Verfassungsblog
ON MATTERS CONSTITUTIONAL

In the Graveyard of International Law

Ostriches, Owls, and Octopuses

Itamar Mann

16.05.2025 doi: 10.59704/d9bfacdddf10352f

Last October, Palestinian human rights lawyer Raji Sourani told The Guardian: Gaza is becoming the graveyard of international law. The diagnosis has only sharpened since Trump's return, across multiple areas of international law. Refugees, climate, health, and trade are just the first collapsing regimes that come to mind. In this reflection, I try to grapple with a question all of us are grappling with: What does this destruction of international norms mean for international lawyers?

Broadly, the profession has split in two. On one side are the ostriches, who have chosen, sometimes consciously, to keep their heads deep in the international legal sand. These lawyers – sometimes I'm among them – are all about doing what's possible with the rules as they have come to be known in the long 20th century. They seem to hope that the liberal rule-based order can still be salvaged. They keep writing, litigating, collecting evidence. They imagine a tribunal awaits, and that with patience, technical legal knowledge will get us there. Ultimately, there will be a ruling, a remedy, a moment when history turns.

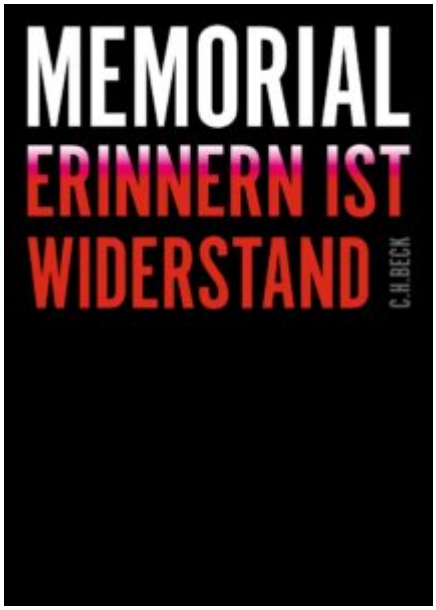
The underlying instinct is continuity – the cool determination to pursue business as usual, even amid catastrophe. The quintessential ostrich response is the appeal: "We are experts. This is the Law. You must follow it!" There are deep normative reasons why ostriches may be attractive. Primarily, they represent a refusal to accept that breaking the rules is also making new rules tailored for the interests of the stronger party. But an ostrich life may amount to a commitment to being on the "right side" of a future that will never arrive. In the meantime, there is always another conference to attend.

On the other side, there are the owls (in this example, a rarer but present species). This camp is characterized by seasoned wisdom and a touch of historical irony. They see clearly that the institutions of the twentieth century are in fact already done with, but they wait for dusk to take flight. They know that it will be necessary to reinvent international law, and that the institutions we have are merely ruins of a forgone world. The US is no longer a global hegemon. China has so far not replaced it. Global markets are volatile, and the AI genie has only been released from the bottle. In these circumstances, the owl adopts the wait and see mode.

International legal owls tend to think more speculatively. Normally, they do not have answers to the problems of the present. If they do, they might reach to the normative force of technology, forgotten indigenous custom, the rights of nature, or the agency of objects. These forces are even less enforceable than standard international law.

Just like being an ostrich, there are also normative reasons to foster an owl outlook. An important one, but not the only one, is that owls do no harm. I sometimes find myself in this camp, too. But since this strategy risks becoming pure speculation, it may ultimately be grounded in aesthetics. It is unclear how this line of thinking can speak to the immediate reality – whether it be ever more severe forest fires, or the deliberate starvation of the people of Gaza. By the time we imagine an alternative, or even by the time we finish dinner, there will be nothing left to save.

++++++++++*Advertisement*++++++++



Im Oktober 2022 erhält die Menschenrechtsorganisation Memorial den Friedensnobelpreis. Noch am selben Tag wird die Beschlagnahmung des Büros in Moskau angeordnet. Nach der Razzia prangt überall auf Materialien und Möbeln der Buchstabe «Z»: ein Mahnmal. Der Welt ist das Netzwerk Memorial durch seine beispiellose Aufklärungsarbeit bekannt, Moskau jedoch sieht in ihm vor allem eins: Einen Störfaktor, den es auszuschalten gilt. Es ist nicht der erste Angriff auf das Gedächtnis der Nation, den die Organisation erlebt und abwehrt. Hier präsentiert sie die Chronik ihrer Kämpfe.

++++++++++++++++++++++++++

An Indictment of the Liberal World Order

Omar El Akkad's "One Day, Everyone Will Have Always Been Against This" (2025) captures this dilemma viscerally, even if not from a lawyer's point of view. El Akkad describes watching a genocide unfold on his phone, from his home in Portland, while his children play nearby.

