

José María Beneyto · David Kennedy
Editors

Justo Corti Varela · John Haskell
Assistant Editors

New Approaches to International Law

The European and the American
Experiences

T · M · C · A S S E R P R E S S

 Springer

Preface

Everywhere we can see the impact of things foreign and far away. People everywhere feel vulnerable to global economic and political forces. But how do these things threaten us and what levers are available to respond? So much about global society remains obscure. What holds it together? How much is chaos, how much system? How are we governed at the global level? Urgent issues implicating people and places across the globe seem to call out for a coordinated global response. How might we aspire to govern?

The local—and diverse—impact of faraway things makes a global response to them difficult, even when it seems most necessary. Although the economic crisis is “global,” it is felt differently by each person and each nation. Just as the costs and opportunities of climate change will fall unevenly across the planet. This disconnect between local and global and the diverse distribution of gains and losses ensures that many significant issues will be solved neither by one city or nation or corporation alone, nor by the United Nations and the routines of global summitry. We might conclude that improved “global governance” is the answer: a diffuse global public policy capacity to aggregate interests, resolve conflicts, manage risks, address common problems, and promote prosperity. International law might well be the material from which such a capacity might be wrought. Intellectuals and policy professionals have ploughed these fields for more than a century, imagining and promoting international law as a tool for global governance.

In their work, we can follow the emergence of global governance as an idea, a promise, and a reform proposal. Indeed, to trace the contours of global governance is to follow the hand of knowledge in arrangements of power, if only because global governance is so often an assertion, an argument, a program of action, or a call to resistance. Indeed, when it comes to global governance, saying it is so can make it so. Indeed, saying it is so is often all there is to it. Global public authority always comes into being and functions as an assertion. In other contexts, we forget the power of claims to right. Other than in moments of revolutionary turmoil, we forget that the sovereign is just a person who says he is King. Institutionalization makes public power and sovereign authority seem “real,” just as it makes

distinctions between things like “public” and “private” or “national politics” and the “global economy” seem natural.

In global governance, the saying and performing are right on the surface. Global governance must be claimed through an assertion that this or that military deployment or human rights denunciation is the act of a global public hand, the “international community” in action. Moreover, the world to be governed must also be identified and thereby made. Forty years ago it was common to say that the most significant product of the space race was a distant photo of planet earth and there was something profound in the observation. Such things constitute our world before we begin to identify actors or structures, assert rulership or solve problems. Of course, such ideas arise from somewhere. Without a space program, perhaps without a Cold War, without *Life* magazine, we might not have had those photos at that moment in that way, and the idea may have arisen differently, at a different moment, or have seemed less compelling. For the globe, the constitution of a world is ongoing. It is technical and institutional work, as well as a communicative and performative accomplishment of the imagination.

The assertive and performative dimensions of global power are equally significant for those who would resist global governance. Identifying the global hand in local unpleasantness is also an assertion and an allegation of responsibility. Where jobs are lost at our local factory, we might finger Wall Street or the transnational corporate elite, just as we might blame our national government, or the currency—even the butterflies—in China. Whether one aspires to bring global governance into being or fears its power, one must name it, assert it, and identify it, before it becomes something to build or destroy.

We might say that what we mean by “global governance” is simply the sum of what those who wish to manage and to resist globally have jointly drawn to our attention as governance. We can read the ideas that compose the world and aspire to rulership both in the centrality of law to the effort—the proliferation of legal institutions, rules and modes of argument across what remains a dispersed, and ad hoc terrain for the exercise of public authority—and in the role played by expertise in global order—the striking transnational effects of shared expert vernaculars for thinking about everything from economic life to war. Policy makers, pundits, and politicians are all hard at work asserting a world, identifying the players and their powers, attributing responsibility, distinguishing cause and effect.

