

Taking Trump Seriously

Why international lawyers are at loss in dealing with Trump

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In her recent [contribution](#) “Trump’s latest attack on international law”, Lena Riemer very accurately points out the threat to international customs and institutions posed by Trump and – currently – by his candidate for the US Supreme Court: Brett Kavanaugh. She demonstrates how Kavanaugh has repeatedly shown disrespect for humanitarian law and human rights in his career as a judge for the Federal Court of Appeals for the District of Columbia Circuit. [Since day one](#) liberals have been worried about Trump’s impact on international agreements, institutions and human rights. And rightly so, considering his [unilateral withdrawal](#) from the Joint Comprehensive Plan of Action, US involvement in [Syria](#), Trump’s world trade [narcissism](#), or simply his recent [speech](#) at the UN General Assembly.

Lena Riemer, therefore, expresses despair: “Kavanaugh’s probable election within the next [days] is a win for Trump and a loss for international law and in the end, [for all who believe in it](#).” I deem it necessary to revisit our beliefs.

Critical legal scholars have long since expressed serious doubt about the “[liberal impulse to escape politics](#)” (p. 6). By now, most international legal scholars are familiar with the notion of “law is politics”, which denies the alleged objectivity and neutrality of the law. Politics, according to critical legal scholars, is internal to the law. In *From Apology to Utopia* (2nd edition, Cambridge 2005) Martti Koskenniemi describes law as a “grammar”, which “enables political victory without having to fight to the death” (p. 597). Studying the legal language requires drawing attention to “the way the generality of legal language is used to buttress particular policies or preferences” (FATU, p. 610). This has been the object of study of [Critical Legal Studies \(CLS\) and its New Stream](#) in general as well as a number of offspring-movements such as third world approaches to international law, feminist approaches to international law or the law and literature movement. Despite this shift in international legal studies, the majority of international legal scholars is still primarily concerned with studying international law as “[a normative or technical substitute for political choice](#)”. The object of study remains an account of “what it is possible to say in that language” (FATU, p. 589) and remains victim to the illusion of objectivity.

And there has been good reason to keep the illusion alive up until this point. With the end of the Cold War international law was on a run: The deadlock in the Security Council was resolved, international law could be “created”; political battles in a Cold War kind of fashion were put aside, reference was now made to the law instead. International institutions were prospering, international courts established. [The end of history was proclaimed!](#) It was inviting to believe that with a growing legal realm a neutral, objective force would soon rule the world, leaving no more

room for poor political decisions. Even the second Iraq War did not nearly produce the state of worry about international law's rule or the international rule of law we are experiencing now. Not because the Iraq War was perceived to be lawful, but because the Bush administration was eager to find a legal justification for its invasion. It used terms such as "[pre-emptive self-defense](#)" and [invoked Security Council Resolutions](#), construing its meaning in traditionally legal terms.

Only now, with Trump, are international lawyers becoming increasingly aware that the law is only so strong as it is not put to question. And yet, Trump is not altogether retreating from multilateralism: [NATO obligations were assured](#) and a [new NAFTA deal signed](#). And admittedly, international law is putting up a decent fight: the US only recently [suffered a loss at the International Court of Justice \(ICJ\) in its dispute with Iran over the new US sanctions](#). Be that as it may, the US has immediately [terminated the Treaty of Amity and announced to ignore the court's ruling](#). The apparent win might backfire, demonstrating the weakness of ICJ rulings without enforcement mechanisms. In fact, these examples show how international law is either apologist – as it enables Trump to sustain political agendas – or utopian – being unable to exert normative force against political will.

It took the "leader of the free world", the president of what is arguably still the most powerful nation on earth, to bring this rather elementary, but important discovery back to life. The atrocities committed in Yugoslavia in the late 90s were without doubt of greater disrespect for fundamental principles of international law than the election of Judge Kavanaugh to the US Supreme Court, yet, the "international community" and liberal world order emerged as the winner at the time. The International Criminal Tribunal for the former Yugoslavia (ICTY) was set up, criticism of missing legal authority, [voiced in particular by Slobodan Milošević](#) (p. 109), was successfully put away with. In fact, [the ICTY is considered a predecessor to the International Criminal Court enabling the future rule of international criminal law](#). Others, however, have revealed the Milošević trial as "[the construction of an 'international community' out of the tragedies of others](#)" and in that sense as a display of power by the "international community". It is emblematic that only a Western leader like Trump could make Francis Fukuyama, the man who proclaimed the end of history some twenty years ago, earnestly [think anew](#).

Politicians were never ones for "speaking the legal language" – in fact, this was considered a lawyer's task. However, politicians were expected to respect international courts' rulings, listen to legal experts and "listen to the legal language" in general by respecting its alleged normative value. Today, political power (literally) trumps the legal language. Trump does not listen to the law; he listens to raw, unfurnished politics. His denial to listen stands symbolical for the way in which we have relied upon the normative force of a language, which, by itself, is powerless. It comes as no surprise that the [only real danger posed to Kavanaugh's election was the accusation of sexual assault, which triggered a FBI-investigation](#), not his disregard for human rights. As international lawyers we are forced to realize the intrinsic weakness of our referral to international agreements such as the ICCPR in the face of such a powerful leader. Accusing Trump of neglect for human rights is stating the obvious and rings of a Kafkaesque feeling of impotence. International

lawyers are forced to change rhetoric, modes of operation and their object of study – for the first time since the end of the Cold War. Realizing that international law is toothless in confronting political power, international lawyers must look at different ways of pursuing their own political agenda. I believe that in order to do so we can learn from CLS and, in particular, David Kennedy, one of the movement’s most eminent figures.

He argues that international law and its institutions need to be rethought “[as a terrain for political and economic struggle](#)”. International actors will have to re-open the arena of political battles and make Trump feel the political losses he suffers from his decision in order to be heard. To that respect the scholar’s task is complementary: Kennedy demands to stop focusing on “[the authority of agents we can see to act within structures we understand. We have paid too little attention to the myriad ways power flows through the capillaries of social life, perhaps particularly at the global level.](#)” We must understand the way the world is governed before being able to claim normative superiority. For international lawyers, this can signify an interdisciplinary approach to the study of international institutions and the modes in which they exercise power, making use of sociology and political theory. Kennedy, for instance, directs his attention to background players, considering “[the vocabularies, expertise and sensibility of the professionals who manage \(...\) background norms and institutions](#)” and how their work might be “[reinterpreted and contested in political terms despite the ubiquity of the conviction among international legal experts that their expert work is not political.](#)” Confronting the [deeper structures of legal phenomena](#) will enable us to understand how decisions are made and, possibly, how to defy them.

Taking Trump seriously means realizing that international law is a language, one which has its uses but also its limits. Trump has shown us and will continue to demonstrate unwillingness to listen to the legal language. I believe that if we do not take this seriously, the “[onslaught on international law and international institutions](#)” will not be stopped but proven right: why should Trump even engage with international law and lawyers, if all it takes to neglect them is not to listen to them?

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