



BOFAXE

Defending International Law in 2024

— We rarely talk about it, but we have all been there. Especially in recent times. Confronted by students, reporters and especially our domestic-law colleagues on the value of – international law?! A toothless tiger. Law for a sunny day. Its proponents? Idealistic, sure, but hopelessly naïve. Those with a skeptical outlook present a compelling argument, namely that even the most fundamental rules of international law are violated on a daily basis and to a significant extent. Furthermore, they contend that, in contrast to other legal systems that are perceived as tangible and enforceable, international law does not offer the same guarantees of swift and effective enforcement.

I believe that it is every international lawyer's responsibility to have a rock-solid reply to such challenges. But to me, our attempts often feel a bit apologetic, construed, cumbersome. Popular choices include: "A world without international law would be even worse" (e.g. [here](#)) and giving examples for the few (mostly ineffective) enforcement mechanisms that we *do* have (e.g. [here](#)). Unfortunately, it is all too easy to counter the first with "How would we notice?" or "Good luck explaining that to the people in Gaza/Ukraine/Taiwan/Yemen/Sudan/Myanmar/etc.". And attempt No. 2 is a dead end, at least as far as reference is made to the veto-infested Security Council, the short-armed ICC or to any court whose judgments do not come with enforcement.

But what could we reply instead? I have some suggestions.

States need International Law, and they almost always comply (even the "bad guys"!).

Today's world is so interconnected that no single state can afford isolation. States heavily rely on international coordination and cooperation. Some depend on exporting their goods, others depend on importing resources and many rely on external support up to the stage of military alliances. Coordinating and cooperating effectively and somewhat predictably requires an international order. One dimension of this is the optimization of international relations at a purely functional level. This dimension comes naturally to most observers and so comes its criticism: As soon as it is "optimal" for a state to blaze its own trail outside of that order, sticking to it loses its appeal and potentially its legitimacy. But there is a second dimension of importance to the international order that is international law, which is more easily overlooked: Because no state can afford isolation, all states experience the existential necessity to be perceived as orderly participants in international relations, as reliable partners. The broader a state's disregard for the international order – and thereby for the order-upholding participants – is displayed, the greater the ensuing isolation and loss of legitimacy will be.

Now, isolation is not a legal concept – yet. And it comes in varying degrees. Not every violation of international law is met with isolation and its direction can be selective at times. But this does not invalidate the point about all states striving to be perceived as law-abiding. When Russia illegally invaded Ukraine in February 2022, it made considerable efforts to justify its conduct *in the vocabulary of international law*. You may remember the Russian narrative of preventing Genocide, defending against Western aggression and being invited to intervene by the alleged Peoples Republics of Donetsk and Luhansk. Simultaneously, Israel defends its conduct in the war in Gaza and against terrorist organizations – despite Israeli atrocities being committed regularly – towards an ever-shrinking circle of supporters *in the vocabulary of international law*. That even those states breaching international law employ its logic to defend themselves against accusations is a powerful indication of the weight they ascribe to the international legal order. As long as this is the case, as long as legal order is preferred over anarchy and the blatant right of the strongest, the importance of international law cannot be invalidated. We may debate over and criticize its effectiveness in important areas. But we may not naively ignore this most important fact: That at its core, where it provides a baseline structure for the modern state's existential necessity to avoid isolation, international law is indispensable.

And before the criticism of this very restricted baseline of international law's relevance even comes up: For the absolute majority of states, abiding to international law far beyond the scope of necessity was and still is nothing but natural.

Louis Henkin's 1968 observation still applies today:

It is fair to say that most nations observe most principles of international law and most of their international obligations most of the time; it is probably the case, even, that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time. (Henkin, 179).

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The Enforcement-Fetish misunderstands Law.

Enforceability of international law is always criticized as weak. And weak enforceability is a problem for international law's effectiveness, especially where commands and prohibitions are concerned. And even more so, when these commands and prohibitions encapsulate cornerstones of international peace and conscience. Nevertheless, it is not enforcement that makes law binding. And even more importantly: Reducing law to commands and prohibitions restricts it to a level of undercomplexity that borders on the ignorance of law.

