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Recalibrating International Law: From Exclusive to Inclusive?

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Summary

- The world we live in is at an historical inflection point. Global cooperation is increasingly elusive and challenging, and many reckon that the Westen liberal order presided over by the United States since the end of World War II is over.
- International law, which is deeply intertwined with the structural transformation of international order, is also at risk of becoming a marginal enterprise in international affairs.
- This Insight investigates how, in an era of limited cooperation, it would be possible to reinstate an international legal order subject to a minimum set of legal standards.
- The principal argument is that what the world needs is a less mechanical, less fervent application of general principles. As a consequence, what we should be looking for is less conviction and more conversation.
- The reality remains that the rules-based international order requires, at the minimum, a substantial revision to accommodate other powers' visions of international order and that a piecemeal approach will not be enough to restore faith in the international legal system.
- Such a shift in the legal system would require holding on to fundamental principles, including the UN Charter and other like-minded international standards. Due to their flexibility, they are specific enough to have practical significance in concrete cases and can serve as criteria to be carefully weighed and balanced to arrive at rational solutions.
- The Insight also highlights that as global cooperation continues to expand around issues vital to humanity's future, so too does the development of guiding principles across diverse areas such as climate change, biodiversity, long-term peace, artificial intelligence, and human rights.
- Finally, it recommends that the international order takes the following into account:
  - It is easier to work with fundamental principles and standards than to deal with and muddle through the operational rules of international law.
  - If the objective is to support a less mechanical, less fervent application of international law, instead of dealing with legal rules whose usefulness, legitimacy or even existence is repeatedly questioned, a principle-driven international order for all nations offers the best path forward.

'There is nothing quite to compare with the fading of the American mind of the idea of the law of nations.'
D.P. Moynihan – On the Law of Nations (1990)

The Issue

Observers have frequently noted that international law risks being irreparably damaged—particularly in relation to the conflicts in Ukraine and Gaza—or, at the very least, significantly weakened. The law itself has been questioned in terms of usefulness, legitimacy, or even existence. How could this be different when a de-globalizing or re-globalizing, but still interconnected, world is faced with rules and norms which, as impeccable or workable as they might appear, are too easy to breach or disregard?

As the old world fades and the new one fights to emerge, how can we prevent this in-between moment from becoming a breeding ground for 'monsters'? A law without zeal which might protect sovereignty while re-establishing basic forms of communications, such as borders or maritime rules, has been proposed in some circles.

The idea of returning to a more modest but sustainable approach to international law would allow more conversations and could possibly favour more compromises.

However, to restore a minimum of faith in the international legal system, international law has to first integrate states initially excluded from rule-setting and, second, consider that its rules are not only technical norms but, primarily, authoritative expressions of principles that define the objectives and course of collective action.

The adaptability of principles enables them to encompass and mediate between conflicting tendencies. For instance, the principle of equality among states should not be read in clinical isolation and always be viewed within a framework that includes the responsibilities of major powers.

Such a framework will allow policymakers to deal effectively with unforeseen and unforeseeable problems by adding useful interpretation to politically charged situations.

As we prepare for a new era—one whose contours have yet to fully emerge—essential principles should be placed at the forefront of progress in international law. Their strength lies in their ability to reinforce the international legal system, often without the need for formal state consent. This Insight investigates how, in an era of limited cooperation, it would be possible to reinstate an international legal order subject to a minimum of legal standards.

International Law as A Marginal Enterprise?

Many would agree with Leon Trotsky's assertion that the twentieth century was the most disturbed century in the history of humanity.[1] Yet, the current century shows little promise of being markedly different.

Global cooperation is increasingly elusive and challenging, and serious doubts have been cast about the future of the postwar international order.[2] Oxford historian Margaret MacMillan asked recently: 'How well American democracy, and the international order, can withstand the stress?'[3]

In slightly different words, how can the world deal with U.S. shock and awe strategy, China's forceful law-making and law-shaping power, and Europe's fears and near-apathy at the same time? And how can international law, which is deeply intertwined with the structural transformation of international order, avoid becoming a marginal enterprise in international affairs?

