

# Rethinking Sovereignty

Key Note Lecture

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Today's Geopolitical Crisis in International Law: Responsibilities of the United Nations  
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May 30, 2018

Dear Dame Rosalyn

Dear Co-authors Philippa Webb, Dapo Akande, Sandesh Sivakumaran,

Spectabilis, dear Colleagues

Ladies and Gentlemen:

This is indeed a very special moment. We celebrate the first comprehensive British Treatise on the United Nations, and we do so not in Geneva, but here in Lugano where international law is just taking off with Professor Ilaria Espa – and within the economics faculty. Both facts are highly remarkable.

When I read law in the 1970s, we were impressed by Alfred Verdross's and Bruno Simma's *Universelles Völkerrecht*. The book conceptualised international law on the basis, and within the constitutional framework, of the United Nations perceived as new World Order. Later, I studied Ian Brownlie's *Principles of Public International Law*. He dealt with the UN briefly in one of the final chapters, remarking that the general study of international organizations "is a department of the social and political sciences". He would merely deal with a few important legal interfaces. The sixth edition of J.L. Brierly's *The Law of Nations*, edited by Sir Humphrey Waldock, placed the law of the United Nations at the heart of the book, and in his preface Sir Humphrey wrote in 1962: "Another edition may have to go even farther in expounding the general principles of international law in the framework of the United Nations and other related international organizations". Well, this is what the authors of Oppenheim's *International Law on the United Nations*, almost all present today in this room, substantially achieved. The treatise, focusing on law and the reality of the United Nations, takes up in a systematic manner what in the continental traditions of commentaries the works edited by Simma and by Cot, Pellet and Forteau have done article by article of the UN Charter. I may express here my gratitude on behalf of all international lawyers to the Balzan Foundation to have enabled this invaluable achievement, led by Dame Rosalyn.

Since its inception in 1945, the United Nations has made substantial contributions to the development of international law. I just mention three highlights:

The Law of Treaties: The Vienna Convention of the Law of Treaties, completed in 1969 and prepared by the UN International Law Commission, provides the indispensable framework for treaty-based relations among States. It has become one of the most important constitutional documents of international law penetrating all fields alike, including, for example, the jurisprudence of the WTO.

The Law of the Sea: the silent revolution, beginning after World War in assigning jurisdictions to exploit natural resources, eventually led to the 1982 United Nations Convention on the Law of the Sea, “one of the most important complex and ambitious diplomatic undertakings in history” as Henry Kissinger recalls. These negotiations profoundly altered the modes of multilateral treaty-making and established consensus diplomacy and the International Tribunal for the Law of the Sea in Hamburg. The field also coined much of the work of the International Court of Justice: ever since the groundbreaking *Continental Shelf Cases* between Germany, the Netherlands and Denmark in 1969, the court, based upon a clean page, developed equitable principles of boundary delimitations. These principles, based upon a rule of equity, evolved over some twenty major cases and amount to the most prominent field of judge-made law to which Judge Higgins substantially contributed during her years on the bench and as President of the Court.

Environmental Law: Much of the development of this field, ever since the 1941 *Trail Smelter Arbitration* between the United States and Canada is owed to the United Nations, yet again offering new modes of working through soft law towards treaty language, from the 1972 Stockholm to the 1992 Rio Declarations. This process produced founding agreements on climate change and the protection of biodiversity. The Intergovernmental Panel on Climate Change (IPCC) is the first effort to systematically include scientific research, including the law, in assessing the causes, impact and policy options on combatting global warming.

It is impossible to do justice to the successful work of the UN in a brief moment, and I simply refer you now to Oppenheims’ International Law!

Other parts of the United Nations largely failed.

Security Council: The system of collective security was rapidly caught up in the cold war and is dysfunctional, with the exception of a brief interlude after the Berlin Wall came down. The Security Council is at the mercy of power politics and subject to veto powers of permanent members. Ukraine and the current experiences in Syria and Palestine make the point, to the detriment of thousands of people deprived.

Moreover, the Security Council is essentially limited to address symptoms in addressing threat of force, aggression and terrorism. The causes are dealt with elsewhere. The ECOSOC, the United Nations Economic and Social Council, largely failed to impact on underlying economic and social issues and to establish closer links to the Security Council. Instead, these issues are largely dealt with outside the UN in the World Bank, the IMF, BIS and the WTO and OCED and many specialised organisations such as WHO, ILO and FAO. UNCTAD, with the exception of investment protection, has not been able to establish an effective balance on behalf of developing countries.

Human Rights Protection: The United Nations has been critical in disseminating the idea and ideals of human rights. The Universal Declaration of December 10, 1948 was a landmark of the young Organisation. But effective international human rights protection within the United Nations largely failed and strategies to achieve social and economic rights were superseded by Sustainable Development Goals. An appropriate mechanism for humans to bring cases and to enforce rulings is still missing. Countries continue to emphasise political independence and non-interference with domestic affairs within Article II (4) of the Charter. The same seems to be true for the operation of the Criminal Court of Justice introduced in 2002.

These failures are essentially due to the predominant understanding of national sovereignty within the system of nation states. Ever since the Swiss extracted sovereignty at the Westphalian peace in 1648, ever since the American independence in the 18<sup>th</sup> and Latin American independence in the 19<sup>th</sup> Century and the process of decolonization after World War II, sovereignty has been reduced to self-determination, independence and freedom from external control. Today, it amounts to most powerful weapon of national conservative movements.