There are of course several different theories on what makes law binding. As international law largely consists of agreements, we should consider the following: When two autonomous entities enter into an agreement, it is their mutual, corresponding and ultimately codependent self-restriction of autonomy that gives legal weight to their agreement. Unfairness and problematic side-effects on third parties notwithstanding, this consent is also what justifies enforcement. If the relationship between enforcement and legal value were reversed, law would be nothing more than subjection to the will of the strongest enforcer. This may have been how law worked centuries ago, but certainly not today.

Not only is enforcement not the determining factor for what should be considered law. In fact, requiring enforceability turns a blind eye to all the legal norms which are not commands and prohibitions, but rights, principles or technical rules. Think of the principles of interpretation, the rules governing the status of global commons, procedural rules, the rules creating organizations, privileges, equality.

How should an international law sheriff enforce doctrinally sound interpretation? Whom should they arrest to uphold the jurisdiction of a court or the allocation of competences in an international organization? Who should be shot to ensure freedom of navigation on the High Seas? And who should receive a ticket when it comes to determining the existence of customary international law or a new state?

A large part of international law provides structure to international relations through norms that do not directly impose behavior. They are better understood as creating the legal environment that states exist in. While the rules of the game may benefit (greatly) from enforcement, trying to enforce the pieces of the game or the board itself makes no sense.

Domestic law, which shapes our daily lives and comes to mind for most when they think of "law" in general, makes us take the existence of board and pieces for granted. But we must be careful to not transfer this to the much more volatile realm of international relations. Having a board to play on in the first place, something that provides structure, context and predictability, is nothing short of an achievement of foundational importance for international relations today.

Thus, I am ultimately convinced that we do not even have to address the enforcement criticism at the level of giving examples and thereby implicitly accepting effective enforcement as a core requirement of relevance. But if we do go there, here are three things to consider:

1. Decentralized enforcement through sanctions, tariffs and political isolation is a common, yet often overlooked practice in international relations. Although not on their own, decentralized sanctions helped to overthrow the apartheid system in South Africa.
2. While domestic law may be more *enforceable* than international law, it is often *not enforced*. Certain grave offences are notoriously difficult to enforce (think of crimes that typically occur behind closed doors) and most minor ones are overlooked or addressed through public disapproval rather than the justice system.
3. When it comes to litigation, keeping point No. 2 in mind, international law's quota of litigations to violations is in all likelihood far above that of domestic law. The number of offences against international law is, by way of the simple fact that the relevant actors are hundreds instead of billions, almost incalculably smaller than that under domestic law. International litigation before the International Court of Justice (ICJ), regional international courts and the myriads of cases of international arbitral tribunals is generally an active business. Thus, the numbers of pursued international litigation logically far trump those of domestic law enforcement.

International Law is the Vocabulary to address Injustice below the Outcry-Threshold.

Historically speaking, explicit rules against aggression, genocide, war crimes and inhumane treatment are relatively young. I do, however, believe that many of the above phenomena have caused considerable outcry long before they were prohibited under international law.

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It goes without saying that any international legal regime wanting to be taken seriously must explicitly condemn that what also causes outcry all over the world. By the same token, however, we neither have to rely on international law telling us what an atrocity is nor how to spot one. The world knows, when it sees. The added value of international law truly lies in providing us with a vocabulary to address the lesser evils. Wars and major international atrocities do not fall from the sky. They emerge from circumstances that may make them appear to be without alternative. Such circumstances come in many forms. Inequality is a breeding ground for conflict, as are needs and greed. Where access to information is restricted, propaganda is easier to believe. Where humanity is disregarded, revenge fantasies grow. Where vital resources are overexploited, livelihoods shrink. The creeping erosion of standards and values even far below the universal outcry-threshold is dangerous and international law provides us with the vocabulary to articulate that. This in itself is an undeniable civilizational achievement.

Addressing an issue in the language of international law alone does not solve the world's problems. But it makes them visible and keeps them on the agenda. It improves our chances of preventing international disaster by identifying its building blocks in legal terms.

Final Thoughts

(International) Law never was and never will be the be-all and end-all solution to our problems. We should not ask more of international law than it can give us and should not confuse rules with spells that change reality once articulated. But make no mistake! International law is valuable and just as easy to defend as to criticize. The apologetic defense mentioned in the beginning, that the world would be off worse without international law, is true for all the above reasons – in 2024 as much as ever before. This is why we must face international law skeptics both as more *convinced* and *convincing* believers.