



Asser Strategic Research Agenda (2016-2020)

**An Institute with a mission:**

*International & European Law  
as a source of trust in a hyper-connected world*

**1. Introduction**

The Asser Strategic Research Agenda (ASRA), *'International & European law as a source of trust in a hyper-connected world'*, will guide and direct the research of the Asser Institute for the years 2016-2020. It has been developed in dialogue with the Institute's researchers and builds on the Institute's past and present research projects. A research agenda, whether of an institution or an individual researcher, evolves as research questions surface and dissolve. The ASRA aims to set out research strands on which Asser research will concentrate in the coming years. It identifies Asser research priorities, while it is a living document that will be revisited mid-term. The ASRA means to be agenda-setting for Asser Research across all legal domains.

The ASRA draws on a vision that trust and trustworthiness are important in today's hyper-connected world, so full of global challenges, and that international and European law have a role to play in the cultivation of a culture of trust and respect necessary to confront these challenges. Hence the institute's mission:

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

Pursuant to the Institute's mission, the Asser Strategic Research Agenda aims to examine how law as a social institution can contribute to the construction and cultivation of trust, trusting relations, and trustworthiness and thus to provide knowledge needed to support our mission.

The Agenda identifies three research strands: A) 'Human Dignity and Human Security in International and European Law'; B) 'Advancing Public Interests in International and European Law'; C) 'Adequate dispute settlement and adjudication in international and European Law', as well as an overarching architrave addressing more general conceptual questions. The next sections set out, first, the vision behind this Agenda (section 2). Subsequently, the translation of this vision into the research strands is discussed (section 3 and 4) followed by a discussion of the Architrave and three research strands (section 5) within which the Institute intends to focus and organise its research in 2016-2020. Finally, the implementation of the research agenda is addressed briefly (section 6).

## 2. Background to the Asser Strategic Research Agenda

Trust is not a common word in legal research, even if it surely is a notion that relates in many ways to the function of law in a society. Arguably, in the words of Tobias Asser, 'law serves primarily to cultivate trust.'<sup>1</sup> For Asser, it was initially about a culture of trust to which law should contribute, so that global trade and economic relations could flourish – 'to further[r] progress through trade.'<sup>2</sup> This goes first of all to traditional legal values, such as coherence, consistency, predictability, legal certainty, and justice or fairness, and their positive impact on global economic transactions while embedded in a legal reality reconciling public and private interests.<sup>3</sup> Law is however not merely about cultivating 'commercial trust'. Its purpose is also to contribute to trust in the context of 'a whole multitude of other actions' and 'relationships of life.' This requires the protection of 'inalienable rights' of peoples and individuals.<sup>4</sup> Moving into the 20<sup>th</sup> century, Asser transferred this vision to the *inter-national* level of states and actively contributed to the development of an international order that defined certain values as its normative foundation, created law on that basis, and established institutions to uphold these values and norms.

Today's world is incomparable to the one of Asser's time. With the development of the Internet and cell phones, the ongoing process of globalisation - that is, the integration of economies and to some extent societies stimulated by the global movement of people, capital, goods and services, and information and ideas - has amplified world wide inter-connectedness to a stage of hyper-connectedness. Since the 1990s, global connectivity, i.e. the digital connectedness of people (or rather their *digital devices*) through information and communication technologies (ICT), the Internet, and social media networks, have expanded exponentially.<sup>5</sup> This has elevated significantly the economic, social, and political interconnectedness and interdependency worldwide. While the world is more connected and

<sup>1</sup> The Inaugural Address is included in EMH Hirsch Ballin (Ed. and Introd.), *A Mission for his Time. Tobias Asser's Inaugural Address on Commercial Law and Commerce, Amsterdam 1862* (Asser Press, The Hague, 2012), p. 22.

<sup>2</sup> *Ibidem*.

<sup>3</sup> *Ibidem*, pp. 19-24.

<sup>4</sup> *Ibidem*, p. 25, 24.

<sup>5</sup> Cf. Thomas Friedman, *The World is Flat. The Globalized World in the Twenty-First Century* (Penquin Books, Newly Released and Expanded, 2006, first published in 2005), p. 59: 'connectivity as Flattener #2'.

interdependent than ever, it has not become easier to gain a clear view of the problems at hand. The most urgent problems of our time - be it climate change, (social) inequality and exclusion, or terrorism - require truly *global* approaches. The emerging global village of seven billion people advances pertinent questions of governance and law to deal with the positive and negative implications of global hyper-connectedness.

