Good-bye, Hobbes?

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31.08.2026 doi: 10.59704/a77ab814dee566a4

A specter is haunting international legal theory, and according to Monica Hakimi, it is the specter of Thomas Hobbes. It is not that there is widespread demand for a global leviathan to replace the many domestic ones. The Hobbesian specter, Hakimi argues, resides in the background, in the collective assumptions through which international lawyers see their own field, its successes and limits. Behind these assumptions she discerns a coherent "sovereigntist theory" that organizes the hallmarks of law around the figure of a "fantastical" sovereign "with both absolute authority and monopolistic control over the levers of coercion."

Having set out the sovereigntist theory, Hakimi does not mince words about the damage it has done, calling it "confusing," "specious," and even "despotic." Her invitation is for a clean break toward a post-sovereigntist frame, toward a paradigm of law more attentive to voice, participation, and empowerment than to control, constraint, command, and coercion. The aim, as she puts it elsewhere, is to exorcise Hobbes's ghost.

This comment engages with and challenges that post-sovereigntist proposal, in particular by contesting Hakimi's rendition of Hobbes's inheritance. It asks whether that inheritance is discarded too quickly, and whether, among the things thrown out, there are elements worth retrieving and ideals worth restating. For in the end, I do not see international lawyers united around a single bad theory. What I see instead is an order pulled apart by the forces of privatization and social fragmentation, which leaves us without an accessible domain of politics, making impossible the claims and self-organization pursued through law. For that world of lost agency, Hobbes deserves recovery and certainly not exorcism.

Let me say at the outset that I find much inspiration in Hakimi's sense of how much is politically at stake in doing legal theory. She sees the crisis into which the post-war world order, with all its institutions and rules, has been thrown. She recognizes the resulting soul-searching on the part of many international lawyers about their own relevance. There is something therapeutic in the article, in its attempt to surface the implicit, to hold our sovereigntist assumptions up for examination so that we might keep or discard them. Where I part company with Hakimi is the prognosis, on the question of what to do with sovereigntism once its central tenets and its lingering influence have been laid bare. While she wants a full clearing-out, sparing nothing, I cannot help but ask what we lose by it—not out of antiquarianism, but because some of what would be swept away is central to the very internationalist, emancipatory project that Hakimi herself cares about.

The Case for Post-Sovereigntism

The reason this prognostic disagreement is relatively narrow is that nearly four-fifths of Hakimi's article is diagnostic. That large portion identifies the central assumptions of sovereigntist theory and offers a superb survey of how those assumptions resurface across otherwise distant disciplinary schools, from formalists to realists and crits. In its purest form, the thesis belongs to John Austin. Law, on this view, is the command of a sociologically ascertainable entity—the sovereign—who is habitually obeyed yet obeys no one. It consists of the commands of whoever holds ultimate political authority, commands the citizens follow under threat of sanction should they not comply. A body of norms that no sovereign has issued and no central power enforces will look, by this measure, deficient from the start.

As Hakimi makes clear, however, few international lawyers hold this position today in its classical Austinian form. What persists is rather its unarticu-

lated residue that each school puts to its own use. Sovereigntism helps realists picture the international realm as a sovereign-less state of nature, while formalists fold it into their story of international law as a horizontal order, founded on the consent of co-equal sovereigns. Her long footnotes do crucial work in persuading the reader that the canonical theorists of each school really did speak along sovereigntist lines, and that a common thread indeed runs through them.

It is, in a way, unsurprising that Hakimi is able to gather such a wide cast into a single conversation. For the sovereigntist theory concerns, in the end, *the* question of social theory: How do human associations hold together in the face of inevitable conflict, which arises not only over clashing material interests, but also over clashing convictions about what is just or good? Hobbes posed this problem most sharply and took a famously extreme position on it. Every alternative to the absolute state, he believed, would sooner or later collapse into a "warre, as is of every man against every man," in which life is "solitary, poore, nasty, brutish, and short." Hakimi reads today's sovereigntists as walking the same path and keeping alive a "false choice between two antisocial models: either despotic control or an anarchic free-for-all." It is in this sense that she sees the sovereigntist frame as doing double damage. Not only does it make international law look unworkable; even if that ideal could somehow be reached, she shows, it would not be especially desirable.

