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"Is the global legal order in a fundamental crisis?"

- Check against delivery –

Let me start by extending my gratitude to Aarhus University and to the Max Sørensen Foundation for the close cooperation in recent years and in particular for the opportunity to speak today as part of the programme for the yearly celebration of Professor Max Sørensen – who also happened to be one of my predecessors as Legal Advisor in the Danish Ministry for Foreign Affairs.

In 2016, echoing a widespread sense of almost existential depression across the international ranks of public international lawyers regarding 'Brexit', Judge James Crawford of the bench of the International Court of Justice, offered a *de minimis* definition of international law in times of crisis by stating that "International law, is 'all that remains' when 'Brexit' happens, or when Donald Trump wins the U.S.' Presidential elections".

Both of these events have indeed happened, and for those of us who follow the current global developments in the field of international politics and law it is quite easy to be concerned: To feel that the tectonic plates of the global order built on the ashes of two world wars are sliding in the wrong direction and to worry that decades of hard work by the practitioners and scholars of international law will be cast aside by nationalistic tendencies, populist leaders and the satisfaction of short-term political and ideological gains.

For the pessimists the signs are everywhere. They are seen in the structural assault on the wider global system and not just in the limited field of international law. They are seen in the

relentless attacks on - and as in the case of BREXIT withdrawal from - established institutions for international cooperation. They are seen in the increasingly nation centered policies with primary focus on the narrow desires of the individual state as opposed to the international community of states as a whole. They are seen in the disregard for - and lack of implementation of - the decisions of international decision-making bodies, both those of a political and those of a judicial nature. And they are regrettably - of particular interest for us present today - seen in the reoccurring clear violations of even the most fundamental principles of international law.

The concrete examples of disregard for the obligations under international law are numerous and widespread. Allow me today just to mention a few.

One of the most worrying violations of fundamental international legal principles in recent years is the invasion and annexation by Russia in 2014 of Crimea, an integrate part of the state of Ukraine.

The international reaction to the Russian military operation has been overwhelming clear in its condemnation of this violation of the prohibition against the use of force in international relation explicitly enshrined in the Charter of the United Nations. The legal analysis of the situation is straightforward for anyone with even the slightest knowledge of international law. The violation is clear and none of the traditional or indeed more controversial legal doctrines allowing for the use of force in specific situations are relevant in relation to the Russian use of military force to annex Crimea in contempt of the rights of Ukraine.

However, in this as in other current situations the abuse of the veto powers in the Security Council has not allowed the Council to play the role it was foreseen in the Charter of the United Nations to take the necessary steps to maintain and uphold international peace and security. In other words, the system that we designed to handle this type of situation is simply not in a position to fulfill its mandated obligations, thus allowing the Russian occupation to continue to this day.

A different but perhaps even more heartbreaking example of current disregard for international law is the ongoing humanitarian catastrophe unfolding in Syria.

Spurred by the broken hopes and aspirations of the Arab Spring, Syria has spiraled down into an inferno of massive human rights violations and abhorrent violations of the most fundamental humanitarian principles guarded by the laws of armed conflict.

The conflict in Syria has led to the murder of hundreds of thousands of innocent civilians and the displacement of millions of Syrians. The rampant violations of human rights and international humanitarian law are too widespread to count. Indiscriminate attacks - and the use of prohibited chemical weapons - against civilians, children, hospitals, educational, religious and cultural institutions occur on a daily basis.

The country is falling apart and the international community is struggling in the face of the paralysis of the Security Council to find relevant responses and fulfill our responsibility to protect the citizens of Syria. Moreover, with the war in Syria still raging we see new and similar situations of massive human rights violations and crimes against humanity happening in places such as South Sudan and against the Rohingyas in Myanmar.

While these examples are perhaps the most vivid and gruesome on the scale of loss of life and affront to human dignity, signs and patterns also seem to suggest that even the traditionally most outspoken and hardened defenders of a global legal order are wavering in their support for international rule of law, strong international legal institutions and domestic and international policies built on the respect for human rights and fundamental freedoms.

Even in Europe, domestic policies in some countries give rise to concern. Fundamental legal guarantees are challenged. The independence of courts is tested. Political calls are made to abandon the framework of international regulations on individual protection.

In days like these, it appears all too easy:

- To reach the conclusion that the global legal order as we know it, is in a fundamental crisis.
- To grieve that the idea of international justice for the common good was but a dream.
- To accept that the harsh and brutish realities of the "real world" are leaving no room for enforceable international obligations.
- And to conclude that we are all alone in a very dark place.

It is easy to reach such conclusions. Maybe too easy. And I for one would take issue with such a pitch-dark and one-sided analysis of the current situation. I dispute these disheartening but tempting conclusions not because of ideological reasons or because I am an incurable optimist. I disagree with this bleak analysis for three reasons deeply anchored in the realities of the world as it is:

1. Such an analysis is blind to the historical realities of the development of international law and human rights,

2. Such an analysis is blind to the abundance of evidence of the many ways in which the global legal order is well functioning and both alive and kicking,

3. Such an analysis is blind to the fundamental imperative workings of the international system and the way in which international law is key in addressing the challenges both of today and of tomorrow.

