# 14 *Deconstructing 'Resilience Talk' in Global Governance Toward a Critical Political Economy Approach*

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## Introduction

A recent Special Issue on resilience in the EU and international institutions observes that '[r]esilience is one of those terms that seems to have appeared out of nowhere to be present everywhere: from billboards advertising "resilient skincare" to think tank policy talks about the need for more resilient critical infrastructures, and environmentalist calls for resilient planetary eco-systems'.[1] Indeed, resilience has become the buzzword or mantra of World Bank sustainable development policies; OECD recommendations for economic development and disaster management; international organisational approaches to supply chain governance; World Health Organization approaches to physical and mental health; the approaches to urban development of the International Committee of the Red Cross and United Nations; and development and disaster management strategies and national security policies in the UK, USA, EU, and elsewhere. This chapter begins from the premise that vocabularies matter in international law, as 'ideologies' in the 'technical sense of reifying, making seem necessary or neutral something that is partial and contested',[2] and in international relations, as disciplinary mechanisms of control and often structurally biased means of governance.[3] Accepting the view that 'resilience sits

[1] E. Korostelva, and T. Flockhart, 'Resilience in EU and International Institutions: Redefining Local Ownership in a New Global Governance Agenda,' (2020) 41 (2) *Contemporary Security Policy* 153–175, 153.
[2] M. Koskenniemi, 'The Politics of International Law – 20 Years Later,' (2009) 20 (1) *European Journal of International Law* 7–19 at p. 12.
[3] S. Smith, 'Singing Our World into Existence: International Relations Theory and September 11,' (2004) 48 (3) *International Studies Quarterly* 499–515.



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precisely at the crux of governmentality and political economy',[4] it is possible to analyse 'resilience talk' as an essential element in the movement away from multilateral, institutional governance, towards the self-help system of self-regulating subjects under neoliberalism.[5] This chapter submits that resilience talk is often a hegemonic force that depoliticises and naturalises deep structural inequalities in the governance activities of international organisations and law. The language of resilience both instantiates and reflects the language, logic, and inherent crises of capitalism. By asking the critical political economy questions of 'who gets what' from resilience talk and just 'whose resilience' are we talking about, the chapter explores resilience as both an ideology and a material force in new constitutional governance.[6] The language of resilience has become the legal and governance common sense of the day, obscuring the underlying conflicting social forces created and advanced by new constitutionalism.

New constitutionalism differs in many ways from the old constitutionalism, but the most salient characteristic of contemporary new constitutional governance is the commitment of global leaders to the expansion of capitalism and the privileging of private, market-based means of capitalist appropriation as the *grundnorms* of global governance.[7] New constitutionalism, like the old or traditional understandings of constitutionalism, associated with the rule of law, limitations on governmental power, and equality before the law, is committed to the rule of law. However, this commitment is to law of a specific form: it is capital's law that can blow both hot and cold, hard and soft, depending upon the needs of capital.[8] As a mechanism of new

[4] A. Howell, 'Resilience as Enhancement: Governmentality and Political Economy beyond "Responsibilisation",' (2015) 35 (1) *Politics* 67–71.

[5] D. Chandler and J. Reid, *The Neoliberal Subject: Resilience, Adaptation, and Vulnerability* (London: Rowman & Littlefield, 2016).

[6] S. Gill and A. C. Cutler (eds.) *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014).

[7] For discussion of the differences between old and new constitutionalism see Gill and Cutler, *New Constitutionalism and World Order*, 1–14 and A. C. Cutler, 'The Rule of Law, Constitutionalism, and Transnational Legality' in C. May and A. Winchester (eds.) *Handbook on the Rule of Law* (Cheltenham, UK: Edward Elgar Publishing, 2018) pp. 307–321, 311–314. See S. Gill (ed.) *Global Crises and the Crisis of Global Leadership* (Cambridge: Cambridge University Press, 2012) for discussion of global leadership.

[8] See A. C. Cutler, *Private Power and Public Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press,

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constitutional discipline, the language of resilience deepens global capitalism, both intensively and extensively, through the hegemony of neoliberalism, the privatisation and the individualisation of responsibility, and the preservation of hierarchies of power and domination as the common-sense foundations for law and good governance. The chapter makes the case for destabilising and disrupting this discourse and practice as a necessary move in revealing the class, gender, racial, and intersectional operations of resilience talk in order to humanise important institutions of global governance.

The chapter begins with a discussion of new constitutional governance, outlining the contours of a critical political economy approach to international organisations and law.[9] Analysis then shifts to document the various and multiple illustrations of the promotion of resilience by various actors, institutions, and legal texts engaged and implicated in global governance. The final section addresses what critical political economy has to offer to our understanding of the interests and purposes served by 'resilience talk' in global governance and makes the case for disrupting and challenging its hegemonic significance as 'common sense' by an appeal to transformative 'good sense'.

## Critical Political Economy and New Constitutionalism

Adopting a critical political economy approach, the relationship between law and capitalism is here analysed as a new constitutionalism that often operates by subordinating the public domain to the disciplines of the private sphere of transnational capital accumulation. By definition, new constitutionalism refers to a combination of processes involving: the emergence of a *de facto* constitutional governance structure for the world market; the neoliberal restructuring of states

2003); A. C. Cutler, 'The Judicialization of Private Transnational Power and Authority,' (2018) 25 (1) *Indiana Journal of Global Legal Studies* 61–95.

