

GERMAN YEARBOOK OF INTERNATIONAL LAW

VOLUME 61 · 2018



DUNCKER & HUMBLOT · BERLIN

GERMAN YEARBOOK OF INTERNATIONAL LAW

Volume 61 · 2018

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GERMAN YEARBOOK
OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 61 · 2018



DUNCKER & HUMBLLOT / BERLIN

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Westring 400, D-24098 Kiel, Germany

Internet: www.gyil.org

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© 2019 Duncker & Humblot GmbH, Berlin

Printed by Druckteam, Berlin

Printed in Germany

ISSN 0344-3094

ISBN 978-3-428-15801-0 (Print)

ISBN 978-3-428-55801-8 (E-Book)

ISBN 978-3-428-85801-9 (Print & E-Book)

Printed on non-aging resistant (non-acid) paper according to ISO 9706 ☉

Internet: <http://www.duncker-humblot.de>

TABLE OF CONTENTS

FORUM

The Trump Administration and International Law

JACK GOLDSMITH AND SHANNON TOGAWA MERCER: International Law and Institutions in the Trump Era	11
---	----

FOCUS

International Health Law

NELE MATZ-LÜCK: Introduction	43
PEDRO A. VILLARREAL: Public International Law and Human Health: Bridging Conceptual Gaps Through Governance	45
ANIKA KLAFKI: International Health Regulations and Transmissible Diseases	73
VALENTIN AICHELE: 'Taking out the Magnifier': Groups in Vulnerable Situations Under Global Health Law	103
SILJA VÖNEKY: International Standard Setting in Biomedicine – Foundations and New Challenges	131
PHILIPPE CULLET AND HU YUANQUIONG: Medical Patents and the Right to Health – From Monopoly Control to Open Access Innovation and Provision of Medicines	153

Walther Schücking Lecture

CHRISTINE CHINKIN: Women, Peace, and Security: Tackling Violence Against Women in the Contemporary World?	185
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GENERAL ARTICLES

RICCARDO PISILLO MAZZESCHI: Coordination of Different Principles and Values in International Law	209
ANNALISA CIAMPI: The Divide Between Human Rights, International Trade, Investment and Development Law	251
PATRIZIA VIGNI: State Responsibility for the Destruction of Cultural Property	295
VILJAM ENGSTRÖM: Regulating the Baltic Sea – A Showcase of Normative Pluralism	347
KATAYOUN HOSSEINNEJAD: Interpretation in Light of Which ‘Object and Purpose’?	377
SOPHIE PAPADILERIS: Protection of Peacekeepers Resorting to Armed Force – A Current Dilemma	403

GERMAN PRACTICE

GUIDO HILDNER: The Activation of the International Criminal Court’s Jurisdiction over the Crime of Aggression: The Edifice is Completed	439
HELMUT PHILIPP AUST AND MEHRDAD PAYANDEH: German Practice With Regard to the Use of Force in Syria	451
SARA JÖTTEN AND FELIX MACHTS: Ban on Strike Action for Civil Servants is Constitutional: The Judgment of the Federal Constitutional Court of 12 June 2018	465
LIV CHRISTIANSEN: Turkish Politicians’ Political Campaigns in Germany – The Legality of Public Appearances Under German Law	475
HENNING BÜTTNER: Much Ado About Nothing vs. the Opening of Pandora’s Box? – Some (Normative) Aspects of the Migration Compact Regarding its Impact on Germany	491
MAXIMILIAN JACOB AND CLEMENS J. DORSEL: The Case of the Lifeline – A German Perspective on the Dilemma of Private Sea Rescuing in the Mediterranean	523

THESIS SUMMARIES

ANDREAS VON ARNAULD, KERSTIN VON DER DECKEN, AND NELE MATZ-LÜCK: Editors' Note	543
STEFAN MARTINI: Comparative Constitutional Justice	545
ANDREAS ORATOR: Prospects for and Limits to Establishing Union Agencies	549
JOCHEN RAUBER: The Changing Structure of International Law as a Change of Inter- national Law's Foundational Principles	553
HUBERTUS REINBACH: The Monopoly of Trade Unions in German Strike Law: The Strike Between Constitution and International Law	557
PHILIPP TAMME: The Enforcement of EU Law by the European Court of Human Rights: Vicarious Constitutional Jurisdiction for Improving the Protection of Individual Rights	561
JOHANN JUSTUS VASEL: The Emancipation of Regional Human Rights Protection Mechanisms	565
FERDINAND WEBER: Nationality and Status: Static and Dynamic in Political Commu- nity-Building	569

