

A THIRD EMERGENT
MIGRANT SUBJECT
UNRECOGNIZED IN LAW:
REFUGEES FROM 'DEVELOPMENT'

SASKIA SASSEN

Third Annual
T.M.C. Asser Lecture



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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

The annual T.M.C. Asser Lecture is a platform for a critical, multidisciplinary and constructive reflection on the role of law in the (potentially radically) changing global society of the 21st century. The lecture series was established in 2015, on the 50th anniversary of T.M.C. Asser Instituut. It honours the Dutch jurist and Nobel Peace Prize recipient Tobias Asser (1898-1913), who worked on both public and private international law. Asser was one of the jurists that laid the groundwork for today's international legal and political architecture.

The lecture is a high-level event within the context of our research programme *'International & European law as a source of trust in a hyper-connected world'*. In 2016, Onora O'Neill, professor emeritus of philosophy at University of Cambridge and crossbench member of the British House of Lords, spoke about *'Accountable Institutions, Trustworthy Cultures'* and how rules are not enough. Ethics and culture of institutions, international or otherwise, are important for the trustworthiness of these institutions.¹ This is an important argument that still resonates in these days of institutional distrust.

On November 30th 2017, the renowned scholar Saskia Sassen delivered the third T.M.C. Asser Lecture at the Peace Palace's Academy hall in The Hague. Saskia Sassen is an extraordinary scholar and a true public intellectual – frequently appearing in international newspapers and in many debate centres around the world. Professor Sassen currently serves as the Robert S. Lynd Professor of Sociology at Columbia University and as a Member of Columbia's Committee on Global Thought.

For her T.M.C. Asser Lecture, professor Sassen used the tantalising title: *'A third emergent migration subject unrecognized in law: refugees from "development"'*. She delivered a highly energetic lecture

¹ Onora O'Neill, *Accountable Institutions, Trustworthy Cultures*, the Second Annual T.M.C. Asser Lecture (The Hague: Asser Press, 2017).

and treated the audience to a rich, databased talk that dealt with one of the most complex challenges to local, national, and international politics today: the relations between globalisation, economic development and global migration.

Sassen took inspiration from Tobias Asser's interest in commerce and trade and his 'internationalism', as she raised the urgent matter of global inequality: the escalating concentration of wealth and advantage in the hands of the few, and the need for new laws to address this sharp inequality. She spoke of the need to discard old laws that fail to address the most powerful economic sectors, which are destroying both land and water across the world.² This struck a chord with the audience in The Hague, and a lively debate followed Sassen's lecture.

At the Asser Institute, we came across Professor Sassen's work in two ways. Firstly, through both Sassen's and our own work on global cities and international law. Thanks to a generous research grant from the Gieskes Strijbis Foundation, our research programme comprises the project '*The Global City: Challenges, Trust and the Role of Law*'. This project consists of four individual PhD studies. Two PhD candidates are exploring the seventeenth-century intellectual history of Amsterdam (arguably, one of the 17th century's global cities) while two other PhD candidates are focussing on the role of international law (human rights law, in particular) in present day global cities dealing with the urgent (global) social challenges to urban life.

When I personally started writing on global cities and international law some ten years ago, Sassen's seminal book from 1991, *The Global City: New York, London, Tokyo* was the first to refer to.³ Since then, obviously, interest in questions concerning cities and international law has increased. In this rapidly globalising and urbanising world, it is the city as a *local* community that is forced to respond to *global* problems, such as climate change and migration.

² Saskia Sassen, *A third emergent migration subject unrecognized in law: refugees from 'development'*, *infra* p 1.

³ Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press, 1991).

Initially, our research team's interest was triggered by Professor Sassen's work on cities. But by reading her papers, we were, slowly but surely, pulled into her large oeuvre on the changing geography of power and centrality, of which 'the global city' is but one manifestation. Sassen's oeuvre focuses on the implications of economic globalisation and our contemporary political economy, with its deregulation of markets and its privatisation of parts of the public sector. These developments undermine governments in effectively confronting crises, such as the environmental crisis, the increasing inequality and the digitalisation challenges, to name but a few.

In 1996, Sassen published *Losing Control? Sovereignty in an Age of Globalisation*.⁴ These topics are of great interest to the Asser research community, as we currently have a research strand on 'Advancing Public Interests in International and European Law'. Throughout her career, Professor Sassen has touched upon international law. In an article in the *Chicago Journal of International Law* of 2000,⁵ Sassen's interest in international law became explicit as she asked about the implications of economic globalisation for the role and content of international law. She pointed to a decline in the normative power of states and of international law.

In the T.M.C. Asser Lecture of 2017, Sassen called for renewal and for adaptation in response to today's profoundly worrisome developments in the global economy. Sassen's latest book, *Expulsions: Brutality and Complexity in the Global Economy*,⁶ deals with the extreme inequality of our world – and often our cities too. The book shows the economic despair of many people around the globe and the complex systems that produce this inequality and despondency. Sassen's book raises an important question for international lawyers: Is there any role for international law in the prevention of- and protection against expulsions caused by the accelerating destruction of land and water bodies?

⁴ Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalisation* (Columbia University Press, 1996).

⁵ Saskia Sassen, 'The State and Economic Globalization: Any Implications for International Law?', *Chicago Journal of International Law* 2000, 109-116.

⁶ Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press 2014).

FOREWORD

The T.M.C. Asser lecture text in this booklet builds on this profound question and discusses how global migration challenges international law. Sassen argues for an international law that recognises the individual who is migrating as a refugee of economic development, because of his/her ‘loss of habitat’ – and expulsion from dead land and dead water. Sassen warns, for instance, not to consider the Rohingya crisis as a purely religious clash. One should also keep in mind the dynamics of the global economy, the hunt for natural resources and China’s Belt and Road programme. She discusses what causes these losses of habitat and calls for the development of international law to respond to them.