It's deeply relatable: The author juggles parenting or feeds his dog while watching children lose their lives, and dogs feed on corpses. As the book progresses it becomes clear that his worldview – built on the 1990s promise of "the West" – shatters in real time. I suspect this shattering is familiar to many international lawyers; for those of my own generation, it adds a biographic layer to the current collapse of the discipline. Respectfully to ostriches and owls, many of us feel comfortable in neither position.

El Akkad grew up in Egypt, Qatar, and Canada. Like many immigrants, he was raised on the cultural promise of liberalism. The West offered more than comfort; it offered meaning: freedom, equality, dignity. But as Biden persisted in arming Israel, El Akkad reached a stark realisation: the promise of a liberal world-based order was a lie from the get-go. He wants to turn his back on American liberalism completely. But it isn't clear where, if anywhere, he can go.

The title of the book may suggest redemption – a belief that the arc of history bends towards justice after all. But El Akkad's outlook is grimmer. "One day, everyone will have always been against this": not because the truth will have been revealed, and solidarity will have followed. But because, by that future, "being against this" will be free for the taking, no price attached. The destruction of Palestinian life in Gaza will have become complete. Analogically, we may find, with Andreas Malm, that "it's too late" for the climate, too.

El Akkad's is a profound indictment – not only of U.S. foreign policy, but of the liberal legal consciousness. When we translate it to the everyday of international lawyers, we may find that it is equally directed at ostriches and owls. Both groups somehow claim the mantle of international justice. But both are blind to our own complicity. Often, we are animated more by our self-images and careers, such as they are, than by the real-world consequences of our work.

The Second Collapse

In early 2024, when South Africa brought its genocide case before the ICJ, the whole world was watching. Representatives of a post-apartheid state stood before judges and said: look, this is what Israel is doing with your weapons and your money. Stop it, if the liberal rule-based order means anything at all. It was a historic moment, and it failed to deliver the needed remedy.

More than a year later, starvation in Gaza is ever more severe. This isn't a "liberal genocide" marked by denial. It is an open commitment to annihilation. This

is the targeting by drone strike of a vessel carrying humanitarian aid, faraway from the battle, in international waters, amid no real international outcry. All masks are off. Just last week, the Israeli Cabinet approved "conquering" Gaza and measures to implement its plans for the "voluntary departure" of Gaza's population. Many are now turning their heads to Riad for winds of change. Trump has now left the Middle East, and according to Israel's intense air force campaign currently underway, the plan of ethnic cleansing may have entered a new operational stage.

To be sure, this is not the first time international law is collapsing. The League of Nations (1920) and the Kellogg-Briand Pact (1928) marked the first wave of modern internationalism. But with the outbreak of World War II, they were quickly swept aside by fascism, war, and genocide. As we all know, the second rise came after 1945: the UN Charter, the Genocide Convention – institutions forged from the ashes of that time. Alongside them, with the help of Western superpowers, Israel was established. Today, Israel is an agent of annihilation – of Palestinians and of the rules themselves. But it is hardly alone in dismantling international norms. The 1951 Refugee Convention, another pillar of the post-WWII order, is being eviscerated by many a "Western" government. We are clearly witnessing a second unravelling.

++++++++++*Advertisement*++++++++

CENTER FOR DIVERSITY IN LAW

DIV LAW

MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Das von der ***Stiftung Mercator*** *geförderte, am* ***Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*** *angesiedelte* ***Center for Diversity in Law*** *unter der Leitung von Max-Planck-Fellow und Lehrstuhlinhaber an der EBS Universität* ***Prof. Dr. Emanuel V. Towfigh*** *sucht zum nächstmöglichen Zeitpunkt*

eine/n Doktoranden:in (d/w/m)

Das Center dient der empirischen, dogmatischen und rechtsvergleichenden Erforschung von Diversität im Rechtssystem und der Vernetzung von Wissenschaft, Praxis und Zivilgesellschaft.

++++++++++++++++++++++++++++

Advocacy in an Environment of Yet-Unknown Rules

As the owl knows, a third emergence of international law may follow, but no one knows as of yet what it will look like. How much more bloodshed will be required in Ukraine, Sudan, Congo? With automated decision-making increasingly central, will we still call it "law"?

We can no longer pretend the ground is stable. But we cannot fully turn our backs away either. Gathering evidence, making arguments – these remain our bread-and-butter activities. They remain necessary, even if we don't yet know what legal structure, if any, will one day consider them. At the same time, we must absolutely let go of the illusion that legal work today rests on solid footing. It doesn't. We need new tools and new frameworks. The insight is based on a basic realism, not on retreat. If there is a way to confront this moment, and its character of permanent polycrisis, it is in finding a strategic combination between an application of the existing rules and a fundamental reinvention. What animal may fit to illustrate this third orientation? Perhaps this is the octopus: serious but playful, a radically different thinker with decentralised intelligence and a capacity to act as a whole.

