

GLOBAL GOVERNANCE FOR THE POLITICAL ECONOMY OF TODAY

DAVID KENNEDY

Ladies and gentlemen, it is a pleasure to be here in Zaragoza, and I look forward to our discussion. The structure of the global political and economic system has changed. The structures of international law and the practices of global governance must also change. Indeed, they are already shifting beneath our feet.

At the same time, we understand very little about how our world is actually governed. Who makes what decisions? Where are the levers for influencing global economic, political and social arrangements which threaten our future? How are global inequalities and imbalances sustained, and how might they be addressed?

Global governance remains mysterious in part because much about global society itself eludes our understanding. Simply mapping the channels and levers of influence and public capacity remains an enormous sociological challenge.

We know, however, that our current international legal and institutional arrangements are not up to the challenges we face. Nor do they reflect the dramatic changes which have altered global political and economic life over the last decades.

People everywhere today understand that we are all vulnerable to the decisions and actions of people far away. We know that our own national states are often unable to defend our interests or support our economic, social and political aspirations in a globalized world.

As we grapple with these facts, we realize ever more clearly that global life is governed less by a functioning system of rules and institutions than by a hodge-podge of local, national and international norms, made, interpreted, enforced or ignored by all manner of public and private actors.

We have long known that the world's elites inhabit a fluid policy process in which they would as often make as follow the law. We now realize that this process has no center and no common direction.

As we think a new about global governance in our new situation, let me offer a few quick propositions.

1. First, mysterious governance is not no governance. The sheer density of rules and institutions in the global space is already astonishing. Although global has fragmented economic and political power, it has not de-legalized them.

Think of the network of impenetrable private obligations which tied our global financial system in knots. Even war today is an affair of rules and regulations and legal principles. People do not always agree on the rules. But the stakes in political and military struggle as often turn on legal missives as missiles.

As a result, the governance challenge is not to bring political actors into law—they are already there. The challenge is to understand and, where necessary, rearrange the laws and institutional machinery which constitutes those actors, channels their interactions and influences their relative powers.

2. Second, global governance is, and will likely remain, extremely disorderly, plural and uncertain. The globalization of law and the legalization of politics and economics have brought with them a tremendous dispersion of law. We live in a world of conflicting and multiplying jurisdictions, in which people assert the validity or persuasiveness of all manner of rules with no decider of last resort.



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It is not clear, moreover, that the situation would be improved by a net reduction in the plurality of law – it might or it might not. The challenge is to learn to operate in a fluid and plural situation which will yield neither to hegemonic nor to constitutional claims. The «system» can neither be dominated nor constituted – it can only be used.

3. Moreover, we must all realize that things we don't like – war or poverty or environmental damage —may also be legal institutions and structures of governance. For example, we must abandon the 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 rarely pay enough attention to the governance significance of legal privileges. Despoiling the rainforest is not only an economic decision – it is also the exercise of legal privilege.

4. The informal and clandestine sides of global order are increasingly important —customary norms, background patterns of private and public expectation, black markets and illegal flows. Although the clandestine, the informal, the illegal, the corrupt, are all quite different, each is a governance regime. Stigmatizing them, ignoring them – or utilizing them —is, for every actor, a strategic choice.

Moreover, one man's corruption is another man's family. One man's private ordering is another man's rent-seeking or squandering of the public weal.

5. We ought not to be carried away by the dream of universal values. People disagree about the most fundamental things. The challenges we face are not technical ones which might yield to expert consensus. They are political. Global governance occurs in a system of global power – it demands allies and creates losers. Talking about «the international community» obscures this fact. No matter how we slice it, the benefits of good governance will be unevenly distributed.

We need to be conscious not only about who will win and lose, but about whom we expect to carry the program to victory. For a generation after the Second World War, global arrangements in the West were underwritten by the United States and a coalition of North Atlantic democracies. The relative hegemony of these powers is gone.

We do not know what will replace it. The political configuration of the world system is now open for revision. Our intuition that the «rise of Asia», the emergence of Russia, India and Brazil, the rise of new middle powers from Turkey and Pakistan to Mexico and South Africa will change things is correct. But we remain unsure precisely how.

6. Whatever the significance of political powers, experts and expertise are equally significant in today's global order. Their ideas matter. It is not all statesmen and politicians, any more than it is «investors» and «multinationals» and others on the commanding heights of the world's economy. Their choices and their beliefs are shaped by experts. 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 tend to 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 the capillaries of social life, 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

7. Overall, knowledge about how we are governed is very unevenly spread about the planet. Those in at the center see things, know things, which are inaccessible at the periphery. From the outside, it can seem the powerful know and intend all that they do, while from the inside, it is easy to feel buffeted by one thing after another.

