

JOINT IEL-ILT INTEREST GROUP MEETING: THE RESILIENCE OF LAW

Location: the University of Latvia ([Raina bulvāris 19, Rīga](#))

Room: 6, 1st floor.

Time: Wednesday 7th September, 11:00 AM- 6:00 PM

Crisis in international law may be understood as exogenous events that erupt at a speed and on a scale that threatens to overwhelm law's capacity to address them. In a crisis, the time required for careful investigation of the facts, posing questions about root causes, deliberating on different possible responses and considering unintended consequences is not available: decisions must be made rapidly in conditions of great uncertainty. Under such conditions, *in order to maintain and perpetuate itself*, a legal system must possess the quality of resilience – must be able to draw on a wide range of resources, reconfiguring and recombining them in novel ways, capable of learning and adaptation. Yet these very same processes of adaptation can also undermine the capacity of the system to carry out the central functions for which it was designed.

Exogenous shocks are considered in the papers that comprise this panel, including phenomena related to globalisation, the unintended consequences of regulatory strategies in international law, and environmental degradation. The focus, however, is on crises within international law more broadly as a result of attempts to adapt to changing circumstances. International law has sought, for example, to embrace a wider array of actors and sources; it has sought to build greater diversity through a range of specialised regimes that pursue problem-solving in very different ways. The result has been fragmentation, decentralisation, deformalisation – all phenomena which can be seen as promoting law's resilience or as undermining it. As legal authorities multiply and take a wide range of forms, new networks are formed, interaction and communication among them could become impossible; law could be lost in the shuffle of a multitude of competing rationalities. But diversity could also be a source of strength: law and legal authority could participate in a network logic in which different actors and sites of normativity contribute – in a synergetic way – to the pursuit of global public goods.

PANEL CONVENORS:

Jaye Ellis and Oren Perez, Co-convenors, International Environmental Law Interest Group

John D. Haskell and Gleider Hernández, Co-convenors, International Legal Theory Interest Group

PANELISTS

Chair: Gleider Hernández, Reader in Public International Law, Durham Law School

Antonio Cardesa-Salzmann, Lecturer, Department of Public Law, Faculty of Law, University of Tarragona

Tomasz Widłak, Assistant Professor to the Chair of Theory and Philosophy of Law and State, Faculty of Law and Administration, University of Gdańsk

Jaye Ellis, Associate Professor, McGill Faculty of Law, Acting Director, School of Environment

Jasper Finke, Assistant Professor of Public, International and European Law, Bucerius University Law School

ABSTRACTS

ANTONIO CARDESA-SALZMANN, TRANSNATIONAL ENVIRONMENTAL CRIME AND THE RESILIENCE OF INTERNATIONAL LAW: SHAPING ILLEGALITY IN MULTILATERAL ENVIRONMENTAL AGREEMENTS

A series of multilateral environmental agreements (MEAs), such as the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, follow policies and regulatory approaches that foresee restrictions on and supervision of international trade and/or transboundary movements of controlled commodities. Other MEAs, such as the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, and the 2001 Stockholm Convention on Persistent Organic Pollutants, also feature international trade control measures. These are crucial to fulfilling the regimes' underlying objectives of environmental protection. Unfortunately, however, the inevitable corollary of such regulatory measures is the emergence of transboundary black markets that pose a serious threat to these regimes' effectiveness and, thus, to international environmental law.

This paper appraises the distinctive ways in which a sample of key MEAs involved in the fight against transnational environmental crime – the Montreal Protocol, the Basel Convention and CITES – are addressing issues of illegality and criminality. It evaluates how these have acquired salience on the global and/or crime and criminal justice agenda in each one of these regimes. In so doing, it also pays attention to the roles in compliance and enforcement undertaken by actors other than governments, as well as innovative network and partnership strategies adopted by governments and international organizations. Three main findings are made in this regard. First, MEAs that face significant compliance challenges through emerging black markets in environmentally sensitive commodities have adopted a strategy of coordination and cooperation to increase their respective effectiveness. Second, inter-MEA coordination has furthered the significance of global and regional enforcement networks of practitioners as de facto norm-setting agents that have deeply influenced the regulatory development and implementation of MEAs. Third, this inter- and transnational process of cooperation has brought about a gradual criminalization of illegal trade in environmentally-sensitive commodities. This has indeed been

so with the Montreal Protocol, the legally-binding provisions of which do not necessarily require a criminal law response to illegal trade in ozone-depleting substances. But it has also intensified the degree of the criminal law and justice response to illegal wildlife traffic, which is henceforth conceptualized as transnational wildlife and forest crime and which requires a broad integrated approach consistent not only with CITES, but also with the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. In terms of governance, this shift also encapsulates the gradual reallocation of the institutional centre of gravity in the fight against illegal wildlife traffic from CITES to the United Nations Office on Drugs and Crime (UNODC) and its Global Programme for Combating Wildlife and Forest Crime.

