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Global Governance in Crisis Time

Vital Interests: Thank you for participating in the *Vital Interests* forum. I am pleased to have this discussion with you on the state of global governance. You sent me a draft of a talk you gave in Beijing several months ago. Lots has certainly happened since that time.

David Kennedy: Exactly - I gave that lecture in February, 2020 right when the coronavirus was about to spread around the globe.

VI: We are now deep into the COVID-19 pandemic and anxious about what the lasting impact will be. Even before the appearance of COVID-19, American-Chinese relations were already tense and the international political economic system was under pressure to move from long-established multilateral norms to unilateral national policies. Several years ago you wrote an influential book *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy.* Can you give us your view of global governance as we enter these uncertain times?

David Kennedy is Manley O. Hudson Professor of Law and Faculty Director of the Institute for Global Law and Policy at Harvard Law School where he teaches international law,

attention paid to the dysfunctional nature of governments in many developed countries, to the big inequalities north to south, east to west, white to black and so forth, and to the ways in which the international institutional machinery, whether it's the WHO for health, or the WTO for trade, or the UN for politics, are simply not in the driver's seats, and don't have the governance capacity that, in an earlier time, one might have hoped that they had.

As we focus on these issues, we see a lot of confusion about just how global governance actually works. I guess the goal of the book was to try to untangle some of that confusion.

First of all, to say that although we often talk about there being an international "order," or an "international system," or "global governance," the situation is actually more struggle than order. Many more people *claiming* to be governing, *trying* to govern each other, battling over what governance might or might not mean in a situation that's very dis-aggregated, very horizontal, and where it's really nobody's job to aggregate the interests of the whole world and figure out what to do to achieve some semblance of global cooperation.

Domestically, we have the idea that the interests and the differences within a polity are brought together and figured out by some group of governing people, and then that turns into policy and that's implemented, all more or less well. All this just makes no sense at the global level. That's the first confusion: we underestimate the extent to which it is and always has been more

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The U.S. has become similar to many developing countries, where the difference between leading and lagging sectors or between the rich and poor is enormous and where there is no organized way of ensuring that the great bulk of people have a sense of security in the face of pandemics, global challenges.

Often international actors struggle physically or politically, but mostly these days they struggle using expertise, technocratic tools, institutional tools, and so forth. I think the second misunderstanding we have about how the world is governed is, quite simply, to underestimate how significant law and expertise really is. We tend to think international affairs is all politics and countries are banging into each other, but actually everywhere you look, there's something legal, something institutional and the way they bang into each other is very often through legal institutions. I think that was the second confusion I was hoping to shed some light on.

Then I guess the third piece would be simply, who are the actors out there and what is the law that's relevant to the governance of the world? If you ask people who regulate global trade, they might refer you to the WTO. Well, trade is regulated, but the WTO is a very minor

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along with the governance provided by elite firms in global value chains.

Where governance is struggle across a disaggregated terrain, you are more likely to get the systematic reinforcement of power differences than the global implementation of something like a shared public interest. For example, degrees of monopoly power will matter a lot. The "governance" in global value chains, if you can call it that, will reinforce the dominance of large firms at the center doing the "governing" as against lots of little companies competing with each other at the periphery. The WTO is pretty irrelevant.

The distribution of authority in the chain, how safety procedures will or won't be implemented and by whom, will reflect the interests of large firms – responding to pressure from *their* consumers, *their* employees, *their* insurers and shareholders while aiming to use whatever rule-making authority they can muster to erect barriers for potential competitors. To understand global governance today, we need to look at the process by which all those actors struggle with each other using law, expertise, institutional forms: that's the direction I was hoping to take in the conversation.

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VI: In your Beijing lecture, you talked about the evolution of law as it was developed by the North Atlantic elites to serve their

institutions. Can you go into how this came about?

