Saggi

David Armitage

Treaties in danger?
Contemporary crises of international order in historical perspective

Abstract

The years between 2016 and 2020 seemed to mark a global retreat from treaties as underpinning international order, not just by the United States under the Trump Administration but across the world, from Brexit Britain to Hong Kong's relations with China. This article assesses the accuracy of that assumption and places it in a wider historical perspective, going back to the sixteenth century, and reviewing earlier arguments as to the durability of treaties and concerns over the fragility of the international order.

Keywords: *Treaties, International Order, Multilateralism Brexit, Kant.*

1.

Treaties are by now the most widespread, the most fundamental, but perhaps also the least understood ligatures of contemporary international order. States have become entangled in tens of thousands of these agreements. Their citizens as well as other bodies – corporations, international organisations, indeed almost any entity, domestic or international – are woven into a worldwide web of treaties. Such contractual agreements are undoubtedly ancient, going back at least to ancient Mesopotamia[1]. However, like the invention of peace, the omnipresence and efflorescence of treaties is a distinctively *modern* phenomenon[2]. A blunt comparison can illustrate this. In 1693, the German philosopher and historian Gottfried Wilhelm Leibniz com-

I presented earlier versions of this argument as an Abendkolloquium at the Wissenschaftskolleg zu Berlin in May 2019 and as the Annual Lecture of the Sir Michael Howard Center for the History of War, King's College London, in December 2019. I am especially grateful to Anne Peters in Berlin, to audiences on both occasions and to the referees for Ricerche di Storia Politica for their comments and suggestions. The argument reflected the historical situation up to early 2020, before the United Kingdom's withdrawal from the European Union and the last presidential election in the United States, and it has not been updated to incorporate developments since then.

[1] See, for example, G. Beckman, *Hittite Diplomatic Texts*, ed. H.A. Hoffner jr, Atlanta, Scholars Press, 1996; T. Bryce, *The «Eternal Treaty» from the Hittite Perspective*, in «British Museum Studies in Ancient Egypt and Sudan», 6 (2006), pp. 1-11; K.R. Veenhoff, *New Mesopotamian Treaties from the Early Second Millennium*, in «Journal for Ancient Near Eastern and Biblical Law», 19 (2013), pp. 23-57.

[2] On the invention of peace, see especially M. Howard, *The Invention of Peace and the Reinvention of War*, London, Profile, 2002; A. Pagden, *Definitions of Peace*, in S. Ghervas, D. Armitage (eds.), *A Cultural History of Peace in the Age of Enlightenment*, London, Bloomsbury, 2020, pp. 19-34.

  ISSN1120-9526

piled what was then one of the earliest examples of the still novel genre of a treaty collection[3]. Leibniz's hefty folio, the *Codex iuris gentium diplomaticus* (1693), contained only 224 diplomatic documents. By the end of 2019, in contrast, the online United Nations Treaty Collection – the lineal descendant of Leibniz's compendium – included over 55,000 items, going back only to 1945: this amounts to more than a 250-fold increase in the number of treaties in a little over three centuries[4]. Yet just how we all became global Gullivers, so thoroughly enmeshed in so many treaties, is a problem surprisingly little studied by historians, political scientists, or scholars of International Relations[5].

Despite this historic proliferation of treaties over the centuries, one of the defining features of our contemporary moment seems to be a *retreat* from treaties across the globe. The most conspicuous evidence of this comes from the United States. Almost from the time it took office in early 2017, the Trump administration started to assault international organisations and the treaties that underpin them. It drafted an executive order for a moratorium on new multilateral treaties: even though this was never issued, the Trumpian assault on existing treaties was persistent[6]. To take only the most prominent examples, up to the end of 2019: the Trump administration terminated the Obama administration's negotiations for the Transpacific Partnership. It withdrew from the Paris Agreement on Climate Change. It equivocated over the mutual defence clause (article 5) of the North Atlantic Treaty on which NATO rests. In October 2018, it threatened to pull out of the Universal Postal Union and repudiate the Universal Postal Treaties on which it rests. It shattered the fragile consensus providing for the nuclear containment of Iran, the 2015 Joint Comprehensive Plan of Action (JCPOA). It dropped its commitment to UNESCO, exited from the Intermediate-Range Nuclear Forces Treaty with Russia, pulled out of the International Arms Trade Treaty and abandoned the World Health Organization. More recently, the US threatened to leave the Open Skies Treaty that allows multilateral surveillance of Russian military operations. The administration's goal to «Make America Great Again» seemed to be premised, on the international stage at least, on «Making America *Isolated* Again». The American Gulliver did not wish to be tied down: in the eyes of the Trump administration, at least, it had nothing to lose but its diplomatic chains.

That US administration's go-it-alone attitude undoubtedly stirred anxiety and antagonism around the world, not least because the US had been the greatest supporter and beneficiary of the so-called «liberal international order» of the past seventy years[7]. Yet the Trump

[3] G.W. Leibniz, *Codex iuris gentium diplomaticus*, Hannover, Samuel Ammonius, 1693.

[4] https://treaties.un.org/ (accessed 9 November 2020).

[5] An important exception is the work of Edward Keene, though this focuses on the nineteenth-century origins of the modern treaty explosion: Keene, *The Treaty-Making Revolution of the Nineteenth Century*, in «International History Review», 34 (2012), pp. 475-500. See also H. van der Wusten, R.A. Denemark, M. Hoffmann, H. Yonten, *The Map of Multilateral Treaty-Making, 1600-2000: A Contribution to the Historical Geography of Diplomacy*, in «Tijdschrift voor Economische en Sociale Geografie», 102 (2011), pp. 499-514.

[6] *Executive Order: Moratorium on New Treaties* (January 2017): https://apps.washingtonpost.com/g/documents/world/read-the-trump-administrations-draft-of-the-executive-order-on-treaties/2307/ (accessed 9 November 2020).

