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INTERNATIONAL LAW IN TIMES OF CRISES - ITS POTENTIAL AND LIMITATIONS

Lecture by Dr. Danilo Türk, Former President of the Republic of Slovenia, at the “Deutsche Gesellschaft für Auswärtige Politik” Berlin, 30 September, 2014

Distinguished Professor Eberhard Sandschneider,
Excellencies,
Ladies and gentlemen,

It is a great honor to address this illustrious group of foreign policy specialists and commentators on a subject of great importance.

We live in a time of crises, or, as the UN Secretary-General observed in his speech at the Opening of the General Assembly a few days ago, at a time when “It may seem that the world is falling apart as crises pile up and disease spreads.”

“Not since the end of Second World War there have been as many refugees, displaced people and asylum seekers”, emphasized the Secretary-general. The extent of human tragedy has become unbearable.

The political dimensions are no less dramatic. The crisis of Ukraine challenges the basic assumptions of the European security and political order. The crisis in the wider Middle East is even deeper and is leading towards a fundamental challenge to territorial order created almost a century ago and a threat to international peace. In the Pacific we see tensions over vast maritime spaces and a proliferation of accusations among Asian capitals. The Ebola epidemic in West Africa threatens the existential foundations of societies and the state order in that part of the world.

And behind all these situations there is a looming global crisis resulting from global warming that continues unabated and unmitigated.

Detailed news about all these developments have become our daily fare and questions about the viability of the existing world order abound.

In times of crises public attention to international law tends to rise. People look towards international law for guidance and for solutions. Political leaders look towards international law for assistance to their preferred course of action, in other words, towards law as a strategy, and - sometimes but not necessarily always - towards international law as an objective and authoritative order.

The times of crises challenge the some of the basic assumptions about international law and its effectiveness. The famous dictum of Louis Henkin, that **most states respect most norms of international law most of the time**¹, while still true becomes clearly insufficient. More ambitious and original solutions need to be sought. Where should we look for inspiration?

¹ Louis Hneknin, How Nations Behave, Second ed. 1979, p.46.

One of the ways to do that is to recall important anniversaries. One of them is the 70th anniversary of the conference that met at Dumbarton Oaks, Washington DC, from early August to the end of September 1944. In those weeks most of the Charter of the United Nations was drafted. That work has produced some of the key features of the global cooperation and global security architecture relevant to our days. They include the powers and composition of the UN Security Council, the scope of the veto of the permanent members, the relationship between the UN and the regional arrangements and others.

It is appropriate that today, almost exactly seventy years later, we pay tribute to diplomats and jurists who constructed the system and helped the political leaders to take final decisions in the subsequent months at Yalta and in San Francisco.

Looking in retrospect we can say that the system put in place in 1945 stood the test of time. It helped preventing another direct war among the major powers and offered a framework within which a tightly knit web of international norms of peaceful cooperation developed gradually. The level of sophistication of international law in the second half of the 20th Century surpassed everything known from previous periods of history.

However, its effectiveness has often been challenged and many of the original expectations have remained unfulfilled. In fact, the problem of effectiveness has been a persistent companion of the United Nations, in particular in matters of maintenance of international peace and security. Critical commentators have rightly pointed out that even when the Organization properly exercised its procedural potential it was often unable to face the fundamental political issues that had to be resolved.

Moreover, from the early days of the Organization, there have been situations, starting with the Iranian crisis of 1947, in which the media saw the signs of an imminent demise of the entire international system of collective security based on the UN Charter. Nevertheless the system survived and continued to struggle for its effectiveness and relevance in the world marked by power politics.

The history of the UN was also marked by periods of success and high, sometimes unrealistic expectations. The ending of the cold war in the second half of 1980s found its expression in the successful UN action to resolve the decade long armed conflict between Iraq and Iran, in the solution to several armed conflicts in Central America and, most prominently, in the successful roll-back of the Iraqi aggression on Kuwait in 1991.

The latter example produced high expectations. The slogans of the day included the expression of belief that the era of wars of aggression is over, that acquisition of territory by armed force will not stand and that veto of the permanent members will no longer be used in the post cold war era. The UN Security Council was able to agree on sanctions imposed on Libya, on Iraq and on Milošević's regime in the Balkans. There were many other examples that supported the belief in the incremental strengthening of effectiveness of the United Nations, and the international law and multilateral institutions more generally.

