ESIL Reflections
Editorial Board: Federico Casolari, Patrycja Grzebyk, Ellen Hey, Guy Sinclair and Ramses Wessel (editor-in-chief)

28 July 2020 Volume 9, Issue 3

International Law in an Age of Post-Shame

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Unless the contempt it harbours for most political conventions becomes the 'new normal', the Trump administration is likely to be remembered for many novelties in public discourse in years to come. One of those novelties is the new vocabulary that President Trump and his supporters have made popular. Phrases such as 'fake news' or 'alternative facts' may have been uttered in the past, but they have only become part of common political parlance with the advent of the Trump administration. What those phrases reflect is commonly referred to as 'post-truth' - the Oxford English Dictionary's word of the year in 2016. A number of book-length studies have been dedicated to the condition of 'post-truth' and its broader political and epistemological ramifications since Trump won the presidency in 2016. The condition decried by those studies can broadly be described as a political culture in which the truthfulness of an assertion does not necessarily act as a condition of its validity and political leaders can get away with outright lies or misrepresentations relatively easily. The Washington Post's Fact Checker database, which calculates and documents the false or misleading claims made by President Trump since he took office, gives a daunting picture of the 'post-truth' condition. Even more alarming is the fact that the phenomenon of 'post-truth' is of broader relevance, since similar situations have been seen elsewhere in the world, whether in the context of the Brexit campaign in the UK, in Putin's Russia or in Bolsonaro's Brazil.

While the concept of 'post-truth' attempts to capture a deeply unsettling problem, its epistemological premises are difficult to align with our postmodern age, postulating as they do the existence of what Stanley Fish calls a 'pre-post-truth' era which, as Fish reminds us, never existed.[1] Applied to the

political realm, 'post-truth' also oversimplifies the complex relationship between politics and truth, implying that during the 'pre-post-truth' era, politicians were truthful. As Hannah Arendt pointed out, 'No one has ever doubted that truth and politics are on rather bad terms with each other, and no one . . . has ever counted truthfulness among the political virtues.'[2] These are important matters to take up, but the purpose of this reflection piece is different. What I want to argue in this piece is that those who decry the post-truth condition and international lawyers who are rightly alarmed by the behaviour of the Trump administration or Putin's Russia toward international law miss the mark when they diagnose the non-conformity of an act or statement to established standards like truth or international law as the root problem. My claim is that, however numerous they may be, instances of such non-conformity could not fully capture what is happening and that what needs to be taken notice of is rather that 'the old powers of shame have been abolished.'[3] Following Alastair Campbell,[4] I propose to call our current age the age of 'post-shame' and invite international lawyers to seriously reflect on what operating in an age of post-shame means for international law.

There Is More to Rule-Governed Practices than Rules

No statistical data about the breaches of international law allegedly committed by the Trump administration seems to exist. It is, however, a safe bet to assume that there is nothing unique in terms of the number or even the magnitude of breaches of international law the Trump administration may have been guilty of. But this fact notwithstanding, it is hard to resist the feeling that there is something unique happening before our eyes. How to account for such a feeling?

Part of the explanation may lie in our professional disposition as international lawyers to see everything that adversely affects international cooperation as something qualitatively similar to outright breaches of international law. This may explain why we feel alarmed by the US withdrawal from UNESCO, the Universal Postal Union, the Paris Climate Accord or the Joint Comprehensive Plan of Action (the so-called 'Iran nuclear deal') even though most international lawyers would agree that technically speaking, these examples involved no breaches of international law. But there seems to be something more at play.

To see what that 'something more' is we have to appreciate how rule-governed practices such as the game of truth-telling and the game of playing by the rules of international law are structured. One thing that is easy to overlook but is crucial to a proper understanding of such games is that they are about much more than simply conforming to some pre-existing truth or standards of conduct. In other words,

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[1] Stanley Fish, *The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump* (One Signal Publishers 2019), pp. 190-191.

[2] Hannah Arendt, *Between Past and Future* (Penguin Books 2006), p. 223.

[3] J.M. Coetzee, *Diary of a Bad Year* (Penguin Books 2008), p. 39.

[4] Alastair Campbell, 'From Trump to Boris Johnson, We're Moving from Post-Truth to Post-Shame', The Guardian, 15 July 2019.

there is more to a rule-governed practice than its rules: the 'grammar' of a rule-governed practice, which tells us what kind of object that practice is, cannot be captured by its rules alone.

