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COMMENTARIES

## International Law and the *Ides of March*: A Response to David Kennedy

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My response to this year's Montesquieu lecture focuses on Professor Kennedy's invitation to imagine the liberal institutional order as having been a dream-like experience, from which international elites have abruptly awoken. Yet, I engage that invitation by altering the framing somewhat. Perhaps the experience that was the liberal institutional order was a kind of theatre as opposed to merely a dreamscape. The 'deliberate' enactment of a geopolitical and geo-economic imaginary,<sup>1</sup> but where liberal actors forgot over time that this ruling imaginary required a convincing public performance.<sup>2</sup> Using my frame, the ensuing decay or collapse of the imaginary then invites a different kind of cautionary tale, where the scene of awakening is a prologue. The actual plot involves a settling of economic, political and legal debts incurred by liberal elites to sustain an imaginary that now confronts declining domestic and international purchase.

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My emphasis on the theme of debt is not random. It flows from the symbolic timing of Professor Kennedy's lecture: given on the eve of what the Roman calendar called the *Ides of March*, or the ceremonious time for settling debts. In this way, my response weaves Professor Kennedy's rich institutional analysis and use of metaphors with the figurative moment of his intervention. In doing so, I argue, the wider narrative might be less of a 21<sup>st</sup> century dreamscape disrupted, and more of how international lawyers are now confronted by a long and virtual enactment of the *Ides of March*. How so? The liberal institutional order was committed to the rule of law only under one condition: its governing lawyers could decide where and when law's rule was applicable. The 'Invisible College'<sup>3</sup> profited visibly from that arrangement in recent decades via intimate access to public policy, discourse and relevance.<sup>4</sup> Yet, the normative contradictions, social disequilibria and ecological consequences incurred have been stunning. The challenge now is to grasp the severity of that indenture for the discipline and profession, and its implications for the rule of law *topos* going forward.<sup>5</sup>

This brings me to what I value most in Professor Kennedy's lecture and intervention: its disruptive proposition vis-à-vis how international orders are perceived sociologically. He focuses on something a good number of international lawyers do not consider as intrinsic for their job description: imagination. I interpret Professor Kennedy's use of imagination as suggesting that international lawyers are governed, like everyone

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<sup>1</sup> Pursuant to Max Weber's assertion that, 'We are cultural beings, endowed with the capacity and the will to take a deliberate attitude towards the world and to lend it significance'. Max Weber, 'Objectivity' in Social Science and Social Policy', in Weber, *The Methodology of the Social Sciences* (Edward A. Shils and Henry A. Finch trs eds, Free Press 1949) 81.

<sup>2</sup> See Jeffrey C. Alexander, *Performance and Power* (Polity Press 2011).

<sup>3</sup> Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University Law Review* 217.

<sup>4</sup> Anne-Marie Slaughter being the individual exemplar of that trade-off with her progression from Princeton academic to President of the American Society of International Law to U.S. State Department Director for Policy Planning.

<sup>5</sup> See Friedrich Kratochwil, 'Has the 'rule of law' become a 'rule of lawyers'? An inquiry in the use and abuse of an ancient *topos* in contemporary debates', in Kratochwil, *The Puzzles of Politics: Inquiries into the genesis and transformation of international relations* (Routledge 2011).

else, by practices of looking at international authority.<sup>6</sup> It's an important move, because to suggest that looking involves practices hints at a dimension of indeterminacy that international lawyers scantily acknowledge, whether in doctrinal practice or scholarship. Specifically, Professor Kennedy helps us grasp practices of looking via his metaphor of dreaming.<sup>7</sup> And that metaphor does something powerful as you follow the text and subtext of the lecture: it challenges an industrial-era sociology<sup>8</sup> that has occupied the core of, not simply international legal theory, but also international relations theory. In particular, the iconography of the modern machine and modern mechanics; which have been translated into the vocabularies of international lawyers and international relations scholars via habitual terms such as structures, systems and orders.