Comments on international law are most depressing at the moment. According to some observers, in particular with reference to the Ukraine and Gaza conflicts, international law would be 'damaged beyond repair'.[4] For others, it is subject to substantial erosion. Examples abound, not all of them connected to the unbridled use of force which, except in self-defence or with the authorization of the UN Security Council, joins a long list of legal failures.

What is new is that the discipline itself seems to be at a critical juncture. The prospect of international law becoming **sede vacante** is one of the possible outcomes. The accumulation of disagreements—some of them deliberately

engineered—combined with an era marked by limited cooperation, makes the swift restoration of an international legal order grounded in minimal legal standards unlikely.

It seems clear that the heydays of international law are over and that the old order looks doomed. That much is suggested by quite a few states, such as China or Russia which, already in their 2016 joint Declaration on the Promotion of International Law, wanted the world to return to some firm commitment to Westphalian state sovereignty.

Through the formal endorsement of legal norms alongside profoundly subversive claims regarding their implementation, they consistently test the boundaries of the international legal system. Another interesting and more recent example is India, which considers that "the treaty-based concepts are typical of the old order."[5]

As enforcing international law has also become more costly to the enforcer than to the violator, the idea of returning to a more modest but sustainable approach to international law is also quite dominant in some circles. "Protecting sovereignty and establishing basic forms of communication, such as borders… maritime rules, and communication protocols" and restricting war as much as possible, is what international law should do.[6]

This seems to align with what some intellectuals have long advocated for, which is more compromise, and not more (liberal institutional) structure of the world. Isaiah Berlin, the British philosopher, took the long view of his own moment in the context of the Cold War: "Far from showing the loose texture of a collapsing order, the world is today stiff with rigid rules and codes and ardent, irrational religions."[7]

The way out, Berlin continued, therefore lay in some "logically untidy, flexible, and even ambiguous compromise… What the age calls for is not… more faith, or stronger leadership, or more rational organization. Rather it is the opposite — less Messianic ardor, more enlightened skepticism, more tolerance of idiosyncrasies, more frequent ad hoc and ephemeral arrangements…What is required is a less mechanical, less fervent application of general principles, however rational or righteous…"[8]

Law Without the Zeal

Taking Berlin's rulebook, what should then be under consideration is whether the current world order, largely based on a 'coalition approach' to multilateralism, does not need a more flexible, ad hoc, imperfect worldview, and of a good amount of tolerance when great powers break rules which lack enforcement. What we should be looking for is less conviction and more conversation.

Charles-Maurice de Talleyrand's motto, 'Above all, not too much zeal', continues to strike a chord in an age where we are collectively expecting too much of international law and, at the same time, tend to remember it only when we need it.

Echoing an aphorism attributed to French Emperor Napoleon, President Donald Trump's social media post of February 15th, 2025, would even like us to forget the law: "He who saves his Country does not violate any law." What is expressed here reflects what theorists remarked nearly sixty years ago, which is that legal rules cannot work because the need for survival far outweighs the need for compliance[9],and there cannot be any political theory of international law because international theory would be the theory of, or struggle for, survival.

It is not surprising then that classic 'realist' thinkers saw law as eminently fluctuating according to situations and circumstances. For them, law could only play a very limited role in international affairs, one always and inevitably circumscribed by power realities. A strategy of flexible legal interpretation, at the detriment of substance and thickness sometimes, was better than nothing.

If it cannot be denied that rules are sometimes difficult to interpret, they nevertheless present one considerable advantage, which is their flexibility.

Under normal circumstances, the flexibility of international legal rules should not be seen as a threat to their legitimacy, but rather as a strength—offering a framework that guides diplomatic engagement while allowing sufficient discretion for states to pursue their foreign policy objectives. When a state advances a new claim or interpretation of a rule through proactive diplomacy, it may be widely contested; yet, by entering the public sphere, it engages with existing international law and can contribute to the gradual emergence of new customary norms.

