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Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword

Janne E. Nijman*

Abstract

Rereading Grotius in 2019 as a sequel to the 1990 and 2009 European Journal of International Law's contributions on 'the politics of international law', at a time of staggering global inequality, Martti Koskenniemi asks what we can learn from Grotius about the 'tendency [of humans] to subordinate themselves' to law and, I may add, the limits of that tendency. While I agree with Koskenniemi that Grotius' 'rule-of-law' conception may help us understand the current backlash against the international rule of law, I suggest an alternative reading of this conception that may assist us even more. Grotius' understanding of humans and of the importance of corrective and distributive justice as components of the international rule of law helps us see the cry 'take back control' as 'indignation' about the (social) injustices and global inequality that international institutions (re)produce and as a cry for just international institutions. Koskenniemi's Foreword rightly asks: what is 'required of us'? I suggest that we should understand the current backlash as an institutional crisis as well as a crisis of selfhood. Reading Grotius may encourage us to include critical language of distributive justice in our 'bricolage' to address 'legitimate popular grievance' about the international rule of law and address the human desire for just institutions also at the international level.

1 Introduction

In 1990, with his – now canonical – contribution to the first volume of the *European Journal of International Law* (*EJIL*),[1] Martti Koskenniemi unsettled our profession profoundly and defined much of its scholarly debate for the decades to come. He argued

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[1] Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law* (*EJIL*) (1990) 4.

that the understanding of international law as distinctly separate from politics obscured how the 'indeterminacy' of international law actually plays out. He found '[t]he success of international law' in its 'formality'. International law understood as abstract and neutral language enables perpetual deferral, he argued. Within the law, 'there are no determining [substantive] legal standards'.[2] Each case requires a particular reconciliation of the situation at hand with the aspirations of the law; if there is justice, it is contextual. Due to the open-endedness of international law, to produce authoritative interpretations and eventually substantive resolutions of conflicts, international law ultimately depends on political choices made in the daily practices of international law.[3] The international rule of law as a – profoundly liberal – flight from politics was revealed to be an illusion of sorts.

In 2009, 20 – in the life of international law, significant – years later, Koskenniemi returned to the discussion of international law as language and of the relationship between international law and politics or power.[4] Through his work, Koskenniemi showed how 'unarticulated assumptions' of the profession are decisive in producing authoritative interpretations and, thus, in facilitating 'closure'.[5] He emphasized how these assumptions or 'structural bias', together with the fragmentation of international law, had yielded competing vocabularies produced by competing functional institutions, regimes and jurisdictions. Analytically powerful, the article reads as a warning against the 'managerialism' that comes with fragmentation and referral to experts far away from democratic debate and control. Professional – or institutional – biases prevent international law from being effective as a standard of criticism and control of power. Institutions of international law have come to justify contingent power structures and the hierarchies of interests and values, which are preferred by national and international elites. Again, the 'International Rule of Law' stands out as illusory. The role of structural biases in generating substantive outcomes raises the uncomfortable observation 'that [the profession] was somehow responsible for the implication of public international law in the perpetuation of the very problems that it officially claimed to alleviate'.[6]

With the Foreword to this volume, Koskenniemi returns 'One Last Time' (would this not be sad?) to 'the politics of international law'. This time he turns to an individual member of the legal profession, Hugo Grotius, one of our 'most competent' colleagues in history, who successfully generated authoritative speech at his own 'Grotian moment'. Koskenniemi aims to understand how Grotius used 're-description' and 'bricolage' to effectively carve out 'a novel [autonomous] space' for international law between theology and raison d'état politics.[7] Again, Koskenniemi relates legal success to formalism. Grotius' effectiveness lies, he argues, in the focus on the formal dimension of the law,

[2] *Ibid.*, at 28.

[3] *Ibid.*, at 31.

[4] Koskenniemi, 'The Politics of International Law: Twenty Years Later', 20 *EJIL* (2009) 7.

