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Michael J. Kelly

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THE EVOLUTION OF INTERNATIONAL LAW: ARCS AND CYCLES

*Michael J. Kelly**

The theme of this conference is “International Law in Crisis.” The organizers hoped that the theme would cause panelists, presenters and participants to pause and take stock of international law as the world moves squarely into the 21st Century. We are called upon to think about the significant transitional events of 2011: (1) the role of the international community in the uprisings of the Arab Spring; (2) the capture and transfer to The Hague of Gen. Ratko Mladić to stand trial for genocide; (3) the targeted killing of Osama bin Laden in Pakistan; and (4) the extent of President Obama’s war powers in Libya.¹

Some may challenge such a theme with the observation that bodies of law, as organic creatures, are always in crisis. Just as some famously contend that the American Constitution is either a “living document”² or a static code,³ internationalists likely fall into similar camps. Yet it would be myopic indeed to maintain that international law is always in a state of crisis. Or never. Black’s Law Dictionary defines crisis as “a crucial point or situation in the course of things; a turning point.”⁴

While international law may or may not be in a state of crisis, it does, however, evolve—as do all bodies of law, whether civil or common in nature. It evolves through application, interpretation, logical progression and even trial and error. But it does not evolve within a vacuum. Rather,

* Professor of Law and Associate Dean for Faculty Research & International Programs, Creighton University School of Law. B.A., J.D. Indiana University; LL.M. International & Comparative Law Georgetown University.

¹ Matt Bradley et al., *As Arab Spring Turns Violent, Democracy Advocates Face Big Challenges*, WALL ST. J., Apr. 23, 2011, at A8; Robert Marquand, *Ratko Mladic's Arrival at Hague Bolsters Promise of International Courts*, CHRISTIAN SCIENCE MONITOR (Sept. 15, 2011), <http://www.csmonitor.com/World/Europe/2011/0531/Ratko-Mladic-s-arrival-at-Hague-bolsters-promise-of-international-courts>; Chidanand Rajghatta, *A Massive House with no Telephone or Internet Connection Led to Bin Laden*, THE TIMES OF INDIA (Sept. 15, 2011), http://articles.timesofindia.indiatimes.com/2011-05-02/us/29495685_1_bin-laden-hunt-extra-ordinarily-unique-compound-khalid-shaikh-mohammed; Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16.

² Ken I. Kersch, *Justice Breyer's Mandarin Liberty* 73 U. CHI. L. REV. 759, 810–12 (2006) (reviewing STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005)).

³ *Id.*

⁴ BLACK’S LAW DICTIONARY 374 (6th ed. 1990).

there is a system within which international law operates; and that system changes over time as well.

With important antecedents in various ancient cultures and civilizations, the modern system began about 350 years ago in a place called Westphalia. The great powers of Europe gathered there in 1648 to end the inter-religious Thirty Years' War in a series of treaties that became known collectively as the Peace of Westphalia.⁵ The Peace is widely regarded as the point of creation for the system of sovereign nation-states that survives today.⁶ That system created international law as "rules of the road" for countries' interaction with one another.⁷ As more countries interact in an increasingly globalized world, more international law is created.

Not surprisingly, it was the 20th century that witnessed the greatest generation of international law in the form of binding customary practice, multilateral treaties, new intergovernmental organizations and cases decided by international tribunals. This burst of lawmaking came largely in three great waves characterized by post-war idealism that, in turn, created a political environment where international law could flourish. However, each period of productivity, some more short-lived than others, suffered from a return to *realpolitik*⁸ forced by those not participating in the system, thereby truncating the underlying idealism.

The first wave of international lawmaking followed World War I. After the unprecedented carnage of that conflict, states determined that such horrible warfare should be prevented from recurring, so they created a League of Nations⁹ and a Permanent International Court of Justice¹⁰ to adjudicate disputes. Many treaties and informal pacts were also approved to bind countries' interests closer together. But the sudden return of the U.S. to isolationism, together with the rise of fascism and the Great Depression, foreshadowed an early end to this era. Germany and Japan, feeling excluded from international bodies, drove the world toward the precipice of World War II.

