Who killed the "S"-words?

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A Discourse on Adaptation: Reconceiving International Environmental Law without Spawning Obsoleteness

Werner Scholtz

The survival of the fittest is the ageless law of nature, but the fittest are rarely the strong. The fittest are those endowed with the qualifications for adaptation, the ability to accept the inevitable and conform to the unavoidable, to harmonize with existing or changing conditions.

Introduction

The effects of globalisation challenge the structure of public international law. The events of September 11, 2001 have given birth to vigorous debate concerning various issues of international law and in general raised the question whether international law may be able to address the challenges posed by globalisation. Thus, public international law discourse illustrates that the main tenets of public international is questioned by scholars. In an attempt to answer the challenges of globalisation several scholars argue that the basis of international law as found in sovereign statehood is withering away. Liberalist approaches propagate a "new world order" where individuals and private groups are the fundamental actors in the international system. Thus, globalisation functions as a decentralizing influence that diminishes the importance of sovereign states. Therefore

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3 J. Klubbers "(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors" in Nordic Cosmopolitanism Essays in International Law for Martti Koskenniemi 353.

4 See in this regard: A.-M. Slaughter A New World (2004).


the end of sovereignty has been announced.⁷ In terms of the latter approach sovereignty is seen as a relic of the past that does not fit in a globalising world.

The challenges that global environmental degradation present, serve as a particularly good example. Sovereign states seem ill-equipped to address global environmental problems as the traditional conduct of states reflects the pursuit of national interests.⁸ The preservation of nation-state autonomy is therefore more important than the prevention of global environmental degradation.⁹ States have generally speaking been unwilling to act as guardians of the global environment.¹⁰ In general sovereignty is often viewed as a barrier to the pursuit of a solution to global environmental problems.¹¹

Thus, it is the main aim of this article to establish how international law should respond to global challenges and threats relating in particular to global environmental degradation. Thus, this article will focus on the responses in terms of international environmental law. The main purpose of this article will be pursued by discussing the “S”-words, which are sovereignty and statehood. I shall indicate that although the “S”-words are under attack, they still flourish. Accordingly, I shall explore whether it is possible to adapt the basic constitutional doctrines of public international (environmental) law on the basis of another “S”-word, which is solidarity.

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State interest is still Self-interest?

States generally speaking pursue their own national interests. The overriding “national interest” is national security and state survival. The interest of a nation may not be beneficial to other states or the international society of states. US practice relating to the issue of climate change serves as a good example. The Bush administration refused to ratify the Kyoto Protocol as the USA is of the opinion that a global solution to climate change necessitates the participation of developing states. It seems that the main reason for the refusal of the USA to join the Kyoto regime was the assumption that this instrument was not in its economic best interest.

However, scholars opine that global environmental problems challenge the traditional international structure as the pursuit of mere national self-interest cannot address issues, such as climate change. It is proposed that climate change threaten the survival of mankind. Thus, the survival of humankind is the “common interest” of all states, which dictates co-operation and accordingly highlights the interdependence of states.


One may also assume that this is true for democracies as governments need the support of their constituencies in order to stay in power.

14 See J. Brunnée “The United States and International Environmental Law. Living with an Elephant” (2004) European Journal of International Law 617-649. In July 1997 the US Senate adopted Resolution 98, which is known as the Byrd-Hagel Resolution. This resolution made it clear that the US would not be party to any climate change agreement that does not impose obligations on developing countries.


"Common interest" is therefore the product of coinciding individual state interests, which means that it reflects egocentric, rather than altruistic features.

If one accepts that we are moving towards a world where "common interest" becomes increasingly important, it means that states may need to pool together their resources in pursuit of the common interest. This would be illustrative of a state society that cooperates in order to achieve common ends. Cooperative measures pursuant to the common interest may be indicative of a society of states that recognises individual vulnerability and collective interdependence. Thus, it may even be said that global environmental problems could serve as a catalyst to transform the traditional state system preoccupied with nation self-interest to a system where common interest is of significant importance for the survival of all humankind.