[5] Koskenniemi, 'EJIL Foreword: Imagining the Rule of Law: Rereading the Grotian "Tradition"', 30(1) *European Journal of International Law* 17.

[6] Koskenniemi, *supra* note 4.

[7] Koskenniemi, *supra* note 5, at 20.

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which leaves room for an 'open-endedness' of his texts: it 'allows for their use for the most varied purposes'.[8] The Foreword reconstructs Grotius' conception of the 'rule of law' as a historical, argumentative success and relates it – interestingly enough – to the present 'legitimate popular grievance' against the international rule of law. The authority of Grotius' idea of law and 'rule of law' for the international society rose in the centuries following the 1625 publication of *De iure belli ac pacis* (*DIBP*).[9] Koskenniemi ascribes this success primarily to Grotius' explanation of the human 'tendency to subordinate [one]sel[f]' to law. An inclination conducive to trustful social relations and to a peaceful, healthy society more generally. Koskenniemi's return to Grotius comes precisely at a moment in which we need to reflect also on the boundaries of this tendency, considering the widespread public distrust, especially of international institutions and norms, and its exploitation by extreme, populist politicians.[10]

The work of Hugo Grotius and the work of Martti Koskenniemi have many layers, and it is with due recognition of this that, in this Afterword, I engage with specifically two facets of Koskenniemi's current article. First, I reflect on Koskenniemi's reading of Grotius' 'rule of law' conception. While I concur with the argument that there is a 'rule-of-law' conception in Grotius' work,[11] I argue for a somewhat different interpretation of this conception, based on a different reading of Grotius' reworking of the three meanings of *ius* in *DIBP*. Second, I will suggest that Grotius' understanding of human nature, which ultimately grounds this conception of the 'rule of law', helps us see how the human inclination to subject ourselves to law is related to a sense of justice. To me, this is an important pointer for our understanding of the current backlash against the international rule of law.[12] As Quentin Skinner has aptly put it, 'we have to do our own thinking for ourselves',[13] yet Grotius may help us see how an international legal order that is complicit in human misery violates the ethical human inclination to subject oneself to that legal order as it violates a sense of justice. The current crises of institutions, as well as the human self, expresses the dire need of '*better* politics'.[14] The Foreword then raises a crucial question: what is 'required of us'?[15]

[8] *Ibid*, at 50.

[9] Grotius, *De iure belli ac pacis libri tres*, vol. II: *The Translation*, edited by Francis W. Kelsey, with the collaboration of Arthur E.R. Boak et al., and an introduction by James Brown Scott (Oxford: Clarendon Press, 1925). Giving way to the 'Grotian tradition' that gravitates around the Grotian ideal of '[t]he subjection of the totality of international relations to the rule of law', to put it in Lauterpacht's words. Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Yearbook of International Law* (1946) 1, reprinted in E. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (1975), vol. 2, 307, at 327.

[10] Nijman and Werner (eds), 'Populism and International Law', 2018 *Netherlands Yearbook of International Law* (2019) 3.

[11] Nijman, 'Images of Grotius, or the International Rule of Law beyond Historiographical Oscillation', 17 *Journal of the History of International Law* (2015) 83.

[12] Similar to the 2009 contribution, which 'tried to keep its methodological commitments below the surface', methodological musings in the 2019 Foreword only hint at contextualist insights of the Cambridge School, for example, but stay away from a fully-fledged exposé about historical and legal methods.

[13] Skinner, 'Meaning and Understanding in the History of Ideas', in J. Tully (ed.), *Meaning and Context: Quentin Skinner and His Critics* (1988) 66.

[14] Koskenniemi, *supra* note 4, at 8.

[15] Koskenniemi, *supra* note 5, at 27–28.