The highlighted evolution within the chosen sample of MEAs clearly hints at an increasing awareness of transnational crime for environmental regime effectiveness and for the discrete emergence of a body of transnational environmental criminal law. It also visualizes the outstanding adaptive capacity of managerial (environmental) regimes to accommodate their principles, rules and institutions to changing external conditions and challenges. More importantly, the described process of inter- and transnational cooperation against transboundary black markets in environmentally-sensitive commodities offers insight on how international law works in times of crises in a very specific field. By resorting to intra-MEA coordination and extra-systemic synergies through inter- and transnational network and partnership strategies, environmental regimes have arguably been successful in articulating incremental institutional and normative responses to existential challenges deriving from transboundary black markets. In a way, one may speak here about the resilience of international law.

In this regard, the paper argues that – somewhat counter-intuitively – the scattered institutional framework of global environmental governance and within it, the intrinsic autonomy and flexibility of the institutional arrangements of MEAs, may be seen as paramount to the problem-solving capacity of resilient systems. Indeed, the United Nations system, in which most of the MEAs' autonomous institutional arrangements are integrated in one way or another, has a somewhat complicated and confusing track record of administrative coordination, especially in the field of environmental governance. Nevertheless, precisely the loose and decentralised network of the MEAs' autonomous institutional arrangements has been persistently praised as allowing for bespoke responses and, where necessary, for regional or thematic clustering of treaties and institutions.

The paper concludes, however, that much of the implicit institutional and normative flexibility bears the risk of putting the process's transparency and legitimacy at jeopardy. A careful balance, as well as ways for constant feedback among cognitive and normative processes, seems therefore desirable for the resilience of international law in times of crises.

JAYE ELLIS, CRISIS, RESILIENCE, AND THE TIME OF LAW

Decades of half-hearted attempts to limit human impacts on ecosystems have led to a state of permanent, widespread crisis. Central to crisis is time – more in particular, the lack of time carefully to craft responses to environmental degradation. The time of ecosystem evolution is accelerating, largely in response to accelerations in the speed of scientific and technological developments and the social, cultural, and ecological changes that they bring about. It seems reasonable to conclude that the time of law must accelerate as well. But how much acceleration is possible if law is to continue to provide order,

predictability, and stability? At what point does law slip the already fragile moorings connecting law, particularly international and transnational law, to democratic legitimation?

These questions will be addressed through the framing concept of resilience. In ecology, resilience is a quality that permits ecosystems to absorb exogenous stresses while continuing to provide a high level of function. The resilience of ecosystems derives from a number of features: aggregation of interrelated components; flows of energy, nutrients, and other media; non-linear evolution; diversity of components; and 'self-critical' behaviour that leads to a nonequilibrium state (J.B. Ruhl). This last feature is best understood in a figurative sense: ecosystems behave *as if* they had the capacity for self-criticism. The features that make ecosystems resilient make them difficult for science and law to grasp. Many argue that legal interventions to preserve ecosystems should be treated as experiments: implementation should be closely monitored and adjustments made as scientific understandings change, but also as data on the response of the system – social and ecological – to the legal intervention become available. However, law's adaptation to the resilience of ecosystems could inflict significant damage on the resilience of law itself. Complex adaptive management can be a recipe for managerialism: highly technical regimes dominated by scientific and economic expertise whose rules are interpreted and applied in ad hoc, context-driven ways. Under such conditions, law may lose its capacity to stabilise normative expectations.

