New Approaches to International Law: The History of a Project

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Abstract

Reflecting upon critical international scholarship and its evolution through time, this review essay focuses on a volume co-edited by José María Beneyto and David Kennedy, along with assistant editors, Justo Corti Varela and John Haskell, on the history of the new approaches to international law (NAIL) and the work of David Kennedy. Considering the individual contributions to this book, this essay argues that while the influence of NAIL upon younger scholars, critical or ‘mainstream’, is beyond contestation, it is questionable to what extent the intellectual priorities and institutional anxieties of the discipline (should) remain the same. Drawing heavily on the theme of professional responsibility that underlies most of the contributions to this volume, this essay proposes a re-orientation of critical inquiry in the light of the implication of international law and institutions in the 2008 financial crisis and its aftermath. Echoing Kennedy’s call to engage with questions of political economy and global governance, this review essay suggests that for critical international law to reclaim its radical and innovative character, it is imperative to engage with the concerns of a post-crash world and to identify and disrupt the role of international law in the constitution of an unstable and unjust international economic order.

1 Introduction

The editors of the book under review, Beneyto, Kennedy, Varela, and Haskell, attempt to take account of the ambitions and politics both of a (loosely defined) intellectual current – the new approaches to international law (NAIL) – and of its central figure,

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David Kennedy. To do so, they have put together nine thematic chapters and a preface by Kennedy. In this review, I first focus on the three substantive themes that have been chosen for analysis. Frédéric Mégret, Karen Engle and Yolanda Gamarra discuss international human rights law, a topic heavily present in earlier texts of NAIL. Thomas Skouteris and Haskell engage with questions of history of and in international law, and Olivier Corten focuses on the law of war. I then address the three contributions (by Akbar Rasulov, Outi Korhonen and Ignacio de la Racilla del Moral) that reflect critically on NAIL as an intellectual project, its history, its limitations, its institutional development and, less comprehensively, its future. Finally, I discuss Kennedy’s preface on global governance before providing a final evaluation of the volume. This preface, which is largely unrelated to the rest of the volume, provides interesting insights into Kennedy’s current projects that address questions of political economy and global governance moving away from the more ‘traditional’ topics of NAIL.¹

The perhaps most pressing question prompted by this book is how it can be situated within the broader context of international legal theory and, more specifically, within critical international law. Apart from Kennedy himself, only two ‘first-generation’ NAIL-ers (Engle and Korhonen) have contributed to this volume. Therefore, the work has the flavour of an inter-generational debate about what international lawyers today can learn from NAIL after Kennedy proclaimed it ‘done’ in 1998.² The book constantly oscillates between a cartography of NAIL and broader reflections. As a consequence, for those international lawyers who are two, or even three, ‘generations’ removed from the original project, this account is undeniably a charming one, yet it does not provide persuasive answers to the question of the positionality of NAIL within the broader discipline nor does it function as a compass in times of intellectual, political and moral confusion for the profession. However, its cartographic virtues are undeniable, and, therefore, it constitutes an informative read and a good starting point for a broader discussion about the past and future of critical international law scholarship.

2 Spring Breaks and Other Ruptures: Human Rights and Their Law

In her contribution on human rights, Engle draws heavily on Kennedy’s ‘Spring Break’,³ a piece that, no matter what one thinks about the substance of its argument, questions what seemed unquestionable back in the 1980s for liberal and ‘progressive’ international lawyers alike – the methodology and the basic premises of international human rights theory and practice. While visiting political prisons in Uruguay during the final months of the dictatorship, Kennedy produced a lengthy socio-legal narrative

¹ These questions are at the heart of his forthcoming book. D. Kennedy, World of Struggle: How Power, Law and Expertise Shape Global Political Economy (2016).
² ‘In the spring of 1998, we celebrated the end of this institutional project at a conference in Cambridge which we called: “Fin de NAIL: A Celebration.”’ Kennedy, ‘When Renewal Repeats: Thinking against the Box’, 32 New York University Journal of International Law and Politics (1999–2000) 335, at 490.
on human rights and professionalism in the field that challenged the received wisdom of his time. In 1984, human rights were the rising star of international law and politics, promising the renewal of the field along with ‘tidying up’ the mess allegedly created by left-wing and right-wing utopias in the course of the 20th century.4

Back in 1985, Kennedy argued that adopting the methodology and vocabulary of human rights was a way for prestigious institutions of the West, such as the Harvard Law School, to engage with pressing social issues around the globe through ‘a neutral defence of the “rule of law” rather than a partisan choosing up of sides.’5 Engle in her chapter focuses precisely on this ongoing tension between human rights and politics, especially mass politics. Political and legal developments in Uruguay with its troubled history largely inform her discussion, as they did in Kennedy’s ‘Spring Break’. In the aftermath of the collapse of the military dictatorships in Latin America, the international human rights movement turned to criminal law and justice seeking to combat impunity. Hence, amnesty laws, and, more specifically, self-amnesties and blanket amnesties, constitute an anathema for international human rights non-governmental organizations.6 As Engle notes, though, the amnesty legislation in Uruguay has the specificity that it has been upheld twice by the electorate when put to a referendum.

