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

by

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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.

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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.

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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 hand-maiden 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 backlashes 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 trust¹⁰ 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.

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‘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 backslashers.

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

JANNE E. NIJMAN
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of the T.M.C. Asser Instituut, The Hague*