David Kennedy: Sure. The legalization of everything didn't happen on its own. People had to do it. Thousands of professional people over a hundred years found and invented modes of legal activity that made sense to them, that they could use and develop and that were useful in their struggles. All kinds of people – not just lawyers or legal theorists – picked up bits of legal argument or procedures they found useful to close out their competitors, consolidate their gains and so forth. It's not just companies -- individuals find it useful to rely on the fact that your suitcase is still yours when you get off the airplane at the other end, just as rock stars find it useful to invoke legal norms in their humanitarian activism.

Along the way, specialized elites kept developing new ideas about what law could be internationally, what tools might be useful, how legal assertions could be made. They were very creative and very innovative. If we go back 120 years or so, it's interesting to see how far we've come. If you were to ask an international law specialist in 1890, or certainly in 1917, "what about law?" they would say, "we need more of it. The problem is politics. We have politics everywhere while law remains weak." That had not always been true – a hundred years before that the omnipresence of law across the world had seemed obvious to these same elites. But a hundred years ago, that is how it looked: how could

probably say, "that is very last century: law is everywhere." The problem, if there is one, is legal technocracy itself: what we need is something we could call politics that's functional, where we can contest things, rearrange things, come to terms together. What's missing is not the legal, but the political.

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The question that I tried to answer in Beijing is, what happened to get from the problem of not enough law, to the problem of too much law and not enough politics? And what happened was an enormous amount of innovation by legal thinkers and people using law in what law *could be*.

If we want to retrace it, the first idea was, if you want to have law you need to have *norms*. States need to get together and agree to have treaties to establish norms. If the states agree to it, then it's law. We all learned that in law school. That was the position a hundred years ago: you knew you had law if you had norms. But it turns out it's really hard to get norms at that level if you think norms happen through interstate agreement. What states agree to is really vague. Already in the 1920s people were thinking, maybe it's not really norms. We

and we'll find the norms later.

So people said, let's arrange dispute resolution procedures and then look for useful normative material: maybe we can draw on private law and we can get some analogies there. The thinking was, even if states don't come together and agree to something, if all law has this or that principle then we can say law must have that globally as well. Generation after generation, people who wanted to use law in their struggles drew law from more and more places and identified more and more things law could do. The result was a very complex and very diverse fabric of norms, rules, and institutions drawn from all kinds of places.

So today, if you're a person with a firm or business and you want to do a deal across three or four countries, you get a lawyer to assess the situation. Let's have a 360-degree audit of my legal situation. There might not be a treaty involved at all. The first question is what people who want to screw up my projects, what are they going to be able to bring to bear as a legal tool and in what kinds of places? Which governments, local, global are my competitors going to be able to harness to try to make this difficult for me? And then, what legal arrangements can I find to consolidate and advance my project?

I might need to locate my insurance contract in Switzerland to cover what I'm doing in Bangladesh. How can I triangulate favorable law to apply to the activities that I'm engaging in here and there or wherever? How can I make my own law if the law that seems likely to be

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VI: As these legal norms came out of the American/ European nexus, they migrated around the world and adapted to global realities. Students from emerging countries came to the United States and Europe to attend law and business schools to learn Western legal systems and practices. Because of this interchange did law itself become internationalized? Did it become something other than what the Western elites had intended it to be?

David Kennedy: Of course. There's a whole new field of study now called Comparative International Law. One of the things that struck me when I was in China recently: if you ask a Chinese international law scholar about the history of international law, they start in a different place, they talk about different national traumatic experiences. An internationally oriented lawyer here would think of World War II, would think of the Holocaust, would think of the Depression. Those things are important in China, but there also have been revolutions and the period of unequal treaties and the Boxer Rebellion. Lots of different considerations.

familiar: how legal elites in the world's semi-peripheral and peripheral places used, reinvented and innovated as they struggled both with other local elites and with foreign firms or governments.

And common legal norms and institutions mean very different things to people differently situated in an extremely unequal world. When a small firm in Bangladesh tries to legitimize its business using contracts and when Apple does the same thing, they may both be using contracts but there's a whole different relationship to the economic power of those two entities. They're very differently able to shield themselves from competitive forces. Here and there, when it came to protecting intellectual property, you'd allocate your enforcement resources differently, just as you'd define the scope of various property entitlements differently.

