

Opinion – In Defence of International Law

Written by Martin Duffy

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MARTIN DUFFY, FEB 6 2022

International law has long suffered an image problem. The international legal system is sometimes seen as one that over-promises and underdelivers. Yet, we have witnessed more than a century of effective international legalism. We have prosecuted war criminals, held independence referendums, decolonized territories, solved maritime disputes, brokered ceasefires and tried the international guilty. However, this inevitably confronts us with the limits of international law. At the base of our discontent is the knowledge that so much of our humanitarianism fails. At worst, determined despots obstinately refuse intervention and continue to perpetuate international atrocities while (at least) the UN, Red Cross and a veritable army of relief workers apply band-aids. This article will discuss some of the problems of implementing international law but will argue that it is not only 'real' but 'realizable'.

For those who belittle international action as a bundle of soft law we can look to many successful inter-state resolutions and to the International Court of Justice (ICJ). Just as the jurist, Hersch Lauterpacht talked of the "vanishing point" of international jurisprudence, we concede that the 'reality of international law is dependent upon its effective implementation. We have accumulated an impressive body of ICJ rulings against and between states which have genuinely righted wrongs, punished the wrong doer, brought even the great powers to order, and prosecuted brutal dictators. Even before recourse to the ICJ we have regional legal equipment which has shown its metal since 1945. Then we also have an effective international legal machinery in the hands of UN specialist agencies enforcing everything from intellectual property rights to a state's compliance on nuclear fission or chemical weapons .

Action is sometimes slow, the results occasionally fragmented, but our international institutions demonstrate repeatedly that they work. International action is not always timely and it is sometimes frustratingly complex. Yet, whatever the intractability of geopolitical tussles, international law is not only real but such a rarefied commodity it is the very gold dust of the international system.

Allen Drury once said "International Law has never stopped men in their pursuit of conquest or revenge". More recently, Noam Chomsky bemoaned the "monstrous toll" exacted in spite of our international legal mechanisms. However, it must be emphasized that the international community's jurisprudence is as forceful as any other kind of law we care to name. But like so many things in life, the proof of the pudding lies in the realization of international law and that is where oftentimes critics are doubtful about its implementation. For this reason, and from an abundance of caution about the theatre of application, international law is often referred to as 'soft law'.

Collective agreement is one thing, but application of international law may well be another. This law is no less real as a concept, but its realization in the workaday milieu of diplomacy may seem aspirational at best, or illusionary at worst. For a start, with the absence of a few clunky institutions, power to ensure compliance with international law is patchy. This weakness lies in the very source of international law i.e., that its proof lies in treaties brokered between states and which are (then) considered "authoritative statements of international law".

Because they are in their nature consensual, such international law founded on treaties is unquestionably real and will usually be consistently implemented. Where the road gets rockier, at the top of the implementation pillar, we have the International Court of Justice (ICJ) and the rules of international law which have been formulated over years of customary practice. Out of the interactions between states, customary international law has evolved which is just as real as the commitment of states to solve disputes amicably. These are unwritten laws as they have evolved out of

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state practice over time, but they are no less real than for being customary rather than codified. Perhaps the existence of comparative international peace in over a half-century is the living history of its affects. We must also consider the importance of natural law which has evolved out of principles common to all developed legal systems.

The Judgements, for example of the International Court of Justice (ICJ) consolidate the force of real law. National courts defer to it, and legal scholars refine it, thus mutually contributing to realization of customary international law. By these means customary international law becomes real. If we are dealing with a concept which is 'real' then we must consider how customary international law is enforced. States can certainly agree arbitration arrangements or recourse to the ICJ, and if these do not work there is an armory of measures, they can take such as reciprocity and collective action. Even the dawn of 'smart sanctions' and targeted diplomatic action have not left us with an international legal system impervious to the regimes of dissident or powerful states. We have international law, but we still do not have international equality.

Customary international law is dependent on respecting state sovereignty, a kind of guarantee that might is not necessarily right, and which imposes checks and balances on the international system. A challenge to this concept comes as we begin to look at the collective damage done by our environmental or human rights derogations. We are coming to develop 'real law' in this area too as we develop appropriate action plans against states, issues which might have been regarded as contrary to sovereignty in the past.