Unfortunately, this is not as simple as it seems. Common interest does not reflect the altruistic interests of states, but the convergence of self-interest. Climate change is said to constitute common interest as it actually represents the convergence of nation interest, which is in this instance the survival of different states. However, climate change does not have the same detrimental impact on all states and it may even benefit some states. As common interest is actually the product of self-interest it may mean that not all states share the common interest or do not pursue it equally. Thus, in this sense the interests of some states, such as island states, may not converge with the interest of states, which will not be affected in the same way by climate change. This may result in international inaction. Thus, governments may choose not to act in order to avert the future effects of climate change. This temporal component of state interest should not be ignored. In this sense it may be said that the common interest may not be as common as it seems. It is

It is of course true that the disastrous effects of climate change on states may have a spill-over effect on other states, which may even influence the peace and stability of the international structure. Climate change may result in the migration of environmental refugees. The problem is of course that governments pursue short-term tangible interests, which means that they may act when it is too late. J. M. Mintzer, J. A. Leonard and M. J. Chadwick Negotiating Climate Change. The Inside Story of the Rio Convention (1994) 11.
therefore questionable whether the convergence of state interest may indeed result in a truly common interest.

The new “S”-word for a new “S”-world: Solidarity

It seems that, for the time being, states still pursue self-interest on the basis of state sovereignty. The convergence of this interest to form a common interest may not constitute an incentive for all states to adopt measures to address global environmental problems.\(^{19}\) Does this mean that we have no hope to combat global climate change? Is the traditional system of sovereign states not up to the challenge? Is mankind doomed? It is excusable to be pessimistic. The prognosis does not seem to be positive. It is clear that some paradigm shift is required to induce global action on climate change. It is my opinion that solidarity should facilitate this paradigm shift.

In terms of my understanding of solidarity\(^ {20}\), states have to be made responsible for the external effects of their policies. Thus, states should conduct their policies in a manner which takes into account the interests of other states. In this sense they should avoid any action or actions which may cause substantial injury to other states. However, solidarity entails more than to refrain from actions that injure other states. It should be the aim of solidarity to guide actions that ameliorate inequalities between states. This implies that in aiming to realise a common goal some states may have to contribute more towards the promotion of an objective. Solidarity therefore dictates positive action, which is to the benefit of a community of states.

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\(^{19}\) Common interest may serve as a driving force in the development of rules. Common interest gives birth to the common concern of mankind concerning climate change.

\(^{20}\) R.S.J. Macdonald “Solidarity in the Practice and Discourse of Public International Law” (1995) Pace International Law Review 259ff. Solidarity may be defined as a “principle of co-operation which identifies as the goal of joint and separate state action an outcome that benefits all states or at least does not gravely interfere with the interests of other states”. See also R. Welfart “Solidarity amongst States: An Emerging Structural Principle of International Law” in: P.-M. Dupuy, B. Fassbender, M.N. Shaw and K.-P Sommermann (eds.) Villkorrecht als Wertordnung Festchrift für Christian Tomuschek (1995) 1087ff.
It is my viewpoint that the convergence of state interest and the resulting common interest is not enough. Solidarity must facilitate a paradigm shift. Thus, state sovereignty should be exercised on the basis of solidarity and not mere self-interest. This does not mean that states will not be able to pursue self-interest, but that the promotion of state interest is influenced by the interests of not only other states but the collective interest of all states towards a common end. This proposal does not mean that solidarity constitutes the basic doctrine of public international law. This position is still taken up by sovereignty. Solidarity serves as a moral principle, which replaces mere national interest. The actions of states, which are taken on the basis of sovereignty, are thus shaped by solidarity in order to answer to the challenges of a global world.

What does this mean for the current discussion? How can solidarity influence self-interest in an international system where states are the primary participants? The United Nations Secretary General's report of the High-Level Panel on Threats, Challenges and Change offers an interesting view on the issues of security, solidarity and sovereignty, and as such may be of value for the current discussion. The core theme of the report is an appeal for a "new security consensus" that will underlie a "new comprehensive collective security system". The panel considered threats that face the world today. These threats relate to people as well as to states. Thus, the report illustrates a holistic view of international security that acknowledges that state security and human security to be entwined. The list of security challenges includes inter alia poverty and environmental degradation.