In the best of our newly established lecture’s tradition, Sassen brings a topic to the international legal community, both here in The Hague and beyond, that demands us to reflect and discuss.

I wish you a good read.

JANNE NIJMAN

*Member of the Board and Academic Director
of the T.M.C. Asser Instituut, The Hague*

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SASKIA SASSEN

INTRODUCTION

It is an honor to deliver the Third T.M.C. Asser Lecture at the Peace Palace in The Hague. Professor Tobias Asser (1838-1913) was one of the few jurists who called for the international legal and institutional architecture of the late 19th and early 20th century to address key modes of injustice. One question we might raise is how Professor Asser might interpret some of the major trends in today's world, particularly the increasingly ambiguous character of economic growth in western countries – notably the Americas and Europe – which began to cut down on the social support aspects. It is quite common to think of our current period as part of the 'post-ww2' period in the West, one marked by expanding middle classes and the expectation that every generation would do better. But in my reading of the evidence, the 1980s brought far more ruptures vis-à-vis the post-war decades than is usually recognized. I see this in the rise of privatization, deregulation and 'globalization'. The current mode of globalization should be distinguished from the 'internationalism' that marked Asser's concern to secure a better world for future generations. I ask myself how Professor Asser would respond to what has become a key element in my documenting of our current era: the escalating concentration of wealth and advantage, the need for new laws to address this sharp inequality, and, most probably, the need to discard some old laws that fail to engage the most powerful economic sectors that are destroying land and water bodies across the world.

In what follows I examine two sets of issues, one belonging to an older history whose consequences are still with us, and the other a

new history in the making that makes visible how much injustice marks our current period. The first brings to the fore the power of law and contractual arrangements to destroy economies that fall outside the corporate/modern mold. The second focuses on two major brutal micro-histories where law can barely function.

There is a question hovering over my examination of types of ‘development’ that destroy livelihoods, land, and water. How would Asser’s legal mind, so engaged by the world, respond to the disastrous outcomes of those negative forms of ‘development’ and to the types of measures that register all of this as desirable: GDP per capita growth as inevitably positive. Would Asser have joined the small group of distinguished scholars, which include Joseph Stiglitz and Amartya Sen, who argue that GDP per capita growth is no longer a useful measure to understand if our economies are doing well for a general population – and not only for the rich?

I can imagine Tobias Asser becoming deeply involved in efforts to prevent another round of some of the disastrous development programs the International Monetary Fund (IMF) and the World Bank implemented in the 1980s and 1990s. No matter the good intentions, these programs helped destroy many an emergent Global South economy. Several of the emigration regions I focus on make this destructive inheritance visible. But the law and the rules of the game do not quite recognize that what got measured as growth entailed the destruction of habitats and smallholder economies in the name of ‘development’.

These are issues I have long engaged with and which I will address, among others, in what follows. It is perhaps the case that not enough has been learnt from past destructions presented as ‘development’.¹ Nor do the pertinent laws and rules of the game recognize that those destructions contributed to some of today’s disastrous migration flows – escapes from land or water grabs, poisoned land and water due to mining, related conflicts, and the impact of all of this on climate change.

¹ See, e.g., my argument in Sassen 2014. I began to develop some of these issues many years ago, e.g. in Sassen 2000.

MOST OF THE POOR DO NOT MIGRATE

Mostly overlooked in common analyses of migrations is the fact that poverty is not enough of an explanation. If it were, we should be seeing billions of migrants across the world. But the estimated number is at most 258 million. And the numbers of recognized refugees have grown sharply over the last decade, reaching 25,9 million, a probable undercount; further, refugees mostly want to return to their lands and homes if at all possible. In brief, both a good share of immigrants and most refugees are not driven by the desire to leave home but rather by extreme conditions that push them out in search of mere survival.

In the case of migrants, this suggests that there is a larger context within which migration flows emerge. It is not simply an obsession with getting into a nice 'western' country. What interests me is precisely that larger context which is too often overlooked in the analysis of migrations, and also in that of refugee flows. It remains under-analyzed partly because it is far more difficult to track than the fact of the migrants arriving at our shores. Further, to some extent, we in the West do not problematize this notion of a desire to migrate, as we see much of the rest of the planet as far less desirable a place to live in than our western world. But this may be an incorrect assumption, since the vast majority of the poor do not migrate.

In the first half of this lecture, I discuss some key international development policies that ended up pushing people out of their land.² The central focus here is on Africa and on the key role of major international development organizations, notably the IMF and the World Bank; European and United States economic interests also played key roles in shaping these policies.³ My aim here is not a full review of the good and the bad development programs. It is rather a tracing of how a rapidly growing share of the less developed areas of the world wound up with destroyed habitats due to massive corpo-

² See also for some of the early pioneering work notably Frank 1969; IMF 2006; Oxfam International 1999; Quijano 2000; Robinson 2008.

³ I have written about this in Sassen 2014 and Sassen 2016.

rate mines, plantations, and water grabs. Directly, and indirectly via their corporations, rich western states have often been major players in these destructions of habitats far away from their own lands. To the list of such major players we can now add China.⁴

In the second half of my talk, I examine two additional migration flows that have much to do with such “modernizing” development modes, even though this is not generally recognized. One is the flight of unaccompanied minors from Central America to the U.S. that took off in 2014. The second is a whole new phase of forced evictions of minoritized Muslims in Asia: the over 700 thousand Rohingya expelled from their land by Myanmar’s military – all in a short period of a few months in late 2017. These two cases are not necessarily representative of the larger world of migrations. Rather, they serve as indicators of how bad it *can* get. Local wars and violence against mostly rural people and communities are major factors often mentioned in academic research and in the media. But they are not the only ones. A key, mostly unrecognized explanation of these flows, has to do with current modes of economic development by private corporations, international institutions, and quite a few governments. It is often seen as positive economic growth: what is overlooked typically is the massive and brutal displacement of rural people from their habitat, which leads to migration as the only mode of survival. These migrations often go to the large peripheries around cities or to other countries, including Europe.