Arguably, positivism had already rendered not only legal decisions but also the content of law contingent, and the legal system has developed means of coping with this uncertainty. However, as Luhmann has argued, making the future validity of legal rules and decisions contingent on their capacity to achieve certain results, and, in addition, placing authority for making decisions as to whether those results have been achieved outside the legal system, both pose significant risks to law. The space of the present ceases to be available to relate past and future, for at least two reasons: first, under what Luhmann terms purpose-specific programmes, legal and political authorities are expected to shape the future present: the judge becomes responsible for projecting herself into the future, seeking to shape it according to the exigencies of the purpose that has been selected. Second, and in a related vein, the present is compressed and has a diminished capacity to bridge past and future by making past experience available for decisions in the present that will allow us to project ourselves into the future (Koselleck). The time required for doctrinal evolution as new problems are encountered and new responses developed is not available, any more than is the time required for democratic deliberation. Given the even slower pace of change in international law, particularly environmental law, the compression of the present gives rise to serious doubts about international law's capacity to respond to global environmental crisis without hollowing itself out to serve as a shell for science, economics, and politics.

If managerialism is seen as an undesirable direction, and if accelerated time requires more nimble, flexible, adaptive forms of law, then one promising avenue is transnational law. Arguably, international environmental law will remain caught between rigid formalism and managerialism until it develops means for addressing itself more or less directly to those who create risk and that are often in a position to gather information about those risks and to manage them. This will imply a turn to transnational law, capable, as Lars Vellechner puts it, of moving back and forth across the boundaries between public and private, statute and contract, and domestic and international.

JASPER FINKE, CRISIS, EXPECTATIONS AND THE MEANING OF INTERNATIONAL LAW: A MODEL HOW LAW ADAPTS IN TIMES OF CRISIS

That crises threaten the function of law and thus law's resilience is in urgent need of improvement during such times appears to be a widely shared belief among lawyers. At the same time this assumption is ridden with prerequisites that more often than not remain implied – prerequisites about international law, its proper functions and the meaning of the term 'crisis'. While questions about the nature of international law and its proper functions lie beyond the scope of this contribution, I will address the following three points: firstly I will recapitulate the often overlooked discrepancies between how states react in times of crises and the alleged failure of law in such situations. Secondly, on the basis of these observations I develop a phenomenological and less normative understanding of the term crisis that will, thirdly, influence how to conceptualize the idea of international law's resilience in times of crisis.

In such times we can observe two different and inconsistent perspectives on the role of law and its significance. On the one hand, as Ramrej has noted, states in responding to crises turn swiftly to law. On the other hand, every theoretical discussion on the impact of crises on law will at some point, and usually rather sooner than later, turn to Schmitt's state of exception and thus law's suspension. Less extreme, but conceptually similar is the more widely shared assumption that law's authority is controlled by politics during crises. If it is, however, true that states turn swiftly to law in response to a crisis, how can law then either be suspended or dominated by politics? A closer look at relevant case studies reveals that states usually do not suspend (all) law, but apply it differently in light of a specific crisis. In other words: responses to crises take the form of law, even though it is uncertain whether they actually comply with law because in order to do so it would be necessary to re-interpret existing provisions. Recent examples are the right to self-defense in response to terrorist attacks, the notion of "taking part directly in hostilities", the law-making competence of the Security Council or the limits that the Treaty on the Functioning of the European Union establishes with regard to bailouts and the competence of the European Central Bank.

A superficial evaluation of these examples could support the 'control of politics' hypothesis since the reinterpretation of law is generally pursued by political actors with the goal of increasing their scope of action. Such a view must, however, assume that the original interpretation is correct and that the new one merely attempts to disguise the illegality of the actions taken by political actors in response to crises. Due to its simplicity such a concept is tempting. It neglects, however, the impact of crises on the process of giving meaning to a legal provision. In order to substantiate this proposition it is necessary to take a closer look at crises.

Crises are perceived as times of change, uncertainty and danger in contrast to normality that symbolizes certainty, continuity and safety. Yet, on closer inspection these dichotomies lose their intuitive persuasive power. Continuity as a key characteristic of normality obscures the fact that change is omnipresent. It is therefore more accurate to emphasize the continuity of change. What distinguishes crisis from non-crisis periods is merely the swiftness with which it occurs. It is similarly misleading to link crises to uncertainty since the future is always uncertain. What differs is the perception of the future. In order to make it more manageable we develop expectations about future developments that are based on past experience. If the future evolves according to these expectations it can easily evoke a feeling of certainty. Thus crises are best understood as situations in which these expectations are disappointed because the now present future developed contrary to what we expected. In order to overcome a crisis it is necessary to adjust these expectations.

