Neither Reform nor Reconstruction

The Atrophy of International Law

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This year's conference of the European Society of International Law took place from 11 to 13 September 2025 at Freie Universität Berlin and was held under the motto "Reconstructing International Law". In their outline of the conference's theme, the organizers, Helmut Philipp Aust and Heike Krieger, delineated a historical approach to the issue of "reconstructing international law" with the following two questions: "How has international law fared after past major systemic crises? What can we learn from institutional and normative projects of (re-)constructing 'new' international law in the past?"

Can we (at least tentatively) answer these very broadly formulated questions? It is certainly useful and proper to look at the past when we examine the current state and possible future of international law, even if it is well known that historians are sceptical about whether anything can be "learned" from history in the sense that with the experience of the past one can today avoid repeating certain mistakes and instead will this time do the "right thing".

"Major systemic crises" and the "reconstruction" of international law

A preliminary question is what we mean by a "major systemic crisis" of international law. For the purposes of my following remarks, I will use the term in connection with that of a "reconstruction" of international law: a major systemic crisis is thus a crisis of international law as a system that in the past led to its "reconstruction". But what does that expression mean? As the organisers suggest in their description of today's opening session, "reconstruction" is not the same as "reform". Reconstruction goes beyond reform. The word essentially means the act of building something again, or building something anew, or putting something together again, following damage. The antonym for (re-) construction is "destruction". While a reform remains within a certain existing frame of reference which it seeks to improve, and does not break with, reconstruction leads to a profound change of an existing order — to something new, but possibly also to something that already had existed in the past. The prefix "re-", originating from Latin, can indicate reversal, but also repetition.

Another preliminary question concerns the *time frame for our reflections*: how far back do we want to go in our examination of previous systemic crises of international law? If dealing with these crises is to tell us anything today, certain general conditions (e.g., of a political and economic nature) must be relatively similar or comparable. This thought rules out, for example, referring to the end of the epoch of the ancient Greek city-states in the fourth century BC, which also put an end to the international legal order that these states had established in the Archaic and Classical periods. But even the structures and conditions of the international law of the Early Modern Age are probably too different from today's to draw any meaningful conclusions from crises of the law experienced in that period. The Thirty Years' War, which ended with the Peace of Westphalia in 1648, can be seen as a systemic crisis of the relations of European potentates and communities, but it concluded the period in which modern international law was being established, that is to say the period of its *construction*, not reconstruction. In the 18th century, the French Revolution of 1789 certainly constituted a crisis of international law, with the revolutionaries proclaiming principles which challenged the traditional European order, but not a systemic crisis answered by a reconstruction. To the other European states, the ideas of the revolution

remained unfounded and illegitimate claims which they refused to accept.

The three crises of the 19th and 20th century

This leaves us with the 19th and 20th centuries. What "major systemic crises" of international law can we identify during this period? Their number is rather small. There are primarily three, all of which are, typically enough, linked to major wars. The first crisis was triggered by Napoleon when he dissolved the Holy Roman Empire, abolished a considerable number of states (including all the ecclesiastical territories), and set out to replace the traditional European system of states with a hegemonic order dominated by France. The second major crisis is represented by the First World War, which led to the collapse of the multi-ethnic empires of Austria-Hungary and the Ottoman Empire, the establishment of numerous new "nation states" based on the new principle of self-determination, and the end of monarchical government in large parts of Europe. The third crisis is associated with the Second World War and the attempt of National Socialist Germany to subjugate the European states and nations and to abolish democracy and individual rights.

It is noticeable that all three crises were accompanied by large-scale wars. On account of this experience, we have come to associate a "major systemic crisis" of international law with war. It is true, crisis and war are not the same. The League of Nations system, for instance, was in a severe crisis long before the Second World War broke out in 1939. However, so far only intense interstate violence caused disruption sufficiently strong to lead to a reconstruction of international law. In other words, historically speaking, there has been, until today, no reconstruction of the international legal system without a preceding major war.

There are also similarities in the way these three crises were responded to. The response was partly restorative in the sense that attempts were made to reestablish the conditions or circumstances that had existed before the respective crisis. In part, however, the response was also "progressive" in nature, with the experience of the crisis being used as an argument to introduce new norms and institutions designed to prevent a similar crisis from arising in the future.

Looking at the three mentioned crises, it can be said somewhat simplistically that each time the progressive element grew stronger. While in 1815 restoration prevailed (although some of what Napoleon had created was retained or only modified), in 1919 a renewal of the international legal order was evident, with the establishment of the League of Nations and the new rules introduced by its Covenant regarding, in particular, limitations of the right to wage war, the peaceful settlement of disputes, the principle of self-determination of peoples, the new mandate system, and the protection of national minorities. Finally, in 1945, the aspects of renewal and change clearly prevailed, with the UN Charter providing for a significant restriction of the traditional sovereignty of states (especially through a general ban on war and a promotion of individual human rights) and for an integration of states into a constitutional world order.