Illustrations readily come to mind. The 2008 financial crisis showed how the financial market had turned into a truly global one, with all the risks of global volatility. Global trade and global supply chains may impact human life positively (such as by creating jobs and stimulating the realisation of the right to food, health and development), but also negatively (such as, when production plants in low-income countries produce cheap clothes for Americans and Europeans at the expense of the basic human rights of the employees). Corruption has become a borderless crime, fraud a matter of computer programming. A negative trade balance of one country may affect the standard of living of citizens in another part of the globe. Global human mobility was a challenge for the WHO when Ebola broke out in Western Africa in 2015. Humanitarian crises are broadcasted real-time by the smartphones of the victims demanding the international community to act instantly. The scope and dynamics of the 2015 refugee crisis are impacted significantly by the connectivity of the refugees coming from the Middle East and Northern Africa. Human rights campaigns like 'KONY 2012' to arrest Uganda's war-lord Joseph Kony and to bring him before the International Criminal Court have boomed through social media. The nature and dynamics of diplomacy are changing too. With the increasing diversity of (non-state) actors involved, it is becoming less of a private and more of a public game. Every self-respecting Ministry of Foreign Affairs and Embassy uses social media as a tool for public diplomacy. The UN, its agencies and programmes twitter all day, showing the peoples of this world their relevance, accountability and trustworthiness real-time. Wikileaks has brought political accountability in relation to a lack of transparency to the fore. What rights do the world's citizens have over the available data? Terrorism thrives on global connectivity, Islamic State is broadcasting through Internet the beheading of his hostages and the threats to blow up humanity's cultural heritage. Global migration has brought diversity in the world's cities to new a level; cultural diversity both enriches and challenges urban life. The *condition capitaliste* may be a driving force behind the growing global inter-connectedness, it also provokes highly critical responses to the accompanying neo-liberal ideology (ranging from the global Occupy-movement to the excitement on Piketty's *Le Capital au XXIe siècle* (2013) across Europe).

The ever increasing global connectedness is transforming our social, political, economic, and cultural-ideational world profoundly. It changes social interaction, the relation with 'the distant other', and democracy. It challenges traditional consumer and citizen behaviour as well as the overall sense of community and the common good. Hyper-connectedness affects the human sense of time and place: the world is both shrinking and expanding, familiar and alien, highly complex and often unpredictable. It renders the global and the local inseparable. This in turn exposes differences in pace, giving rise to frictions but also to fruitful interactions. Linking the local and global intensifies the dilemmas, uncertainties, and risks that come with globalisation and modernity. Humanity's hyper-connectedness generates questions of loyalty, identity, solidarity and responsibility. Questions concerned with privacy, security, and liberty. It elevates questions of (social) inequality and redistribution of wealth, (youth) unemployment

and business competitiveness, social inclusion and exclusion, counter-terrorism and organised crime, and environmental pollution to a global level. As a phenomenon that goes beyond the technological, digital infrastructure, hyper-connectedness concerns the *global* connectedness of *people*, with hearts and minds, thoughts and emotions. As such, it may offer chances for tackling current global challenges, as these generally require a global approach. In all cases, hyper-connectedness captures the human condition of the 21<sup>st</sup> century. As the defining condition of any society, today and tomorrow, it is a significant given for research into international and European Law in the coming five years.

Within this hyper-connected and variegated world, the construction and cultivation of trust is difficult, but crucial: '[T]rust becomes a more urgent and central concern in today's contingent, uncertain and global conditions. ... [C]hanges in contemporary societies are making the construction of trust more urgent [...] and more difficult'.<sup>6</sup> Trust is often perceived to be less readily accessible today than in traditional, more homogeneous and static environments. Diversity may be felt to contribute to a sense of alienation and social isolation, which put trust under strain; yet, with room to grow, diversity will nurture society and enrich it with citizens with complex, plural identities. Trust in one's identity and capability enables one to engage and interact with the world, to meet differences without fear. As such, trust is an activating mind-set. It is moreover fundamental to all forms of human interaction, especially social, political and economic relations.

To be sure, this is not to subscribe to what Onora O'Neill calls the false – yet, currently rather popular – narrative in public discourse that 'trust is in decline, we need more trust, we have to rebuild trust'.<sup>7</sup> Indeed, such a regressive approach of trust is to be avoided. Society is not in need of more trust *tout court*, as O'Neill argues, it is in need of well-placed trust and well-placed mistrust. In a hyper-connected world, mistrusting the untrustworthy is as important as trusting the trustworthy. But arguably, in a hyper-connected world, precisely this differentiation is a challenge. This said, more trustworthiness, when communicated and recognized as such, will contribute to trusting relations and a culture of trust.<sup>8</sup>

Trusting relations, not only between individuals but also between for example states or institutions, work better. When differences in views, values and/or interests start producing tensions, dissonants, and variances in pace, trusting relations assist actors thanks to the reciprocity of the willingness to be a respectful and trustworthy partner in cooperation. And, '[w]ith our fates ever more entwined, our future must be one of ever deeper cooperation' to face up to the global challenges.<sup>9</sup>

**By consequence, the role of international and European law as a source of trust in the hyper-connected world of today is as relevant as ever. The Asser Research Agenda aims to examine how law as a social institution can contribute to the construction and cultivation of trust, trusting relations, and trustworthiness.**

<sup>6</sup> Barbara Misztal, *Trust in Modern Societies: the Search for the Bases of Social Order* 9 (Polity Press, 1996).

<sup>7</sup> Onora O'Neill, *Perverting Trust*, The Clare Hall Ashby Lecture 2009.

<sup>8</sup> *Ibidem*.

<sup>9</sup> UN Secretary-General Ban Ki-moon on UN Charter Day, 26 June 2015.

