

ASSER
INSTITUTE



Centre for International & European Law

Programme

Second Annual T.M.C. Asser Lecture

Accountable Institutions, Trustworthy Cultures

by Onora O'Neill

The Hague, 8 December 2016



Den Haag

We are grateful for the support of the Municipality of The Hague

Second Annual T.M.C. Asser Lecture

on the development of international law

PROGRAMME

- 15.30** **Registration with coffee and tea**
- 16.00** **Opening Address**
Prof. Ernst Hirsch Ballin, President T.M.C. Asser Instituut
- 16.15** **T.M.C. Asser Lecture**
Baroness Onora O'Neill, Emeritus Professor of Philosophy
at University of Cambridge/House of Lords, UK
- Introduced by Prof. Janne Nijman, Academic Director of
the T.M.C. Asser Instituut
- 17.15** **Q&A**
- 17.30** **Reception**

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 (1838 –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.

Speaker: Onora O'Neill



Biography

Onora O'Neill combines writing on political philosophy and ethics with a range of public activities. She comes from Northern Ireland and has worked mainly in Britain and the US. She was Principal of Newnham College, Cambridge from 1992-2006 and Hon Professor of Philosophy in the University of Cambridge. She was President of the British Academy from 2005-9, chaired the Nuffield Foundation from 1998-2010, and has been a crossbench member of the House of Lords since 2000 (Baroness O'Neill of Bengarve).

Accountable Institutions, Trustworthy Cultures

Across the last fifty years there have been huge efforts to construct more accountable institutions at every level from international organisations to state bureaucracies, from giant corporations and NGOs to small businesses and local charities. A principal instrument in seeking greater accountability has been an extension of law and regulation: more enforceable rules constraining more institutions and their office holders in more of their activities. Yet accountability by regulation has often disappointed. Onora O'Neill shall argue that the principal problem is not that rules do not matter: they are evidently needed for the rule of law, and hence also for the protection of human rights, for democracy, and for commercial life.

However rules are always and unavoidably incomplete and indeterminate. Their use is always a matter of judgement, and it is an illusion to imagine the rules can go 'all the way down'. Yet contemporary regulation often appears to ignore this well established point. Small wonder that those working in the institutions are so often reduced either to putting excessive efforts into mere compliance—or to cynicism and gaming the system. A more adequate approach to institutional life would recognise the importance of institutional cultures that acknowledge the importance of institutional life being guided by purposes, standards and cultures that require and foster the exercise judgement in the use of rules.

The Annual T.M.C. Asser Lecture on the development of international law

A mission for our time

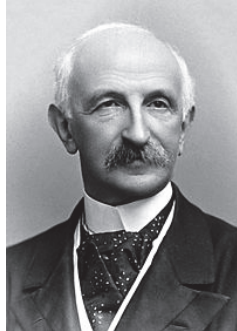


Photo: Tobias Michael Carel Asser

Introduction

The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. It is the T.M.C. Asser Instituut's flagship lecture and its date (2 December) commemorates the foundation of the Institute in December 1965.

Mission

Tobias Asser was a man with a vision. A man who kept his finger on the pulse of his time, and who managed to shape the legal developments during his days.¹ In his Inaugural Address upon the acceptance of his professorship at the University of Amsterdam in 1862, Asser explained that it was his 'vocation' to reflect on commercial law and its 'import', while 'taking into consideration the condition of society in [his] century'.² What we learn from his lecture extends beyond the field

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

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

of commercial law; it shows Asser's view of the law more generally: 'law serves primarily to cultivate trust'.³

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

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

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

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

In spite of well-known complications and dark sides,⁹ in this context the Rule of Law and the principles of human rights are paramount. These may provide direction in our considerations about trust and respect in relation to challenges brought by, for example, globalisation, urbanisation, (global) migration, the

³ *Ibid.*, p. 22.

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

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

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

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

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

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

atomisation of society, climate change, environmental degradation, the complexity of the traditional North-South divide, the dangers of a renewed international arms race, and the dilemmas of new global actors such as the EU.

