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INTERNATIONAL LAW AND THE FAR RIGHT: REFLECTIONS ON LAW AND CYNICISM

INTERNATIONAL LAW AND THE FAR RIGHT: REFLECTIONS ON LAW AND CYNICISM

by

Martti Koskenniemi

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The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. The Annual Lecture builds on his vision and mission, it invites distinguished international scholars to take inspiration from Asser's idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

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FOREWORD

> We have two choices. We can be pessimistic, give up, and help ensure that the worst will happen. Or we can be optimistic, grasp the opportunities that surely exist, and maybe make the world a better place. Not much of a choice.
>
> Noam Chomsky, *Optimism over Despair* (2017), 196

For the Annual T.M.C. Asser Lecture, we always look for speakers who are more than expert international lawyers. We look for public intellectuals who dare to address the questions of our times. We aim for an afternoon of reflection and discussion on important global issues, and on how these challenge international law. We do so from a profound commitment to issues of social justice and out of the conviction that we need to *bring critical thinking to power*, to the International City of Justice and Peace. In 2018, the best speaker to guide us in a critical reflection on the backlash against internationalism and its institutions was Martti Koskenniemi.

A ROCK STAR OF INTERNATIONAL LAW

Martti Koskenniemi is Professor of International Law at the University of Helsinki and Hauser Global Professor of Law at New York University School of Law. Perhaps it is more accurate to say that over the past thirty years, Professor Koskenniemi has redefined the discipline of international law. In class, I simply introduce Martti as 'a true rock star of international law'. We discuss how reading Martti's work is often a life-changing experience. His books are intellectually rich and powerful, highly instructive and profoundly engaging.

In 1989, Professor Koskenniemi caused a shockwave within the international legal discipline with his book *From Apology to Utopia: The Structure of International Legal Argument*.[1] I remember how in the

[1] Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, Helsinki 1989.

mid-1990s – I was at Leiden University at the time – this shockwave still rippled through Dutch academic circles and through the high grounds of international legal institutions of The Hague. The way Martti critically deconstructed international law and legal argumentation gave some a sense of liberation. In others it caused a deep resentment.

From Apology to Utopia, or FATU, as the book is often called, is an intellectual *tour de force*, bringing *structuralism* to international law. Structural analysis looks for the 'deep structure' that is generally hidden yet has a stake in the production of the visible social phenomena around us. By bringing this type of analysis to international law, Martti challenged how mainstream academics were thinking and writing about international law. But *From Apology to Utopia* is not a work of international legal *theory*. Koskenniemi is theorising to understand international law *practice* – a practice he experienced first-hand as a Finnish diplomat and legal advisor.

THE RESPONSIBILITY OF THE INTERNATIONAL LAWYER

With his work, Martti Koskenniemi challenged the academic discipline of international law to be honest about international law. We had to stop living the fairy tale that more international law will automatically bring us more justice and less war. Martti's work showed that law is indeterminate. It is language, it is interpretation. And as such, it is strategy and tactics. *There is politics in law*. And from that, I would like to add, it follows that international lawyers have a responsibility.

Therefore his project is not merely descriptive. It is also normative in its implications. For if law does not produce substantive positions or outcomes, but rather *justifies* them, then, when we analyse a legal argument in a judgment or when a rule is proposed, the questions should be: *who wins, who loses*? These are political questions. They open up a space for critical, emancipatory thinking. A thinking that fits well with the intuitions of many students and international lawyers alike. It still strikes a chord for me.

BEYOND CYNICISM

Koskenniemi's work ascribes to international law a place in this world *beyond mere technical use by experts and bureaucracies*. This is a place which he also seeks to understand through history. In *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*,[2] Koskenniemi studied the 'Men of 1873'. Tobias Asser, after whom this lecture series was named, was one of those jurists in the late 19th century who laid the groundwork for the international legal and political architecture against which much of the present backlash is directed.

Although Martti Koskenniemi and I share a great interest in the intellectual history of international law, for the Annual T.M.C. Asser lecture, I urged him to speak his mind about international law *in our time*, ambiguous as our time presently is. For how to understand and address Brexit, the Trump administration and the growing Alt-Right movement? How to cope with anti-globalist populism? How to understand and respond to the present *backlash* against internationalism and globalisation? How can international law be relevant amidst these global developments? And, to add a self-critical note, did the critical approach to international law itself not contribute to this backlash, and to the loss of confidence in international law and global governance?

So here we are: the fourth Annual T.M.C. Asser Lecture, given by a true rock star of International Law, entitled '*International Law and the Far Right: Reflections on Law and Cynicism*'.

In this lecture, Koskenniemi examines the current cynicism. He asks if, and how it can be productive, perhaps as a 'scepticism' that will facilitate the 'progressive change' of international law and institutions, rather than a purely destructive force as the 'political cynicism' cur-

[2] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002; Hersch Lauterpacht Memorial Lectures, Series Number 14).

rently manifest in the 'reactionary activism' of the far right.[3] Koskenniemi's examination of the present backlash reads as a short history of international law over the past twenty years. Two decades in which his research uncovered processes of *fragmentation, deformalisation* and the formation of *global elites* in international law.[4] For years Koskenniemi has been critical of what he calls the *managerial turn,* with which international law has become something technocratic. In a world of experts and expertise, the latter's 'structural bias' provides 'closure' – that is, substantive outcome – when the law was indeterminate or open-ended.[5] In the past, his critique came with a call for re-politicization. Arguably, with the current political discussions on the EU and Brexit, on TTIP and on the international law of foreign investment, a re-politicized international *legal* discourse *est arrivé près de chez nous*. But reactionary politics was, of course not, what Koskenniemi was aiming for.

Koskenniemi addresses this tension in his text. More than in the spoken version of the lecture – which dealt more with the *why* we are facing the present backlash – in the second part of the written lecture, he also works towards answering questions of *how* to respond to the backlash.

The backlash, Koskenniemi argues, 'expresses a *status anxiety* and takes the form of a *cultural war* against the values and priorities associated with the "international" or the "global" that became dominant in the 1990s.'[6] People have lost any belief in international law and global governance, they feel 'defeated'. They are the losers, while the (cosmopolitan) elites benefit from the project of liberal internationalism. 'Legitimate grievance [against technical and economic globalisation and the architecture and operation of its legal and political institutions] is captured by cynical reason', Koskenniemi argues.[7] In other words,

[3] Hereinafter p 2.

[4] See e.g. M. Koskenniemi, 'The Politics of International Law – 20 Years Later', *European Journal of International Law*, 20(1) 2009, pp 7–19.

[5] M. Koskenniemi, 'Imagining the Rule of Law: Rereading the Grotian "Tradition"', *European Journal of International Law*, 30(1) 2019, pp 17–52.

[6] Hereinafter p 5.

[7] Hereinafter p 6.

these grievances have to be addressed, lest the far right further exploits them and continues its rise to power. How to safeguard *critique* in order to 'contribut[e] to emancipation'[8]?

Koskenniemi's analysis of the backlash is Foucauldian in nature. He explains how it is both a 'problem of knowledge' and a 'problem of politics'.[9] The backlash as a revolt against the elites is a revolt against the 'systems of knowledge' and truth production, which are presented as neutral and objective, yet reinforce elite power rather than that they serve the people and society at large. Expert knowledge of, for instance, trade, investment, and human rights appears as a handmaiden of elite power – a means to prioritise elite values, culture, and interests. The rise of expert knowledge has come with the rise of liberal internationalist policies and thus for the backlashers allegedly with a denial of their values and priorities. They feel misrepresented and deceived, both politically and culturally, and revolt against 'law and legalism' as an elite system of knowledge.

FACING THE CRISIS OF TRUST WITH AN ATTITUDE OF TRUTHFULNESS

Koskenniemi argues that an adequate response will have to start with an honest critique of today's global governance institutions, of the ideologies that shore up these institutions, and of the injustices they produce. This requires us to scrutinize the systems of knowledge that produce these institutional decisions and (distributive) outcomes. And – most importantly – it requires a change in the way experts and expert knowledge are understood: a move from *truth* to *truthfulness* that allows for uncertainty and doubt, for questioning assumptions and foundational ideas. Only then can the (often valid) crisis of trust[10] in domestic and international legal and political institutions and experts be addressed. Only then can the 'complexity' of issues be recognised, can values and facts be disentangled, and can an ensuing fruitful debate on alternative domestic and global policies exist. The

[8] Hereinafter p 36.
[9] Hereinafter p 17.
[10] Hereinafter, e.g. pp 9–10 and p 32.

'politics of knowledge' needs to be moved from the darkness into the light, because only then can we discuss the questions '*who wins, who loses?*' and hold power to account.

I read Koskenniemi's analysis as a call for honesty, modesty, sincerity and vulnerability on the part of the international lawyer (as expert) in academia, as well as in national and international bureaucracies. As such, it is an antidote to the cynicism of the backlashers.

I wish you an inspiring read of Koskenniemi's thought-provoking lecture.

Janne E. Nijman
Member of the Board and Academic Director of the T.M.C. Asser Instituut, The Hague

INTERNATIONAL LAW AND THE FAR RIGHT: REFLECTIONS ON LAW AND CYNICISM

Martti Koskenniemi

> Cynicism is enlightened false consciousness. It is that modernized, unhappy consciousness, on which enlightenment has laboured both successfully and in vain.
>
> Peter Sloterdijk, *Critique of Cynical Reason* (1988)

PROLOGUE

Peter Sloterdijk's famous analysis of cynicism reminds us of one of the traps that lie on the road to enlightenment, namely the situation where we find ourselves with all of its critical tools and none of its promised liberation. We have arisen from what Kant called our "self-incurred immaturity" resulting from blind belief in authority – and yet the world where this ought to have led us to treat each other always "as an end, and never merely as a means", remains as distant as when we began.[1] Instead of bringing "freedom", the ability to critique anything and everything has been turned into the expressionist employment of the most radical anti-enlightenment tropes and alignments so as to hit back at those whose theories brought us nothing but misery. The ideals of universal solidarity, equal value and vulnerability, born with the imperative of critique, proved excessively ambitious. Failing to reach them, we did not fall back to where we started, but to a different place. Disenchantment could not be undone. When faith was gone, it could not be recreated by wishing we still had it. But even as faithless, we could always turn the tools of critique against those who

[1] The definition of enlightenment as escape from "self-incurred immaturity" is of course from Immanuel Kant, 'An Answer to the Question: "What is Enlightenment?"', in *Political Writings* (H Reiss ed. 1991), 54 and the maxim "*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, and never merely as a means*", is from Immanuel Kant, *Groundwork of the Metaphysics of Morals* (M Gregor ed. 1998), 38 [4:429].

still suggested we believe them. What we had learned, after all, was that their "knowledge" was just their power. They were the source of our misery and now remain its symbol. The last thing we shall do with the tools of criticism, then, is to demolish their power. Thereafter, it will be *our* turn to express *our* power, and once we have done this, *we shall have no need of their hypocrisy*.

This is a classical, powerful image of one type of critique of reason and enlightenment. Although Sloterdijk used it to analyse the cultural and political worlds of the 1930s and 1970s, its themes resonate with the present "backlash" against the rationalism and universalism that is often linked with internationalism and globalization as well as with the institutions of liberal-democratic polities – courts, bureaucracies, the media, political parties and processes, perhaps the idea of "liberal democracy" itself. Rationalism, universalism and the rest of the ideology that opposes enlightenment to "myth" have been with us for a long time. But so have concerns of the "dialectic of the enlightenment", the fear of the totalising, instrumentalist and de-humanising implications of enlightenment itself turned into myth and returned to us as an economic and disciplinary techno-nightmare. Some of the best social thought of the 20th and early 21st centuries has focused on the failures of the enlightenment that were not brought about by its detractors but by its internal dynamics, the way its *critical* impulse was set aside by the pursuit of its economic, scientific and technical ambitions.