[9] I use the term critical political economy to capture a form of historical materialist analysis that goes beyond class distinctions to incorporate a more complex understanding of the sites and sorts of struggles that characterize global governance. I conceive of historical materialism as a philosophy of praxis and as a method of critical analysis and immanent critique that has unavoidable transformative and emancipatory potential. See A. C. Cutler, 'Toward a Radical Political Economy Critique of Transnational Economic Law' in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (New York: Cambridge University Press, 2008), pp. 199–219.

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according to the juridical demands of market civilisation;[10] locking-in mechanisms, such as trade, investment, and financial laws, which support neoliberal accumulation; informality and flexibility in non-binding legal regulation; and the interpellation of the neoliberal subject in the development of the commodity form of law as the template of global governance.[11] While each process will be addressed in turn, critical political economy asks 'who gets what?' and 'whose interests and purposes are served?' through law under a new constitutionalism that obscures and shields foreign and transnational corporations from accountability, while locking states into legal commitments that continue to advance private transnational capital accumulation.[12]

As mentioned earlier, the new constitutionalism refers to the uneven emergence of a *de facto* constitutional structure for the global political economy. This development has largely coincided with the global expansion of capitalism since the 1980s and the pursuit over the past few decades by many states and associations of neoliberal policies and constitutional reforms, both domestically and globally. The new constitutionalism is further reflected in a proliferation of neoliberal trade and investment frameworks, such as the US, Mexico, Canada Free Trade Agreement, the World Trade Organization (WTO), the international investment regime, and in legal and institutional changes in macroeconomic policy, exemplified by politically independent central banks and currency boards. Changes in public service provision involving the privatisation of education, healthcare, and many other aspects of life are linked to neoliberal trade and investment frameworks and treaties, such as the General Agreement on Trade in Services (GATS)[13]

[10] Market civilization refers to a social order associated with late twentieth- and early twenty-first-century capitalism that is geared to the preservation and expansion of capitalist markets, locally and globally; nationally and transnationally. See Gill and Cutler, *New Constitutionalism and World Order*, p. 319.

[11] Gill and Cutler, *New Constitutionalism and World Order*.

[12] R. Cox, 'Social Forces, States and World Orders: Beyond International Relations Theory,' 10 *Millennium: Journal of International Studies* (1981) 126. See Negar Mansouri, this volume and A. C. Cutler, *Private Power and Public Authority* for elucidation of Cox's critical political theory.

[13] See Cutler, 'Toward a Radical Political Economy Critique of Transnational Economic Law' and A. C. Cutler, 'Unthinking the GATS: A Radical Political Economy Critique of Private Transnational Governance' in. M. Ougaard and A. Leander (eds.) *Business and Governance* (New York and London: Routledge, 2010), pp. 78–96.

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and the global intellectual property regime,[14] and are subordinated to the demands and regulatory power of transnational business corporations. The new constitutionalism increasingly informs bilateral and multilateral trade and investment agreements, and other economic, social, and environmental policy frameworks.[15] It is redefining politics and governance globally and, in the terminology of the World Bank, involves locking in states to neoliberal frameworks of capital accumulation.[16] Neoliberalism is a 'theory of political economic practices proposing that human well-being can best be advanced by the maximisation of entrepreneurial freedoms within an institutional framework characterised by private property rights, individual liberty, unencumbered markets, and free trade'.[17]

The new constitutionalism is increasingly significant in shaping global public policy, in ways that may have long-term effects on the ontological and epistemological bases of constitutionalism, as well as more broadly on institutions of social reproduction associated with public services, care, and education.[18] In this regard, it provides the template for contemporary economic, social, and political regulation and entails the acceptance by society of the expansion of commodification through legal protection of private property rights as natural, rational, and common-sense modes of governance that serve the common interests of all, both the governors and governed.[19] Private appropriation becomes constitutionalised through law and state as a public good. Through new constitutionalism, the communal protection of

[14] S. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

[15] D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008); A. C. Cutler, 'Transformations in Statehood, the Investor-State Regime, and the New Constitutionalism,' (2016) 23 (1) *Indiana Journal of Global Legal Studies* 95–126.

[16] World Bank, *Building Institutions for Markets* (Oxford: Oxford University Press, 2002).

[17] D. Harvey, 'Neoliberalism as Creative Destruction,' 610 (1) (2007) *The Annals of the American Academy of Political and Social Science* 22–44, 22.

[18] I. Bakker and S. Gill, *Power, Production and Social Reproduction: Human In/Security in the Global Political Economy* (Basingstoke, Hants and New York: Palgrave Macmillan, 2003).

[19] A. C. Cutler, 'New Constitutionalism and the Commodity Form of Global Capitalism,' in Gill and Cutler, *New Constitutionalism and World Order*, 45–62.

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private property rights becomes a natural and organic accompaniment of global production and exchange.[20]

The commodity form of law is central to new constitutional governance. Evgeni Pashukanis,[21] building upon Karl Marx's critique of political economy, believed that law is inextricably linked to capitalism and is in fact itself a product of capitalism, functioning as an integral part of the commodity system: the commodity form of law is homologous with the commodity form of capitalism and mediates political interests.[22] The commodity form of law reinforces capital and is legitimated through the misrecognition of law as impartial, just, rational, and operating between juridically equal subjects. Law is therefore deeply imbricated in capitalism and its resulting relationships of power. To Pashukanis, this imbrication is predicated on the formation of the legal subject as the holder of legal rights as an abstract, impersonal, and, ultimately, juridical person. In fact, in recognising the juridical subject, capitalism assumes its legal character through the legitimation of exchanges of commodities as formally equal commodity owners: one party the owner of labour and the other the owner of surplus value, engaged in free exchange.[23] But to Marx and Pashukanis, this assumption of juridical equality masks the profound inequality that inheres in the very fabric of capitalist relations between owners and producers. Importantly, it is the role of new constitutionalism to obscure this inequality and render it invisible in the formation of common sense.