I examine these types of migration flows as indicators of a condition that is becoming acute across the world: the loss of habitat.

⁴ I develop these issues in great detail elsewhere. See Sassen 1988; Sassen 2014; Sassen 2016; Sassen 2017.

WHY DOES ONLY A FRACTION OF THE POOR OF
THE WORLD MIGRATE?

New migrations have long been of interest to me in that they help us understand why a given flow starts.⁵ Hence they tell us something about the larger contexts that generate such flows. This means that the migrant becomes an indicator of a change in the area where that migrant comes from. This contrasts with a later stage in a flow when it becomes chain migration, which is much easier to explain than how and why a new flow emerges. Once chain migration sets in, it is typically the family that authorizes one or another member to migrate for the good of the household. Chain migration has been the dominant mode in the West since the 1950s as many of those migrating by then were in the second or third generation. It is these routinized migrations that have received most of the attention from immigration experts in the West. Far more difficult is to understand why a migration begins, since the vast majority of people, including the poor, do not migrate.

I use the case of Africa to examine the many ways in which western governments – especially those from Europe and the United States – laid the ground for pushing local peoples into migration streams, often for bare survival. The aim was mostly to develop Africa. The result was mostly to enable large foreign corporations to extract natural wealth and to enable the making of African elites rather than genuine economic development. My argument is that these negative outcomes lie at the origins of many African migration streams into Europe.

The massive acquisitions of land by major corporations and governments for their own interests (from mining to growing crops) have contributed to the expulsion and destruction of smallholder

⁵ My work on migration has long focused on that larger context within which a new flow takes off (e.g. Sassen 1988; Sassen 1990; Sassen 1996). At the heart of my work on the subject is that migrations happen *inside* systems, but these systems are not countries: they are the larger operational space within which the powerful countries of an epoch pursue their aims. Examples are the British Empire, the Pax Americana, and such.

agriculture, often enabled by well-intentioned but ill-conceived IMF policies. Emigration is often a basic survival move rather than an aspiration for a better life. Alongside these often well-established migrations, we see novel flows that have emerged recently in Central America, Africa, and Asia.

Each of these very diverse types of flows points to a larger context marked mostly by extreme conditions. Factoring in how those conditions came about, allows us to see at least some of the larger dynamics generating migration as an option – for a better life or for bare survival. Each of these flows emerges from situations larger than the internal decisions of households, and larger than the ups and downs of national or local economies. The extreme and sharply delineated conditions from which they arise operate at diverse levels – ranging from individual needs to macro level dynamics, and they do so with variable degrees of visibility.

Violence is one key vector explaining these migrations, but it is not the only one.

I add a second key vector, one insufficiently recognized: the fact that well over thirty years of international ‘development’ policies in sending countries have left much land dead due to, for instance, mining, land grabs and plantation agriculture. The most extreme case is Africa. The result was and continues to be the expulsion of whole communities from their rural habitats.

Critical for my analysis is the fact that much of this expulsion of rural people from their habitats is registered as GDP per capita growth: they are replaced by large-scale modern agriculture and mining. Beyond the expulsion of millions of smallholders, the types of large-scale modern ‘developments’ that replace them – mostly mining and plantations – exhaust the land and poison water bodies. Smallholders know how to keep the land alive, but their production is still mostly not considered in measures of GDP per capita growth. For the expelled, pushed out of their land across several decades, moving to the slums of large cities is increasingly their last option. And, for those

who can afford it, they leave their countries for common destinations in Europe and North America.

This multi-decade history of destructions of rural economies and expulsions dressed as 'modernization and development' has now reached extreme levels: vast stretches of land and water bodies are now dead due to mining, plantations, and water extraction by the likes of Nestlé. At least some of today's localized wars and conflicts in Africa, Latin America and Asia arise out of such destruction and loss of habitat, with climate change further reducing livable land.

A mix of conditions – wars, dead land, and expulsions of smallholders from their modest economies in the name of 'development' – has produced a vast loss of life options for a growing number of people in more and more parts of the world. This, then, is not the migrant in search of a better life, hoping to send money to his or her family left behind. These are people in search of bare life.

Important to my analysis is the lack of recognition in law of this third kind of migrant, one evicted from her land to make room for a mine or a plantation. This migrant fits neither of the two established subjects in law: the refugee and the immigrant. She is a third subject invisible to the eye of the law because she is a refugee of what is registered as positive: certain modes of 'economic development'. Nor is there law that recognizes the fact that much 'economic development' and wealth have their basis in land grabs from rural smallholders, destruction of land and water bodies by mining and plantations, and more. Migrants who lose their land or have their water supplies poisoned by nearby mines, *are* refugees of such modes of 'economic development'. There should be law that recognizes them as such. But for now the basic interpretation is that those development modes are good for a country.

What I seek to present here are the social and economic conditions that render this third subject invisible to existing law, and my hope is that there are legal scholars who might be interested in making this migrant subject visible in law: not simply as a persona, but as

an outcome of development modes we (still) register as positive, no matter what they do to people, to land and water, and to the survival of the biosphere.

European and U.S. 'development' practices over several decades, as well as their shaping influence on international institutions, such as the IMF and the World Bank, are key factors in this analysis, with Africa a key area for the deployment of such development notions. Africa also accounts for the most complex of the migration flows I examine in this lecture. But it is also the continent where much of the international development apparatus has focused on and based many of its innovations. Africa then also makes visible how even well-intentioned development practices can destroy habitats and thereby engender 'development' refugees. The political and economic actors enabling these expulsions should be made accountable and 'development' refugees should be recognized as such.