### 3. International and European law as a source of trust

The concept of trust has been studied in sociology and (political) philosophy,<sup>10</sup> but it has never really become part of the discourse of legal researchers. And yet, for the abovementioned reasons it is timely to examine how law as one of the social institutions can contribute to the construction and cultivation of trust, trusting relations, and trustworthiness - all the more so in a vast and hyper-connected world.

Both international and European law take effect at multiple levels: at the international or global, the European, and the domestic and/or local level. This section uses the sphere of operation (for example "the European legal level") as a structuring principle, rather than the source (for example "EU law") - even if these two will often coincide.

#### *The International Level*

Relations among states are often studied and interpreted through a Hobbesian lens of fear and distrust.<sup>11</sup> In this Hobbesian reading, egoistic state conduct accounts for order at the international level. Coexistence and cooperation are explained by the rules of a zero-sum game.<sup>12</sup> This take on international relations does not take into account trust as a factor. In a more positive stand, however, international law is one of the structural arrangements that facilitates relations among states and guides conduct of a variety of actors, state and non-state, and by contributing predictability, stability, and a discourse of justice, cultivates trust and cooperation.

In today's hyper-connected world, international law may be an important means of communication and collaboration facilitating a move beyond fear. As a shared language, international law may provide traditional (positivist) legal values, such as, predictability, normative coherence and consistency, transparency, and contestability in relations among states and, as such, contribute to the development of more trusting - peaceful - relations.

With human rights - recognised to be possessed by all human beings - now part and parcel of international law and European law, there is a shared language to create shared expectations of human dignity and human security. No longer is international law merely based on the principles of state sovereignty and sovereign equality, the inherent dignity of the human person has become an equally important paradigm.<sup>13</sup> The development of international human rights law has reshaped the international legal order and transformed the way global problems are approached (by law). Human rights are increasingly woven into the fabric of the international law of trade, environment protection, natural resources, international crimes,

<sup>10</sup> Giddens, Beck, Fukuyama, O'Neill, Sztompka, Appia, Sen, Kymlicka, Misztal and others.

<sup>11</sup> The preventive self-defence (doctrine) being one way to deal with that fear. Cf. Tuck and Sands.

<sup>12</sup> Realist or Hobbesian tradition.

<sup>13</sup> See eg Prosecutor v. Dusko Tadic a/k/a "Dule" (Decision on the Defense Motion for the Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the former Yugoslavia, 2 October 1995 (Tadic Interlocutory Appeal), in para. 97: 'A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.' Cf. eg Antonio Cassese, A Plea for a Global Community Grounded in a Core of Human Rights, in *Realizing Utopia: The Future of International Law* (2012).

and the use of force, to mention just a few. As such, human rights considered as standards may provide international law with normative coherence and a basis for accountability. International law then may serve as the foundation of a global social order and contribute to trust-building and trusting relations among the plurality of states and other global actors. Trust is after all not only produced and sustained by procedural values, but also by substantive values such as human dignity and justice.

At the same time, fragmentation, deformalisation, and privatisation in law-making may affect the aforementioned legal values that carry the authority of international law. The transformation of the State from *the* international law-maker into one among many entities which regulate (their own) behaviour, raises various questions related to the Rule of Law and specific legal values mentioned above. For example, how to protect international public order, public interest values, and global public goods by law while a tendency towards (transnational) private or self-regulation is visible? Moreover, the law of treaties – including the rule of *pacta sunt servanda*, and the obligation to register and publish treaties to enhance the cognizability of international law – may strengthen the Rule of Law at the international level. This branch of international law is flexibilized but also challenged by the rapidly growing plurality of lawmakers and law-making practices.<sup>14</sup>

Both regionalisation and fragmentation are in fact scrutinized in scholarly discussions for posing a challenge to normative coherence, hierarchy, and validity in international law. Koskenniemi has termed related concerns as ‘postmodern anxieties’ and pointed to a systemic bias of many international lawyers which contributes to the highly technical terms with which they respond in order to uphold the constitutional model.<sup>15</sup> Legal pluralism on the other hand aims to appreciate the legal reality of multiple and competing legal orders, while seeking ways to respect the aforementioned values part of international law.

International law as an instrument to protect the powerful rather than as a means to guide and constrain the powerful is a source of distrust. Upholding the rule of law at the international level, in a legally and politically pluralist world however levels the playing field and is conducive to trust building and trusting relationships. Trustworthy international courts and tribunals are crucial in this respect.

### *The European level*

In Europe, trust is one of the issue at stake today and most likely will be for many years to come. Whether one takes a close look at the debate on Greece’s debt crisis, global migration, the controversial EU-US agreement on the use and transfer of Passenger Name Record (PNR) data, EU measures against climate change or Europe’s 2020 Strategy, in all cases trust is in some way a crucial question. Either between a Member-State and the EU, among Member-States, among EU Institutions, between the EU and non-EU states, or between EU citizens and EU institutions; trust and trust culture may be, and are, brought in in a number of ways. This is visible for example in the extent to which human dignity, human security, sustainable

<sup>14</sup> The general international law principle of good faith –within and beyond the law of treaties – also grounds the element of trust. Cf Project Onur Guven.