The report adds human security, in addition to state security, as an independent goal of the UN Charter. According to Slaughter it even subordinates state security to human

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23 See Part II of the UN Report.
24 See the comments of Slaughter on 623ff.
security.\footnote{Ibid.} Human security is a matter of collective security due to the fact that we live in an interdependent world where “threats are interrelated and a threat to one is a threat to all”.\footnote{UN Report 19, Para. 17.} Thus, “No State, no matter how powerful, can by its own efforts alone make it invulnerable to today’s threats”.\footnote{UN Report 21, Para. 24.} States may overcome these perils through shared responsibility.\footnote{Slaughter (2005) American Journal of International Law 625.} It is interesting to note that the panel report in its discussion of “Sovereignty as Responsibility” affirms the main tenets of the report of the ICIS.\footnote{“Report of the International Commission on Intervention and State Sovereignty” (ICISS) The Responsibility to Protect (2001). See also Para. 135 of the Report of the Secretary-General “In Larger Freedom: Towards Development, Security and Human Rights for All” (UNGA A/59/2005).} According to the panel “States not only benefit from the privileges of sovereignty but also accept its responsibilities” in signing the UN Charter.\footnote{UN Report 21, Para. 29.} These responsibilities include not only the obligation of a State to protect the welfare of its own peoples, but also to fulfil its obligations to the wider international community.\footnote{UN Report 22. From a developing country perspective interdependence may sound like a justification for mere interference. This is also alluded to by Slaughter. See 624. It is indeed not impossible that developed countries may misuse the existence of a common threat to pursue self-interest. Thus, it is necessary to have mechanisms to facilitate a balance between interference in order to secure human values and egocentric actions disguised as the latter. This question, however, does not fall under the ambit of this discussion.} Thus, the report endows states with an instrumental value.\footnote{The report reads that the Charter “seeks to protect all States, not because they are intrinsically good, but because they are necessary to achieve the dignity, justice, worth and safety of their citizens”. UN Report 22, Para. 30. It is therefore that Slaughter correctly argues that human security trumps state security.} States exist to ensure the security of its citizens and meet its international obligations in terms of its shared responsibilities for collective human and state security. It is my opinion that in this regard state security merely exists as a means to achieve human security.

The above discussion has certain profound implications for international environmental law. States are vessels in international law that need to secure the welfare of citizens in order to promote their human dignity. The interdependent nature of states has, however, made it impossible for States to achieve these means on their own. This is evident in the case of global environmental threats, such as climate change. Weaker states mostly have
difficulty in this regard. Thus, all states have to cooperate in order to ensure that individual states may guarantee the security of their own citizens. This also means that all states have a shared responsibility for the security of citizens in other states. Thus, states may not merely focus on narrow-minded nation interest as their actions may have repercussions on the security of other nations and therefore on collective human security. This implies that the growing importance of the concept of solidarity is a result and also a response to threats that we are faced with in a global world. It is important to take note that these threats are not merely viewed as such because they constitute a threat to state security. The challenges constitute threats in and of themselves. This argument means that self-interest must gradually be replaced by real common interest through solidarity. This common interest rests on a common recognition of common threats, which cannot be addressed through mere self-interest. Thus, my view of common interest does contain elements of altruism as states may have to effect measures, which is not optimal for nation interest, but secures human welfare. It is of course evident that this form of common interest also includes self-interest. In conclusion, it may be said that the pursuit of national interest (state security) is in a process of change in order to respond to global environmental problems. Thus, adaptation of public international law on the basis of solidarity actually occurs as a rational choice or response to the threats of a globalising world. This means that circumstances induce states to alter their actions in response to global threats. These responses may in certain instances result in the amendment of international law rules.

This is not to say that the change has occurred in full, but that states are reacting to global problems. State security is not of the same importance as it used to be. The importance of human security dictates a different approach; common threats may only be met by a pursuit of a truly common interest, which may ensure the protection of human security and state security.

36 Slaughter (2005) American Journal of International Law 623, This viewpoint therefore goes further than to merely recognise that state collapse may have an impact on other states.
38 In general international law is based on the consensus of states. Thus, the rational responses of states may result in customary law or treaties.
system, which addresses existing inequalities in the international arena. This does not exist at present. Thus, the aspirational phase of these theories they may serve as a justification for interventionist actions in other states. These interventionist actions may answer to the interests of more powerful states.