Scholars of global law and governance have periodically paused to ask how this work of world making is going. We are passing through such a moment of self-reflection now. I routinely ask my students how they see the world now. Is it like 1648 or 1919 when it seemed everything needed to be rethought? Or is it like 1945, when the international order seemed to need reforming but not remaking. Tweak the League Covenant and you have the UN. Replace European empire with self-determination under American hegemony and continue. Or is this like 1989, when the demand was not reform but implementation: finally, with communism defeated we could implement the solutions put forward a generation before. Many opt for the middle position: reform, add Brazil to the Security Council, sort out the democracy deficit and currency travails in Europe with another round of treaty drafting, and

keep going. But an ever increasing number come to the study of international law feeling this is or should be another 1648 or 1919. The essays collected in this volume reflect in various ways on scholarly work, including some of my own, written over the last few decades in this spirit. What if we thought it was 1648 and we could start again? What if we saw existing institutional arrangements and proposals for reform as hopelessly inadequate to the tasks at hand? Could we understand where our predecessors went wrong? Might we begin anew? That, it seems to me, is the aspiration behind the search for “new approaches” to international law.

It is immensely flattering that the authors collected here have found my own writings useful. I am grateful for the sustained engagement, commentary, and criticism. These essays differ a great deal in emphasis and direction. That is surely partly a matter of geography, of generations, and of each author’s own preoccupations and projects. Nevertheless, to my mind, those who seek “new approaches” to international law today do share a common impulse. An impulse to step back from contemporary common sense about the nature of global order and the available paths for reform, as well as a recognition that despite decades of careful study, we still lack a good picture of how we are, in fact, governed at the global level. Simply mapping the channels and levers of influence and public capacity remains an enormous challenge.

Nor do we have a persuasive program of action. The International Criminal Court could triple its budget and jurisdiction, the United Nations could redouble its peacekeeping efforts, the international human rights community could perfect its machinery of reporting and shaming—and it would not prevent the outbreak of genocide, the collapse or abuse of state authority. Every American and European corporation could adopt standards of corporate responsibility, every first world consumer could be on the outlook for products which are fairly traded and sustainably produced, and it would not stop the human and environmental ravages of an unsustainable global economic order. America could sign the Kyoto Protocol, could agree with China and the Europeans on various measures left on the table at Copenhagen, and it would not be enough to prevent global warming. The United Nations’ Millennium Development Goals could be implemented and it would not heal the rupture between leading and lagging sectors, cultures, classes. The Security Council could be reformed to reflect the great powers of the twenty-first, rather than the twentieth century, but it would be scarcely more effective as a guarantor of international peace and security. Global administrative action could be everywhere transparent and accountable without rendering it politically responsible.

Each of these efforts might be salutary. Some may be terribly important. Yet the intuition that this would all somehow not be enough has become widespread. We know that these well-meant projects may do more to render problems sustainable for the regime than to resolve them. Just as we know the most well-intentioned efforts to strengthen global governance and reinforce international law may, in fact, be as much part of the problem as of the solution. As a result, restating these proposals is not a recipe for reform or revival. It is a recipe for disenchantment and

for a withdrawal of confidence, affiliation, and interest from the machinery we know as international law or “global governance.” At such a moment, it is not surprising that many are rethinking our capacity for global governance and reassessing the role of international law. Striking off in new directions today requires more than stepping back from the classical international law tradition. By now, we know that international law is more complex than simply adding up national law and international law, public law and private law. For a century, international lawyers have known that the Westphalian vision of states interacting with one another in a horizontal public legal order has been demoted. For years it has been said that the state has been opened up, broken apart, replaced by the shifting internal dynamics of national bureaucracies and local powers. Already in 1949, the ICJ redefined sovereignty as “an institution, an international social function of a psychological character, which has to be exercised in accordance with the new international law.”

The twentieth century was an enormously rich one for disciplinary renewal. The structure of international law was radically rethought, shifting focus from assessments of normative validity to depictions of an interactive dynamic of persuasion and legitimacy. New international legislative, administrative, and judicial institutions were built only to have their activities be reimaged as functions and dispersed, exercised wherever two were gathered in their name. The language of law was marked off from political discourse, articulated in hundreds of codifications, only to be re-integrated with political life as the mark, measure and language of legitimacy. Across the last century, international lawyers, policy makers, intellectuals, and statesmen built new modes of world public order by reinterpreting dispersed institutions in legal terms, as a transnational policy process, a transnational judicial network, a global civil society. The big ideas of the mid-twentieth century, such as transnational law, policy science, and functionalism broke disciplinary boundaries and framed a more sociological inquiry into the operations of law in the world. They taught us that if it worked like law, we could learn a lot by treating it as law, and they remind us that things may not, in fact, all add up. Legal and institutional pluralism is our fate. Twentieth century scholars spawned new fields like “international economic law” or “international environmental law” or “global administrative law” to foreground new institutions, new problems, new ideas about how governance works across great distances. All these ideas were born as responses and challenges to the Westphalian regime. These are the reinventions which have faltered. Today, approaching the world anew demands more.