One question this generates, is whether we can develop legal instruments that recognize this asymmetry between what a) gets measured as a positive and thereby gains standing in the law and in governmental preferences, and b) the invisible negatives it also generates, notably the accelerated destruction of land and water as well as the failure to recognize the long-standing rights of smallholders to their land.

WHEN 'DEVELOPMENT' ONLY WORKS FOR THE FEW...
AND DESTROYS THE HABITATS OF MILLIONS

Many of today's negative features in Global South countries (e.g., the sharp growth of poverty and of expulsions of smallholders from their land) originated partly in the development strategies launched by major international institutions and global firms in the 1980s and the 1990s. Mining and plantation agriculture are among the notable examples of a mode of development that is basically extractive, and leaves behind dead land and poisoned water. Further, by insisting on opening up these countries to imports, much of the international system has wound up enabling large multinational consumer en-

terprises to enter markets once in the hands of local producers and shops.

The outcome has been a significant destruction of local enterprises and local manufacturing. Opening up these fragile economies to global firms ready to supply all needs, gradually reduced them to consumption economies. The extractive sector, largely under the control of foreign firms, has grown in importance and has become an enabler, not of countrywide development but of the emergence of rich local elites.

A major factor in the late 1970s and early 1980s, rarely mentioned nowadays, was the push by the so-called 'transnational banks' to sell debt to less developed countries.⁶ Two clarifications are necessary here. One is that the rise of OPEC (Oil Producing Export Countries) in the 1970s brought with it a vast concentration of money in the oil-producing countries. Two is that instead of 'storing' this money in their countries, the major Arab oil producers decided to work with western banks to let that money grow.

That was a time when the various financial instruments that we can use today to multiply the value of cash did not yet exist. Selling debt for an interest rate was the way of making a quick profit. African governments, especially, were pressured or persuaded to buy such loans – which meant taking on debt. Meaning eventually many if not most of these governments wound up paying a very high price for those seemingly cheap loans: government elites got rich but the economic development of these countries ceased being of interest to their governments and elites.⁷

For much of the 1980s and onwards, indebted poor countries were asked to pay a share of their export earnings toward debt service that was much higher, namely about 20 percent, than that asked in other instances of country indebtedness. In 1953, for instance, the Allies

⁶ Sassen 1988.

⁷ For a full analysis of how this extraordinarily destructive modus operandi came about, see Sassen 1988. See also Sassen 2016.

cancelled 80 percent of Germany's war debt and insisted on only 3 to 5 percent of export earnings for debt service. In the 1990s they asked 8 percent from Central European countries when these exited the communist sphere. Against this background, today's debt service burdens on poor countries is extreme, as I discuss below.

It does suggest that the aim regarding Germany and, later, Central Europe, was reincorporation into the capitalist world economy of the time. In contrast, the aim vis-à-vis the Global South countries in the 1980s and 1990s was more akin to a disciplining rather than an enabling regime, starting with the forced acceptance of loans and restructuring programs instituted by the international system.

These were measures that helped large extractive firms, such as mining, plantations, and consumer multinationals enter these economies on very profitable terms. After 20 years of this regime, it became clear that it did not deliver on the basic components for healthy development; the discipline of debt service payments was given a strong priority over infrastructure, hospitals, schools, and other people-oriented development goals.

The primacy of this extractive logic became a mechanism for systemic transformation that went well beyond debt service payment. It included the devastation of large sectors of traditional economies, small-scale manufacturing, the destruction of a good part of national corporations as well as the petty bourgeoisie, the sharp impoverishment of the population, and, in many cases, the impoverishment and thereby corruptibility of the state.

By the 2000s, the rapid growth of government debt in mostly poor countries led global regulatory institutions to implement the so-called structural adjustment programs. Key to this project were, and are, the IMF and the World Bank, and, eventually, the World Trade Organization (WTO). These have shaped the evolution of much of the Global South over the past two decades. Debt servicing was the instrument for this disciplining: it weakened the governments of those countries by forcing them to use growing shares of national

revenue for interest payments on their debts rather than for economic development.⁸

Further, it made them susceptible to signing unfavorable deals with global firms in extractive industries rather than furthering mass manufacturing and local commerce by national firms. These arrangements did little to promote local capacities for developing manufacturing and commerce, two sectors that could have generated a modest but effective middle class.

THE DEBT THAT KEEPS GROWING

Debt and debt servicing problems have long been a systemic feature of the developing world.⁹ But what concerns me here are the particular features of IMF-negotiated debt rather than the fact of debt per se. A further concern is how the gradual destruction of traditional economies prepared the ground, literally, for some of the new needs or aims of advanced capitalism. Examples are the acquisitions by national and foreign enterprises of vast stretches of land – for agriculture, for accessing underground water tables, for mining, and more.¹⁰ The third concern is the survival struggles of the poor and of the impoverished middle classes.

While each one of these three components is familiar and has been present before, my argument is that they are now part of a new organizing logic that changes their valence and their interactive effects. Even as we have seen the rise of a robust well-to-do middle class over the last decade or two, there are also growing numbers of poor households and impoverished villages.

⁸ IMF 2009a; IMF 2015a; Sassen 2008.

⁹ The research literature on this subject is vast. For understanding how the international community addressed the matter, which is just one approach, see, e.g., IMF 2015a, IMF 2015b, IMF 2015c, IMF 2015d). For a critical analysis, see the multiple reports produced by the Jubilee Debt Campaign (e.g., Jubilee Debt Campaign 2013a, Jubilee Debt Campaign 2013b). Elsewhere I argue (Sassen 2014, Chapter 1) that today’s “austerity programs” for the Global North are a kind of equivalent of these older restructuring programs in the Global South.

