

International Law under Pressure

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Continued relevance in times of hardship

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Katja Creutz

The Finnish Institute of International Affairs



Katja Creutz
Senior Research Fellow
The Finnish Institute of International Affairs

The Finnish Institute of International Affairs
Kruunuvuorenkatu 4
FI-00160 Helsinki
tel. +358 9 432 7000
fax. +358 9 432 7799
www.fia.fi

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INTERNATIONAL LAW UNDER PRESSURE

CONTINUED RELEVANCE IN TIMES OF HARDSHIP

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SUMMARY

The present international political environment is marked by multiple crises, which all have a bearing upon how international law is perceived. Whether one refers to the conflict in Ukraine or to the refugee crisis confronting Europe, there is a widespread sentiment that such events embody a crisis of international law more broadly. This is not just because states have violated their international commitments or been unable to live up to them. A deeper discontent with the international legal system seems to be increasingly prevalent among Western states as well, making international law more of an inconvenience for states than a tool for cooperation.

This analysis studies challenging developments vis-à-vis the international legal order and the merits of criticism directed against it by national policymakers. Two main criticisms that have been levelled against international law will be looked into: 1) the law's inability to take account of national interests; and 2) the law's inability to reflect new realities.

The exploration of these claims and international law's capability to respond to these concerns will inform the final discussion on whether international law is in a real crisis or not. The analysis will conclude with the finding that the main problems are to be found outside of international law itself; holders of political power should not treat international law as a nuisance, but should manifest their continued commitment to it by operating within the realm of the law and by making use of the tools provided by it in order to deal with contemporary concerns. If states choose to act outside of the law, it will not only undermine international law's authority, it will also increase uncertainty in international relations.

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Introduction

International law has always been in danger of being dismissed or diluted. Its proponents are accustomed to claims that the international legal order is not real law to begin with and that its compliance pull is unconvincing. Furthermore, contemporary international lawyers increasingly have to deal with structural challenges within the law itself: the traditional state-centrism, which underpins much of the law, seems to fit badly with the rise of non-state actors and the multitude of issues to be regulated. The tension between state sovereignty and the protection of rights also continues to haunt much of the international law debate.

But there are also other concerns that are more acute in nature, and which international law needs to address. The massive influx of refugees has generated demands for revision or dismissal of the international refugee regime, the significance of the recent treaty on climate change has been belittled, and human rights are considered a nuisance when states respond to terrorist organizations and their acts, for instance. Recent global developments have given rise to a more critical attitude towards the international legal order even among Western political leaders who, as principal authors and benefactors of this legal order, have not exactly been in a position to question its inequity or illegitimacy. In effect, there seems to be less genuine commitment to international law than before among states that have generally been favourably disposed towards it.

Whether the international legal order really is in crisis or not as a result of the numerous contemporary incidents and challenges that have placed the global system under stress, suffice it to say that there is a perception of a crisis, which needs to be addressed.¹ This analysis will therefore take issue with the anti-international

law sentiment that emerges in times of flux, and which has caused several states to question the utility and appeal of the international legal order. The analysis will not discuss the more profound question concerning international law's capacity to induce compliance, nor will it address the law's internal challenges regarding, *inter alia*, legal subjectivity.

In exploring the continued relevance of international law in exceptional times, the focus will be on the causes of the current crisis mentality, the criticism levelled at international law by national policymakers, and the question of whether the critique is valid or not. It will also seek to address the implications of the alleged crisis for the international legal order, and will discuss whether international law will emerge all the stronger for recent incidents that have called its role and importance into question.

A hardening climate

Challenging developments

There are several developments in international relations that have contributed to the pressure that international law is increasingly under to demonstrate its relevance to contemporary concerns. First, economic hardship is one contributory factor to the so-called crisis of international law. In 2008–2009 the world experienced its worst economic recession since the 1930s and the lack of economic growth has led several states to undertake wide austerity measures.² As a result, cuts have been made in public spending and the overall climate has become harsher, with vulnerable and marginalized groups among the hardest hit. This has affected the realization of international human

1 Richard Goldstone, 'The Crisis in the Implementation of International Law', 44 *Case Western Reserve Journal of International Law* (2011) 13–39 at 26.