[7] For a classic statement of the features of that order, see A.-M. Slaughter, *International Law in a World of Liberal States*, in «European Journal of International Law», 6 (1995), pp. 503-538.

administration's series of withdrawals and repudiations was more of a symptom than a cause of international instability. The rise of political populism and its slide into authoritarianism, from the Philippines to Poland and from Egypt to Brazil and beyond (even in the United States), joined nationalism and isolationism to anti-democratic politics across the globe. There appeared to be an elective affinity between illiberalism on the one hand and international anarchy on the other. In modern history, at least, it has generally been the case that democracies are the best respecters of treaties, due to a greater concern with reciprocity and reputation and to stronger pressures on their leaders from informed, responsive citizens. Upholders of domestic constitutions tend to be promoters of international institutions[8]. By contrast, autocrats have been much less respectful.

The connection between authoritarianism at home and anarchy, and weak or broken alliances, abroad may help to explain the Trump administration's apparent hostility toward treaties – for example, the Paris Accord on Climate Change, the JCPOA, the IRNF treaty – and treaty organisations, such as NATO, UNESCO, the WTO and the EU. To some commentators, at least, this aversion to treaty relations and treaty-based organisations signified that «the international institutions supporting the postwar order are under attack by President Donald J. Trump» as a distinguished group of International Relations scholars wrote in an open letter to *The New York Times* in July 2018. «The international order formed after World War II provides important benefits to the United States as well as other countries» they went on. «US leadership helped to create this system and US leadership has long been critical for its success» they argued, arguably[9].

Arguably, because the international order they sought to protect was in part much older than seventy years, with many of its elements going back at least to the inter-War period and even to the 19th century. Moreover, crucial elements of that order, including the World Trade Organization and the European Union, are far younger and were only created in their current form in the 1990s. It also ignores those institutions, pan-American, pan-African, pan-Asian, and pan-Islamic, where the US did *not* lead, the roots of many of which go back to the various «pan»-isms of the late 19th and early 20th centuries[10].

The much-invoked «liberal international order» is thus neither universal nor eternal: even if we see it as more than simply an ideological slogan, it is only one form of international ordering among many. It has also been repeatedly re-invented, even since the Second World War, during the Cold War, after decolonization, and in the age of neoliberalism, for example. In the eyes of both its proponents and its critics, treaties and treaty-based institutions were fundamental to that order. It was liberal because contractual and hence consensual. It was international in that states were its architects and curators. And it was orderly in so far as it placed

[8] K. Taylor Gaubatz, *Democratic States and Commitments in International Relations*, in «International Organization», 50 (1996), pp. 109-139; W. Reed, *Alliance Duration and Democracy: An Extension and Cross-Validation of* «*Democratic States and Commitment in International Relations*», in «American Political Science Review», 41 (1997), pp. 1072-1078; B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge, Cambridge University Press, 2009, pp. 24-36, 80-86, 121-155.

[9] *Why We Should Preserve International Institutions and Order*, in «The New York Times», 23 July 2018.

[10] On which see especially C. Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought*, New York, Columbia University Press, 2007.

transgressors, terrorists, pirates, rogue states, and similar threats – outside its boundaries, as problems to be managed rather than partners to be engaged. Despite occasionally self-serving efforts to provide this order with an enduring pedigree or deep backstory, historians have shown that the liberal international order was not a discovery but rather an invention, and one tied to the rise of US global supremacy and the creation of an alliance culture that spanned first the Atlantic and only later the wider world[11].

Both the threats to liberal international order, and the means to defend it, might then seem to lie especially in US hands. However, treason against treaties was not uniquely Trumpian. Even setting aside for the moment Vladimir Putin's disregard for international law in Russia's invasion of Crimea, we can think of many other examples, in Switzerland, China, or the United Kingdom, for instance. In November 2018, Swiss voters took part in a so-called *Selbsbestimmungsinitiative*. This was the so-called the «Swiss law not foreign judges» referendum backed by the right-wing Swiss People's Party, in which voters were asked to take back control over their own affairs by giving Swiss law, and particularly the Swiss Constitution, precedence over treaties, except for the «mandatory provisions» of international law. Voters rejected the proposition by two-thirds against and only one-third in favour, but the move was symptomatic of the spreading distrust of treaties[12].

On the far side of Eurasia, the Chinese government has undertaken a more concerted effort to undermine an existing treaty, the 1984 Joint Sino-British Declaration. Like all similar international agreements, the Declaration was archived at the United Nations and it has not since been renegotiated. Both sides have commitments under the Declaration, which remains in force until it is renegotiated among the contracting parties. It is no mere «historic document» as some Chinese commentators have called it, then, but in the eyes of the international community, and certainly to the United Kingdom, a live and binding agreement lasting for fifty years, as Article 3 (12) of the Declaration specifies. In the words of a recent British statement, «the Joint Declaration is a legally binding treaty, registered with the United Nations, which continues in force. It remains as valid today as it did when it was signed over thirty years ago»[13]. The British government's strong defence of the Joint Declaration is one sign that, all appearances from the Brexit brouhaha aside, the United Kingdom has not become a rogue state and that its treaty commitments are not generally imperilled.

This bears repeating, in light of the United Kingdom's exit from the European Union («Brexit»). Over the course of 2019, Prime Ministers Theresa May and Boris Johnson presented different versions of a Withdrawal Agreement from the European Union to Parliament and to the British people until its final passage in December 2019, leading to the UK's exit from the

[11] S. Wertheim, *Tomorrow, the World: The Birth of US Global Supremacy*, Cambridge, MA, Belknap Press, 2020; M. Rapp-Hooper, *Shields of the Republic: The Triumph and Peril of America's Alliances*, Cambridge, MA: Harvard University Press, 2020.

