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INTERNATIONAL LAW AND THE SOCIAL QUESTION

by

Anne Orford

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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

International Law and the Social Question: An Alternative Hague Tradition?

With this fifth edition, the Annual T.M.C. Asser Lecture has offered another late-November afternoon of critical thinking on the state of international law, its past, present, and future. In the last five years, we have annually gathered at the premises of the Peace Palace, once built under Tobias Asser's gaze, to listen to a world-leading international law scholar invited to take note of Tobias Asser's ideas and epoch, and to reflect on the role of law in dealing with the challenges and (potentially radical) changes to society in the 21st century.

Tobias Asser and his generation of international lawyers stood at the cradle of traditional international law and institutions. Earlier in 2019, Arthur Eyffinger published the two-volume biography, *T.M.C. Asser (1838-1913): "in Quest of Liberty, Justice, and Peace*", in which he examines *inter alia* Asser's role in the Four Hague Conferences on Private International Law (1893-1904) and the two Hague Peace Conferences (1899 and 1907), in the creation of the Permanent Court of Arbitration, and in other international law initiatives such as the Peace Palace library and the Hague Academy. Together these have given rise to the so-called 'Hague tradition of international law'.[1] Asser and his colleagues fought for the peaceful settlement of international disputes, disarmament, and international humanitarian law. In the mission statement of this Annual Lecture, however, I have reflected also on the complexity of the legacy of Asser and his generation.[2] On the one hand, Asser, a Dutch citizen of Jewish descent, was acutely aware of the times and of the crucial value of mutual trust and

[1] A. Eyffinger, *T.M.C. Asser (1838-1913): "In Quest of Liberty, Justice, and Peace"* (Leiden, Boston: Brill Nijhoff, 2019).

[2] J.E. Nijman, The Annual T.M.C. Asser Lecture on the Development of International Law: A Mission for Our Time (2015), hereinafter p 51.

respect for the health of any society. Hence, the fundamental question underpinning his work: how can law and legal institutions serve the cultivation of mutual trust and respect in society? On the other hand, these late 19th and early 20th century liberal-humanitarian internationalists 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.'[3] In their view, 'jurists should not remain in the scholar's chamber but were to contribute to social progress.'[4] But the world order they helped build was also defined by Eurocentrism, colonialism and racial discrimination.

Last year, Martti Koskenniemi examined the populist backlash against internationalism and its institutions as both a 'problem of knowledge' and a 'problem of politics'.[5] In his view, it is an expression of 'status anxiety' on the part of many citizens and a revolt against the prioritization of the cultural values and interests of the global cosmopolitan elite. To further continue the examination of this backlash, we invited Professor Anne Orford to deliver the 2019 Asser lecture.

A SCHOLAR ON THE INTERSECTION OF INTERNATIONAL LAW, HISTORY, AND POLITICS

Anne Orford is Redmond Barry Distinguished Professor, holding the Michael D Kirby Chair of International Law at Melbourne Law School. She is an Australian Laureate Fellow at that same law school, and an elected Fellow of the Academy of the Social Sciences in Australia.

It is not an overstatement to call professor Anne Orford a world-leading critical scholar. She has received many awards and prestigious research grants, and she has held numerous visiting positions around

[3] M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP 2002), p. 92.
[4] Ibid., p. 57.
[5] Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism*, Fourth Annual T.M.C. Asser Lecture, (T.M.C. Asser Press 2019), p. 17

the world, most recently that of Visiting Professor at Harvard Law School. Anne Orford has published excellent monographs, edited volumes and articles, which have truly impacted our discipline. Personally, I very much look forward to the publication of her next book, *International Law and the Politics of History*.[6]

I admire the scope and depth of her thought, the ability to be profoundly critical about international law but also to open up possibilities for change. This is captured well in her online bio:

> 'her scholarship combines study of the history, theory, and practice of international law, and an engagement with debates in history, social theory, economics, and philosophy, in order *to grasp the changing role of international law and its relation to social, political, and economic transformations*.'

Hers are important analytical insights about the role of international law in both international and domestic politics, which are valuable to address urgent global and local questions.

For us at the Asser Institute, one of the most urgent of such questions has been about the current populist moment in domestic politics and the distrust of international law and institutions. It involves concerns about the role of international law in the global economy, that is, in the latter's construction and deregulation in the light of the climate crisis or social injustices. What work is international law doing, and can it do, in the transformation of society?

Her analysis of the populist moment turns around the role of liberal internationalism and international law in pushing for a neoliberal world order and liberal states, while *neglecting 'the social'* for the last few decades. International lawyers, she argues, have to put 'the social question' back on the table.

[6] Anne Orford, *International Law and the Politics of History* (CUP, forthcoming in 2021).

A COUNTER-FACTUAL HISTORY OF THE HAGUE TRADITION?