<sup>15</sup> M Koskenniemi and Paivi Leini, Fragmentation of international law? Postmodern Anxieties, 2002 *LJIL* 553-579.

development, and the Rule of Law are taken as guiding principles for EU external relations (eg in the case of Foreign Investment); as guiding principles for the relation between Member States when it comes to austerity and solidarity; and as guiding principles for the relation between the EU, its members, trade partners and the 'approximating' countries. The trustworthiness of the EU as a global actor depends on the extent to which normative coherence exists between EU internal regulation and EU law of external relations. An EU that promotes human rights, the Rule of Law, and sustainable development internally while ignoring these values in its external relations and policies - hence impacting negatively societies and peoples outside the EU - rapidly loses credibility and authority. How then can the EU be a trustworthy foreign policy actor? Questions of the implementation of the principle of coherence urge themselves upon us.<sup>16</sup>

In EU law-making, transparency, supervision and accountability are crucial to sustaining the necessary climate of trust. To foster the European citizens' trust in EU democratic decision-making, the Lisbon treaty aimed to reinforce the rights of the European Parliament (democratic legitimacy at the European level) as well as the rights of national parliaments (democratic legitimacy at the national level).<sup>17</sup> The Treaty of Lisbon however has not solved the EU's legitimacy crisis. The legitimacy of European integration continues to be an issue of controversy. Hence, in addition to the many technical-legal questions raised by European unification and harmonisation initiatives in European law, political-normative questions regarding the legitimacy of the European Union have to be addressed. Also in inter-institutional relations trust is an old concern. Arguably, the practice of inter-institutional agreements contributes to trustbuilding in this context.

Another aspect of paramount importance is the reconciliation of private and public interests in all areas of EU legislation. Competition and market rationalisation are among the (public interest) objectives that the EU is set to serve besides other public interests and public interest values, such as, human dignity and human security, social inclusion, sustainable development, and Rule of Law values to mention just a few. Ultimately, European integration is aimed at furthering a peaceful and prosperous Europe. Hence, pursuant to the auxiliary objective of establishing an area of freedom, security and justice the EU legislator actively develops regulatory initiatives in the fields of international private law and judicial cooperation that touch upon civil (law) and, most notably, commercial matters. Incidentally, the Europeanisation of (international) private law appears to proceed from the assumption that the objectives of unification and harmonisation of law in the Union are recognized by EU citizens and corporations, and that this enhances the legitimacy of the European integration process.

In fact, the EU legal order is based on trust entirely. In the Opinion on the accession of the EU to the ECHR, the Court of Justice of the EU, for example, confirmed that the EU legal order and the union of European peoples are based on the principle of mutual trust. Here, trust

<sup>16</sup> See eg the extension of the scope of impact assessment on sustainable development from Europe to the Earth. Following Art. 3 of the TEU.

<sup>17</sup> Cf Research by Davor Jancic, "Representative Democracy across Levels: National Parliaments and EU Constitutionalism", *Croatian Yearbook of European Law and Policy*, Vol. 8, 2012, pp. 227-265; Davor Jancic, "Globalizing Representative Democracy: The Emergence of Multilayered International Parliamentarism", *Hastings International and Comparative Law Review*, Vol. 38, No. 2, 2015, pp. 197-242.

among Member States rests on 'the fundamental premiss (*sic.*) that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. Th[is] premiss (*sic.*) implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.'<sup>18</sup> Trust in each other's judicial systems carries the development of EU private international law.<sup>19</sup> But what does this really mean? What is the scope of the principle, what are its limits? How do the principles of mutual trust and mutual recognition of judgements relate to other EU law principles and goals, such as access to justice? How do these principles relate to the public policy doctrine? To what extent is mutual trust a 'myth'?<sup>20</sup> If it is not, what does it take to maintain mutual trust? These questions are highly relevant to the EU and its Member-States as well as to EU citizens and businesses alike.

### *The domestic level*

Trust is equally important at the domestic level, between government and citizens as well as among citizens; it is partially (and increasingly) informed by international and European law. The relationship between citizens, on the one hand, and the law and institutions of the EU, on the other, is often direct. In contrast, international law takes effect largely at the domestic level, either through the judiciary, legislature, or executive. In the decentralised system of international law it is courts, parliaments and – increasingly - local governments that make international law work. In the area of law-making, the interaction between the international, European and domestic levels and between international, European and domestic law sources is highly complex. When it comes to international and European law as a source of trust at the domestic level, concerns such as the protection of human rights and the environment (notably climate change) or the governance of global migration readily come to mind. Cities form so-called hot-spots where temperatures rise faster than elsewhere due to climate change, and face various water related challenges. Hence, various forms of international cooperation started in which cities across the globe took the lead where states could not yet agree on further steps in the fight against climate change. Human rights law as a source of trust for citizens in their relations with the police and the public prosecutor, for parents who seek help for a radicalising child, and for employees with an immigration background who have to overcome discrimination at the labour market. How may international and European law moreover help to further trustworthiness in society? How may international and European law support trustworthy conduct?