[12] *Eidgenössische Volksinitiative «Schweizer Recht statt fremde Richter (Selbstbestimmungsinitiative)»*, https://www.bk.admin.ch/ch/d/pore/vi/vis460t.html (accessed 9 November 2020).

[13] United Kingdom Parliament, Research Briefing, *Hong Kong: The Joint Declaration* (5 July 2019): https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8616 (accessed 9 November 2020).

EU on 31 January 2020. May and Johnson often spoke of the agreement as a «deal» but it was in fact a much bigger deal than that: it is an international treaty, negotiated in good faith between two sovereign actors and then presented for ratification using the regular British constitutional mechanism for approving treaties, as Article 50 of another treaty, the 2007 Lisbon Treaty, demanded. The three failed attempts Theresa May made in 2019 to ratify the EU-UK treaty known as the Withdrawal Agreement marked the first parliamentary rejection of a treaty since at least 1864[14]. Her successor Boris Johnson's expressed willingness in late 2019 for the UK to «crash out» of the EU with no deal displayed not only mendacious ignorance of the economic effects of leaving without an agreement, as well as a criminal neglect for Britain's international reputation and its commitment to a treaty-based regional order in Europe. Leaving without a deal would have been a breach of Article 50 and would have left the UK as a «third country» with regard to the EU, under much harsher conditions than it now enjoys. The prospect of crashing out receded for a while with the passage of the Withdrawal Agreement Act in December 2019. I will return to Brexit in my conclusion, but for the moment, examples may stand as symptoms of an apparent multi-fronted attack on the infrastructure of internationalism, often in the name of anti-globalism and national self-determination.

From Trump's aggressive isolationism via the SVP's push for self-determination and China's questioning of the Joint Declaration to the UK's becoming the first member-state to leave the European Union, there seems to be ample evidence of a retreat from treaties, even in the supposed heartlands of «liberal» international order: that is, in the economies of the Atlantic world. Yet it would be a mistake to assume that breaking or repudiating treaties was as recent or modern a phenomenon as the «liberal international order» they underpin. For example, over the past two hundred years, a quarter of bilateral alliance treaties have ended through renegotiation but roughly one-third have terminated in opportunistic violation of their terms: the mean duration for an alliance between 1816 and 1989 was less than ten years[15]. More benign, perhaps, but equally palpable is the increasing reluctance of countries worldwide to enter into bilateral investment treaties and their parallel desire to leave existing agreements[16]. More striking still is the cessation of peace treaties between states. For much of the nineteenth century, most if not all wars ended with a peace treaty; by the 1980s, a secular decline reached its low point when no such treaties were signed. Indeed, since the Second World War interstate conflicts have become no longer started with declarations of war or ended with treaties of peace[17]. All these develop-

[14] B. Fowler, *A Government Defeat on May's Brexit Deal Tonight will be a Historic Failure of Process*, in «The Times Red Box**»,** 15 January 2019: https://www.hansardsociety.org.uk/media/coverage/a-government-defeat-on-mays-brexit-deal-tonight-will-be-a-historic-failure (accessed 9 November 2020), referring to the Mutual Surrender of Criminals (Prussia) Bill (27 July 1864).

[15] B. Ashley Leeds, B. Savun, *Terminating Alliances: Why Do States Abrogate Agreements?*, in «Journal of Politics», 69 (2007), pp. 1118-1132.

[16] Z. Elkins, A.T. Guzman, B.A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, in «International Organization», 60 (2006), pp. 811-846; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, Cambridge, Cambridge University Press, 2015, p. 395.

[17] T.M. Fazal, *Why States No Longer Declare War*, in «Security Studies», 21 (2012), pp. 557-593; Id., *The Demise of Peace Treaties in Interstate War*, in «International Organization», 67 (2013), pp.

ments, long-term and short-term, medium-range and post-War, seem to indicate the shaking, perhaps even to some observers the collapse of the very architecture of an international order founded on treaties.

Treaties, and the normative regime they sustain, seem to be under threat in many parts of the world. Should we be alarmed about this? Is the treaty-based international order indeed under attack, or at least in peril of erosion? Is the treatment of treaties a symptom of an emergent or full-blown crisis of liberal international order, as some have claimed?[18] In short, in a world increasingly populated by anti-globalists, nationalists, and isolationists, are treaties in danger? To answer these questions, this article places our current moment in a longer historical perspective by going back to the early modern period and then forward again to our own time. This rapid excursion has two main aims. The first is to illustrate some scenes from the historical *pas de deux* between treaties and international order. The second is to use these scenes – and some of the commentaries upon them – to see how previous thinkers, especially in the Global North, understood the relation between treaties and international order in ways that might seem both eerily familiar to us and fruitfully strange. The apprehension that treaties has been a common one since the sixteenth century: in this sense, anxiety about their fragility long precedes the association of treaties with a specifically liberal international order. A *longue-durée* perspective can show that contemporary fears may be misplaced if they do not correctly diagnose the dimensions of the danger or the causes of the threat. It can also highlight what is distinctive about our own moment, in which treaties have become so closely associated with international order that any assault on its infrastructure appears to be an attack on the entire structure itself.

There were, of course, treaties long before there were conceptions of international order; and there have been conceptions of international order that do not depend on an infrastructure of treaties. In fact, the very term «international order» is barely a hundred and fifty years old. As we can see crudely from this chart of the appearance of the English term «international order» in the Google Books database, «international order» emerges in the last third of the nineteenth century and then had a fluctuating career thereafter.