This understanding of crisis – a period of disappointed expectations that must be adapted in response to new experience – is crucial for assessing international law’s resilience for two reasons. For one, expectations and the concept of normality that they reflect are highly relevant in the process of giving meaning to a text or practice. Thus, adapting expectations in response to a crisis will be reflected in the meaning of a legal provision. Consequently, resilience can only refer to law’s ability to absorb social changes and adapt to them, but not to safeguard an almost unrealistic ideal of law’s independence. The concept and understanding of crisis that I propose offers an explanation for this adaptation process through reinterpretation of legal provision as an intrinsic element of law and not as a political process that is imposed on law.

TOMASZ WIDŁAK, POLYCENTRIC INTERNATIONAL LAW, RESILIENCE AND THE PURE THEORY OF LAW

Improving the adaptive capacity of international law in times of crisis has grown to be one of the key interests of international legal theory and philosophy of law. In the present postmodern reality the threats to the social and legal order come about suddenly, unexpectedly and from very different “directions” involving specific and sometimes complex rationalities: economic, financial, ecological, military, technological, cultural etc. Enabling effective normative response to these stimuli equals the ability to contain and channel them within the limits of the legal system and thereby save the social order of the international community from collapse. Such capacity to withstand disturbance and maintain the basic processes and structures constitutes the resilience of the legal system.

However, the traditional characteristics of a legal system are believed to be working in the opposite direction and may outbalance the law’s resilience in case of sudden and intense crises. For instance, it is commonly believed that the state-centric model of international law-making fosters normative resistance and petrification of the system of law. Therefore, the system responds by promoting more flexibility and responsiveness via procedural changes in the creation of its traditional sources as well as uses other strategies like relativizing normativity and deformalizing the law. New standards and values are introduced and promoted, often coming from the participants of the international community in the broader sense (the private actors).

Seemingly, the system adapts to the increasing challenges of the age by absorbing new cognitive frameworks for dealing with different rationalizations and empowering them with rule-creation and standard-setting capacity. This promotes the most significant process of the contemporary systemic change in international law – the move from centralization and formalism towards polycentrism and deformalization of law. The structure of the international legal order (not so much a “system”) becomes heterarchical, sectorial and increasingly private. This process in itself does not have to be assessed as negative, as it undoubtedly may – under specified conditions – increase multidirectional flow of information, multimodality of problem solving as well as better regard for context of the arising risks and challenges.

Nonetheless, from the legal point of view there are at least two specific aspects of the abovementioned process. One is the obvious and widely discussed fragmentation and sectorialization of international law. As a result, the law risks political and substantive overstretch that leads to communication problems as well as policy collisions among the subsystems and their standards ending up being less rather than more resilient. However, the second aspect is the transformation of the very normativity of

international law and constitutes even a greater threat because it may amount to a far more fundamental paradigm change. On the one hand, the normative openness of the law itself, which means greater inclusion of principles, standards and other non-definite argumentative rules in legal argumentation, may be beneficial for the law's overall resilience. On the other hand, the normative dilution of the rules of law and their validity that goes along with depoliticized rule-making is quite different and more dangerous phenomenon. Sectorial managerial regimes equipped and reassured with global governance tools may tend to impose their rationalities and patterns of causation leading to creating problems rather than solving them. The set-up standards may be flexible and adaptable but the risk is that they simply descriptively create reality along partisan narrative rather than normatively regulating it. For instance technical requirements for cyber-security developed along technical rationalities may tend to determine the scope of the right to privacy rather than vice versa.

The Kelsenian diagnosis would be that the legal system absorbing and confusing other normative and non-normative regulators and cognitive frameworks with legal normativity risks the confusion and conflation of the "is" and the "ought". The paper will argue for maintaining the systemic unity of international law not as its "maladaptive" feature but quite the opposite – as the way of sustaining the law's inclusionary potential, providing for its capacity to reconnect international law with local institutions and global citizenry as well as defend it from the hegemony of the powerful global managerial regimes growing increasingly insulated from the formalism as a tool of political supervision. The intent is not to revive the Kelsenian modernist project but rather to employ the idea of the purity of law as a conceptual and interpretative tool. To remain a meaningful and resilient normative system international law cannot dissolve itself into the universe of non-legal epistemic communities. Such a process would be the opposite to the evolution towards an autopoietic law that theoretically constitutes the ideal of the most resilient self-organized system.