In the following my interest is less in attacking or defending the philosophical or the historical enlightenment than in making a contrast between a political *cynicism* that Sloterdijk identified as an important 20th century legacy and that I find visible in today's reactionary activism, and a *scepticism* that uses the critique of enlightenment rationalism for progressive change. There is much reason to be critical of many aspects of technical and economic globalization, including its human rights ideology, the architecture and operation of its legal and political institutions and its "low-level democracy".[2] The far right surge

[2] For that latter theme, see Susan Marks, *The Riddle of All Constitutions. International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2003).

rejects those institutions as part of an elite conspiracy against the "people" whose authentic interests it pretends to advance, often by seeking to empower an authoritarian leader. An adequate response to that project will have to start from a (sceptical) critique of the way global institutions have failed to deal with the injustices of the world in the past decades. And it has to struggle against the cynicism of the far right by encouraging critical engagement with the systems of knowledge and politics that inform the work and the distributive choices of those institutions.

BACKLASH AND INTERNATIONAL LAW

Like most professionals, international lawyers have worried over the present "backlash" in Europe, the United States and occasionally elsewhere against internationalism, "globalism" and international institutions. But I do not think international law has been seriously challenged. Neither Donald Trump, the Brexiteers, the Orbán or the Kaczińsky government, the Modi, Duterte or Bolsonaro regime have had an axe to grind with basic principles – sovereignty, non-intervention, treaty-making, immunity, sending ambassadors to foreign countries.[3] Of course there are the occasional attacks on the European Court of Human Rights and the Trump regime continues its policy of obstructing or leaving various international institutions. But human rights have always been controversial and obstructionist US behaviour is nothing new (think of the League of Nations, the Law of the Sea, UNESCO, the International Criminal Court...). Treaty-making in special fields such as environmental law has slowed down, and until recently only Chinese diplomats referred to Article 2(7) of the UN Charter and the reservation of "matters of domestic jurisdiction". Now that claim is heard more often. But it is a *legal* claim. Making it is not to target international law but a certain understanding of it.

The target is liberal internationalism, of course – global governance institutions and the ideologies upholding them. While I do not think

[3] Others have said the same – e.g. James Crawford speaks of the "necessary international law" that has stood rather unchallenged. 'The Current Political Discourse Concerning International law', 81 *The Modern Law Review* (2018) 1–22.

that "classical international law" with its emphasis on sovereignty and formal treaty-making are threatened, the project of international law and its ideological *ambiance,* especially in the form it received in the 1990s, certainly are. We know the 1990s as the period of optimism following the fall of the Berlin Wall, the demise of real socialism and the emergence of a sense that suddenly history and progress were once again on their way. Many people believed that this meant that the world was becoming increasingly more "liberal" – a reference to a set of political and cultural values that had become increasingly prominent in the secular West since the 1960s. In the 1990s, many things had suddenly become possible that had been blocked by the political antagonism of the Cold War – setting up global free trade regimes and a system for adjudicating political leaders for crimes against their own populations, intensification of the work of human rights treaty bodies and the rise of the idea to subordinate the most varied aspects of late modern life to "global governance". The number of UN Security Council resolutions skyrocketed and people were saying that the body was "finally" working as it should. A blockage had disappeared that had obstructed history's natural, "cosmopolitan" flow. Remember the UN World Conferences? Rio 1992, Vienna 1993, Cairo 1994, Copenhagen 1995, Beijing equally in 1995, Istanbul 1996.[4] The environment, human rights, women, social development, housing… All this hurly-burly underpinned by a new vocabulary of globalization, even "constitutionalization" of something many referred to as a "New World Order".[5] The surface may have appeared economic or technical, but the insiders' ambition was greater; a new way to think about the world beyond domestic politics was breaking out. In an emblematic work, published during the last moments of the decade, Tom Franck from NYU drew attention to the "*emerging triumph of individualism*" that was laying the "*foundations of universal constitutional democracy*".[6]

[4] For a good overview of these events, see J.A. Lindgren Alves, 'The UN Social Agenda against "Postmodern" Unreason', 28 *Thesaurus Acroasiarum: Might and Right in International Relations* (Sakkoulas 1999), 51–108.

[5] E.g. Deborah Cass, *The Constitutionalization of the World Trade Organization* (Oxford University Press 2005); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2005).

[6] Thomas M. Franck, *The Empowered Self: Law and Society in an Age of Individualism* (Oxford University Press 1999), 281, 285

But little seems left of that ambition twenty years later. Suddenly there is nationalism, even racism, attacks on foreigners, migrants and women, international "elites", judges and academics almost everywhere. Domestic leaders touting nationalism and tradition across the world target the homilies of the 1990s. The attacks are not directed against international law in its basic, statist version, nor are they evidence of any clear or coherent program of legal reform either. I do not think the backlashers know or care that much about international law. One of the features of the backlash is its *opportunism*. It picks up any theme that might be capable of energizing the right-wing constituency, never mind how relevant *you* might think it is. The website of FOX News is full of acrimonious attacks on Obamacare and George Soros side by side with stories about crocodiles eating babies and UFOs having landed in Northern Arizona. Of course, no international theme is immune to opportunist attacks – this might be about a WHO women's reproductive health program or the latest decision on the hate speech in a human rights court, a new multilateral trade treaty or a climate change measure.[7] It all depends on what things are in the air. Do not expect a reasoned reform project from the backlashers. To produce such would be to capitulate, to concede to the legitimacy of the institution to be reformed. A real backlasher does not concede to anything, least of all to speaking the language of unelected international bureaucrats.

My claim is that what I will call the backlash is not about this or that institution or policy. It expresses a *status anxiety* and takes the form of a *cultural war* against the values and priorities associated with the "international" or the "global" that became dominant in the 1990s. It receives its force from the failure of globalisation to live up to its promises, the intuition that behind all that rhetoric something else was happening, some people were winning while others were losing, and while some injustices were addressed, others were being created. The energy created by this perception is not accompanied by reforms proposals, however, but is being expended in the kind of cynical manoeuvrings laid out above. Therefore, it cannot be dealt with by sug-

[7] For some examples, see Harold Koh, 'The Trump Administration and International Law', 56 *Washburn Law Journal* (2017), 413–469.

gesting that international institutions should do their job better. Suggesting more reform will just confirm the impression of elite autism: "*There has been no end to reform in the past 30 years – and we always find ourselves defeated*." I say defeated and not "left behind" to highlight the sense of an enduring conflict in society where the winners have consolidated their victory by the institutions they rule. These institutions present themselves as representatives of reason and enlightenment. They speak the languages of science and technology, ostensibly employed at the service of universalism and human rights – of treating everyone "as an end and not as a means". Every grievance is already being dealt with by those institutions. Social agendas, corporate responsibility, empowerment and sustainability projects proliferate. There is not a problem for which some group of global experts would not already be busily seeking remedies. Of course resources are scarce, of course priorities must be made and reforms take time, of course the world is a really complex place so you cannot expect results overnight… And yet, some people, perhaps many people but still just a small percentage, have much to gain from the system as it is.

The impression is that of a lack of alternatives, the endless ability of ruling institutions to absorb grievances without doing much about them. [8] This impression has been captured by far-right reactionaries who have turned it into a call for revenge and reversal. Legitimate grievance is captured by cynical reason. The point is not to govern better – after all, none of the available blueprints and projects produced by the "best" think-tanks and research institutions is invulnerable to critiques routinely vented by competing think-tanks and institutions. They are all part of the same conspiracy. None of them can be trusted. There is thus no point in offering anything institutional or technical. Instead, the call is to something apparently much simpler, something already tried and tested, namely to return to an imagined moment before globalization, neoliberalism, human rights, feminism, environmentalism, the moment when fast cars, steel and space travel framed the universe of the imagination.

[8] For a characteristically insightful depiction of this experience, see David Kennedy, 'Law, Expertise and Global Political Economy. The 2018 Montesquieu Lecture', 23 *Tilburg Law Review* (2018), 109–120.

I will proceed as follows. I begin with a rapid sketch of the transformation that took place in the world of international law from the 1960s to the 1990s. "Globalization" based authority on its skilful employment of systems of knowledge that knew no boundaries, that were managed by world-wide institutions, and that created social hierarchies expressed in the mastery of expert-languages. This was accompanied by the emergence of a universal politics of human rights that was deeply intolerant of older values and hierarchies, especially those of white male privilege. Both knowledge and politics became "enlightened". I will then distinguish between the legitimate economic grievances of the 1990s and the consequent emergence of far right attitudes that instead of focusing on the patterns of economic distribution have directed popular *ressentiment* against the cultural transformations accompanying them. The more the political debate focused on culture and identity, the less critical power it had on global inequality and the structures sustaining it. The far right arose on the strength of a cynicism that will do nothing to redress existing injustice. The breadth of its appeal underlines the urgent need for alternatives. I will suggest that international lawyers ought to re-examine their commitment to present global institutions. Like all institutions, they operate under ideas and assumptions that are contestable and revisable but that tend to be taken as natural and obvious by the people who work in them. Law offers a powerful vocabulary to consolidate those ideas and assumptions – but also to challenge them and the way they are understood and implemented. To fight cynicism, injustice needs to be addressed better than has been done with existing institutions and conventional assumptions. This, I will suggest, requires rethinking the power and role of expert knowledge in global institutions and the ways in which political contestation operates within them.

THE PROBLEM WITH THE 1990S

First – what is international law? In a book of almost 20 years ago, I traced its emergence to the Victorian liberalism of the late-19th century, the effort by a handful of international-minded bourgeois *avocats* to spread liberal legislation in Europe and to civilize the colo-

nies.[9] The Great War and the League of Nations limited this ambition to functional cooperation and peaceful settlement; international law was institutionalized in foreign ministries as an effort to square domestic sovereignty with a pragmatic international legal order. During the Cold War, the profession needed to keep its ideological ambitions in check while it sought to consolidate European political boundaries, support economic collaboration and coordinate decolonization. The constructive ambitions received direction in Europe with the Schuman Plan, and all that came after.

But the 1960s was a time of greater ambition. My generation grew up with the fizz and sputter of Radio Luxembourg. Capitalism changed gear; there was *soixante-huit*, Vietnam and Woodstock. The truths of earlier generations – their patriotism, their legalism and their Cold War spirit – became old hat. Wolfgang Friedmann's 1964 book *The Changing Structure of International Law* provides a wonderfully perceptive account of that moment in international law. Sketching what he called a move from a law of *co-existence* to a law of *cooperation* he used the vocabulary of interdependence and expansion to stress the fundamentally *international* nature of that moment: technological progress, environment, trade, development: "…beside the level of interstate relations of a diplomatic character there develops a new and constantly expanding area of co-operative international relations." This would begin from the regional level – much attention was given to the European Communities. But the EC was a "movement" that was to be seen as "a possible precursor of a future integration of mankind".[10]

Forget about the Cold War, think about "the silent spring", the imperative of development, the boundlessness of technology, the spread of a culture of individualism… "[T]he national state, and its symbol, national sovereignty, are becoming increasingly inadequate to meet

[9] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001).