What is most striking about the pattern of usage of «international order» are the two peaks in usage of the term: the earliest, and largest, during and just after the First World War, the second during and just after the Second World War; after that, it falls off considerably and shows a modest upward trend-line until the 1990s, when the reliability of the underlying corpus of books becomes much less robust. If these spikes and troughs indicate discussion of international order, then it strongly correlates with perceptions of international *dis*order. The contemporary increase in discussions of international order – especially the putative «*liberal* international order» – also appears to show greater anxiety about the possibilities for that order. Such talk about international order may then be more an index of its fragility than of its stability.

695-724; Id., *Wars of Law*: *Unintended Consequences in the Regulation of Armed Conflict*, Ithaca, NY, Cornell University Press, 2018.

[18] G.J. Ikenberry, *The End of Liberal International Order?*, in «International Affairs», 94 (2018), pp. 7-23; M. Eilstrup-Sangiovanni, S.C. Hofmann, *Of the Contemporary Global Order, Crisis, and Change*, in «Journal of European Public Policy», 27 (2020), pp. 1077-1089.

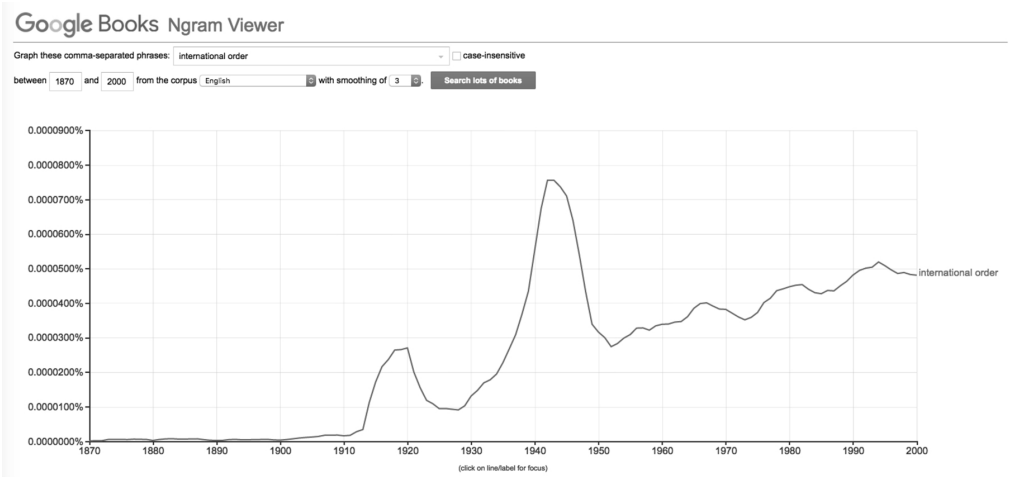

Fig. 1. ????

The moment when «international order» first stared to take root was also the time when the pace and volume of treaty-making began to accelerate. The last third of the nineteenth century was perhaps the first great moment of institutional internationalism in world history. It was then, in the aftermath of the revolutions in communications wrought by the steamship, the telegraph and the railroad, and when contemporaries increasingly observed that their world was shrinking in both time and space, that a host of international bodies, from scientific commissions to postal and telegraph unions, sprang up. They were often undergirded by multilateral treaties[19]. At that point, multilateral treaty-making was still a relatively novel phenomenon, with few precedents before the 1856 Declaration of Paris in which seven European powers agreed at the end of the Crimean War to stamp out privateering on the high seas[20]. This moment also marked a pivotal point in what one scholar has called «the treaty-making revolution of the nineteenth century» with a sevenfold increase in the number of treaties across the century and particular spikes in the 1810s, 1880s and 1900s. In the last decade of the eighteenth century, 20–30 treaties on average were made each year: by 1914, it was around 200: «In other words, the making of a new international treaty went from being something that happened perhaps twice a month [on average], to something that happened about every other day»[21]. It seems to be during this acceleration that the phrase «international order» first took root: indeed, the earliest book with that title appeared then, the Belgian economist Charles Périn's *L'Ordre international* (1888). (Périn lamented the lack of international law as a symptom of international disorder, and urged

[19] A. Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World*, Berkeley, University of California Press, 2004.

[20] J.M. Lemnitzer, *Power, Law and the End of Privateering*, Basingstoke, Palgrave Macmillan, 2014.

[21] Keene, *The Treaty-Making Revolution*, cit., p. 478.

the renovation of the law of nations, under the authority of the Catholic Church, as the only means to restore universal norms in a divided world)[22].

It was also during this moment that a unitary category of «treaty» emerged among scholars of international law who had recently professionalised themselves starting in the 1870s[23]. The convergence of a new language of international order with an explosion of treaty-making and a professional conception of treaties could all be accidental, of course, but there might also be causal links at work among these developments. The treaty-making revolution of the 19th century turned out to be almost a permanent revolution. By 2010, there were «some 3000 multilateral [treaties] and 27,000 bilateral treaties [...] in effect» around the world; within a decade, that number had doubled, as we have seen, to over 55,000[24]. International order is, to a great extent, now secured by treaties. For the moment, the vast majority of them remain safe and out of danger. But we should not project the present back onto the past: for many centuries before the twentieth, the architecture of treaties was not nearly so well developed and there was widespread scepticism that it could support any serious weight at all.

2.

Scholars of International Relations and political science, especially in the United States, have conventionally traced the weaving of a worldwide web of treaties back to the Peace of Westphalia that ended the Thirty Years' War in 1648. 1648 became the key date for the creation of the modern, treaty-based, international order and the treaties of Münster and Osnabrück the birth-certificates of a novel system of independent, secular, sovereign statehood. This «myth of 1648» has been thoroughly debunked of late[25]. We now know that the world of the second half of the seventeenth century was one of many sovereigns but few states, in the sense that we would now understand them. The sovereign population of the globe was variegated and confusing, a welter of porously bordered entities mixed with complex federations, such as the Holy Roman Empire – the major beneficiary of the Westphalian settlement – as well as sovereign corporations like the Dutch and English East India Companies and Indigenous sovereigns in North America, Africa and South Asia and Southeast Asia[26].