In an increasingly globalised and interconnected world, one societal concern is the challenge to social cohesion stemming from global migration. Diversity or plurality may well be considered one of the characteristic conditions of contemporary societies. Hyper-diversity is

<sup>18</sup> CJEU, Opinion 2/13 (Full Court), 18 December 2014, para. 168. See also, European Commission's Press Release "Building Trust in Justice Systems in Europe: 'Assises de la Justice' Forum to Shape the Future of EU Justice Policy", 21 November 2013. See also, ECtHR, Judgment of 25 February 2014, application no 17502/07, *Avotins v Latvia*, para 49: judicial cooperation within the EU grounds '*sur le principe de "confiance réciproque dans la justice" au sein de l'Union.*'

<sup>19</sup> Cf. Research by Vesna Lazic.

<sup>20</sup> Matthias Weller, Mutual trust: in search of the future of European Union private international law, 11 (1) *Journal of Private International Law* 67 (2015).



a relevant factor in a society's building trust, since familiarity is (according to eg Giddens and Sztompka) crucial to the cultivation of trust. Hyper-diversity, as used for example by Timothy Garton Ash, Edward Mortimer and Kerem Öktem, refers to *diversity* of such a scale that it causes traditional frameworks of reference and normative yardsticks to be challenged. On the other hand, global cities, which are generally characterised by their hyper-diversity in terms of language and ethnic, religious, and cultural background, often seem rather successful in generating an urban space where strangers live together with a minimum of shared ethos.<sup>21</sup> Such an urban context bears out the importance of a basic sense of trust. Trust is, after all, about connecting to others who are different. An important set of questions concerns how international and European law may operate within these global cities such as to be a source of trust and respect and to support social inclusion and cohesion, tolerance, and non-discrimination. Questions on how city governments implement international and European law at the local level and, in turn, how city governments become active at the global stage and relate to International Organisations and international law directly in their attempt to confront global challenges.

#### **4. Three basic conditions for law to be a source of trust**

For international and European law to be a source of trust – at the international, European, and domestic level - at least three conditions have to be met. First, the law has to be grounded in the Rule of Law idea and to respect, protect, and promote human rights. Second, the law has to protect the public interest and prevent rules and norms from being an instrument for the promotion of the (private) interests of just a few. Third, the law must be effectuated through adequate mechanisms for dispute settlement and adjudication, otherwise it cannot be a source of trust. This holds for settlement of disputes among the members of a society as well as between the members of a society and the governing institutions. Against this backdrop 'law as a source of trust' yields a viable framework for legal research,<sup>22</sup> which can be conceptualised and operationalised further. The three aforementioned conditions are briefly elaborated immediately below. In Section 5 they are translated at a more concrete level into three respective research strands of the Asser Strategic Research Agenda.

First, for (international and European) law to be a source of trust it has to respect, protect, and promote human dignity and human security in the context of a variety of serious global challenges, from terrorism and (internal) armed conflicts to climate change or hyper-diversity in our cities. Upholding the Rule of Law and a generally high level of human rights protection contributes to the development of trust (and arguably *vice versa*). As such, toleration of differences may emerge (pluralism). Thus, the first strand of the Strategic Research Agenda uses human rights law as its normative framework.

Second, one function generally assigned to law is to guide subjects, whether states or citizens, to act in the interests of others and the public interest or the common good, or at least, to constrain them into respecting and/or taking into account those interests. It is law's business to balance public and private interests in a coherent and just manner. In general, normative

<sup>21</sup> Cf. Michael Ignatieff,

<sup>22</sup> It is of course a notion that is conducive to multi- or inter-disciplinary research.

coherence is a structural factor in the creation of trust. But here, focus is on a specific aspect. The second strand of the Strategic Research Agenda is concerned with what the law aims to achieve: does law reflect public interest, and if so in what way? Does it fulfil its role as protector of public interests (such as, fostering solidarity, protecting personal liberty, ensuring a healthy ecological environment, stimulating a sustainable economy, employment and public health considerations) in relation to the private or specific interests (such as, interests of individual Tycoons, (Media) corporations or Sports organisations)? Does it fulfil this role in a consistent and coherent way? International and European law's safeguarding of public interests in different fields is the object of critical analysis in this second research strand.

Third and finally, a factor that is notoriously corrosive to trust in any society is arbitrariness and irresponsibility of office-holders and institutions. After all, the counterpart of trust is trustworthiness; here, accountability of both public authority and private power is paramount.<sup>23</sup> This can be linked to a more general requirement, that is the effectuation through enforcement of the law. For law to provide order, to protect human dignity and security, and to promote the common good or public interest, it needs to be given effect; if necessary – in a situation of conflict or non-compliance – through mechanisms for enforcement of the law. The third strand identified in the Strategic Research Agenda accordingly focuses specifically on mechanisms for dispute settlement and adjudication in any field, whether in international crimes, inter-state disputes, transnational civil disputes, or anti-competitive practices.

## **5. The Asser Strategic Research Agenda: an architrave and three research strands**

In the ASRA, the Asser Institute's research is organised – along the lines of the three *conditions* set out in the previous section - in three research strands and an overarching architrave. These three strands are separate but interlinked on many counts.

