

Preventing the Past

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Introduction

It is part of human nature to learn from past experience. At the same time, we possess the ability to act with foresight even in situations where we cannot build on personal experience. We can act either on the basis of the experience of others or on the basis of inductive logic. We are careful when crossing the street even if we haven't been in collision with a vehicle in the past. We will try to avoid situations which we know to be dangerous as a matter of common sense. In this way, most people are able to avoid most calamities most of the time.

What works reasonably well for individuals is much more difficult to achieve collectively. A look at the history of international relations over the last hundred years suggests that the international community has an inherent inability to act with foresight. As a consequence, major changes in the international legal system were invariably reactions to past disasters.

It is debatable to what extent these disasters were predictable. One can always discover omens with hindsight. Yet it is undeniable that reactions to major calamities tend to focus narrowly on their perceived causes without addressing wider structural issues.

The League of Nations

The point is best illustrated by looking at the two major political international institutions created during the first half of the twentieth century. The League of Nations was a reaction to World War I which was perceived as a diplomatic accident. Nobody had wanted or planned it. Basically well-meaning politicians had lost control of the overall situation leading to what was then the biggest carnage in human history.

This led to the creation of a mechanism that was designed to prevent a recurrence of the events of 1914. The Covenant of the League of Nations did not outlaw war or the use of force but merely provided procedures for the peaceful settlement of disputes. It preserved the sovereign right to go to war in case the other side refused to submit to these procedures or failed to comply with their outcome. In addition, it imposed a three-month waiting period before war was permitted. This was designed to cool tempers and to provide an opportunity for rational reflection and negotiation.

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Perhaps this mechanism would have worked in 1914, but it certainly failed in 1939. The conditions that the drafters of the Covenant of the League of Nations had in mind were not those that led to World War II. That war was not an accident among well-meaning politicians but premeditated and planned by a ruthless regime.

The United Nations

The reaction to World War II was the creation of a mechanism designed to prevent a recurrence of the events of 1939. The situation that led to World War II evidently shaped the concept of collective security underlying the United Nations Charter. That concept is directed at lawless outsiders that must be brought to bay by concerted action. The UN Security Council, on behalf of the entire membership, was to take decisive action against troublemakers – if necessary, by military means. Member States were to provide these means under special agreements. A Military Staff Committee consisting of the Chiefs of Staffs of the permanent Members of the Security Council was to coordinate the employment of military forces by the Security Council.

Perhaps such a mechanism could have stopped Nazi Germany in 1939 if employed decisively and effectively. As it happened, it was never put into operation as planned. During the period of the Cold War, superpower rivalry paralyzed the Security Council. Even after the fall of the iron curtain in 1990, the Security Council never fully assumed the powers foreseen in the Charter; it never took military enforcement action and States never put forces at its disposal for that purpose.

Instead, the United Nations has reacted in a stopgap manner to a variety of situations. The concept of peacekeeping operations was conceived to deal with crises not envisaged in the Charter. More recently, the Security Council has resorted to authorizing Member States or groups of Member States to take military action on its behalf. In this way, the United Nations has functioned not as a constitutional framework for a peaceful world, but rather like a fire department that reacts to emergencies as they arise.

Terrorism

At present, the dominant theme in the area of international security is terrorism. Again, no decisive action was taken before 11 September 2001. Even though national leaders now deny having received clear warnings, a look at the records of the United Nations Security Council indicates otherwise. Before 11 September 2001, the Security Council had repeatedly warned of terrorism, specifically referring to Osama bin Laden and the Al-Qaida organization, and it had called upon Member States to take more effective action, including ratification and implementation of

the existing anti-terrorism conventions (see, e.g., Security Council Resolutions 1267, 1269 and 1333).

Yet, it was only after the events of 11 September 2001 that the Security Council, in Resolution 1373, took the radical step of incorporating obligations from those conventions into a binding resolution, thereby legislating even for States that had not ratified the treaties.