If we step back for a moment, we could say that international law promises to play a series of quite distinct functions in international society. Many look to international law for the expression of universal values, most commonly in the human rights canon. But we now know that people disagree about the most fundamental things, that values are not universal, and that even human rights can often be part of the problem as of the solution. Even virtues have dark sides. I am not the first to notice that human rights was a late twentieth century project and that is now, in some sense, over. At the same time, international law also promises

to identify the legitimate actors and their powers, most formally by enumerating the “rights and duties of states.” This is partly sociological, simply registering the powerful and their capacities. And of course it is also normative, offering a measure of the legitimate uses and misuses of power which may be useful in resolving disputes about who can do what. But international law no longer catalogs the sites of power, nor delimits their authority, for all the functional reinventions of the last century. Too much remains off screen, even there. We are neither describing the world as it is nor imagining a world that could be.

Perhaps most importantly, international law promises a catalog of policy tools and institutional arrangements with which to confront global problems. We have long said that like the European Union, only more so, the international order governs in the key of law rather than that of budgets or a monopoly of force. Yet the tools for addressing the most severe global challenges facing us are not to be found in international law, even after the dispersion and functional re-imagining of global governance as a matter of networks sharing common vernaculars of legitimacy. It would be more accurate to identify the cramped channels of public order entrenched by our legal system as among the root causes of the difficulties we face.

A new approach to international law and global governance would begin where these efforts have left off. A first step would be realizing that global governance is not only about management and problem solving. It concerns the making of the world. And in this it may indeed be up to our problems, for they are not technical or political challenges. They are structural. Their roots run deep. To develop a new approach, we must grasp the depth of the injustice of the world today and the urgency of change. We must realize that the most egregious problems are not those that “cross borders” or threaten the sustainability of the current order. They are precisely those occluded and reproduced by that order—and, often, by our best efforts to set things right

Imaginary boundaries have become fault lines built into the world: public and private, national and international, family and market. A conceptual separation between economics and politics has become a startling mismatch between a global economy and a political order lashed to local and territorial government structures. The result is a rupture between a national politics on the one hand, and a global economy and society on the other. At the top and the bottom of the economy, we have deracinated ourselves, moving ever more often across ever greater distances. In relative terms, the middle classes are the ones who have become locked to their territory. Increasingly, the relative mobility of economics and territorial rigidity of politics have rendered each unstable as political and economic leadership have drifted apart.

Government everywhere is buffeted by economic forces, captured by economic interests, engaged in economic pursuits. Everywhere governments operate in the shadow of disenfranchised and disillusioned publics who have lost faith in the public hand, in its commitment to the “public interest,” in its sovereignty, its relevance, its capacity to grasp the levers that affect the conditions of social justice or economic possibility. In the face of integrated supply chains, global markets,

financial uncertainty, workers, corporations, banks—all turn to the nation state for redress, bailout, support—only to find there is often little their sovereign can or will do.

Just as the global economy has no “commanding heights,” so the political system has no sovereign center. The institutional structure for each has been broken up. Political life has drifted into neighborhood and transnational networks, been caught up by the media, transformed into spectacle. Politics is diffused into the capillaries of economic and social life and condensed in the laser beam of media fashions. The institutional roots of the economy are informal networks, embedded in local and private rules, rather than the regulatory schematics of any nation, let alone the institutions of the “trading system” or the WTO. Think of the network of obligations which tied our global financial system in knots: collateralized debt obligations, credit default swaps and securitization so complex, and markets so rapid no regulatory authority can unravel them. Corporate governance so fluid and inscrutable one rarely knows who calls the shots. We have only begun to understand private law or corporate governance as global governance. But credit default swaps stand in a long line of private arrangements, including slavery, made in one place that restrict public policy alternatives elsewhere.