[10] Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia University Press 1964), 19.

the needs of our time", Friedmann wrote.[11] The 1960s was tough on traditional values, national, religious, agrarian, bourgeois. It appreciated plurality and individualism. And human rights:

> … the necessity to protect the individual as such internationally, even against his own state, has become an accepted postulate of international lawyers, and the recurrent subject of international debate.[12]

"Even against his own state" – it was not surprising that a refugee from Germany to Australia and finally the US would make this point. Now flash forward to the 1990s. The end of the Cold War, the rise of the EU, intensification of international cooperation in trade, development, environment technology, resource management, even democracy, all such developments outlined and celebrated in another work by Tom Franck, *Fairness in International Law and Institutions,* based on his lectures at the Hague Academy in 1994.[13] The theme of "fairness" was in many ways representative, as Franck himself observed in another work, of the concerns of that decade.[14] With the increasing complexity of global regulations, hard-and-fast rules (what Franck called "idiot rules") would have to be set aside. Situations were too varied; the automatic application of bright-line rules would too often result in injustice. [15] "Creative indeterminacy" was needed in the law to leave law-appliers room to apply it "fairly". There would be less predictability. But if only we could trust the law-applier that would not be too great a cost.[16]

But could one really trust those anonymous, distant and alien appliers of international law, the operators of "global governance"? Was it a mere coincidence that the expansion of such governance paralleled

[11] Friedmann, *The Changing Structure*, 365–6.

[12] Friedmann, *The Changing Structure*, 376.

[13] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998).

[14] Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990).

[15] I have discussed this in many places at greater length. See e.g. Martti Koskenniemi, 'The Fate of International Law. Between Technique and Politics', 70 *The Modern Law Review* (2007), 1–32.

[16] Franck, *The Power of Legitimacy,* 53, 50–66.

the spectacular growth of inequality at home and abroad? Already long ago, theorists of democracy expressed their worry about this lack of trust in democratic institutions, politics and politicians. A "republican" commitment to the public good seemed to be visible nowhere, everyone appeared to be thinking of their own interests. The endless talk about the "democracy deficit" of the European Union or the "legitimacy" of the WTO hardly convinced domestic constituencies. Reputation for "fairness" needed to be achieved, it could not be presupposed.

In the 1990s much decision-making power on matters affecting domestic constituencies in the West was transferred to international bodies. International lawyers were thrilled to see the emergence of the WTO, the ICC, sustainable development, responsibility to protect. They were busily travelling to where the "international" was being polished and reconstructed as the "global". But the audiences at home were often unimpressed. What they saw was austerity, the disappearance of contestation and a new technocracy wedded to what the historian Timothy Snyder has called the "politics of inevitability", a lack of alternatives to chosen policy.[17] Now the "backlash" views that as a betrayal. All the talk about governance of an interdependent world was a camouflage erected by unelected bureaucrats to perpetuate their privileges. The immediate target is the 1990s but deep down the enemy are the transformations of the 1960s that opened the West to the world outside and reversed the hierarchies of white male privilege. "Taking back control" addressed the status loss directly. It is about restoring a system of control familiar from a previous generation, control by white men over their women, their families, and societies, a time when *cosmopolitan elitists, feminists, Jewish philanthropists, gay journalists and African refugees did not tell us how to think or what to do.*

[17] Timothy Snyder, *The Road to Unfreedom. Russia, Europe, America* (Penguin Random House 2018).

A PROBLEM OF KNOWLEDGE

What irritates the backlashers no end is that global power does not at all present itself as values or preferences – as conventional politics – but as knowledge. International experts rule because they are experts, because they *know* that climate change is true, that increasing prison sentences have no effect on criminality, and that the greatest to suffer from Brexit are its supporters. *Check the facts!* That exchange is patronizing, and hierarchical in form; there is no conversation, only surrender is available. On the one side, truth, on the other ignorance. And yet, as the experts themselves know very well, opinion and choice exist at both ends. Positivism died long ago, replaced by the more complex tools of structuralism and hermeneutics, all the fuzzy science that tells us that "facts" always appear in regimes of knowledge which, though true on their own terms, are no longer solid when we compare such regimes with each other, or look deep inside their constituent elements. If there is anything international lawyers have learned from the debate on "fragmentation" it is this: what one may want to say on a given problem depends on which type of knowledge one uses to look at it.[18] And as soon as one has found the relevant knowledge, one will find that it is divided into an orthodox and a heterodox view. The backlashers have noticed this, and their leaders use it to show that what passes as "fact" is no different from opinion, that the resulting humiliations and deprivations are born with the bad faith of the experts, their cynical use of their opinions as fighting words to consolidate their authority. "Austerity" is a choice, not a necessity.

Global law is about the governance of complexity. Environment, trade, investment, development, security. Each regime is about knowledge, yes, but also about value: each has a powerful ethos or a project, a policy to advance. To be a trade lawyer is also to think of trade law and its objectives – free trade – as good. To have been educated in

[18] 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission' (UN Doc A/CN/4/L.702 18 July 2006). See further Anne-Charlotte Martineau, *Le débat sur la fragmentation du droit international. Une analyse critique* (Bruylant 2015).

environmental law is also to have internalised the importance of the goals that environmental law seeks to advance. But both often deal with the same issue. Which to choose: trade or environment? Security or privacy? Global governance is a clash of knowledges, a clash of competences, rival descriptions of the world and of the blueprints those descriptions help produce and sustain.[19] A natural resource may be described as an object of exploitation or protection; a domestic policy decision both as "development" and "protectionism". Global politics has become a politics of knowledge: once you know which regime will deal with a problem, you already have a good idea of how it will be dealt with. Is the crisis in Central Africa a human rights problem or an economic development problem? The answer depends on whom you ask, the High Commissioner of Human Rights or the World Bank. And is post-conflict governance in Kosovo a matter of security, of adequate housing and employment or of educating girls? Peace-keeping professionals, social development experts and human rights activists will each provide a different answer, each with equal conviction. Truth is not one but many. And they are in struggle.[20]

The backlashers have noticed this. The trade expert wants more trade, and the environmental scientist more protection, the interior ministry wants more surveillance, the justice ministry less. It is all so predictable. Imagine a discussion between a police officer, a human rights lawyer, a teacher and an architect on social policy. The police officer will want to eradicate insecurity in the streets, the human rights lawyer points to poverty in the community. The teacher would prefer expanding the education of the girls while the architect has in mind a housing project. Each has a complex technical vocabulary to defend their view. And each believes that the available resources would be best used if directed to *their* field, if their project became a project for that society itself. The unavoidable impression to the outsider is that

[19] The debate about fragmentation has of course repeatedly highlight this. I have discussed the matter in more detail in 'Hegemonic Regimes', in Margaret Young (ed.) *Regime Interaction in International Law. Facing Fragmentation* (Cambridge University Press 2011), 305–324. See also Kerstin Blome et al, *Contested Regime Collisions. Norm Fragmentation in World Society* (Cambridge University Press 2016).

[20] As extensively analyzed in David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

the *certainty* each side claims for its knowledge is only a sham. What the experts are *actually* doing, is trying to monopolise available resources and prestige. No doubt experts may often be brought into consultation with one another, to debate their varying objectives in meetings in Geneva, New York or any other such global centre.[21] But the backlashers know that however the debate will go, they will have no say in it. They have none of those languages. Instead they have one recollection, namely that "*whatever the expertise – we will always lose in the end; whatever the policy, it is bound to treat us as an ignorant underclass*".

Well, you might think, should not the government make those choices? But modern government is just a local version of an international negotiation. The environment minister represents an environmental knowledge that is utterly global; the trade ministry is a kind of local bureau of the WTO or the Bretton Woods system – and the justice minister will remind everyone of the protections the human rights treaty system offers to women, children, refugees, the disabled and so on. Domestic departments operate on the basis of systems of knowledge that have nothing "domestic" about them. No wonder. Their personnel were once Erasmus students and are now constantly travelling to Brussels, Washington, Beijing…. All governance today is global governance. No surprise the backlashers feel alienated: they do not sit at those meetings; even if they did, they would not know what to say.

But not only have expert languages colonised everything and it seems impossible to choose between them, they are also utterly split within themselves. I used to take part in the public debates concerning the Treaty on Transatlantic Trade and Investment (TTIP) and its follow-up, the EU-Canada (CETA) initiative. The question often arose whether private-public arbitration in those treaties might enhance investment – whether it made economic sense for a state to accept the possibility of being sued by an investor in an international arbitration process.

[21] For the "operational" and "regulatory interactions" between such expert groups, see Jeffrey L. Dunoff, 'How to Avoid Regime Collisions', in Blome et al. *Contested Regime Collisions* (Cambridge University Press 2016), 58–70.

There were always two economists. One of them claimed that the presence of such clauses invariably attracted investors – while the other retorted that they made no difference whatsoever.[22] Once they had made their points they then began to attack the respective "models" they had used to come to their opposite conclusions. The feeling of disbelief and frustration in the audience was tangible – "*must we really take a stand on the relative merits of economic models in order to decide whether to support investment agreements or not?*"

Of course they would not. And of course, models do not work like that. As the Harvard economist Dani Rodrik reminds us, "The correct answer to almost any question is: It depends. Different models, each equally respectable, provide different answers."[23] From this the backlashers have drawn the conclusion that there really is no difference between expert "knowledge" and opinion, truth and bias. You could always find an economist, a lawyer, an engineer, to defend whatever needs defending. What the expert says is just cynically dressed as knowledge so as to lift it outside political contestation *so as to exclude me*!

The media loves experts. It gives us 35 seconds to give our view on the state of the economy or the environment, or the relations between great powers or the ways to resolve the Syrian crisis. And we yield against our better judgment. As good experts we *know* the complexity and uncertain status of what we know. But we cannot show that uncertainty in public, even as privately we talk about it all the time. It is as if there were two kinds of expert knowledge, *expert knowledge at day and expert knowledge at night*. Imagine an interdisciplinary conference. During the day, performances full of self-confidence: here is what I know, the latest datum from my research institution. Impressive, powerful, even exotic. But then at night, after the conference dinner, two glasses of burgundy and a private conversation: "*Oh my*

[22] For an intelligent discussion of the conflicting evidence, see Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press 2017), esp. 155–179.

[23] Dani Rodrik, *Economics Rules: Why Economics Works, When It Fails, and How To Tell the Difference* (Oxford University Press 2015), 17.

field is in crisis, you cannot imagine how divided we are about the fundamentals, especially the fundamentals. While we agree on what lies on the surface we really have no idea where it came from, and how to understand it." Daytime confidence – uncertainty at night.

The backlashers have noticed this. They have seen experts speak from apparently boundless knowledge, years of study and training – and constantly contradict each other, or being shown to have been mistaken or biased. But there has been no accountability. So the backlashers have concluded that these are just people in bad faith, speaking down to us in esoteric languages. Privilege disguised as knowledge. But experts know that it is hard, almost impossible to *express uncertainty* in public. Try it and you will notice the journalist's despair. And you will never be interviewed again. Displaying complexity is possible in a culture of *trust.* In such a culture, people feel that it is better to be governed by people who know something, even if they do not know it all. But where there is no such trust, uncertainty looks like betrayal and expertise appears as self-promotion. According to a study by Pew Research in the United States from July 2017, 58% of Republicans and Republican-leaning independents say colleges and universities have a *negative effect* on the way things are going in the country.[24]

It is important to realise that the backlashers are right that globalization meant the rise of expert power that is coy about its political priorities. In the 1950s, Karl Polanyi observed that the internationalization of economic decisions had "separate[d] the people from power over their own economic life" and that this had been an important contributor to the rise of Fascism in Europe.[25] History never repeats itself as such. But as the philosopher Didier Eribon has shown more recently, the distance between Paris and Reims has become a breeding ground for resentment and right-wing reaction. For the values of Paris – of the city – today have received automatic priority over

[24] <http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation/>. See also Tom Nichols, 'How America Lost Faith in Expertise', 96 *Foreign Affairs*; issue 2, 60–73.