Nuclear Weapons

Perhaps the most serious current threat to humankind is the use of nuclear weapons. This possibility has been looming for over half a century. The actual use of nuclear weapons in Hiroshima and Nagasaki in August 1945 has now become part of distant history. The disastrous consequences of the use of just one such weapon in a population centre are well known even to the military layperson. But the world has become so used to this threat that, unlike at the height of the Cold War, the threat receives little attention. The fact that things have gone well for decades has created a false sense of security that is unsupported by reality. The end of acute superpower rivalry has further contributed to this deceptive picture.

As a consequence, international law has not come to grips with the nuclear threat. A number of treaties address specific issues of the possession, testing and deployment of nuclear weapons, but they do not address the core objective of their total elimination. The most important treaty in this area, the Nuclear Non-Proliferation Treaty of 1968, is primarily designed to preserve the oligopoly of the existing nuclear powers. Article VI of the Treaty contains the obligation to pursue negotiations leading to general and complete disarmament under strict and effective international control. This provision has remained a dead letter: no serious negotiations towards complete nuclear disarmament have been undertaken. The reduction of nuclear stocks has gone hand in hand with their modernization and has not reduced the possibility of a nuclear holocaust in any real sense.

The woefully inadequate state of international law in this field was highlighted by the International Court of Justice (ICJ) in its Advisory Opinion of 8 July 1996. The Court had been asked to answer the question "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The Court, after describing the effects of nuclear weapons, said: "These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet."¹

¹ Advisory Opinion, para. 35.

After examining applicable treaties, the principles dealing with the use of force in the United Nations Charter, customary international law, and humanitarian law applicable in armed conflict, the Court reached a result that is, at best, inconclusive. Most significant among the Court's findings is the following statement: "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such." More specifically, it stated that, in view of the current state of international law, "the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."²

International law has generated a large number of rules and principles in the most diverse areas. Yet it has been unable to deal with a phenomenon that, in the words of the ICJ, has "the potential to destroy all civilization and the entire ecosystem of the planet."³ Moreover, present international law evidently values the survival of a State more highly than the lives of millions who would be affected by the use of nuclear weapons.

The nuclear threat is further exacerbated by indications that the materials and technology required to produce nuclear weapons may have passed into the hands of non-State actors, including terrorist organisations. In this way, not even the dubious hope that *States* will behave rationally and with restraint can give rise to comfort.

The sad conclusion is that the international community will not take decisive action to outlaw nuclear weapons completely before it has confronted the catastrophic consequences of their actual use. Under these circumstances, the more optimistic scenario would be a local or regional instance of their use leaving the rest of the world the opportunity, once more, to make an attempt to prevent a recurrence of past events. A large-scale use of nuclear weapons on a global level would most probably preclude the question of any further legal regulation.

Conclusion

One could add further examples to illustrate the backward-looking nature of international law and the inability of the international community to act effectively and with foresight even where the necessary information is readily available. Such examples might include climate change or certain areas of international economic regulation.

² Advisory Opinion, para. 97.

³ Advisory Opinion, para. 35.

What is the cause of this strange collective disability? Clearly, it is not part of human nature. Strategic planning is a necessary part of normal economic life. Any commercial company that acted with such inertia would be wiped out within a short period of time.

There is no simple answer to this pressing question. One possible explanation for the reactive nature of international law would be the unique nature of the international community and the consequent inability to learn from the experience of others. Another explanation might be the short-term perspective of most politicians whose political success depends on tactical rather than long-term strategic planning. Yet another possible explanation would be the dependence on public opinion, which is unable to perceive dangers until it is too late. The complex nature of finding compromise on the international level may be another contributing factor. The pursuit of egoistical interests by individual States will often make it impossible to sacrifice national advantage to the common good. None of these explanations is satisfactory by itself, although in combination they may capture the essence of the problem.

The past hundred years have seen impressive developments within the international legal system. However, the basic structural weakness of the system has remained unchanged. A fundamental change is not presently in sight. Such a change would require a degree of courage and vision that we have occasionally observed on the national and regional levels. We can only hope that one day the international legal system will be able to escape from the trap of reacting to past events and create a functioning constitutional framework that will enable it to act with foresight to meet the threats and challenges of international relations.