¹⁰ Sassen 2014, Chapters 2 and 4.

From the 1980s to the early 1990s, governments' debt service payments to the international system had increased to \$1.6 trillion, more than the actual debt. From 1982 to 1998, indebted countries paid four times their original debts, and at the same time their debt stocks went up by four times. For instance, for every \$1 African countries received as aid in 1998, they paid \$1.40 in debt service. Africa's debt to Gross National Product ratios were especially high in the late 1990s: 123 percent, compared with 42 percent in Latin America and 28 percent in Asia.¹¹

Thus Global South countries had to use a significant share of their total revenues to service these debts.¹² The IMF, the World Bank and sister institutions established the criteria and processed these debts, thereby functioning as a global disciplining regime rather than an enabler of local development.

Recognition that the earlier restructuring programs did not work led to the Heavily Indebted Poor Country (HIPC) initiative, set up in 1996 by the World Bank and the IMF. The aim became to assist countries with debts equivalent to more than one and a half times their annual export earnings.

By 1 July 2009, 26 countries had completed the HIPC process, and nine had "passed the decision point".¹³

¹¹ There were also some reasonably good outcomes. Thus by 2003, debt service as a share of exports (not overall government revenue) ranged from extremely high levels for Zambia (29.6 percent) and Mauritania (27.7 percent) to significantly lowered levels (compared to the 1990s) for Uganda (down from 19.8 percent in 1995 to 7.1 percent in 2003) and Mozambique (down from 34.5 percent in 1995 to 6.9 percent in 2003).

¹² See Amen and Gills 2010; Bello 2004; IMF 2008; IMF 2015c; IMF 2018a.

¹³ For a more detailed analysis, see Sassen 2008a, Sassen 2008b, Sassen 2014.

To be eligible, countries have to have been compliant with the IMF for at least three years. The HIPC process begins with a 'decision point' document. This sets out eligibility requirements. Among these is the development of a Poverty Reduction Strategy Paper (PRSP) that replaces the earlier Structural Adjustment Programs (SAPs). PRSPs describe "the macroeconomic, structural, and social policies and programs" that a country is required to pursue in order to be eligible for debt relief (IMF 2009a, IMF 2009b, IMF 2015a, IMF 2015b, IMF 2015c, IMF 2015d).

As of 2006, the poorest 49 countries (i.e., 'low-income countries' with less than \$935 per capita annual income) had debts of \$375 billion. If to these 49 we add the 'developing countries', together these 144 countries had a debt surpassing \$2.9 trillion, and had already paid \$573 billion just for debt servicing.¹⁴

But HIPC soon showed its shortcomings. The Multilateral Debt Relief Initiative (MDRI) went into full operation in July 2006. It was intended to address many of the critiques of the HIPC initiative. MDRI promised the cancellation of debts to the World Bank (incurred before 2003), to the IMF (incurred before 2004), and to the African Development Fund (incurred before 2004) for the countries that completed the HIPC initiative. According to one estimate, the major cancellation schemes (including HIPC and MDRI initiatives and the Paris Club) have written off \$88 billion so far.¹⁵

From a social development angle, the IMF and World Bank restructuring programs have been highly problematic. The debt burden that built up in the 1980s and the 1990s had negative effects on the composition of state spending.

Zambia, Ghana and Uganda were three countries that global regulators such as the World Bank and the IMF saw as cooperative, responsible, and successful at implementing Structural Adjustment Programs (SAPs). These three countries illustrate some of the issues set out above that apply even for countries held in high esteem by global regulators. For, at the height of these programs in the early to mid-1990s, Zambia's government paid \$1.3 billion in debt but only \$37 million for primary education; Ghana's social expenses, at \$75 million, represented 20 percent of its debt service; and Uganda paid \$9 per capita on its debt and only \$1 for health care. In 1994 alone, these three countries remitted \$2.7 billion to bankers in the North.

¹⁴ Jubilee Debt Campaign 2013a and Jubilee Debt Campaign 2013b.

¹⁵ Jubilee Debt Campaign 2007, Jubilee Debt Campaign 2013a, Jubilee Debt Campaign 2013b.

This may have been good for the lenders, but not for a majority of the poor in those countries. Nor was this great for their governments. This became clear when the new programs (HIPC and MDRI) emerged as an option: all three countries joined them and they accepted the Poverty Reduction Strategy Paper requirements, thereby making them eligible for debt relief, which worked for them.¹⁶

Generally, IMF debt management policies from the 1980s onwards can be shown to have worsened the situation for the unemployed and poor.¹⁷ Much research on poor countries documents the link between hyper-indebted governments and cuts in social programs. These tend to affect particularly women and children through reduced education and health care.¹⁸

The above is part of a larger history in the making. In my reading it includes as one key element a *repositioning* of much of Africa and major parts of Latin America and Asia in a new massively restructured global economy. Increasingly they became source countries where actors from diverse parts of the world could come and extract. Weakened governments and the destruction of traditional economies have launched a new phase of extraction by powerful states and firms and a new phase of survival economies for the impoverished middle classes and the long-term poor.¹⁹

In brief, after several decades of these ‘development initiatives’, centered on debt and extractive sectors, most IMF program countries had been left with larger government debts, devastated local economies and enterprises, and poorer populations. It also enabled the proliferation of predatory elites of all sorts, some in the domain of politics and some in the economy.

¹⁶ Thus Zambia’s debt service in 1997 was 18.3 percent of income on exports but 1.3 percent by 2007 (IAEG 2009). For Ghana these figures were 27.1 percent and 3.1 percent respectively, and for Uganda 19.7 percent and 1.2 percent (IAEG 2009).

