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International Law – quo vadis?

Franziska Stahl

Over the past few years we have seen an upsurge in conflicts triggered by internal contestation of power (manifested in demonstrations and revolts staged by opposition groups and attacks by non-state armed groups), the recurrence of interstate conflict and indiscriminate terrorist attacks across the globe, including in places that had previously been spared from such violent incidents. At times of ever-closer global interconnections, intrastate conflicts that would have flown under the radar of world politics during the decades of the Cold War have implications far beyond those states directly subject to them.

The international order to maintain peace, stability and security is today increasingly challenged and international law as its guiding framework is perceived to have reached its limits: Authoritarian leaders strengthening their grip on power by taking recourse to political violence and restricting fundamental rights and freedoms, and blatant breaches of key principles of international law by states and non-state actors go largely unpunished. In fact, all too often existing rules of war are reluctantly enforced or openly disregarded with powerful states unilaterally taking coercive action. At the same time, the number of interventions in (post-) conflict situations authorized by the UN Security Council is decreasing, testimony of its growing marginalization as the sole institution entitled to legitimately authorize the use of force.

25 years after the end of the Cold War the heydays of international law seem to be over. The positive momentum felt at the turn of the

century – featuring an unprecedented number[1] of resolutions passed by the UN Security Council, the adoption (1998) and entry into force (2002) of the Rome Statute founding the International Criminal Court (ICC), and the introduction of the principle of the Responsibility to Protect endorsed by UN member states at the World Summit (2005) – has slowed down, giving way to uncounted violations and an increased fragmentation of international law.

As the international community has proven unable to come to terms with solutions to protracted and new conflicts (Libya, South Sudan, Syria, Ukraine), terrorist groups demonstrate their capacity to have an impact and influence well beyond their local strongholds and international borders are increasingly contested (trafficking and smuggling), the world is more than ever in need of appropriate rules for the international order backed by political willingness and capabilities to enforce them.

This article analyses contemporary challenges to the international order and highlights approaches to remediate them. It proceeds in a three-step approach: First, it identifies shortcomings in the current application and efficacy of international law. Second, it analyses the different incentives of powerful, emerging and fragile states to comply with international norms and to take on responsibility for the protection of international peace and security. Third, it pinpoints opportunities for reform, promoting a first things first approach focusing on topics such as counterterrorism where the interests of key decision makers and states subject to interventions converge. Based on this analysis it is argued that emerging powers and fragile states should have a stronger say in norm creation and enforcement and should take on more responsibilities to protect the international (legal) order.

International order and the legal framework for peace and security

The contemporary framework for peace and security based on international law seems to be particularly unfit to meet contemporary challenges: Following a few years characterized by consensus, the UN Security Council is again mostly divided and paralyzed over actions to take to protect international peace and security. This is even more so following disagreement over the interpretation of UN SC resolution 1973 (2011) authorizing 'all necessary measures' to protect civilians and the subsequent intervention in Libya.[2] Over the past few years, interventions in conflicts and in the internal affairs of fragile states have thus increasingly been carried out without prior authorization by the Security Council. Even where consensus authorizing intervention was reached, implementation is stalling: the traditional powers willing to commit boots on the ground to defend the international order are increasingly facing budget constraints and internal contestation, forcing governments to limit their external engagement. Across well-established democracies nationalist and populist movements are gaining public sup-

[1] Between 1988 and 2000, the number of resolutions adopted by the Security Council more than doubled. Cf. Fasulo, Linda (2004). An Insider's Guide to the UN. New Haven, Connecticut: Yale University Press.

[2] Cf. S/RES/1973(2011)

port, making it ever harder for governments to abide by and commit to internationally agreed upon rules and procedures. Whilst these may seem tedious, they actually represent some of the biggest accomplishments of the post world war II international order. By outlawing war and limiting state authority by introducing and protecting citizens' human rights, the UN Charter combined with the Universal Declaration of Human Rights and the Geneva Conventions revolutionized the international legal order, setting right before might. In today's world where threats are as global as goods and services, it is shortsighted to put national self-interest ahead of self-commitment to internationally agreed-upon rules of engagement.