2 Report of the United Nations High Commissioner for Human Rights, UN Doc. E/2013/82, 7 May 2013, at 7.

rights law in particular,³ which is assumed to be too costly because it entails social, legal and institutional reform, including the building of an operative justice system. As a consequence, the rights of disabled persons have been cut back, for instance, as have the rights of asylum seekers to legal aid. It seems that human rights are assumed to be a luxury that states can afford mainly in economically good times. Some states have even suggested that the protection of human rights hinders economic growth,⁴ and that developing states simply cannot afford to uphold human rights because they are so costly.⁵

A second development that has clearly affected international law is the changed security environment following the 9/11 terrorist attacks on US soil. Transnational terrorist networks have become increasingly prevalent, and terrorist attacks are no longer limited or isolated acts, but designed to cause widespread casualties while forcing states to adopt authoritarian practices. Attempts to quell terrorism and brutal non-state groupings, such as Al Qaeda, ISIS or Boko Haram, have led to the 'adoption of policies and practices that exceed the bounds of what is permissible under international law and

result in human rights violations'.⁶ Legislative changes have been made in several countries, paving the way for mass surveillance of citizens, banning undesirable acts, prohibiting organizations or restricting basic rights and freedoms in other ways.⁷ The fight against terrorism has also affected the rules on the use of force,⁸ as many states have engaged in extraterritorial or cross-border use of force in the name of the 'war on terror', thereby questioning the inviolability of the law on the use of force. Similarly, practices such as extra-judicial or targeted killings have emerged in the grey zone of acceptable anti-terrorism measures, as demonstrated, for example, by the killing of Osama bin Laden.

A third factor affecting international law's relevance is the rise of nationalism and of populist as well as far-right parties. As a consequence, politics has become increasingly polarized in many European countries. The French Front National, Hungarian Jobbik, and Dansk Folkeparti in Denmark are just a few examples of the rise of new political parties that seek to challenge the established ones. The agenda of these parties varies, but many of them are nationalistically oriented and cut across the traditional left- or right-wing party division. Whereas some parties mainly oppose the European Union and the values it represents, others display ethnic nationalism characteristics and even fascistic traits.

Many of these parties have been able to influence their countries' political agendas, and some have assumed governmental responsibility with electoral support. Typically, the

3 Report of the United Nations, supra note 2, esp. paras 2-7, 70; Council of Europe, Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis', Issue Paper, November 2013; Viljam Engström, 'The Political Economy of Austerity and Human Rights Law', Institute for Human Rights Working Paper No 1/2016, Åbo Akademi University, Finland.

4 Overseas Development Institute Briefing Paper, 'Economic Theory, Freedom and Human Rights: The Work of Amartya Sen', November 2001, at 3.

5 Eric Posner, 'Human Rights Treaties Are Expensive to Follow', post in 'Have Human Rights Treaties Failed?', Room for Debate, *New York Times*, 28 December 2014, www.nytimes.com/roomfordebate/2014/12/28/have-human-rights-treaties-failed, accessed 31 March 2016.

6 Sabine von Schorlemer, 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism', 14 *European Journal of International Law* (2003) 265-282 at 274.

7 Ibid., at 275.

8 Christian J. Tams, 'The Use of Force against Terrorists', 20 *European Journal of International Law* (2009) 359-397 at 359-360.

politics of these parties emphasizes national solutions over international ones, and the socio-economic well-being of their own nation takes precedence over international cooperation and legal frameworks. This trend is further exacerbated by phenomena such as terrorism, radical Islamism and the current migrant crisis in Europe,⁹ which all fuel xenophobia and intolerance. Consequently, these parties often seek to question many prevailing international legal obligations. For example, the Danish Dansk Folkeparti has demanded that Denmark should renegotiate its obligations under the UN Refugee Convention, the European Convention on Human Rights and the 1961 Convention on the Reduction of Statelessness, or ultimately withdraw from the respective conventions.¹⁰ Its representatives have similarly dismissed the international conventions regulating warfare as ridiculous, and part and parcel of the tyranny of international conventions.¹¹

Branches of law under attack

Certain branches of international law have particularly come under fire due to the interconnected developments mentioned above. Legal regimes of a humanitarian character are largely experiencing less commitment and even outspoken defiance. To start with, the migration crisis has caused political leaders to question the meaningfulness of the refugee regime. In fact, the 1951 UN Refugee Convention – the very

core of international refugee law and one of the oldest conventions on rights – is being questioned. Policies that are outright violations of international refugee law are being undertaken by several states and law-breaking practices are being praised as efficient and attractive.¹² Austria, along with other states, has closed its borders to asylum seekers, for example, in violation of the UN Refugee Convention,¹³ Australia is continuing its practice of detention centres irrespective of concerns expressed by the United Nations Refugee Agency (UNHCR), and Greece is failing to follow the Dublin Agreement, which requires the country to register incoming refugees. Whereas some of these international law violations are the result of an inability to live up to commitments, many are intentional violations of international refugee law because the perception is that international law needs to be put aside in the name of national interests.