How can I make my own law if the law that seems likely to be applied is unlikely to be congenial to my interests and so on.

And we're only now beginning to map legal norms and practices for their differential impact on unequal players – the new interest in the legal history of colonialism has been a place to begin that inquiry. Reframing international legal affairs as about relations of domination rather than arrangements among equal

mentality, that the liberal democratic order had won. Democracy would spread, there would be peace and prosperity for all as a result of free trade and neoliberal capitalism. That was an illusion. Why was that view of a positive future with law as the overriding norm misguided?

David Kennedy: There's a lot of nostalgia now for the "post-war order," especially in the North Atlantic. I think first, we need to ask, was it ever that coherent or ordered? Was it ever that effective? Was it ever that peaceful? Was it ever that humanitarian? Was it the same thing from 1945 until yesterday, until Trump was elected? No. It was always a much more complicated thing than we now remember. Even in that post-Cold War moment where there was a great deal of euphoria among elites, certainly on the Eastern seaboard, I think there was already a lot of wishful thinking and historical reinterpretation of an era marked by struggle, war, inequality of all kinds.

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When you look at the situation now, all these years after the end of the Cold War, the worries that people have are quite different, especially in the North Atlantic where there was all that enthusiasm back in the 1990s. Inequality and political economy are

many are nostalgic.

Take the focus on inequality, particularly within countries: is seems to have something to do with global affairs, but not in a way on the radar in the 1990s. Nor, of course, it is the same everywhere: inequality in China between the enormous population brought out of poverty and those left behind is quite a different thing from inequality in the developed West where the middle is falling to precarious insecurity. Both seem to have some crucial link to global arrangements – perhaps even to those midwifed in that post-Cold War moment.

Here in the US, inequality is about security --- all of the basic elements that make a life secure, employment, education, health, have become precarious. Whatever we were thinking about global affairs in the 1990s, whatever our fantasies of global consensus, it didn't have much to say about that. When security did become the focus – after, say, 9/11 -- it was all about strange outsiders, terrorists, faraway wars in defense of a complacent status quo at home. All that seems long ago now. And if you look at things from China's perspective, just to pick one example, things also look completely different: no longer a rising – or just potentially rising – power, but a risen global force with hundreds of millions of citizens linked to global value chains and elites eager to exercise the authority that comes with economic power. It would be strange if people there saw the world as they did in 1990, if they were not constantly reinterpreting their own centuries

become similar to many developing countries, where the difference between leading and lagging sectors or between the rich and poor is enormous and where there is no organized way of ensuring that the great bulk of people have a sense of security in the face of pandemics, global challenges, Chinese competition, automation, climate change, other basic interests in employment, education, health and housing. So you have a sense of insecurity heightened by the deep sense that nobody is running the store – or whoever pays no attention to what you're worried about. The people who are running the store - elites, the experts, the technocrats – are not attending to your sense of insecurity, neither nationally nor globally. They keep talking about a "post-war order" -- whatever they thought that meant – when that all seems to be part of how people came to feel insecure.

Reframing international legal affairs as about relations of domination rather than arrangements among equal parties, whether in trade or diplomacy, would be a big step forward.

Path dependence perhaps – but it is hard not to conclude that they, at least, continue to find it useful in their own struggles for power and wealth. I've been interested in this expression, "today's inequality might not be sustainable." That's an expression an elite person uses to say "we might have overdone it."

you've got that in your mind and you're running the order, you're also not going to think the order is as great as you thought it was in 1995.

VI: In the inevitable economic struggle you mentioned, there are going to be winners and losers. If, however, there are too many losers and they get angrier and angrier, that creates social unrest and protests creating uncertainty and turmoil in the world. Is there nothing that the establishment hates more than insecurity?

David Kennedy: I'd worry more about the insecurity of everyone else, but you're right. I think our elites are also feeling nervous. From the commanding heights you could easily imagine asking yourself "how angry are they?" How many of them are there and how long have we got? That sense of the precariousness of the order is, I think, new since the end of the Cold War. And it is characteristic of an elite class worried about their own commanding position.