Allow me to elaborate on these three reasons.

Firstly, on the apparently inherent human tendency to make the assumption or reach the conclusion that matters were much better in the past. They were not. Or at least I feel quite confident to come to the conclusion that they were certainly not when it comes to the respect and implementation of international legal obligations.

When grieving over the challenges faced today, we must not make the mistake of forgetting the historical fact that the international legal order has made tremendous progress in the last 70 years.

The net of international obligations is as tight-knitted as ever before across the full spectrum of relevant fields for potential international regulation. This is notably also the case in the more controversial fields of the law where the risk of clashes between international norms and ideological political standpoints is high. Indeed, we have seen a major expansion of new regional and international legal instruments also in the field of human rights and humanitarian law as well as the creation and growth of international legal bodies and monitoring mechanisms. International criminal justice is being served. Certainly not in all cases, but in important cases of perpetrators of war crimes, murder and gender-based violence against thousands of innocent men, women and children are held to account for their actions in a multitude of national and international courts addressing situations across the globe.

Enormous progress has been made in the last decades, but the point is that all these achievements were not easily attained. Every international obligation to limit the free behavior of individual states and their governments have always come hard-fought. The opposition has always been fierce. Particularly when it comes to the protection of individual rights. The development of the protective realm of the international human rights system has always taken place on the battlefield of ideological opposites and between political competitors. Progress has always been painstakingly slow and the risk of regress always present in every new negotiations over political and legal texts and declarations. This is not new, and we should therefore not be neither surprised nor unnecessary scared that these patterns of political behavior persists today. We should be surprised if this was not the case.

Make no mistake: I am in no way arguing that the international legal order is not fragile. It is. The risk of setbacks is constantly present in particular when it comes to the established legal system for the promotion and respect of fundamental human rights. What I am arguing is that we should not misjudge the inherent structural opposition against international regulation as a

particularly new tendency or as evidence that the system is more fragile than it really is.

Moving to my second point, seated as I am as head of the Office of Legal Services in the Danish Ministry of Foreign Affairs I certainly see all the challenges that public international law is facing today. We spend a lot of time in the Ministry addressing these many challenges.

What I also see - and probably see more clearly that the public discourse sometimes allows us to believe - is a constant flow of evidence of a well-functioning, highly necessary and in many areas fully respected system of international legal regulation. Not just in the sense that international obligations are on a regular basis identified and subsequently adhered to by states, but also more fundamentally a general acceptance that the procedures for inter-state cooperation and behavior is and should be regulated by international law. I personally believe that former professor Ole Spiermann quite convincingly has outlined this practical and political need for common international regulation in his analysis of public international law spurred by respectively the need for coexistence and for cooperation.

States are constantly developing new international legal norms because they need to and because they want to. States venture into the creation of international law both for practical legal reasons to fill a demand for structure and predictability in areas where national regulation does not suffice, but also for political reasons to address challenges of a common nature, which necessitates the cooperation across the sovereign realm of each individual state. In other words, it is in the own interest of states to maintain and expand a global legal system.

Examples of common international acceptance of legal regulation and the need to respect this regulation are abundant in all areas where international cooperation is in the common interest of the involved states both on mere technical issues, but also when the subject of regulation is of a more complicated political character, such as climate change, the international fight against terrorism or global trade. Similarly, more contentious issues of acute national interest are also addressed using the toolbox of public international law. A good example of this of high

relevance for the Kingdom of Denmark is the delimitation of our borders with our neighboring states.

As I speak, we are in different stages of different negotiations of the settlement of overlapping claims related to our borders with respectively Poland, Norway, Iceland, UK, Ireland, Canada and Russia. All these negotiations are difficult. All of them involve hard fought claims for a considerable number of square kilometers and some of them maybe the potential opportunity for access to resources and economic gains. However – in spite of their impotence and potential for conflict – the important point is that these negotiations are all conducted in full accordance with the UN Convention on the Law of the Sea and the general principles of public international law. In the end, it will be the pen, not the sword, which decides the delimitation of our borders with our neighbors.

Thirdly and as my final point, despite the current sense of general despair over the way of the world as it is right now, I do not see a future where a strong global system of legal regulation will not be needed and more importantly I have not heard anyone at a responsible political level suggest otherwise neither in Denmark or elsewhere. On the contrary, the necessity of ever-tighter international regulation is only being reinforced by the growing number of political challenges that cannot be contained within the borders of a single state.

Global warming, immigration, global trade, pollution, transnational crime, cyberspace, energy, conflict resolution. None of these issues can in any meaningful way be addressed by any single state. No policies decided and implemented by Denmark alone will have any lasting effect of these present and future global challenges. Only through international cooperation will progress be made and only through the painstakingly hard work of establishing the right legal framework for the necessary international cooperation will such a cooperation function as it is intended and in a stable and predictable fashion.