One example of such serious play was, indeed, South Africa's genocide case. Alongside its failure to deliver remedies, it helped build a movement and sound an alarm. Octopus thinking appears elsewhere, too. In climate litigation, the push for intergenerational rights – repurposing constitutional and human rights law – has opened new doors, starting from *Urgenda* and the German Federal Constitutional Court's climate ruling. Law and Political Economy (LPE) scholars are reimagining trade and investment frameworks to confront global inequality and food

insecurity. These efforts do not abandon law, nor do they accept it as it is – they mutate it under pressure.

Remarkably, octopus thinking is rooted in an attempt to performatively deploy existing rules, while also reinventing the system. The owl's interests in the rights of nature and in the agency of objects may yield new ways of thinking about the climate, or about how we live with our technologies; but only if they meet the ostrich's technical acumen, based on its close look at many grains of sand.

The discipline's future depends on integrating the instinct for continuity with the energy of rupture. We cannot choose one over the other.

*

Editor's Pick

by EVA MARIA BREDLER



By the taxonomy above, I'm an owl: easily having its head turned by new ideas, only to despair over the legal status quo. That's exactly how I felt reading Jane Bennett's "Vibrant Matter: A Political Ecology of Things." Drawing on Deleuze, Guattari, Spinoza, Latour, and others, Bennett starts from the idea that things are alive and have agency – what she calls "thing-power." Her inquiry: what would politics look like if we truly accepted that humans never act alone, but always as part of a "human-non-human working group"? Thanks to Bennett, the mould in my flat feels more like part of an experimental house-share. Just don't ask me what that means for my landlord.

*

The Week on Verfassungsblog

summarised by EVA MARIA BREDLER

In politics, the species of the fish is not a rare sight: swimming with the political current, endowed with remarkably short memories. Others may recall: Alexander Dobrindt, now Federal Minister of the Interior and for Homeland, once championed the introduction of a car toll during his tenure as Transport Minister – against all legal warnings. The outcome is well known: the European Court of Justice struck it down and ordered Germany to pay millions in damages.

Same fish, different water: on 7 May, Dobrindt instructed the federal police to intensify **border controls** and turn away asylum seekers. In doing so, he effectively suspended the Dublin Regulation – a move CONSTANTIN HRUSCHKA (GER) considers a "clear violation of the law". And the human costs may well exceed any monetary compensation.

Compensation is important, undoubtedly, but in asylum proceedings notoriously hard to obtain. Now the coalition agreement even promises to shift the **fact-finding principle** (*Untersuchungsgrundsatz*) to a party-led model (*Beibringungsgrundsatz*). As CAROLIN DÖRR (GER) argues, this is practically unfeasible – particularly because asylum seekers rarely have access to the relevant evidence.

This was also at issue in **Hamoudi v Frontex**, now pending before the ECJ: who bears the burden of proof – the high-tech EU agency, or the asylum seeker adrift at sea? AGOSTINA PIRRELLO (ENG) explains what Advocate General Norkus' opinion got right and where it missed the mark.

Other opinions kept us busy this week as well – namely those of Advocate General de la Tour in the joined cases of *Alace* and *Canpelli*, on whether and how EU Member States may define which countries qualify as "**safe countries of origin or third countries**." According to de la Tour, "predominantly safe" is safe enough, even if certain groups remain at risk. Last week, MATILDE ROCCA (ENG) focused on the human rights implications. This week, ADEODATA KANYAMI-HANDA (ENG) takes a closer look at designations as

"partially safe" and the Directive's intended safeguards, structure, and language.

Perhaps surprisingly, Trump's policies impact legal proceedings in German asylum cases. In particular, the defunding of development cooperation has radically reshaped the information landscape on relevant countries of origin. LEA HANSEN and SOPHIE ROCHE (GER) demonstrate how central **USAID** had been for reliable data – and what the end of its operations now means for asylum judges.

Citizenship is not only hard to gain but increasingly easy to lose. More and more states now foresee **revoking citizenship** when nationals are convicted of terrorist offences. The Amsterdam District Court has now ruled such laws discriminatory on grounds of ethnic origin. SANTIAGO DRESEN (ENG) explains why the court may have conflated legal categories of discrimination.

As the recently leaked report by the German domestic intelligence service confirms, the far-right AfD appears to be dreaming of more far-reaching revocations of citizenship, consistent with its ethnically defined concept of the people. Much debate has followed about what the official classification of the AfD as a "confirmed right-wing extremist endeavour" means for **civil servants** who also happen to be party members. The legal standard is, in principle, clear: mere passive membership in an anti-constitutional party is not enough to breach the duty of political loyalty. But the recent ruling of the Federal Administrative Court regarding the far-right group "Der Dritte Weg" may be an early sign of change, as SOFIANE BENAMOR (GER) observes.