How then does international law become 'real'? International law is supported by principles and practices tested by time. Another area where international law is demonstrably real is in the theater of armed conflict. The law of war which arises therein consists of justification (*jus ad bellum*) and laws which apply during war (*jus in bello*) or international humanitarian law (IHL). This example of real law should always be a last resort. The UN Charter (2/4) prohibits, "the threat or use of force against the territorial integrity or political independence of any state" and prohibits acts of aggression unleashed against UN mandates. Years of Red Cross action and the dissemination of IHL have made humanitarian law real, enforceable, and consequently saved millions of lives. IHL is thus a good example that international law is indeed real. International law has also been real in its action to eliminate torture. The Convention Against Torture was activated in 1987. It is all encompassing and very much a real legal protection and has withstood efforts by states to re-interpret its provisions.

The 1948 Genocide Convention is a real law against the crime of genocide. This is different from the definition of a crime against humanity which is targeted against civilians and includes slavery, persecutions on even deportation. Both are subject to UN-authorized international tribunals. Genocide is regarded as a crime a scale above this as it threatens the very existence of humanity. We now have a long history of applying real law in real courts to prosecute these offences. Of course, one of the first examples was the Nuremberg Trials. One of the key rulings which made them effective was that state orders could not be used to shield perpetrators from prosecution. Also, Nuremberg established that our conceptualization of atrocity could be applied retrospectively, thus holding perpetrators responsible for crimes that had not been legally defined before the outbreak of conflict. This ensured that war crimes, crimes against humanity, and eventually genocide could be effectively prosecuted under international law.

The counter argument to this use of 'real law' is that even in the case of genocide, violations continue to this day. Regrettably, it did not prevent the Cambodian genocide in the 1970s and some experts argue that when its Extraordinary Chambers commenced, the guilty has already eluded justice. In response to the Rwanda genocide, in 1995, the UN established an International Criminal Tribunal for Rwanda securing almost sixty genocide convictions. Further high-level prosecutions were achieved by the Special Court for Sierra Leone. While Nuremberg, and these modern examples of Cambodia, Rwanda, and Sierra Leone had fixed mandates, the international community finally accepted that it needed real law. The UN adapted the Rome Statute of the International Criminal Court (ICC) in 1998 and the ICC commenced in 2002. The ICC does not intervene if states are themselves willing to act. The absence of the USA, China, Iraq, Libya, Yemen, Qatar, and Israel as members (amongst many other states) are critical weaknesses. Nevertheless, both in its volume and effectiveness the ICC has shown itself to be a formidable weapon in bringing real law to the international system.

In some cases, advocates of humanitarian concerns believe broader and more substantial interventions are justified

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way beyond the cumbersome capacity of the ICC. Humanitarian intervention sanctioned by the UN and under Responsibility to Protect (R2P) have expanded the potential for effective international action. R2P stresses that the state's "primary responsibility [is] the protection of populations from genocide, war crimes, crimes against humanity and ethnic cleansing". In cases where the state is unable or unwilling to do so, the responsibility of the international community goes from simply assisting, through aid and diplomacy, to using force, which (in turn) must be sanctioned by the UN Security Council.

In face of a volatile and rapidly changing world order, international law has proven itself to be a force for good. Far from a mere paper tiger the measure of international law is today shown by the successful prosecution of both powerful and rogue states alike, by regional stabilization initiatives, by a collective sense of international stewardship, by millions of lives saved, and by relative systemic peace. However, these are not grounds for complacency and there exist new challenges for international order. The tectonic plates of geopolitics are constantly shifting. Foreign policy aspirations from China, Russia and other revisionist states have the potential to re-shape the fabric of our international system. To some experienced diplomats, the practice of modern international diplomacy is akin to "taming hell". And, in this sense, seldom have times more necessitated 'real' law because the alternatives do not bear contemplation.

About the author:

Martin Duffy has participated in more than two hundred international election and human rights assignments since beginning his career in Africa and Asia in the 1980s. He has served with a wide range of international organizations and has frequently been decorated for field service, among them UN (United Nations) Peacekeeping Citations and the Badge of Honour of the International Red Cross Movement. He has also held several academic positions in Ireland, UK, USA and elsewhere. He is a proponent of experiential learning. He holds awards from Dublin, Oxford, Harvard, and several other institutions including the Diploma in International Relations at the University of Cambridge.