In a wonderfully insightful essay inspired by Wittgenstein's philosophy, Hubert Schwyzer invites us to imagine a tribe in which a ritual is performed once a year by two priests of the community consisting in moving the chess pieces around on a chessboard in accordance with the rules of the game of chess. If we find out that the objective of the priests is not to win as is the case in the game of chess, but to determine the will of the gods and that the notion of a recreational and competitive activity involving winning and losing makes no sense to the members of the tribe in that context, could we still say that the priests are playing chess? For Schwyzer the response is no, because:

> [W]hat makes [playing chess] the kind of activity it is is not . . . a matter of its rules. Rather what makes chess-playing the kind of thing it is is a matter of what sorts of things it makes sense to say with respect to chess, of what sorts of things are, in a logical sense, relevant or appropriate to say with regard to chess. . . . Thus, it belongs to the 'grammar' of chess that we can say such things as 'Let's play chess,' 'That was a wise (a silly) move,' we can ask who won or is winning, say 'Bad luck' to the one and 'Well played' to the other after the game is over; these ways of speaking are intrinsically relevant in the context of chess, not in the context of, say, Mass. If these locutions were as inappropriate with respect to chess as they are with respect to Mass, chess would play a quite different role in our lives, we would regard it as, it would be, something essentially different from the sort of thing it is, a competitive game.[5]

What this means is that the difference between the rite of chess and the game of chess cannot be explained by reference to the rules according to which each of these practices proceeds. This is so because those rules 'can govern what happens *only on the chessboard*,' while 'the difference [between the rite of chess and the game of chess] lies *away* from the board altogether', in 'what happens, for example, *before and after* the activity at the chessboard, [. . .] [in] the different ways of speaking and behaving which are appropriate with respect to each case.'[6] As Schwyzer points out, something as important for the nature of the game of chess as the proposition that chess is a competitive game, not a religious ritual is not a rule of the game of chess, '[n]or is there a rule of chess stating that one must *treat* chess as a game.'[7]

The grammars of the game of truth-telling and the game of law are no different: they are not limited to the rules of those practices. For instance, the game of truth-telling implies that its players normally feel that they have to be able to meet the burden of accuracy if challenged or that they have to be consistent. In the game of playing by legal rules, players should be able to justify their conduct by reference to those rules or offer plausible justifications when they seem to deviate from them. Inability to comply with such protocols is seen as an unenviable position to be in because one's reputation can be adversely affected by breaches of socially important practices, which normally trigger the feeling of shame or some sort of emotional discomfort. These protocols are internalized by the members of the community and act as a powerful social regulation mechanism.

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[5] Hubert Schwyzer, 'Rules and Practices', 78 *Philosophical Review* (1969), pp. 454-455.
[6] *Ibid*, p. 464 (emphasis in original).
[7] *Ibid*., p. 463 (emphasis in original).

A Rising Culture of Post-Shame and International Law

Several important recent episodes from international life seem to suggest that shame is increasingly losing ground in international affairs. Who could have imagined a few years ago that a head of state may - even in the context of an interstate feud - publicly assert that his spouse is better looking than the spouse of another head of state?[8] If you think that this example is too far afield from normal preoccupations of international law, consider Putin's denial of the presence of Russian soldiers in Crimea, in particular, his assertion that the soldiers on the ground who were wearing uniforms that strongly resembled the Russian military uniforms were 'local self-defence units' who may have bought those uniforms in a local store.[9] President Trump's public statement that taking strong measures against in response to the murder of Jamal Khashoggi would be acting 'foolishly', bearing in mind a projected $450 billion investment that the US had heavily negotiated with Saudi Arabia, also deserves special mention in this context.[10] What is common to these examples is that they exhibit a remarkable lack of care about decency, plausibility or hiding base motives. But to appreciate why such care should even matter we need to take a detour.

Most international lawyers may not have heard about the theoretical significance of the hypocritical homage paid to the rules of international law, but virtually all of them are familiar with the following passage of the celebrated *Nicaragua* judgment in which the International Court of Justice (ICJ) came very close to endorsing a similar analytical framework. As the Court stated in that judgment:

> If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[11]

There is much to meditate on in this short passage, but one need not endorse Kelsen's claim that a minimum degree of effectiveness is a condition of validity of a legal norm to realize that the problem of 'whether or not the State's conduct is in fact justifiable' cannot be set aside as cavalierly as the ICJ seems to suggest. If all that matters is a *pro forma* reference to international law, Hitler's assertion that Germany acted in self-defence when invading Poland should be seen as strengthening international law. Similarly, Putin's denial that Russian soldiers were present in Crimea can be interpreted as an indirect acknowledgement that such a presence would be problematic in terms of international law. But such empty rhetoric can hardly do any good to international law unless it is complemented by the requirement that 'justifications must have plausibility.'[12] It is because 'plausible justifications are often unavailable or limited'[13] that such discursive protocols matter for the practical