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2 A Grotian 'Rule of Law'

Koskenniemi stages the 'rule-of-law' idea that operates in *DIBP* as precursory to today's international legal order with its 'rul[e] by "unelected" judges [and arbiters] operating within a disembedded system of global economic governance' and by experts shaping the law 'outside the realm of political contestation'.[16] He reconstructs Grotius' 'rule-of-law' idea as a rule of 'strict' or enforcable law in service of trade and commerce at home and abroad. Public authority is about protecting contracts and private rights. In the open-endedness of Grotius' legal system, 'closure' is generated, Koskenniemi claims, on the basis of assumptions and (interest and value) priorities of a mercantile elite. Trust and trustworthiness are crucial to mercantile relations, and Koskenniemi rightly points to the role of law that Grotius foresaw in the creation of such a culture of trust, as the law would enable reliance on contract partners to honour their obligations and on respect for property. In short, Grotius' 'rule of law' aimed to enable 'every one [to] quietly enjoy his own, with the Help and with the united Force of the Community'; institutions of government exist to enforce these private rights.[17] This was the rule of enforceable or expletive justice. While I agree with Koskenniemi that this is definitely part of Grotius' early thinking,[18] I would argue that there is more to his 'rule-of-law' conception in *DIBP*. *De iure praedae* (1604) was written by a young, very ambitious, shrewd and dedicated corporate counsel of the Dutch East India Company with a political agenda of patriotism and nationalism.[19] *DIBP*, on the other hand, was a mature work on international law, written after his arrest in 1619 at the age of 35 and his escape from Dutch imprisonment. By then, his ambition was first and foremost to bring peace to Europe through law – an ambition nurtured by Erasmian-inspired irenicism visible also in the theological works (such as *De Veritate*) that Grotius wrote parallel to *DIBP*.

In other words, in *DIBP*, the 'rule-of-law' conception is aimed at ending religious wars and creating peace and toleration within a religiously divided Europe. To restrain the use of force, a notion of strict justice was essential. Force is then only justified to punish and to enforce rights, but it was not enough to create peace and to maintain society. This would require sovereigns to jump their own egos and short-term interests and take responsibility for humanity as a whole. Koskenniemi rightly observes that '[o]f course, Grotius believed that God had created human nature and the rules

[16] *Ibid.*, at 27.

[17] *Ibid.*

[18] *Ibid.*, at 28. While, initially, Grotius may have aimed 'to develop a conception of law that would organize public power and private rights in a system of principles whose validity and binding force would be untouched by the conflicts that pitted Europeans against each other'.

[19] H. Nellen, *A Lifelong Struggle for Peace in Church and State, 1583–1645* (2015). In 1625 and with later editions of *De iure belli ac pacis*, Grotius' focus was mainly on Europe and reuniting Christianity. He seemed blind to, and/or silent of, injustices that were developing, for example, with the transatlantic slave trade by the Dutch West India Company (established in 1621) and the transformation of commercial relations overseas into colonization with plantation systems. Let us also learn from Grotius the risk of underperceiving grave injustices. H. Grotius, *De iure praedae* [*Commentary on the Law of Prize and Booty*], edited and with an introduction by M.J. van Ittersum (2006 [1606/1868]).

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of reason and had told us to abide by them. In other ways, however, theology played no role in discerning the contents of natural law. That had become a purely human affair'.[20] Yes and no.