International human rights law is also under attack both verbally and in state practice. States disregard human rights commitments, while human rights organizations and defenders are disrespected, and the rise of brutal non-state actors has led to widespread human rights violations. Amnesty International has described the current situation as a ‘global assault on people’s basic freedoms, with many governments brazenly breaking international law and deliberately undermining institutions

9 Taina Tervonen, ‘Äärioikeisto ajan hengessä’, 53 (1) *Ulkopolitiikka* (2016) 34–37 at 36.

10 ‘Her er de tre internationale aftaler, som DF vil have Danmark ud af’, 10 August 2016, nyheder.tv2.dk/politik/2016-08-10-her-er-de-tre-internationale-aftaler-som-df-vil-have-danmark-ud-af, accessed 17 August 2016.

11 ‘Dansk Folkeparti: Krigens love skal laves om – de er “dybt latterlige”’, 25 July 2015, politiken.dk/indland/politik/ECE2770370/dansk-folkeparti-krigens-love-skal-laves-om--de-er-dybt-latterlige/, accessed 17 August 2016.

12 ‘Australia’s Brutal Treatment of Migrants’, *New York Times*, 3 September 2015, www.nytimes.com/2015/09/03/opinion/australias-brutal-treatment-of-migrants.html, accessed 17 August 2016.

13 On the subject of border closure and prevailing law, see, for example, UNHCR, ‘No Entry! A Review of UNHCR’s Response to Border Closures in Situations of Mass Refugee Influx’, PDES/2010/07, June 2010, esp. at para. 364.

meant to protect people's rights'.¹⁴ Russia, for example, refuses to accept the judgments of the European Court of Human Rights (ECTHR) as binding by allowing its own courts to overrule its rulings;¹⁵ the EU is alleged to have violated both international and regional human rights law with its questionable agreement with Turkey on migrant returns; and China is campaigning to clamp down on human rights lawyers and activists.¹⁶ Whether the disregard of human rights is a counter-reaction to its accomplishments, as some have claimed,¹⁷ is debatable. Rather, it says something about a hardening climate where the foundations of liberal democracies are being disputed.

The universal rules on international humanitarian law are also being increasingly contested and disregarded. This not only relates to the development of new means of warfare, such as drones or automatic weapons systems, but also to a deliberate deviation from legal norms

due to security threats. US contempt of the prohibition of torture, which has been widely regarded as a peremptory norm of international law, was openly manifested in the so-called Torture Memos in 2002. In a similar manner, the establishment of the military detention centre in Guantánamo showed a flagrant disregard of international law. In many conflicts, such as in Libya and Syria, all warring parties have committed war crimes, and it seems that violations of the laws of armed conflict are becoming more commonplace. The concept of hybrid warfare also serves to challenge the laws of armed conflict by relating to acts that are outside the parameters of traditional armed conflict.

However, non-humanitarian norms are also being called into question. As regards international environmental law, the capability of an international agreement to help fight climate change is widely debated. The Paris Agreement, which was adopted in December 2015, has been described as 'just worthless words'.¹⁸ Its legally binding character in particular has come under attack as it has been claimed that it is not worth the paper it is written on.¹⁹ When it comes to the rules regulating the use of force, many breaches have occurred in recent decades with the Russian intervention in Ukraine being the most far-reaching example. In particular, the flagrant breaches of the rules that form the

14 Statement made by Secretary-General Salil Shetty of Amnesty International at the launch of the Amnesty International Report 2015/16, 'The State of the World's Human Rights', Amnesty International, 2016, www.amnesty.org/en/latest/research/2016/02/annual-report-201516/, accessed 11 April 2016.

15 Alexandra Sims, 'Vladimir Putin Signs Law Allowing Russia to Ignore International Human Rights Rulings', 15 December 2015, *Independent*, www.independent.co.uk/news/world/europe/vladimir-putin-signs-law-allowing-russian-court-to-overthrow-international-human-rights-rulings-a6773581.html, accessed 11 April 2016.