None of the three crises led to an "end of international law." To the contrary, each time international law emerged from the crisis stronger than it had been before. Normatively, international law grew both in terms of the breadth of topics covered and in depth. And after each crisis, attempts were made to strengthen international law institutionally. After the Napoleonic era, this was done with the creation of the German Confederation (*Deutscher Bund*) and the system of the "Concert of Europe" with its series of conferences under the leitmotif of the balance of power. Following World War I, it was the League of Nations and organizations associated with it, like the International Labour Organization, which substantially enhanced the efficiency of international law.

When we say that international law emerged from each crisis stronger than it had been before, that implies a certain continuity between the law before and after the crisis, i.e., before and after the law's "reconstruction." And indeed, in all three cases (the restoration of the European state system in 1815, the creation of the League of Nations in 1919, and of the

United Nations in 1945) the essential foundations of international law, as it had developed in Europe since the 16th and 17th centuries, were not called into question. Only in 1815 was there a revolutionary break with the immediate past in the sense that, together with his Empire, Napoleon's vision of a European international order was overturned.

So we can identify an odd, and also disconcerting, pattern. There comes a major crisis, there comes war, followed by a reconstruction of international law with a strengthening of its rules and institutions — until the next crisis arises, either a hundred years later or only twenty. As international lawyers, we therefore could be tempted to welcome such a crisis as an accelerator of positive change and optimistically wait for the next one — if the entailed sacrifices had not been so great.

The "major systemic crises" of the past were initially and primarily political crises, which then also hit and hurt international law. They did not originate in the law itself, and it is unlikely that a different law could have prevented them. As deeply political crises, they also could not be resolved by legal means alone. Empirically speaking, they were settled militarily, i.e., decided in favour of the political goals of the victorious warring parties. The new, or reconstructed, law followed as an epiphenomenon. Put another way, international law as such cannot be blamed for the crises of the past, but neither can it be praised for their resolution.

Is international law currently in a major systemic crisis?

To answer this question, we first need to decide what yardstick we want to apply. If this yardstick is determined historically and we use historical examples such as the Napoleonic hegemony or the collapse of the League of Nations legal order to assess the severity of the crisis, the answer, I believe, is no. The current situation is not, or at any rate not yet, comparable to these catastrophic events of the past.

The international legal order exhibits, to use a fashionable term, a high degree of resilience. It is not easy to bring about its collapse. The main reason for this is likely to be found in the practical needs of inter-state relations, i.e., in the need for the government bureaucracies to interact with each other in a reasonably reliable manner, that is on the basis of mutually accepted rules. In that customary interaction of governments, a systemic crisis of international law comes along with very high costs and risks, which governments seek to avoid as far and as long as possible.

If our analysis is correct, this also means that the time is not yet ripe for a fundamental reconstruction of international law similar to that of 1815, 1919 or 1945. Instead, the appropriate course of action at this stage would be to reform the existing system while preserving and even strengthening its basic conditions and principles.

However, it is exactly a part of the present crisis of international law that such a consolidation by way of reform has not taken place in the past three decades. We observe a long-standing inability of the "international community" to reform key parts of the existing legal system, in particular the norms and institutions that serve to prevent war, genocide, and grave violations of human rights. When it is no longer possible to carry out essential reforms to a system, there is a growing likelihood that the system as such will fail at some point in time. Such a breakdown may or may not lead to a reconstruction of the system. This depends, among other things, on whether the constructive forces are stronger than the destructive.

At the same time, important parts of international law agreed upon in multilateral treaties since 1945 are showing signs of erosion or degeneration, with states openly violating or ignoring applicable norms or declaring them inapplicable on flimsy grounds. This gradual erosion affects, *inter alia*, the *ius ad bellum*, the definition of the right to self-defence, international humanitarian law, human rights, and refugee and asylum law. Agreement on new treaties about questions not covered by the existing rules has become very difficult. As a result, international law is increasingly being marginalised as "irrelevant" by political actors — the very actors whose actions and rhetoric have contributed to the weakening of legal norms in the first place.

The inability of states to agree on fundamental reforms of international law as developed since 1945 on the basis of the UN Charter demonstrates the relative weakness of those states which were the principal founders of the post-World War II international order. It becomes apparent that these states are no longer able to accomplish a modernization and renewal of the system they created in the wake of the Second World War. Their weakness is a consequence of structural shifts in the international distribution of power that have occurred in recent decades. The political, economic and military power of the "Western" group of states (i.e., essentially the states of Europe and North America) as compared to that of other groups has declined. In retrospect, the period following the end of the Cold War appears as a missed opportunity for the West to restore and strengthen — possibly for the last time — the international legal order of the UN Charter. It seems that the Western states, presuming that an "end of history" had arrived also in international law, overestimated their relative strength.