Indeed, critical political economy offers important insights into the constitution of common-sense meanings. It recognises that capitalism does not simply reproduce itself of its own accord, but requires certain attitudes, institutions, and apparatuses to enable its continuing

[20] A. C. Cutler, 'Gramsci, Law, and the Culture of Global Capitalism' (2005) 8 (4) *Critical Review of International Social and Political Philosophy* 527–542.

[21] E. Pashukanis, 'International Law' in. B. Piers and R. Sharlet (eds.) *Pashukanis: Selected Writings on Marxism and Law* (London: Academic Press, 1980) pp. 168–190 and E. Pashukanis, *Law and Marxism: A General Theory* (London: Pluto Press, 1978).

[22] See I. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1976–1977) 11 (3) *Law & Society Review* 571–588 and T. Krever, 'The Rule of Law and the Rise of Capitalism' in C. May and A. Winchester (eds.) *Handbook on the Rule of Law* (Cheltenham: Edward Elgar Publishing, 2018) pp. 184–200, 197.

[23] Pashukanis, *Law and Marxism*.

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reproduction and expansion.[24] Theories of the State recognise the analytical distinction between functions of accumulation and legitimation, recording the need of capitalist states for material, institutional, and normative or ideological reproduction. Robert Jessop, for example, differentiates between the 'accumulation strategies' of a state and its 'hegemonic project', suggesting that achieving the material conditions for capitalism is insufficient, for these conditions must be generally accepted by society.[25] Jessop articulates understandings of hegemony inspired by Antonio Gramsci and the idea that the dominant class achieves dominance or 'hegemony' through the combined influence of coercion and consent. Gramsci believed that hegemony, the process by which the ruling class establishes the conditions necessary for achieving leadership, could not be secured solely through coercion, but required the ideological capture of popular support. This involves the acceptance and internalisation by the masses of the interests and values of the ruling class as their own. Indeed, as Adam Morton observes, 'hegemony is the articulation and justification of a particular set of interests as general interests. It appears as an expression of broadly based consent, manifested in the acceptance of ideas and supported by material resources and institutions.'[26]

The acceptance by civil society of relations of dominance is thus a crucial dimension of hegemony. So too is the work of the 'organic intellectuals' who facilitate the internalisation of the interests of the ruling class as the common interest and, indeed, as the 'common sense' of the time. Antonio Gramsci observes that the acceptance by the masses of the dominant ethos as 'common sense' is not a result of 'self-deception [*malafede*]' but 'the expression of profounder contrasts of a social historical order' associated with its subjugation as a group.[27] It is organic intellectuals of the day who are able to generate the acceptance by the

[24] K. Marx, *Capital: A Critique of Political Economy*, vol. 1. trans B. Fowkes. (London: Penguin, 1976. [1867]); L. Althusser, 'Ideology and Ideological State Apparatuses: Notes towards an Investigation,' in *Lenin and Philosophy and Other Essays* (New York: Monthly Review Press, 1971), pp. 127–186.

[25] R. Jessop, *State Theory: Putting the Capitalist State in its Place* (Pennsylvania: Pennsylvania State Press, 1990), p. 216.

[26] A. Morton, *Unravelling Gramsci: Hegemony and Passive Revolution in the Global Political Economy* (London: Pluto Press, 2007), p. 113.

[27] A. Gramsci, Q. Hoare, and G. Smith (eds.) *Selections from Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1971), pp. 326–327.

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masses of the interests of the ruling class as 'common sense'. Moreover, law is the 'instrument for this purpose'.[28] Indeed, organic intellectuals are able to garner both the 'spontaneous' consent of the masses and the legal enforcement of coercive discipline. In this latter respect, Gramsci regarded the law and legal institutions as playing a particular role in producing common-sense understandings under-girding hegemony.[29] Law becomes the mechanism for authorising the framing of private interests as public interests and as common sense. Although Gramsci wrote very little about law, his fragmentary analysis of law coupled with his understanding of hegemony inspires a *praxis conception of law* of great relevance to this analysis.[30] This conception derives from Gramsci's theorisation of Marxism as a philosophy of *praxis:* as a unity resulting from the dialectical development of contradictions between theoretical and practical activity. Gramsci contemplated this unity as 'immanent' in capitalist society and as realisable through practices informed by critical inquiry.[31] The role of the organic intellectual is linked to the processes of establishing the hegemony or leadership of the dominant social forces. The process of achieving hegemony and 'colonising the internal world of the dominated classes' involves three related developments in which organic intellectuals and law play leading roles: universalisation, naturalisation, and rationalisation.[32] Universalisation involves the representation by the dominant group of its private interests as common and public in nature, while naturalisation and rationalisation concern processes of reification that present the existing order as fully consistent with the natural and rational order of things. Law facilitates these processes by interpellating individuals as equal legal subjects, obscuring their actual subordination and inequality, and rationalising this appearance as part of the universal and natural order of things.[33] These processes may be achieved through *trasformismo*, being the absorption of opposition into the

[28] Ibid., p. 246.
[29] M. Benney, 'Gramsci on Law, Morality and Power' (1983) 11 *International Journal of the Sociology of the Law* 191–208.
[30] Cutler, 'Gramsci, Law, and the Culture of Global Capitalism'.
[31] Gramsci, *Selection from Prison Notebooks of Antonio Gramsci*, pp. 400, 450.
[32] D. Litowitz, 'Gramsci, Hegemony, and the Law,' (2000) 2 (2) *Brigham Young University Law Review* 515–551, 525.
[33] Althusser, in *Ideology and Ideological State Apparatuses*, developed the theory of interpellation to capture the role that ideology plays in constituting individuals as legal subjects who are aware of and identify with their own subjectivity, thereby participating consensually in the reproduction of capitalism.