Structural shortcomings and procedural deficiencies

From these observations it can be inferred that the existing legal framework to protect international peace and security has not kept up with the pace of contemporary challenges. Conflicts have become more multifaceted, involving a broader variety of actors; cleavages are ideological, political, religious and ethnic at the same time. The existing rules were not conceived for this kind of conflicts. International law does not provide for appropriate mechanisms to address changing trends of modern day warfare and has proven too slow in adapting to it.

From its very conception the international legal order was built on several cornerstones as regards its governance, subjects and content. First, the primary objective of international law was to outlaw war and regulate inter-state conflicts – at that time the most frequent form of conflict and the most imminent threat. As foreseen in the post-world War II regime, norms guiding state action and the key principles were set and implemented by a group of responsible states committed to the protection of international peace and security, i.e. the UN Security Council. In case a state violated agreed upon rules, this select body was competent to authorize the use of force as last resort, legitimizing intervention for the benefit of all. This governance arrangement is however increasingly obsolete: the permanent members of the Security Council are no longer representative of the guardians of world peace. Instead, due to their respective colonial legacies, their role in conflict resolution is often biased. In fact, in many regions it is precisely these powers that imposed the structures triggering conflict today (arbitrary borders, weak state institutions and predatory systems). While the permanent five undoubtedly dominated the international order seventy years ago, their might is today contested by emerging powers and regional power blocs.

Second and linked to this, the agreed upon rules were to be implemented and enforced by nation states, at the time the sole subjects of international law. As such the principal actors of the international systems were the ones charged with its regulation, norm setting and enforcement. Today, however, the set of actors having a stake in the international system is much more diverse, including a broad variety of non-state actors such as multinational corporations, NGOs and epistemic communities, engaged not only in norm setting but increasingly in norm implementation. In view of this growing number of actors with ever more diverse characteristics, many of the foundational blocs of the international system are today becoming obsolete. Yet, enforcement is still

contingent on member states and thus subject to the political will of nation states. Even where international courts exist they are only as strong as commitment of the constituting member states.[3]

Third, in terms of content and context, international law was conceived to regulate state-state interaction, to limit the exercise of power by means of the rule of law and to protect civilians in armed conflict. Contemporary conflicts differ both as regards constellations and the means of warfare: Intra-state conflicts are frequent and violations of international humanitarian law such as indiscriminate killing of civilians are committed by state and non-state actors alike. These examples show that the Geneva Conventions aimed at limiting cruelty in inter-state conflict are no longer sufficient for contemporary conflicts.

By implication, none of these three cornerstones of the international legal order is fitting anymore. Even the most basic rules of international humanitarian law, traditionally perceived as the least common denominator of humane treatment, are being disregarded by conflict parties: Representatives of the ICRC have been subject to kidnappings (Mali) and hospitals have been purposefully bombed (Syria, Afghanistan), etc. This is testimony of the fact that enforcement based on moral, retribution and reciprocity is not enough to bring state and non-state actors into compliance.

State practice as impediment for international law

In addition to these procedural and structural deficiencies, state practice further undermines international law. Interestingly, this is the case for three different sets of actors, albeit due to varying dynamics:

First, powerful states, i.e. generally speaking those states having contributed to the genesis of international law and IHL are increasingly negligent in its application. In fact, the very same powers that served as driving forces in the drafting of the UN Charter are today the ones weakening it. Several of the permanent members of the UN Security Council make increasingly use of executive orders, lethal autonomous weapons system and undeclared warfare, thus violating the basic rule of international humanitarian law. In view of lengthy procedures and the likely stalemate of the UN Security Council, such behavior has become more and more frequent. Whilst covert operations and unilateral action promise swift solutions, they raise significant questions with regards to accountability and the protection of civilians.