Book Reviews

Edward Chukwuemeke Okeke: <i>Jurisdictional Immunities of States and International Organizations</i> (BRÖHMER)	575
Benoit Mayer: <i>The International Law on Climate Change</i> (KULOVESI)	579
Henri Decœur: <i>Confronting the Shadow State: An International Law Perspective on State Organized Crime</i> (SCHLOENHARDT)	582
Leonardo Borlini: <i>Il Consiglio di sicurezza e gli individui (The Security Council and Indi- viduals)</i> (KOLB)	585

8 TABLE OF CONTENTS

Birgit Spiesshofer: <i>Responsible Enterprise: The Emergence of a Global Economic Order</i> (HOBE)	591
Astrid Kjeldgaard-Pedersen: <i>The International Legal Personality of the Individual</i> (SPARKS).....	594
James Harrison: <i>Saving the Oceans Through Law: The International Legal Framework for the Protection of Marine Environment</i> (GUILLOUX)	597
Paolo Lobba and Triestino Mariniello (eds.): <i>Judicial Dialogue on Human Rights: The Practice of International Criminal Tribunals</i> (IMANI)	599
Stefanie Schmahl and Marten Breuer (eds.): <i>The Council of Europe – Its Law and Policies</i> (HOPPE)	602

FORUM

The Trump Administration and International Law

International Law and Institutions in the Trump Era

JACK GOLDSMITH AND SHANNON TOGAWA MERCER*

ABSTRACT: This paper has two goals. First, it documents President Donald Trump's primary influences on international law and institutions in his first two years in office. Second, it seeks to assess the medium- and long-term impact of those influences. The vast majority of international law and institutions remains untouched by Trump's actions. He has brought significant change to high-profile international treaties and institutions such as the Paris Agreement, the Iran deal, and the global trade system. His verbal attacks on U.S. allies and international institutions that traditionally garnered U.S. support (such as NATO) promote disharmony among these allies, diminish trust in the institutions, and make it easier for leaders in other nations to adopt a similarly disdainful attitude. Trump's influence has been significant. But other U.S. presidents have assaulted international institutions only to be followed by a president who embraces those institutions and dims the impact of the assaults. Trump's ultimate impact will depend on who succeeds him in office. It will also depend on larger trends in international affairs, such as the rise of China and the re-ascendancy of Russia as global powers, the many failures of liberal internationalism, and the general disenchantment in liberal democracies with distant, elite, global institutions. These factors were operating before and independent of Trump, many of them were pushing in the same general direction as Trump, and they will make it challenging to return to anything like the pre-Trump international status quo.

KEYWORDS: Donald Trump, Liberal Internationalism, International Order, Paris Agreement, International Trade, WTO, Iran Deal, INF Treaty, United Nations, NATO, Syria, Al Qaeda, Islamic State, Laws of War

This paper examines the widespread belief that the Trump administration's attacks on international law and institutions are significantly harming the international legal order. Part I describes the actions Trump has taken. That is the relatively easy part. It is much harder to figure out the medium- and long-term impact of Trump's actions. For the reasons offered in Part II, we think that in most respects it is still too early to

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tell. But we speculate that Trump's biggest impact is likely to come as much from his verbal attacks on international law and institutions as from the material changes he has brought to them.

I. The Trump Onslaught

President Trump treats international laws and institutions with disdain, and frequently issues threats with respect to them. He did this during the presidential campaign, in his Inaugural speech in January 2017, and persistently ever since. 'America will always choose independence and cooperation over global governance, control, and domination,' he told the General Assembly in September 2018, in a recent, typical formulation.¹ 'We will never surrender America's sovereignty to an unelected, unaccountable, global bureaucracy,' he added, in the course of excoriating the World Trade Organization (WTO), the International Criminal Court (ICC), and the United Nations (UN) Human Rights Council.² President Trump's anti-internationalist bark has been very loud, and must be included in any assessment of his impact, which we do in Part II. But first, in this Part I, we assess his bite.

