



BOFAXE

100 Days of Biden (Part 1)

TOP OR FLOP FOR INTERNATIONAL LAW?

When Joseph R. Biden won the US Presidential election on 3 November 2020, the dawn of a new era seemed at our doorstep. 100 days after his inauguration, this post examines whether this impression has turned out to be justified from an international law perspective after his first 100 days. Has Biden lived up to the promises he made during his campaign for the fields of international security, human rights, international trade and climate change?

International Security

President Biden stated at the Munich Security Conference in February that the US commitment to NATO was “unshakeable” and that the partnership between Europe and the US constituted “the cornerstone of all we hope to accomplish in the 21st century”. He nevertheless demanded greater burden-sharing regarding defense spending by the Europeans, mirroring earlier demands made by the Trump administration. The Biden administration also announced a plan to spend even more on defense than President Trump.

Additionally, the new administration developed a plan to restore the 2015 Iran nuclear deal, which Donald Trump had abandoned in May 2018. Careful advances have already been made.

President Biden announced at the same time that all US troops would leave Afghanistan by 11 September 2021. The removal of the remaining 3000 American troops coincides with the 20th anniversary of the 9/11 attacks in 2001 which marked the starting point of America’s longest “war” in recent history. The US maintained it would remain engaged in Afghanistan, albeit focusing its efforts on non-military aid. In stark contrast to his predecessor, the Biden administration coordinated this step with NATO partners and Afghan President Ashraf Ghani before his announcement. These developments give hope that Joe Biden might be much more committed to multilateralism in the field of international security than his predecessor.

Human Rights

In a New York Times interview during his campaign, Biden announced that he would make human rights the cornerstone of US foreign policy.

With regard to the UN Human Rights Council (HRC), the Trump administration had announced it would leave the Council in June 2018, accusing it of supporting human rights-abusing States and an anti-Israel bias (see here why these reasons were not given in good faith). On 8 February 2021, the Biden administration said the US would engage with the Council “immediately and rigorously” again. For now, the US can only act as observer, but the new US permanent representative to the UN, Linda Thomas-Greenfield, said the US would run as a candidate in October. Interestingly enough, the new administration upholds the substantive critique of the Trump administration: the US announced it would “push back on UN human rights violators who want to be legitimized” in the Council and that the HRC should issue “fewer resolutions against Israel”. How these intentions will be put in practice, remains unclear. One way would be to press for competitive slates when new members are elected as usually the regional groups only put forward the same amount of candidates as seats to be filled. This puts the idea that the composition of the Council should reflect the human rights record of its members (UNGA resolution 60/251) *ad absurdum*. Only where there are more candidates than seats can this criterion be respected – as the recent rejection of Saudi Arabia’s candidacy for the Council shows. With regard to Israel, the easiest way would be for the US to take a more differentiated approach to the issue in the Security Council – making the continued engagement of the matter in the HRC dispensable, but that seems an unrealistic scenario. At least, the new Secretary of State, Anthony Blinken, acknowledged that “walking away won’t fix [the Council]” and that the departure had “created a vacuum of US leadership”.

Only a few days later, on 12 February 2021, the US also announced it would review its efforts to close the Guantanamo prison in Cuba. Until today, the prison remains the Bush administration’s most toxic heritage: terrorism suspects are indefinitely detained as wartime captives, they are denied a fair trial and given inhumane treatment. In the view of past Republican administrations, the Guantánamo detainees are neither entitled to constitutional protection (as they were located outside US territory), nor to protection under the International Covenant on Civil and Political Rights or the Geneva conventions (as the US considered them “unlawful combatants” (see here and here)).

Today, Guantanamo holds 40 detainees. While President Barack Obama had promised to close Guantánamo during his campaign, he never made good on this promise. President Trump never intended to close Guantanamo, but announced instead to further “load it up with some bad dudes”. While many questions of the Biden’s announcement remain open, at least the new administration announced it did “not intend to bring new detainees to the facility.” So far, however, the new administration seems shy to commit to bringing the remaining detainees to prisons and courts on American soil – a step that would be necessary if the US wants to be serious about making human rights the cornerstone of its politics. With regard to this issue, Biden might be heading towards the exact same failings as President Obama.