Kosovo Bombing

The aerial bombing campaign launched in March 1999 by NATO against Serbian forces in the province of Kosovo is an interesting example of international law developing through diplomatic practice. Even if the participating states considered that the action was politically and morally justified, differing views were expressed as to the legality of this action which was not authorized by the Security Council. The fact that the 'humanitarian intervention' in Kosovo was not ultimately condemned by the Security Council proves that international practice can, in extreme cases of human suffering, tolerate an ad hoc intervention on moral grounds in contradiction with the classic rules of international law.

The debate of legality versus legitimacy in this case was brought forth by former United Nations Secretary-General Kofi Annan in his 1998 Ditchley Foundation lecture. This was a discussion that caused internal tensions within the UN secretariat. Questions regarding whether international law should be waived for reasons of moral imperatives and political feasibility are difficult ones, and these are questions that are bound to resurface during serious international crises. For lawyers, departures from legality should bear the burden of persuasion about their overwhelming urgency and necessity, and claims of legitimacy should be implemented only in exceptional circumstances, and then within a framework of principled restraint.

To judge international law only by its shortcomings or failures would be unfair. It is constantly and effectively adapting to the international environment and adjusts itself in relation to the changing balance of power between 'the liberal West' and the 'illiberal rest'.

It is true that modern international law remains primarily a product of Western preferences. However, non-Western states have not always been devoid of influence (United Nations, Bretton Woods institutions, Bandung 1955, the human rights revolution of the 1970s and 1980) and continue today to call vigorously for reforms of norms that they say are operating in the interest of Western powers, such as the law of the sea or international human rights law.

Overall, international law has made tremendous progress. It has transitioned from a contractual system of rules into a much denser network of principles and procedures. Even its rules are now deeper and more comprehensive than one century ago in all branches – the use of force, human rights, the economy, and the environment. It has given birth to large-scale organizations such as the UN, institutions which were objectively necessary to maintain peace and act as its guardian post-World War II. Moreover, the international judicial system that supports the existing architecture is now playing an important and direct role in the building of a global system of governance.

Conflicts are now seen as a legal matter, even if sometimes more lawfare than law. In Ukraine, international bodies such as the International Court of Justice, the Human Rights Council, the Organization for Security and Co-operation in Europe, the Council of Europe, and the European Court of Human Rights are all engaged. Likewise, a record number of States have referred both the Ukraine and Gaza situations to the International Criminal Court (ICC).

This activist stance stems from the current inability of the Security Council to respond meaningfully to most crises due to the irreconcilable positions and interests of its permanent members. Even if the substance and impact of these interventions can be discussed (the International Court of Justice has never ended a war), the larger role engineered by a significant minority of UN members on security matters before the UN General Assembly is a clear indication that the Security Council is in danger of being replaced as the spokesperson and unified voice of the United Nations. For some, it would even be time to completely give up on the UN Security Council[10].

The End of the Old Order

What is also a reality is the assault on what became known as the 'rules-based international order', a staple of Western foreign policy that was supposed to provide a degree of world order. But which specific rules does this order refer to? And who has the authority to set them up?

Under the guise of upholding universal principles, states and other international actors are subject to a range of inconsistent binding and non-binding rules, as well as double standards.[11]

On the one hand, Western countries do participate in collecting evidence related to the Russia-Ukraine war, but on the other hand they hesitate to act similarly regarding the Israel-Hamas war. Likewise, many – not all – European governments support the ICC in prosecuting the Russian president for war crimes and its decision to seek an arrest warrant for the Israeli prime minister. However, consecutive US leaders have taken opposing views on some of these ICC prosecutions.

Even those who argue in favour of an international order based on international law still seem unprepared for what Anne Applebaum has recently described in her book Autocracy, Inc, as an association of autocratic governments which, through transactional partnerships, is spreading to the democratic world and poses a real threat to democracy, freedom, and human rights.

It remains clear that the rules-based international order must undergo substantial revision to reflect the visions of emerging powers and to ensure that international relations are not governed by brute force.It has also become clear that a piecemeal approach will not be enough to significantly move the needle. The reaffirmation of the Atlantic Alliance and NATO for instance, as fundamentally important as it is, is likely to contribute to the emergence of distinct sub-orders, potentially making the global order appear less unified and therefore more minimalist or normatively weaker.