Anne Orford starts her lecture by pointing to another historical moment in The Hague. Decades before Tobias Asser co-presided over the Hague Peace conferences, she argues, 'the tradition of internationalism in the Hague was initiated in 1872, […] when Karl Marx and Friedrich Engels attended the tumultuous Fifth Congress of the International Working Men's Association.'[7] The Congress is mostly famous for the historic break-up between Marx and Bakunin, but this aside it also reminds us of the decades of the Industrial Revolution and of the latter's impact on the working classes: poverty, child labour, unhealthy working conditions, and lack of representation in political decision-making on economic law and policy.

Reading the lecture, one wonders: What if this congress had come to define Hague internationalism? This is hardly the place for a counter-factual history of the Hague tradition of international law. With this historical anecdote, however, Anne Orford effectively makes us realise how marginal 'the social question' has been in the Hague tradition of international law, and also during recent decades.

While pointing to the late 19th and early 20th century roots of liberal internationalism and the concern for social issues and 'social progress' with Tobias Asser and his colleagues, Orford discusses how liberal internationalism has been centred on the liberalisation of commerce and trade, and on concomitant dispute settlement mechanisms, such as arbitration, from the beginning.

After situating her lecture against the backdrop of Tobias Asser and his times, Anne Orford provides us in fact with a short yet profound history of twentieth century international law; she demonstrates how international lawyers as liberal internationalists have come to neglect 'the social question'. The logic and goals of the market have come to dominate international law-making, while the social – and environmental – implications have not been engaged with, whereas those

[7] Anne Orford, *International Law and the Social Question*, hereinafter p 2.

profoundly affected by harsh global capitalism have not been represented in these economic law-making processes.[8] The judicialisation and constitutionalisation of international (economic) law of the past thirty years – Orford discusses the WTO and its dispute settlement body, investor-state dispute settlement (or ISDS), and the trade and economic integration agreements (such as NAFTA, TTIP, TTP and CETA) – have pushed for 'the international rule of law' when entrenching the liberalisation of the global capitalist economy and the protection of foreign investment. Reading Orford's lecture, one cannot help asking: *the rule of* whose *law?*

THE RETURN OF THE SOCIAL QUESTION AS A QUESTION OF REPRESENTATION

In Orford's analysis, the current backlash against the international legal order and its institutions is not so much 'a reactionary cultural-political movement' fuelled by cultural anxiety about the '*loss of status*',[9] as Koskenniemi argued in last year's Asser Lecture. Nor can it be explained by 'a concept of the masses and of the elite that is largely empty of any substantive content'.[10] Rather, the economic or material causes of the populist backlash should not be underestimated. Pushing the crisis of the elites further, Orford asks 'whether there is any substance to the argument that international law has facilitated a takeover of democratic or collectivist decision-making processes about economic issues by particular groups.'[11]

In this lecture, she points to a loss of democratic control over economic (law-making) decisions and a lack of participation in these deci-

[8] Cf Alessandra Arcuri, 'International Economic Law and Disintegration: Beware the Schmittean Moment', *Journal of International Economic Law*, Volume 23, Issue 2, June 2020, Pages 323–345 in which she discusses ia Dani Rodrik's argument on re-empowering the nation-state and his books: Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton: Princeton University Press, 2018); see also Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton, 2011).

[9] Hereinafter pp 16 and 17.

[10] Hereinafter p 16.

[11] Hereinafter p 21.

sion-making processes by the working class. In short, there may actually 'be reasonable grounds for the claim that the project of economic integration through law has had an effect on the social question broadly conceived.'[12]

Anne Orford thus gives us her take on the 'perceived backlash to international law and institutions' and suggests it 'offers an opportunity to think again about the ways of relating politics, economics, and the social that have been consolidated through international law and to do so by posing the issue as a question of representation.'[13]

Here, Orford comes to the core of her argument: *the social question is a question of representation* in decision-making processes about economic issues that have significant distributive effects. International lawyers while being members of the global elites play 'a double role' as international and state agents. They operate in both the domestic and the international sphere and they move between these spheres to see where for example the liberal internationalist interests of trade, foreign investment, and their respective dispute settlement mechanisms are served best. They participate in political decision-making that has been 'lift[ed] […] out of the democratic process.'[14]

Here, Orford points to the rather uncritical understanding of the double role of legal professionals; as if no tensions or conflict exist, as if the development of global governance is 'apolitical' or 'neutral'.[15] It is not. Orford thus questions the self-image of international lawyers and professionals that maintains it is possible to employ this 'double agency' without betraying one or the other role. Have we as international lawyers and professionals been more interested in developing the international legal order with instruments such as ISDS than in representing the interests of the working and middle class?

[12] Hereinafter p 22.
[13] Hereinafter p 4.
[14] Hereinafter p 48.
[15] Hereinafter p 33.