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[8] Aurelien Breeden and Megan Specia, 'Dispute Over Amazon Gets Personal for Bolsonaro and Macron', New York Times, 26 August 2019.
[9] 'Vladimir Putin Answered Journalists' Questions on the Situation in Ukraine', 4 March 2014, available at: http://en.kremlin.ru/events/president/news/20366
[10] Statement of President Donald J. Trump on Standing with Saudi Arabia, 20 November 2018.
[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), p. 98, para 186.
[12] Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, 2nd edition 1979), p. 45.
[13] *Ibid.*

significance of international law. Instrumental reasons are likely to play an important role in guiding state behaviour in this regard. For instance, implausible justifications will have a hard time gaining 'meaningful political traction'.[14] But equally important for the plausible justification requirement is the existence of a culture in which utterly implausible justifications trigger moral discomfort.

The consistency requirement in the game of truth-telling can be analyzed in similar terms. Consistency is not a natural value, but a consequence of publicity in specific social settings. Jon Elster points out that '[o]nce a speaker has adopted an impartial argument because it corresponds to his interest or prejudice, he will be seen as opportunistic if he deviates from it when it ceases to serve his needs.'[15] But consistency is an effective constraint only in a culture where being seen as 'opportunistic' is something that a speaker would avoid as shameful. In the same vein, hiding base motives and trying to find 'impartial equivalent for self-interests' could only become moral imperatives in a setting where publicly displaying base motives and self-interests is seen as something wrong.[16]

Because of the reciprocity inherent in its operation, shame has been described as an emotion that 'serves[s] to bind people together in a community of feeling.'[17] As Williams points out, '[a]n agent will be motivated by prospective shame in the face of people who would be angered by conduct that, in turn, they would avoid for those same reasons.'[18] What we may be witnessing in international affairs these days is a gradual erosion of such a shame culture in international society. Not only do we see an alarming number of episodes showing an utter disregard for any risk of 'social degradation', but no such degradation actually occurs when it is called for. As the number of such episodes increases, they tend to be seen as part of the 'new normal', at least as less abnormal than they used to be.

This 'new normal' is as alarming as breaches of international law in themselves. What international law is and how one must treat it as a social practice – whether one must celebrate it, whether one must feel ashamed when breaching it with no plausible justification - is not a matter of the rules of international law but a matter of a broader socio-cultural context in which international law operates. Using Wittgenstein's memorable thoughts about how one can understand and translate a language of a tribe, one can say that what international law is and how it must be treated is a function of the role it plays 'in the whole life' of the community it governs, 'the occasions on which it is used, the expressions of emotion by which it is generally accompanied, the idea which it generally awakens . .

[14] Ryan Goodman, 'Humanitarian Intervention and Pretexts for War', 100 *American Journal of International Law* (2006), pp. 128-129.
[15] Jon Elster, 'Deliberation and Constitution Making', in Jon Elster (ed.), *Deliberative Democracy* (Cambridge University Press 1998), p. 104.
[16] Jon Elster, 'Strategic Uses of Argument' in Kenneth Arrow and others (eds.), *Barriers to Conflict Resolution* (W. W. Norton 1995), p. 246.
[17] Bernard Williams, *Shame and Necessity* (University of California Press 1993), p. 80. See also, Carlo Ginzburg, 'The Bond of Shame', 120 *New Left Review* (2019), p. 43 (referring to 'a shame-based community'); Peter N. Stearns, *Shame: A Brief History* (University of Illinois Press 2017), p. 1 ('Shame is . . . one of the "self-conscious" emotions, along with pride, humiliation, embarrassment, and guilt, that forms or may form a significant aspect of individual emotional life, but that depends on group standards and – to some extent at least – group enforcement.').
[18] Bernard Williams, *Shame and Necessity* (University of California Press 1993), p. 83.