Still, in 2011, the Inter-American Court of Human Rights ruled against the legislation in the Gelman case expressly noting that endorsement by the electorate was not decisive.7 For Engle, this open disregard of the exercise of popular sovereignty, especially in the context of such a politically sensitive decision, confirmed the anti-political tendencies of human rights as promoted by the human rights movement of the 1980s (at 51). She further associates the turn to human rights discourse during and in the aftermath of right-wing dictatorships with an attempt to confront right-wing authoritarianism ‘without insisting or relying on the left’s larger, distributive, economic and political agenda’ (at 50). Kennedy himself summarized the anxiety of disassociating abusive regimes from their broader political frameworks: ‘We learn that human rights can also legitimate a regime, even a regime we believe violates rights, if only by isolating the violation in a way which normalizes the rest of the regime’s activities.’8

Accordingly, the insistence on the centrality of criminal punishment after the collapse of the regimes in question is understood by Engle to be stemming either from a neglect of the internal balance of power and the political compromises of the transition process or from an understanding that the comprehensive political agenda of the left has been defeated and justice is to be attained on an individual level and through

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7 IACHR, Case of Gelman v. Uruguay (Merits and Reparations), 24 February 2011, at 229. All IACHR decisions are available online at http://www.corteidh.or.cr/index.php/en/jurisprudencia (last visited 8 January 2016).
juridical mechanisms. Engle summarizes finely this position, quoting an anonymous human rights activist whose brother disappeared during the dictatorship: ‘The left lost the war. All we have now is justice’ (at 69). Even though Engle is respectful of human suffering, her discomfort is obvious. It becomes evident from her analysis that an equation of justice with criminal justice is not satisfactory for her. Yet she does not elaborate on this point, regrettably not using the opportunity to reflect on the possible synergies between critical international law and other, more comprehensive, understandings of justice.

Gamarra, in her chapter, challenges the assertion that human rights have been developed as a fundamentally anti-political movement. Gamarra focuses on the grave nature of the crimes committed by the military dictatorships in Latin America and, more specifically, on the crime of forced disappearance. In these cases, a multitude of fundamental rights (personal integrity, personal liberty, life and the legal status of the disappeared person) are being violated. Hence, already since 2006 the Inter-American Court of Human Rights has pronounced that the prohibition of forced disappearance and the duty to investigate it whenever it occurs ‘have achieved the character of jus cogens’. Moreover, Gamarra invokes the fact that the UN General Assembly has played an important role with its 2005 Resolution on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, prohibiting impunity and encouraging an active role for the victims in post-conflict situations (at 85).

Gamarra also puts forward strong political arguments that support the stance against impunity. She notes that justice and peace are closely associated and that ‘truth, reparation and declaration of responsibility’ are essential characteristics of the former (at 85). Further, she points out that Uruguay is a rather exceptional case of the popular endorsement of such amnesties. Typically, collapsing dictatorships abuse the system to protect themselves through amnesties shortly before democracy is restored (at 92) – Chile being a typical example thereof. Moreover, Gamarra invokes the powerful example of the Tokyo and Nuremberg trials to highlight the role of institutions of justice in ‘creating an accurate and comprehensive historical record’ (at 83). Arguably, this is a deeply political process that not only records the past but also contributes to building a better future by creating a consensus that ‘certain conduct occurred and should not be repeated’ (at 84).

The debate between Engle and Gamarra reflects significant elements of the discussion in the field of human rights after the ‘critical challenge’. Mégret, in the volume under review, has undertaken the complicated task of summarizing the major assertions of critical human rights theories. As Mégret points out, most critical human rights

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9 IACtHR, Case of Goiburú et al. v. Paraguay (Merits, Reparations and Costs), 22 September 2006, at 84.
10 Contra, ‘[a]s well as trying alleged war criminals, these trials serve as vindication of Western progress ... they function as moral demarcations between the accused and the accuser, they avert attention from war crimes closer to home and, finally, they contain the message that the untried crimes are not of this magnitude or order’. Simpson, ‘War Crimes: A Critical Introduction’, in T. McCormack and G. Simpson (eds), The Law of War Crimes: National and International Approaches (1997) 1, at 9.
theories present internal criticism, since they call for scepticism while acknowledging
the importance of human rights in contemporary legal imagination (at 5). Ben Golder
raises a similar point, noting that there is a strong trend for the redemption of human
rights, a call for the radical renewal rather than the definite rejection of human rights
discourse in the work of many critical legal scholars, and he invokes Kennedy’s work
to support this claim. Still, Kennedy has urged us to be cautious towards this desire
for renewal, which he argues to be endemic in the international legal community: ‘The
discipline of international law today is cheek by jowl with people calling for new think-
ing and renewal, even as they offer up the most shopworn ideas and initiatives.’

Mégret identifies the following themes as calling for critical reflection. Even though
his account is, understandably, fairly brief and descriptive, he appears to largely sympa-
thize with most, if not all, of these themes, echoing a broader cautiousness in the critical
international legal community vis-à-vis human rights. First, indeterminacy questions
the aspiration of human rights to be ‘a consciously transformative project that sees itself
in opposition to classical public international law’ (at 7). Human rights are to a signifi-
cant extent embedded in the fabric of international law and, thus, oscillate ‘between
apology and utopia’ like all international law. Human rights claim to curtail decisively
the arbitrary power of the sovereign. Yet, at the same time, they cannot ignore the sov-
ereign as ‘a source of legitimacy, power and order’ (at 8). Such is the importance of the
indeterminacy critique that Kennedy has chosen to focus on it, to the exclusion of other
potential arguments, when asked by the Texas Law Review to write an explanatory note
to situate ‘Spring Break’ within the then contemporary legal literature.

Second, Mégret discusses the allegation that there is an intrinsic link between
human rights and Western imperialism – either cultural, political or economic. It is
a common concern to ask whether human rights are the new ‘standard of civilisa-
tion’, a concept that justified and facilitated colonialism and imperialism throughout
the 19th century. Specifying this argument, we can observe that the safeguarding of
rights (of course, not human rights but, rather, civil rights) was right from the start
part and parcel of the original standard of civilization. Hence, one can argue that
rights are not a new guise of the colonial ventures of Western capitalism but, rather,
that they have been an integral part of the ‘civilizing mission’ from the very start.