Such state practice indicates that self-commitment to international norms has become inconvenient even to those powers traditionally defending international law. By circumventing the existing structures and procedures of the international legal order,

[3] See as an example the track record of the ICC and (non-) enforcement of the arrest warrant issued for Sudanese president Al-Bashir. It shows that the implementation and enforcement of international law is still contingent on the political will of nation states. Cf. Davenport, David (2014). International Criminal Court: 12 Years, $1 Billion, 2 Convictions. Available at: http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#14f220fe6440

making recourse to unilateral action or using more select international settings (G7, EU, NATO), or exercising interventions with *ad hoc* coalitions, these states weaken international law significantly.

Secondly, authoritarian and non-democratic regimes either openly question the validity of international law or interpret it to suit their geo-political interests: Whereas international law was intended to protect peace and security and provide a framework for post-conflict reconstruction, it is now made reference to by authoritarian leaders in order to justify illegitimate action in the name of the right to self-determination. Whilst the responsibility to protect was conceived as a milestone to provide solutions to new challenges and to protect civilians, it has been unilaterally invoked in intra-state conflicts by intervening powers. The example of the Russian intervention in Crimea is only one illustration of the abuse of the norm, undermining its credibility.

Third, terrorist and non-state armed groups purposefully disregard international law and use the compliance of adversaries (often states) with IHL as weakness. Offenses such as hostage takings, beheadings, sexual enslavement, bombing, attacks on civilian aircrafts, political assassinations outlawed under IHL are committed with complete impunity, questioning the universality of these norms and creating wrong incentives for states to deviate from the norm.

Supporters and opponents of reform

The above shows that international law – as it stands – is challenged from different angles and in dire need of reform. However, in view of the new sets of actors and new types of conflict, it is valid to ask how such reforms should be undertaken. If international law were to be updated to take into account modern conflict, with *whom* should new rules be negotiated in order to grant them legitimacy and to be universally accepted? As explained above, international law is based on the assumption that those subject to it are also the ones enforcing it. If this equation is no longer valid, this poses a procedural challenge.

It is a truism of realist theory that national self-interest will always prevail over self-commitment and -constraint. Assessing how international law could be strengthened thus requires a careful analysis of the added value of international law to the respective actors currently undermining or bypassing it. What benefits do states and non-state actors gain from adhering to the basic principles of international law? If non-state actors have come to be key actors in today's conflicts, should they also be involved in setting the rules and bear responsibilities? These are complex and difficult questions – which need to be addressed in order to increase the effectiveness of international law.

Aspiring to promote international peace and security and to guarantee minimum standards, international law conceives of the state as guarantor of stability and security, legitimately representing the interests of their citizens. This assumption is however partly outdated: First, in contexts of internal contestation it is often difficult to distinguish the aggressor from the protector. Second, non-state armed groups such as

the Islamic State can sometimes prove more efficient and reliable in exercising governance and (albeit discriminately) providing basic services than state authorities, raising questions as to the legitimate representation of citizen's interests.[4]

It is clear from the above analysis that the interests of states in maintaining the international order differ. Interests of those states having set the rules are better reflected than those of states having gained independence post-colonization. At the same time, priorities of economic strongholds are distinct from countries facing civil unrest. This is further reinforced by economic powers benefiting from increasing strength of regional organizations creating level playing fields for engagement, whilst fragile states often see their authority contested from within (opposition groups) and outside (subjection to international rules, authority of regional organizations). Whereas powerful states have frequently used international law to legitimize their involvement abroad, fragile states have seen themselves increasingly forced to abide by rules in whose creation they have not been involved. Added to this is the fact that within fragile states, non-state actors can have more leverage and legitimacy than state actors, further deepening the gap between the applicable rules and the situation on the ground.