[25] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd edn. (foreword by J Stiglitz) (Beacon Press 2001), 234.

those of the provincial town, left to decay economically, socially and culturally. Eribon remembers how his father, together with his father's trade union friends, everyone active as communists, used to struggle for improved labour conditions in the factory, expressing solidarity with Turkish guest workers. Now the factory is gone, and so is the solidarity. Everyone now votes for Marine Le Pen.[26] As Katherine Cramer has found out in her study of popular attitudes in rural Wisconsin, the feeling is that the "people of the city", inhabiting the Capital and having jobs with the government, have utterly lost touch with the greatest part of the country. The well-educated people of the city with their fancy jobs now look down on everyone else, and show no respect. The inhabitants of rural Wisconsin (and the suggestion is: of many other places) look around and remember (rightly or not) that maybe 20, maybe 40 years ago, these towns and those fields looked prosperous and were well-looked after. But now the factories have closed, farming hardly pays off and the young have moved away. No resources are directed from the capital to the towns any longer, those politicians hardly visit these places, apart from the single trip they make just before the elections.[27]

This situation has now been captured by far right cynics. "*Make America Great Again*" appeals to that experience and that resentment. This is not absolute deprivation, of course – the people in Wisconsin are not "poor" by any global standard. But the decline is real and prompts the memory of a better past, a time of confidence in one's status, and the status of one's values. And when the decline is then explained as unavoidable owing to the "facts" of globalization, while the "facts" are less than solid and the real cause of the situation is the choices that other people have made on the basis of those "facts", rejection seems not at all that incomprehensible. Instead of knowledge, "fake news". Law shares this problem. It pretends to be about knowledge – knowledge on how to create or maintain a just society, or, more

[26] Didier Eribon, *Returning to Reims* (MIT Press 2013).

[27] See Katherine Cramer, *The Politics of Resentment. Rural Consciousness in Wisconsin and the Rise of Scott Walker* (University of Chicago Press 2016) and the update after the Trump election as a public lecture at <https://www.youtube.com/watch?v=My3_lb8x-gM>.

modestly, about what technical rules there are and how they should be interpreted. But it is not at all clear how "true" our conclusions are, what distance they have from opinions about the matters they discuss. The effort to think of law as a "science", even as culturally embedded in the German (and Finnish) language, sounds quaint in the Anglophone world.[28] Legal propositions are like the economists' models – their correctness "depends" on a number of assumptions not directly addressed in them. Sam Moyn has recently suggested that there is no longer any larger vision from which the ways of doing law or types of legal knowledge can be evaluated: "We live among the ruins of prior inconclusive confrontation and fragmentation."[29] Well-known approaches to law from the past, formalistic and realistic, critical and mainstream, geared towards economics or anthropology, have been available for many years now, each with its well-known strengths and weaknesses, none specifically prepared to respond to problems of *this moment*, least of all to the pervasive cynicism that exists outside towards those very fields.

A PROBLEM WITH POLITICS

But it is not only a problem of knowledge, it is equally a problem of politics.

Friedmann was still careful, in 1964, presuming that human rights could not yet advance far globally, and instead just took satisfied note of a number of regional developments. Shift again to the 1990s and human rights had become "the last Utopia". With the fall of real socialism, rights had entered the hard core of politics, directing and limiting the discretion of public authorities, courts, legislators, holders of executive power (but significantly not private enterprises), at home and abroad. Again, the right place to begin to understand this is the 1960s and the massive rise of individualism in the West. *It is*

[28] See further my 'Is Legal Science Possible?', in Gralf-Peter Calliess and Lorenz Kähler, *Theorien im Recht – Theorien über das Recht* (ARSP Beiheft 155, Stuttgart, Nomos 2018), 31–43.

[29] Samuel Moyn, 'Legal Theory among the Ruins' , in Justin Desautels-Stein and Christopher Tomlins, *Searching for Contemporary Legal Thought* (Cambridge University Press 2017), 101.

my life! Who are you to tell me how I should live! Society had no legitimate claim to enforce "morals", only to prevent concrete, demonstrable harm.[30] This claim was famously written into Ronald Dworkin's theory of rights as "trumps" in 1977, as normative claims overriding utilitarian calculations, social policies and moral principles.[31]

Looking around in the 1990s, Tom Franck wrote that "*each individual is entitled to choose an identity reflecting personal preference … in composing that identity, each may select more than one allegiance*".[32] Characteristically optimistic. It is not hard to derive such free-floating individualism from the cultural transformations of the 1960s, the collapse of religious, patriarchal and nationalist values and the rise of what would later be called "identity politics". In a more sociological and realist mode, rights arose everywhere in the West from the effort to counter the discretion that, as Tom Franck explained in the works referred to above, had been transferred to authorities by the deformalization of modern law. Open-ended standards of fairness were everywhere, telling the law-appliers to take account of purposes and principles and apply them equitably by balancing all relevant considerations. That this is no different from inviting them to go by their own cultural and political preferences and that this was OK as long as they broadly reflected those of the relevant community. But if they did not… In any case, many people grasped at the opportunity to "trump" whatever policies were being pursued by domestic authorities. The result was the fantastic "rise and rise" of human rights into a kind of super-value, higher than political principles or programs, limiting what such principles and programs could be.[33]

This turned rights into extremely valuable assets, and explains the intensity with which different groups ran after them. What could be greater than having a preference that no countervailing preference could undermine? As more and more preferences were translated into

[30] On the famous Hart-Devlin debate in the 1960s, see Patrick Devlin, *The Enforcement of Morals* (Oxford University Press 1965) and HLA Hart, *Law, Liberty, and Morality* (Stanford University Press 1963).

[31] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[32] Franck, *The Empowered Self*, 39.

[33] Kirsten Sellars, *The Rise and Rise of Human Rights* (Sutton Press 2002).

the rights of their holders, activists began to worry. If everything was a right, nothing was. How to separate "genuine" from "fake" rights? There was no litmus test. Or perhaps better, there once had been such a test – namely the theory of natural rights – but that could hardly be proclaimed under modern conditions. How could one "prove" that a preference was actually validated (or invalidated) by "nature"? And so the sphere of politics was colonised by rights-talk. For some this was innocuous, or genuinely helpful. But one could see where this was going. Did racists or misogynists have the right of free speech? Was there a right to bear arms in public places? What about the religious fundamentalist's preference to educate their children at home? Did affirmative action violate the rights of white men? The right to "security" is undoubtedly an important human right – did this then mean that increasing policing resources and the presence of CCTV cameras in public localities should be seen as important human rights measures?

Now no good human rights lawyer would ever think this. They would immediately retort that such policies are not part of "genuine" human rights. And again, the "backlashers" are outraged – "*So you say that everyone's rights are of equal concern – but in your practice, you always override priorities that WE think of as important! Hypocrites!*". In the absence of clear criteria to distinguish "real" from "fake" rights, the human rights camp seems to be merely trying to impose its values on the world. *Why would their political priorities somehow automatically override ours!* Think about economic, social and cultural rights (ESC rights), brought into the canon as a Cold War manoeuvre to finish up the implementation of the Universal Declaration of Human Rights (1948/1966). This seemed especially important in order to show that human rights have a heart, and to avoid the accusation that it was blind to larger social problems. Rights also had to do with distributing resources in a just way. If they only had a "programmatic" character (as it was usual to assume), did they not operate as a kind of party program designed to bind the hands of legislators and finance ministries outside electoral policies? Was human rights in truth a social-democratic policy of the welfare state, cleverly disguising itself as a "non-political" project of realising pre-existing "rights"? For example,

Philip Alston's recent work as UN Special Rapporteur on the relation of privatization to extreme poverty is an excellent example of sophisticated human rights policy.[34] But it is also economic policy and the question is whether it has *any* distance to sophisticated *socialist* attention to capitalism's dark side. And if there is no difference – well, then what about the claims about "universal and inalienable" or about the view of rights as a non-political *limit* to politics? For those not already committed, human rights could only appear as a *leftist policy in unpolitical disguise*.

Of course, nobody denies that extreme poverty ought to be eradicated. Many who think this are surely economic liberals who believe that the best way to accomplish this is by de-regulation. Trade unions, they believe, have distorted the labour market, undermining incentives for companies to hire workers, thus contributing to massive unemployment. In an astonishing feat of historical forgetting, the human rights camp has failed to remember that the most important rights struggles from the Magna Charta to the American and French revolutions and beyond have been about the recognition of rights to own property. If John Locke is part of the international human rights canon – as Hersch Lauterpacht for example firmly believed – then very strong property protection is part of the canon too.[35] Surely it is not insignificant that Lauterpacht and his collaborator Sir Hartley Shawcross played key roles in the *Anglo-Iranian Oil Company* case that had to do with the protection of the property rights of the company's British owners. Investment protection can easily be (and has been) argued in human rights terms: the investor has the *right* to repatriate the profits gathered from the uses of the property. If present investment lawyers avoid arguing this, it is not because they would not believe in investors' property rights but owing to their (correct) assessment that the human rights establishment would not view the matter in such a way.

[34] Extreme Poverty and Human Rights, UN Doc A/73/396 (26 September 2018).

[35] Hersch Lauterpacht, *International Law and Human Rights* (London Praeger 1950).

Nor is it irrelevant that some of the 20th century's most visible advocates of a liberal economy – Hayek, Röpke, Friedman – were quite comfortable with speaking in rights terms. Opposing Fascism and Communism, the neoliberals wanted to liberate the creative energies of individuals from oppressive economic planning – this then kicked off the development of international trade law.[36] When human rights advocates today speak of "corporate social responsibility" they are over again challenged by business executives arguing that companies contribute best to welfare rights by filling the expectations of their customers and the pockets of their owners. Nor is this necessarily cynical. It may seem so to human rights activists but only to the extent that they have inherited a *different* economic doctrine – namely a social-democratic or a Keynesian one – that they believe compels public intervention. The rights activist may feel that the corporate executive is not "taking rights seriously" – but the latter will see the rights advocate as a closet communist.

Human rights are a politics that emerged in the secular West between the late 1960s and the 1980s. Many things converged then: the break-up of homogenous national cultures and the loosening of social and religious norms, the increased attraction of a commercially incentivised non-conformism. Questions of identity became important – much more important than national greatness or growth of the domestic GNP. The interest in rights often coincided with calls for cosmopolitan democracy and global justice. As the phenomenon reached the 1990s it converged with a twofold critique of old style politics. One aimed to set limits to public authorities' powers; in fact it often seemed that constraining the state was the very point of rights. A related consequence was that political objectives came to be defined in abstract and universal terms with little connection to domestic histories or practices. Both developments were underlain by the supposition that conventional policies were hampered by party politicking and state "interests". New types of "civil society" engagement were needed.

[36] See the valuable Quinn Slobodian, *Globalists. The End of Empire and the Birth of Neoliberalism (*Harvard University Press 2018). The same points have also been in Samuel Moyn, *Not Enough. Human Rights in an Unequal World* (Harvard University Press 2018).

