine) and from 2022 onwards (some twenty percent of Ukraine) and toyed with the idea of annexing sovereign countries (Canada) or using the military to gain control over parts of their territories (Greenland, the Panama canal). He attacks international organizations by sanctioning individuals working for or with the International Criminal Court (ICC) and pulling out of or cutting funding for international organizations. He obstructs the international trade regime by blocking the appointment of the World Trade Organization's Appellate Body (the quasi-supreme court on trade law-related matters) members

while ignoring its core rules, eg the Most Favoured Nation principle, with his tariffs. Last but not least, he disregards basic rules of human rights law when he declares that there could not be a trial for every migrant he wants to deport.

All of these actions deviate from rules the US itself has created. Its last annexations took place under President William McKinley in the late 19th and early 20th centuries and control over the Panama Canal was agreed on under Jimmy Carter back in 1977. No other US president has sanctioned the International Criminal Court (ICC)—Bill Clinton even signed the Rome Statute initially—and the US was at the forefront of the establishment of the WTO. When

it came to deportations, both Obama and Biden upheld certain minimum due process standards. Past administrations have consistently denied recognition to territorial conquest from the 1930s and 1940s onwards; long gone seem the days of the Stimson doctrine, named after former US Secretary of State Henry Stimson, who rejected Japan's invasion of China's Manchuria region and the erection of its puppet state Manchukuo, or the Welles Declaration from 1940 (named after then-Under Secretary of State Benjamin Sumner Welles), that stated that "[t]he people of the United States are opposed to predatory activities no matter whether they are carried on by the use of force or by the threat of force. ➤

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They are likewise opposed to any form of intervention on the part of one state, however powerful, in the domestic concerns of any other sovereign state, however weak.”

It goes without saying that past US administrations have not always lived up to these standards; one only needs to think of the Bush administration's absurd legal justifications for the Iraq war, the waterboarding debate, or the American Service-Members' Protection Act from 2002, which allows the president to order military measures to get US nationals out of custody if they are to be prosecuted by the ICC (the “Hague Invasion Act”).

What is new, however, is that the current US president does not even pretend to care about international law. One even isn't sure whether he knows about its existence. Often enough, his administration comes up with no legal justifications at all or mere references to security or the powers of the executive accorded by the US constitution. In other words, while his predecessors often cheated, they still played the game of international law. Trump does not.

Still, the question now is not whether Trump is “destroying” international law, whether we should still “believe” in international law, whether it still matters or how it can be “saved” or even “revived”. International law cannot be erased, not by Trump, not by Putin, not by anyone else. Rules to manage cooperation

and coexistence of different groups, big or small, have always been with us, from Draco to the Bible, from the Code Napoleon to the dark times of “Totalitarian Lawlessness” (Georg Schwarzenberger) before and during the Second World War—from which we are, hopefully, far away. Some are formal, some not, some written, some oral, some detailed, some general. We find them everywhere, from friendships and marriages to workplaces, from communities all the way to the international system. Even early societies had to regulate interactions with their neighbors: Jared Diamond, in his famous book on humans as the “Third Chimpanzee”, for example observed the “powerful rules about treatment of one's fellow ‘us’” that “did not apply to ‘them’, those dimly understood, neighbouring enemies” among tribes in New Guinea. These rules were oftentimes brutal, but they were rules, nevertheless.

Not so much has changed since the early days of humanity. In essence, nation states are just another form of organized societies that need to find a way to co-exist or, possibly, cooperate with their peers. And that inevitably requires rules.

The real question, thus, is not whether but which international law exists. There is the one that enables you to send packages across borders (universal postal law) or talk to people from all over the globe in an instant (international telecommunications law). International law is not always political.

Then there is the one that prohibits aggression, guarantees individual and collective rights (such as self-determination), emphasizes that treaties are binding (*pacta sunt servanda*) or that states have to make full reparation for the injury caused by their wrongful acts. The one that created institutions to deal with global problems, from war and peace and human rights to the protection of cultural property or pandemics.

And yet, questions of enforcement and adherence remain, questions that inevitably emerge when reading about massive human rights violations, war crimes, genocide, excessively high tariffs, environmentally harmful policies—to name just a few of the countless headlines related to Trump's actions from the early phase of his term.

International law is not only an attempt to regulate the world as it is but also a hopeful aspiration, a project to create a world as it should be. From this perspective, we need to differentiate cooperation-related from confrontation-related rules. The former include the basics of technical cooperation, of diplomatic relations, the law of the treaties, the regulation of unfriendly acts (like declaring diplomats *personae non gratae*) and countermeasures (like sanctions), means to settle disputes, or institutional aspects of international organizations. These rules are mostly alive and well, explaining why one usually does not hear about them that often; by way of example, diplomats are usually not harmed and embassies

are not invaded. Even enemies understand that there is a need to respect their representatives, no one should be blamed for merely speaking, officially, on behalf of his or her government.

The latter, then, is the type of international law that is needed to deal with Great Power politics, protect basic human rights, or combat Climate Change. It includes those relevant for global cooperation, to preserve world peace or achieve the Sustainable Development goals. This is the type of international law people usually think about when lamenting its demise.

Such thoughts are nothing extraordinary, quite the contrary. During the 19th century, some even wondered whether international law was real law or rather a non-binding declaration of will that could be abrogated or deviated from whenever a ruler wished.

This led to the conclusion that law does not necessarily have to be tied to effective enforcement mechanisms but rather the question of whether a sufficient number of people believe that it should be respected. In the interwar period, E. H. Carr famously considered a treaty-based prohibition of war and the belief in the League of Nations and its collective security system as naive, if not potentially dangerous Utopianism (because it misunderstood, in his opinion, the real causes of war and how to prevent them). Or think of Thomas Franck, a Jewish émigré from Nazi Germany who would later become one of the big names of 20th century international law scholarship, who openly wondered who “killed” article 2(4) of the United Nations Charter (the prohibition of force) some 55 years ago.

In light of the above, one should avoid thinking of international law as one

unified and coherent set of rules that are either irrelevant in the age of Realpolitik or the solution to all of the world’s problems. We should also keep in mind that violations are the exception, not the rule; we talk about them as much as we do because they are so rare—there was no World War III after 1945 and no “Nuclear Holocaust”—and while we will never know whether and to what extent we can attribute that to international law, we do know that it was relevant in shaping a world that, in stark contrast to previous times, condemns war, at least officially. Lastly, we also need to keep in mind what law, in general, is (and what not): generally accepted obligations created by those bound by (states) or benefiting from it (human beings).

To conclude: when worrying about the impact of Trump on international law, we should ask ourselves which international law we are talking about. While the days of genuine multilateral cooperation and global governance are over, the days of international law as a common denominator are not, and never will be. Where there are peoples, nations and states, there is international law. It serves not only as a way of regulating virtually every aspect of our daily lives—some better, some worse—but also as a common language: Every practitioner, be it a diplomat, politician or academic, knows or, at least, should know what “force”, “genocide”, or “torture” means, and what is prohibited and what is not, as they have been defined in treaties and by courts. International law is not an end in itself but, like law in general, a tool that enables states to cooperate or define certain limits to their actions; whether they do so successfully, however, depends on political, not legal factors. The law is only as good as those working with it allow it to be.

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