A. Trade

Trump has disrupted the international trade regime along many dimensions.

During the presidential campaign, Trump said that he would renegotiate the North American Free Trade Agreement with Canada and Mexico 'to get a better deal for our workers,' and that if he could not get a better deal, he would withdraw from it.³ The renegotiations began in January 2018. In late September 2018, the United States, Canada, and Mexico announced that they had reached a deal on a new treaty,

¹ Donald J. Trump, *Remarks by President Trump to the 73rd Session of the United Nations General Assembly in New York, New York*, 25 September 2018, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-73rd-session-united-nations-general-assembly-new-york-ny/>.

² *Ibid.*

³ Donald J. Trump, 'Full transcript: Donald Trump's jobs plan speech', *Politico*, 28 July 2016, available at <https://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891>.

called the United States-Mexico-Canada Agreement.⁴ It remains unclear whether this new agreement will receive the necessary ratifications.

Trump has been similarly disdainful of the WTO, which he views as biased against the United States.⁵ But his attacks on it have taken a different form. He has significantly ramped up the Obama-era practice of vetoing appointments to the WTO's Appellate Body (AB).⁶ The AB consists of seven 'judges' appointed for four-year terms who resolve appeals from WTO panel decisions.⁷ AB appointments are made by consensus. In declining to approve candidates, the United States is thus exercising a veto.⁸ This veto impacts the AB because it requires three members to decide a case.⁹ On 30 September 2018, the AB was reduced to three members; and by December 10, 2019, when two of those three reach their term limits, there will be only one.¹⁰ That will leave the AB inoperative and the WTO functionally unable to resolve appellate disputes.¹¹

The Trump administration has also sparked a global trade war by engaging in an exchange of tariffs with China, Turkey, the European Union (EU), and Canada based on a number of justifications.¹² The extent to which these actions violate the WTO

⁴ United States-Mexico-Canada Agreement, 2018, available via <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

⁵ See Edward Helmore, 'Trump: US will quit World Trade Organization unless it "shapes up"', *The Guardian*, 30 August 2018, available at <https://www.theguardian.com/us-news/2018/aug/30/trump-world-trade-organization-tariffs-stock-market>.

⁶ See Bryce Baschuk, 'U.S. Blocks Korean Judge from WTO Appellate Body', *Bloomberg*, 24 May 2016, available at <https://www.bna.com/us-blocks-korean-n57982072872/>; Tetyana Payasova, Gary Clyde Hufbauer, and Jeffrey J. Schott, *The Dispute Settlement Crisis in the World Trade Organization*, March 2018, available at <https://pii.com/publications/policy-briefs/dispute-settlement-crisis-world-trade-organization-causes-and-cures>.

⁷ *Ibid.*

⁸ Art. 2.4 Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2 (DSU) 1994, 1869 UNTS 401; see also Tom Miles, 'Diplomats Search for Way to Save Trade System After U.S. Vetoes Judges', *Reuters*, 27 November 2017, available at <https://www.reuters.com/article/us-usa-trade-wto/diplomats-search-for-way-to-save-trade-system-after-u-s-vetoes-judges-idUSKBN1DR2PR>.

⁹ Art. 17.1 DSU.

¹⁰ See Payasova et al., *supra* note 6.

¹¹ See Tom Miles, 'U.S. Blocks WTO Judge Reappointment As Dispute Settlement Crisis Looms', *Reuters*, 27 August 2018, available at <https://www.reuters.com/article/us-usa-trade-wto/us-blocks-wto-judge-reappointment-as-his-term-nears-an-end-idUSKCN1LC190>.

¹² China and the United States have engaged in a tit-for-tat exchange of tariffs and threats since January 2018. As of 19 September 2018, 85 to 95 percent of United States exports to China are under