Among the institutions undermined were political parties and the political process. Changes propagated by the human rights camp appeared wholly beyond the capacity of the old institutions. Universality and inalienability connoted a level of ambition they had given up long ago. A particularly important moment was when the social democrats, panicking over declining electoral support, co-opted rights as part of the "Third Way". Tony Blair, Bill Clinton and Gerhard Schröder rose to power by supporting the rights of women, minorities and disadvantaged groups as well as internationalist agendas of humanitarian intervention and the environment. The door was opened for groups and themes previously suppressed. But the neoliberal cooptation of the Third Way fatally undermined its credibility, eventually bringing social democracy down and now threatening to take human rights with it. By the time the financial crisis of 2008 had set in, rights had become infected by their association with a centrist elite that spoke of free trade and privatization while presiding over unending austerity and a massive growth of domestic and international inequality. The left had lost its bearings and left in its wake an increasingly cynical electorate looking for revenge in iconoclastic attacks on political correctness and a reactionary attachment to nationalist nostalgia.

The 1990s transformed human rights from a language of revolution to routine governance. That language combined the cultural aspirations of the 1960s with a debilitating blindness about how its alliance with global trade and finance was seen and felt outside the magic circle of its staunchest adherents. Increasingly large parts of Western electorates were beginning to feel that they had been allocated life in an underclass struggling for "bullshit jobs" while a global elite spoke of human rights and thrived. Many people suddenly found that they were represented by nobody any longer – until right-wing manipulators found their way to the stage by breaching the rules of political correctness and directing their scorn at "human rights" as a wholly hypocritical effort to move elite values outside of political debate. The new politicians were reactionaries, a species not seen in Western democracies in decades: everything created since the 1960s had to go.

THE BACKLASH

Much of the liberal and left academy dresses its professed sympathy to the backlashers in terms of a social pathology, to be healed by social and economic reform. According to this analysis, what needs to be done is to support equality and to pick up those "left behind". Reference is often made – I, too, have made it – to the "Elephant Curve" in Branko Milanović's *Global Inequality* showing that in the period 1988–2008 the economic position of the white lower-middle class in Europe and the US has stagnated while the middle classes in the non-Western world have won, sometimes considerably, as have the richest of the rich, the one per cent of the one per cent.[37] This has been taken to suggest that the right-wing surge expresses an economic grievance that needs to be addressed by policies that better target those constituencies.

Although this interpretation is correct, it offers no means to respond. The historical causes of the backlash lie in the massive increase of global and domestic inequality over the past thirty years, coupled with the failure of the political process to give meaningful expression to the resulting grievances. The symptoms of that predicament differ across the world.[38] In the Global South, the collapse of the 1970s efforts to establish a new international economic order terminated one type of contestation against neo-colonialism and the neoliberal project. The result has been the integration of the developing world into the process of globalization, with massive poverty and political stasis. In 2018, 3,4 billion people – almost half of the world – lived on less than $5.50 a day. The significance of this fact is underlined by the simultaneous presence of extreme wealth, both far from but also side by side with such poverty. The backlash against such situations takes both right-wing (India, Brazil, the Philippines) as well as left-wing (Venezuela, Bolivia) forms, as befits the specific political history

[37] See Branko Milanović, *Global Inequality. A New Approach in the Age of Globalization* (Harvard University Press 2016).

[38] One of the more useful messages in Jan-Werner Müller's many analyses of right-wing "populism" is highlighting the different forms it takes in different locations, reflecting domestic histories.

of each country. The *historical* analysis that identifies the grievances as economic and their causes as global coexists with the diversity of the political and cultural forms that the backlash locally takes. This highlights the relative independence of the political and cultural forms that give expression to the economic facts.

In the developed North, too, the cultural and political attacks on globalization – including the right-wing nationalist surge – operate according to their own specific logics. Measured by almost any global standard the "nationalists" in Hungary or Poland, or the Trump supporters in middle America, are reasonably well-off – though of course they find themselves at the suffering end of the Milanović curve. Nevertheless, they are not moved by the annual data produced by Oxfam or Credit Lyonnais pointing to the ever-widening gap between the richest of the rich and everyone else.[39] No concern has been expressed by the backlashers about money laundering or tax havens. On the contrary, a European backlasher may even admire a billionaire who has been able to trick the system so spectacularly. Instead, that person will find it scandalous how social welfare benefits are directed to all kinds of alien groups, "illegal immigrants", mock-refugees and lazy foreigners. In reward for the honest labour of the white man the elites are planning to turn everywhere into a global Mogadishu.

Here lies the cynicism in Europe and the US – the replacement of the theme of economic inequality by a concern over cultural identity and *loss of status*.[40] This has been fertile ground for demagogues to sow. Until recently, almost everyone in Europe and the US could look at the Third World and think, "*Well, at least we are not like that.*" White privilege justified the confidence that notwithstanding the ups and downs of the economy, one's relatively higher status would remain unchanged as would that of one's children. No longer. At the same time, the very aspirations and values to which this confidence was related – the values of white male privilege – have been endlessly

[39] For 2019, see <https://www.oxfam.org/en/pressroom/pressreleases/2018-01-22/richest-1-percent-bagged-82-percent-wealth-created-last-year>.

[40] See further Malcolm Bull, 'Am I Right to be Angry?', *London Review of Books* (2 August 2018), 23–24.

ridiculed by the global elites and their human rights client groups. These cultural facts have fuelled the backlash. In the absence of a mechanism to channel injustice into credible economic and social reforms of international institutions, domestic political systems have turned into platforms for cultural battle about national identity and rights, about gender, abortion and immigration, about majorities and minorities and the history and meaning of the "nation". This transformation is captured in Eribon's *Returning to Reims* – as neither trade unions nor socialist parties are able to channel the resentment to social and economic change, such channelling is taken over by reactionaries tapping into the nostalgia for the (mythical) past where things were supposedly domestic and infinitely "better", when homogeneous solidarity, the sense of "being all in this together", still flourished to compensate the devastations. The slogan of *taking back control* appealed precisely to that nostalgia.

In other words, the attack on "global elites", refugees, non-governmental and human rights institutions is not about economic deprivation. It carries no program for institutional or policy-reform.[41] It has instead been directed against the massive cultural transformation that began in the 1960s: civil rights, women's rights, gay rights, minority rights, the environment, the third world… *café latte*… It is about the fact that Western political leaders no longer "respect" the old values but treat them with contempt. The backlashers do not care for reform – there is no real program, no policy engagement with international institutions (apart from "exit"). All that would seem too "social-democratic", and everyone remembers social democracy's fatal corruption by its neoliberal alliance. Instead of an attack on the economics and technology that upholds global inequality, the backlash is a reactionary cultural-political movement that hopes to create a world before civil rights, before environmentalism, multiculturalism, secularism, gender equality, the time before patriarchy began to seem like a dirty

[41] This is nowhere more visible than in the success of the "Brexit party" in Britain whose electoral victory in the 2019 European Parliament elections and the subsequent appeal of its promise to "change British politics for good" has been independent of the absence of any political program (August 2019). For the promise to "develop" a program "on the big issues facing the UK", see <https://www.thebrexitparty.org/about>.

word.[42] It is only after that reaction has been completed, after new leaders have been chosen that the people's voice will be heard again. It is only then, that the work can begin…

Reactionaries are not interested in institutional niceties – look at the Trump regime's obstructions in the WTO, the unilateral withdrawal from the Iran agreement, the INF Treaty and the Paris climate regime. For the reactionaries, even to debate with an adversary whose legitimacy has been denied would be to capitulate.[43] People who have the expert knowledge it takes to debate reform of the EU, the WTO or the climate regime have no regard for white privilege. Whatever adjustments might be made would simply consolidate the authority of *these* institutions, and *those* people. "Exit" is the only message, everything else is secondary, superficial. What the reactionaries want first is revenge against a political elite that has used the grandiloquent rhetoric about human rights so as to distribute material and spiritual values to its friends – aliens, minorities and "unaccountable international bureaucrats". This is pure negativity – from Brexit to the Paris Climate Agreement or the UN Human Rights Council.[44] There is nothing in terms of future intent or commitment. Instead there is a play on the drama of "leaving", admired by an audience who never felt they were inside anyway. And they make the Leninist calculation that the main

[42] The secret with the electoral victory of Donald Trump in the US in 2016, Carol Gilligan and David Richards write, was based on his promise "to undo shame and restore honor to those, mainly white men and their white wives, who felt that they had lost their dignity by losing what they had considered to be their rightful position in the racist and patriarchal scheme of things." Carol Gilligan and David J. Richards, *Darkness Now Visible. Patriarchy's Resurgence and Feminist Resistance* (Cambridge University Press 2018), 37. The point Gilligan and Richards are making, and with which I agree, is that patriarchy is not just an aspect of Trump's success. It is its principal lever and the very basis on which the Trump administration reacts to its environment.

[43] For the US, refusal to take part in the efforts to fill the WTO Appellate Body is discussed e.g. in Gregory Shaffer, Manfred Elsig and Sergio Puig, 'The World Trade Organization's Dispute Settlement Body. Its Extensive but Fragile Authority', in Karen J. Alter et al, *International Court Authority* (Oxford University Press 2018), 329–330.

[44] See also William David, 'Leave, and Leave again', *London Review of Books* (7 February 2019), 9–10.

thing is to crush what exists in the present; the future cannot be any worse.

Here we meet the cynicism of the backlash in its specifically "Sloterdijkian" incarnation. Kantian universalism – the *Plan for Perpetual Peace*, laid out in 1795 and endlessly celebrated by the globalists during its 200th anniversary – was a declaration of optimism at the end of a century of enlightenment. The experience of the revolution, of a people taking their future in their own hands, "would not be forgotten", Kant wrote.[45] At the heart of the universal morality that would emerge with the critique would be law and legalism, including above all the idea of the constitution that would become the representative of the "idea of universal history with a cosmopolitan purpose", in the image of Kant's 1784 essay with that name. By contrast, cynicism joins the "realism" that rejects the utopias of a law-governed world. For it, human beings are endlessly self-interested, violent and envious. Against Kant, the cynics raise the omnipresent dangers of *deception* and *conspiracy* threatening "the people" from all sides. It is no wonder at all that out of all the institutions of the modern state, the far-right cynics carry an intimate attachment to the police and the security apparatus. They see everywhere dark forces ready to undermine the nation, to crush its traditional values, break up its families, destroy its communities. The battle is for survival. There are "too many people" already – we have to harden ourselves to the images of the bodies floating in the Mediterranean, on the Rio Grande… The "islamisation of Europe" has commenced, illegal aliens are everywhere and the "population replacement" is under way.[46] The elites have already agreed to throw open the borders so as to let all the dark masses in. The "mainstream media", the enemy of the people, wants us to look elsewhere while the catastrophe is imminent and the "American Carnage" is on the way. Law and legalism lead nowhere, they are part of the elite machinery of deception – only a powerful Leader can help us resist.

[45] Immanuel Kant, 'The Contest of the Faculties', in Kant, *Political Writings* (H Reiss ed. Cambridge University Press 1991), 182.

[46] See e.g. <https://www.defendevropa.com/news/population-replacement/>.