Thus, it is my viewpoint that one should rather investigate how international law should develop and adopt sovereignty in order to empower states to respond to global environmental needs? Sovereignty does not need to be declared a ghost of the past, but should ideally form the foundation for the protection of the interests of all of the people of the world, which constitutes humankind.

Sovereignty needs to undergo constant adaptation in order to live up to the challenges of a global world. Fortunately sovereignty is a dynamic concept of international law. The history of international law clearly illustrates that adaptation is not only possible, but normal. Nineteenth century international law gave birth to exclusive sovereignty, which distinguished between civilized and uncivilized states. Thus, it is fair to state that sovereignty served as an instrument of inequality. The UN Charter introduced sovereign equality in order to provide states with formal equality and the opportunity to participate in international law. The exclusive form of Westphalian sovereignty made way for a new version of sovereignty. Thus, a sovereignty regime can be replaced by another. This process implies continuity. Sovereignty is a flexible concept that changes shape, without losing its essential elements.

Sovereignty therefore doesn’t translate into absolute power and does not justify resistance to measures aimed at the protection of the global environment. It rather entails

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47 Cohen Ethics & International Affairs 14.
50 It must be borne in mind that Westphalian sovereignty only related to European states. See, however, G. Simpson Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order (2004) 12.
Sovereignty still sovereign?  

What does the above discussion mean in relation to the notion of sovereignty in international law?

It must be noted that sovereignty and equality of states constitute the basic constitutional doctrine of public international law. As such it may even be seen as a *Grundnorm* of a society of states. This important concept has been the focal point of much debate among international law scholars. It is, for instance, argued that a decentered cosmopolitan world order has emerged which renders the discourse of sovereignty and the role of states irrelevant. Cohen rightly rejects this thesis from a normative as well as empirical perspective. It seems that cosmopolitan moral and legal theorists “are eager to abandon the concept of sovereignty because it signifies to them a claim to power unrestrained by law.” The acceptance of a decentered cosmopolitan world order may introduce an imperial project. The USA seems hostile towards the UN as well as international law and is the sole superpower of the world with unprecedented military power which it sees fit to invoke in order to enforce human rights and democracy.

It is, therefore, my opinion that sovereignty still constitutes the basic constitutional doctrine of public international law. Alternative proposals which may introduce a post-sovereignty international law are indeed very ambitious, but several problems arise in relation to this issue. It must be borne in mind that a new liberal global order also needs a

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39 This part of the discussion is based on a forthcoming publication in the December 2008 edition of the *Netherlands International Law Review*, titled “Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism.”


43 See also T.W. Pogge *Cosmopolitanism and Sovereignty* (1992) *Ethics* 48-75.


responsibilities to protect and secure human values, such as a liveable environment for all
generations. Further, sovereignty is important in a world characterised by great disparities
between rich and poor. The introduction of post-sovereign theories in such a system may
be to the detriment of poorer states. For these states sovereignty is vital for survival as
they need to deter potential "eco-imperialistic" acts of richer states. Thus, sovereign
equality guarantees at least formal equality before the law and the possibility to deter
unwanted interference.

A perception exists, however, that sovereignty, and in particular permanent sovereignty is
used when developing states are intent on resisting international pressure to protect their
natural resources from overexploitation. Utilising sovereignty to resist cooperation in
order to address global environmental problems is, however, reminiscent of Westphalian
sovereignty and does not accord with the modern notion of sovereignty that should serve
as the foundation of the protection of the interests of individuals. Thus, developing states
dare not use sovereignty as an excuse for inaction in the area of international
environmental law. The need to adapt the basic constitutional doctrine in order to respond
to global environmental challenges, with recognition of the North-South divide in
international law, has inspired me to develop the concept of "custodial sovereignty." Basically, custodial sovereignty means that a state is the custodian of its global
environmental resources. Other states have an expectation that the relevant state will
protect its resources for the whole of mankind. The other states have a duty to support the