Third, the alleged ‘thinness’ of political and moral assumptions underlying human
rights is a common challenge. The critique dates back to the 19th century when Karl

12 Kennedy, supra note 2, at 335.
14 Kennedy, supra note 3, at 1417–1423.
16 For the most authoritative account of the concept, see G.W. Gong, The Standard of Civilisation in International Society (1984), at 14–15.
Marx, although praising rights for facilitating political emancipation, noted that in the social realm they presume and perpetuate the image of the ‘egoistical man’ – the socially isolated individual – whose main attribute is his ability to have property.\textsuperscript{17} From a feminist\textsuperscript{18} or from a post-colonial\textsuperscript{19} standpoint, human rights have been criticized as emanating from masculinist or fundamentally Western assumptions about the good life and as principal sources of oppression. Kennedy identifies feminist lawyers who have been uncomfortable with ‘women’s rights’ being the only terrain for international legal feminism as one of the ‘constituents’ of NAIL.\textsuperscript{20}

Fourth, institutionalization and professionalization are two aspects of the contemporary human rights movement that attract significant criticism from NAIL-inspired scholars, to the extent that they prioritize ‘procedure over substance, elections over meaningful participation, economic rights over economic justice etc.’ (at 13). Mégret himself has chosen to focus on the issue of institutionalization and professionalization of international human rights when discussing the work of Martti Koskenniemi, a fact that might indicate the centrality of this last critique within the NAIL canon.\textsuperscript{21} Finally, Mégret issues a ‘redemption’ call himself, arguing that since human rights enjoy a ‘huge capital of sympathy’ (at 25), it is essential that this capital is used in a positive way and that there is a need to ‘re-politicize rights by foregrounding debate, and process over eternal truths, technocratic rationality, judicialization and universalism’ (at 33). This final call is crucial for the construction of the self-image both of NAIL and of subsequent generations of critical international lawyers. Even though Kennedy has insisted that both he and NAIL occupy a position outside the ‘mainstream’,\textsuperscript{22} he does not offer a firm explanation about what distinguishes between the two. The redemption call for human rights may well be a legitimate one, but it remains to be seen if redemption is possible and desirable in the first place. Indeed, if NAIL’s ‘new thinking’ results in an alternative language of human rights, is it even plausible to differentiate so sharply between NAIL and ‘the mainstream’, or is Roger O’Keefe right in branding the ‘crits’ as ‘the loyal opposition’ of the field?\textsuperscript{23}

\textsuperscript{17} K. Marx, On the Jewish Question (1843; reprinted 2012).
\textsuperscript{20} ‘Others were women frustrated by the limitations of a “women’s rights” approach in expressing their feminism within international law.’ Kennedy, supra note 2, at 487.
\textsuperscript{22} ‘My own experience is that people, doctoral students, young lawyers, sometimes really turn on the gas if they see plausible professional life outside the mainstream, if they become convinced that intellectual work can be more than assimilation, credentialization, or work on the self.’ Kennedy, supra note 2, at 499.
\textsuperscript{23} ‘Nor was he hostile to critical-theoretical approaches, which played their salutary subversive role in an ecumenical college as a kind of loyal opposition, even if again by temperament, which included his semantic hypersensitivity, he himself preferred not to “problematize” things but to make them as simple as possible, though no simpler.’ R. O’Keefe, Curriculum Vitae: A Prequel (Part I) (2016), available at http://www.ejiltalk.org/curriculum-vitae-a-prequel-part-i/ (last visited 9 January 2016).
Ultimately, the centrality of human rights for the intellectual history of NAIL might point to certain politically and intellectually significant differences between past and present priorities of scholarly engagement. The book under review devotes three out of its nine chapters to the dialogue about human rights. During the constitutive decades of NAIL (the 1980s and 1990s), human rights constituted the rising star of international law and carried an uncontested air of moral superiority. Thirty years later, few international human rights lawyers are immune to the critical challenge. They have themselves launched renewal projects, and self-reflection and self-criticism are now parts of the professional parlance. In my view, there are now more urgent and relevant projects to be undertaken by younger critical – or, more generally speaking, progressively minded – international lawyers. Surely, human rights are not the answer to some of the most pressing questions of our times, such as inequality, and, to an extent, they are still ‘part of the problem’.

Yet, in a world heavily determined by thousands of bilateral investments treaties, by the rise of mega-regional trade and investment agreements, and by (unbalanced) monetary unions, how big of a problem is the human rights discourse? Put otherwise, in a world shaped by the 2008 financial crisis, it is plausible to argue that the ‘new thinking’ of our time should focus on international law and questions of political economy or, rather, on how international law and international lawyers have been central in the constitution of a fundamentally unjust political economy on a global level. Even though Kennedy has been calling for such a re-orientation already since the turn of the century, and even though his preface to the book under review focuses on exactly these issues, the theme of political economy and (its) international law is strikingly absent from this volume. After all, Kennedy has pointed out that ‘[e]ach international lawyer deploys criticisms to clear the ground for proposals’. It is difficult to envisage such a reformist proposal without a strong ‘political economy’ critique, and, indeed, a number of the contributors elsewhere have been thinking and writing on questions of law and political economy. The fact that this edited volume

24 Writing in the context of the recent economic crisis Aoife Nolan, one of the leading academic voices in socio-economic rights, acknowledged the failure of the human rights paradigm in setting effective restraints on how the crisis was actually managed. Even though her account ends with a ‘redemption’ of the paradigm, the mere question whether human rights are ‘fit for purpose’ would probably be unthinkable without the ‘critical challenge’. Nolan, ‘Not Fit for Purpose? Human Rights in Times of Financial and Economic Crisis’, 4 European Human Rights Law Review (2015) 358.


26 See Kennedy, supra note 8.

27 ‘In my view, we could rethink the locus of international political contestation and public policy by invigorating debate about what have seemed to be the background rules and structuring institutions of private law, economic life, and local culture. … We should judge the global market, like the global political order, by the distribution it effects among today’s overlapping cultural, political, and economic groups.’ Ibid., at 419. See also Kennedy, ‘Law and the Political Economy of the World’. 26 Leiden Journal of International Law (2013) 7.

28 Kennedy, supra note 2, at 345.

29 E.g., two of the contributors to this volume (Haskell and Rasulov) are also contributors to a recent publication on law and the political economy (co-edited by Haskell). U. Mattei and J.D. Haskell (eds), Research Handbook on Political Economy and Law (2015).
remains largely silent on the question creates a marked mismatch between Kennedy’s preface and the rest of the book.

