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The Politics of Global Lawmaking: A Conversation

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1 Introduction

Sarah Nouwen: Martti, we have been given one hour, an audience in a magnificent hall, a global audience on screens and a topic on which you have spent most of your career: the politics of global lawmaking. We discuss the politics of global lawmaking in the context of the conference theme: 'Changes in International Lawmaking: Actors, Processes, Impact'.

Let's begin with that theme. The programme's description of the theme suggests that international lawmaking has changed. The old situation is characterized as an ideal-type Westphalian system in which international lawmaking took place mostly through foreign ministries' concluding international agreements that were then sent to parliament for domestication. The new situation is described as one with many more actors: international governmental organizations, inter-agency networks, non-governmental organizations, corporations, private actors, transnational networks, and all of this at the expense of state consent.

Our host, Professor Pål Wrange, just observed in his opening address that many of these norms 'may not actually be adequately labelled "international law"' and yet, they are included in the theme that we are studying today, because, and here I quote again, 'their impact is nevertheless real, and they may arguably be studied with a legal scholar's tools'. The description of the conference theme acknowledges that the Westphalian model has never matched the reality, but it asserts: 'the changes are real and force international scholars to reassess their object of study'.

These changes then also lead to the political questions that we have been assigned to discuss: questions about social, economic, ideological causes and consequences; the politics of specific regimes; the impact of new forms of lawmaking on states and the ultimate political question: Who loses, who gains?

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So, there is a lot to cover here: both the past and the present; both law and politics; both ideas and concrete impact.

I cannot imagine a better interviewee to answer these questions – and possibly, to challenge some of the assumptions – because if I had to characterize your entire oeuvre in one word, Martti, I would probably choose the word *both*. International law is not either apology or utopia, but constantly oscillates between the two. International law is not either natural law or voluntarist law, but draws on both, in different measures in different times. *Imperium* and *dominium* are not separate legal domains, but usually come together. And so do the so-called private and public realms. International law is both respectful to tradition and is seeking change. International law is a field of both thought and action, not as opposites, but as emanations of each other. History is not the opposite of the present, but shapes how we think about international law today. International law is not merely law or merely politics, but is both law and politics. In your writing, the past and the present, law and politics are not four directions on a compass. Rather, the perspective is much more multidimensional than even Wittgenstein imagined: the rabbit duck is not two-dimensional but three-dimensional, or perhaps even more-dimensional.

I propose to structure our conversation in three parts: first, we begin with some ice-breakers. Then, we go to global lawmaking – past and present. We end with the politics of it all: What is at stake?

Obviously in your answers you will draw on the work you are so well known for, including *The Gentle Civilizer: The Rise and Fall of International Law 1870–1960*,[1] and the work on the politics of international law. But I would like to tempt you to reveal a bit from your book that has just come out: *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870*.[2] It is 'only' a 'prequel' to *The Gentle Civilizer*, but it encompasses 1,126 pages and covers half a millennium. The opening line – 'This is not a history of international law' – pre-empts disciplinary debates about methods. But, for all those who have been queueing overnight at the Cambridge University Press store as if a juicy round fruit company has just released the latest iSomething, please do give us a flavour of the book.

2 What Is It that Brings Us Together?

Sarah Nouwen: Look at all of us here. Apart from the great efforts by the organizers, what is it that brings us together? What unites us? What do we have in common? Her Royal Highness Crown Princess Victoria mentioned themes such as respect for human rights and peace as objectives that attract young people to international law. Dr Hans Corell mentioned the rule of law and Professor Wrange suggested that we all want

[1] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Hersch Lauterpacht Memorial Lectures 2002).

[2] M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (2021).

to make a difference. And, indeed, when I think of your *Gentle Civilizer* book, I think of men with shared projects.[3] Do *we* here share a project? Yesterday's interest groups showed a great diversity of projects: one cares about the environment, the other about migration and yet another about social sciences and international law. What *is* it that we, gathered together here, share?

Martti Koskenniemi: Well, Sarah, what a privilege it is to be here in conversation with you. And not only because it also offers an opportunity to give some publicity for this new book that I actually have not had in my hand because of the difficulties in deliveries from the UK to the continent. So, you asked me about what it is that brings us together and you referenced my *Gentle Civilizer*. Clearly, the main idea of that book already 20 years ago was to suggest that we can think of 'modern' international law as a single European project. This was in part about bringing liberalism to European governments and political life. What I think of as the first generation of professional international lawyers – the founders of the Institut de droit international – were all more or less active in their respective liberal parties. In part, what these lawyers wanted to do was to 'civilize' the colonies as well as the administration of the colonies: they were advocates of moving from colonial companies to direct administration by the colonial metropolis. They were able to have this two-pronged project because they were such a homogenous group.[4] Now, of course, as you laid out, the subtitle of the book also has this ending, 1960, and many people have not noticed that the book also suggests that this project is over, that it is no longer possible to think about the international world, the principles by which it should be governed in the old way. I often mention Wolfgang Friedmann's *The Changing Structure of International Law* (1964) as a watershed.