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52 Developing countries fear that the global environmental agenda, which they perceive as an agenda
of the North, may hamper their economic growth. It does seem that the international
environmental agenda is dominated by the richer developed countries that are plagued by
problems of affluence, whereas the developing countries need economic growth and are driven to
seek solutions to problems of poverty. See J. Nambiar "The Developing Countries in the
Evolution of an International Environmental Law" (1990) Hastings International &
Comparative Law Review 907. The most notorious example of the issue of "eco-imperialism" is
illustrated by the debate concerning the deforestation of tropical rainforests. M. Sanwal "The
Sustainable Development of All Forests" (1992) Review of European Community and
International Environmental Law 289.


54 Perlee Cooperative Sovereignty 97.

55 W. Scholtz "Animal Culling: a Sustainable Approach or Anthropocentric Atrocity: Issues of
Biodiversity and Custodial Sovereignty?" (2005) Macquarie Journal of International and
Comparative Environmental Law 9-30. This article merely introduced the concept in response to a
specific problem: My forthcoming publication in the Netherlands International Law Review deals
with the theoretical tenets of this concept.
Custodial sovereignty finds practical application in differential treatment provisions, such as those relating to financial assistance and technology transfer in international environmental law. These provisions may serve as evidence of the acceptance of the main tenets of custodial sovereignty. In this sense custodial sovereignty doesn't imply a radical alteration of accepted public international law. This concept illustrates the manner in which international law may rise to the occasion and adapt in order to answer to the challenges of our times.

All about a stateless state society.

A further important question is how the above proposals have an impact on the vessels of sovereignty.

The normative framework of international law may be traced back to the Peace of Westphalia, which provided the constitutional foundations for an emerging state system. The birth of modern international law placed the state at the centre of the international structure and state sovereignty as the fundamental ordering principle of this system. States became the subjects of international law. In terms of the orthodox positivist doctrine of international legal personality only states are subjects of...
international law. However, there has been an increasing acceptance of the legal recognition of other entities, such as international governmental organisations. But, in general international law has been, and primarily still is, state-oriented.

States are international legal subjects in international law and as such have a very important role to play. It may even be said that "the existence of the state facilitates international law, whereas the very structure of international law facilitates statehood." Various scholars, however, doubt whether states are equipped to meet the challenges posed by global environmental degradation. Thus, public international law, which recognises states as primary legal subjects, is in accordance with this agreement flawed as the primary actors in international law are unwilling or unable to pursue global environmental interests.

Further, the identity of subjects of international law has been at issue among scholars. Several scholars have announced that the importance of states have diminished as non-state actors exhibit increased influence in the creation, implementation and enforcement of international law.

\[\text{References:}\]


Non-state entities, such as the Holy See, chartered companies and belligerents have, however, presented exceptions as they were awarded certain legal capacities.

Klabbers *Nordic Cosmopolitanism* 356.


Klabbers *Nordic Cosmopolitanism* 352.

Slaughter which propagates that individuals and private groups are the fundamental actors of the international system. It is, however, interesting to note that Slaughter accepts that states are the point of departure in the international law structure. Slaughter *ASIL* 240-253. In a later book she establishes the main tenets for a future new world order. In terms of this approach, transnational governance has replaced states as the main actors in the global political system. A multiplicity of horizontal networks exist which link different government officials in regulatory, legislative and judicial channels. Vertical networks also exist between national and supranational counterparts, which include the relationship between the European Court of Justice, the International Criminal Court and the courts of the member states. Horizontal and vertical governmental networks form the body of global governance which allegedly replaces international cooperation and diplomacy. Slaughter *A New World Order*. Her theory is characterized by the fact that the "State" is disaggregated into its component political institutions. See A. M. Slaughter "International Law in a World of Liberal States" (1995) *European Journal of International Law* 503-538.
It is therefore important to determine how to overcome the impediments that the state-centric nature of international law may present in the search for solutions to global environmental problems. I do not think it viable to propose an order which is primarily occupied by non-state actors. The question is rather how non-state actors (NGOs) may be accommodated in the international structure in order to strengthen international law. This also does not mean that non-state actors should deserve the same legal recognition as states. Legal subjectivity also does not seem to imply that equal rights and duties are awarded as "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community." 65

The panacea for current global environmental problems in a state-centred system does not lie in a proposal, which advocates the demise of statehood and the establishment of a global civil society.66 I have in a previous article vividly illustrated this point in relation to the divide between Northern and Southern NGOs.67 In general even the common interest of NGOs is defined by the needs of their own constituencies. Thus, this situation reflects the current environmental North-South divide that exists between states. Awarding extensive rights to NGOs in the international arena may marginalise the interests of the South further and leave them more vulnerable to the whims of the North.