¹⁷ UNDP 2005, UNDP 2008.

¹⁸ For data overviews, see UNDP 2005, UNDP 2008, UNDP 2015; World Bank 2005, World Bank 2006, World Bank 2015a, World Bank 2015b.

¹⁹ For a more detailed analysis, see Sassen 2008a, Sassen 2008b, Sassen 2014.

At its most extreme this meant the immiseration of growing numbers of local people who ceased being of value as workers and as consumers even as national elites emerged and became rich. What mattered was access to natural resources, rather than people as workers and consumers. But it also meant that traditional petty bourgeoisies ceased being of value. Such repositioning and destructions have contributed to the current duality marked by the rise of a new class of highly educated professionals and an impoverishment of the working class and of rural people who have lost their land and end up in urban slums.

The migrations to Europe in the 1970s and 1980s were in good part a response to this absence of options for the more modest households and the failure of the international system to enable genuine development and stop the massive land grabs and mining operations, mostly by foreign firms. Those same conditions have now become extreme and have generated massive conflicts of all sorts. The rise of a prosperous middle class is not enough to counteract the disastrous effects of ill-conceived policies by the IMF, the World Bank, and other international institutions. Nor have the new rich African elites helped much. The absence of accountability regarding the rich and powerful, both national and foreign, has brought with it a silence about the extent to which these abuses destroyed smallholders and much of the modest working and middle classes. This has also meant that the migrations of these devastated modest households is rarely connected to those destructions. Instead, the burden of proof, so to speak, was put on the migrants themselves: they, rather than those that forced them out, were held responsible for their losses.

One brutal way of putting it, is to say that the natural resources of much of Africa and good parts of Latin America and Asia have long counted more for extractive sectors (both national and foreign) than the local people counted as consumers and as workers. The lack of both genuine development and distributed economic growth *is* a mode of growth that benefited elites and foreign investors. It was basically extractive and thereby used a country's people, but did not bring genuine development to their lives.

More recently, we are seeing the rise of a strong, highly educated middle-class in several African, Latin American and Asian countries keen on productive modes of development. This is a good turn of events, even if so much extraction has already destroyed much land and many water bodies in some of those countries. The hope is that these new generations will care about genuine development that can bring economic openings to larger sectors of their populations.

With this background in mind, I now turn to the types of migrations that are to variable extents an outcome of such destructive modes of economic ‘development’. But with one sharp difference: the vast extractions and destructions of the past many decades have produced a massive loss of habitat, which, in turn, has made the expulsions of rural people more immediate and more brutal. These past restructurings have created a whole new extreme struggle for land and resources and the indigenous populations are often the first victims.

EXTREME MIGRATIONS

Among the many migrations that mark today’s world, I now turn to the rise of a new type of migrant, one evicted from a small farm (or shop in the urban periphery) by what we commonly refer to as ‘economic development’ – plantations, mining, water grabs, and other large projects. This is a migrant subject for whom we lack a designation. The core feature marking this new migrant subject is that s/he is the victim, directly or indirectly, of a mode of ‘economic development’ centered on extractions – of land, metals, water, and more. These are, thus, refugees who have been expelled from their land by modes of development that are measured as positive economic growth. Even as they actually extract rather than add or give.

The two cases I focus on here bring to the fore a feature as yet unmentioned: extreme violence. When this is in play it has the power to obscure other factors that may actually feed the violence. Among such factors are land and water scarcity, and vast new development projects such as mines and plantations. As indicated earlier, these are

de facto refugees who have been expelled from their land by what is measured as positive economic development.²⁰

Thus when they appear at our borders they are not recognized as refugees who have lost their livelihood because their countries' standard economic measures show growth in advanced economic sectors, notably mining, plantations, and water extraction (e.g. the global bottlers such as Nestlé and Coca Cola). And we lack a category to recognize that millions of smallholders and modest middle classes every year are expelled from their land directly by major firms and major development projects. They are invisible to the eye of the law, since the law registers it all as economic growth and modernization. Recognizing that migrations tend to happen inside systems helps explain why poverty as such is not enough to explain migration, and why the estimated total of under 300 million migrants in the world is relatively small, given the almost 3 billion poor in the world. Communities that have long been poor may not have emigrations. Or, if they do, it can be shown that they start at some point – even when a household or a community has long been poor. Most major migrations of the last two centuries, and often even earlier, can be shown to have beginnings, they are not simply there from the start. It also explains why we do not have far more migrations – especially in earlier periods when it was easier to enter another country.

The two extreme flows I focus on next are examples of a particular set of new migrations that emerged over the last few years.

These are two very different types of flows. Yet each points to a larger context marked mostly by extreme conditions. Further, these conditions can be made visible in ways that cannot be done with typical migrations where households often play the crucial role in assigning one or another family member to an existing migration stream. Here I focus on flows that come out of situations larger than the internal logics of households. They emerge from sharply delineated conditions operating, respectively, at the city level, at the regional level, and at a global geopolitical level.

²⁰ I develop this at length in Sassen 2016.

The focus on two extreme migrations helps make visible some of the key trends our current governance and legal systems fail to see or recognize. Violence is the standard explanation of the Central American and the Myanmar cases I examine next. But violence is made; simply invoking violence as an explanation is not enough. What lies behind that violence? We must identify the reasons for such violence. In fact, often it is the sources behind wars and violence that we must understand as war and violence can be outcomes of a deeper condition.