The result: the old worlds of diplomacy, foreign policy, and national economic management have become obsolete and left to play catch up with forces for which they were not designed. In such a world, we can dream about global governance, but we cannot have it. Not until the political economy of the world has been rebuilt. The relationship between the institutional frameworks for economic life and the channels for politics will need to be remade, a project demanding institutional innovation and experimentation.

Effective governance is no longer a matter of eliminating the corruption or capture of public authorities—difficult as that is. Nor is it a matter of sound corporate governance, corporate social responsibility and effective regulatory supervision—difficult as those are. Effective governance requires that public and private actors become adept at something none are now well organized—or well disposed—to attempt: managing the distribution of growth, linking the leading and lagging, managing the political economy of dualism. And they must do this not only in their backyard, in their territory, in their sector—but in a new world of shifting relations and linkages. Where small things have large effects, where local rules govern global transactions, and where very little is transparent or predictable.

If that is our world, how might scholars of international law contribute? How might we articulate the values, map the world, proffer the necessary policy tools? How might we speed politics, rewire economic life, encourage institutional innovation and experimentation? New approaches for this century might begin by clearing the ground. The debris of the traditional Westphalian narrative—and of its twentieth century modernizations—will need to be hauled away. Indeed, perhaps that is all we can offer now—vigilance against the repetition of renewal, vigilance cultivated in the gnarled vines of critique that have grown up alongside a century of optimistic renewals.

We can at least offer these—mistakes to avoid, bridges to nowhere built once too often. We will want to remember that the fragmentation of economic and political power has not de-legalized them. The governance challenge is not to bring political actors into law—they are already there. Law remains a language in which governance is written and performed. Even war today is an affair of rules and regulations and legal principles. At the same time, we will want to remember that global governance is—and will likely remain—extremely disorderly, plural and uncertain—a matter of performance and assertion, of argument as much as technique. The world's elites have long learned to inhabit a fluid policy process in which they as often make as follow the law. We must now draw the consequences of that knowledge. They will not be tamed by constitutional schemes. We must look for the politics in the cracks of fragmentation and search for economic possibilities in the choices it enables.

We must remember that things we does not like are also legal institutions and structures of governance. We spend far too little energy understanding the role of law and policy in the reproduction of poverty or the continuity of war in times of peace. We will need to abandon the comforting idea that “international environmental law” concerns only environmental protection and remember that law also offers comfort to the sovereign or property owner who wants to cut down the forest. We must remember what it means to say that compliance with international law legitimates, whether on the battlefield or off. It means, of course, that grinding poverty, terrible inequality, environmental destruction, and the premeditated destruction and death of war have become acceptable.

And we will want to remember that the informal and clandestine, the sacred and the violent, the spectacular, also govern. We push so much off-screen, either back in history or below the waterline of sovereignty. Before Westphalia—religion, empire, conquest as law. Religious confession—and ideological conviction—we say, are matters of national or local concern. Force today the expression and enforcement of right. This is comforting—but it is not accurate. Global governance remains as much a matter of religion, ideology, and war, as of persuasive interaction among the elites we call the “international community” about what is legitimate. It is a terrain for political engagement rather than a substitute for political choice.

Exercising our critical muscles, we can discourage being carried away by the dream of universal values. People disagree about the most fundamental things. Nor will the challenges we face yield to technical expert consensus. They are political. And politics is no more dominated by statesmen and politicians than the economy is directed by “investors” and “multinationals” standing on the commanding heights. Both are far more diffuse and dynamic systems, held together, if at all, by belief, expertise, assertion.

Ultimately, politics is less a matter of structures and agents than of ideas and expertise. After all, if for a generation everyone thinks an economy is a national input/output system to be managed, and then suddenly they all become convinced that an economy is a global market for the allocation of resources to their most productive use through the efficiency of exchange in the shadow of a price system,

lots has changed. That is also governance. We rarely have a good picture of the blind spots and biases of expertise. We too often focus on the authority of agents we can see to act within structures we understand. We have paid too little attention to the myriad ways power flows through belief, common sense, affiliation, or the experience of victimization, pride, and shame. All these things move like a virus or a fad, but our epidemiology is weak, our sociology of status, convention, and emulation at the global level rudimentary.