However, very soon history demonstrated its capacity to surprise and to end the time of hope with a wave of atrocious human behavior. The post cold war era descended into vicious ethnic and religious conflicts marked by massive and systematic atrocities and genocide - the most heinous of all crimes. And all these tragedies took place in an era in which human rights were

expected to prevail. What a bitter irony of history and what a challenge to the effectiveness of international institutions and international law!

In addition, the post cold war era has witnessed disintegration of states, sometimes as a prelude to armed conflict and sometimes as a consequence of it. Important challenges to political perception have taken place. While during the preceding period, the period of cold war, the principle of territorial integrity of states was perceived - only with very few exceptions - as a *conditio sine qua non* of normality as well as of the settlement of all political problems related to the state, the post cold war era brought new realities.

In a number of situations self determination of peoples and dissolution of multiethnic states became the key elements to the solution of a political problem. This phenomenon has typically characterized Central and Eastern Europe and parts of Africa. And it has been often, albeit not always, accompanied by the use of force and massive violations of human rights.

All this has made the operation of all diplomatic mechanisms, including the UN and other international organizations more difficult and more complex. The effectiveness of international law met its limitations. Today it appears that the era of disintegration of states is not nearly over. The threats to territorial integrity in South Sudan, Syria, Iraq and Libya demonstrate the dangers of chaotic circumstances resulting from internal conflict and inadequate international reaction.

Should a more proactive and intrusive approach be taken by the international institutions, in particular the UN? Does international law provide a platform for such an approach?

The answer to the latter question is - yes - a rudimentary legal platform for international engagement exists. The general formulations of the right of all states to territorial integrity (such as the one embodied in the Declaration of Friendly Relations - UN GA Resolution 2625 (XXV) of 1970) require that states conduct themselves in compliance with the principle of equal rights and self-determination of peoples. Territorial integrity of states does not exist in a political vacuum or divorced from the right of peoples to self-determination. It must be earned.

However, a basic platform of international law does not suffice. The concept of "the people" has many meanings and they depend on the changing historical circumstances.

And then, even in circumstances where the conceptual problems are not too difficult the international community often lacked political will and practical tools to help finding real solutions. Therefore, all instances of the past practice have to be looked at and analyzed with great care. Particular attention needs to be given to those instances of peace making in which the questions of power sharing, autonomy or, possibly, federal arrangements in multi ethnic and multi religious states were of critical importance.

International assistance in the establishment of power sharing, autonomy and federal arrangements are, obviously, not new to international peace makers. In fact, past practice offers knowledge and experience that could be used in the future. The two agreements related to Lebanon - the Taif agreement of 1989 and the Doha agreement of 2008 - are worth studying as a source of inspiration. Studying all aspects of Dayton agreement that ended the war in Bosnia and Herzegovina in 1995, both good and less good ones, can also help. And the experience of the Ohrid Agreement that ended the turmoil in Macedonia in the year 2000 - the

process of its preparation and its content could serve well to the negotiators searching future solutions for situations involving threats to territorial integrity of states.

A particularly important lesson learned in the management of transitions of the recent past relates to the importance of the constitutional frameworks for gradual and peaceful transitions. This lesson has been learned and relearned in situations as diverse as those of the East European transitions, of Timor Leste and, most recently, of Tunisia. Establishing a genuine constitutional framework, one that is sturdy enough to provide the legal frame for the turbulent and conflictual politics of change is an essential condition for successful transitions in our time.

The question which has to be asked at the international level is whether this search should include a degree of international involvement and how should such an involvement be carried out.

There is no single or general answer to this question. It appears, though, that questions that have traditionally belonged to internal politics of states and of constitutional law are becoming increasingly a matter of international concern and legitimate action of international institutions, in particular the United Nations. This is due to the fact that international peace and security are increasingly threatened by internal instability of multiethnic and multi religious states and that attempts at preventive diplomacy in such situations are legitimate. At a practical level, most often the international community has to find ways of engaging the political actors within a state in an effort to seek solutions. Diplomacy has to engage in a search for effective and fair constitutional arrangements and has to be based on sound political judgment.

Decision making in such circumstances is a serious quality test of politicians and the policies they pursue. But they are not alone in their difficult task.

They can take advantage of the lessons learned in the work of the United Nations and other international organizations engaged in peace making and in preventive diplomacy. Three among such general lessons can be identified as the “softer aspects” of an international approach to intense crisis situations:

First: Act early. The earlier action is taken the more likely it is that it will be effective eventually. Crisis situations tend to become more difficult with every day and week passed.