To be sure, Grotius' international 'rule of law' was a rule of *ius gentium et naturae* grounded in (a particular conception of) human nature. Grotius was able to have confidence in humans and the role of law for society because of the *imago Dei* anthropology that supported his thinking.[21] This was in contrast to Hobbes, for example, who understood humans to be egoistically defined by fear, greed and competition only. Grotius aimed to express something universal in the Christian language of his times: humans are by nature equipped with the capacities of reason, free will, sociability and, thus, of care or love and dominium.[22] Thanks to their 'soul' or 'mind', humans are able to know the common good (that is, in medieval thinking, the way to serve and approach God) and to take it into account. In Grotius' (universal) natural society, the law of self-love or self-interest is a law of nature that humans share with all animals, but humans move beyond acting out of immediate self-interest as they are capable of distinguishing principles of 'higher import than the things to which alone instinct first directed itself' – that is, the principles of 'right reason … and the nature of society'.[23] The human soul with the innate capacities of reason and *appetitus societatis* – without which society cannot be maintained – knows, in other words, commutative or 'expletive' justice – that is, strict or enforcable justice – as well as 'attributive' or, in Aristotelian terms, distributive justice, which is a broader sense of justice that relates to virtues like *caritas* and moderation and a long-term perspective on the good of society and, thus, to good judgment.[24] The latter category of justice is relevant, for example, when one wonders how to punish and how to govern as it involves more than respect for another's *suum*. While Koskenniemi acknowledges that Grotius 'occasionally nod[s] towards a notion of justice that concerned benevolence to one's neighbours' and while he elaborates on the role of human conscience, virtues and internal obligations within Grotius' theory, he declaredly does not see how Grotius' rule of *ius gentium et naturae* embraces both categories of justice, not merely strict or enforcable justice.[25]

3 The Three Meanings of *Ius* Re-conceived

In *DIBP*, Grotius distinguishes three meanings of '*ius*': (i) *ius* as justice; (ii) *ius* as a subjective right; and (iii) *ius* as objective law.[26] Both Koskenniemi and I neither see Grotius

[20] Koskenniemi, *supra* note 5, at 35.

[21] Nijman, 'Grotius' *Imago Dei* Anthropology: Grounding *Ius Naturae et Gentium*', in M. Koskenniemi *et al.*, *International Law and Religion: Historical and Contemporary Perspectives* (2017) 87.

[22] Grotius, *supra* note 9, Prolegomena, ch. 8, 16.

[23] *Ibid.*, bk I ch. II, s. I, (2 and 5).

[24] *Ibid.*, bk I, ch. I, s. VIII, (36ff).

[25] Koskenniemi, *supra* note 5, at 28–30.

[26] Grotius, *supra* note 9, bk I, ch. I, ss. III–IX.

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as the inventor of the notion of subjective right nor do we think he has – with this notion – transformed natural law theory into a modern theory of natural rights. While Richard Tuck argues that '[r]ights have come to usurp the whole of natural law theory, for the law of nature is simply, respect one another's rights',[27] Koskenniemi retains natural law as a 'frame', be it merely to secure the enforcement subjective rights, such as liberty, property and sovereignty. Natural law is derived from commutative or enforcable justice (only). This suggests that Koskenniemi has joined the 'minimalist liberalism' accounts of Grotius' conception of *ius gentium et naturae*. I have dealt with the three meanings of *ius* in *DIBP* in detail elsewhere,[28] so here I focus on providing a more comprehensive understanding of justice as the foundation of Grotius' 'rule of law'.

In *DIBP*, Grotius introduced an important subdivision of *ius* as subjective right into a perfect right or *facultas* (an enforcable right) and an imperfect right or *aptitudo* (a right relative to the virtues or non-enforcable, distributive justice). Perfect rights include both private and public rights or competences, and they are embedded in *ius* as objective law.[29] Both Oliver O'Donovan and Joan Lockwood O'Donovan and Peter Haggenmacher have invalidated a reading of Grotius in 'the liberal contractarian tradition of natural rights' with 'the moral-political dominance' of the 'proprietary subject'.[30] Both show how Grotius' legal thinking cannot be disconnected from his theological or moral 'commitments' at the time.[31] This new distinction between *ius* as *facultas* and *ius* as *aptitudo* then enabled Grotius to develop *ius* as justice too. He subjected the Aristotelian distinction between commutative and distributive justice to 'radical revision'.[32] By stretching the meaning of the subjective right beyond perfect, enforcable rights to include imperfect rights, Grotius brought attributive or distributive justice, which aims for the common good, into natural justice and therewith into the international realm.[33]

In my view, this is the essence of the 'rule-of-law' conception that operates in *DIBP*. Grotius' rule of *ius gentium et naturae* aimed 'to qualify the dominance of subjective right' by embedding subjective rights in a legal system derived from both communitative and attributive justice.[34] Contrary to what Koskenniemi seems to suggest, Grotius developed a theory of 'responsible government' precisely by re-conceiving natural justice to include attributive or distributive justice.[35] O'Donovon explains very clearly how Grotius conceives of distributive justice in the sense of 'justice as judgement'.[36]

[27] R. Tuck, *Natural Rights Theories* (1979), at 67. Similarly, see Haakonssen, 'Hugo Grotius and the History of Political Thought', 13 *Political Theory* (1985) 240.