The backlashers have intuitively felt the entanglement of facts and values, knowledge and politics. Although modern expertise presents itself as hard and self-contained, its encounter with the world is full of ifs and buts: "It all depends." That is true in international law, too. Even as sovereignty was supposed to be declining in the 1990s, this was never the whole truth. Vulnerable communities have always been clear that without something like it – without autonomy – one remains at the mercy of those more powerful. Whatever the benefits of globalization, they often seemed (rightly or wrongly) less important than the loss of the ability to decide on the conditions of life at home. International lawyers may have had an intuitive preference for the "international" as if that expression would stand for something clear and fixed. But in their more reflective moments they have been for both internationalism *and* sovereignty at the same time without quite being able to explain how the two could be combined.[47] Because neither is clear or fixed, establishing their relationship in a *general way* is not possible. Priority between such abstract categories can be made only once we know which solutions they stand for – free trade or protection, for example, the right of this or that group? These are matters on which there is disagreement. International law has not *already* resolved that disagreement so that it would suffice to "apply the law". Should I choose this principle or that? Go by the rule or by the exception? Rather than a repertory of ready-made solutions, international law is better seen as a resource for arguing all the many contradictory things that we believe are true or right. Sometimes we opt for the local, sometimes for the international. Sometimes we

[47] One of the 20th century's most ardent opponents of sovereignty was Hersch Lauterpacht whose main work, *The Function of International Law in the International Community* (1933) was an elaborate manifesto against sovereignty. And yet, in 1948 he found himself in New York, assisting the Jewish Agency and participating in the drafting of the Declaration of Independence of Israel. He was both an internationalist and a Zionist, an ardent defender of international institutions but well aware of the need a people might sometimes have of the shield of sovereignty. See James Loeffler, 'The "Natural Right of the Jewish People": Zionism, International Law, and the Paradoxes of Hersch Zvi Lauterpacht', in James Loeffler and Moria Paz, *The Law of Strangers. Jewish Lawyers and International Law in the Twentieth Century* (Cambridge University Press, forthcoming 2019).

choose this principle, sometimes that. We bring these choices before authoritative audiences as "interpretations of the law", leaving it to those audiences to decide, definitely for that situation, but always temporarily in the larger frame, what ought to be done, who will win.

The fact that we disagree even on what the "authoritative audiences" are, highlights the role of power within international law. Is it the domestic or the international audience? Is it an audience of economic or human rights experts, soldiers or lawyers? That such choices are not pre-determined by some higher-level laws on which everyone would agree warrants some scepticism about international law. An authority decides – but the matter might also have been decided another way. For the cynics, such choices come about through corrupt manipulations by those in hegemonic positions in the respective institutions. The far-right language of "corruption" and "deception" is premised upon the existence of a "correct authority" or the "right solution" that would be unmediated by the uncertainties and internal divisions within the relevant expert vocabularies. The myth of unmediated knowledge (that is to say, knowledge untainted by the priorities within the respective systems of expertise and authority) is part of what makes the far right what it is. This kind of jargon of authenticity (of the "nation", or the "people") once led to anti-Semitism.[48] Although anti-Semitism is still a fertile source of inspiration for those who parade the myth of the "purity" or genuineness of this or that concoction of people or idea, that myth is no less jargon than its bureaucratic nemesis. What makes it *cynical* is the way it refrains from turning its hyper-critical eye towards itself: all authority is dubious, everywhere there is a conspiracy, but not among us!

The backlashers are right that expertise *is* political in the sense that it is not about truths carved in stone. It is about bias, uncertainty and conflict, and always revisable. Or as critical lawyers have endlessly argued – for every rule (and not only a rule of "law", but of any formal system of expertise) there is always an exception and the choice of

[48] The reference here is of course to Theodor Adorno, *The Jargon of Authenticity* (Northwestern University Press 1973). Still today, anti-Semitism remains a powerful part of the far-right cynical disposition.

whether to apply one or the other remains open. This warrants scepticism, of course, but it also undermines the kind of cynicism that lets itself be captured by the myth of the unmediated, spontaneous truth that will be revealed once elite deceptions have been abolished. The fact that cynicism annihilates both knowledge *and* politics is the reason why it ends up, as Jan-Werner Müller has shown, as mafia regimes where the intermediate world of courts and bureaucracies, universities and the media are turned into servants for the truths of the regime[49] – while in fact inculcating a double consciousness familiar from the Soviet world where the presence of public belief and private non-belief made meaningful critical exchange impossible between the rulers and the ruled.

Perhaps the most important contribution of legal scepticism for present debates is to highlight the role of power in social institutions. Past practices crystallise as future expectations through struggle between alternative standpoints. Those standpoints then inform the endless process of legal interpretation and application. Law creates hierarchies and distributes values, but also renders such outcomes open to evaluation and critique from alternative standpoints. To think about the law in this way is to go some way to meet the politics of knowledge, to underline the temporary and tentative nature of what it is we believe we know and avoid creating the expectation of final authority that has so enraged the backlashers. This also entails a relativization of the boundary between knowledge and politics. Like many others who came to professional life in the 1970s, I used to argue in favour of the "politicization" of this or that aspect of social life. Technological reason, we believed, had "colonised the life-world". But I now think there was something wrong in that gesture. There is no *authentic* field of politics, untainted by what we think we know, how we have been educated to think about questions affecting, say, the distribution of social values. Every "political" opinion is buffered by some expert knowledge, some system of separating between what is more and what is less credible. It is impossible to produce "development", say, without consulting development experts, and being simultaneously exposed

[49] Jan-Werner Müller, 'Populism and the People', 41/10 *London Review of Books* (23 May 2019), 35–7.

to the many preconceptions and biases that "development expertise" entails.

The inseparability of knowledge and politics throws light on two versions of *cynicism* that have emerged in the debates with the backlashers. One operates on the side of the "system" that insists on the "truth" of present forms of knowledge – and does this *against its better judgment*. Here the problem lies in the lack of scepticism warranted by the very assumptions that justify its reliance on the systems of mediation that produce its knowledge and politics. Another has to do with the reactionary politicians for whom the *pursuit of truthfulness* itself can be set aside in the search for power and respect by the reliance on the mythical idea of unmediated truths.

A large recent literature suggests that the confrontation with the backlash is about *truth* against *lying*. The retort often takes a moralistic tone. Lying is wrong, it undermines public institutions. [50] *Check the facts!* I doubt the power of this retort. If the best experts understand the relativity of their knowledge (the clash of truth regimes, the internal splitting of regimes into orthodoxies and heterodoxies), then insisting on its obvious verity displays a cynical denial of what they know – namely that all of us move in a grey zone of interpretations, value judgment and choice. Everyone is situated in a continuum of being "more or less" knowledgeable or ignorant, constantly operating in a situation of relative certainty. If the cynicism of the "system" lies in its insufficient scepticism, the cynicism of the far right lies in its having drawn from scepticism the conclusion that everything is corrupted, that knowledge and politics are types of deception carried out by the "unaccountable elites" (of the academy) and the dark forces of the "deep state". The cynicism of the far-right lies with its move from a critique of the ways mediation takes place in the present to the position that no mediation at all is needed – that the "truth" is one and will be obvious to all once the obfuscations of the elites have been

[50] Out of the very extensive literature, see e.g. Michiko Kakutani, *The Death of Truth* (Penguin Random House 2018); Jennifer Kavanagh and Michael Rich, *Truth Decay. An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (Rand Corporation 2018).

removed. This makes political adversaries appear illegitimate because in bad faith and supports their methodological by-passing or indeed their criminalization: *Lock Her Up*!

On both sides, there is a tendency to assess the situation in terms of the black and white of "truth" and "lies". But it may be better to think of these encounters as people acting in more or less *truthful* ways. It is no news that the backlash is connected to the absence of trust and confidence between groups in the West that have, since the 1960s, become increasingly alien to and suspicious of each other, an experience intensified by the cocooning effect of digital media and the targeting practices of the global economy. In such conditions, efforts at sincerity and accuracy – elements of truthfulness – may not be highly appreciated.[51] They involve risk – the risk of not hitting the mark, the risk of appearing naïve. The risk is accentuated if there is neither a common project nor shared norms – apart from the norm instructing everyone to stick to their rights. The perverse concern of the far right for the "freedom of speech" is one instance of this. Indeed, why is it that racist or anti-Semitic speech should be prohibited? Aren't racists quite justified in their righteous sense of being unjustly discriminated against? Such questions highlight the social and communicative aspects of the situation. It is not everywhere that one can say "*I may not know everything, but I will try my best.*" To be able to say this requires some kind of solidarity, some sort of acknowledgment of a common project or shared norms that would, for example, allow understanding the idiocy of a notion such as "Nazi freedom of speech". Only as long as there is some intuitive agreement of the latter, a culture where the former can be said is possible. Both raise the issue of vulnerability as a kind of litmus test: from attacking knowledge for the reason that it is fragile it is only a step to attacking the human individual because of that very same reason.

[51] See further, Bernard Williams, *Truth and Truthfulness. An Essay in Genealogy* (Princeton University Press 2002).

CONCLUSION

I want to finish by reflecting on our "situation" in a historical light. In a massive, recently completed history of democracy, the French historian Marcel Gauchet identified the world of the 1990s – "neoliberalism" – as fatally self-contradicting. It arose from the long history of departure in the West from tradition, both religious and secular. In the 20th century, attachment to the nation gradually gave way to the pursuit of individual self-realization and autonomy, both enshrined in a culture of rights but also more widely in the kind of legalism that underlay the world of the 1990s. In this process, the nation came to be understood as the sphere of the "rule of law", arbitrator between the autonomous pursuit of their rights and interests by individuals.[52] The public realm was flooded by experts to guide us in how to realize such individual life-projects. In such a market conception of society, government became the aggregation of individual preferences. This occasioned a "crisis of representation". In the absence of a shared project and commitment to norms, representative mechanisms became alien and insignificant, hardly more than a playground for professional politicians who were understood, like everyone else, to be only interested in pursuing their interests.[53] The political process failed to channel the experience of the citizens into projects of social transformation. Instead, it became "governance", an elite performance on a par with other features of the popular culture.

Instead of simply producing the conservative lament about the effects of individualism on tradition, Gauchet claims that these phenomena form the surface of a (neoliberal) system that are in stark contradiction with their "proper conditions of existence", an utterly homogeneous set of economic, social and cultural assumptions. The conflict between the explicit surface – the performances with which the electorate are entertained – and this "deep-structure" emerges over again, in economic inequality, social dislocation, the increase of private and public debt, the depletion of natural resources and the devastations in the

[52] Marcel Gauchet, *L'avènement de la démocratie IV. Le nouveau monde* (Éditions Gallimard 2017), 656–7.

[53] Gauchet, *L'avènement de la démocratie*, 655–664.

peripheries. But these are never dealt with as systemic issues. Time and again, small adjustments are made to cope with problems regarded as accidental and born out of extrinsic causes. The migration crisis, for example, has exploded the contradiction between the ideas of individual autonomy and the heavy investment in the nation – national borders, cultural and religious homogeneity – that controls the response. The inability to articulate and reason about those underlying values has emboldened reactionaries to appeal directly to cultural prejudices. The great majority who say they believe in autonomy and rights are silenced by their inability to draw the conclusion that there is no valid justification for preventing anyone from settling down really anywhere they like. For Gauchet, it is unsurprising that no conception of nationhood has entered the public debate that would be reconcilable with individual rights. "Only those political communities that are certain about their consistency are capable of accommodating alterity. Hospitality presupposes confidence in its background reasons and the ways to realise it."[54]

The contradiction between the world in which we live and how we have learned to understand it and our place in it raises the old theme about historical change: to what extent are (legal) systems able to accommodate contradictions and anomalies through reforms and adaptations – and when do they collapse so that a revolution will bring about a new system, new values and hierarchies, new winners and losers?[55] The backlash is a symptom of a systemic problem – a problem, I have argued, that originates in the 1960s but came to a head in the liberal hubris of the 1990s. Adaptations are now being frantically looked for, including in international law. The "Brighton Declaration" that strengthened member state jurisdiction vis-à-vis the European

[54] Gauchet, *L'avènement de la démocratie*, 677.