But what should they be worrying about? We might imagine they would be taking the measure of the overall global situation, aggregating and balancing interests, and building an order oriented to ensuring the global public interest. Indeed, we often describe the current – or the postwar – order in just these terms.

You could imagine people governing a metropolitan region – or even a nation if you squint – thinking like that, however much of a swamp of special pleading the capital has become. But globally? Take the enormous

themselves newly insecure. Or take the challenge of linking leading and lagging sectors, regions, firms, populations in productive virtuous cycles. We don't have anything like a vocabulary or institutional arrangement to do this. There is no person or institution whose job it is to figure out how to make those trade-offs. They are made through struggle.

A lot of inequality is sustainable – inevitable even – but maybe there's a tipping point and we won't be able to continue to consolidate economic, political, social and moral gains among a very small group of people.

VI: Part of your work is to provide opportunities and connections for students from the developing world, from the Global South. You hear their aspirations, listen to their demands and expectations for their societies. What do you glean from them?

David Kennedy: I have made it my project to try to be as open and listening as much as I can to voices from the Global South, broadly speaking, and to try to develop networks of intellectuals who are thinking hard about these issues. What I hear, of course, is that elites in every place want to be elite. Just as they want to understand their projects as virtuous.

But we shouldn't romanticize the humanitarian wishes and projects of the people in the Global South, nor

our own, differ in their interests and their strategies for engaging this or that foreign project. They're making choices and developing connections that will be beneficial to them. So the idea, if we once had it, that China would decide it would really be great to be our junior colleague forever in a world managed by us --- it's unlikely many folks in China would have that idea, although certainly there are sections of the elite in most places, China included, for whom that does seem to make sense.

Here in the North Atlantic, we need to get used to the idea that there will be people struggling against us who have real power and real capability - that we've helped them build. We still have to get used to that: it's a world in which we're not the center of everything.

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The other thing I would say, is that it's quite striking how similar the challenges of governance in many developing societies are to those we have here in the United States. Extreme differences of income potential, education, an underclass that's structurally written off or incarcerated in one or other way, terrible ethnic or racial dynamics that are centuries in the making and impossible for the society

government. Where the Bill & Melinda Gates foundation has more to say about health than national health authorities.

We found out with COVID that global value chains and local value chains and insurance companies and whatever had more to say about who had masks and protective equipment and who got a test than the CDC. It turned out hedge-fund people who bought the testing laboratories or equipment suppliers had a powerful say. Here, as across the Global South, it's a crazy situation in which governance in the public interest is playing catch up to much larger forces within the society and without.

We do have Silicon Valley and Bangladesh does have a very competitive textile industry that could move tomorrow to another country. Those are really different challenges. But the internal governance challenges, the sense of being buffeted by global forces, powerful firms, that's a shared experience now.

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VI: Since countries in the Global South do find themselves vulnerable, are there regional organizations that can provide governance and assistance that international entities like the WTO and the UN used to

between those who have and those who do not.

short answer is no. If you are standing in the center and you are close to the UN, it is easy to imagine: "well, we are the global and then there are the regions and the nations and the cities and so forth." It makes sense as a kind of federal fantasy of global affairs. But it is hard to think of a less realistic picture of global affairs. All together missing, at a minimum, are the locations of private power, the relevance of media, the movements of people, the pressures of a changing climate or technological change on who wins and who loses.

And regions are fraught with internal differences. I had a wonderful student from Nepal last year -- she'd been in the foreign office for some time --- and her preoccupation was how terrible it was to have to deal with India. The last place she wanted problems solved was in her region.

Historically, some people in almost every part of the world have pursued the project of establishing their own regional European Union. None has been particularly successful. Inter-regional differences and national government dysfunction have troubled each of these efforts. And we might wonder now about the EU itself as a structure for problem solving in the public interest. Indeed, it is no secret that the EU is ripe for reassessment. When I was in college I was a Europeanist. I went to Brussels and I practiced law there and I worked for the Commission and so on. It seemed

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was the future - technocratic governance, a loss of governmental capability at all levels, and an intensification of center-periphery dynamics that are very hard to unravel. It is hard to overstate how far the EU project has fallen – how much it has become yet another space for disappointing, dysfunctional leadership and for unequal struggles between those who have and those who do not.