International lawyers have invested heavily in that modern mechanical imaginary without ever appreciating they hold the stock certificates. The dream metaphor draws association with Benedict Anderson's pivotal reshaping of how historians, sociologists and anthropologists came to understand the making and breaking of nations: 'imagined communities'.<sup>9</sup> Transferring something from Anderson's assertion into the field of International Law, one could probe the extent to which International Law, as a world of practices, profits similarly from a governing community of imagination. An imagination animated by particular metaphors, theories, subjects and objects, which cohere socially into a collective vision of, as John Ruggie coined it, 'what makes the world hang together'.<sup>10</sup>

Yet, the prospect of a governing imagination grates against the formalization project that has dominated the labor of doctrinal international lawyers, both in relation to justifying their relevance—internally—against other cleavages of law and—externally—to the social sciences and society at large. A will to professionalize, one might say, that empowered a classical and liberal oligarchy of international lawyers to fence what the "proper discipline" does as something analogous to normative plumbing. International lawyers became positioned vocationally as metaphorical plumbers of inter-state rules, rights and obligations; piping their flow and direction and sounding alarm when pipes burst. Yet, to be a plumber, you must imagine and assume certain fixed structures; and, typically, mechanistic structures of space and association. What Professor Kennedy's lecture underlines is a contemporary globe where the international lawyer as conventional plumber encounters novel architectures of authority. Architectures that are not synonymous with mechanistic structures or metaphors. Architectures that rely on other imaginaries of structure and ordering beyond the mechanical. Debates over international structure now prompt the question that Nicholas Onuf has asked of International Relations theorists: 'Structure? What Structure?'<sup>11</sup>

It is at this juncture that Professor Kennedy proposes a different *S*-word to help us make sense of the changing architecture or architectures of authority in and on the globe: "struggle". To understand change, as Professor Kennedy advises, follow the interactions, associations and forms of leverage between people. I see this as a potentially empowering and breakthrough move. But, we need to grasp—pardon the pun—the many struggles this will provoke to seize this latest version of "struggle". And what worries me are the habits of mind typical of experts, scholars and international lawyers, which lead to old frameworks, ideologies and piping becoming repackaged as our new future and analytical horizon;<sup>12</sup> defeating through the back door new practices of looking and identifying alternatives. As the American constitutional historian, Howard Zinn, once put it: '[...] if you just listen to TV and read scholarly things, you actually begin to think that things are not so bad, or that just little things are wrong [...]'.<sup>13</sup>

This brings me to my stock-taking of promise and peril in the new turn to "struggle", and its potential in delivering new imaginaries of authority and thus practices of looking at the geopolitical, geo-economic and legal globe. First, a conceptual focus on struggle pushes international lawyers into deeper study of practices of authority-making, and how this produces radically new and transborder forms of institutionalization, where we break down an orthodox fixation on formal "sources" and "courts", as well as the proto-disciplinary silos of doctrinal, informal or transnational law. Thus, "struggle" extends inspiring potential for a neo-disciplinarity

<sup>6</sup> For insight on practices of looking, see David Shim, 'Remote sensing place: Satellite images as visual spatial imaginaries', [2014] 51 *Geoforum* 152, at 152.

<sup>7</sup> See George Lakoff and Mark Johnson, *Metaphors We Live by* (2nd edn, University of Chicago Press 2003).

<sup>8</sup> Anthony Giddens, *The Consequences of Modernity* (Polity Press 1990) 10–12 and 151–52.

<sup>9</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 1991).

<sup>10</sup> John Gerard Ruggie, 'What makes the world hang together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 *International Organization* 855.

<sup>11</sup> Nicholas G. Onuf, 'Structure? What Structure?' (2009) 23 *International Relations* 183.

<sup>12</sup> Timothy Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press 2002) 1–6.

<sup>13</sup> Howard Zinn, 'The Problem is Civil Disobedience' (Johns Hopkins University debate, Baltimore, November 1970) accessed 19 April 2018 <<http://www.historyisaweapon.com/defcon1/zinnproblemdisobedience.html>>.

within International Law, which encourages international lawyers to now engage the many varieties of *doing* international legality in the current global political economy.<sup>14</sup>

Yet, and second, Professor Kennedy's turn to struggle has an exposed theoretical flank. It still needs to confront decisively that old *S*-word, "structure", if it stands a chance of cultivating new alternatives. Confronting, especially, the governing metaphor that has always been standing behind "structure" since at least da Vinci's time: the machine. Why is that confrontation a must? We look no further than the old chestnut traditional international lawyers will deploy: the inter-state system has always been in struggle throughout modern history and in different ways, and thus the proposition of a new "struggle" might be old wine in a new wine skin.