[55] Distinguishing between routine adaptations of a system to pressures from its environment and "revolutionary" transformations affecting the inner rationality of the system as a whole is an old theme not only in systems theory (Luhmann) and the history of science (Kuhn), the history of ideas (Foucault) or philosophy (Badiou), but also in critical legal thought. I have made use of it in *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005), 548–561. This has been recently updated for an analysis of "legal revolutions" in Hauke Brunkhorst, *Critical Theory of Legal Revolutions. Evolutionary Perspectives* (Bloomsbury 2014).

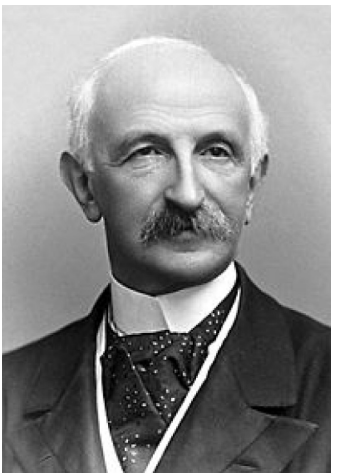
Court of Human Rights is one example, the demise of the TTIP treaty and the replacement of investment arbitration in CETA by an "investment court" another. The State's right to regulate in important fields of domestic policy has been reaffirmed. "Brexit" and the move to plurilateral or regional treaties might engender yet further adaptations. Whether they suffice to counter growing support for authoritarian or proto-fascist leaders preaching a wholesale return to a pre-1960s world remains unclear.

The separateness of what we know and what would be good is an important aspect of the way we have learned to think about the world. Much of the backlash has attacked that distinction: they claim people who insist on it (and make the distinction between truth and lying) are only trying to lift their opinions outside the political debate so as to strengthen their cultural, political and economic hegemony. I have argued that the backlashers are right in this regard: the culture of global expertise cannot be so confident of the "truths" with which it wants to bind others. To respond in a non-cynical way would be to change focus from truth to *truthfulness,* the social attitudes and practices of knowledge-production and dissemination. This is both to insist on the best available scientific – and legal – knowledge but also on its limits and its vulnerability to sceptical criticisms. This injects political contestation – equally invited to truthfulness – within knowledge-production and use. The far right is suspicious of academic work because its results so often conflict with far-right prejudice. But I think an even greater conflict exists between with what the far right stands for and the pursuit of accuracy and sincerity that belongs to knowledge-production and use. To cultivate truthfulness is to work for a society where vulnerability (of knowledge and humans) is taken seriously. This may not be compatible with mere adaptations of present international law and institutions. It will require bringing the inner contradictions of neoliberal society into the open, and thinking creatively about the alternatives. Such thinking will have to take place and involve institutional reforms at both "domestic" and "global" levels. It may also require rethinking 18th century revolutionary myths about the separation of knowledge and political value. This itself is

both a "political" project and an inference of what we "know", namely that the truth of a proposition has to do with the extent to which it contributes to emancipation.

THE ANNUAL T.M.C. ASSER LECTURE ON THE DEVELOPMENT OF INTERNATIONAL LAW

A Mission for Our Time



INTRODUCTION

The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

MISSION

Tobias Asser was a man with a vision. A man who kept his finger on the pulse of his time, and who managed to shape the legal develop-

ments during his days.[1] In his Inaugural Address upon the acceptance of his professorship at the University of Amsterdam in 1862, Asser explained that it was his 'vocation' to reflect on commercial law and its 'import', while 'taking into consideration the condition of society in [his] century'.[2] What we learn from his lecture extends beyond the field of commercial law; it shows Asser's view of the law more generally: 'law serves primarily to cultivate trust'.[3]

For its mission statement, the Annual T.M.C. Asser Lecture builds on the vision and mission of the man who has lent it his name. It invites distinguished international lawyers to take inspiration from Asser's idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today.

Current legal scholarship has uncovered the complications of Asser's mission, and of his internationalist friends and colleagues.[4] It has pointed to the downside of how the international legal order took shape in spite of the good intentions of these late 19th and early 20th century liberal-humanitarian internationalists. Asser himself was well aware of the dangers of utopian idealism[5] on the one hand, and the dangers of a nationalistic conservative attitude towards international law on the other. Every age has different needs and pitfalls and hence, sailing between commitment and cynicism,[6] every age requires a different course.

[1] A Eyffinger, *T.M.C. Asser [1838–1913] Founder of The Hague Tradition* (The Hague: Asser Press, 2011), p. 11.

[2] The Inaugural Address is included in E.M.H. Hirsch Ballin (ed. and intro.), *A Mission for his Time. Tobias Asser's Inaugural Address on Commercial Law and Commerce, Amsterdam 1862* (The Hague: Asser Press, 2012), p. 18.

[3] Ibid., p. 22.

[4] See below 'Tobias Asser in context: One of the 'Men of 1873".

[5] At the Second Hague Peace Conference, Asser himself said 'you know I am not a Utopian', Eyffinger, p. 5, n. 45.

[6] M Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', in *Collection of Essays by Legal Advisors of States, Legal Adviser of International Organizations and Practitioners in the field of International Law* (United Nations, NY, 1999), pp. 495–523; also available online.

Our time, too, is in dire need of reflection. It is marked by the politics of fear, domestically as well as globally. In different ways 'fear operates directly as a constitutive element of international law and the international ordering and decision-making processes.'[7] Taking note of Tobias Asser's legacy in this context, a reorientation of the international order towards an order based on respect and trust urges itself upon us.[8]

Today, with international lawyers perhaps sadder and wiser, it seems more than ever to be an international lawyer's task to examine – as Asser did in his day – how to respond to 'the condition of society'. Mutual trust and respect are crucial to the health of any heterogeneous society, whether it is the international society or one of the rapidly growing cities across the globe. A (research) question which Tobias Asser bequeathed to us is 'how can law serve this aim?'

In spite of well-known complications and dark sides,[9] in this context the Rule of Law and the principles of human rights are paramount. These may provide direction in our considerations about trust and respect in relation to challenges brought by, for example, globalisation, urbanisation, (global) migration, the atomisation of society, climate change, environmental degradation, the complexity of the traditional North-South divide, the dangers of a renewed international arms race, and the dilemmas of new global actors such as the EU.

Against this backdrop, the Annual T.M.C. Asser Lecture aspires to be a platform for a constructive, critical reflection on the role of law in dealing with the challenges and (potentially radical) changes of the global society of the 21st century.

[7] D. Joyce & A. Mills, 'Fear and International Law', *Cambridge Review of International Affairs*, 19:2 (2006), pp. 309–310.

[8] A. Carty, 'New Philosophical Foundations for International Law: From an Order of Fear to One of Respect', *Cambridge Review of International Affairs*, 19:2 (2006), pp. 311–330; also, J.E. Nijman, 'Paul Ricoeur and International Law: Beyond 'The End of the Subject'. Towards a Reconceptualization of International Legal Personality', *Leiden Journal of International Law*, 20 (2007), pp. 25–64.

[9] D. Kennedy, *The Dark Sides of Virtue* (Princeton: PUP 2004); also, M. Koskenniemi, *The Gentle Civilizer*, infra note 21, and *The Politics of International Law* (Oxford: Hart 2011).

BACKGROUND

In Asser's time, the cultivation of trust and respect in international relations was indeed an urgent matter. Asser's professional life spans from the second half of 'the long 19th century'[10] up to the eve of the First World War. It was a time of rising nationalism and mounting 'distrust and despair'[11] in Europe. The 19th century Eurocentric world order was to collapse only a few years after Asser's death.

In Asser's lifetime America had experienced the Civil War (1861–65) and slavery was abolished after a slow struggle. In Europe, the Crimean War (1853–56) and the Franco-Prussian War (1870–71) brought decades of peace in Europe to an end. With these wars the horrors of industrial warfare began and forever changed the destructive scale and intensity of armed conflict. In Asia, Britain and France forced China, by military means, to open up its markets for opium, on the basis of what they argued to be their sovereign right to free trade, even against the imperial government's desperate attempt to protect its dwindling population from opium addiction. A socialisation into international society and law that was to leave its mark on China's approach to international law well into our time.[12] In the latter days of his career, Asser actively supported the International Opium Conference (1912) to end the opium enslavement of the Chinese people.[13]

With the economic policies of the late 19th century the European empires spurred on the process of modern globalisation in the industrial era. Asser had a keen interest in economics and as the head of a (commercial) law practice for most of his life,[14] he is likely to have been especially sensitive to the process. In his view, transnational trade and commerce were crucial for societies to thrive and develop peace-

[10] Eric Hobsbawm's term for the period 1789–1917.

[11] Eyffinger, p. 67.

[12] S. Suzuki, 'China's Perceptions of International Society in the Nineteenth Century: Learning more about Power Politics?', 28 *Asian Perspective* (2004), pp. 115–144.

[13] Eyffinger, p. 79.

[14] Among his clients, though, were the heirs of King Leopold in the Congo heritance.

fully. In that sense, his perspective on free trade and commerce was utilitarian – in the service of 'public welfare'.[15] Hence, his stance was not uncritical; transnational trade and commerce facilitated by law and legal institutions were to serve peace and justice, but not to exploit or violate 'the inalienable rights of a free people'.[16]

The urbanisation of 19th century Europe prefigures that of today; it basically put much of the current global city system in place. Asser was outspoken about his love for the 'distinguished mercantile city' of Amsterdam: '[u]nder any circumstances, wherever my place of domicile, I will forever remain an Amsterdammer!'[17] His love of Amsterdam, however, not only sprung from the city's tradition of international trade and commerce, but also and even more so from its tradition of openness to strangers and providing a refuge for the expelled. Being a Dutch citizen of Jewish descent, the exclusion and violence brought about by anti-Semitism in European (urban) societies must have been a matter of personal concern for someone so eager to participate in the public sphere. Nationalism, a growing sentiment in Europe, was completely alien to Asser. With his urban cosmopolitan mind-set, his thinking was transnational by nature. His vision of international and personal relations did not hinge upon fear and othering, but rather upon respect and trust.

For Asser, the role of law was vital to the emancipation of the Jewish minorities in Europe, as was the case for any minority. He worked with an integral view of the Rule of Law, to be strengthened as much in the domestic as in the international society. Asser's dedication to citizens' rights and the principle of legal equality is visible, for example, in his advocacy of equal voting rights for women.[18]

While Asser's vision of law and legal institutions was all about the ideals of peace, prosperity and justice, he was concrete and prag-

[15] Hirsch Ballin, p. 19.
[16] Ibid., p. 33.
[17] Eyffinger, p. 13.
[18] Hirsch Ballin, p. 13.

matic when aiming to shape developments in private and public international law.

Asser's commitment to international trade and commerce as a means to achieve peace and international solidarity inspired his efforts to deal with 'conflict of laws' and to promote a unification and codification of the rules of private international law. In his view, the demands of international life went beyond economic relations only, and so, being the pragmatic lawyer that he was, Asser presided over the Four Hague Conferences on Private International Law (1893–1904) which managed to produce six conventions ranging from procedural law to family law issues.

While international tensions intensified and an arms race was looming, Asser moved into the realm of public international law – albeit with a good share of realism about state conduct and the pursuit of self-interest. Together with Feodor Martens, Asser stood at the helm of the Hague Peace Conferences (1899 and 1907), which focused on international humanitarian law and the peaceful settlement of disputes. The First Conference resulted in the constitution of a Permanent Court of Arbitration (PCA). Being a prominent arbiter himself, Asser participated in the first case before the PCA. Thanks to Andrew Carnegie, who wanted to ensure a 'wise distribution' of his wealth, the Peace Palace was built and The Hague was thus granted its role of *City of Peace and Justice*.

