

GOVERNANCE

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The State As A Curse Or A Blessing For the World Order: How Much Does International Law Depend On States As Actors?

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Introduction:

For centuries, the State formed the pillar of the world order according to international law. State sovereignty, in its Westphalian definition of the 17th century, constituted the basis of international relations. Other actors such as international organizations only began to emerge in the 19th century. The last century has seen a rapid expansion of other international non-state actors, especially after the Second World War: Liberation or Resistance Movements emerged with the fight for decolonization. "People", "minorities" and even individuals were recognized under international law as bearers of rights and obligations. This trend has increased with the end of the Cold War and the intensification of globalization. Transnational corporations or non-governmental organizations (NGOs) started to shape international relations thus increasingly challenging the predominant role of the nation States as main actors on the international scene. On the other end of the scale supranational organizations such as the European Union have begun to step in as international actors in their own right thus limiting the sovereign freedom of action of their member States through the transfer of competencies implied by such membership.

The growing competition from "below" (e.g. corporations, NGOs, etc.) and from "above" (multilateral and supranational organizations) created the impression that the State as an international actor was becoming less relevant. To some critics the nation State had grown into an outdated model of organization. It was even regarded as a hindrance to the development of a peaceful and just world order since States have been in the past the primary source of wars and international crises. The unification of Europe through the European Union was strongly motivated by the common will to not repeat the horrors of past wars on the continent. It was felt that by limiting the power of the individual State through strong and legally binding multi- or – even better – supranational instruments the danger of "unguided" nation States could be controlled. Other continents such as Africa or Latin America have tried to create similar structures of international co-operation with various degrees of intensity. Another important new factor after the end of the Cold War was the newly found unity and – accordingly –

power of the Security Council of the United Nations. For the first time in history the system of collective security seemed to work. The case-book example is the swift and unanimous reaction to Iraq's invasion of Kuwait in 1990 which led to the first Iraq war of 1991. Several other Security Council decisions on the maintenance of peace and security have followed since. However, the first serious rifts in this harmony came with the Kosovo-crisis in the late Nineties where the Security Council was unable to intervene militarily to prevent ethnic cleansing due to the opposition of Russia. The consequences of this failure led to an intensive debate over the so-called "Responsibility to Protect" to which I will come back later.

The dream of a rule-based international order where each individual State would co-operate in good faith for the common well-being and refrain from unilateral action outside of the UN Charter or international law came to a halt in the aftermath of 9/11. The Iraq war of 2003 showed that powerful States still act outside of the system of collective security if they deem it necessary for reasons of their national interest. The picture of unilateralism which was set in the Iraq War II has been imitated by other States in other circumstances or occasions. The political conflicts around the issue of nuclear proliferation of Iran or the DPRK are striking examples. Yet, the renaissance of the "State" as a self-conscious actor contrasts, however, with the fact that States, acting individually, are seldom able to solve major threats and challenges of an economical, social, political or even military nature which emanate from either state or non-state actors. The phenomenon of international terrorism increased the awareness of the vulnerability of States.

In summary, the pattern of international actors has become more varied and complex. Non-state actors play today a role unparalleled in history. The predominance of the State as the leading actor on the international scene is not self-evident anymore. Since the State is now forced to justify its primary role vis-à-vis other actors, the concept of State sovereignty must be adapted accordingly. It cannot longer be seen as simple prerogative but also as an obligation.

* The opinions in this paper are expressed in a personal capacity and do not necessarily reflect the position of the Federal Department of Foreign Affairs.

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How Does International Law Define the Role of The State as Standard Setter?

For States, the term "standard setting" has two connotations: Firstly, it has a substantive meaning in the sense that standards describe a certain moral or ethical behaviour, like the respect for human rights, democracy and good governance or law-abidingness. Secondly, the term "standard setting" also implies a normative element. International standards can take a variety of forms and degrees of commitment (treaties, MoU, "best practices", guidelines, etc.). In this normative sense international law created through treaties or customary law still constitutes the classical internationally binding standard of behaviour for States. It is true, however, that States have started to resort to more flexible forms of standard setting since the negotiation of conventional agreements has become increasingly cumbersome, especially on the multilateral level. The adoption of legally non-binding instruments such as "Declarations", "Common Principles", "Memoranda of Understanding" and the like has become more frequent. While these instrument have the advantage of simplicity and flexibility there is also a risk that they may contribute to a certain erosion of classical international law.

States are still the primary creators of international rules while being at the same time their primary addressees. It is not a coincidence that international law is also called "the law of the Nations". Since international law is made by States for States, it has been slow in recognizing the position of non-state actors legally. Individuals have been afforded international rights in human rights instruments and international humanitarian law and, more recently, even international responsibilities in international criminal law. These rights and responsibilities have become internationally enforceable by international human rights bodies such as the European Court of Human Rights international criminal tribunals such as the ICC. Other non-state actors have a partial international status which derive from particular treaties. (cf. the status of armed groups in the Additional Protocol II to the Geneva Conventions of 1949 on non – international conflicts; the standing of enterprises in conventions such as international investments protection agreements). Even if this development is likely to increase international law will remain the backbone for international relations and especially for the respect for peace and security. In fact, there are only two alternatives to an international order based on the rule of law: The law of force or anarchy

The main danger to international peace and security does not come from actors such as international terrorists, organized trans-national criminal or the like but from either too powerful or else from too weak or failed States. Experience demonstrates that too much military and political power tends to favour nationalism and uncontrolled unilateral action. On the other side, the weakness or inexistence of national institutions creates a vacuum which is often the source of crises or conflicts (Kosovo, Haiti, Congo).

We need, therefore, to find a balance between strengthening States which are too weak while controlling those who tend to become too powerful. In fact, a world order based on peace and stability depends on stable, reliable but also more responsible States. State sovereignty as the counterpart to statehood can no longer be considered as a privilege but must also be seen as a responsibility to its own citizens and to the international community. In other words, States must abide to certain substantive standards to which they have subscribed themselves such as the prohibition of the use of force, the respect for the rule of the law, human rights and good governance. This is in essence the conclusion of the former UN Secretary General's Panel on "Threats Challenges and Change"¹ whose central elements have been taken into the "World Summit Outcome" Declaration adopted on 24 October 2005 at the occasion of the 60th Anniversary of the United Nations².

Conclusions:

1. Even if the State as the main international standard setter faces increased competition from "below" (NGOs, multinationals, etc.) and "above" (inter- and supranational organizations) it will keep its leading role for the foreseeable future.
2. Standard setting through negotiations which lead to internationally binding norms is often slow. As a consequence, other more informal standards which are easier to adopt have begun to increase rapidly.
3. Standards set by non-state actors impact already now on the establishment of norms created by States. This influence and interaction is likely to increase in the future.
4. International law as the overarching set of internationally binding rules is still necessary as the foundation and basis of international relations. It creates the necessary legal security to allow for all other more informal standards to work.
5. Compared to other forms of standard setting the development of international law may be complicated and cumbersome but it has some decisive advantages: It is legally binding upon sovereign States and takes primacy over national law. Besides, it has been created by governments and approved by parliaments which confers to this body of law a higher democratic legitimacy than to standards adopted by any non-state actors.

Last not least the continued authority of States for shaping the world order will not so much depend on the function of the State as the *normative* standard setter but rather on the willingness to abide to high *substantive* standards of behaviour and to assume corresponding individual and collective responsibilities.

¹ Report published as UN-Documents A/59/565, www.un.org/secureworld.

² A/RES/60/1