3 On Laws of War and the Discreet Charm of Anti-Formalism

The question how international law can be used to support progressive causes is a recurring theme in this volume. Even though in the USA international lawyers since World War II have generally been aligned with liberal or progressive movements, the relationship between NAIL and the political left has been at best erratic. Even though Kennedy identifies resistance to post-1989 neo-liberal triumphalism as a unifying characteristic for first generation NAIL-ers, he also notes that ‘there was no shared set of ideas, commitments, or critiques’. The new interventionism of the 1990s and the 2003 Iraq War manifested clearly both the role of international lawyers (mainstream and critical alike) as public intellectuals and the fundamentally political nature of *jus ad bellum* and *jus in bello*. In his chapter on the laws of war, Corten undertakes the challenging task of summarizing and reflecting on Kennedy’s rich and controversial book *Of Law and War*. The book was written in the aftermath of a series of events, such as the Kosovo intervention, 9/11, the ‘war on terror’ campaign, and the second war in Iraq, which profoundly challenged our understanding of war, international law and their interplay. Further, it contains a series of provocative arguments such as the existence of an increasingly shared vocabulary between humanitarians and the military as well as the ongoing de-formalization of the law of war. In his chapter, Corten focuses mainly on the second set of arguments.

Corten begins his chapter with a reflection on one of Kennedy’s more provocative aphorisms that ‘the point about a norm is not its pedigree, but its persuasiveness’. Accordingly, what is really relevant about law is not to be identified by an abstract discussion of its validity but, rather, a de facto examination of ‘whose interpretation of the law will, in fact, prevail, and before what audience?’ Corten attempts to bridge the gap between the American and European critical international lawyers by maintaining that although this realist position would generally not be shared by European international lawyers, it resonates with the Marxist theory of law, which

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30 Kennedy, *supra* note 2, at 438.
33 ‘As a result, statesmen, military strategists, and humanitarians may disagree, but they are speaking the same language and playing the same game. ... If ours has become a culture of violence, it is a shared culture, the product of military and humanitarian hands.’ *Ibid.*, at 166.
34 ‘The point about war today, however, is that these distinctions have come unglued. War and peace are far more continuous with one another than our rhetorical habits of distinction and our wish that war be truly something different would suggest.’ *Ibid.*, at 3.
generally treats law as an instrument of power (at 254). Corten goes on to depart from Kennedy’s radical anti-formalism, which he treats as normative rather than as descriptive, in two ways. First, he asserts that validity is not just another factor that contributes to persuasiveness but emphasizes that ‘persuasiveness cannot operate without arguments based on formal validity’ (at 256). The doctrinal inclinations of the professional community known as ‘international lawyers’ render the persuasiveness of an argument dependent on its formal validity and on its compliance with the logical rules of deduction and with the rules of interpretation.

Second, Corten questions the substantive claim by Kennedy that we are experiencing a phase of radical formalization of the laws of war. He invokes numerous examples dating back to the 19th century but also draws from contemporary state practice (at 257–264) to challenge this narrative and support the position that post-1945 *jus ad bellum* is formal *par excellence* (at 262). He then argues that especially regarding *jus ad bellum* formalism is the preferable option for progressive international lawyers since ‘formalism is a much more efficient tool to combat war than antiformalism’ (at 266). It needs to be stressed that Corten does not advocate a formalist approach in all fields of international law but makes clear that for him formalism ‘is a strategic choice in the realm of the law of war’ (at 267), whereas anti-formalist approaches must be given preference, for instance, in the field of sovereign debt, where formalism would lead to inflexible arrangement and the over-burdening of states for the benefit of investors and creditors.

Corten’s approach to the question of law and war from an unapologetically political perspective raises the question of professional responsibility in the context both of theoretical and doctrinal legal debates. Should international lawyers be more committed to a methodology (say formalism) or to a political agenda, meaning that they might need to oscillate between different methodological positions, as Corten suggests? Indeed, besides Kennedy, other figures associated with NAIL, such as Korhonen or Koskenniemi have reflected systematically on questions of professional ethics and professional expertise. Koskenniemi, for example, systematically denounces ‘managerialism’ as the default position of most international lawyers. For him, the managerialist international lawyer openly disregards the normative arguments, and, much more so, the emancipatory agendas, that underlie international law and indulges the apology of state power. For the managerialist lawyer, the objects and purposes of the law are a given, and the only legitimate disciplinary pursuit is to invent optimal technical solutions for their achievement. As a response to managerialism, Koskenniemi proposes to resort to formalism. Even though Corten’s engagement with formalism is much more ecletic, the overarching concern about professional responsibility in a world of power and inequality remains the same.

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37 But see the late work of Nicos Poulantzas, who conceptualized law (and broadly the state) as the outcome of class struggle, rather than simply a tool at the hand of the ruling classes. N. Poulantzas, *State, Power, Socialism* (2000), at 76–93.


4 Telling (Hi)stories and Destabilizing Truths: NAIL and History

Turning to a concept’s history is a useful way to unravel its blind spots, biases and, of course, hidden emancipatory potentials. Hence, it comes as no surprise that history – be it history of and in international law or international law in history (at 103) – constitutes a major field of inquiry for those engaging critically with international law. In this volume, Skouteris provides us with an overview of mainstream and critical approaches to history within the discipline, and Haskell constructs an alternative history of Hugo Grotius’ legacy.