All this is an enormous positive program for thought. While we pursue it, the global order will be remade—indeed, it is already being remade. International lawyers can wait to see what emerges and write it down—or they can embrace the challenge of midwife-ing a new political economy. After all, the global nature of “problems” and the local nature of “government,” whether linked to a city, a state, or to the international order itself, is not only a troubling fact to be overcome. It is also the product of a very particular political economy and a historically specific set of institutional arrangements.

Our traditions for thinking about global governance, however, remain surprisingly uninterested in remaking the political economy of the world, in redistributing economic growth and political authority. For all our talk about global governance, the national, local, and transnational institutions that reproduce the problems we deplore remain totemic focal points, objects of a cult-like veneration. No sensible discussion of global governance can begin with the premise that “independent central banks” or the “demands of the market” or “the European project” will need to be swept away or substantially transformed. They simply must be defended. In the United States, an enormous majority can view the government as a dysfunctional part of the problem without anyone seriously proposing to alter anything about it. The government is crazy, but the constitution is sacred.

Perhaps our attitude toward global governance would be quite different if we began with the idea that our world is already governed, but that we are not part of, nor likely to become part of, the governing class. From this perspective, things we do not like, from economic instability, poverty, and warfare to environmental degradation, are not problems which escape governance. They are the byproducts—or even the intended consequences—of our current governance arrangements. Were we to start here, the urgent issue would be precisely to reinterpret and remake of the world rather than seeking to harness existing institutions to new rulership possibilities.

These two perspectives—global governance as the public good we need and the system of power we resent—are at war in contemporary discussions of global public policy. An endless debate between them has been institutionalized, professionalized, and stylized. Indeed, in large measure, debate about the desirability and limits of global governance is what global governance has become, just as international law has become debate about the bindingness of norms, the boundaries of process, the meaning of sovereignty, and so on. Substantive debates about what to do turned into debates about the boundaries of process, power, and norm, or into technical matters to be managed by familiar institutional players. In such debates, global governance appears both as a project and promise and as a frightening and disappointing reality. The promise seems always to recede before

us, our fervor to get there fueled by our disappointment in its reality. Starting anew will mean pulling ourselves away from this mesmerizing and repetitive discussion about the governance that might be.

We might turn our attention, instead, to the world—what do we see outside the window? What is the world—how is it arranged, what wars are continued in its settled structures and routines? We might say, for example, that in political economic terms, what is going on in the world today is less the rise of Asia or the internet than a rapid process of factor price equalization and technological assimilation. After all, the last two centuries have been an aberration—characterized, in the wake of the industrial revolution, by one nation, and then a small group of nations, rising to unprecedented levels of prosperity relative to everyone else. It was only a matter of time before the scientific and human technologies which enabled the dramatic rise of the North Atlantic, including the governance arrangements, would become more widespread. Until everyone aspired to a refrigerator, an air conditioner, a car—and until their societies began to provide the means to realize those ambitions.

But relative income equalization, like growth, is an extremely uneven business. It certainly does not mean the elimination of income differentials. On the contrary. Inequality is everywhere. Nor is a global economy a uniform economy. Things turn at different speeds. People are left out. People are dragged down. Economic change is profoundly destructive.

When people turn to their sovereigns for help the results are terribly uneven. Some are too big to fail—others too small to count. Indeed, the public hand everywhere has become a force multiplier for leading sectors, nations, regions. As it was between nations in the colonial era.

As a result, our modern global economy rests on an accelerating social and economic dualism between leading and lagging sectors, economies, nations, and populations. We face a revolution of rising frustrations among the hundreds of millions who can see in, but for whom there seems no route through the screen except rebellion and spectacle. At the same time, we face the restive demoralization of all those whose incomes, economic opportunities, and expectations have fallen—and will likely continue to fall. Indeed, the fundamental organizing framework for global political struggle today is neither ideological hegemony nor great power competition. It is the political economic question of the distribution of growth. How will economic opportunity be distributed between those who lead and those who lag? The wild horse to be ridden now is precisely this dynamic of dualism, the tendency for growth here to impoverish there.