WHEN MINORS GO SOLO: CENTRAL AMERICA

Central America is one of the key regions where the flight of unaccompanied minors rose sharply a few years ago. 'Urban violence' has become the leading explanation among those studying this escape of minors from the cities and the decision to try getting to the U.S., which means crossing the whole of Mexico.²¹

Yet there is more to be brought into the picture. In my reading, we need to trace this violence back to the destruction of smallholder rural economies. This is one key, overlooked factor at the origins of the disastrous outcomes. Powerful families with vast lands know how to extract wealth from land. They are key actors in pushing out smallholders to develop large-scale commercial plantations, mining, water grabs, and more. Private armies help execute the project of expelling the smallholders, and take care of threatening or even killing human rights activists fighting for the rights of smallholders. Some smallholders were killed by private armies. Others escaped to poorer quality lands of little interest to the big landowners.

Many of these expelled families eventually wound up in the cities of Central America. Cities are increasingly the only option for those expelled from their land. But the cities lack jobs and options for displaced rural families. The drug trade is one of the few, easily accessible economies in these cities. It has often been the only one where expelled rural smallholders can get some income in the cities.

²¹ Let me note also that the number of apprehensions of Mexican nationals decreased by 18 per cent from FY 2014 to FY 2015, according to statistics from the Department of Homeland Security found under sub-heading U.S. Customs and Border Protection (CBP) Enforcement Efforts at and between Ports of Entry.

One outcome is that many of the displaced rural workers have been killed in the drug battles of Central America's cities.

Out of this disastrous mix of conditions comes the desperate hope of getting to the United States of America. While Central America has long been an emigration region, for both political and economic reasons, the current flow of unaccompanied children is new. They are driven by extreme fear because of urban violence that has left growing numbers of minors without carers. They are on their own. The U.S. Customs and Border Protection data show that a first major flow of about 63,000 unaccompanied minors, most from Central America, crossed the southern U.S. border between 1 October 2013 and 31 July 2014. This is nearly twice the number of child migrants who came during the same period the previous year. The estimate is that by the end of 2014, up to 90,000 unaccompanied children had crossed the border into the U.S.; prior to 2012, more than 75 per cent of unaccompanied children were from Mexico. By 2015, only 28 per cent were from Mexico, and the rest from Guatemala, El Salvador and Honduras.²²

What we do not know is how many of these minors never made it. We only know the numbers for those who arrived in the U.S., driven by fear. Their parents being forced off their land by private armies marks the beginning of harsh high-risk lives in these cities rendered violent by both the drug trade and the absence of reasonable economies.

THE MURDEROUS EXPULSION OF THE ROHINGYA

The Rohingya, a Muslim minority, have long lived in Rakhine state. This is one of the poorest and most isolated provinces of Myanmar, on the western side of the country, facing Bangladesh across a narrow water body. They also have long been persecuted by Myanmar's military.

²² Renwick, 2014; Negroponte 2014; Chishti and Hipsman 2014; U.S. Customs and Border Protection 2016.

This persecution took on a more extreme than usual violence in 2012, when the country passed new laws that opened up its vast resources to foreign investors from a growing number of countries. Over 100 thousand Rohingya were expelled from their villages in a fairly central part of Rakhine state. The villages were burnt down, and the Rohingya placed in camps, with the promise of a return to their villages. They are still in the camps today, their former villages evidently put to economic uses preferred by the army given their proximity to Sittoung, Rakhine state's main city.

Myanmar has several other minoritized peoples who have also suffered losses of their land and resources at the hands of the army. Even minoritized Buddhists have suffered land grabs. Behind these grabs of lands long used and occupied by diverse minoritized peoples lie major investors, both national and foreign. These are interested in natural resources – timber, mining, water.

But the extreme events of late 2017 mark a whole new phase in the scale of evictions of the Rohingya: an estimated 100 thousand shot or burnt to death in their homes, 700 thousand escaping to Bangladesh in a few months, over 350 villages burnt down to the ground. Local peoples and a vast international world of concerned institutions invoked religious persecution as the only explanation.²³

Clearly religion was and is a central factor. But I found it difficult to accept that religion was the only explanation. I knew too much about the massive development projects the military were enabling and authorizing which brought them great wealth: a third of the vast Myanmar forest lost to the timber industry, a river rerouted so it brought its water to China, while leaving local rural communities without water, vast mining developments that were displacing local peoples, including minoritized Buddhists.

At this point I want to emphasize one specific aspect which led me to a whole other understanding of a critical, but overlooked element

²³ IMF 2018b; World Bank 2018.

in this short brutal history. I can accept the explanation centered on religious persecution – in this case anti-Muslim persecution; this was and remains a major factor. But the risk of such a strong and effective explanation is that it can easily obscure other factors in play. Yes, there are extreme Buddhists who have proclaimed that killing Rohingya is a necessary act. And yes, the Rohingya evidently never mixed easily with the other inhabitants, and in the current period this persecution has become extreme.

But when the military burn 350 villages, most of them in one month – September 2017 – then there is more in play.

I had already researched the massive land grabs and development projects that the military were enabling across the country.²⁴ My question then became, what is happening in Rakhine state, that long forgotten and marginal part of Myanmar? What do the Myanmar military want to do there? By early 2017, I had information about a vast development taking place further south from the area where the 350 villages were burnt. I found it by researching China’s Road and Belt project.²⁵ China had negotiated a contract with the Myanmar government to develop a \$ 5.7 billion port in Rhakine state and a large economic zone. The shadow effect of such a large development would sharply raise the price and the value of the land occupied by the Rohingya further north. Most of the responses from the international media were: “No, it is all about religion.”

CONCLUSION: THE DISPLACED

In this lecture, I have questioned the basic assumption that traditional modes of economic development – aimed at inclusion into the so-called advanced global capitalist economy – necessarily benefit a country, and I have pointed to ‘the loss of habitat’ that such economic endeavours have caused for many people around the globe.

This negative effect challenges international law and governance to recognize and become responsive to an emerging third category of

²⁴ See Sassen 2017a.