[22] C. Périn, *L'Ordre international*, Paris, V. Lecoffre, 1888.

[23] M. Donaldson, *The Emergence of «Treaty» as a Unitary Category*, paper presented at the workshop, *What is a Treaty?*, Wissenschaftskolleg zu Berlin, March 2019; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge, Cambridge University Press, 2001.

[24] B. Simmons, *Treaty Compliance and Violation*, in «Annual Review of Political Science», 13 (2010), p. 274; UNTC: https://treaties.un.org/.

[25] For example, A. Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, in «International Organization», 55 (2001), pp. 251-287; B. Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations*, London, Verso, 2003; B. Straumann, *The Peace of Westphalia as a Secular Constitution*, in «Constellations», 15 (2008), pp. 173-188; P. Piirimäe, *The Westphalian Myth of Sovereignty and the Idea of External Sovereignty*, in H. Kalmo, Q. Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept*, Cambridge, Cambridge University Press, 2010, pp. 64-80.

[26] P.J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India*, Oxford, Oxford University Press, 2011; S. Belmessous (ed.), *Empire by Treaty: Negotiating European Expansion, 1600-1900*, Oxford, Oxford University Press, 2015; A. Phillips, J.C. Sharman,

In fact, a world of hard-edged, sovereign, mutually recognising states may not even have emerged until at least three hundred years later, in the wake of the creation of the United Nations and of *1948*; or perhaps even later, at the height of decolonisation in the 1970s[27]. It is therefore not in Westphalia, or in 1648, that we should look for the normative association between treaties and international order: in fact, the identification of 1648 as the matrix of that association was symptomatic of the emergence of a treaty-based «liberal» international order after 1945. This may become clearer in light of a long tradition after 1648 of arguing that treaties were not so much the ligatures of international *order* as inducements to international *disorder*. Excavating that tradition makes clearer how comparatively novel is the perceived relationship between international order and treaties, and therefore how contingent is any contemporary anxiety about the threats to a treaty-based order.

The political theory of treaties in the early modern period and Enlightenment often assumed that treaties were made to be broken and that reliance on them as a source of order among nations would generate instability. In 1914, the German Chancellor Bethmann-Hollweg notoriously called treaties mere «scrap[s] of paper» but that suspicion had pre-dated him by at least four hundred years[28]. As Niccolò Machiavelli notoriously put it in ch. XVIII of *The Prince* (1513), «plausible reasons can always be found for [...] failure to keep promises. One could give countless modern examples of this, and show how many peace treaties and promises have been rendered null and void by the faithlessness of rulers»[29]. Machiavelli's contemporary Desiderius Erasmus agreed that the treaties were a sign not of the faithfulness of princes but of their faithlessness: «Where mutual trust exists and business is being done between honest men, there is no need for a lot of these niggling bits of paper» [*multis et anxiis syngraphis*][30]. Almost two centuries later, Leibniz agreed, in the preface to his *Codex iuris gentium diplomaticus*: «Today, in truth, we would not be wrong in many cases to say that rulers play cards in private life and with treaties in public affairs»[31]. He suspected that some of his readers might think it odd for the editor of such a collection of treaties to discourse on the «weakness of such paper chains» [*de infirmitate chartacei vinculi*]. However, he protested in Machiavellian tones, he had to describe things as they are not as we would like them to be. It was in this same spirit that Leibniz related a dry Dutch joke in which a fashionable wit puts up a house-sign with the title «perpetual peace» [*pax perpetua*]. The picture beneath it? A graveyard. The only eternal peace was the sleep of the dead.

The greatest philosophical sceptic of the next generation of the Enlightenment shared Leibniz's scepticism about treaties as guarantees of international order. David Hume, in

Outsourcing Empire: How Company-States Made the Modern World, Princeton, Princeton University Press, 2020.

[27] J. Burbank, F. Cooper, *Empires in World History: Power and the Politics of Difference*, Princeton, Princeton University Press, 2010.

[28] T. von Bettmann-Hollweg (1914), quoted in R.A. Denemark, M.J. Hoffmann, *Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making*, in «Cooperation and Conflict», 43 (2008), p. 186.

[29] N. Machiavelli, *The Prince*, trans. R. Price, introd. Q. Skinner, Cambridge, Cambridge University Press, 2019, p. 60.

[30] Erasmus, *The Education of a Christian Prince*, ed. L. Jardine, Cambridge, Cambridge University Press, 1997, p. 94.

[31] Leibniz, *Codex Iuris Gentium*, sig. (*)^{r}.

his philosophical masterpiece, the *Treatise of Human Nature* (1739-1740), noted that rulers had ethical obligations just like other individuals, but that their utilitarian calculations meant that they were not obligated to the same degree: «[T]he morality of princes has the same *extent*, yet it has not the same *force* as that of private persons». Or, as Hume elaborated the point in the more popular version of his argument, the *Enquiry Concerning the Principles of Morals* (1751):

> The observance of justice, though useful among [nations], is not guarded by so strong a necessity as it is among individuals; and the *moral obligation* holds proportion with the *usefulness*. All politicians will allow, and most philosophers, that REASON OF STATE may, in particular emergencies, dispense with the rules of justice, and invalidate any treaty or alliance, where the strict observance of it would be prejudicial, in a considerable degree, to either of the contracting parties. But nothing less than the most extreme necessity, it is confessed, can justify individuals in a breach of promise, or an invasion of the properties of others[32].