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

Background

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

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

With the economic policies of the late 19th century the European empires spurred the process of modern globalisation in the industrial era. Asser had a keen interest in economics and as the head of a (commercial) law practice for most of his life,¹⁴ he is likely to have been especially sensitive to the process. In his view, transnational trade and commerce were crucial for societies to thrive and develop peacefully. In that sense, his perspective on free trade and commerce was utilitarian – in the service of 'public welfare'.¹⁵ Hence, his stance was not uncritical; transnational trade and commerce facilitated by law and legal

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

¹¹ Eyffinger, p. 67.

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

¹³ Eyffinger, p. 79.

¹⁴ Among his clients, though, were the heirs of King Leopold in the Congo heritage.

¹⁵ Hirsch Ballin, p. 19.

institutions were to serve peace and justice, but not to exploit or violate 'the inalienable rights of a free people'.¹⁶

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

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

While Asser's vision of law and legal institutions was all about the ideals of peace, prosperity and justice, he was concrete and pragmatic when aiming to shape developments in private and public international law.

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

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

¹⁶ Ibid, p. 33.

¹⁷ Eyffinger, p. 13.

¹⁸ Hirsch Ballin, p. 13.

'wise distribution' of his wealth, the Peace Palace was built and The Hague was thus granted its role of *City of Peace and Justice*.

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

Tobias Asser's legacy is almost too vast for one man. No wonder his role was recognised by the Nobel Prize Committee in 1911. The Committee portrayed Asser as 'the Hugo Grotius of his day'.¹⁹ For sure, they both aimed at the strengthening of the Rule of Law in a global society.²⁰

In contemporary international legal scholarship, Professor T.M.C. Asser was one of the international lawyers which Martti Koskenniemi has famously called the 'Men of 1873': twenty to thirty European men who were actively engaged in the development of international law and who, thanks to among others Asser and his dear friend Rolin, established the *Institut de Droit International* in 1873.²¹ They were interested in 'extending the mores of an *esprit d'internationalité* within and beyond Europe. ... [they were the] "founders" of the modern international law profession.'²²

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

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

'For Asser, for instance, the tasks of the *jurisconsulte* in the codification of private international law followed "from the necessity to subordinate interest to justice – in preparation of general rules for the acceptance of governments to be used in their external relations".'²⁵

¹⁹ See for the Nobel Peace Prize 1911 speech:

http://www.nobelprize.org/nobel_prizes/peace/laureates/1911/press.html

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

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

²² *Ibid.*, p.92.

²³ Koskenniemi, pp. 93-94.

²⁴ *Ibid.*, p. 57.

²⁵ *Ibid.*, pp. 57-58.

Building on Tobias Asser's vision and mission

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

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

The rich and somewhat complex heritage of internationalism does not leave room for naïve ideas about international law as an instrument only for the good of liberal-humanitarian reform; if '[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology... [and i]f there is no perspective-independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?'²⁹

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

Janne Nijman

²⁶ Hirsch Ballin, p. 12 and 2.

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

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

²⁹ Koskeniemi, p. 513.

³⁰ *Ibid*, p. 516.

**International & European law
as a Source of Trust in a Hyper-connected World**

Contours of the Asser Strategic Research Agenda

2016-2020

Introduction

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

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

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

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

- A facilitator for all Dutch Law Schools that wish to collaborate with Asser in research networks and projects and/or in knowledge disseminating activities.
- A vanguard institute for the University of Amsterdam (UvA) in The Hague (for the UvA Law School in general and the Amsterdam Center for International Law (ACIL) in particular).

Mission

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

Contours of the Asser Strategic Research Agenda 2016-2020

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

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

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

- Human Dignity and Human Security in International and European Law
- Advancing Public Interests in International and European Law
- Adequate Dispute Settlement and Adjudication in International and European Law

Human Dignity and Human Security in International and European Law

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

Advancing Public Interests in International and European law

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

Adequate Dispute Settlement and Adjudication in International and European Law

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

Looking ahead

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

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

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

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