T.M.C. Asser's mission of peace, liberty and justice defined both his academic and diplomatic work. He intended to listen to 'the voice of the conscience of [his] century' and tirelessly applied his legal genius to develop public and private international law. After decades of neutrality, he would moreover steer the Netherlands back into the diplomatic arena and towards a more prominent international position.

Tobias Asser's legacy is almost too vast for one man. No wonder his role was recognized by the Nobel Prize Committee in 1911. The

Committee portrayed Asser as 'the Hugo Grotius of his day'.[19] Certainly they both aimed to strengthen the Rule of Law in a global society.[20]

In contemporary international legal scholarship, Professor T.M.C. Asser was one of the international lawyers Martti Koskenniemi has famously called the 'Men of 1873': twenty to thirty European men who were actively engaged in the development of international law and who, thanks to among others Asser and his dear friend Rolin, established the *Institut de Droit International* in 1873.[21] They were interested in 'extending the mores of an *esprit d'internationalité* within and beyond Europe. … [they were the] "founders" of the modern international law profession.'[22]

> For the men of 1873, international law was to be social and cultural in a deep sense: not as a mere succession of treaties or wars but as part of the political progress of European societies. They each read individual freedoms and the distinction between the private and the public into constructive parts of their law. If they welcomed the increasing interdependence of civilized nations, this was not only to make a point about the basis of the law's binding force but to see international law as part of the progress of modernity that was leading societies into increasingly rational and humanitarian avenues.[23]

Their liberal project was a project of reform, human rights, freedom of trade, and 'civilization'. In their view, 'jurists should not remain in the scholar's chamber but were to contribute to social progress.'[24] Koskenniemi further cites Asser to explain the *esprit d'internationalité*:

> For Asser, for instance, the tasks of the *jurisconsulte* in the codification of private international law followed "from the necessity to subordinate

[19] See for the Nobel Peace Prize 1911 speech: <http://www.nobelprize.org/nobel_prizes/peace/laureates/1911/press.html>.

[20] See Asser's Address at the Delft Grotius Memorial Ceremony July 4, 1899, p. 41.

[21] Eyffinger; M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP 2002).

[22] Ibid., p. 92.

[23] Koskenniemi, pp. 93–94.

[24] Ibid., p. 57.

interest to justice – in preparation of general rules for the acceptance of governments to be used in their external relations".[25]

BUILDING ON TOBIAS ASSER'S VISION AND MISSION

The institution of this Annual Lecture is inspired by these 'Men of 1873' in general and by Asser's social progressive, 'principled' pragmatism, liberalism, and 'emancipation from legal traditionalism' in particular.[26]

Drawing inspiration from the 'Men of 1873' is however not without complications. Part of their project was the 'civilizing mission', with all its consequences. On the one hand, in the early decades of the 20th century these scholars may have been hopeful about decolonisation and lifting developing countries out of poverty. Asser's own involvement in attempts to end a most 'embarrassing chapter of Western history', the Opium Wars, may also be mentioned. On the other hand, international law as an instrument of civilisation has surely shown its dark sides. Today, more than ever before, we are aware of how internationalism and the Rule of Law have been the handmaidens of (economic, legal) imperialism.[27] Scholars have pointed to the 'double standards' as 'an integral part of the ideology of democracy and the rule of law' so visible in the application of international law even today.[28]

The rich and somewhat complex heritage of internationalism does not leave room for naïve ideas about international law as an instrument only for the good of liberal-humanitarian reform; if '[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology… [and i]f there is no perspective-

[25] Ibid., pp. 57–58.

[26] Hirsch Ballin, pp. 12 and 2.

[27] E.g. A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: CUP, 2005).

[28] A. Carty, 'The terrors of freedom: the sovereignty of states and the freedom to fear', in J. Strawson (Ed.) *Law after Ground Zero* (London: Glasshouse Press, 2002), pp. 44–56.

independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?'[29]

While for some this rhetorical question marks the end-point of possible legal endeavours, the Annual T.M.C. Asser Lecture hopes to be a place for reflecting critically on what lies *beyond* this question. As Koskenniemi points out, '[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before.'[30] And so, since '[i]nternational law's energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded', we ask: What does the *esprit d'internationalité* mean today and what could it mean in and for the future?

Janne E. Nijman
Member of the Board and Academic Director of the T.M.C. Asser Instituut, The Hague

[29] Koskenniemi, p. 513.
[30] Ibid., p. 516.

INTERNATIONAL & EUROPEAN LAW AS A SOURCE OF TRUST IN A HYPER-CONNECTED WORLD

Contours of the Asser Strategic Research Agenda 2016–2020

INTRODUCTION

The T.M.C. Asser Instituut was founded in 1965 as an interuniversity institute for international law in The Hague. Over the past 50 years, the institute has developed into an internationally renowned centre of expertise in the fields of public international law, private international law and European law.

Located in The Hague, the 'International City of Peace and Justice', the Asser Institute is the established location where critical and constructive reflection on international and European legal developments takes place. In the vicinity of the many Hague international (legal) institutions, diplomatic missions, and government ministries, the institute exercises strong convening power and attracts legal scholars from around the world to present and test cutting-edge ideas in their respective fields of expertise.

The Asser Institute has a strong tradition in pursuing independent research. The coming years will see the institute build on this research expertise and further strengthen its academic profile whilst fostering its orientation towards fundamental and independent policy-oriented research.

In doing so, the Asser Institute will continue to fulfil the following roles:

- A facilitator for all Dutch Law Schools that wish to collaborate with Asser in research networks and projects and/or in knowledge disseminating activities.

- A vanguard institute for the University of Amsterdam (UvA) in The Hague (for the UvA Law School in general and the Amsterdam Center for International Law (ACIL) in particular).

MISSION

The T.M.C. Asser Instituut aims to further the development of international and European law in such a way that it serves a cultivation of trust and respect in the global, regional, national and local societies in which the law operates.

CONTOURS OF THE ASSER STRATEGIC RESEARCH AGENDA 2016–2020

Pursuant to the institute's mission, the Asser Strategic Research Agenda (ASRA) 'International & European law as a source of trust in a hyper-connected world' aims to examine how law as one of the social institutions can contribute to the construction and cultivation of trust and trusting relations needed for cooperation in this large and hyper-connected world.

It will guide the further development of the institute's research capacity and it will contribute to further strengthening Asser's intellectual identity and its position at the interface of the world of legal academia and legal practice.

In the ASRA, the Asser Institute's research is structured along three research strands and an architrave. The latter deals with more general conceptual questions about trust, trustworthiness, and trust-building effects of international and European law fostering the overarching, more abstract and loosely defined normative framework. The three strands are separate but mutually interlinked:

- Human Dignity and Human Security in International and European Law
- Advancing Public Interests in International and European Law

- Adequate Dispute Settlement and Adjudication in International and European Law

HUMAN DIGNITY AND HUMAN SECURITY IN INTERNATIONAL AND EUROPEAN LAW

If law cannot provide a sense of human dignity and security, it sells short the cultivation of trust. Upholding the Rule of Law and a generally high level of human rights protection contributes to the development of trust (and, arguably, vice versa). The research strand Human Dignity and Human Security in International and European Law adopts as its normative framework a human rights approach to contemporary global challenges, inter alia in the field of counter-terrorism, international criminal law, international humanitarian law, international trade, environmental protection, European private international law, and the law of EU external relations. It examines what it means to safeguard human dignity – also in relation to human security – in these areas.

ADVANCING PUBLIC INTERESTS IN INTERNATIONAL AND EUROPEAN LAW

Both at the European and international level, the dual impact of globalisation and fragmentation has complicated the use of legislation and regulation in safeguarding public interests. Advancing Public Interests in International and European law aims to critically examine how international and European law may further protection of public interests in different areas, ranging from the governance of sports and media in Europe to natural resources, trade, and environmental protection at the international level. Research within this strand will engage with a large set of questions centred on the potential synergies and trade-offs between different public interests and private interests. Possible normative frameworks for reconciling conflicting values are, for example, the principle of proportionality and variants of the constitutional approach.

ADEQUATE DISPUTE SETTLEMENT AND ADJUDICATION IN INTERNATIONAL AND EUROPEAN LAW

By effectuating the law – and thus upholding the Rule of Law –, courts, tribunals and other dispute settlement mechanisms provide fairness, security, stability and predictability. All of them values conducive to trust. Courts, tribunals and other dispute settlement mechanisms can perform this function adequately only if they, in turn, are perceived as trustworthy in speaking and enforcing the law. The research strand Adequate Dispute Settlement and Adjudication in International and European Law examines the adequacy of dispute settlement and adjudication in various areas, as diverse as foreign investment and transnational civil and commercial disputes, doping and sports more generally, cross-border civil disputes, international crimes, and classic inter-state relations.

LOOKING AHEAD

Over the period of this research agenda, the institute will:

- Conduct high-quality independent research – both fundamental research and policy-oriented research –, in order to contribute to current academic and policy debates within the scope of the aforementioned research strands.
- Increase its research capacity, especially through the promotion and fostering of PhD research in international and European law.
- Deliver research-based, cutting-edge, high-level policy-oriented meetings, (professional) education modules and public events of knowledge dissemination.
- Intensify – in areas where the institute's research expertise can be brought to bear – its cooperation and engagement in European and international academic networks, as well as in the national, European and international arenas of policy formation and legal practice.

More information about the Asser Institute's research & activities can be found on the website: www.asser.nl.

THE ANNUAL T.M.C. ASSER LECTURE SERIES

The Annual T.M.C. Asser Lecture is a platform for a critical, multidisciplinary and constructive reflection on the role of law in the (potentially radically) changing global society of the 21st century, and a high-level event within the context of our research programme '*International & European law as a source of trust in a hyper-connected world*'.

In 2015, Professor Joseph Weiler (President of the European University Institute in Florence, and University Professor at NYU School of Law) delivered the Inaugural Annual T.M.C. Asser Lecture on *'Peace in the Middle East: has International Law failed?'* in which he identified an indeterminacy issue in the legal framework of belligerent occupation that allows for different interpretations. This, according to Weiler, has turned into a political dispute about the facts, for which international law can provide no more than a roadmap.

In 2016, Onora O'Neill, Professor Emeritus of Philosophy at the University of Cambridge and crossbench member of the British House of Lords, spoke about '*Accountable Institutions, Trustworthy Cultures*' and how rules are not enough. The ethics and culture of institutions, international or otherwise, are important for the trustworthiness of these institutions. This is an important argument that still resonates in these days of institutional distrust.[1]

In 2017, Saskia Sassen, Robert S. Lynd Professor of Sociology at Colombia University (NY), discussed the relations between globalisation, economic development and global migration in the lecture entitled '*A Third Emergent Migrant Subject Unrecognized in Law: Refugees from "Development"*'. She asked: 'Is there any role for inter-

[1] O. O'Neill, *Accountable Institutions, Trustworthy Cultures* (The Hague, T.M.C. Asser Press 2017).

national law in the prevention of, and protection against, expulsions caused by the accelerating destruction of land and water bodies?'[2]

For more information on the Annual Lecture Series, registration and programme, please go to: www. asser.nl/annual-lecture, or contact TMCAsserLecture@asser.nl

[2] S. Sassen, *A Third Emergent Migrant Subject Unrecognized in Law: Refugees from 'Development'* (The Hague, T.M.C. Asser Press 2018).

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