This apprehension that a plea of necessity, or «reason of state», could justify the breach of a treaty was widely shared in the Enlightenment. For example, that paradigm of Enlightened rulership, Frederick the Great, forewarned his reader in the preface to his *History of My Age* (1746), that she «will see, during the course of this work, treaties made and treaties broken». The safety of Frederick's people had to take precedence over the sanctity of agreements; and, in words that confirmed Hume's view that the promises of princes have a different status from those of ordinary individuals, he went on: «A man who gives his word to another [...] must keep [it], since honour prevails over self-interest. But a prince who enters into a treaty [...] exposes important States and provinces to countless misfortunes; it would therefore be better that the sovereign repudiate such a treaty, rather than let his people perish»[33]. This calculus of *Realpolitik* may have made sense to princes like Frederick, but to more critical publics it simply nourished the view that monarchs were unethical and untrustworthy and that their agreements, their treaties, were hardly worth the parchment they were written on: that they were, in Leibniz's words, no more than «paper chains», not even the slender Lilliputian cords that had restrained Lemuel Gulliver in Jonathan Swift's *Gulliver's Travels* (1726).

The classic Enlightened account of such monarchical duplicity came from one of Frederick's own former subjects, and an astute student of the genre of treaties, Immanuel Kant. Kant's *Zum ewigen Frieden* (1795) stands out among his writings for its literary playfulness[34].

[32] D. Hume, *A Treatise of Human Nature*, ed. L.A. Selby-Bigge, P.H. Nidditch, Oxford, Oxford University Press, 1978, pp. 567-568; Id., *An Enquiry Concerning the Principles of Morals*, ed. T.L. Beauchamp, Oxford, Oxford University Press, 1999, p. 100; see also M. Koskenniemi, *The Advantage of Treaties: International Law in the Enlightenment*, in «Edinburgh International Law Review», 13 (2008), pp. 27-67.

[33] Frederick II of Prussia, *Avant-propos*, to *Histoire de mon temps* (1746), in *Œuvres de Frédéric le Grand*, ed. J.D. Erdmann Preuß, 30 vols. (Berlin, Imprimerie Royale, 1846-1856), II, p. viii; trans. A. Scholar in Frederick II of Prussia, *Frederick the Great's Philosophical Writings*, ed. A. Lifschitz, Princeton, Princeton University Press, 2020, p. 84.

[34] I. Kant, *Toward Perpetual Peace* (1795), in I. Kant, *Practical Philosophy*, M.J. Gregor (ed.), Cambridge, Cambridge University Press, 1996, pp. 317-351.

«Playfulness» and «Kant» are words not often found in the same sentence, but his book did contain many layers of jokes for his readers. Any of them familiar with the texts of seventeenth- and eighteenth-century European peace treaties and with the contemporary literature of the law of nations would have recognised his title as an allusion to the frequent stipulation in those treaties that their purpose was to secure «perpetual peace». However, Emer de Vattel, the author of the century's greatest compendium of the law of nations, the *Droit des gens* (1758), noted that this did not mean that they «promised never to make war on each other for any causes whatever», only that they wouldn't revive the same *casus belli* in future[35]. It was just such «casuistry» that led Kant to include Vattel in a roster of the «pitiful comforters» [*leidige Tröster*], those towering contemporary authorities on the law of nations whom princes often cited to justify their wars but whose testimony had, Kant said, had never prevented a conflict[36].

Readers who caught the first in-joke in Kant's title were rewarded with a second, Kant opened his essay by explaining the title with an obvious allusion to Leibniz: «It may be left undecided whether this satirical inscription on a certain Dutch innkeeper's signboard picturing a graveyard ["perpetual peace"] was to hold for human beings in general, or for heads of state in particular, who can never get enough of war, or only for philosophers, who dream that sweet dream»[37]. And even readers who did not get the allusions to Leibniz and Vattel would soon notice that Kant had artfully cast his entire treatise in the form of a treaty, complete with six «preliminary articles for perpetual peace among states», three «definitive article[s]», and two supplements, one of them treating the vexed subject of secret articles in treaties for perpetual peace.

The inspiration for Kant's treatise on treaties is usually attributed to the Treaty of Basel concluded between Prussia and France in April 1795 and this agreement may indeed have been the initial spark for his imagination. However, as these strata of textual and generic allusions suggest, Kant was more concerned with a whole European international order and its underpinnings. The only definitive means of securing perpetual peace, Kant argued, would be for the civil constitution of each state to be based on the autonomous consent of its citizens (who would be likely to veto needless wars); the resulting republics would have to be conjoined in a federation, retaining their individual autonomy, rather than a world state; and they would all be under a regime of cosmopolitan right tempered by a duty of hospitality towards visitors from outside. Taken together, the terms of Kant's treaty – a social contract, in fact, between populations and their rulers – would lead asymptotically towards perpetual peace, unlike «what have till now been falsely called peace treaties (strictly speaking, truces)» [*so genannte Friedensschlüsse (eigentlich Waffenstillstände)*][38].

With generic wit and ample allusion, Kant argued for the possibility of truly perpetual peace, based on scaling up his conception of autonomy from individuals up to states and the voluntary community they create among themselves. This would be a solution to what he

[35] E. de Vattel, *The Law of Nations*, ed. B. Kapossy, R. Whatmore, Indianapolis, Liberty Fund, 2008, p. 663 (IV.ii.19).

[36] Kant, *Toward Perpetual Peace*, cit., p. 326.

[37] *Ibidem*, p. 317; C. Meckstroth, *Hospitality, or Kant's Critique of Cosmopolitanism and Human Rights*, in «Political Theory**»**, 46 (2018), p. 541.