Different Approach

A more encompassing approach to restore faith in the international legal system is therefore needed. Two elements already stand out as key factors for renewal.

First, given that the heavily institutionalized system of international law is unlikely to undergo a fundamental overhaul,[12] it must find ways to integrate states that were initially excluded from the rule-making process.

The price to pay is that some rising powers might promote a distinct vision of international society based on principles of sovereign equality, independence, non-interference, and consent. This would present a challenge for solidarists who see humanity as the proper foundation of state sovereignty and advocate for an ethically progressive model of global order. These adjustments may lead to the emergence of distinct, flexible sub-systems—such as 'regional international society' groupings—which could generate friction among international actors due to differing interpretations of legal norms that challenge established frameworks.

However, it seems unlikely that rising and middle powers will unburden themselves from the sources and principles that have shaped the international sphere for more than one hundred years. The fact that rising and middle powers use law and engage in shared global legal regimes, norms, and institutions is a clear indication that they are willing to strengthen their 'status as a legitimate and responsible member of the international society'.[13] This inclusive approach is essential to mitigate potential conflicts arising from competing blocks.

Secondly, the international order is presently based on international rules that not all states consider as being akin to rules of international law. Laws should not be viewed merely as a collection of technical norms and guidelines, but also as authoritative expressions of the fundamental principles and values enshrined in the UN Charter and other international instruments. Legal norms are neither automatically decisive, nor the sole expression of the aims of states. They can be applied to situations without rigidity or unimaginative compliance to precedent.

Interestingly, the return of discussions on natural law (or morals) in mainstream legal scholarship recently is another sign of a fundamental change in the way essential principles are being put at the forefront of progress in international law.[14]

If natural law disappeared in the nineteenth century, it was mainly because it stood in the way of the privileged status that colonial powers were trying to claim with notions such as "the standard of civilization" and with the establishment of positive law, a law that they could make and control. The reappearance of natural law will contribute significantly to the strengthening of the international legal system without requiring state consent.

Suggesting that a shift in the international legal system is possible, or desirable, obliges one to make a number of propositions as to what this could look like. What are the fundamental principles which could provide a law that all sides could adhere to?

The UN Charter-based system, because of its universality, and because it represents a system authorizing diverse actors to have a voice as equal participants, is still the framework that can offer structure and direction.

The UN Charter and other like-minded international standards are the main source of fundamental values and principles. They include respect for sovereignty, non-intervention and territorial integrity[15], as well as human rights, fundamental freedoms and an open international economic system. They are accepted by UN Member States precisely because they embody the deeply held values of most of humanity, making them both a moral imperative and a "thick" legal foundation of international relations.[16]

Other essential principles issued from natural law include peremptory norms of jus cogens, candidates frequently cited being the right to self-determination and the prohibition on territorial conquest, genocide or piracy, and the general principles of equality, good faith, due process, necessity and proportionality. Because natural law does not depend on practice, compliance does not and should not determine its validity.

As Sir Gerald Fitzmaurice, a rapporteur on the law of treaties for the UN International Law Commission, explained about pacta sunt servanda (legal agreements are binding): "[Pacta sunt servanda] is a principle of natural law in the nature of jus cogens; and it is as a principle of natural law that it can act as a postulate of international law, giving the latter system an objective validity – i.e. a validity not dependent on the consent of the entities subject to the system."[17]

Relying on the UN's foundational principles may seem incompatible with the diversity, change and novelty of current events. How then can these opposing elements be reconciled into practical commitments?

Due to their conflicting implications, they cannot offer automatic solutions to specific problems, but they can serve as criteria to be carefully weighed and balanced to arrive at rational solutions. Despite the inherent tension between principles and immediate needs, they can be aligned to work in harmony.