⁵ J.L. BRIERLY, *THE LAW OF NATIONS* 3–7 (5th ed. 1955).

⁶ LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 9 (1995); Leo Gross, *The Peace of Westphalia: 1648–1948*, 42 *AM. J. INT'L L.* 20, 26 (1948).

⁷ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 30 (2004). See also Thomas H. Lee, *International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today*, 67 *LAW & CONTEMP. PROBS.* 147, 150 n.15 (2004).

⁸ JACKSON NYAMUYA MAOGOTO, *WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY* 4–11 (2004).

⁹ League of Nations Covenant, Jun. 28, 1919, 225 C.T.S. 195.

¹⁰ Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 U.N.T.S. 391.

The second wave of international lawmaking followed World War II. This renewed dynamic bore the U.N.¹¹ as successor to the League, reconstituted the International Court of Justice,¹² adopted landmark treaty regimes to control state behavior such as the Geneva Conventions¹³ and the Genocide Convention,¹⁴ and witnessed the birth of international criminal law at Nuremburg. However, the start of the Cold War, the rise and spread of communism, and the proxy war in Korea froze many of those initiatives in their tracks. During the ensuing forty year standoff between the U.S. and the Soviet Union, international law developed only intermittently in areas the superpowers allowed: international banking and finance, law of the sea and environmental law. But the defeat of communism by 1990 brought another opportunity.

The first President Bush, a former U.S. ambassador to the U.N., declared a New World Order following the Cold War.¹⁵ This ushered in the third wave of international lawmaking. The 1990s was a decade of intervention on behalf of suffering peoples (Iraq and Kuwait, Somalia, Bosnia and Kosovo) which challenged the traditionally strict Westphalian notions of inviolable state borders and mastery by the central government over its internal affairs.¹⁶ Humanitarian intervention finally became an operational paradigm in its own right,¹⁷ and international law embraced human rights issues more fully. International trade law also enshrined free trade principles in the new World Trade Organization,¹⁸ and regional trade bodies such as NAFTA¹⁹ were created to facilitate the expansion of capitalism as a driving force in the globalized world.

¹¹ U.N. Charter, June 26, 1945, 1 U.N.T.S. XVI.

¹² Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

¹³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 12, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

¹⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

¹⁵ John E. Young, *Bush Defends Non-Intervention in Iraq*, WASH. POST, April 14, 1991, at A27.

¹⁶ Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver" – Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 376 (2005).

¹⁷ *Id.* at 395–401.

¹⁸ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

¹⁹ North American Free Trade Agreement, U.S.-Can.-Mex., 32 I.L.M. 605 (1993).

The terrorist attacks of al-Qaeda against the U.S. homeland on September 11, 2001 brought the curtain down on this optimism. Terrorism refocused the world's attention on threats posed by non-state actors and rogue regimes seeking to develop weapons of mass destruction. Politics within the U.S. had more to do with this process than agreement among countries of the world. The consolidation of power within the administration of the second President Bush by unilateralists resulted in the U.S. systematically disengaging itself from multilateral international legal systems that ran contrary to domestic political goals.

Thus, America denounced the Kyoto Protocol²⁰ to reduce ozone-depleting gases, terminated the Anti-Ballistic Missile Treaty,²¹ withdrew from the International Criminal Court,²² and circumvented the U.N. Security Council to illegally invade Iraq²³ and topple Saddam Hussein, resurrecting 19th-century doctrines like pre-emptive strike and reprisal²⁴ along the way. President G.W. Bush effectively brought to an end the new era of internationalism begun by his father, using terrorism as a justification for doing so.