. etc.'[19] In this understanding, shame is an integral part of the grammar of international law. The fact that 'the Trump administration did not even bother to provide an international law justification for the attacks'[20] launched against a Syrian army air base on 6 April 2017, the fact that 'the president of the United States did not even think to consult international law' when recognizing Israeli sovereignty over the Golan Heights on 25 March 2019[21] or the fact that administration officials attempted to justify that recognition by reference to considerations that are not recognizably legal[22] are not less concerning than those breaches because they do not square with the grammar of international law. Like in the chess game 'played' by the tribe described in Schwyzer's essay, a fundamental alteration of this kind in the grammar of international law can change 'what kind of object' international law is.

But is there anything new under the sun? Isn't the history of international law replete with examples of states acting inconsistently with their stated positions, making up facts or stretching law beyond credibility? If this is so, international law may never have had its 'pre-post-shame' era. A cynical account of international law would welcome such a diagnosis, but I submit that this diagnosis is not sufficiently attentive to the social dynamics at play. Consider the US-led unlawful intervention in Iraq in 2003. There is little doubt that the Bush administration knowingly lied about Iraq's alleged development of weapons of mass destruction and links with terrorist organizations. But it is also a fact that the Bush administration seriously attempted to persuade the American public and the international community of the veracity of those allegations. The difference between this attitude and Putin's denial of the Russian involvement in Crimea is well captured by Chaim Perelman's famous analogy between bad arguments and counterfeit money. In an effort to account for why people sometimes pretend to argue, Perelman observed:

> The process of argumentation needs to be of interest and value in many cases if some people decide to pretend to argue. It is because a currency is in circulation and has a value that we take the trouble of making counterfeit money.[23]

Counterfeit money is thus premised on the recognition of the value of the official currency, which explains that efforts normally would be made to make it look as close as possible to that currency.

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[19] Ludwig Wittgenstein, *The Blue and Brown Books: Preliminary Studies for the 'Philosophical Investigation'* (Wiley-Blackwell 1991), para. 103.

[20] Stefan Talmon, 'The United States under President Trump: Gravedigger of International Law', 18 *Chinese Journal of International Law* (2019), p. 659. For a broader diagnosis along the same lines, see P.M. Dupuy, 'Conclusions' in Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (eds.), *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (OUP 2017), p. 508 ('states are no longer really looking to either the vocabulary or the norms of current international law to justify their actions').

[21] Monica Hakimi, 'Why Should We Care About International Law?' 118 *Michigan Law Review* 1283 (2020), p. 1298.

[22] Tweet by John Bolton, @AmbJohnBolton, 22 March 2019 ('To allow Golan Heights to be controlled by the likes of the Syrian or Iranian regimes would turn a blind eye to the atrocities of Assad and the destabilizing presence of Iran in the region. Strengthening Israel's security enhances our ability to fight common threats together.').

[23] Chaim Perelman, 'Les cadres sociaux de l'argumentation' (Discussion) 26 *Cahier Internationaux de Sociologie* (1959) pp. 130-131.

What we are witnessing in the examples discussed above is that - to stay with the counterfeit money v. official currency analogy - there is no sign that any value is recognized to the official currency. It is not only that Putin's denial of the Russian involvement in Crimea had little persuasive force (like a blank sheet of paper presented as official currency); Putin did not even appear to care in the least about whether his denial was in any way persuasive.

What lessons can be drawn from international law's encounter with post-shame? International law is unlikely to be seriously affected if the phenomenon of post-shame remains isolated. But when what a community normally considers to be a shameless act is rarely met with noticing, still less social degradation, such a lack of reaction is susceptible to being taken as a community license for 'anything goes' and can, in the long run, redesign what is visible or worth noticing in that community. Keeping social degradation alive would at least send the signal that the shameless are not in a position to change a community practice no matter how shamelessly they act. When, speaking at the Munich Security Conference in 2015, Russian Foreign Affairs Minister Sergei Lavrov expressed support for the principles of territorial integrity and non-intervention and asserted that Crimea willingly joined Russia in conformity with the United Nations Charter and that, unlike the German reunification in 1989, the Crimean episode involved a referendum, his audience is said to have responded with derisive laughter. Shaming the shameless may be hard to achieve, but reacting to shameless acts in such a way can save a community at least in the eyes of its members united by the bond of shame.

So the lesson may be this one: 'take care of shame and international law will take care of itself.'[24]

Cite as: Fuad Zarbiyev, 'International Law in an Age of Post-Shame', ESIL Reflections 9:3 (2020).

[24] This is, of course, a paraphrase of the famous slogan of Richard Rorty. Eduardo Mendieta (ed.), *Take Care of Freedom and Truth Will Take Care of Itself. Interviews with Richard Rorty* (Stanford University Press 2006), pp. 57-58.