16 Amnesty International, 'China: Authorities Intensify Crackdown against Critics with Deplorable Jail Terms for Rights Activists', 29 January 2016, www.amnesty.org/en/latest/news/2016/01/china-authorities-intensify-crackdown-against-critics/, accessed 11 April 2016.

17 KIOS Foundation, 'The Shrinking Space for Civil Society and Human Rights Defenders', KIOS Seminar Report 2012, at 6.

18 Oliver Milman, 'James Hansen, Father of Climate Change Awareness, Calls Paris Talks "A Fraud"', *Guardian*, 12 December 2015, www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud, accessed 11 April 2016.

19 Eija-Riitta Korhola, 'Innostus Pariisin sopimukselta on ylimitoitettua', 14 December 2015, www.korhola.com/lang/fi/2015/12/innostus-pariisin-sopimukselta-ylimitoitettua/, accessed 11 April 2016.

cornerstone of international law have triggered claims that international law is in crisis.²⁰

Arguments raised against international law in exceptional times

The stability and strength of international law are to a certain extent always dependent on the political attitudes of states, which may vary over time. Some governments or polities are simply more law-abiding than others, as are various national political parties.²¹ Yet in times of exceptionality, both those political regimes that value international law and those that do so less, may circumvent international law due to the changed political landscape. This has occurred, for example, in response to the migration crisis. States have deviated from both the letter and the spirit of international refugee law, and some have expressly stated that it is difficult in these circumstances to abide by the law.²² Others have gone as far as to state that they will not apply international refugee law at all if they are faced with the collapse of

neighbouring states.²³ Clearly, when it becomes too costly for a state to abide by its obligations in comparison to the benefits it may derive, this may trigger violations.²⁴

Such a development should be taken seriously, as an ignorant or hostile attitude towards international law may spread and the ramifications may become greater if many states become less respectful of international law.²⁵ Two contemporary practices that have become more prevalent despite their unlawfulness are the disregard shown by the United States towards the peremptory nature of the prohibition of torture, and the previous practice of the European Union returning asylum seekers' ships without processing their asylum requests.²⁶ In response, one should attempt to discuss the critique raised against international law by usually law-abiding states, which are now questioning the ability of the international legal order to take account of national interests and to respond to changed circumstances and needs. In the following section, each of these aspects will be explored in turn.

Incompatibility with national interests

States that have generally been considered sympathetic towards international law in the past have now played the national interest card due to recent challenges in international affairs. The migration crisis in Europe has prompted

20 Jeffrey Sachs, 'The Ukraine Conflict and the Crisis of International Law', 24 March 2014, *Project Syndicate*, www.earth.columbia.edu/sitefiles/file/Sachs%20Writing/2014/Ukraine%20and%20the%20Crisis%20of%20International%20Law%20by%20Jeffrey%20D.%20Sachs%20-%20Project%20Syndicate.pdf, accessed 7 April 2016.

21 Başak Çali, 'International Law in International Relations: What Are the Prospects for the Future?' in Başak Çali (ed.), *International Law for International Relations* (Oxford University Press, 2010) 379–394 at 383–384.

22 Speech given by Finnish President Sauli Niinistö at the opening of Parliament, 3 February 2016, www.presidentti.fi/public/default.aspx?contentid=341374&nodeid=44810&contentlan=1&culture=fi-FI, accessed 11 April 2016).

23 'Norska regeringen: Vi överger folkkräften om Sverige kollapsar', 21 February 2016, *Fria Tider*, www.friatid-er.se/norska-regeringen-vi-verger-folkr-tten-om-sverige-kollapsar, accessed 11 April 2016.

24 Laurence R. Helfer, 'Flexibility in International Agreements' in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art* (Cambridge University Press, 2012) 175–196 at 176.

25 Çali, supra note 21, at 384.

26 Çali, supra note 21, at 384.

national policymakers to state that international refugee law is too lenient or idealistic, and that implementing its rules flies in the face of the national interests of their own people or European values. For example, Hungarian Prime Minister Viktor Orbán has rejected the application of international refugee law based on the argument that the Hungarian people have different interests and values.²⁷ The same applies to international human rights law. The future commitment of the United Kingdom to the ECHR has been widely discussed, as leading national politicians have seen it as detrimental that the convention and its implementing body, the ECtHR, takes precedent over the national parliament.²⁸ Similar sentiments have been expressed with respect to international criminal justice and the International Criminal Court (ICC). African state parties have threatened to withdraw from the Court on different occasions based on its alleged bias against Africa and supposed disrespect for the continent.