Departing from its state-centered conception, international law is easily confused as a tool made recourse to by powerful states to enforce might. Originally, it is however conceived to introduce limits on exercise of authority and should thus make states more equal rather than more different. Who are the actors most supportive of and consequently potentially most willing to reform international law? Powerful states guiding and enforcing the international order and markets have over decades insisted on the widening of international law, defending its universal applicability. Conditionalities for economic and political support have been applied to grant access to markets and facilitate foreign direct investment. Regional organizations across all continents have promoted the international legal order setting ambitious goals as regards market liberalization and protection of human rights. All this contributed to a growing acceptance of norms initially set by a rather select group of more or less alike states.

It is remarkable that the increasing contestation of international law is juxtaposed by an ever growing body of codified international law and a growing number of states signing up to it. In addition, those states having had least leverage in the genesis of international law (e.g. former colonies) feature the most avant-garde regional and national legal frameworks to protect international norms, often allowing for the direct application of international treaties. As an example, most constitutions and provisions regarding the protection of international norms stipulated in modern peace agreements are much more progressive compared to prevailing legal frameworks in many industrialized states. It thus seems that there is a particularly interest for post-conflict states to commit to the rules of the international order. The high number of treaty ratifications by fragile and post-conflict states can be explained by conditionalities and the incentive structure of the international system.

[4] On governance by the Islamic State in Iraq and Syria c.f. Mara Revkin and William McCants (2015), "Experts weigh in: Is ISIS good at governing?", The Brookings Institution. Other examples include for instance Islamist insurgents in Northern Mali.

International law provides fragile states facing internal challenges with a tool to request support to combat non-state armed groups, allowing governments to reinforce their power. Whilst such requested assistance to regain control over the state's territory based on state consent is undoubtedly in line with the spirit of the UN Charta, the inclination of the members of the intervening powers to follow such an invitation is likely to be dependent on the requesting state's resources and geostrategic relevance. At the same time, international law may also have catalyzed quests for self-determination and secessions in fragile states. Governments of fragile states may thus have an ambivalent appreciation of international law, however, their dependency on international support will in most cases create incentives for – at least ceremonial – adherence to it.

Given their domestic constraints, fragile states are unlikely to be the key drivers of reform to make international law more inclusive. But they could join forces to limit the leverage of traditional powers and support those states seeking to take on more international responsibility in their endeavors to do so. One example is expressed support of many African states for a permanent seat for Germany in the Security Council. It is those states benefitting most from international burden sharing in the protection of international peace and security that are most likely to be in favor of it. Such uprising leaders are typically either states wanting to take action in a consortium with a broad coalition rather than going it alone (like Germany) or regional powers who do not face high entrance barriers to compliance with existing rules and whose political economy benefits from a stable international system (such as Brazil).

First things first: focus on common interests

To reestablish the credibility of international law as guiding framework for peace and security, existing rules need to be consistently applied. In addition, reform efforts should focus on topics that are of common interest to all sets of actors. These are topics where consensus is most likely to be reached and reform thus most feasible.

Fighting non-state armed groups on a fragile state's territory seems to be a clear example where the interest of fragile, emerging and powerful states converge. As a consequence, this is where most scope for norm adjustment is to be expected. Ironically, it is precisely the so called "war on terror" and interventions to restore public order in fragile states that have contributed significantly to the undermining of international law as described above. Powerful states have not always been coherent in their decisions to intervene or not to intervene on behalf of a government that has come under threat.

The inconsistent application of international law has further weakened it. A comparison of external intervention shows that Security Council resolutions have been passed whenever the security (terrorism, migration) or economic interest (resources, trade routes – piracy) of the intervening powers – rather than international peace and security more generally – were considered to be at stake. This has led to wrong priorities guiding such interventions and a mismatch between the interests of interveners and receiving states, questioning the legitimacy and appropriateness of current conflict resolution mechanisms. Interventions (whether mandated by the Security Council or not) envisage to

restore peace and security and protect civilians by enforcing the cessation of hostilities and reestablishing the rule of law. Yet, often, mandates are insufficiently adapted, disregarding local needs and thus diminishing local support for interventions.[5]

Reform is thus needed both in terms of the governance structures of the international order and of the content and objectives of applicable rules. Governance must be more representative, giving responsibility to emerging powers and guaranteeing the inclusion of currently marginalized states. The long requested reform of the UN Security Council is nothing new but more pertinent than ever. Yet, it is only one important aspect of reform. International law needs to better reflect today's realities. All conflict parties irrespective of their status and all actors exercising control over local markets and individuals rights need to be bound by the same rules. Those seeking more influence and responsibility need to commit to suit the action to the word. This is true for states seeking a permanent seat in the Security Council just as much as for non-state actors contesting authority of states.