Skouteris identifies four core assumptions shared by dominant narratives on international law today. First, he maintains that the mainstream understanding of history is inherently empiricist and re-constructionist (at 106). According to this line of argument, international legal history, first, sets as its object the reconstruction of the truth about the past. Admittedly, scholars may encounter practical obstacles in their attempt to retrace this truth, but this is taken as an incidental, evidential problem and not as an epistemological one. Accordingly, history can be of use to lawyers to the extent that it increases our certainty about ‘law’s normativity, social function, or evolution’ (at 107). Nevertheless, law retains its distinctiveness in relation to history, and, consequently, it is the second assumption of mainstream international law history that the content and normativity of legal rules can only be established through exclusively legal techniques (at 109). Third, to what would have been Karl Popper’s great embarrassment, dominant (read: liberal) historical narratives about international law are profoundly historicist. International law and its history are closely associated with the (rather slippery) concept of progress, international law being both a tool to realize and a result of ‘humanity’s – here we are dealing with yet another problematic concept – march from the cave to the computer’. Finally, there is a trend to distinguish ‘the use of historical data from writing history’ (at 108). Certain historical narratives are presented as the ‘core centre’ of the history of the discipline and as being beyond doubt. Prominent examples are Malcolm Shaw’s understanding of international law being the pioneer of human progress or the widespread assertion that the 19th century is the blueprint of pre-modern international law, which securely has been left behind.

Following some core premises of structuralist epistemology, Skouteris focuses on history as a discursive practice and maintains, first, that history is not independent from historiography but, rather, is co-determined by the choices and evaluations of the historical narrative (at 113). Second, he argues that law cannot be understood

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41 The concept of humanity and the human has been thoroughly examined and subjected to critique especially in the context of human rights. See generally C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007), at 51–90.
44 The origins of structuralist epistemology can be identified in the work of Georges Canguilhem, who ‘insists that for him marking discontinuities is neither a postulate nor a result, but rather a “way of doing,” a process which is an integral part of the history of science because it is summoned by the very
as being autonomous from its ‘social, political, personal or other context’ (at 115).\textsuperscript{45}

Invoking Anthony Carty, Skouteris argues that deriving state intent – a process of great practical relevance when it comes to custom – is impossible without engaging with questions of power, security and self-understanding.\textsuperscript{46} Third, Skouteris argues for a genealogical approach to international law as opposed to the unsustainable and politically problematic discourse of progress. He suggests that an approach that ‘focuses on relations of power rather than relations of meaning as causing change’ (at 116) would enable us to situate international legal history within a broader social, economic and geopolitical framework marked by ruptures and dis-continuities. This genealogical approach could counteract hegemonic international legal historiography that ‘reads historical processes as “the present unfolding in the past”’ that is as a linear story of successes that leads to the increasing ‘perfection’ of international law \textit{(ibid)}.

In Chapter 5, Haskell attempts to construct a counter-hegemonic historical account of the perceived ‘father’ of international law, Hugo Grotius. More specifically, he scrutinizes the standard account that Grotius’ works marked the emergence of a secular, tolerant, liberal international law (at 124). Haskell argues that if we take a closer look at the ‘minimal Christianity’ of Grotius, we will detect a different story. Indeed, bridging the gap between different Christian denominations was closely associated with the exclusion of non-Christian societies from the realm of natural law. At a first level, this is documented by the multitude of Grotius’ anti-Semitic and Islamophobic comments that are presented at length in this chapter (at 137, 138). The problem, though, with presenting Grotius as some progressive figure in the history of international law runs deeper than his occasional anti-Semitic or Islamophobic quotes. Haskell argues that the universalism of the Grotian law of nature was a legitimizing force for the atrocities and the economic exploitation during the colonial era. For if the law of nature is universal, then those who choose to violate it have brought about an offence to the ensemble of ‘human society’. Therefore, (Christian) kings could rightfully use force to restore this natural order, even if they did not suffer directly from the violation. Hence, Grotius’ universalism opened its ‘gates’ to non-Christian nations only to go on and legitimize their exclusion and oppression by constructing a universal right to intervene when natural order was disturbed.

The echo of Grotius’ thought in contemporary international legal debates concerning humanitarian intervention is manifest.\textsuperscript{47} Nevertheless, this might be not so much


\textsuperscript{47} See generally A. Orford, \textit{International Authority and the Responsibility to Protect} (2011).
evidence of the deep-rooted humanitarianism of international law than of its ongoing imperial synergies. At the end of the day, if Grotius was the father of modern international law, he was also an employee of the East India Company with vested personal interests in colonialism (at 127). Haskell suggests an unorthodox way to engage with Grotius as a politically situated legal theorist whose works benefited certain interests at the expense of others. At the conclusion of his piece, Haskell invites us to embrace partiality and to accept that any conception of a universal good is a chimera. Invoking the example of patent law, Haskell argues that certain interests (poor countries’ and multinational companies’ interests in this instance) are fundamentally incompatible, and, hence, a progressive lawyer must accept that irreconcilable conflict is inherent in law and politics and consciously fight for the interests of the oppressed and marginalized (at 146). To do so, progressive international lawyers should no longer ‘appear … ashamed of their inability to propound doctrine in the imperious tone of tradition texts’. 48 Instead, articulating arguments and principles that seem ‘against all empirical odds and against all reasonable hope’ is the only way forward to construct a counter-hegemonic international legal paradigm (at 147). This final call carries a similar ethical imperative as the contribution by Corten. The concern expressed by Haskell and Corten about the direct political ramifications of our arguments, to my mind, reflects the consciousness of a generation largely free from the constraints of the Cold War. For some of these younger scholars, intellectual innovation without political commitment can become empty posturing and, hence, the returning concern about the situatedness of scholarly projects.

5 New Approaches to International Law: History, Topoi and Materiality

Three out of the nine chapters of this edited volume deal with NAIL as an intellectual current, its history, its objectives and, unsurprisingly, the role of Kennedy in its development. This editorial decision is far from obvious. Is this self-reflection indicative of nostalgia for a long-lost battle? Is it a sign of intellectual isolationism, an implicit acceptance that the book at hand is of interest predominantly to insiders who are always interested in the narratives of their own field? Or, rather, does this self-reflection express a conviction that the history of NAIL is useful not only for newcomers to critical approaches to international law but also for the history and theory of international law as such?

What is clear is that although, as Rasulov argues, NAIL is not a flag anyone is willing to wave anymore (at 151), critically minded lawyers are still present in the international law scene (at 180, n. 58). Hence, oral and written histories of NAIL serve objectives broader than the satisfaction of intellectual curiosity. The argument that for critically minded scholarship to evolve it needs to learn from NAIL’s mistakes and achievements is a convincing one. Rasulov has chosen to engage with four important questions in this regard: the oral histories of NAIL, its discourse patterns, its material bases and, finally, its aesthetic models.