Hence post-sovereigntism. In the last fifth of the paper, Hakimi sketches how we might "move past" sovereigntist theory. Thin as the sketch is, the main tenets are still there, with the New Haven School flagged as a chief inspiration. They come down, roughly, to two substantive suggestions and one methodological one: (1) we should stop searching for a sovereign in a decentralized system; (2) we should understand the authority of international law through whom it empowers, rather than through its disabilities or its enforcement; and (3) we should build the ideal pragmatically, letting our theoretical constructs be shaped by human purposes and by the non-ideal conditions in which we actually live.

Coercion and World-Making

What, then, are my misgivings about Hakimi's post-sovereigntism? They concern suggestions (1) and (2), and not at all (3). Indeed, I find much to admire in the pragmatic spirit of her theorizing. As many have observed, there is a strong essentialist pull in legal theory, a pull toward the search for the necessary properties a set of social phenomena must display in order to count as law. On this essentialist path, legal theory turns into the hunt for the nature of law, a nature that supposedly holds across all contexts. I read Hakimi's article quite differently, as an effort to find new and more illuminating ways to describe our lives, which is to me an instance of what Richard Rorty called edification, a mode of theorizing that he set against and preferred over the foundationalist tradition.

My difficulty lies instead with the substance of the post-sovereigntist horizon, thus with (1) and (2). Take (2) first, since it concerns law's authority, or its normativity. Hakimi distinguishes between law's coercive and its constitutive dimensions, and she rests her preferred conception of authority on the constitutive dimension alone. True to her method, she turns to the real world to make the case, urging us to see the empowering, constitutive successes of international law:

> *"[In] the post–World War II period, the number and significance of international institutions grew exponentially… As they used law, they decided who had authority for the decisions before them and constituted their social order with it. In turn, it constituted them. It empowered them to exercise voice and agency, and do things together, that they otherwise would not and almost certainly could not have done. Importantly, it had these constitutive and empowering effects no matter the extent to which it satisfied the sovereigntist conditions for command-and-control."*

There is much to agree with here. In a way, distancing law's normativity from coercive control was precisely why Hart's critique of Austin's command theory proved so devastating. Austin's mistake, as Hart made

clear, was to understand all legal rules on the model of commands. While some legal norms do take that form, not all of them do. Some are power-conferring: they empower individuals and communities, and in those circumstances our engagement with law cannot be properly understood as part of a prudential calculus of avoiding sanctions. Law has a world-making dimension that gives us voice and enables us to pursue our individual and collective projects.

Elaborating a closely related intuition, Martin Loughlin distinguishes between two kinds of power, *potestas* and *potentia*. When we speak of law's constitutive dimension, then, we are speaking of *potestas*: the power that constitutes a "we" capable of acting, generated and felt as "power to." *Potentia*, by contrast, names the capacity to bring about intended effects, and it is felt as "power over." On Loughlin's account, law as an institution rests on a "ceaseless dialectic between the two."

My worry is that Hakimi's post-sovereigntism leans too far toward one side of that dialectic. To its credit, it frees us from a picture in which international law is judged *solely* by its coercive capacity: its *potentia*, its control, its might. That move opens room to assess, for instance, the provisional measures issued by the International Court of Justice not merely by the narrow indicia of compliance (by what the wrongdoing state does in response to the order), but as one moment in a longer political struggle and process of change.