We know that not everyone can be a highest tech, greenest technology leader—any more than everyone can be the lowest wage manufacturer. These are niche market dreams. Justifications for mobilizing resources behind those most likely to lead one way or the other. But the global, political, and economic challenge is to link experimental, leading edge economic dynamism with everyone else. Across cities, within and between nations, in regions, across the world. The central questions today are not political questions—if by that we mean questions to be addressed by governments acting alone or negotiated through conventional

diplomatic circuits. Nor, however, are they economic questions—if by that we mean questions to be answered by the operations of markets, guided by the hand of robust competition. They are questions of political economy—and they will be decided in the diffused institutional and regulatory structures which frame the interconnected, fluid, and chaotic operations of political and economic life after globalization.

Once we see this world, it will be hard to avoid the conclusion that the relationship between politics and economics is being remade. And in that effort, law has much to contribute. After all, economic thinking is not only the product of academic economics departments, any more than politics is owned by political science. Legal scholars have generated new economic and political ideas before. Prior to the Second World War, a robust institutionalist tradition was shared between the legal, political, and economic fields. Over the last 30 years, some of the most influential economic ideas were forged in law faculties by the “law and economics” movement. The return of “political economy” will require an alternative, for which the intellectual foundations have already been laid. Heterogenous traditions in social theory, in economic and legal scholarship, have opened a window on the politics embedded in the basic operations of economic life, the nature of political economy in a world of global markets and local rules, the nature of instability and risk in economic activity, and the mechanisms by which inequalities between leading and lagging sectors, nations, and regions are reproduced.

We know that the elements of economic life—capital, labor, credit, money, liquidity—are creatures of law. Law not only regulates these things, it creates them. The history of economic life is therefore also a history of institutions and laws. Economies configured differently will operate differently. We may discover choices among different economic trajectories—among alternative, perhaps even equally efficient, modes of economic life with diverging patterns of inequality. Too often, even scholars sensitive to the interaction of economic and political forces, whether in law, history, political science, or economics, nevertheless treat these domains as distinct, generating accounts of political change sensitive to materialist drives, or registering the impact of political and institutional change on economic life. This work can entrench the assumption that economic and political life follow different logics. The presence of law in the foundations of economic and political life suggests a different path. Not to explore the relationship between “efficiency” and cultural or political commitments, but to understand the concrete forms through which these are each constructed as different and placed in a relationship with one another. Pursuing this path will strengthen our understanding of inequality and dualism in political and economic life.

After three decades of “new approaches,” a great deal of intellectual work remains to be done. I hope you will read these essays in that spirit—less a history of new approaches to follow than a record that as the century turned, people tried to shake off the promise of repeated renewals, looked hard at the arrangements of power and the complicity of law. They did not figure it out. These essays reveal no path forward, no recipe for a new world political economy. But we must recall

how long it took to invent a national politics and organize the world in nation states. For all the agony that has come with success, building a national public politics across the planet had a strong emancipatory dimension—slaves, women, workers, peasants, colonial dominions obtained citizenship in relationship to the new institutional machinery of a national politics. It will not yield easily. It was equally difficult to build a global economy atop that political order. For all the vulnerability, instability, and inequality wrought by the effort, the global economy has also lifted hundreds of millions from poverty. It will not be unbuilt in a day. Building a new political economy for a global society will be equally difficult. The promise is equally large. The spirit of new approaches is to begin. I hope it does not take as long, nor require as much violence to be born.

David Kennedy
Manley O. Hudson Professor of Law
Director of the Institute for Global Law
and Policy at Harvard Law School
Email: dkennedy@law.harvard.edu

Contents

Part I History of the Human Rights Movement

- 1 **Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes** 3
Frédéric Mégret
- 2 **Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement** 41
Karen Engle
- 3 **National Responses in Latin America to International Events Propelling the Justice Cascade: The *Gelman* Case** 75
Yolanda Gamarra

Part II New Theoretical Approaches in International Law

- 4 **Engaging History in International Law** 99
Thomas Skouteris
- 5 **Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial** 123
John D. Haskell
- 6 **New Approaches to International Law: Images of a Genealogy** 151
Akbar Rasulov

7 Innovative International Law Approaches and the European Condition 193
Outi Korhonen

8 Notes for the History of New Approaches to International Legal Studies: Not a Map but Perhaps a Compass 225
Ignacio de la Rasilla del Moral

Part III Reassessing the Use of Force in International Law?

9 Formalization and Deformalization as Narratives of the Law of War 251
Olivier Corten

Index 273