In other words, the current 'backlash against "globalism" has repoliticised the work of international lawyers, particularly in relation to international agreements addressing trade, investment, and economic integration.'[16] Orford shows how the international order that has been constructed by international lawyers and officials insufficiently recognises the interests of middle- and lower-class populations, and, for that matter, of future generations or of the earth system. In the creation of a global market economy in the course of the 20th century, international lawyers have been guided by economists such as Wilhelm Röpke, Friedrich Hayek, and Ludwig Von Mises and their successors, who pushed for liberalisation of the market from (democratic) state control.[17] As a result, today's international law and institutions stem from a century of free market thinking under the guise of an 'impartial legalism' or a 'neutral' international rule of law.

> 'International lawyers involved in the negotiation and subsequent interpretation of international agreements had made it seem a matter of legal necessity that certain property rights and economic relations were privileged over other rights, relations, values, and interests. The backlash unsettled that sense of necessity more effectively than two decades of critical legal scholarship has been able to do.'[18]

The current backlash is about the *kind* of international legal order we have created, and about the role international lawyers as experts have played in it. It doubts the interests and values that have been given prevalence and it impugns the legitimacy of the current system of international adjudication in for example trade and investment disputes. The proposition that the latter system exists 'independently of ideology, politics, national interests, or substantive visions of the good' is unsustainable.[19] 'The privileging of international adjudication over domestic political processes for resolving conflicts between the protection of property rights and competing values of public health, environmental protection, or survival has', Orford argues, 'inevitably

[16] Hereinafter p 35.
[17] Hereinafter p 24 *et seq*.
[18] Hereinafter p 35.
[19] Hereinafter p 43.

embroiled judges and arbitrators in serious ideological controversies and political struggles.'[20] It has evoked a profound anxiety about the loss of democratic control and participation in this control, in particular for those whose insecurity and uncertainty in life have escalated.

FROM EXPERT RULE BACK TO DEMOCRACY AND THE HAGUE TRADITION

This would not be a signature "Orford lecture" if it did not provide some pointers for change. Orford makes a call to embrace a repoliticisation of the role of international lawyers, and also some soul-searching on the part of these international lawyers. Stop suggesting that the work international lawyers and officials are involved in is 'neutral'; stop denying that the 'international rule of law' comes with political choices that give prevalence to some interests and values over others; acknowledge that when an issue is brought into the ambit of international law, (some) democratic control may be lost.

Orford shows it is time 'to reject the fragmented closed worlds of international law' and to ensure that competing interests and values of public health, human rights, environmental protection, or planetary survival are included in and weighed throughout economic decision-making. Moreover, and more generally, holistic reasoning in international adjudication and international law- and policymaking should be the default. International legal and political processes inescapably have social implications. They touch on jobs, labour conditions, and life circumstances of working- and middle-class people. International law, Orford argues, has been complicit in the creation of a global economy that has produced 'surplus population' and 'precarity'[21] in both the Global South and the Global North, even though the latter has generally actively pursued the neoliberal economic

[20] Hereinafter p 44.

[21] Hereinafter pp 1-4. See also on the fall of the middle class and the rise of a new 'precariat', Godfried Engbersen, Erik Snel and Monique Kremer (eds), WRR-verkenning 37 *De val van de middenklasse? Het stabiele en kwetsbare midden* (2017), available online: https://www.wrr.nl/publicaties/verkenningen/2017/07/06/de-val-van-de-middenklasse

global order.[22] The current backlash forces international lawyers to examine how the public can be better represented in decision-making and to move away from strict expert rule. These types of solutions have however yet to be invented at the global level.

Hence, the democratisation of international decision-making, in general, and of economic decision-making, in particular, requires the urgent attention of international lawyers – not in the least because of their 'double role'.[23] This demands honesty and openness about implied distributive effects: '[i]nternational lawyers can reveal the political choices already being made within the law at moments that appear "technical", and open those political choices up to democratic approaches to the social question.'[24]

To conclude, then, what does Orford's analysis mean for such a well-entrenched tradition as the Hague tradition of international law and its (adjudicative) institutions, which are now taking a considerable part of the heat of the global backlash?

In the late 19th century, the social question emerged together with the rise of industrial capitalism and the rapidly growing proletariat. In 1872 in the Lange Lombardstraat in The Hague, Dr Karl Marx called for the 'rule of labour' and the 'domination of the proletariat' before the First International collapsed and moved to New York, while anarchist Bakunin left the scene with great annoyance over Marx's authoritarianism. The rest is history, often dark history.

That said, with the social question placed back on the table, no less than as a *pièce de milieu*, the value of solidarity and the spirit of social justice challenge the Hague tradition of international law to engage. I am grateful to Anne Orford for having articulated the contingency of international law, both past and future. Putting back the social question on the table of international lawyers during that late

[22] Hereinafter pp 9-10.
[23] Hereinafter p 22.
[24] Hereinafter p 49.

November afternoon in The Hague, she not only held a mirror up to our faces but she also showed us the relevance – the significance even – of the choices that international lawyers make.

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