Rasulov’s chapter reflects on the importance of oral histories of the intellectual current that denotes NAIL. Occasionally leaning towards ‘idle pub conversations or silly gossiping’ or ‘some kind of intra-disciplinary mythology’ (at 158), which internalizes the ‘Heroic Quest narrative’ (at 159), these oral histories ‘project narratives designed to educate’ (at 158). Moreover, the part of the book under review that attempts to provide a written and more systematic account of the history of NAIL draws our attention to the political economy of NAIL, an aspect often lost due to the ‘personal, the individual, and the emotive’ character of all personal narratives (at 162). The argument here is that even though there is not ‘any kind of obvious witch-hunt going on against the NAIL crowd’ (at 163), their career seems to evolve in a slower and more painful way than those of the mainstream.

A set of comments is warranted here regarding the ‘institutional anxieties’ of different generations of critical international lawyers. For those of us entering the profession in the context of a neo-liberalized university, the slower career progression for the ‘NAIL crowd’ to which Rasulov refers is not necessarily the biggest of concerns. Rather, questions of how to engage as a critical scholar and teacher in the time of ‘metrics’ and ‘service provision’ and of increased job insecurity and workloads are much more pressing both with respect to individual intellectual development and the sustainability of something resembling an international critical legal project. At the turn of the century, Kennedy observed that institutional changes and loss of bureaucratic positions could really ‘shock’ the project. One can imagine the much greater impact of today’s temporary contracts and reduced research budgets. A material-institutional account of contemporary critical thought needs to reflect seriously on these developments and, more importantly, to come up with possible strategies for confronting such impediments.

Rasulov discusses some of the material bases of NAIL. This is particularly valuable to the extent that he implicitly acknowledges that the predominance (or, in this case, the established presence) of academic ideas (or ideas of any kind for that matter) significantly depend on academic networks, institutional bases and available resources to support, refine and spread these ideas. NAIL’s initial ‘headquarters’ has undeniably been Harvard University, initially with the European Law Research Centre and subsequently the Institute for Global Law and Policy (at 171). Places such as Brown, the London School of Economics and the School of Oriental and African Studies (the ‘London corridor’), Cornell, Bogota, Melbourne and Sydney, Toronto, the American University in Cairo and the Erik Castren Institute in Helsinki are also identified as significant bases for NAIL (at 171). A number of shared social practices such as conferencing, academic publishing, graduate-level teaching and PhD supervision are identified as having contributed towards the development and the coherence of NAIL.

In a sense, materiality is also at the core of Rasulov’s last point. Invoking Terry Eagleton’s arguments about *avante garde* aesthetics, Rasulov addresses the ‘anxiety

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49 For an overview, see J. Campbell, *The Hero with a Thousand Faces* (1949).
50 Kennedy, *supra* note 2, at 500.
of incorporation’, a rather common concern of critically minded lawyers that their work might end up being appropriated by hegemonic structures of power. Along with Eagleton, he argues that the social functions of intellectual (or artistic) movements does not depend on their quality or abstractly radical character but, rather, on the political power of the social forces supporting this set of ideas or practices. Nothing inherent in the form or structure of a legal argument or, in the case of Eagleton, of an artistic movement can guarantee its radical character or can immunize it from political appropriation. Rather, it is the political positioning of legal arguments and legal practices within the terrain of social confrontation that determines their radicalness or conformity in the final analysis.

‘New thinking is emerging in international law. The tone of such thinking has seemed somewhat tragic, but not as nihilistic as has been suggested’ proclaimed Korhonen in 1996. Almost 20 years later, she provides us with a re-examination of the core premises (or promises) of NAIL – that is, the idea of theoretical innovation as well as the concept of theory as such. Moreover, she reflects on the intellectual locality of NAIL, tracing the specificities of the European encounter with NAIL.

Korhonen begins her analysis by arguing that it is difficult to talk about renewal in the field of international law without mentioning Kennedy’s ‘Spring Break’ and ‘Autumn Weekends’, when Kennedy ‘wrote in the first person unravelling the narrative logic at the same time as spinning it kaleidoscopically’ (at 196). Kennedy, though, for Korhonen was not the only innovator. Nowadays, for example, it is not easy to ignore Hilary Charlesworth’s and Christine Chinkin’s interventions or the Third World Approaches to International Law critiques. Charlesworth has observed that, despite their disagreements and contradictions, innovators sustained their ‘guerrilla warfare type interventions here and there’ even ‘without any guarantee of effectiveness’ (at 198). The lasting legacy of these interventions confirm Korhonen’s observation that ‘there is no question about the significance of the innovative-minded Movements Era in the discipline that started in the late 1970s’ (at 198).

One of the principal contributions of NAIL in the field of theory of international law was that it revealed the existence of an international law theory. Before ‘the discipline used to be so deeply embedded in its reigning theory that the illusion of theorylessness prevailed’ (at 206). However, the affirmation of the omnipresence of theory is also accompanied by suspicion. Both Kennedy’s and Koskenniemi’s writings reveal a distrust of theory. Korhonen observes that ‘substitute[s] for the concepts of “theory” and “method” started appearing in international legal writing at the turn of the 1990s, and they still abound

ranging from sensibility, intuition, voice, style, credo, rhetoric to performance’ (at 206). Unsurprisingly, this double move of revelation and abandonment poses a challenge at the heart of NAIL. As Korhonen points out, the ways in which innovators deal with this challenge differ significantly. Koskenniemi has opted for formalism, Charlesworth has focused on effectiveness and Kennedy regularly oscillates between different positions (at 208).