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dominant group,[34] which involves the work of organic intellectuals who 'perpetuate the existing way of life at the level of theory' as the rational and natural order of things.[35]

Resilience talk and the experts who cultivate and advance it through the work of international organisations and law are the organic intellectuals who naturalise and rationalise resilience as the best practice in global governance. They facilitate the interpellation of the subjects of resilience planning as 'neoliberal subjects' and active participants in the reproduction of capitalism and many of the conditions causing severe crises in capitalism in the first place.[36] In doing so, expert international lawyers are instrumental in the construction of hegemony, perhaps unwitting participants in the creation and maintenance of neoliberal hegemony. For example, international intellectual property lawyers who are advancing climate resistant seeds as the solution to climate change may be regarded as promoting the resilience paradigm and the common sense of adapting to, rather than resisting or trying to abate, the climate crisis. They are thus enabling climate capitalism to proceed as business as usual and possibly contributing to corporate concentration in the seed industry, which is threatening global food security.[37] The discussion will turn to consider how resilience is becoming the common sense in global governance of the climate change crisis, sustainable development, and disaster and refugee management strategies. These crises and disruptions are all interlinked in various ways to a deeper crisis in the production and reproduction of global capitalism.

## Resilience Talk in Global Governance

Notable common tendencies in each of the resilience strategies adopted by international organisations considered here are the trends toward

[34] Gramsci, *Selections from Prison Notebooks of Antonio Gramsci*, pp. 57, 58–59.

[35] Litowitz, 'Gramsci, Hegemony, and the Law', p. 526. See also Cutler, 'Unthinking the GATS' for an Althusserian reading of the interpellation of transnational corporations as neoliberal subjects under global capitalism.

[36] B. Evans and J. Reid, 'Dangerously Exposed: The Life and Death of the Resilient Subject,' (2013) 1 (2) *Resilience: International Policies, Practices and Discourses* 83–98.

[37] S. Mahoney, 'Owning the World's Seed Supply: How Seed Industry Mergers Threaten Global Food Security' (2019) 31 (3) *The Georgetown Environmental Law Review* 563–79.

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the enhanced role of technical experts in global governance, the deformalisation of law through the predominance of 'soft law',[38] and the management of crises in capitalism through the application of what Robert Cox refers to as 'problem-solving theory'.[39] Problem-solving theory is differentiated from 'critical theory' in that the former takes the world as it is with its existing power structures, while the latter seeks to transform the world and challenges existing hierarchies of power and authority. Resilience theory has its origins in multiple disciplines in the attempt to deal with risk management. It is 'concerned fundamentally with how a system, community or individual can deal with disturbance, surprise and change'.[40] Ecosystem stability, engineering infrastructure, psychology, the behavioural sciences, disaster reduction, supply chain regulation, and multilateral aid organisations are just some of the areas adopting resilience theory into their programming. The goal is to 'ensure that shocks and stresses, whether individually or in combination, do not lead to a downturn in development progress' and economic growth.[41] The focus on risk management and reduction and ensuring the continuity of economic expansion and growth is consistent with what Henk Overbeek refers to as the 'reformist' turn in global governance from a 'transformist rallying cry' in the late 1970s, to rule by technocratic experts and 'the global rule of capital' geared to 'the management of neo-liberal globalisation'.[42] Today global governance is 'increasingly informalised', 'based on self-regulation by private forces' and 'predicated on a constitutionally anchored legal basis':[43] the new constitutionalism. As we turn to examine examples of resilience governance it becomes apparent that they are connected in different ways to a deeper crisis of capitalism on a planetary scale.

[38] E. Ferris and J. Bergmann, 'Soft Law, Migration and Climate Change Governance,' (2017) 8 (1) *Journal of Human Rights and the Environment*, 6–29.
[39] Cox, 'Social Forces, States and World Orders.'
[40] T. Mitchell and K. Harris, 'Resilience: A Risk Management Approach,' *ODI Background Note* (January 2012) (The Overseas Development Institute, UK) 1. J. Walker and M. Cooper, 'Genealogies of Resilience: From Systems Ecology to the Political Economy of Crisis Adaptation,' (2011) 42 (2) *Security Dialogue* 143–160.
[41] Mitchell and Harris, 'Resilience,' 1.
[42] H. Overbeek, 'Global Governance: From Radical Transformation to Neo-Liberal Management,' in K. Dingwerth, P. Pattberg, and D. Compagnon, 'Forum: Global Governance: Decline or Maturation of an Academic Concept?' (2010) 12 (4) *International Studies Review* 696–719, 697.
[43] Ibid., p. 700.