BOFAXE

100 Days of Biden (Part 2)

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International Trade

For many international lawyers (see [here](#) and [here](#)) the US' continued blockage of the appointment of new members to the World Trade Organization (WTO) Appellate Body (AB) has been a particular worry. This has brought the appellate process, and the entire WTO, close to collapse. The WTO does currently not offer its members access to a binding, two-tier, independent and impartial resolution of trade disputes any longer, given that the AB does not reach the quorum of three members necessary to hear appeals since the Trump administration blocked the appointment of new nominees in December 2019. Given that “[v]acancies shall be filled as they arise” (Art. 17.2 Dispute Settlement Understanding), the members of the WTO are in breach of their own rules. While the US has recently given up its opposition to the appointment of Nigeria's Ngozi Okonjo-Iweala as the new director general of the WTO, and while the new US Trade Representative (USTR), Katherine Tai, said in her confirmation hearing she would work in a “*practical and constructive*” manner with the WTO (see [here](#), p. 2), the Biden administration has not so far lifted its veto on the appointment of new AB members. Quite to the contrary, Ms. Tai also stated that “*over the years, the appellate body has overstepped its authority and erred in interpreting WTO agreements in a number of cases*” (see [here](#), p. 6). It is thus likely that the US will only give up its opposition to new appointments of the AB if the WTO partners make concessions to reform that body.

With regard to bilateral trade relations, after a heated exchange between US Foreign Secretary, Antony Blinken, and China's most senior foreign policy official, Yang Jiechi, one has to assume US-China trade relations remain tense. Biden's priority now rather seems to be creating a greater common cause with allies against China, especially on technology and economics. The development of US-EU economic relations must be assessed differently: Biden vowed to end Trump's “*artificial trade war*” with the EU. In the meantime, both sides announced they would suspend tariffs connected to the longstanding Airbus-Boeing dispute for the next four months.

Climate Change

On the first day of his presidency, Joe Biden announced that the US would be rejoining the Paris Agreement. The decision took effect on 19 February 2021. At a virtual climate summit on 22 & 23 April with 40 world leaders – dramatically convened on Earth Day with an appearance from Pope Francis – President Biden pledged to cut US greenhouse gas emission in half by 2030 as compared to 2005, thereby nearly doubling the previous commitment set by President Obama in 2015. This is a necessary step if the US wants to stand any chance of meeting its mission of net zero emissions by 2050, as was repeatedly promised by Biden during his campaign. While some other State leaders pledged similarly ambitious goals (e.g. Canada and Japan), some of the biggest emitters did not make any new commitments, notably China and India. Whether the US can live up to its self-announced goal of becoming the world leader in the fight against climate change will depend on whether, and when, the US can convince States like China and India to join in the efforts. China currently emits nearly twice the amount of Co2 as the US. By December – at the COP26 UN climate change conference in Glasgow – we may know whether Biden is on track towards its newly announced goals, and able to leverage progress to convince other states to follow-suit. And what if Biden's slogan “More green energy means more green jobs” does not hold up? Mr. Biden has just experienced that a path to re-election is only possible via the rust belt – a region highly dependent on very “un-green” jobs. Republicans at home have immediately critiqued the goals as raising energy prices and destroying jobs.

Conclusion

If we put these developments in the first 100 days in the context of broader theories of international relations, we see a mixture of neo-isolationism / restraint (e.g. the withdrawal of the troops from Afghanistan), liberal internationalism (e.g. rejoining the Paris Climate Agreement or the Human Rights Council) mixed in with some elements of primacy (e.g. with the US insisting on its own ideas about the WTO AB). While the Trump administration was largely dominated by neo-isolationism in its foreign policy, the new Biden government is clearly a much stronger believer in liberal internationalism, much to the joy of most other States.

However, there are also areas where President Biden has not changed course. International trade within the WTO has been mentioned. Another example is that of the International Criminal Court (ICC). While he lifted sanctions on the ICC's top prosecutor on 2 April 2021, Secretary of State Blinken reaffirmed the US' previous critique of the ICC in general and specifically on their engagement with Iraq and Palestine. The Biden administration will not join the Rome Statute, leaving only the modest hope that the US will at least display less open hostility vis-à-vis the court.

Second, while many States are working towards human rights obligations of businesses (either in the new treaty initiative at the Human Rights Council or via national legislation such as the *loi de vigilance* in France or the *Lieferkettengesetz* in Germany), the US remain purposefully absent from any business and human rights debate. Mr. Biden has remained silent on the issue.

Finally, with a view to (im)migration, while Joe Biden has in the first 100 days proposed raising the refugee ceiling, quadrupling President Trump's historically low cap, it is equally true that due to a delay in signing a presidential decree on refugee admissions, President Biden is on track to accept the fewest number of refugees this year of any modern president – including Donald Trump.

What can we make of this analysis? Maybe it is best to remember Amanda Gorman's words, the 22-year-old poet who impressed millions of viewers with her inauguration poem:

“*if we're to live up to our own time, then victory won't lie in the blade, but in all the bridges we've made. That is the promise to glade, the hill we climb, if only we dare.*”

Joe Biden has certainly taken these words to heart in his first 100 days. However, it is easy to make promises and symbolic gestures in the first weeks of a new Presidency. The harder work lies still ahead of the President, in the next four or eight years to come.