International law has in different forms existed for centuries if not millennia. In all this time the interrelation and indeed interdependence of different parts of the world has only increased. The

global legal system is here to stay, not because we necessarily have to want it, but because we need it.

So should we cancel the alarms and rest assured that all is well? The answer is of cause no. All is certainly not well. But all is not necessarily as bad as we might fear – at least not across the board.

We need to understand the nature of the threat against the system. In doing so and in order for us to address the most fundamental challenges that the global legal order is facing, we need to do the sufficient analytical homework to precisely identify the specific points of serious concern as well as the areas where the system maintains a strong international responsiveness of respect. Public international law is a product of national and in turn international policies and as such, the global legal order is shaped and influenced by the constant changes and developments of both the real world and the world of international politics. The role of international law is to anchor and frame the international decisions and indeed the decision making process itself. It is to crystallize our common norms and understandings into predictable and acceptable patterns of behavior. This role will only become even more important as the problems of the 21st century piles up.

So to answer the overall question for my presentation - is the global legal order in a fundamental crisis? I believe the answer is: Yes, but with the important modification that this to a degree has probably always been the case. The question then is whether we in the current situation should be more alarmed than we for good reasons have always been? The answer to this question is probably all things considered also yes. But because of the tendencies we see in specific fields of international law, not because the entire global legal order is confronted with an immediate system-wide collapse as such.

For some, this conclusion will of cause only confirm their anxiety. As it should. But in the words of the great Antarctic explorer, Sir Ernest Shackleton, who spend his carrier facing overwhelming, life-threatening challenges: "Difficulties are just things to overcome, after all."

So how will we overcome the difficulties we face? As we move forward we need to recognize that tension exists between:

- on the one hand the strong political wish in many states for a wider degree of national margin of appreciation in the implementation of our international obligations as well as a tendency among some of the biggest global actors to perceive international cooperation and regulation as a zero-sum-game, and

- on the other hand the imperative need for international law to address all the new and ever more complex challenges that only can be solved on a regional or global scale.

A well-functioning multilateral system with strong institutions and a tight-knitted complex of international regulation is a prerequisite for ensuring stability and predictability. These are of equal importance in ensuring international peace and security and the foundation for growth and economic prosperity. Such a system presents a major advantage for Denmark and it is in our fundamental national interest to promote binding international cooperation and rules, which ensure a level playing field, the influence of smaller countries and promote multilateral solutions.

However, the system as we know it is not cast in stone. We will continuously have to adapt the system, to change it, to ensure the necessary reforms, in order for the system to continue to be able to present relevant solutions to the reality that surrounds us also in the future.

In doing this, it is an imperative to secure the active participation and obligation of all the major actors on the international scene – including the major powers of tomorrow. The sustainability of a relevant and obligating global legal order depends on its ability to address the challenges of the future and in engaging the wider international community as a whole.

When embarking on this task we need – both internationally and on the domestic level - to be able to discuss the pros and cons of reform vs. the preservation of what we know. The short- and long-term advantages and disadvantages of the current system and the need for change where it is relevant.

We must be able to adapt to new realities, including the way in which we develop international law. Sometimes new "hard-law" conventions are needed; but sometimes what is needed is the sufficient – and often easier achievable - development of "soft-law" instruments defining a common understanding of the way existing rules apply to new or changed challenges. We should be open to pursue both avenues.

As we progress, the analysis of the need and substance of any reform should be done on the foundation of an enlightened understanding of the convention-based system as it is and the benefits it provides both to Denmark and to the international community as a whole. Such a discussion must take place based on a genuine understanding of what international law is and is not and what can and cannot be accomplished under international law, and not based on some of the distorted representations of the misconstrued failings of the system that are sometimes presented in the public domain. In order to be able to present a clear and accurate picture of the existing global legal order, we need debate and contributions from academic scholars and students of international law. We need your analysis and your insights. And we need to hear your voices of both reassurance and critique in the public debate, which currently is shaping the broader understanding of the future relevance of international law.

In conclusion, allow me to quote Professor Max Sørensen for the following words of wisdom (in my own very unofficial translation to English) published in 1971. Words, which illustrates exactly the point I have been trying to make today:

"The system of public international law is full of contradictions and paradoxes. The urge to normatively restrict the behavior of states and thus ensure the needed predictability [in the

international system] is no less deep-seated than the need for the rule of law in the national society.

However, it has not been possible to contain the struggle between opposite interests with a sufficiently restrictive framework. Freedom of action is assumed a higher priority than the values achievable through mutual respect for a common system of norms. Development trends towards a centralized universal system clashes with the dominance of the viscous and persistent traditional structures. Sense and rationality clashes with feelings and passion. Mutual consideration clashes with one-sided assertiveness.

But is all this not just a reflection of the fact that public international law mirrors the situation of the human community as a whole?"

True words in 1971 and true words today.

Thank you!