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Phillipe Bourbeau provides an excellent overview of the adoption in the social sciences of the resilience framework and notes that '[t]he United Nations, together with several international organisations and non-governmental organisations, has invoked resilience as a new organising principle' to address human suffering and reduce the costs of emergency responses.[44] The World Bank identifies building resilience as essential to achieving the goals of 'ending extreme poverty and promoting shared prosperity' by integrating the risks of climate change and disaster relief into development initiatives.[45] The World Health Organization similarly regards resilience building as at the 'core' of its *Health 2020* vision, while resilience building is integrated as well in United Nations Sustainable Development Goals.[46] In fact, adaptation to climate change,[47] sustainable development,[48] disaster relief,[49] climate migration management,[50] and the management

[44] P. Bourbeau, 'Resilience and International Politics: Premises, Debates, Agenda,' (2015) 17 (3) *International Studies Review* 374–395, 377.

[45] World Bank, *Building Resilience: Integrating Climate and Disaster Risk into Development* (Washington, DC: World Bank, 2013), viii.

[46] World Health Organization, *Strengthening Resilience: A Priority Shared by Health 2020 and the Sustainable Development Goals* (Copenhagen: WHO Regional Office for Europe, 2017).

[47] World Bank, *Building Resilience*.

[48] The United Nations Development Program, *Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty* (New York: United National Development Programme, 2011) www.preventionweb.net/files/24163workshopbuildingresiliencecasestudi.pdf; Swiss Agency for Development and Cooperation, *Building Resilience: Bridging Food Security, Climate Change Adaptation and Disaster Risk Reduction* (Rome: Swiss Agency for Development and Cooperation, 2011) www.preventionweb.net/files/24163_workshopbuildingresiliencecasestudi.pdf; the Swedish International Development Cooperation Agency, *Resilience, Risk and Vulnerability* (Stockholm: Swedish International Development Cooperation Agency, 2012).

[49] IPCC, *Managing the Risks of Extreme Events and Disasters to Climate Change Adaptation* (Cambridge: Cambridge University Press, 2012); the Intergovernmental Authority on Development Platform for Drought Disaster Resilience 2013 https://igad.int/about-us; the Global Alliance for Resilience Partnership National Resilience Template 2013 www.food-security.net/en/topic/global-alliance-for-resilience-agir/; UK Department of International Development, *Defining Disaster Resilience: A DFID Approach Paper* (London: UK Department of International Development, 2011); USAID, *The Resilience Agenda: Helping Vulnerable Communities Emerge from Cycles of Crisis onto a Pathway toward Development* (Washington, DC: USAID, 2011). Swiss Agency for Development and Cooperation, *Building Resilience*; The United Nations Development Program, *Towards Human Resilience*; the Swedish International Development Cooperation Agency, *Resilience, Risk and Vulnerability*.

[50] UNICEF, *Resilient migration* (Mexico: UNICEF, 2017).

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of crisis-related supply chain disruptions[51] provide the most notable and growing imbrications of resilience-oriented global governance strategies and mechanisms into the foundations of capitalism, in both local and global political economies. As Julian Reid observes, the 'resilient subject is one which presupposes the disastrousness of the world, and likewise one which interpellates a subject that is permanently called upon to bear the disaster'.[52] The grafting of resilience strategies onto sustainable development policies by the United Nations Development Program (UNDP) and the United Nations Environment Program (UNEP)[53] integrated neoliberal rationalities into sustainable development projects and was a complicated process that is beyond the scope of this chapter.[54] However, the upshot of the process is the framing of sustainable development, not as a question relating to the *security* of the individual, but rather one relating to the *adaptability* of the individual. The resilient subject is thus 'not a secure but an adaptive subject;'[55] a subject that accommodates itself to the existing order and its existing power structures and 'not a subject which can conceive of changing the world, its structure and conditions of possibility'.[56] Indeed, the resilient subject is considered the 'new ethic of responsibility' for disaster management and championed by the Intergovernmental Panel on Climate Change (IPCC).[57] But critics question the suitability of a theory developed in addressing

[51] UNCTAD, *Review of MaritimeTransport* (New York, NY: United Nations Publications, 2020).

[52] J. Reid, 'Interrogating the Neoliberal Biopolitics of the Sustainable Development-Resilience Nexus,' (2013) 7 *International Political Sociology* 353–367, 355.

[53] See United Nations Development Programme, United Nations Environment Programme, World Bank, World Resources Institute, *World Resources 2008: Roots of Resilience – Growing the Wealth of the Poor* (Washington, DC: World Resources Institute, 2008).

[54] See Reid, 'Interrogating the Neoliberal Biopolitics of the Sustainable Development-Resilience Nexus' and M. Duffield, *Development, Security and Unending War: The Governing of the Worlds Peoples* (Cambridge: Polity, 2008) for a full account of these developments.

[55] Reid, 'Interrogating the Neoliberal Biopolitics of the Sustainable Development-Resilience Nexus,' p. 362.

[56] B. Evans and J. Reid, 'Dangerously Exposed: The Life and Death of the Resilient Subject,' (2013) 1 (2) *Resilience: International Policies, Practices and Discourses* 83–98.

[57] Evans and Reid, 'Dangerously Exposed,' p. 85; IPCC, *Managing the Risks of Extreme Events and Disasters*, pp. 32–38.