[38] Kant, *Toward Perpetual Peace*, cit., p. 351.

would have diagnosed as crises in his own contemporary international order: predatory princes, dependent populations, the militarisation of society, hardening borders, and the proliferating pathologies of empire across the globe. But Kant made clear that perpetual peace need not entail the sleep of death a year later in his *Verkündigung des nahen Abschlusses eines Tractats zum ewigen Frieden in der Philosophie* (1796) [*Proclamation of the Imminent Conclusion of a Treaty of Perpetual Peace in Philosophy*], where he played his serious joke out to its conclusion. In that brief and often overlooked work, Kant defended his critical philosophy as «an outlook always armed» which, «precisely because of this [...] accompanies the activity of reason, [and] offers the prospect of eternal peace among philosophers». This would be the foundation for what Kant saw as a true peace treaty, based on mutual understanding among the parties and thereby «declared settled, or at least near to settlement»[39].

Kant's witty manipulation of a century of European treaty culture exposed the danger *for* treaties, particularly from princely politics and the imperatives of modern state-building, and the dangers posed *by* treaties, if they were too naïvely held to be structural elements of international order. These concerns and warnings did not go away in the course of the nineteenth century. Kant's *Perpetual Peace* found a new life in the aftermath of the First World War. At this moment, peace groups, federalist societies, and supporters of the nascent League of Nations canonized his work as the blueprint for a new international order and attempts to end war, after the war to end all wars[40]. Kant's second supplement to his fictive treaty, arguing in favour of publicity and against «secret article[s] in negotiations of public right», appeared as the very first of the Fourteen Points US President Woodrow Wilson promulgated in early 1918 as a guide for the coming peace: «Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in the public view»[41].

Wilson's worry about secret treaties was widely shared in 1918-1919 and it led in due course to a norm of treaty publication being inserted into the Covenant of the League of Nations in 1920. This demanded that treaties only come into force when they were registered with the League and subsequently published, as an institutional answer to the problem of political duplicity Kant had brought into the open. This article (18) of the Covenant led in due course to the expectation after 1948 that all such agreements would be registered with the United Nations under Article 102 of the UN Charter, leading to the UN Treaty database of today. However, it did not bring an end of secret negotiations or even to secret agreements, which were not always

[39] Id., *Verkündigung des nahen Abschlusses eines Traktats zum ewigen Frieden in der Philosophie* (n.p., 1798); Id., *Proclamation of the Imminent Conclusion of a Treaty of Perpetual Peace in Philosophy*, in Id., *Theoretical Philosophy After 1781*, ed. H. Allison, P. Heath, Cambridge, Cambridge University Press, 2002, pp. 453-460; A. Lebovitz, *The Battlefield of Metaphysics: Perpetual Peace Revisited*, in «Modern Intellectual History», 13 (2016), pp. 327-355.

[40] E.S. Easley, *The War Over Perpetual Peace: An Exploration into the History of a Foundational International Relations Text*, Houndmills, Palgrave Macmillan, 2004, pp. 35-45.

[41] I. Kant, *Toward Perpetual Peace*, cit., pp. 337-338; W. Wilson, *Address to a Joint Session of Congress*, 8 January 1918, in *The Papers of Woodrow Wilson*, gen. ed. A.S. Link, 69 vols., Princeton, Princeton University Press, 1967-1994, XLV, p. 536.

called treaties, to avoid the necessity of publishing them by registration[42]. Nor of course could it cure statesmen's cynicism about treaties classically (and misogynistically) expressed fifty years later by French president Charles de Gaulle in his verdict on the Franco-German Elysée Treaty of 1963: «Treaties are like young girls or roses: they last as long as they last. If the Franco-German treaty is not applied it will not be the first time in history»[43]. Yet the Elysée Treaty *did* last. Indeed, it was supplemented with a new Franco-German treaty signed in Aachen/Aix-la-Chapelle in January 2019[44].

3.

One inference from this swift survey of the centuries, is that treaties have long been perceived to be in danger, at least in the eyes of Europeans and that crisis – or a *feeling* of crisis – is endemic to international order, whether liberal or otherwise. Our own anxieties may be different, like the source of them, and the intensity of the threat, especially from a superpower like the United States that was once deeply invested in proclaiming its devotion to upholding international order, may be distinct. However, the apprehension is no more novel than the danger: both have long antecedents, even precedents. We might think of the US Senate's failure to ratify the country's entry into the League of Nations and the subsequent collapse of the League in the late 1920s and early 1930s. The withdrawals from the League by Italy, Japan, and Germany of course doomed it to oblivion. Later, there were the two World Wars; the long-drawn-out process of decolonisation; the proclamation in the 1970s by the resulting "new states" of a New International Economic Order; the destabilising proxy wars and mutual hostilities of the Cold War: all these moments raised genuine fears of the end of distinct and overlapping international orders across the course of the twentieth century.

And, more recently, before the Trump administration, the US had conspicuously absented itself from a variety of treaty-based structures of international order, among them the ILO and UNESCO, the Statute of the International Criminal Court, the Law of the Sea Convention, and the Kyoto Protocol on Climate Change. The Trump administration's actions may have seemed extreme – or perhaps just extremely well choreographed – but they had many precursors among the Reagan, Clinton, Bush and even the Obama administrations' actions, for example in relation to the Intercontinental Anti-Ballistic Missile Treaty, the Land-Mine Treaty or the statute of the International Criminal Court.

In light of these and other developments, such as the Iraq War and the ultimate failure of most members of the UN Security Council to ratify the ICC statute, the United

[42] M. Donaldson, *The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order*, in «American Journal of International Law», 111 (2017), pp. 575-627.

[43] Charles de Gaulle (2 July 1963), quoted in J. Jackson, *A Certain Idea of France: The Life of Charles de Gaulle*, London, Allen Lane, 2018, pp. 594-595.

[44] *Traité de coopération et d'intégration franco-allemand d'Aix-la-Chapelle* (22 January 2019): https://www.diplomatie.gouv.fr/fr/dossiers-pays/allemagne/relations-bilaterales/traite-de-cooperation-et-d-integration-franco-allemand-d-aix-la-chapelle/ (accessed 9 November 2020).