We might say much the same thing about those who live in the worlds of public and private power on the global level. Private actors at the center of the global economy understand how to operate within a plural and disaggregated global legal order far more instinctively than do their counterparts in national government service, diplomacy or the world of international public institutions. Military professionals often have a far more difficult time thinking strategically about operations in a global battle space than their counterparts in the world of transnational finance or business, for whom legal pluralism is an everyday matter of risk and opportunity.

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“Obama no ha cambiado gran cosa la política exterior que mantenía Bush”

El profesor David Kennedy expuso sus reflexiones más comprometidas, arriesgadas y novedosas sobre la globalización en un momento de crisis. Lo hizo el pasado 10 de diciembre en Zaragoza, en la clausura del III Foro Internacional de la Institución Fernando el Católico, coordinado por la profesora de Derecho Público en la Universidad de Zaragoza Yolanda Gamarra. En esta ocasión, el foro versó sobre civilizaciones, nacionalismos y derecho internacional. Aunque usted ha venido a Zaragoza para hablar sobre la gobernanza mundial y la política y los desafíos estructurales que de ellas se desprenden, no puedo dejar de preguntarle, como jurista internacional, si le parece lícita la filtración de los documentos de Wikileaks.

La principal lección que debemos extraer de la revelación de los documentos de Wikileaks es que se han hecho públicos datos internos del Departamento de Estado de Estados Unidos con las ideas de los expertos que discuten sobre relaciones exteriores. Por lo tanto, no es algo sorprendente si ya formas parte de ese grupo de expertos. Pero si es raro que los documentos se hayan hecho públicos de una forma tan amplia, tan masiva. Creo que esa es la clave de todo.

Según estos cables, Estados Unidos trató de acabar con la justicia universal que promueve España. ¿Le parece esto una violación de los derechos humanos en cuanto que habrá crímenes contra la Humanidad que nadie querrá o se atreverá a juzgar?

No. Yo creo que la cuestión de la justicia universal es una buena idea. La clave está en una interpretación más general de la política internacional y de las leyes internacionales. En todos los países hay puntos de vista diferentes acerca de si la justicia universal es la forma correcta de sacar adelante un programa de defensa de los derechos humanos. Creo que el hecho de que este debate se lleve por cauces diplomáticos no es sorprendente, ya que los gobiernos llevan a la práctica sus propios puntos de vista acerca de la manera más apropiada de conseguir esos derechos. Las cuestio-

nes acerca de la jurisdicción universal son políticas, no jurídicas. ¿Y eso no da, en última instancia, algo de impunidad a ciertos malhechores?

Puedo entender el deseo de una jurisdicción universal, y no hay duda de que esta brinda la posibilidad de llevar a cierta gente ante la justicia en el momento y el lugar idóneos. Pero tenemos que reconocer que, como un sistema global no es en realidad universal, existe una cuestión importante, que es la parte legal y ética de los derechos individuales de las personas que se involucran en este sistema universal. El proyecto de desarrollo de una jurisdicción universal de los derechos humanos puede ser válida, pero en la práctica no deberíamos sorprendernos de que su puesta en marcha sea políticamente muy controvertida.

También según las filtraciones de Wikileaks, Washington trató de que el juez Baltasar Garzón no investigara Guantánamo.

Creo que hay una cuestión importante, que está siempre sobre la mesa en los círculos internacionales y entre los abogados internacionales, y es que hacer en relación a la política. Y, sin defender la posición estadounidense, que creo que fue equivocada desde el punto de vista político, no es sorprendente que el país mantenga esa posición y que, para ello, siga utilizando todos los medios posibles a su alcance. El derecho internacional proporciona un canal para la consecución de las agendas políticas, pero no es un sustituto de la discusión política en sí. Y en ese punto, esté uno de acuerdo o no con la posición estadounidense, no es sorprendente encontrar que sus diplomáticos defiendan de forma vehemente esa postura.

Es parte de su trabajo.

Cuando yo era un joven abogado internacional me entrevisté con el Departamento de Estado para ser diplomático. Pasé los exámenes, fui a la entrevista final, y en ella me dijeron: «Entiende que si usted se convierte en diplomático no se le permitirá disentir de la agenda exterior de Estados Unidos, ni en público ni en privado». Y ese fue el final de la entrevista,



David Kennedy, hace unos días en Zaragoza. OLIVER DUCH

porque me quedó claro que no estaba hecho para la vida diplomática. Pero para aquellas personas que persiguen y ejercen esa carrera, su trabajo es defender de la forma más agresiva que puedan la posición política establecida por el presidente. Otro tema es si esta es una buena posición. Wikileaks simplemente revela que en Washington están defendiendo una postura concreta, y eso no es de extrañar en absoluto.