The proposal that states should not merely pursue state interest seems to be an utopian dream. But, is this at all viable and realistic? I shall introduce some form of harsh realism in order to explain myself. I do not think that my suggestion is akin to a new era of Global Enlightenment. Nor do I think that we have entered a phase where a community of states is sharing communal values, which may bring about the reign of effortless global achievements in the field of international environmental law. I agree with Koskenniemi that the international law system exists merely in a formal sense of a shared

vocabulary and a set of institutional practices that states use for cooperation or conflict.\footnote{58} Thus, international law does not embody some "autonomous ideal of authentic communal life". Law is therefore designed to promote each state's idea of the "Good". A global civilization pursuing a global autonomous good does not exist yet. In this regard the realism of geopolitics needs to be recognized. It is most possible that a creation of uniform values for a global civilization shall be found on Western values, which may once again introduce the exclusion of non-civilized states in international law.\footnote{60} This project may lead to the dominance of non-Western states. The "new world order" agenda may present an unarticulated alternative to the current international law structure, which may impose unshared values on people. Thus, statehood is important to protect citizens from foreign imperialism and serve the distinctive interests of its citizens. In this sense statehood needs to serve human security. This means that where the support of statehood results in a failure to promote human security, statehood does not serve its purpose.

Sovereign statehood still survives as the basis of international law. Globalisation has brought about changes to which international needs to respond. It is important that international law facilitates the various role players in international law as to ensure that human security is promoted. This means that states are still primary actors in international law and as such must be endowed with international legal personality. The doctrine of international legal personality must be adapted as to accommodate a plural society of actors.\footnote{70} However, states are the vessels that are primarily responsible for the realisation of the distinct needs of its citizens in a context of shared, albeit also distinct, values.

Conclusive remarks


\footnote{70} The approach of the ICC in the Reparations for Injuries Suffered in the Service of the United Nations case makes provision for the possibility to endow actors with rights and obligations that may differ from those awarded to states.
It was the aim of this lecture to indicate in which manner international law may respond to the challenges and threats of globalisation. I have alluded to the response of scholars, which find it necessary to replace the basic constitutional doctrine of international law. The attacks on the “S”-words (sovereign statehood) and calls for a new world order may impose values of a powerful state on the rest of the world and therefore introduce a new wave of imperialism. It is my suggestion that international law is able to adapt to circumstances and rise to the occasion to meet the challenges of a global world. Instead of attacking the foundations of international law, it should be strengthened and developed. Another “S”-word comes to the rescue: solidarity. Sovereign statehood may be further developed on the basis of the principle of solidarity. Solidarity should be the “yeast” that ensures the adaptation of international (environmental) law to current challenges. The interests of states also change with the dynamic circumstances that occur. States adapt their behaviour in order to pursue changed interests. The vocabulary of international law is therefore adapted in accordance with the changed interests of states. This implies that in this instance adapted international law is a product of the rational choice of states in the context of the current Zeitgeist.

The responses to global environmental challenges vividly illustrate the adaptive nature of international environmental law. Climate change makes it imperative for all states to cooperate in order to solve this global problem. States still pursue state and human security on the basis of sovereignty. This form of sovereignty does not provide states with a justification for inaction, but rather a responsibility towards its own citizens and also even to other citizens to pursue sustainable development. Sovereignty, however, protects states from the imperial actions of powerful states and thus ensures that states may preserve the well-being of their own citizens.

Thus, my proposals in this lecture ensure that we do not kill the “S”-words of international law in response to global challenges, but that we rather foster and nurture them as to ensure a sustainable solution for humankind.