National interest is often contrasted with international legal obligations, and indeed frequently so when it comes to fighting terrorism or handling the migration crisis. There are nonetheless several counterarguments against the claim that international law fails to take account of national interests. Firstly, states generally make the law themselves or freely choose to accede to the law, which means that the decision to be bound by the law has actually been considered to be in the national interest of

the state after careful consideration. Secondly, abiding by the law in general should be seen as a value in itself. In the long run, it is in the interests of all states that the law prevails.

The authority of international law should be assumed based on the participatory process of making it; since states have acted as international law-makers they should also ‘embody special duties of respect for legality’ because of this status.²⁹ Moreover, states not only create the law, they also enforce it, which means that the international legal system depends upon states.³⁰ In other words, states are both the source of international law as well as its guardian.³¹ The state thus has a certain responsibility to uphold the rule of international law, but at the same time, it has a responsibility towards its people on whose behalf it acts. This dual position of the state is unproblematic when the rule of international law coincides with the interest of the state, but may become troublesome when the state is under the impression that international law is at odds with its national interests.

However, the international law-making process ensures that states are in control of what they sign up to exactly. The negotiation process allows the state to participate in the framing of obligations, and the act of ratification provides the state and its leadership with a real opportunity to scrutinize the text and decide whether it approves. Reservations are a further means of mitigating domestic concerns. There is, however, some merit in the claim that states no longer control all aspects of the development of legal norms that bind their territory. Several changes in international law-making have taken place in recent decades that have made

27 Christopher Harress, ‘Hungarian Prime Minister Says Refugees Will Harm European Values’, *International Business Times*, 24 October 2015, www.ibtimes.com/hungarian-prime-minister-says-refugees-will-harm-european-values-2155108, accessed 17 August 2016.

28 ‘UK Must Leave European Convention on Human Rights, Says Theresa May’, *Guardian*, 25 May 2016, www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum, accessed 17 August 2016.

29 Jeremy Waldron, ‘The Rule of International Law’, 30 *Harvard Journal of Law & Public Policy* (2006–2007) 15–30 at 23.

30 *Ibid.*, at 24.

31 *Ibid.*, at 23.

international law-making more multi-faceted. In practice, '[t]he traditional image of the states as masters of treaties' may insufficiently reflect the current reality.³² This should, however, not be understood solely as a negative tendency; the delegation of power can be monitored,³³ while it ensures dynamic responses to social problems.

Another aspect of the claim that international law disregards national interests and should hence be set aside is more profound and long-term. It may well be that some international rules, such as those regulating the status and rights of refugees, would be stricter if drafted today,³⁴ but any efforts to undermine substantive rules of international law simultaneously weaken the international legal order, especially if states are looking to unilaterally deviate from it. The preservation of international law has a value in itself, namely protecting stability in international relations. First and foremost, if states were allowed to unilaterally decide if and when to apply international law, international relations would destabilize as the international legal order is built upon reciprocity. States rely on and expect other states to live up to their commitments, and if one cannot predict how states will behave in specific matters, co-existence and interdependence will become much harder. Why else would Finland, for example, call Russia's attention to its obligations not to allow people without a visa to cross the Finnish-Russian border?

As has been said, 'there is an inherent trade-off between domestic flexibility and foreseeability

of relations between states':³⁵ unless a state wants to live in an unpredictable and isolated world, it must rely on and abide by international law. Even the most powerful and influential states need international law for processes such as trade, diplomatic protection, sovereign immunities,³⁶ or even environmental protection. Therefore, it cannot be said to be in the interests of national policymakers to simply side-track international law as the long-term consequences would be detrimental.

It has been claimed that '[c]ompliance with international law for the sake of complying with international law is naïve and idealistic',³⁷ but such arguments must be refuted. What is important from the perspective of the trustees of the state, the people, is that the state maintains its general law-abiding mentality. It cannot be in the interests of the people of any country to support an unconstrained government as it could pose a danger to the freedoms people enjoy.³⁸ There is no inherent value in maximizing the freedom of the state by not following national or international laws.³⁹ Hence the law, whether national or international, should not be treated as 'an inconvenience to

32 Anne Peters, 'Membership in the Global Constitutional Community' in Jan Klabbers, Anne Peters and Geir Ulfstedt, *The Constitutionalization of International Law* (Oxford University Press, 2009) 153-262 at 209.