Second: Ensure inclusiveness. The more inclusive the process of search for solutions, the more likely it will conclude with an agreement. Crisis situations tend to show a quick growth of polarization within the society concerned. The weakening ability of the government to deliver security and hope for the future turns the people to their other loyalties and emotions are running high. The only potential remedy in such dangerous circumstances is dialogue, organized as an inclusive process, one that leaves no ethnic or religious or other relevant group outside. The role of women in such a dialogue must be properly understood and supported. And above all, the dialogue must not shy away from the difficult issues of organization of state power. However, a caveat is in order here: It must be realistically admitted that in real situations it might not be possible to start with the whole agenda at once. Formulation of a realistic and gradually expanding agenda is an important test of diplomacy in crisis situations.

Third: Territorial integrity requires effort. As mentioned before, in the post cold war era, the territorial integrity of states is no longer an axiomatic basis of conflict resolution. It must be earned. In several situations of the recent past the crisis situations have degenerated to a point at which the dissolution of states - multi ethnic, multi religious or otherwise complex states - presented itself as a necessity and therefore as part of the solution. To avoid such unwelcome scenarios the inclusion of all political actors who determine a particular situation is necessary. In addition, it might be necessary to address the questions of territorially defined autonomy or federal arrangements sufficiently early, with a proper sense of realism and political creativity. Although decentralization might be perceived as a step towards ultimate partition, it could, in fact, be necessary to keep a country together.

All these three basic lessons are relevant, although not automatically applicable, to crisis situations of our time, including the one unfolding before our eyes in Ukraine. The crisis in Ukraine represents a fundamental challenge to the functioning of the political order in Europe. The importance of a stable solution cannot be overemphasized. Ukraine must not become a permanent geopolitical battlefield. She must be enabled to play an independent and globally important role as a bridge of cooperation.

Ukraine has the potential for such a role. In order to use her potential, Ukraine should be helped in the effort to develop an inclusive constitutional arrangement and an appropriate international status. The international actors should help in constructing both of them. The role of the OSCE under the Swiss chairmanship has to be praised and, above all, understood as an important contribution in this regard. The subsequent OSCE Chairmen in Office will inherit a good base to build on.

Dialogue at all levels must be encouraged internationally. Internal dialogue in Ukraine that started in May should be resumed and gradually expanded. The dialogue based on the ceasefire agreement of 5 September should continue and should be supported by confidence building measures and an increasing international monitoring organized through the OSCE. And the larger process involving Ukraine, the EU; Russia and the nascent Eurasian customs union should continue with the aim to a long term arrangement of economic cooperation in the larger Euro-Asian space. All these levels of dialogue must be internationally supported and nurtured.

The experience with the crisis in Ukraine in 2014 carries an important lesson for the cooperation between, on the one hand, the regional organizations, in particular the OSCE and, on the other, the United Nations. At present, the OSCE is in the lead. This is in accordance with Chapter VIII of the UN Charter. The situation in Ukraine is “appropriate for regional action” (Article 52 of the UN Charter). At the same time it is important that Ukraine remains on the agenda of the United Nations Security Council and the General Assembly. The situation has global implications and some of its aspects, such as the situation of human rights and the investigation of the tragedy of 298 victims of the downing of MH17 must be considered by the global community represented in the United Nations.

The example of Ukraine demonstrates the growing importance of various regional organizations in dealing with international crises. The importance of regional organizations and arrangements has generally grown in the post cold war era. The examples of Bosnia and Kosovo in Europe, Sierra Leone, Liberia and Sudan in Africa and Syria in the Middle East

can be quoted as expression of the same tendency. However, the level of success varied. A stronger role of regional organizations in itself does not guarantee a higher level of success.

The tragic fate of Syria offers the most disturbing example. In that situation the UN and the Arab League joined hands in an effort to put together a strong mediation effort between the Syrian Government and various opposition forces. The armed conflict that started in the year of the Arab spring as an armed uprising against an oppressive regime has gradually gained religious, ethnic and international dimensions. There were glimmers of hope along the way - the talks in Geneva and Montreux and the success in the destruction of Syrian chemical weapons. Nevertheless, this partial success and the limited progress achieved at earlier stages of the crisis have not prevented the gradual transformation of the Syrian conflict into a region wide crisis with strong religious character. This evolution has created the single most important threat to international peace and security of today.

The emergence of ISIL and its use of terror and brutal force to establish an Islamic Caliphate in the territories of Syria and Iraq represent an acute threat to the international order in the wider Middle East and has potentially devastating consequences for global security. The current military action against the acts of aggression committed by ISIL is a form of legitimate collective self defense - of Iraq and other countries in the region threatened directly - and of all the member states of the United Nations who have decided or will decide to join in the effort.