[28] Nijman, *supra* note 11.

[29] The *dominium eminens* is such a perfect right to be exercised for 'the sake of the common good'. Grotius, *supra* note 9, bk I, ch. I, s. vi.

[30] O. O'Donovan and J. Lockwood O'Donovan, *Bonds of Imperfection: Christian Politics, Past and Present* (2004), at 12; Haggenmacher, *infra* note 45.

[31] See, e.g., O'Donovan and Lockwood O'Donovan, *supra* note 30, at 11–12. O'Donovan, 'The Justice of Assignment and Subjective Rights in Grotius', in *ibid.*, 167, 170, 173.

[32] O'Donovan, *supra* note 31, at 179.

[33] Nijman, *supra* note 11, at 114–115.

[34] O'Donovan, *supra* note 31, at 201.

[35] *Ibid.*, at 185.

[36] O. O'Donovon, *The Ways of Judgment* (2005).

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The understanding of government as practising justice – political acts of judgment that aim to render justice – rests on the human capacity of 'well-tempered judgement', being able to decide what is the right thing to do for the good of society by drawing on virtues (like moderation or trustworthiness) rather than being 'led astray by fear or the allurement of immediate pleasure, [o]r carried away by rash impulse'.[37] Good judgment means that 'the widest possible considerations of general welfare' are taken into account.[38] Grotius thus saves the common good from 'marginalization' in the (scholastic) conceptualization of natural law.[39] *Ius naturae et gentium* is therefore derived from both commutative and distributive justice, and to act lawfully as a ruler, for example, means that the latter – and, thus, considerations of the common good – have to be part of 'right reasoning'. More generally, this 'duty of responsibility [for society] outruns subjective rights'.[40] In short, 'justice as judgment' has to be understood as part of the rule of *ius naturae et gentium*. Private or public subjective rights – dominium as, for example, ownership or sovereignty[41] – are always embedded in natural law and justice and thus never absolute. They come with a responsibility for (others in) society and for the common good. In *DIBP*, which was aimed at ending the wars waging around him, the rule of *ius naturae et gentium* pushes the government's responsibility for peace and welfare in society into the international realm. In Grotius' own words, rulers have a 'general responsibility for [the universal] human society'.[42] Rather than 'totaliz[ing]' the notion of subjective right, *DIBP* established a 'rule of law' that goes beyond the mere protection of *suum cuique* and prescribes that in order to act lawfully one has to take the common good of humanity into account when exercising one's right.[43] *DIBP* pushed for a 'rule of law' that prescribes virtuous, just government both at home and abroad.[44]

4 Justice, Human Subjection to Law and Its Limits: What Is 'Required of Us'?

The Foreword attributes Grotius' success to the answer he provides on why humans, whether merchant or sovereign, subject themselves voluntarily to law and legal

[37] Grotius, *supra* note 9, Prolegomena, ch. 9; 'distributive justice' is also part of the discussions in Prolegomena, chs 10, 44; see also Nijman, *supra* note 11, at 116.

[38] Nijman, *supra* note 11, at 117.

[39] O'Donovan, *supra* note 31, at 200.

[40] *Ibid.*, at 202.

[41] Punishment should serve society, for example; punishment out of rage would be unlawful. Property was not sanctosant, expropriation was permitted for 'publick Advantage' against 'just Satisfaction'. See, e.g., Koskenniemi, *supra* note 5, at 48.