Due to the constraints inherent to the genesis of international law and its conception based on states in terms of norm-setting, implementation and enforcement and existing governance mechanisms (notably the Security Council), no drastic changes are to be expected in the near future. Yet, the international order is in dire need of reform not to lose further ground in view of recent developments and the upsurge of conflicts. The focus should therefore be put on pragmatic solutions: not striving to include non-state actors to take on responsibility for international peace and security, but to make them more accountable by reinforcing the capacity of states on whose territory they operate. Granting more power to regional leaders (e.g. Brazil, Germany, India and Japan) having shown their commitment to the protection of international peace and security over years as non-permanent members of the Security Council not only contributes to a fairer burden sharing but is also more representative of the current distribution of power.

The adoption of the principle of the responsibility to protect is one example of a rather progressive rule of international law: Not only was it pioneered by the African Union, representing many of those states traditionally less involved in the creation of international norms. Its development and codification were further lead by Canada, i.e. again an untraditional actor, striving for more responsibility. Whilst the responsibility to protect thus provides a good example of new norm creation, it is also representative of the weaknesses inherent in regulations spearheaded by emerging powers: In fact, the responsibility to protect has thus far only been enforced by the traditional powerful states, at best in coalition with emerging powers. This brief analysis illustrates that for the reform of the international legal order to be effective, emerging powers need to take on responsibility beyond the creation of norms, committing to active engagement in its enforcement.

[5] For example, the UN United Nations Multidimensional Integrated Stabilization Mission (MINUSMA) in Mali is mandated to reform the security and justice sectors in a view to combat terrorism and mitigate push factors of migration. Whilst this reflects the political motivation of troops contributing states, concerns of the local population in need of reliable and indiscriminate delivery of basic services are not taken into account, resulting in growing frustration with and opposition to the mission.

Conclusion

The current upsurge in intra-state conflicts, new constellations of power, a diverse set of actors and fast-evolving challenges to international peace and security are a clear indication that the reform of international law as guiding framework is a matter of imminent importance. As the analysis has shown, whilst incentives of states to adhere to international norms and contribute to their diffusion differ, all states without exception have an interest in strengthening international law and the international order.

Currently, those actors with the biggest stakes in influencing the international (legal) order are the ones challenging and undermining it. Yet, recognition of the shortsightedness of such behavior seems to be growing. Seeming quick fixes circumventing international agreed-upon rules never pay off in the long term. Unilateral action will always trigger questions of legitimacy and catalyze frustration and radicalization, thus risking to promote conflict instead of solving it.

In view of contemporary challenges, regulators will always need to react rather than act as those actors disregarding rules are by definition less constrained in their actions. The growing trend of populism in well-established democracies is thus particularly dangerous, setting wrong incentives for leaders promising swift solutions circumventing international law. The international system is in need of committed leaders and the consistent application of rules and adherence to minimum standards.

Reform can be facilitated by addressing first things first, focusing on those topics where interests of powerful and fragile states converge. Bringing non-state actors contesting the authority of states as key actors of the international order into compliance with international norms can be achieved if fragile states receive more support in enforcing the applicable rules.

International law needs to be strengthened by reforming both its governing structure and its content. Emerging states having proven their commitment to the promotion of international peace and security must be granted more responsibility. This allows alleviating the burden of traditional powers facing increasing economic constraints and internal contestation promoted populist leaders. For a more equitable international order to become a reality, mere contributions to norm creation are not enough. They must be matched with solid commitments to enforce the norms of the international legal order, for right to enhance accountable might.