What is striking about Korhonen’s contribution is the distance between this account and her earlier engagements with NAIL. In her 1996 article in the European Journal of International Law, Korhonen felt the need to clarify more than once that the lamentations about NAIL foregrounding the end of the discipline by surrendering it to nihilism and the total absence of meaning were in fact unsubstantiated. The tone of the present chapter is far less defensive. After all, it was written and published after 20 May 2006. On that day, Kennedy was one of the three (male) speakers at the closing panel of the European Society of International Law, which for Jan Klabbers marked the point when ‘critical legal studies died by becoming, as the Germans say, salonfähig. The “new stream” became the mainstream; the “new stream” became the “new orthodoxy”’.

However, this acceptance by the mainstream comes at a certain cost. For example, today Koskenniemi’s basic argument about the indeterminacy of the international legal argument is at least tolerated and, in any case, taught and reproduced by ‘mainstream’ international lawyers. Still, Koskenniemi’s attribution of this oscillation to the aporias of liberalism itself has largely been ignored or rejected. On the occasion of the re-issue of From Apology to Utopia, the book was understood by one of the rising voices in international legal theory to be a (general) call for the rehabilitation of theory and social sciences and not as Korhonen had interpreted it in 1996 as a deconstructive exercise demonstrating the ‘deeply contradictory nature of liberal social theory’.

De la Rasilla del Moral provides an ambitious summary of NAIL’s main traits (at 227). Moreover, he suggests a periodization of Kennedy’s thought and work into three distinctive phases: his engagement with post-structuralism in the 1980s, his intellectual resistance to (neo)-liberal triumphalism in the 1990s and, finally, his contemporary intellectual preoccupations with an emphasis upon global governance. For the author, NAIL’s politics firmly place NAIL in the opposite camp of what Robert Cox has called ‘problem-solving’ theories. NAIL does not simply accept the firmly established


59 D’Aspremont, supra note 57.

60 Korhonen, supra note 52, at 24.

61 In the realm of international relations problem-solving theory: ‘Takes the world as it finds it, with the prevailing social and power relationships and the institutions into which they are organised, as the given framework for action. The general aim of problem-solving is to make these relationships and institutions work smoothly by dealing effectively with particular sources of trouble.’ In Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’, 10 Millennium (1981) 126, at 128–129. The distinction between problem solving and critical theory is a useful one for international law as well.
(read: hegemonic) assumptions of the international legal system and tries to detect optimum solutions within the given framework. Rather, NAIL turns to theory and history in order to challenge ‘doctrine and technocratic practice’ and ‘legal managerialism’ (ibid.) while highlighting that despite their best intentions individual international lawyers can promote or facilitate ‘oppressive and conservative structures of international legal thought’ (at 227).

To do so, NAIL reconceptualizes history as a field of ‘reflective contestation’ while focusing on the colonial, racist, patriarchal legacies of international law. Interestingly, this deeply ethical, even ‘existential’ project is accompanied by ‘a profound distrust for grand narratives and the proclamation of abstract and universal principles that characterize modernist thinking’ (ibid.). Further, de la Rasilla del Moral emphasizes NAIL’s interests in paradoxes, ambivalences and deconstruction. After all, ‘ambivalence rules’ was one of the core ‘slogans’ of the last NAIL conference. All in all, he conceptualizes NAIL as a typical post-modernist school of thought, a position widely accepted but not unchallenged.

The origins of this debate about the broader intellectual origins and commitments of NAIL can be traced back to Kennedy’s early contributions in the 1980s. De la Rasilla del Moral inquires into the theoretical influences on Kennedy’s thought: the Frankfurt School, critical legal studies with a special emphasis on their appropriation of American legal realism and French (post-)structuralism, especially Derrida. *International Legal Structures* and *Critical Theory, Structuralism and Contemporary Legal Scholarship* are two early works of Kennedy’s that manifest his ‘radical methodological eclecticism and the inter-disciplinary ambition’ (at 231). For de la Rasilla del Moral, major evolutions in heterodox approaches to international law – be it Koskeniemi’s *From Apology to Utopia* or the turn to history (at 230, 232) – can be directly associated with Kennedy’s early theoretical explorations.

The author conceptualizes the second period of Kennedy’s oeuvre as lying between ‘NAIL and the Counter-End of History’ (at 234) or, in Kennedy’s words, ‘escaping ... the neo-liberal triumphalism of the post-Cold War discipline’. It was in this period that his ongoing interest in international institutions was initiated, and he focused, for example, on ‘the process of European integration which he observed was encapsulated in historical frames of international renovation(ism), and reiteration(ism), or continuism’ (at 234–235).

62 Kennedy, supra note 2, at 497.

63 ‘Koskeniemi’s and Kennedy’s early works are often cast as ones of deconstruction, in my opinion incorrectly. But neither *International Legal Structures* (*Structures*), nor *From Apology to Utopia* (*FATU*) are works of deconstruction, but rather, as stated by the authors themselves, of structuralism. The differentiation is vital. It may be, as I contend, that these are works settled in modernity and are not “post-modern critiques”’, Singh, ‘International Legal Positivism and New Approaches to International law’, in J. Kammerhofer and J. d’Aspremont (eds), *International Legal Positivism in a Post-Modern World* (2014) 291.


66 Kennedy, supra note 2, at 491.

in Kennedy’s contemporary work: his ever-broadening scope of inquiry and the emergence of global governance as one of his principal interests. This project is characterized by its particular methodology and its politics. Methodologically, it reflects Kennedy’s struggle against ‘compartmentalized knowledge’ (at 243). To him, the ‘mystery of global governance’ can only be grasped through a ‘new background intellectual frame’ (ibid.), which goes beyond compartmentalized knowledge and the disciplinary constraints of international lawyers.

The question of Kennedy’s politics takes us back to the political orientation of NAIL. For Kennedy, contemporary debates about global governance ‘fail to grasp the depth of the injustice of the world today and the urgency of change’. In the aftermath of the 2008 crash, few would deny the necessity for change. However, in this call for reform ‘we should question and not take as a given the present distribution of the means of production, tax and transfer policies or separation of fiscal and monetary policy’. Formulated differently, it is essential that these calls for reform do not result in yet another technocratic exercise but, rather, address issues of power, inequality and dispossession at the heart of ‘global governance’.