The original motivation for sovereignty of the state in the founding works of Jean Bodin, *Six Livres de la République* (1576), and Thomas Hobbes, *Leviathan* (1651) are forgotten: Writing in the middle of religious civil wars, sovereignty of the state (other than a ruler) was a matter to establish peace, order and legal security, welfare and prosperity for people in mutual cooperation within society. It was not about independence. We need to go back to these roots and these goals, as applied and adapted to a highly interdependent world, characterised by global value chains in the economy. Peace and welfare and legal security all depend upon international cooperation. They call for co-operative or shared sovereignty and an appropriate role and responsibility of the United Nations and other international organizations.

This is a message of importance today. The roots and causes for the new nationalism around the world are not the UN or international cooperation, or an open trading system. Much of the underlying distrust induced by the financial crisis 2007-2012 and by self-serving elites is due to lack of effective cooperation among central banks, banking supervision and governments to contain such evolutions. And much of it is caused by failed domestic policies, mainly in education, equal opportunities, retraining and inadequate funding of local community services.

In the European context, Brexit can be partly understood, at least from the outside, as a rebellion against British and London based centralism, ignoring the needs and hopes of people in the midlands and the north. It has little to do with the EU blamed, except for free movement of persons which, however, Britain chose on her own to apply without restrictions and phasing in vis-à-vis the new Eastern Europeans members. The way forward will hardly work, not only in Northern Ireland. In particular going back to bilateral trade policies and free trade agreements will not bring the jobs back people wish to see in an integrated world economy and global value chains.

The Swiss are obsessed with sovereignty and independence, while facing a complex reality of independence with Europe and the World. Instead of embracing it and actively

contributing to European integration with all their resources and political experience, they fight rear-guard battles at the cost of losing self-confidence.

The world has let Italy down in matters of refugees and migration. Again the roots are in excessive national sovereignty, beggar-they-neighbour policies, and the lack of international cooperation. In Italy, the hopes of young people to find jobs and found their own families will not materialise with populist recipes, ignoring European integration and global value chains. The focus needs to be on homework, reforming labour relations and the educational system.

As scholars, however, we need to go beyond such observations. We need to work on a better understanding of sovereignty and reconceptualise it, going back to Bodin, Hobbes, Rousseau and others in writings and teachings.

These underpinnings help us to support and understand two modern developments in international law.

Firstly, the doctrine of multi-level governance (MLG).

This school of thought, in different variants, recognises that all levels of governance, from local and global governance and what Brierly/Waldock called international legislation back in 1963, are of equal importance and relevance. It simply is a matter of properly allocating powers and financial and human resources to appropriate levels of governance in order to produce appropriate public goods. The late John Jackson called this sovereignty-modern. Others talk about constitutionalising international law. I call it the five Storey House.

Of course, challenges and issues of legitimacy are different on different layers. Democracy cannot flourish on the global and continental levels comparable to local and national levels. Instead, the focus here is on providing the public goods of welfare, peace and stability, which are public goods of equal importance. Importantly, the psychology of human interaction on all layers remains the same; the same legal principles, in particular goods faith apply alike.

In the final analysis, clear boundaries between domestic and international law disappear to the benefit of a more comprehensive framework. This is not world Government. Perhaps it is global federalism, while fully respecting that international law does not impose a particular form of governance but continues to interface different political systems, keeping them cooperating.

Secondly, the doctrine of Common Concern of Humankind.

The United Nations Framework Convention on Climate Change, the 2015 Paris Agreement, and the Agreement on Biodiversity recognise that global warming and the loss of biodiversity or common concerns of humankind. The 2005 International Health Regulations use the term international concern to define thresholds for WHO action and intervention.

The emerging doctrine of common concern helps to identify serious problems which cannot be solved alone but depend upon international cooperation. Such problems exist in many areas, from monetary stability, marine pollution, and transfer of technology for renewable energy, migration, protection of the essence of human rights to gross income

inequality, just to name the topics in a current PhD research project at the World Trade Institute (WTI) on common concern of Humankind. They share the risk of threatening world peace and stability if remained unattended.

Common concern of humankind may eventually develop, in a process of claims and responses, to a principle of public international law, comparable to sustainability. Where applied, it calls for cooperation, and hence a duty to consult and negotiate. It entails obligations to do the home work; and with this, it may enlarge extraterritorial application of own laws, in particular in terms of Production and Process Methods. Finally, it calls for countermeasures to confront free-riding of States on the global commons. As community rights, common concern will allow to reconceptualise the concept of jus cogens and to integrate the duties to act in terms of the emerging doctrine of Responsibility to Protect (R2P).

These efforts are mainly addressed to States and how they behave, to call upon Louis Henkin. Once people learn, perhaps dearly, that the new nationalism does not pay and does not assist them in the pursuit of happiness, society and government will adjust in political processes and gradually, step by step, implement multi-level governance and accept a new principle of Common Concern of Humankind. These insights, in return, will allow further developing the law and functioning of international organizations and courts of law in international affairs. Sovereignty-revisited puts forth the insight that no state alone should be able to block decisions. The veto has no place in this system and will make way to weighted-voting and the need for flexible coalitions in addressing reasonable disagreement.

Within the United Nations, these concepts invite us to rethink the role of the Security Council, the interaction with other bodies of the Institution. The two volumes which we honour today, in assessing law and realities of the United Nations, provide us with an invaluable foundation to do so.

I very much look forward to the round table and discussions. Thank you for your attention.

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Berne, 28 May 2018