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natural systems to social systems and highlight how resilience theory, rooted as it is in neoliberal, market-based, technical managerialism, erases 'the role that large scale social, economic and political processes play in shaping resilience', depoliticises solutions, and ignores gendered and intersectional dimensions of existing power structures in the communities subject to resilience policies.[58] In law, resilience talk forecloses the development of alternate possibilities. In the context of the climate resistant seeds discussed earlier, the resilience adaptation model forecloses legislation regulating corporate concentration in the seed industry or regulations limiting the sorts of seeds that can be patented and, ultimately, fails to address the underlying problems and risks to the environment and to global food security.[59]

Michael Mikulewicz illustrates how resilience-based development in Liberdade, a community on a small island in the Gulf of Guinea that is subject to impacts of climate change droughts, floods, and rising sea levels, is promoting resilience amongst the new leaseholder farmers. However, the resilience strategy developed by the UNDP rested upon the privatisation of agriculture and failed to provide the necessary agricultural support for the farmers as well as adequate investment in the project. As a result, there was complete failure to address the specific development needs of the people and the underlying structural inequalities relating to social, gender, and racial inequalities. As the state retreated from the countryside, the farmers were left to UNDP managers who excised these structural problems 'from the resilience formula'.[60]

Stephanie Wakefield, in a study of efforts to address rising sea levels in Miami Beach, emphasises the conservative nature of climate change resilience policies in urban environments that 'do not counter or transform existing social or economic urban relations. Instead, they attempt to extend and maintain existing relations into the future.'[61] They thereby 'secure and manage an unchanging urban order' dedicated to 'maintaining Miami Beach's current socio-economic order' premised upon tourism, high-end real estate markets, and luxurious lifestyles.[62]

[58] M. Mikulewicz, 'Thwarting Adaptation's Potential? A Critique of Resilience,' (2019) 104 *Geoforum* 267–282, 273.
[59] Mahoney, 'Owning the World's Seed Supply,' p. 579. [60] Ibid., p. 273.
[61] S. Wakefield, 'Miami Beach Forever? Urbanism in the Back Loop,' (2019) 107 (2) *Geoforum* 34–44, 40.
[62] Ibid.

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Margherita Pieraccini shows how resilient legal strategies, involving customary, property, and environmental laws enacted to protect the common property area of Regole d'Ampezzo, Italy, in fact obscure underlying gendered power relations.[63] These laws sustained gender inequality by preventing women from inheriting rights and participating in management of the region, prompting the author to call for a politicised understanding of the legal regime.

The political economy dimension of resilience talk is vividly illustrated by its impact on climate migrants. The *United Nations Framework Convention on Climate Change* 2010 recognises mobility as an adaptive strategy for climate change and the Paris Agreement echoed this recognition and called for concrete recommendations. The result was the *Guidance on Protecting People through Planned Relocations from Disasters and Environmental Changes* and *Operational Guidelines*, both soft law initiatives developed by legal experts and representatives from international organisations and states to assist states and organisations in addressing displaced persons.[64] However, the treatment of displaced persons through the adaptation and resilience framework has reconceptualised migration as a solution to the problems of disaster and climate change, rather than as a result and consequence of the failure to mitigate these very problems in the first place. This reconceptualisation shifts the terrain of legal discourse, lenses, and solutions from one concerning threats of harm that need to be addressed and solved in the context of mitigating climate change, to one of adaptation to and management of climate change. Indeed, this treatment reflects a 'turn from a discourse of "climate refugees", in which the organisations perceive migration as a failure of both mitigation and adaptation to climate change, to one of "climate migration", in which organisations promote mitigation as a strategy of adaptation'.[65] Moreover, 'the growing mantra of resilience in climate policy and politics' and 'the more recent narrative on "migration as adaptation" appears to displace justice claims and inherent rights in favour of a depoliticised

[63] M. Pieraccini, 'A Politicized, Legal Pluralist Analysis of the Commons' Resilience: The Case of the Regole d'Ampezzo,' (2013) 18 (1) *Ecology and Society* 4.

[64] Ibid. See Ferris and Bergmann, 'Soft Law, Migration and Climate Change Governance,' p. 17.

[65] R. Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation: "Climate Refugees" and "Climate Migrants",' (2013) 18 (3) *New Political Economy* 337–363, 337.

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idea of adaptation that relies on the individual migrant's ability to compete in and benefit from labour markets'.[66] The concept of 'climate refugee' has been displaced by the concept of 'climate migrant', signalling the ascendance of neoliberal reconfigurations of the problems of climate change and disaster management.[67] Once a refugee subject to the catastrophic effects of failures to mitigate climate change and possessing rights to security and (reparative) justice, the migrant is reconfigured as a resilient subject/worker with a duty to self-actualise the potential to manage and adapt to the crisis by integration as a migrant into the work force of the receiving state and contribute to the development of the home state by sending regular remittances home. The climate migrant is thus inserted into the global circuit of capital as a valuable source of remittance income through an expert policy discourse conducted in global governance circles.[68]

Indeed, international organisations have been very active in promoting the climate migrant/worker concept. The UNEP, the International Organisation of Migration, the United Nations University, and the Munich Re Foundation created an alliance – the Climate Change, Environment and Migration Alliance – in 2008 to 'mainstream environmental and climate change initiatives into migration management policies and practices, and to bring migration issues into global environmental and climate change discourse'.[69] In fact, the promotion of climate migration by the International Organisation for Migration (IOM) is 'a defining feature of this organisation'[70] and a central site for the development of expert discourses on climate migration resilience.[71]

The shift from climate refugee to climate migrant was accompanied by another subtle shift away from hard treaty law to soft laws and domestic policies. As Romain Felli observes, '[n]o longer should the

[66] G. Bettini, S. Nash, and G. Gioli, 'One Step Forward, Two Steps Back? The Fading Contours of (in)Justice in Competing Discourses on Climate Migration,' (2017) 183 (4) *The Geographical Journal* 348–358, 348.
[67] Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation,' p. 337.
[68] Ibid.
[69] A. Morton, P. Boncour, and F. Laczko 'Human Security Policy Challenges,' (2009) 31 *Forced Migration Review* 5–7, 7.
[70] Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation,' p. 342.
[71] See A. Pécoud, 'What Do We Know about the International Organization for Migration?' (2018) 4 (10) *Journal of Ethnic and Migration Studies* 1621–1638.