This is where I propose that the turn to "struggle" needs more theoretical leverage to further lawyerly imaginations. The conceptual banner of struggle needs to theorize the defining geopolitical and geo-economic mutation of our new epoch: the way in which transborder infrastructures and practices are developing novel *platforms* of global legal rule.<sup>15</sup> Most associate the notion of "platform" in an extra-legal sense vis-à-vis the internet and social media.<sup>16</sup> Yet, the concept is also useful for grasping how transborder configurations of state, non-state and sub-state actors are encoding and enclosing novel boundaries of exclusion across the globe today; with structural implications that go well beyond common references to a "network" society. Moreover, what is conceptually valuable about the term "platform" is its political connotation: the 'place from which to speak and be heard'.<sup>17</sup> It is worth reflecting on that meaning in a global context saturated by layer upon layer of often competing legalities. In other words, the geopolitical and geo-economic landscape is inundated by "legalized" platforms. However, what happens when the voting masses do not speak, or cannot be heard, using one of those legalities? What happens should the rule of law become equated socially as a rule of lawyers, and thus framed as inaccessible, incomprehensible or, even, the linguistic asset of a plutocratic elite.<sup>18</sup> As Eric Posner has recently highlighted, these are real-time concerns for international lawyers as they confront an overarching struggle of public confidence:

...[T]he problem [is] less that a hegemon like the United States seized an excessive share of the gains from international cooperation, than that elites in all countries supported forms of international cooperation that benefited them and harmed the masses or were perceived to harm the masses. This process was accompanied by a great deal of self-serving propaganda that the elites themselves may even have believed, with the members of the Invisible College participating as unwitting servants of power.<sup>19</sup>

Posner's remarks are strongly worded, and I seize upon this tone to loop back to my opening theme on the *Ides of March* and the settling of debts. One of the signature traits of the liberal institutional order was the legal method by which its elites governed: rule *through* law. That method operated relatively unchallenged for three decades, in part, because of how heavily elites leveraged the rule of law *topos* as a normative asset. The powerful and historic narrative that the rule of law represented the rule of no one.<sup>20</sup> Yet, this over-leveraging of the *topos* to sustain a liberal ruling imaginary, alongside the visible privileges elites gained from that move, now confronts social, political and, mostly importantly, systemic upheaval.

For Posner, such upheaval becomes translated into a sharp rebuke of self-serving rule, with the Invisible College being pointed to as implicated ethically in the rise of global populism. However, the consequences are more extensive should we adjust our practices of looking to identify deeper normative and institutional repercussions. Most notably, populist leaders, from Europe to the Philippines, have used social discontent to mobilize historic foreclosures on rule of law and human rights institutions. In effect, enacting a settling of debts (or scores) with liberal rule *through* law, but at the price of encroaching on the normative and juridical inheritance of the rule of law *topos*. That much is knowable so far. What remains to be seen,

<sup>14</sup> See Nikolas M. Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and their Politics* (CUP 2016).

<sup>15</sup> See Nick Srnicek, *Platform Capitalism* (Polity Press 2017).

<sup>16</sup> See Anne Helmond, 'The Platformization of the Web: Making Web Data Platform Ready' (2015) *Society Media plus Society* 1.

<sup>17</sup> Tarteton Gillespie, 'The politics of 'platforms'' (2010) 12 *New Media and Society* 347, 350.

<sup>18</sup> See Chrystia Freeland, *Plutocrats: The Rise of the New Global Super-Rich and the Fall of the Everyone Else* (Anchor 2014).

<sup>19</sup> Eric Posner, 'Liberal Internationalism and the Populist Backlash' (2017) University of Chicago Public Law & Legal Theory Paper No. 606, 17.

<sup>20</sup> Nikolas M. Rajkovic, 'Global law' and governmentality: Reconceptualizing the 'rule of law' as rule 'through law' (2010) 18 *European Journal of International Relations* 29, 34–35.

however, is the kind of ruling imaginaries that become established after the conclusion of this figurative *Ides of March* for liberal internationalism. This is where I locate the biggest “struggle” international lawyers are now confronted with: addressing the hefty normative, social and ecological debts of the liberal institutional order while, at the same time, having the courage and ingenuity to regenerate the institutional imagination(s) of the discipline. In this way, I see Professor Kennedy’s lecture as a step toward a needed neo-disciplinarity in the curriculum and outlook of International Law. One where international lawyers begin to see themselves as engaged in understanding and producing complex architectures of global authority, and not just stately plumbing.

### Competing Interests

The author has no competing interests to declare.

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