33 Oona A. Hathaway, 'International Delegation and State Sovereignty', 71 *Law and Contemporary Problems* (2008) 115-149 at 148-149.

34 President Niinistö, *supra* note 22.

35 Başak Çali, *The Authority of International Law: Obedience, Respect and Rebuttal* (Oxford University Press, 2015) at 115.

36 Çali, *supra* note 21, at 382.

37 Julian Ku, 'Russia Reminds the World (and International Lawyers) of the Limits of International Law', *Opinio Juris* Blog Post, 2 March 2014, opiniojuris.org/2014/03/02/ukraine-russia-international-law-governing-use-force/, accessed 12 April 2016.

38 Jeremy Waldron, 'The Rule of International Law', 30 *Harvard Journal of Law & Public Policy* (2006-2007) 15-30 at 18.

39 *Ibid.*, at 19.

be ignored',⁴⁰ but as a guarantor of rights and duties.

Inability to reflect new realities

An important aspect of the critique against many international legal rules in times of turmoil is that they remain static and incapable of reflecting changed circumstances or realities on the ground. This criticism particularly concerns international legal commitments expressed in multilateral treaties, the majority of which are meant to be enduring and not temporally limited.⁴¹ As a consequence, it is often asserted that international law is a static legal system that cannot take account of changed circumstances, and should therefore be ignored if the circumstances surrounding the regulated issue in question change substantially. Lately, such arguments have been raised in connection with the refugee and migration crisis testing Europe when state leaders have called for 'adjusting the rules of the game'.⁴²

International law seeks through different means, either collective or unilateral, to guarantee the flexibility of its rules and compliance with them. First, it needs to be recognized that many international law regimes have opened rules that leave states a certain margin of appreciation, or room for manoeuvre, when it comes to implementation.⁴³ In fact, the very purpose of framework conventions or so-called

codes or charters is to guarantee contracting parties as much freedom as possible to take national concerns into account.⁴⁴ Second, there are formal and informal flexibility mechanisms in international agreements that are far from symbolic provisions,⁴⁵ and that make it possible for national policymakers faced with internal opposition to achieve room for manoeuvre with respect to the relevant regime or rules under it.

When the circumstances surrounding an obligation under international law change, state parties are faced with a number of alternatives to choose from. When it comes to treaty obligations, the most formal way to proceed is treaty amendment, which means that all treaty parties agree upon revising the treaty according to the rules laid down in the treaty itself.⁴⁶ Thus, for example, Canada and the United States are currently contemplating the renegotiation of the treaty governing the management of the Columbia River so that the protection of ecosystems could be better taken into account. Admittedly, bilateral treaty amendments are easier to make than changing conventions with multiple parties, but multilateral treaty amendments also frequently take place: For example, the EU member states have on various occasions amended the Treaty on the European Union, and the state parties to the ICC made amendments to the crime of aggression under the Rome Statute in 2010.

But changes to treaties need not always be so formal. In many instances, changes are made via interpretation, and take place over time. Such interpretation may be the result of findings from international courts or organizations overseeing implementation, or it may be made

40 Ibid., at 27.

41 Emmanuel Voyiakis, 'International Treaties' in Başak Çali (ed.), *International Law for International Relations* (Oxford University Press, 2010) 99–121 at 114.

42 Patrick Kingsley, 'UN Backlash against Call to Scale Back Geneva Convention on Refugees', *Guardian*, 6 January 2016, www.theguardian.com/world/2016/jan/06/un-backlash-against-call-to-scale-back-geneva-convention-on-refugees, accessed 17 August 2016.

43 Çali, supra note 35, at 104.

44 M. J. Bowman, 'The Multilateral Treaty Amendment Process – A Case Study', 44 *International and Comparative Law Quarterly* (1995) 540–559 at 540.