Another, and related, present-day symptom of crisis is the growing nationalism, or national egoism, in many parts of the world that erects boundaries of all kinds, including economic boundaries, and is directed against the international cooperation and solidarity of states envisaged by the UN Charter. It finds an expression in a militarization of foreign policy and an increasing use of a language of violence. Not every form of nationalism calls into question the system of international law established in 1945, but aggressive cumulative nationalism, which prevents agreement on significant issues, certainly does.

In past systemic crises of international law, individual states could be clearly identified as opponents of the challenged order. For example, the so-called Axis Powers (Germany, Italy, and Japan) fought against the League of Nations system and sought to replace it with a "new" international order. Today, such a confrontation is less clear-cut, which makes the threat more diffuse. Not only is the group of states opposing the order in force less easy to define, but so too is the group of reliable and vigorous supporters of the existing order. To which extent can, for instance, the United States still be counted among those supporters?

If the current challenges of international law intensify into a genuine systemic crisis, that crisis cannot find a "solution" in an inter-state war, as has been the case in the past. A large-scale military conflict involving the world's most powerful states would most probably lead to a nuclear war, which would claim appalling casualties and possibly even threaten the existence of humanity. If war is no longer a rational option, then the "method" of letting the respective victorious powers reconstruct the international order, as practised to date, also becomes obsolete.

A political or legal system cannot only disintegrate because it is opposed by enemies. It can also suffer from internal weakness, frustration, a lack of positive energy or forward-looking optimism. Thus, it can fall apart from within, or erode, in a process that can extend over a longer period of time and does not necessarily follow a linear course. Frustration can be rooted in disappointment. The more promises and expectations a legal system has generated, the greater the potential for disappointment.

There is a lot of frustration in Western societies, but even more so in the "Global South" where current international law is widely perceived as an instrument of power of the West (or North), but not as a constitutive element of world order that deserves respect because of its sense of justice or its noble goals. This (fully understandable) perception results in a gradual weakening, questioning and delegitimization of guiding principles, concepts and institutions of international law as a set of norms still mainly determined by the ideas and values of the states of Europe and North America.

If we take the various aspects mentioned together — the inability of states to reform international law, the growing egoism of states, the increasing weakness of the West, on whose ideas the present international law is essentially based, and the worldwide dissatisfaction with the fairness and nonarbitrary enforcement of international law — we must conclude that the current international legal order is highly fragile and vulnera-

ble, and could at any time plunge into a systemic crisis. This crisis would be fundamentally different in nature from the crises of the past, which involved the rise and fall of individual powers *within* the group of European and Western states, and which led to consecutive reconstructions of international law in basically one general direction. This time, a reconstruction of international law could take place in the spirit of a non-Western power — a novum in the history of international law. Eventually, international law is about to transcend the boundaries of the occidental history of ideas.

As long as current universal international law continues to exist in a status of weakness and fragility, there is likely to be (in place of improvement or reform) a rollback or dismantling of those parts of the law that are particularly controversial between opposing states and groups of states. These could include principal favourites of the West, such as multilateralism, effective international organizations, free trade, human rights, democracy, international criminal law, and climate protection. The introduction of certain values into international law, as initiated with the UN Charter, could be scaled back without other values receiving a similar universal recognition. In that sense, one cannot rule out an end of the era of "liberal" international law guided by Western political principles.

It is undeniable that today's political and legal world order no longer meets the needs of the times and may even prevent developments and decisions that are necessary for the survival of humanity. Looking back, future generations will probably wonder how long humanity clung to a division into "sovereign states" invented so long ago. What is needed is truly "creative efforts (*efforts créateurs*) commensurate with the dangers facing us", as the preamble to the Treaty establishing the first European Community, the European Coal and Steel Community, put it in 1951, repeating the words of Robert Schuman's declaration of May 1950.

Some conclusions

To sum up, there have been only a few crises in 19th and 20th century international law that can be described as "systemic" crises followed by a "reconstruction" of international law in the sense of a fundamental change of its rules and institutions. These crises did not arise in the law itself or in legal science, but were triggered by political and military developments, in particular changes in the distribution of economic and military power. No such crisis in modern times has yet led to an "end" of international law. Previous systemic crises were "resolved" by wars, the victors of which determined the parameters of reconstruction. To date, there has been no reconstruction in the form of a peaceful accommodation of differing interests and viewpoints.

Contemporary international law is in crisis, but not yet in a systemic crisis. Based on historical experience, therefore, a reconstruction of international law is not to be expected for the time being. In the foreseeable future, the existing system will continue to exist, but in the absence of meaningful reform it will also be further weakened. We must prepare ourselves for a prolonged period of stagnation and even atrophy, a progressive wasting away and marginalisation of norms and institutions built in the past. A total collapse of the system as a result of its weakness and degradation is unlikely as long as there are states that have an interest in maintaining intergovernmental relations with a certain degree of reliability and predictability, and in avoiding a very costly arrangement of pure power relations or even anarchy. However, this international law as a minimal order will not allow the most pressing issues facing humanity to be resolved.

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