Some research will contribute to the more general conceptual questions about trust, trustworthiness, and trust-building effects of international and European law; or it will be on the conceptualization of international and European law as catering to the development 'from an order of fear to an order of respect'.<sup>24</sup> This is part of the development of the overarching, more abstract and loosely defined normative framework.<sup>25</sup>

<sup>23</sup> Piotr Sztompka, pp. 122-125.

<sup>24</sup> Anthony 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, Janne 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. D Joyce & A Mills, Fear and International Law, *Cambridge Review of International Affairs* 19:2 (2006), pp. 309-310.

<sup>25</sup> One may think of engaging with authors such as Jürgen Habermas, Niklas Luhmann, Paul Ricoeur, Piotr Sztompka, Gunther Teubner, Amartya Sen, Onora O'Neill, etc.

Most research will take place within the three strands that are structured along the lines of the three conditions identified above.

**A. Human Dignity and Human Security in International and European Law.**

**B. Advancing Public Interests in International and European Law.**

**C. Adequate Dispute Settlement and Adjudication in International and European Law.**

Each of the three research strands leave room for different types of research output. Each strand aims to conduct high quality independent research –both fundamental research and policy-oriented research -, in order to contribute to the academic and policy debate in the respective fields, and to deliver research-based, cutting-edge (professional) education and knowledge dissemination events.

**(A) Human Dignity and Human Security in International and European Law**

If law cannot provide a sense of human dignity and security, it sells short of cultivating trust.

‘Human dignity’ constitutes the basis for all fundamental rights in international, European, and domestic law. Respect for, and protection of, human rights is a fundamental function of the law at all levels of society: local, national, European, and international. With human rights - recognised to be possessed by all human beings - now part and parcel of international law and European law, there is a shared language to create shared expectations of human dignity.<sup>26</sup> No longer is international law merely based on the principles of state sovereignty and sovereign equality. The inherent dignity of the human person has become an equally important paradigm.<sup>27</sup>

The other element, ‘human security’, ‘aims at ensuring the survival, livelihood and dignity of people in response to current and emerging threats – threats that are widespread and cross cutting.’<sup>28</sup> It ‘underscores the universality and interdependence of a set of freedoms that are fundamental to human life: freedom from fear, freedom from want and freedom to live in dignity. As a result, human security acknowledges the interlinkages between security, development and human rights and considers these to be the building blocks of human and, therefore, national security.’<sup>29</sup> With the concept of ‘human security’, the orthodox approach

<sup>26</sup> John Tasioulas, “Human Dignity and the Foundations of Human Rights,” in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: OUP, 2013).

<sup>27</sup> See eg Prosecutor v. Dusko Tadic a/k/a "Dule" (Decision on the Defense Motion for the Interlocutory Appeal on Jurisdiction), International Criminal Tribunal for the former Yugoslavia, 2 October 1995 (Tadic Interlocutory Appeal), in para. 97, *supra* note 13; Cf. eg Antonio Cassese, A Plea for a Global Community Grounded in a Core of Human Rights, in *Realizing Utopia: The Future of International Law* (2012).

<sup>28</sup> United Nations Trust Fund for Human Security, ‘Human Security For All’, <http://www.un.org/humansecurity/about-human-security/human-security-all>.

<sup>29</sup> *Ibid.*

of security as national security is challenged and confronted with human rights-based delimitation: national security protection is not an automatic safeguard against human rights violations. Indeed, protection of human security in our time is seen to potentially reduce the protection of human dignity.

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, environment 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.

Arguably, in the aftermath of 9/11 the quest for global and national security in combatting terrorism has put a strain on the enjoyment of human rights. In response, the concept of 'human security', which emerged as early as 1994 in the UNDP report,<sup>30</sup> took root in the context of anti-terrorism with the aim of keeping human rights values in sight. The question how to reconcile the combat of terrorism with full respect and promotion of international and European (human rights) law remains highly topical up to this day.<sup>31</sup>

In the field of international criminal law one may raise the question as to how domestic courts contribute to the advancement of human security in connection with the ICC and its work. In this respect it has been argued that, in line with the principle of complementarity, domestic courts are better suited for the provision of human security.

At the international level more generally, one may have to confront the *limits* of a human rights approach. Question in this context - relevant to both private and public international law - could relate to human rights in the face of legal pluralism: are there limits to the transformative influence of international and European human rights law - with the focus on individual dignity - on both private and public international law?<sup>32</sup>

At the European level, issues of Rule of Law, human rights, and human security likewise have been used as a guiding principle in relation to both EU internal law and policy formation and EU external relations law and policy development.<sup>33</sup> The questions and points of tension this raises have come to the fore once again in the context of the migration issues, also in relation to human rights protection, currently at stake in Europe and globally.

As to the domestic level, this research programme puts special focus on the sub-national level of the city: for the so-called global cities both international and European human rights law currently function as a point of reference in their attempts to advance rights of the human individual. One question is how (international and European) human rights law may contribute to the mutual recognition of the plural identities that characterize the urban dweller in the

<sup>30</sup> In 2005, the report *IN LARGER FREEDOM: Towards Development, Security and Human Rights for All*, added an environmental dimension with the so-called freedom from hazardous impact.

<sup>31</sup> See much of the work of Christophe Paulussen and Jessica Dorsey.