¿Cree que la Administración Obama ha realizado algún cambio en relación a su política exterior en conflictos como Iraq o Afganistán?

Creo que las guerras que Estados Unidos ha llevado a cabo en Iraq han sido errores terribles. No solo para las sociedades involucradas, también para la de mi propio país. Y realmente no veo que la política de Barack Obama haya cambiado significativamente respecto a la que mantenía su predecesor, George W. Bush. Obama ha dado un pequeño giro, pero no una gran vuelta. Y tengo poco clara la cuestión de cómo extraer cualquier tipo de justicia de la situación que se vive en Afganistán. Me preocupa que, como en el caso de Vietnam, la política en Afganistán sea la de continuar con la violencia. Ninguna de las partes va a aceptar que la política no ha sido exitosa, y considero que eso es moralmente reprehensible a todos los niveles.

¿Sigue siendo válida la política del unilateralismo preventivo adoptada por Estados Unidos en 2003, cuando invadió Iraq?

No estoy seguro de si prevención es la palabra correcta para describir lo que sucede en Estados Unidos. Creo que la doctrina de asumir la política preventiva ha sido más o menos abandonada. Pero no se puede reducir la práctica de la clase política estadounidense a estar involucrados. De este modo se pueden esperar diferentes explicaciones y justificaciones, con cada vez más vacilaciones, creo, sobre el uso de la fuerza. Todo el mundo puede darse cuenta de que es más difícil actuar sobre la marcha que anticiparse a algo. Por lo tanto, no se sorprenda si durante unos años la clase política es más reuente a utilizar la fuerza. Pero no creo que la idea general de que el uso de la misma sea una opción para la política exterior estadounidense haya cambiado.

En un mundo tan globalizado, ¿qué ha cambiado en el ámbito del derecho internacional? ¿Es necesario cambiar algo más?

Creo que la crisis ha dejado claro que no entendemos bien cómo se ejerce el poder político a nivel mundial o cómo somos gobernados. En el derecho internacional, la atención se centra en las actuaciones públicas de los diferentes estados, pero nosotros sabemos ahora que la economía es más importante en las relaciones políticas internacionales que cualquier otra cuestión que se pueda resolver por la vía diplomática. Por tanto, necesitamos un orden legal internacional que sepa lidiar con el poder privado, con las leyes privadas, con leyes internacionales de actuación tales como los comportamientos de los inversores y las relaciones con la banca europea, por ejemplo

ELENA RODRÍGUEZ

HA DICHO

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IRAQ Y AFGANISTÁN

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POLÍTICA DE INTERVENCIÓN

“Considero que no se puede reducir la práctica de la intervención en aquellas situaciones en las que los intereses de la clase política estadounidense están involucrados”

8. Finally, we must realize that global governance is not only about management and problem solving. We must grasp the depth of the injustice of the world today and the urgency of change. We have built fault-lines into the political economy of the world. 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.

The result is a mismatch between a national politics on the one hand, and a global economy and society on the other. At the same time, the rumbling fault line of an accelerating social and economic dualism haunts our world. We now face a revolution of rising frustrations among the hundreds of millions of individuals who can see in, but for whom there seems no route through the screen except through rebellion and spectacle.

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 midwifeing a new political economy. There are lots of interesting proposals on the table. We have discussed many of them here in Yaroslavl already.

Perhaps the new politics will be about experimentation and institutional diversity, protected by a re-activated sovereignty in the middle powers of the South. In such a vision, we might strengthen and defend small pockets of public sovereignty in cities and churches and corporations and nations which have the capacity to experiment, as shields for the weak, guarantors of policy diversity and arenas for democratic political life.

Perhaps the new politics will be about mobility, involving a grand bargain linking free trade in goods, free movement of capital, with free movement of persons. A new global politics may also be about building a transnational political will, through which sovereignty would come to be seen as an open-ended promise of inclusion. If the new politics is to be about empowerment, we might imagine citizens not only informed, consulted, their polling data serving as base line for expert management, but actually deciding.

I would hope that we could carry the revolutionary force of the democratic promise – of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life – to the sites of global and transnational authority, however local they may be.

Indeed, I hope we will learn to multiply the sites at which decisions are made and can be contested, in the hope for a heterogeneity of solutions. I hope we will trust one another – and ourselves – enough to experiment and embrace a

multiplicity of local and national approaches to our common situation. I have in mind less new institutional procedures than a new spirit of management, encouraging the human experience of responsible freedom throughout the worlds of corporate, private, public and technical expertise.

It took a long time to invent a national politics and to organize the world in nation states. 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. Building a new politics for a global society and a global economy will be equally difficult. Let us hope it does not take as long. And does not require as much violence to be born.

Thank you. I look forward to our discussion.