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environmental migrant be located conceptually within the realm of international law and legal categories, as he comes to be surrounded by an ensemble of deformalised norms, and practices, such as "soft laws", advice, capacity-building practices, etc.'[72] In fact, international migration law is characterised by the predominance of soft law arrangements at the bilateral, regional, and international levels, although there are a few international treaties.[73] Felli associates this shift to deformalised norms with a shift away from 'the language of international law' and 'reparative justice' to a language of 'strategic individuals with an entrepreneurial ethos'.[74] Felli also regards the shift as part of a deeper process of primitive accumulation[75] that reconfigures the political economies of predominantly Southern states, dispossesses their climate migrants from the means of production, and subjects labour to precarious conditions of employment. It is important to note that this shift and these processes are instantiated through law and have profound legal consequences for those dispossessed through climate change.

In my view this shift is an example of the commodity form of law at work. Migrants are reconfigured and interpellated by soft law initiatives as resilient neoliberal subjects as they are injected into the global political economy of migrant labour. Indeed, the World Bank presents migration as adaptation through remittances of goods or money to a migrant worker's home state as a positive consequence of climate migration, while the IOM promotes temporary, circular labour migration and 'income diversification through remittances'.[76] The World Bank estimates that global remittances for 2020 were US$651 billion,[77]

[72] Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation,' p. 346.

[73] See Ferris and Bergmann, 'Soft Law, Migration and Climate Change Governance'.

[74] Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation,' p. 346.

[75] Felli (ibid., p. 349) defines primitive accumulation as an ongoing process within capitalist relations of production that keep the worker a 'dispossessed individual, separated from the means of production… who must constantly reproduce himself through the market by selling his labour power in exchange for a wage, making him productive for capital accumulation'.

[76] IOM, *IOM Policy Brief: Migration, Climate Change and the Environment* (Geneva: IOM, 2009), 2; IOM, *Compendium of IOM's Activities in Migration, Climate Change and the Environment* (Geneva: IOM, 2009), 53.

[77] World Bank Data, https://data.worldbank.org/indicator/BX.TRF.PWKR.CD.DT.

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while the IOM 2020 Annual Report details the funding of over sixty-two countries in the development of migrant worker schemes.[78] Problematically, circular labour migration introduces 'extreme flexibilisation' into migrant labour and as a consequence labour unions worldwide and even the International Labour Organization have denounced migrant worker schemes, which Felli argues 'turns these migrants into an activity productive for the accumulation of capital. Climate change is thus harnessed toward the reconfiguration of social relations in a capitalist form.'[79]

Nicola Phillips identifies the promotion of migration as a development strategy and a form of accumulation by dispossession that inserts migrant workers from the South into transnational supply chains through the provision of labour. This strategy creates conflict between migrant workers and national workers by putting downward pressure on wages and leads to the extreme flexibilisation of labour.[80] As noted by others, this form of migration management 'is fundamentally about making migration economically beneficial, notably by connecting the supply of labour in the less-developed South with the migrant workers in the North'.[81] Felli calls for a reconsideration of how the conception of the climate migrant naturalises and depoliticises the politics of climate change, the dispossession it works, and the legal forms involved, to which attention turns.

## Disrupting 'Common Sense' in Global Governance

Critics of resilience talk argue that resilience strategies are essentially reactive and function to shift development assistance responsibilities (as well as responsibilities for climate change mitigation, disaster relief, and so forth) away from states, international organisations, and business corporations and onto individuals, who are expected to achieve development as resilient neoliberal subjects. A study of the

[78] IOM, *Annual Report 2020* (Geneva: IOM, 2020), 27.
[79] Felli, 'Managing Climate Insecurity by Ensuring Continuous Capital Accumulation,' p. 356.
[80] N. Phillips, 'Migration as Development Strategy? The New Political Economy of Dispossession and Inequality in the Americas,' (2009) 16 (2) *Review of International Political Economy* 231–259.
[81] M. Geiger and A. Pécoud, 'The Politics of International Migration Management' in M. Geiger and A. Pécoud (eds.) *The Politics of Migration Management* (Basingstoke, Hants: Palgrave Macmillan, 2010), pp. 1–20, 14.