Ironically, however, it was the short-sighted brashness of President Bush's go-it-alone strategy with respect to the world that doomed that very strategy to failure.²⁵ The logistical and financial burdens of near-unilateral occupation in Iraq, together with disasters such as the Abu Ghraib prison scandal²⁶—where American jailors were never provided with Geneva Convention instructions on handling POWs—caused many within the government to realize anew the tangible benefits of international cooperation. Subsequently, a chastened America quietly returned to the U.N. system for support, engaged NATO to assist in security detail²⁷ and sought financial assistance from other states.

²⁰ See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 22 (1998); see also Keith Bradsher & Andrew C. Revkin, *A Pre-emptive Strike On Global Warming*, N.Y. TIMES, May 15, 2001, at C1; Thomas L. Friedman, *Tiger By the Tail*, N.Y. TIMES, June 1, 2001, at A19.

²¹ Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.-U.S.S.R., May 26, 1972, 23 U.S.T. 3435; see also *ABM RIP*, ECONOMIST, Dec 12, 2001, at 1.

²² Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90.

²³ U.N. GAOR, 58th Sess., 7th plen. mtg. at 2-4, U.N. Doc. A/58/PV.7 (Sept. 23, 2003).

²⁴ Michael J. Kelly, *Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 3 (2003).

²⁵ Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT'L L. & COM. 149, 149 (2004); John Kornblum, *Help Wanted in Iraq*, WASH. POST, June 27, 2006, at A21.

²⁶ See SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004).

²⁷ Paul Richter, *Dutch Hesitations Create Hitch in Afghan Mission*, L.A. TIMES, Feb. 2, 2006, at A4.

More than anything, international law seeks to avoid perils such as the U.S. experienced in Iraq, and it works to improve the situations of both states and people within a predictable framework of behaviors and expectations.²⁸ Although fascism and communism helped bring an early end to internationalism after both World Wars, it remains to be seen whether terrorism will be able to do the same in the post-Cold War world. Combined with unilateralist tendencies within the last remaining superpower, it could. But alone, it will be difficult.

Terrorism thrives on division, fear and hatred. Many of its constituent elements (kidnapping, torture, hijacking, money-laundering, mass murder) have been outlawed by treaties, and its adherents remain wanted criminals. The more that countries agree to pursue terrorists together—while simultaneously sapping the impetus for terrorism by incorporating fair trade policies, opening markets, spreading democratic principles and encouraging compliance with international law—the less terrorism will be able to undermine the third wave of internationalism by itself.

The election of President Barack Obama offered an opportunity for the U.S. to return to the great task of international lawmaking.²⁹ His initial efforts at multilateral cooperation appear promising. To be sure, international lawmaking can occur without the U.S. But for it to be at once transformative and wide-reaching, America must have a seat at the table. Although the days of the Great Powers are largely over, they are still needed in this regard.

Recognizing the opportunity presented at the conclusion of World War II for the second great wave of international lawmaking, Justice Robert Jackson remarked as he prepared the first war crimes trial of Nazi leaders at Nuremberg:

Any legal position asserted on behalf of the United States will have considerable significance in the future evolution of International Law. In untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of inter-

²⁸ Harold Honju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2599 (1998).

²⁹ Michael J. Kelly, *Charting America's Return to Public International Law Under the Obama Administration*, 3 J. NAT'L SECURITY L. & POL'Y 239, 239 (2009).

national conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power.³⁰

The arcs and cycles traced by the evolution of international law are not predictable. They typically are responsive to crises of some sort or another, but that doesn't mean that international law itself is in crisis. The crises that states respond to through international law are better seen as opportunities to forge better societies and stronger law. If such opportunities are missed, the world suffers. But if they are seized, then the possibilities are only limited by the political will of the community of nations.

³⁰ Justice Robert H. Jackson, Report to the President on Atrocities and War Crimes, Yale Law School (Sept. 15, 2011), http://avalon.law.yale.edu/imt/imt_jack01.asp.