VI: The global political economy is buffeted on all sides these days with future challenges coming from climate change and other de-stabilizing threats. How do old institutions, established legal regimes, and the trend to national self interest evolve to provide more flexible and inspired governance?

David Kennedy: I think we need to stop imagining that, on the whole, the legal and institutional structures are about problem solving or ensuring a virtuous and humanitarian future. We have a big project just to understand, first and foremost, how deeply they are embedded in the things we don't like. How poverty is also a legal institution. It's put together and reproduced through legal and governance arrangements. How war has become a legal practice. How racism is

else globally and within our country. Only once we figure that out, map these effects, can we begin to unpick them

So it is not law that's going to point the way into a better future. Law right now is part of the buttressing structure of each of the problems that we worry about. Under-development is legally produced by the arrangements that keep Bangladeshi textile workers in a competitive relationship with each other and don't keep Apple or Walmart in a competitive relationship with anyone. That's not natural, that's created, and so it's not law that's going to bring us something better. We will have to do it. And it will require a lot more unpacking and remaking of the legal fabric than relying on law's virtue to point the way.

It is hard to understand when you've been thinking of law as a humanitarian promise. You need to start thinking about law as an inequality accelerator.

VI: If it is the "we" that need to take responsibility, then is it the experts, is it the elites schooled in established norms that need to find a way out of our current predicament and create better structures for the future?

David Kennedy: Well, first thing is this: it's nobody's job to do this. Everybody gets up in the morning and has some other job defending their own interest, pursuing

no vocabulary, no capacity for a productive politics.

With COVID, for example, we think these guys who are in public health should know what to do and then we should do it. They are the experts and if they could get their act together the problem is simply implementation. Indeed, it's remarkable how consistent public health experts have been on the whole. But they're just one group of experts. There are also the people who are expert in macro-economic management, and those who specialize in managing the national mythology of self-reliance, and those who worry about public safety, and so on. What about unemployment and what about the distribution of losses from that? How do you balance those things? It turns out that's also an expert practice – of struggle. In a world of functional disaggregation and specialization, you get three to four experts in a room representing different approaches and they battle about where to draw the lines between public health, public safety, public welfare and so forth. Or where to draw the line between a global economy that should be liberated and a national entity that should be sovereign. Those things are all entangled all over the place but how and where it got tangled this way and not that, or who is pushing back and forth on what line between various modes of resolution – wherever that is being sorted out, there is governance.

I've held out a great hope that with a better orientation among people in technocratic governing classes, pressed by social movements and by these broader

not how I see it. It very often turns out that inside the bowels of current arrangements relatively small changes can make a very large difference once you're attuned to the role that law plays, let's say, in reinforcing differences of power between leading and lagging regions or firms or interests. Once you focus on that, relatively small changes might change the dynamic.

After all, the arrangements we now see had to be made, one tiny struggle, one expert argument, at a time. We know how to link corporations to territory more effectively, for example -- we used to do it. We do know how to have capital flow less freely and less quickly, how population flows can be facilitated – we used to do it. After COVID we hear that people running a global value chain ought to break it down, pre-position inventory, relocate or diversify crucial supplies. We know how to do that – how to slow the global flows that are experienced as impersonal "forces' ' threatening livelihoods here and ensuring livelihoods there. As a result, I do think that a long march through the institutions and legal arrangements of modern governance offers a path through which even profound change can be made.

VI: David this has been an interesting conversation. We like to end things on a positive note so it is good to hear in June, 2020 that we can look forward to well-intentioned people figuring out our current predicament and plan for future challenges. As you said we have figured out difficult times in the past.

law as an inequality accelerator. Once you identify how it does that, you can then get to work remaking it to empower others, advance other interests.

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