<sup>32</sup> See eg Horatia Muir Watt;

<sup>33</sup> Cf A Matta and T Takacs (Eds), *Human Security as a tool for comprehensive approach for human rights and security linkages in EU Foreign Policy*, CLEER Working Papers 2014/5.

contemporary hyper-diverse world.<sup>34</sup> In turn, cities are on the rise as actors at the international level. It is a task of international legal scholarship also to examine how the rise of the global city impacts the international legal order.<sup>35</sup>

This research strand may deal moreover with the question as to whether, and if so how, human rights law may stimulate trust in a society – whether urban, national, European, and/or international - wherein values and attitudes of legal subjects are so diverse that it is hard to find common ground for creating a general normative regime? A possible follow-up question would be: how can the Rule of Law act as a guiding principle for living in (hyper-)diverse societies?

## **(B) Advancing Public Interests in International and European Law**

The dual impact of globalisation and fragmentation has complicated the use of legislation and regulation, both at the European and International level, to advance public interests in at least two ways.

Firstly, globalisation has spurred a widening and deepening of the interconnectedness and interdependence between societies, markets and industries. Various societal challenges and opportunities are equally common and interlinked and can no longer be considered as solely within State control. As a consequence, new mechanisms of global governance have emerged in the form of regulatory hybrids that overcome the traditional public/private divide. Increasingly, (transnational) private regulatory regimes have taken on authoritative roles and functions in e.g. the governance of sports, financial markets, the Internet, food, health, and environmental protection. This transfer of regulatory power to private norm-producing centers raises fundamental questions about lack of accountability, participation and representation, rule of law protection, etc.

Secondly, and paradoxically, the trend of fragmentation of international and European law into numerous functionally differentiated spheres - each with their own ethos, their specialist rationalities and expert communities - results in conflicts between individual norms, institutional practices and jurisprudence, and possibly even the loss of an overall perspective on the law. Such conflicts appear particularly accentuated when considering the pursuit of public interests, which lie at the crossroads of diverse spheres of legal practice. What does this mean for a coherent management of different public interests (values) and their alignment with interests of multinationals and/or private citizens and interests groups (in as far as the public and the private interest do not overlap)?

<sup>34</sup> Cf Ernst Hirsch Ballin, *Citizens' rights and the right to be a citizen* (Series Developments in International Law Vol. 66), (Leiden/Boston: Brill Nijhoff 2014).

<sup>35</sup> Cf Janne Nijman, Renaissance of the City as Global Actor. The role of foreign policy and international law practices in the construction of cities as global actors, in *The Transformation of Foreign Policy: Drawing and Managing Boundaries*, ed. by Andreas Fahrmeir, Gunther Hellmann, and Miloš Vec (OUP, 2016).

Research within this second research strand, *Advancing Public Interests in International and European law*, aims to critically examine how international and European law furthers the protection of public interests in different areas, ranging from the governance of sports and media in Europe to natural resources, trade, and environment protection at the international level. This generates many questions that bring about fundamental policy implications.

Research within this strand will concentrate on a large set of questions centred around the potential conflict between different public interests and private interests. How are such value conflicts reconciled in various areas of international and EU law and across different sectors? Is the level of fragmentation too significant to permit the definition of common principles and techniques? Possible normative frameworks for addressing the safeguard of public interest are, for example, the principle of proportionality and variants of the constitutional approach.<sup>36</sup>

These questions can be examined through the lens of various concrete, topical and practically important cases studies.

In the field of international and European economic law, research could look into the different mechanisms used for reconciling private (economic) interests and public (economic and non-economic) interests; the latter including the protection of the environment, public health and safety, privacy and fundamental rights more generally, and media pluralism and diversity. A comparative methodology transcending individual strands of economic law (e.g. international trade and investment law, EU free movement law, and EU competition law) and fields of application (often with a high degree of sector specificity) facilitates mutual learning and cross-fertilization between the legal tests that have been developed in these specialised areas of decision-making: what are the shared commonalities, advantages and disadvantages of the methods? Do they allow for a similar or a different degree of considering public interests? To what extent are they grounded on the specificities of a particular sector? And how can the systemic coherence in advancing public interests across the different fields of economic law and across different sectors be increased? Etc.

Otherwise, when it comes to the EU being a trustworthy global environmental leader, pertinent research could be done on the extent to which EU Foreign Investment Law complies with, or deviates from, the requirements set by the legal principle of sustainable development as adopted in article 3 TEU. The same question could be posed with regard to the precautionary principle in environmental law-making.

### **(C) Adequate Dispute Settlement and Adjudication in International and European Law**

To maintain its legal fabric, a legal order develops various mechanisms for the settlement of differences between the legal actors. While the number and variety of legal actors as well as of the legal issue areas is increasing, both international and European law have developed a number of mechanisms aimed at effectuation of the law. These range from classic judicial procedures between legal equals (epitomized by adjudication of inter-state disputes before the ICJ) to arbitration procedures between states and companies, to procedures aimed at

<sup>36</sup> Cf research Davor Jancic, Tamara Takacs.

dealing with transnational civil and commercial disputes, to procedures aimed at protecting the rights of individuals vis-à-vis states or rather at holding individuals to account in the framework of international criminal law. In this text, this is all brought under the heading of 'dispute settlement and adjudication'.