Even so, law's world-making capacity depends, at least in part, on its claim to *govern* conflict. This is why the sword belongs to the way we ordinarily perceive the rule of law. Granted, the conceptions held by legal theorists need not match those held by lay people, which can be ill-judged or confused. Yet the two cannot stray too far apart either. A theory of authority that rests on empowerment alone does not easily account for why international judges rightly worry about the efficacy of their judgments, sometimes reaching for avoidance techniques and declining to enter the merits of politically explosive cases, even at the cost of leaving certain grievances unspoken. They do so because it falls, in the end, to those who use and speak for international law to make it work. We are drawn to law's empowerment in part because its words carry real consequence, and that consequence is, in the last instance, the consequence of the sword.

Sovereigntism's Progressive Story

Finally, and perhaps most fundamentally, I am not persuaded by (1). Here I think Hakimi discards the sovereigntist legacy too completely and too soon. Cutting law loose from the sovereign has, no doubt, an attractive ring to it. It echoes Foucault's call to cut off "the King's head" in political theory. And, yes, Hobbes's idealization of the sovereign office did sit comfortably with an absolutist state that left little room for pluralistic power-sharing arrangements. What is more, Hobbes's legacy in the international law and international relations world has been claimed mainly by political realists across the generations, from Hans Morgenthau down to present-day scholars like Eric Posner. They cast the world beyond the sovereign state as fundamentally anarchic, a realm in which law is epiphenomenal and makes a difference only at the margins.

That, however, is far from the only story. There is also a respectable and progressive body of work for which Hobbes marks the very moment when the political is first articulated as a domain that stands on its own, made and contested by us rather than divinely ordained and imposed from without. Many progressive projects, from democratic revolutions to demands for collective self-determination, turned precisely on an ideal of sovereignty. For these projects, the definition and idealization of the sovereign office was a precondition.

Our Crisis

Hakimi locates the urgency of her reframing in a crisis that needs no recounting for the readers of this blog. For some, the world order that followed the Second World War is dead, and if not dead, then in deep trouble, as the daily images of tragedy from Ukraine, Palestine, and increasingly Sudan remind us.

When I ask what our crisis fundamentally is, however, I do not see a crisis of international lawyers

deluded by the wrong theory. What I see, beyond that, is a crisis of depoliticization.

Consider the proposals to rebuild devastated territories in Gaza through private equity, as though the place were a land-development project, a distressed asset waiting for PE professionals to work out the most profitable outcome. Or recall the openly transactional bargaining over Ukraine's mineral resources. The danger, in each case, is that the language of the dealmakers crowds out other ways of seeing and describing the world and the injustices within it. Their sterilizing talk of "reconstruction" and "post-occupation," of spreadsheets and IRR analyses, comes to push aside any attempt to assign responsibility or to demand restitution.

A post-sovereigntist world order, unfortunately, appears to me only to amplify these deleterious impulses. That is why I think overcoming the crisis requires some thick notion of international community, which, as Hakimi herself shows, is constituted not only through a thin discourse of cooperation but also through conflict. This shared political imaginary, I want to suggest, is simply too deeply bound up with the idea of the sovereign, which alone gives us an autonomous domain of politics, a domain that can then become the subject of public law. Hence I hold on to the sovereign, even if the sovereign office remains perpetually vacant on the global realm and has never been more than a fiction in the domestic one. We can, of course, abandon that sovereignty-oriented imaginary, and the world will not be without governance. But my fear is that it will be the governance of colorless technocrats, PE professionals, and false visionaries—not of the community of jurists and movements who seek emancipation and agency through international law.

For all these reasons, Hobbes's ghost does not appear to me as a demon to be exorcised. I picture him rather as the ghost of King Hamlet, who in the first act, comes in the night to warn and instruct a son whose will is far too fragmented to see, let alone to act.

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SUGGESTED CITATION

Erhan, Doruk: Good-bye, Hobbes?, Verfassungsblog, 31.08.2026, doi: 10.59704/a77ab814dee566a4.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260901-145248-0.