²⁵ See Sassen 2017b.

migrants, next to the internationally recognized refugee and immigrant: the refugee fleeing economic development, displaced by the destruction of her habitat, her chances of survival.

Moreover, – if I may, here in the city of Tobias Asser – I would point to the need for international law to develop a response also to what *causes* this loss of habitat. There is an urgent need to reflect on the land grabs, destructive mining practices, and industrial water pollution, among others, and their implications for the content of international law and international law institutions and the distribution of accountability.

The flows I have described are mostly refugee flows even if some are not formally recognized as such by the international system. They are to be distinguished from the almost 260 million regular immigrants in the world today, who are mostly modest middle class and, increasingly, high-level professionals functioning in the global economy. Today's immigrants are not the poorest in their countries of origin. Nor are they generated by the extreme push factors feeding the flows I have described here. Nor are these refugees, in turn, usually the poorest in their countries, even if leaving their home countries often entails using up all their resources; many have advanced educations and started out with resources.

In today's world, migration is to my mind increasingly the result of expulsions. The concern of those migrating is bare survival rather than the older notion of the search for a better life. These migrants are today's refugees – one component of a larger population of displaced people. They stand out by their sudden surging numbers and by the conditions in the areas where they originate: extreme violence and the extreme destruction of local economies and environments. These are today's key factors generating this surge of refugees.

There is, in my reading, a need for making law that addresses these abuses and makes them visible. These are not simply migrants in search of a better life; they are refugees from development malpractice by powerful actors. And such malpractice is rampant in more

and more parts of the world. It has disastrous consequences for local economies and societies in the Global South. While such development malpractice is likely to render more extreme the effects of climate change in some of these regions – with its own disastrous consequences for local economies and societies there. It all amounts to an acceleration in the destruction of land and water. This massive loss of habitat is what lies behind much of the current migrations, and rather than holding the migrants accountable we should hold the large enterprises and corrupt elites accountable.

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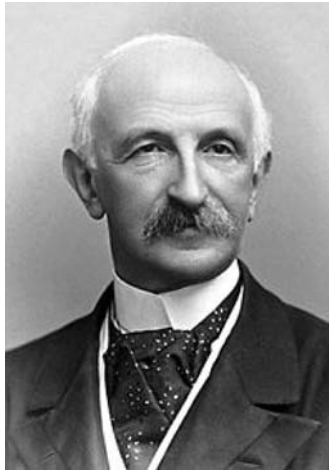
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THE ANNUAL T.M.C. ASSER LECTURE ON THE
DEVELOPMENT OF INTERNATIONAL LAW

A Mission for Our Time



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 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 develop-

ments 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 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 idealism⁵ 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.

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 E.M.H. 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.

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.

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 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.

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, J.E. 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).

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 began and forever changed the destructive scale and intensity of armed conflict. In Asia, Britain and France forced China, by military 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 latter 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 on 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 peace-

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 heritance.

fully. 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 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 prag-

¹⁵ Hirsch Ballin, p. 19.

¹⁶ *Ibid.*, p. 33.

¹⁷ Eyffinger, p. 13.

¹⁸ Hirsch Ballin, p. 13.

matic 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 stood at the helm of 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 '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 recognized by the Nobel Prize Committee in 1911. The

Committee portrayed Asser as ‘the Hugo Grotius of his day’.¹⁹ Certainly they both aimed to strengthen 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

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.

interest to justice – in preparation of general rules for the acceptance of governments to be used in their external relations”²⁵.

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-

²⁵ Ibid., pp. 57–58.

²⁶ Hirsch Ballin, pp. 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.

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 Koskenniemi 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

*Member of the Board and Academic Director
of the T.M.C. Asser Instituut, The Hague*

²⁹ Koskenniemi, 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. Over 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 the cultivation of 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 the Asser Institute's research & activities can be found on the website: www.asser.nl.

ABOUT THE AUTHOR



Saskia Sassen is the Robert S. Lynd Professor of Sociology at Columbia University and a Member of its Committee on Global Thought (www.saskiasassen.com). Her books are translated into over 20 languages. Recent books are *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press 2014), *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press 2008), *A Sociology of Globalization* (W.W. Norton 2007), and the 4th fully updated edition of *Cities in a World Economy* (Sage 2012). Prof Sassen is the recipient of many awards and honors, including multiple doctor *honoris causa*, named lectures, and being selected as one of the top global thinkers on diverse lists. She was awarded the Principe de Asturias 2013 Prize in the Social Sciences and elected as a Foreign Member of the Royal Netherlands Academy of Sciences.

Saskia Sassen on her lecture *A Third Emergent Migrant Subject Unrecognized in Law: Refugees from 'Development'*:

‘There is an emergent type of migrant not formally recognized in law. She is a kind of refugee, but not of war. Rather this is a refugee from particular forms of economic development that not only cause environmental destruction but also have expelled millions of rural smallholders from their land over the last few years.

They include mining, plantations, land grabs to expand cities or new built types of private enclaves for the rich, water grabs by the big bottlers, and more. These modes of development are typically registered as “economic development” and show up as growth in a country’s GDP. The fact that they expel millions of smallholders and often destroy small manufacturing and other local economic activities is not registered in those measures. The millions who have been expelled from their land (mostly in Africa, Asia and Latin America) are invisible to those standard measures. The options they typically confront are either to go to the slums of big cities in their countries or try to emigrate.

The rapid surge in these flows combined with the conditions they leave behind raise a question that organizes much of the analysis: Are the categories and the laws (national and international) we use to understand and describe migrants enough to capture this third type of emergent migrant – a migrant of economic developments that have created massive expulsions of people? My answer is: not quite.

Can we develop a new legal regime that recognises these outcomes and either condemns them or secures justice for the millions of people whose sources of livelihood are being summarily and often brutally destroyed?’

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