45 Helfer, supra note 24, at 190.

46 Jan Klabbers, *International Law* (Cambridge University Press, 2013) at 57.

by way of auto-interpretation, where a state declares its one-sided interpretative aims. An example of the former case is the ECHR, which has been interpreted by the ECtHR as a living document trying to adapt to present-day realities. During the conclusion of the ECHR, nobody envisaged it as a means of protecting the rights of sexual minorities, but today it has been interpreted to that effect. One may also seek to achieve consensus on how to interpret treaties in force through informal processes or consultations. For instance, the UNHCR invited states and other stakeholders to global consultations on the UN Refugee Convention in 2001, with the precise aim of strengthening the refugee regime on unclear issues.⁴⁷

Treaty law also recognizes the existence of exceptional situations. So-called escape clauses may give the state the right to temporarily withhold abidance in exceptional circumstances.⁴⁸ Such clauses have been used, for example, in international trade law and human rights law. In the latter legal category, derogation clauses are employed to take account of exceptional situations, such as a state of emergency, during which a state may derogate from its obligations if it adheres to substantive and temporal limitations, as well as other procedural requirements. There are also specific doctrines and excuses for not fulfilling one's international legal obligations under certain limited situations. The controversial doctrine of *rebus sic stantibus* states that in the event of a fundamental change in circumstances, a state has the right to withdraw or terminate a treaty under very limited conditions.⁴⁹ Moreover, self-defence, necessity or *force majeure* may, for example, constitute

excuses for the wrongful behaviour of states, but only under very strict conditions.⁵⁰

The existence of procedural rules of international law, which allows for changes to be made in the law or even the unmaking of law, thus seeks to guarantee that instead of the unilateral rebuttal of the law, its tools are used to actively change it. Treaties are constantly negotiated or renegotiated, complemented or even abandoned if they have become obsolete. The law of dispute settlement also gives parties the opportunity to challenge interpretations of the law or acts that are considered unlawful. Ultimately, a state can choose to leave a treaty which no longer serves its interests, often recognized in and regulated by the treaties themselves. National policymakers must therefore realize that international law cannot be avoided; even if one wants to be released from commitments to substantive law, one must follow procedural rules.

Consequences of pressure

The recent criticism levelled against several branches of international law, coupled with state practice deviating from or not implementing the law, warrants a discussion about the capability of international law to respond to contemporary developments. It also calls for a discussion on how this pressure affects international law as a whole, and some commentators have actually gone as far as to state that international law is in crisis.⁵¹ The crisis of international law has nevertheless been proclaimed at regular intervals and international

47 UNHCR, 'Prima Facie: Global Consultations on International Protection', October 2002, at 1, www.unhcr.org/3d98491d4.html, accessed 13 April 2016).

48 Helfer, *supra* note 24, at 186.

49 Article 62 of the Vienna Convention on the Law of Treaties, adopted 22 May 1969, entered into force 27 January 1980, 1155 United Nations Treaty Series 331.

50 Articles on the Responsibility of States for Internationally Wrongful Acts, *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN Doc. A/56/10 (2001), Chapter IV, Arts 21, 23 and 25.

51 Sachs, *supra* note 20.

law has, in fact, been described as a ‘discipline of crisis’.⁵²

Undoubtedly, exceptional times have a bearing upon the international legal order because they often involve breaches of the law, thus giving rise to disputes surrounding specific legal questions. But mere breaches do not render international law irrelevant or meaningless; absolute compliance is not required for the existence of a rule of international law.⁵³ Instead, unclear situations or specific developments may serve as catalysts for change.⁵⁴ During times of pressure, legal rules are discussed, upheld, rejected or modified. Thus, crises are said to be good for the international legal order because they generate the progressive development of international law. For example, the Kosovo crisis in 1999 triggered a wide discussion on the right to humanitarian intervention, which gave impetus to the development of the Responsibility to Protect doctrine. Similarly, the occurrence of terrorist attacks in the new millennium has affected the law on the use of force, which has come to embrace new threats. The concept of an ‘armed attack’ did not originally embrace attacks conducted by non-state groups, but today many scholars and practitioners are willing to include terrorist attacks as a basis for the right to self-defence.