[42] Grotius, *supra* note 9, bk II, ch. XX, s. XLIV.

[43] Elsewhere, I linked this to Erasmus' thinking on peace and war in which the latter is 'an enemy of virtuous government' as well as an enemy to the people. See Q. Skinner, *The Foundations of Modern Political Thought* (1978), at 244–245; see also Nijman, *supra* note 11, at 121–130, for Erasmus' influence on Grotius.

[44] *Cf.* Carty and Nijman, 'The Moral Responsibility of Rulers: Going Back beyond the Liberal Rule of Law for World Order', in A. Carty and J.E. Nijman (eds), *Morality and Responsibility of Rulers: Chinese and European Early Modern Origins of a Rule of Law as Justice for World Order* (2018) 1.

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institutions. In Grotius' understanding, human beings are created in the image and likeliness of God and therefore have the capacities of reason, free will, sociability and care and dominion. As such, they have by their very nature a relationship with justice. Humans relate to society, law and government with an inner sense of justice that encompasses both commutative and distributive justice.

In Grotius' anthropology, humans are more than short-term, calculative, self-interested beings; they are ethical-moral beings, naturally capable of subordinating themselves to law and legal institutions that are just – that is, in conformity with both commutative and distributive justice. Law and institutions provide individual safety and legal certainty yet also nurture the common good. Whether the sovereign or the citizen is endowed with natural subjective rights, 'il n'en reste pas moins un être communautaire, naturellement ancré dans un ordre juridico-moral objectif'.[45] In Tierney's words, Grotius, in fact, did not break with the natural law tradition in which natural rights were 'derived from a view of individual human persons as free, endowed with reason, capable of moral discernment, and from the ties of justice and charity that bound individuals to one another'.[46] In *DIBP*, the rule of *ius naturae et gentium* implies that humans as capable beings subject themselves to law flowing from both commutative and distributive justice.

Thus, at a time of profound European crisis, Grotius 'bricolage[d]' care for the common good – in short, distributive justice or 'justice as judgement' – into the rule of *ius naturae et gentium*. In other words, he provided a conception that was well beyond minimum liberalism (beyond the mere protection of *suum*). This is, however, not how Grotius has been 'followed'. Koskenniemi observes how Grotius' 'idea of human beings as *sui iuris* possessors of private rights could not fail to influence political modernity'.[47] Grotius' influence is indeed unquestionable, but it is good to remind ourselves that it is a corrupted version of his conception of the international rule of law that came to define the development of the international legal order. It may actually be precisely this fact that explains today's backlash against the international rule of law of our time, which developed predominantly in its dimension of corrective or commutative justice (think of the – be it weak – 'rule by judges' that Koskenniemi calls into question), while ignoring the dimension of distributive justice (think of, for example, the complicity of international (economic) law in today's injustices and the ensuing 'rule by experts', whose bias serves the economic elites).

In other words, Koskenniemi's suggestion to read, at a time of articulate popular grievances against international law and institutions, Grotius' explanation of the human inclination towards subjection to law and legal institutions, is arguably more insightful and helpful than even Koskenniemi himself seems to suggest. Of course, we cannot pick up 'crude "lessons"' from our histories, but, as Skinner also explains, historical inquiry can prevent our thinking from 'fall[ing] under the spell of our own intellectual heritage' and being paralysed by it. Koskenniemi's turn to Grotius provides

[45] Haggenmacher, *Droits subjectifs et système juridique chez Grotius* (1997), at 129.
[46] B. Tierney, *The Idea of Natural Rights* (1997), at 77.
[47] Koskenniemi, *supra* note 5, at 51.

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us with a 'lesson of self-knowledge'.[48] It helps us see how it can be that people, in principle, are not inclined to revolt against the international legal order, and, yet, they do not seem to be willing to subject themselves to the current international legal order.