Why is this so? Because principles are flexible. They are not like robot sentinels facing each other across a border. They do not prescribe specific procedural patterns or detailed mechanisms for action. Also, they do not require maintenance, contrary to rules and norms whose support needs 'long-term thinking and acceptance of short-term costs.'[18] Finally, they open up negotiating possibilities and offer constructive additions in international attempts to resolve conflicts.

Because they allow for adaptation, they are able to embody opposing elements. Even in a UN system replete with privileges and hierarchy, notably within the Security Council, power differentials are – to some extent – moderated to promote a more predictable environment, enabling diverse actors to participate in decision-making and have a voice in the General Assembly. Thus, the fundamental principle of equality among states[19] is to be viewed within a framework that includes the special responsibilities of major powers. In the same vein, observance of human rights is to be seen in relation with the principle of non-intervention.

This is precisely what, more than sixty years ago, former UN Secretary-General Dag Hammarskjold conveyed in his 1961 address at Oxford University. He stated, "Necessarily general and comprehensive, the principles and purposes of the Charter still are specific enough to have practical significance in concrete cases."

Even if they can entertain a specific life of their own, principles are durable as they cannot possibly be undone. They are not subject to what IR scholars refer to as 'norm death'.[20] Attempts to weaken, for instance the prohibition on force does not impact the obligation itself, but rather the sense of a legal duty to comply.

The principles of the Charter are, moreover, supplemented by the body of legal doctrine and precepts that have been accepted by states generally, and particularly as manifested in the resolutions of the United Nations organs. In this body of law, there are rules and precedents that can appropriately furnish guidance.

Gaza 1956 and Congo

These principles, for example, played a crucial role in the establishment of the first United Nations Emergency Force in Gaza in 1956. By drawing lessons from the UNEF experience, it became possible to formulate fundamental criteria that would serve as standards and guidelines for future peacekeeping operations.In 1956, the key principles guiding the establishment of the Force included non-intervention in internal political conflicts, the exclusion of major military powers from participation, the international character and status of the Force, the United Nations' independence in the selection of contributing troops, and the principle of good faith in interpreting the Force's mandate and objectives.

These are precisely the same principles that further helped in projecting specific policies to be followed and in restraining ill-considered measures when the UN had to deal, a few years later, with the request for military assistance in Congo.

Obviously, the current situation in DRC, where UN peacekeepers have been present for almost 26 years now (in addition to 4 years between 1960-1964), calls into question the UN's interpretation of fundamental peacekeeping principles including the use of force by peacekeepers and the maintenance of impartiality and potential implications for peacekeepers who are providing support during joint operations with actors engaged in fighting.

However, it is also true that the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) has one of the most robust mandates in the UN's history as it is authorized to use 'all means at its disposal.' The expansion of the normative framework of peacekeeping might run counter to the principle of non-intervention and be detrimental to the concept of peacekeeping itself, and to the longstanding principles that supported its original vision.

Generation Gap

As we can see, considerations of principle and law are sometimes not enough to settle all questions, especially in an age of fluid geopolitics. The following two quotes, 70 years apart or so, show how principles can be perceived by different practitioners of international affairs.

- "The Principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the policies of any single nation or people." (UN's former secretary-general Dag Hammarskjöld's statement during the Suez Crisis, 31 October 1956 – Official Records of the Security Council, 751st meeting.)
- "What happens is that people often try to make these big issues of principle. Usually, you invoke a principle when you want to persuade or pressure somebody to do something." (S. Jaishankar, India's foreign minister, Financial Times, 16 March 2025.)

In the multidimensional world of diplomacy, the Euclidian definition of the straight line as the shortest way between two points does not always hold true. This line, as traced by the purposes and principles of the Charter, might at times cross other lines and encounter problems associated with political judgment, especially for those in charge of 'saving a country' or for those who are pursuing a 'looser form of relationship' on the global stage.

For these actors, forums of discussion may remain the tool of first resort diplomacy. The Quad, for instance — of which India is a member alongside with the U.S., Japan, and Australia — is a "club" with no "legal contractual obligation" that member countries are nurturing because you can have the comfort, the flexibility and the commonalities without legal contractual obligations.