The situation is fraught with dangers. The military effort may take time. And the solution to the crisis will at the end have to be political. It would be important to provide the ongoing efforts with a general international legal and political framework by means of an appropriate resolution (or several resolutions) of the UN Security Council.

A solution will have to include arrangements for the future coexistence of ethnic and religious groups in the region. Should this be done within the existing international borders? Obviously this would be the preferred outcome but again one which requires a strong political effort. One would hope for an effort under the UN auspices involving all countries in the region as well as the UN Security Council. All the regional and global actors are already involved in the situation and all must be interested in a real solution. In fact, the situation in that part of the world is a critical test case of effectiveness of the international system as a whole.

This brings me to a critically important aspect of the question of effectiveness of international institutions and international law today, the question of the role of the permanent members of the UN Security Council. Under the UN Charter, the permanent members bear special responsibilities for the maintenance of international peace and security. When they cooperate, the UN can be very effective as seen at the time of the first Gulf war in 1991 and in many other situations. When their policies diverge and their differences prevail the Organization easily becomes paralyzed.

In other words: In the critically important matters of international peace and security, there is no substitute for cooperation among the permanent member of the Security Council. They continue to bear the main responsibility for the functioning of the international system as a whole. This was the historically important idea guiding the negotiators at Dumbarton Oaks seventy years ago. And this continues to be the corner stone of international security today.

The situation that is developing in the Middle East is a wake up call: It calls for a renewed effort towards a global security compact among the permanent members of the UN Security Council.

Admittedly, such a compact was due but could not materialize in the immediate aftermath of the Cold war. The Agenda for Peace proposed by the then UN Secretary General in 1992 and the subsequent Security Council resolutions created a half finished product, a construction site rather than a developed edifice. Their guidelines were not always followed and their results were unsatisfactory. The subsequent years have brought additional experience and, hopefully, wisdom which could help building a consensus regarding the main strategic challenges to international peace and security and on the ways in which they need to be addressed. Such a consensus would help the international institutions, the UN and the regional organizations, to fulfill their mandates more effectively and enable solutions that seem elusive today.

One could argue that political conditions for such a compact do not exist at present. This could be true but only in a purely static perspective. Much will depend on how the major powers and the UN act with regard to the main crisis situations of today. Managing the crisis in Ukraine towards a peaceful resolution would be an obvious condition for progress in other areas. A strong diplomatic effort to engage all the actors in the Middle East, including Iran and Saudi Arabia, as well as all permanent members of the UN Security Council and other major global players would go a long way towards establishing a stable situation in the region. All of international actors share, to varying degrees, an interest to stop the current drift towards anarchy and all of them understand, to varying degrees, that their cooperation is a necessary condition for political stability in the region. The Security Council resolution 2178 (2014), adopted last week, aiming to curb international recruitment and travel of terrorist fighters should be seen as the first step towards a much more developed cooperation in involving all the relevant players.

The situation in the Middle East, while being as desperate as rarely before, is also a powerful wake up call for strengthened cooperation. **The process towards a global security compact among the permanent members of the Security Council could be initiated through a further Security Council resolution, or a series of resolutions, that would create a political framework for an inclusive cooperation to stabilize the Middle East.** The challenge of the Middle East today represents also an opportunity to start a new phase of global security cooperation and to strengthen the institutions designed to maintain international peace and security.

While the situation in the Middle East is the most immediately dangerous among the threats to global peace today and therefore **also the most obvious reason for a revival of the global security cooperation**, it is not the only one. There are many more that would benefit from strengthened global security cooperation. In addition, there are new threats to international peace and security that require a new level of international security cooperation. Let me briefly mention the two most critical among them - the threat of infectious diseases and the crises resulting, directly or indirectly, from global warming.

Earlier this month the UN Security Council adopted its resolution 2177 (2014) on the crisis created by the outbreak of the Ebola virus in West Africa. The security implications of that crisis are obvious. It became necessary for the most powerful body of global security system to engage.

It is useful to recall that this is not the first time that the Security Council acted in the case of an infectious disease. Fifteen years ago the Council addressed the epidemic of HIV/AIDS in the conflict in Congo. That initiative was owed largely to the indefatigable diplomacy of Richard Holbrooke, then US Ambassador to the UN, and was initially received with expressions of surprise: Issues of public health, so the argument went, do not belong to the Security Council. However, the fight against HIV/AIDS became an important ingredient for peace making and post conflict peace building in Congo. In addition, the engagement of the Security Council added to the more general effort of the UN to combat HIV/AIDS, as well as malaria and tuberculosis, and played an important energizing role at a time when the international action to deal with these diseases started to grow.