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reception of Syrian refugees into Jordan and Lebanon under the guise of resilience frameworks reveals that very little development resulted for either the refugees or the host states and the framework is better regarded as a strategy to keep migrants out of the European Union.[82] Sarah Sharma notes that 'resilience is a reactive neoliberal policy tool implemented by the World Bank in urban spaces of the global South in both the transition from the Washington and post-Washington Consensuses and the rise of the climate crisis on the international development agenda'.[83] She further notes that '[r]esilience policies call for individuals to brace themselves, build up strength, and bounce-back from so-called exogenous shocks and stresses'.[84]

Resilience strategies are a form of neoliberal discipline and new constitutionalism. They deliver significant power and authority to technocratic experts and obscure underlying socio-political-economic causes of poverty, insecurity, and inequality. Attention is shifted away from providing solutions to the underlying causes of insecurity and inequality, such as the failure to achieve climate change mitigation, toward technocratic adaptation, management, acceptance, and normalisation of crises as something that requires adaptation. Resilience talk is, in the end, a form of post-politics that has evacuated the 'political' in favour of technical, economic, and managerial reason with profound implications for local and global political economies. Indeed, Mark Neocleous argues that resilience has colonised 'the political imagination': 'resilience is by definition *against resistance*. Resilience wants acquiescence, not resistance. Not a passive acquiescence, for sure, in fact quite the opposite. But it does demand that we use our actions to accommodate ourselves to capital and the state, and the secure future of both, rather than to resist them.'[85]

[82] R. Anholt and G. Sinatti, 'Under the Guise of Resilience: The EU Approach to Migration and Forced Displacement in Jordan and Lebanon,' (2020) 41 (2) *Contemporary Security Policy* 311–335.

[83] S. Sharma, 'Reactive, Individualistic and Disciplinary: The Urban Resilience Project in Dhaka,' 12 (6) (2021) *New Political Economy* 1078–1091, 1081.

[84] Ibid., 1082.

[85] M. Neocleous, 'Resisting Resilience' (2013) 178 *Radical Philosophy* 2–7, 7. Many question the emancipatory potential of international law, while 'resistance' is an increasingly contested concept in international law. Both concepts are beyond the scope of this paper. For the contested status of resistance see B. Rajagopal, 'International Law and the Challenges of Theorizing Resistance,' 41 (2) (2003) *Columbia Journal of Transnational Law*

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How might we destabilise and dislodge resilience talk in global governance laws and institutions? The first step is to problematise the relationship between law and resilience thinking. Problematisation involves recognising that '[l]egal structures, principles, and processes, as well as core concepts of the rule of law, impinge on the capacity of societies to manage ecosystems, withstand environmental degradation as well as economic shocks'.[86] The next steps involve ascertaining *how* law affects these systems and identifying its positive or negative effects.

I believe that scholars of international law and organisation have a particular role to play in problematising the resilience paradigm of governance, as what Antonio Gramsci would call the 'organic intellectuals' of global governance. International lawyers, as legal experts, give shape to the norms and practices that articulate and, indeed, constitute the 'common-sense' foundations of global governance. Located at the intersection of national and transnational capitalist systems, they function to represent their disciplinary consensus as 'normal', transmitting it through society, consensually, as 'common sense'. But as David Kennedy has noted, in doing so they believe that they 'advise, they interpret, but they do not rule' and they 'sustain their self-image [as neutral experts] by locating the "political" elsewhere'.[87] As experts they are engaged in technical management, not governance. However, as Kennedy argues 'we need to relativise our idea of "international governance" more radically', because there is 'very little' in political life that is not better understood 'as the work of experts and the product of expertise'.[88]

We might begin by contesting the work of legal experts of resilience talk by first recognising that 'common sense' is precisely that: common opinion as framed by legal expert opinion makers. It is not 'good sense'

399–434 and A. Orford (ed.) *International Law and Its Others* (Cambridge: Cambridge University Press, 2006). For analysis of resistance against law, resistance through law, and resistance that redefines law, see A. C. Cutler, 'Reclaiming Sovereignty: Resistance to Transnational Authority and the Investor-State Regime' in P. Zumbansen (ed.) *The Oxford Handbook of Transnational Law* (Oxford: Oxford University Press, 2021), pp. 810–820.

[86] J. Ebbesson and E. Hey, 'Introduction: Where Is Law in Socio-Ecological Resilience?' (2013) 18 (3) *Ecology and Society* 25.

[87] D. Kennedy, 'Challenging Expert Rule: The Politics of Global Governance,' (2005) 27 (1) *Sydney Law Review* 5–28, 15.

[88] Ibid.

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as Gramsci conceived of it in terms of understandings accompanying transformative political praxis. Governance through good sense contemplates self-reflexivity as well as conscious recognition of and moral and ethical engagement with contesting social forces. It begins, as Kennedy notes, with asking 'who wins and who loses' in resilience policies and programmes.[89] This directs attention to the political economy of resilience, the 'who gets what' in resilience politics, and the class, gender, and intersectional power relations embedded in the legal norms and structures. It also involves delving into the 'politics of consciousness' by examining the underlying 'shared assumptions', 'blind spots and biases' of resilience experts.[90] Contestation involves going beyond problem-solving theory in approaching crises, like those of climate change and climate refugee/migrants, to engage in critical theory by focusing on the purposes and interests served by resilience talk. Crucially, this involves a recognition that the politics of resilience does not lie elsewhere. The challenge is not about discovering cracks or openings in resilience talk, but recognising as critical theory reveals, that the cracks and openings are always already there, because dominant understandings require continuous articulation in order to remain dominant and there is always opening for contestation in this process.

Hegemony is a process and one that requires continuous reinforcement, justification, and legitimation. International lawyers must acknowledge their crucial role in the construction of hegemony and not acquiesce in assumptions that are taken for granted as the legal common sense of the day. The challenge is to critically examine the assumptions upon which law operates; to interrogate the relationships between law, capitalism, and humanity. They/we cannot, and, indeed, must not, seek shelter behind distinctions between law and politics, public and private, here and there. The investigation must interrogate the political, economic, and social consequences of the dominant legal forms of our time.

[89] Ibid. [90] Ibid., 22.

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