Nations published a collective study of «Multilateralism under Challenge?» in 2004[45]. A decade later, another group, this time of legal academics, diagnosed «the end of treaties» a decade later in 2014, two years before Donald Trump had even declared his candidacy for the Republican presidential nomination[46]. «What has changed under President Trump is the number of treaties that have been terminated», one commentator remarked in 2019: «In the first two years of his presidency alone, the United States withdrew from more international treaties than under any of his predecessors»[47]. And yet in this, as in so many matters, Trump was not so much an aberration among US presidents as an exaggeration of their worst features.

Across the globe, the fundamental architecture of the contemporary treaty-regime is not in danger: the UN Charter remains in place, as does the 1969 Vienna Convention on the Law of Treaties, which celebrated its fiftieth anniversary in 2019[48]. No one, except perhaps Trump himself, suggested the dissolution of any of the great treaty organizations, from the UN and NATO to the IMF and the World Trade Organization. Even the basis of the European Union remains unquestioned, despite the political, legal and economic stresses the EU has been under in recent years; popular support for the EU has grown across the Continent and the Brexiteers have found no imitators. The 1969 Vienna Convention on the Law of Treaties states that any treaty can be terminated with the consent of the parties (Art. 57.b) and since then treaties have generally provided for consensual exit. In fact, most withdrawals from treaties are made under the terms of the treaties themselves, such as Article 50 of the Lisbon Treaty: this only reaffirms the fundamental place of treaties in the international rule of law[49].

In these regards, treaties, and the institutions they underpin, do not seem to be generally or seriously at risk. And since the late 1990s, there has been an appreciable increase in the number of peace treaties signed around the world. They have not marked the negotiated end of international conflicts, of course, but rather of *civil* wars. From the Dayton Accords to the peace process in Colombia, one reason for the increasing salience of peace treaties in the termination of internal conflicts is the backing of the international community for such brokered and monitored solutions. With respect to civil wars, at least, treaties are not in danger, but seem in fact to be proliferating. To quote one leading German scholar of international law, Georg Nolte, with regard to the alleged decline of the global treaty regime, «it is too early to fall into a doomsday mood»[50].

[45] E. Newman, R. Thakur, J. Tirman (eds.), *Multilateralism Under Challenge? Power, International Order, and Structural Change*, Tokyo, United Nations University Press, 2004.

[46] T. Meyer, J.P. Trachtman, B.M.J. Szewczyk, T.M. Fazal, T. Koivurova, C. Galway Buys, B. Israel, H. Cantú-Rivera, *Agora: The End of Treaties*, in «AJIL Unbound», 108 (2014), pp. 30-73.

[47] S. Talmon, *The United States under President Trump: Gravedigger of International Law*, in «Chinese Journal of International Law», 18 (2019), pp. 645-668.

[48] Compare M. Copelovitch, S.B. Hobolt, S. Walter, *Challenges to the Contemporary Global Order: Cause for Pessimism or Optimism?*, in «Journal of European Public Policy», 27 (2020), pp. 1114-1125.

[49] L.R. Helfer, *Exiting Treaties*, in «Virginia Law Review», 91 (2005), pp. 1579-1648; J. Galbraith, *The President's Power to Withdraw the United States from International Agreements at Present and in the Future*, in «AJIL Unbound», 111 (2017), pp 445-449; H. Hongju Koh, *Presidential Power to Terminate Agreements*, in «Yale Law Journal Forum», 128 (12 November 2018), pp. 432-481.

[50] G. Nolte, *Treaties and Their Practice – Symptoms of Their Rise or Decline*, in «Recueil des cours» [Hague Academy of International Law], 392 (2018), p. 377.

On balance, and in both long-range and wide-angle perspective, treaties are not be in quite as much danger as the headline-writers, especially in the United States, would have us believe. Yes, concern about the Trump administration's aggressively public contempt for certain treaties was justified, while bearing in mind the failure of earlier US administrations, from Reagan to Obama, to join or to ratify international agreements. We should also recall that the Trump administration less noisily acquiesced to other treaties, notably its affirmation of article 5 of the NATO treaty. Yes, we should be equally or even more worried about Russia's contempt for the long-settled international taboo against conquest or annexation. Yes, Hong Kong should be concerned about attempts to back off commitments made in the Joint Declaration. And, yes, the European Union and the United Kingdom should still be vigilant about the long-term effects of Brexit.

Yet it would be premature to take all these as signs of the collapse of any specific international order, «liberal», «rules-based», or otherwise. Treaties have long been seen as fragile. International order has not always depended upon them; now it does, anxiety about treaties expands into a greater worry about the architecture they uphold. And treaties have just as often upheld empire, extraction and inequality as liberalism or democratic values. There is at present no immediate crisis of statehood, or of international organizations, but there is surely a crisis of democratic legitimacy for such organizations, which fuels populist hostility towards distant, unaccountable institutions. This in turn opens the door for illiberal nationalists to criticize them, and even to deligitimate them.

There may therefore be a crisis *in* the contemporary international order, but it has not yet become a full-blown crisis *of* the international order[51]. Our goal for the moment should be simply to diagnose that crisis correctly. After all, in its original medical sense, a crisis marks the turning point in the progress of a disease: it can just as likely lead to a sparkling recovery as to a shattering collapse. In light of centuries of anxiety about the fragility of treaties, and the various kinds of order they have upheld, we may be able to see that our own moment is part of a longer history of worries about treaties rather than imminent threats to them. The lesson in the end is that, when treating treaties, the greatest danger may lie in mistaking signs of distrust for symptoms of disorder.

David Armitage, Department of History, Harvard University, 215 Robinson Hall, Cambridge, MA 02138 (USA); armitage@fas.harvard.edu

[51] Eilstrup-Sangiovanni, Hofmann, *Of the Contemporary Global Order*, cit., pp. 1079-1080.