The AfD reclassification raises many further questions. One of them: should **public broadcasters** still grant the AfD airtime? JOHANNES MAURER's answer (GER): probably yes, but the broadcasters do have some leeway.

The CDU–SPD coalition agreement remains far from fully unpacked. This week, we looked at the **National Security Council** the government plans to introduce.
HEIKO MEIERTÖNS (GER) situates the institution within the constitutional structure of the German state.

The coalition agreement remains silent on the long-overdue reform of the **law of descent** (*Abstammungsrecht*), especially regarding the rights of two women to both be recognised as legal mothers. TERESA FACHINGER (GER) uses the occasion to summarise the constitutional requirements: such reform is not a matter of political convenience, but of constitutional obligation.

The agreement also refers to "combating disinformation." Some read this as a covert call for a "**ban on lying**". SUSANNE BECK and MAXIMILIAN NUSSBAUM (GER) clarify what the relevant passage really says – and what role criminal law may or may not play.

Criminal law, however, played no role in the infamous case of racist chants by guests at the Pony Bar on the German island of **Sylt** last year. The public prosecutor dropped the investigation into incitement to hatred for lack of sufficient evidence – not a good idea, according to VINCENT ECKE (GER).

"Just a joke," the bar patrons may have said. A problematic sense of humour – one that, according to ROMAN ZINIGRAD (ENG), the European Court of Human Rights in ***Yevstifeyev and Others v Russia*** tragically fails to recognise as hate speech, thus contributing to its normalisation.

This week, we launched a **symposium on the institutionalisation of citizens' assemblies in Germany** (GER), gathering interdisciplinary and comparative legal perspectives on form, function, and constitutional footing. FELIX PETERSEN provides an introduction to the current state of the debate. MARC ZECCOLA explores legitimacy, transparency, informational balance, quality, and acceptance functions. DANIELA WINKLER and KORNELIUS LÖFFLER compare these assemblies to existing institutions and explore their hybrid position between society and the state. KLARA WESTERLAGE argues that granting quasi-legislative power to such assemblies would be unconstitutional. PHILIP BERGER examines whether assemblies with decision-making power can be reconciled with constitutional theory. FRANK BRETTSCHNEIDER investigates successful communi-

cation structures before, during, and after citizens' assemblies. POLA BRÜNGER addresses the critical question of inclusion: how to involve people without German citizenship. ANDRÉ BÄCHTIGER, SASKIA GOLDBERG, and MARINA LINDELL present two interpretations of a comparative study on public attitudes towards citizens' assemblies in Germany, the US, Ireland, and Finland. CHRISTIAN ERNST and ENNIO FRIEDEMANN show that the principle of municipal self-government could offer a broader scope for assemblies. ARNE PAUTSCH focuses on the permanent assembly in East Belgium, and PETER BUßJÄGER on the national climate assembly in Austria. ANDREAS GLASER analyses the Swiss situation.

We also continued our symposium on "**Ongoing Controversies over Methods in EU Law – Towards a Reflexive Turn**" (ENG). MARCO GOLDONI shows that the study of European Union Law from the perspective of Law and Political Economy can offer valuable insights. SIGNE REHLING LARSEN revisits Tocqueville's "Democracy in America" and makes the case for studying the European Union based on comparative federalism. MORITZ SCHRAMM shares his personal insights on semi-structured expert interviews. ANTOINE VAUCHEZ explores how democratic legal concepts are being redefined in polarised Europe. Viewing law as local knowledge, AFRODITI MARKETOU draws on the findings of a "classical" comparative study on the application of proportionality as an EU law principle in France, England, and Greece. Finally, FERNANDA G. NICOLA reads judgments of the CJEU as "EU Law Stories".

At times like this, we might wish for more "*love stories*" rather than "*law stories*".

Speaking of: How do political fish get along with international octopuses, actually? Just one story: Otto, the octopus from the Sea Star Aquarium in Coburg, became famous for regularly redecorating his tank – throwing stones at the glass, turning off lights by squirting water at them, and bothering other aquarium residents.

We definitely need more octopuses.

*

Take care and all the best!

Yours,

the Verfassungsblog Team

*If you would like to receive the **weekly editorial** as an e-mail, you can subscribe here.*

ABOUT THE AUTHOR

Itamar Mann

Itamar Mann is an NWO Tulip funds researcher at VU Amsterdam and a visiting professor at the Faculty of Law at Humboldt University, Berlin.Itamar Mann is an NWO Tulip funds researcher at VU Amsterdam and a visiting professor at the Faculty of Law at Humboldt University, Berlin.

SUGGESTED CITATION

Mann, Itamar: In the Graveyard of International Law: Ostriches, Owls, and Octopuses, Verfassungsblog, 16.05.2025, doi: 10.59704/d9bfacdddf10352f.

Licensed under CC BY-SA 4.0.

Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250627-143923-0.