6 The King Reigns but Does He Govern?: On Global Governance

In his preface to this volume, Kennedy places the main focus on global governance, a question of particular acuteness in times of global financial crisis. This short intervention reflects Kennedy’s latest research agenda and provides an additional lens through which we may read the rest of the book under review. Three broad themes can be identified: first, global governance as a reality as well as a way to conceptualize reality; second, the role of law in global governance; and, third, the positionality of critical international lawyers within this framework. Kennedy observes that ‘global governance’ is not about neutral management and problem solving. Rather, ‘[i]t concerns the making of the world’ in the sense that ‘the world to be governed must also be identified and thereby made’ (ix, vi). As a consequence of this world making, ‘[p]olitical and economic leadership have drifted apart’ and ‘[p]olitical leadership has everywhere become peripheral to economic management’.

This absence of a unified economic or political leadership does not imply that the global order is lawless since ‘[l]aw remains a language in which governance is written and performed’ (at xi). This observation entails two conclusions: one about law’s complicity with power and one about law as an emancipatory tool. The first one has occupied a significant part of Kennedy’s and other critical lawyers’ writings in the past, and it need not be reproduced here. Suffice it to say that we need to remain sensitive to the fact that ‘well-meant projects may do more to render problems sustainable for

69 Ibid., at 848–849.
72 Ibid., at 70.
the regime than to resolve them’ (at vii). With respect to the emancipatory potential of law or, to be more precise, the emancipatory potential of realizing the importance of law in the construction of global governance, Kennedy draws our attention to political economy and more specifically to Karl Polanyi’s and other institutionalists’ economic thought. The argument is that we need to comprehend how core features of the capitalist economy (capital, labour, credit, money, liquidity) ‘are creatures of law’ (at xiv). This affirmation bears a significant emancipatory potential, for what is made can also be remade or unmade. In Kennedy’s words, ‘the presence of law in the foundations of economic and political life suggests a different path’ (at xiv).

This brings us to the international lawyer’s role in the struggle to resist and reform global governance. Three distinct trends can be identified in international law scholarship: complicity, puzzlement and commitment to liberation. Kennedy has focused extensively on the role of international lawyers in consolidating power by providing it with humanitarian or technical vocabularies that fit their plans. Puzzlement is also a common posture of international lawyers when confronted with ‘global governance’ questions that cannot be captured by traditional legal dichotomies (national versus international; public versus private). The third option – commitment to liberation – is motivated by the acknowledgment of ‘the depth of the injustice of the world today and the urgency of change’ (at ix). For Kennedy, the volume at hand is an expression of this commitment as it assembles authors who ‘tried to shake off the promise of repeated renewals, looked hard at the arrangements of power and the complicity of law’ (at xiv).

7 In Place of an Epilogue

The book under review seeks to reflect on NAIL as an intellectual current and on the work of Kennedy and his role as one of the ‘paternal’ figures of NAIL. This goal has been partly achieved. The volume provides us with a good overview of NAIL’s engagement with human rights, international legal history and the laws of war. Yet the absence of certain themes is striking. International institutions were mentioned occasionally by different contributors, but they were not included as one of the book’s main themes – a puzzling decision, especially in the context of the global economic crisis.

The editors of the volume have opted for providing an extensive institutional and intellectual history of NAIL. This part of the book is of particular interest, especially to younger scholars who have sympathies for the project but know little about its intellectual origins or its institutional underpinnings. For them, this book can be a good guide to the ‘geography’ of our discipline. Still, at times, the account that is given feels overly ‘celebratory’ and dodges some hard questions about the political commitment of NAIL or its positioning towards the ‘mainstream’. The emphasis on ‘internal’

histories also feels a bit hermetic, especially as the contributions hardly touch upon the anxieties of a newer generation of critically minded scholars who struggle to think productively about international law in a university committed to ‘policy recommendations’ and ‘pathways to impact’. In this respect, it appears to me that the editors of the book have opted against a volume that would have clearly linked past and present theoretical debates and institutional anxieties. This is a lost opportunity for a more explicit inter-generational debate within the ‘critical’ scene and for a firmer take on what this ‘critical’ scene is in the first place.

Instead of a final conclusion, let me recall a significant aspect of Kennedy’s work. In the epilogue to Of Law and War, Kennedy engages in one of the most ethically intense calls to international lawyers that has come to my attention.\(^{74}\) Akin to Lacanian psychoanalysis, Kennedy urges us to assume responsibility for our desire and not conceal it behind legal arguments and technical vocabularies. If the major difficulty of our times is ‘locating a moment of responsible political freedom’,\(^{76}\) then the most profound legacy of David Kennedy is him insisting that legal language should never prevent us from facing ‘the terrible responsibility and freedom that comes with the discretion to kill’, to govern and to decide.\(^{77}\)

**Individual Contributions**

David Kennedy, *Preface*;
Frédéric Mégret, *Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes*;
Yolanda Gamarra, *National Responses in Latin America to International Events Propelling the Justice Cascade: The Gelman Case*;
Thomas Skouteris, *Engaging History in International Law*;
John D. Haskell, *Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial*;
Akbar Rasulov, *New Approaches to International Law: Images of a Genealogy*;
Outi Korhonen, *Innovative International Law Approaches and the European Condition*;
Ignacio de la Rasilla del Moral, *Notes for the History of New Approaches to International Legal Studies: Not a Map but Perhaps a Compass*;
Olivier Corten, *Formalization and Deformalization as Narratives of the Law of War*.

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\(^{74}\) Kennedy, *supra* note 32.

\(^{75}\) ‘An important step towards attaining this ethical position is for the subject to take responsibility for her own desires, and stop looking for other people or disciplines to tell her what to do, what to want, and how to be.’ Aristodemou, ‘A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours’, 25 *EJIL* (2014) 35, at 38.

\(^{76}\) Kennedy, *supra* note 32, at 171.

\(^{77}\) *Ibid.*, at 168.