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,<sup>37</sup> doping and sports more generally,<sup>38</sup> cross-border civil disputes,<sup>39</sup> international crimes,<sup>40</sup> and classic inter-state relations.<sup>41</sup>

A society's capacity to settle and adjudicate adequately its differences by judicial mechanisms which operate in a fair, accessible, predictable manner enhances the accountability of actors - both private and public actors, and both persons and institutions. Ultimately it enhances the stability of the legal order. Classic virtues of the law such as fairness, impartiality, predictability, and accountability, and the actual authoritative *resolution* of differences through dispute settlement mechanisms are central to the maintenance of trust in society.

For example, in the context of EU-US negotiations on a Transnational Trade and Investment Partnership (TTIP), EU Commissioner Cecilia Malmström's proposal of an Investment Court System aims to address 'a fundamental and widespread lack of trust by the public in [the old ISDS model's] fairness and impartiality'. To restore trust, Malmström argues, the new dispute settlement system should have 'the same elements that lead citizens to trust their domestic courts', and should be 'accountable, transparent and subject to democratic principles.'<sup>42</sup>

Or, in the words of a former President of the International Court of Justice, for the Court to play a significant role in the promotion of the International Rule of Law it is crucial 'that Member States will continue to place their trust in the Court, not only with the submission of new disputes, but also through the acceptance of the Court's jurisdiction'.<sup>43</sup> The same is true *mutatis mutandis* for the International Criminal Court. The lack of trust in the ICC, most notably among African leaders, affects its role in delivering international criminal justice and

<sup>37</sup> Cf Luca Pantaleo's ongoing research; also, eg, Vesna Lazic, *Revising the 1976 UNCITRAL Arbitration Rules – Towards a Greater Degree of Transparency in Investment Arbitration?*, *PIL Yearbook Law Faculty of the University of Montenegro: Private International Law and Protection of Foreign Investors* (Montenegro: Podgorica 2008), 29-49.

<sup>38</sup> Cf Marco van der Harst, *The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law*. In: Paulussen CH et al. *Fundamental rights in International and European Law - Public and Private Law Perspectives*, (The Hague: T.M.C. Asser Press, forthcoming). Also, eg, Antoine Duval's work on the CAS.

<sup>39</sup> Cf Steven Stuij's PhD project; also, eg, Vesna Lazic, *Procedural Justice for Weaker Parties in Cross-border Litigation under the EU Regulatory Scheme*, 10 (4) *Utrecht Law Review* (2014), 100-117.

<sup>40</sup> Cf Research by Christophe Paulussen.

<sup>41</sup> Cf research by Olivier Ribbelink.

<sup>42</sup> Cecilia Malmström, BLOG POST 'Proposing an Investment Court System', 16 September 2015. While the old model was sometimes characterised as 'private justice' the new Court system should be a 'public justice system'.

<sup>43</sup> H.E. Judge Hisashi Owada, President of the ICJ, in his address to the United Nations General Assembly, ICJ Press release No. 2010/35, 29 October 2010.

upholding the rule of law. The counterpart of trust being placed in these judicial institutions is their trustworthiness.

In the context of dispute settlement and adjudication, one set of questions thus concerns the trustworthiness of dispute settlement mechanisms and judicial institutions. What does it mean to evaluate these mechanisms and institutions, their procedures and decisions, in terms of trust and mistrust? What does trustworthiness – the counterpart of trust – mean in relation to dispute settlement mechanisms, such as arbitration by the PCA or CAS, and judicial institutions, such as the ICJ or the ICC?

A second set of questions may be concerned with the duty or ‘responsibility to enforce’<sup>44</sup> the law. By enforcing the law, courts, tribunals and other dispute settlement mechanisms provide security, stability and predictability all values conducive to trust. They can solely perform this function adequately if they, in turn, are perceived as trustworthy in enforcing the law.

## **6. Implementation**

To implement the ASRA, the Institute aims to initiate, develop, and conduct high-quality independent (fundamental) research and, based on that, (critical-constructive) policy-oriented research; to offer a forum for exchange between legal scholars and practitioners; and by initiating and organising academic and expert meetings, professional education courses, and public events.

It aims to develop an Asser PhD Programme, with PhD research conducted within the three research strands. The Institute will seek external funding for this Programme.

It aims to strengthen its Visiting Researchers Programme.

At an institutional level, ASRA aims to provide a framework for the development of research projects. It means to stimulate a dynamic flow of research output in a variety of formats. Such variety is possible thanks to the Institute’s position at the crossroads of fundamental and policy-oriented research on the one hand and contract- and commissioned research oriented to legal practice on the other. Ideally, it primes a chain of output: on the basis of contract research one writes a blog or policy-oriented paper and once an idea is tested in that way, it may be developed into an academic journal article or book (chapter). This is a two-way process: the fundamental and policy-oriented research in turn will create visibility of the Asser researchers as experts from whom it would be rewarding to commission advise or contract research.

*November 2015, Janne Nijman*

<sup>44</sup> Rod Rastan, Paust.