French philosopher Paul Ricoeur's 'small ethics' may help us bring this out further. He has articulated how every human being has an ethical inclination to 'aim [...] at the "good life" lived with and for others in just institutions'.[49] Ricoeur may help us understand how current popular grievances against the contemporary international legal order are not so much coming from a resentment against international institutions as such but, rather, from a disappointment with these and with the injustices and inequality they produce. Ricoeur explains how a crisis of institutions, in our case international institutions, comes with a crisis of the modern self, whose ethical desire to live well with one's global fellow human beings requires *just* international institutions; these are to mediate global human relations, organize reciprocity and assist in realizing just aspirations and reaching just ends. International institutions often are instruments of domination, but they do not have to be. On the contrary, they may be orders of respect and recognition. As such, they are essential for the constitution of the human being as an ethical-legal subject.[50] For global citizens, as for any citizens, subjection to the law depends on representation, reciprocity and just distribution – on '*juste distance*'. However, this is excessively complicated to organize in a globalized world. Without just international institutions, humans are violated in the fulfilment of their being and denied global citizenship.

In a globalized world like ours, for humans to be able to live the good life, they are fully dependent on just international institutions. In the past 50 years, attempts to include the promotion of social justice in the international legal order, such as by the New International Economic Order, have failed. The impact of Friedrich Hayek's rejection of social justice as part of the 'rule of law' on international law and institutions is hard to overestimate.[51] In the last decades, international law's role in the creation of a neo-liberal global economy has further obstructed the aspirations of social justice. Today, global inequality is at an all-time high, in an era in which human suffering anywhere is visible in an instant everywhere.[52] The global climate crisis with all of its related global crises of water, land and health, to mention a few, is another case in point. Global crises that require a just approach thus require global institutions that allocate rights, duties, responsibilities, burdens, resources and opportunities justly. Without these institutions, humans are powerless and have no way to relate to, and live the 'good life' with, their fellow human beings. The neglect for humanity's common good over time has produced a crooked international legal order that betrays the human

[48] Q. Skinner, *Visions of Politics* (2002), at 89.

[49] P. Ricoeur, *Oneself as Another* (1992), at 172.

[50] Nijman, 'Paul Ricoeur and International Law: Beyond "The End of the Subject" – Towards a Reconceptualisation of International Legal Personality', 20 *Leiden Journal of International Law* (2007) 25.

[51] F.A. Hayek, *Law, Legislation and Liberty*, vol. 2: *The Mirage of Social Justice* (1976).

[52] J. Linarelli, M. Saloman and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2019); S. Pahuya, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

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sense of justice. I am inclined to understand utterances like 'take back control' as 'a cry of *indignation* … in the face of injustice';[53] a cry of righteous anger coming from an ethical awareness and a cry for just international or global institutions and – for what Koskenniemi rightly calls – '*better* politics'.

Koskenniemi takes from Grotius that '[t]he representatives of jurisprudence were to instruct rulers and subjects not only about their formal [perfect] rights but also about virtuous behaviour, good mores and a sense of equity and appropriateness, items "which [are] the foundation of social life".'[54] This is even more true when the full conception of Grotius' 'rule of law' is taken into account. And, thus, if 'closure' is something that we lawyers are actively involved in, and the international legal order we created is profoundly unjust, what is 'required of us'?

This Foreword, which is similar to Koskenniemi's previous *EJIL* contributions, calls on the sense of responsibility of the international lawyer: 'find a normative voice' and critique and change the 'structural bias' of international law so as – I would add here – to take humanity's common good into account.[55] With a view to securing the latter at a time of profound European crisis, Grotius brought ('bricolaged') the vocabularies of virtue ethics and distributive justice into the international rule of law. This is a highly relevant insight for us. To save the legitimate popular grievances from exploitation by extreme Right nationalist politicians, justice in all of its dimensions needs to underpin the international rule of law. The politics of international law has to be brought beyond fear and greed in order to respect the human self.

[53] P. Ricoeur, *The Just* (2000), at x (emphasis in original).
[54] Koskenniemi, *supra* note 5, at 40–41.
[55] *Ibid.*

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