But exceptional times or crises may also have an adverse effect on the development of international law. International incidents may start with some states breaching a specific rule of international law, which may over time lead to a pattern of violations by many states,

thus questioning the very existence of that rule.⁵⁵ In other words, the danger is that non-compliance will turn into non-law,⁵⁶ although it would be difficult to point to such a decisive turning point. For example, the demise of the prohibition against the threat or use of force embodied in Article 2(4) of the UN Charter has been proclaimed several times since 1945,⁵⁷ yet most international legal scholars would (still) accept the rule as the cornerstone of international law. What is perhaps more important for the overall development of the international legal order is that crises often concern issues of war and conflict, thereby limiting interest to a few branches of international law,⁵⁸ or even narrow legal questions. More structural and less visible problems, such as violence against women or poverty, are not equally attractive to international lawyers. As a result, international law may degenerate and counterintuitively become static due to the focus on crisis.⁵⁹

Clearly, international incidents and exceptional times must be seen as something more than merely opportunities to pass judgment upon potential law-breakers. In times of flux, international lawyers and advocates must emphasize the overall importance of legality and instruct on the proper tools for dealing with rules that are felt to be outdated. Rhetoric questioning the law, and practice that fails to abide by it without attempting to remedy prevailing problems, will only increase uncertainty with regard to particular regimes. The decision to stay within the confines of the law and to work with the

52 Hilary Charlesworth, ‘International Law: A Discipline of Crisis’, 65 *Modern Law Review* (2002) 377–392.

53 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, at para. 186.

54 Jonathan Charney, ‘Anticipatory Humanitarian Intervention’, 93 *American Journal of International Law* (1999) at 834–841 at 836.

55 Michael J. Glennon, ‘How International Rules Die’, 93 *Georgetown Law Journal* (2005) 939–991 at 960.

56 *Ibid.*, at 960–961.

57 Thomas Franck, ‘What Happens Now? The United Nations after Iraq’, 97 *American Journal of International Law* (2003) 607–620 at 610.

58 Charlesworth, *supra* note 52, at 386.

59 Charlesworth, *supra* note 52, at 377.

available tools nevertheless rests with political powers. The problem thus appears to be not the law itself, but rather the choices made by those exercising political power. At the end of the day, the revision of treaties is primarily a matter of politics and diplomacy.⁶⁰

Indeed, it seems that national policymakers are doubtful about the mechanisms of international law,⁶¹ or that they do not really want to change the rules of the game,⁶² but rather to play without rules altogether. In other words, exceptional times provide an opportunity for power-holders to seek a diminished set of rules constraining their behaviour. However, the reluctance to engage in a constructive process to settle issues or replace outdated law may be much more harmful to international law in the long run than mere violations of it.⁶³

Political will is essential for making new, amending existing, or ending old law. Different states may have different incentives to engage in renewal and it is often claimed that opening up treaties is like opening Pandora's Box: at the end of the day the whole treaty may be destabilized. The fact that the Dublin Regulation, which stipulates that asylum seekers must be processed in the first country of arrival, has broken down has not yet resulted in commonly agreed new rules on more reasonable ways of sharing the responsibilities for refugees seeking protection. Political leadership and

decisiveness are required in order to replace the Dublin regime; the inability of states to agree upon how things should be done is not a failure of the law *per se*, but rather a demonstration of the lack of will to make new, functioning rules.

Conclusions

Although the alleged crisis of international law may be overstated to a certain extent, it appears to be true that international law has been under increasing pressure lately from national policymakers seeking to question the law's relevance to current global affairs. Two options remain for these powers: either to stay within the confines of international law and act in accordance with its substantive and procedural norms to implement it, and to seek to influence the law in cases where it is considered to be malfunctioning, or to abandon international law altogether. The latter option would mean forsaking a way of cooperating with other actors in the international arena,⁶⁴ which would leave states isolated at times when collaboration is truly essential. As this is not a viable alternative, politics should therefore not be conducted at the expense of international law.⁶⁵ Holders of political power need to demonstrate their continued commitment to international law, both politically and financially, instead of painting the law as imposing itself upon them, leaving them without options on how to act in challenging times. This especially concerns states that have generally been favourably disposed towards international law and have expressed their commitment to the rule of international law. The continued relevance of international law can be preserved only if responsible political leaders stay loyal to the idea that international agreements are in touch with reality.

60 Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press, 2003) at 601.

61 For example, Finnish President Niinistö has called attention to the slowness of treaty amendment in responding to acute situations. See President Niinistö, *supra* note 22.

62 Tams, *supra* note 8, at 373–374.

63 For similar views, see Eric Posner, 'Jeffrey Sachs on the "Crisis of International Law"', Blog Post 26 March 2014, ericposner.com/jeffrey-sachs-on-the-crisis-of-international-law/, accessed 13 April 2016.

64 Çali, *supra* note 35, at 115.

65 Çali, *supra* note 21, at 383.

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