That experience tells a great deal about the new threats to international peace and security, such as Ebola virus and HIV/AIDS, and the new ways in which such threats have to be addressed. The Security Council can play a uniquely important role **of energizing broader international action**, of bringing military and peacekeeping assets into the effort and of strengthening the unique convening power of the UN that has, time and again, proved to be a vital asset in the effort to resolve humanitarian crises, both man-made and natural.

And finally, an expanded and more integrated cooperation to deal with crisis situations is the order of the day today and nowhere is that more obvious than in the need to organize international action to mitigate and to reverse global warming. Disturbingly, global action in this regard is still insufficient.

More than seven years ago, in April 2007, the UN Security Council conducted a debate on the issues of **energy, security and climate**. That debate addressed the consequences of global warming on international peace and security. It recognized that melting of ice and rising sea levels are expected to produce major changes to the World's physical landmass and water availability which, in turn, is likely to lead to further disputes over territory and water. That prospect is likely to be preceded by emigration from areas that will become uninhabitable due to reduced freshwater availability and declining agricultural capacity.

The war in Darfur has offered a bitter taste of what might happen in many parts of the world in the future. Climate change will almost inevitably complicate the balance of the World's climate and energy objectives. Tensions, disputes and armed conflicts cannot be excluded. It is no secret that the most adverse effects will take place in the fragile states where poverty and social tensions represent additional sources of potential conflict. This may result in economic, social and political disintegration of states and in new political crises.

The Security Council discussion of 2007 expressed a sense of urgency, an understanding that the global security system cannot wait for the worst effects of global warming to happen. However, it did not produce continuity of discussion, let alone a coherent policy. This is disturbing. The ever more frequent natural disasters resulting from global warming indicate that new threats to international peace and security could emerge earlier than expected. The current UN activity will hopefully energize the negotiations needed prior to the summit on global warming which will take place next year in Paris. An agreed policy platform and, ideally, a binding agreement regarding the reduction of the emissions of greenhouse gasses would be an important contribution to peace and security in the future.

Let me conclude.

Today international peace and security are again under stress due to a variety of crisis situations. The effectiveness of international law is again put to the test. In situations like this it is important to recall that **the effectiveness of international law, in its essence, is not a matter of legal formalism or a simple search for applicable legal norms.** It is much more, a matter of political wisdom and moral soundness and, in the final analysis a matter of anthropology. This is why diplomacy and politics are such dominant themes in my presentation today.

Herein lies the solution to the problem of effectiveness as well as the main obstacles to it. **There is no substitute for the sensitivity and acuteness of political judgment** to be exercised by political decision makers. There is no substitute for determined and sophisticated diplomacy.

Today, decision makers have to make difficult, far reaching and often dangerous decisions. They have to assess, with a sense of realism and with a good historical knowledge and perspective, **matters relating to the territorial integrity and constitutional structure of states.** They have to avoid unlawful and illegitimate interference in internal affairs of states, yet, at the same time they have to recognize the emerging threats to international peace and security and act sufficiently early. Their decisions and action have to be informed by international law and carried out within the framework of the Charter of the United Nations.

Great powers bear special responsibilities in this context. These responsibilities are best met when they act **collectively**, again, in the framework of the UN Charter. There is no doubt today that the permanent members of the UN Security Council are expected to carry out their responsibilities in the Middle East collectively and with a sense of responsibility to peoples in the region as well as to the international community as a whole. In this situation they need help - from within the region and globally. This is **the time for engagement** of all the actors of the international community who could contribute in the process of search for durable political solutions. Military force alone will not produce such solution. It is necessary at this moment but it has to be supplemented by **a coherent and well coordinated global diplomacy.** The role of Germany can be very significant in these circumstances - as a major power, well respected in the region and globally, a country of great political sensitivity and common sense.

These qualities were demonstrated in the efforts to secure peace in Afghanistan more than a decade ago - let us recall the importance of the Bonn Conference of 2001- and in the welcome initiatives related to the Palestinian issues. Germany possesses precious political capital and diplomatic potential. Shouldn't it be used now?

I am not the first visitor in Berlin praising the wisdom and capacity that Germany has demonstrated in the recent history. I am not the first visitor encouraging her further and active engagement. At the same time, I am aware that my appeals for acute political judgment and responsible decision making are addressing an audience well aware of these requirements. So, let us have a discussion about the way forward.

I look forward to your questions and comments.

Thank you for your attention.