But as the space for global cooperation is growing every day on issues crucial to humanity's existence, so are principles in all areas: climate change and biodiversity, long-term peace and security, including responsible conduct in outer space, the cyber domain, artificial intelligence, and commitment to human rights.

The Pact for the Future, the new global roadmap endorsed by the last UN General Assembly in September 2024, is one example of general declaration making abundant use of principles. It clearly advocates respect for the classic principles and purposes of the Charter: political independence, self-determination, humanity, neutrality, and impartiality in the field of humanitarian access and assistance.

It also anchors newer principles connected to the environment and development, such as the principle of common but differentiated responsibilities, or the principles of equity and solidarity in relation to the responsible and ethical use of sciences, technology and innovation. Others are specifically engineered to respond to complex global shocks or to accommodate digital and emerging technologies (principles of inclusive participation, environmental sustainability, equitable distribution of benefits, accessibility and interoperability…).

Albeit more discreetly, important principles are also being agreed upon in smaller arrangements between like-minded states. The 2020 Artemis Accords signed by NASA and seven other space agencies are a good example of a type of cooperation that was until now the domain of the Outer Space Treaty of 1967.

Drafted in an era dominated by state actors, the Treaty which regroups 115 countries enshrines the idea of outer space as the "province of all [hu]mankind," forbids national appropriation of space, and secures freedom of exploration for all. Its guiding principle is that space activities should benefit everyone, not just a few states.

The 2020 Accords comprise three sets of principles:

- norms reflecting existing international norms (exclusively peace purposes, benefit of humankind, transparency and sharing of scientific information, assistance/rescue in outer space, registration and preventing and mitigating space debris);
- norms that are claimed to refine and operationalize existing rules (interoperability, utilization of space resources, safety zones and deconfliction of space activities);
- novel principles: preserving outer space heritage.

The principles discussed within the Artemis Accords might look like upsetting the edifice of international law relating to Outer Space. They might appear as a political statement turning away from multilateralism and potentially leading to the fragmentation of international space law.

But it was a conscious choice. Rather than trying to negotiate a successor to the Outer Space Treaty, it was thought it would be better to begin with broad and non-legally binding principles which can serve as the basis for discussions on the development of international practices and rules applicable to the extraction and utilization of space resources and as catalyst for further legal development in the area.

An essential element in achieving sustainable adherence to these mutually arranged principles is to identify common interests as a basis for joint action and agreed standards. A pragmatic approach where each problem is addressed through a tailored combination of partners forming ad hoc coalitions is most useful. A strategy of diplomatic 'variable geometry', as the one advocated by former United States Secretary of State Antony Blinken in 2023,[21] would certainly help unite states with a shared interest without necessarily requiring agreement on other core issues.

Conclusion and Recommendations

Partial solutions between like-minded states may have limitations, especially if important states refuse to join. But this is not different from the resistance to some universally agreed rules on human rights or on the interdiction to the use of force in the absence of effective enforcement in international law.

Overall, it is easier to work with fundamental principles and standards than it is to come to terms with, and muddle through, the operational rules of international law.

Applied in a subtle way, general principles of a legal quality can influence - in an organic sense, and not as a construction of ideal patterns - the development of international behavioral standards and their effective implementation beyond the like-minded approach.

If the objective is to support a 'less mechanical', 'less fervent' application of international law, instead of just providing palliative life support to legal rules whose usefulness, legitimacy or even existence is repeatedly questioned, a principle-driven international order for all nations offers the best path forward.

It will allow policymakers to deal effectively with unforeseen and unforeseeable problems by adding useful interpretation to politically charged situations. For that approach to succeed, policymakers need to be as faithful to the interpretation of fundamental principles and purposes of the UN Charter as possible in view of international law and the decisions already made.

It might be worthwhile, in that respect, to seek the advice of the UN Secretary General, whose obtention will be regarded as the representative opinion of the organization.

Should the need arise, advisory committees of the Secretary-General, as those on the United Nations Emergency Force and Congo composed of representatives of governments most directly concerned with the matter at hand, could also provide the guidance required to deal with difficult situations or most egregious violations of international law as part of their competences.

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