And so, what has existed since then? Well, a number of different projects: political projects, economic projects, personal advancement projects, security and environment projects, humanitarian projects and so on. 'Public international law' is not a concept that collects all of these transnational projects under its wings. Even as they are articulated in a legal vocabulary, the idioms they operate with empower very different actors and institutions and stand for different and often contradictory objectives. The idioms of trade and investment, of cyber law or European law, for example, no longer look for or presuppose the kind of global institutional order that old 'public international law' stood for.

I suppose what brings us here – in ESIL – is that we do speak in these different idioms. If the argument about indeterminacy in my earlier book *From Apology to Utop*ia is correct then we are not entitled to presume that merely by operating a legal vocabulary, we are part of some common project. One of the important experiences from late 20th-century

[3] See also Lang and Marks, 'People with Projects: Writing the Lives of International Lawyers', 27(2) *Temple International and Comparative Law Journal* (2013).

[4] The social composition and attitudes of the first generation have been recently exposed at length in P. Rygiel, *L'ordre des circulations? L'institut de droit international et la régulation des migrations 1870–1920* (2021), at 31–95 and of the second generation in D. Kévonian, *La danse de pendule. Les jurists et l'internationalisation des droits de l'homme 1920–1939* (2021), at 31–85.

international law has been precisely the ability of legal languages to carry many different kinds of projects, even contradictory ones. When I think about this, I often go back to a work published by Christian Joerges and Navraj Singh Ghaleigh in the context of the European University Institute a few years ago – where you, Sarah, now work and teach – namely, *Darker Legacies of European Law*, which examines the various ways in which European legal vocabularies have taken their native speakers into Fascism.[5] The book gives a really powerful demonstration of how it is impossible to believe that one can be saved, if you want to use that metaphor, merely by speaking in a legal idiom.

3 The Attraction of the Legal Vocabulary

Sarah Nouwen: What we then share is this language, a language of state responsibility, of human rights, of sovereignty, while our underlying projects may be very different. In *To the Uttermost*, there were lots of people who were also having recourse to law and many of them were not lawyers. Indeed you commented: 'some might even have felt offended if you had called them a lawyer'. They were diplomats, philosophers, theologians. Most of us here today are lawyers, according to the list of participants. That raises at least two questions: First of all, for your protagonists in *To the Uttermost*, for instance, philosophers such as Rousseau and Kant, what made the legal vocabulary so attractive? Why did they turn to law? And secondly, why is it that now law, at least a conference such as ESIL, mostly attracts lawyers? Where are these other people who were once attracted to the language of law? Or is perhaps ESIL not a good benchmark to look at that?

Martti Koskenniemi: Do I detect an anxiety in your question – I mean the question about international lawyers speaking merely to each other? Are we just a marginal group whose interests are shared by nobody – why do the philosophers, political theorists, diplomats, economists no longer speak to or with us today? You are right that earlier on ideas about a law among nations, a universal law, appeared in many different technical vocabularies, from theology to political counselling, university lecturing and political pamphleteering. The idea that human affairs were governed by laws that were inherent in social life and that should be known in order to govern successfully used to be a large part of European political culture. It was by no means an affair of lawyers only.

Both Francisco de Vitoria, the 16th-century Spanish Dominican theologian, as well as Immanuel Kant, would have been insulted had you called them lawyers, although they constantly wrote in the legal idiom. For them, lawyers were people interested only in rather minor aspects of the operation of bureaucratic institutions. By contrast, they believed they were writing on quite existential questions regarding the lives of individuals in society.

Why did they do this? What explains their interest in law? In the early modern period, people like Vitoria, Gentili, Grotius, Kant, etc., came to law because of the

[5] C. Joerges and N. Singh Ghaleigh (eds), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and Its Legal Traditions* (2003).

difficulties they experienced with Christian moral theology. Addressing human affairs through *ius gentium* seemed a useful alternative for these men, and for many others, especially for two reasons.

One reason was that the law of nations allowed them to explain the power of rulers over their subjects. According to the Bible, God created human beings both free and equal. Nobody was born superior to others. There would be no natural hierarchy among humans. However, by recourse to *ius gentium*, the law of nations, it was possible to argue that human sinfulness had destroyed this paradisiacal harmony and that in secular history humans had agreed that they would live best under individuals entitled to rule over them. In other words, the law of nations gave them the idea of sovereignty. For early modern thinkers, governing humans was to be based on an idea of human reason, expressed abstractly in the idiom of the law of nations, and concretely in the laws of separate nations. If you wanted to talk about the relations of political communities, or the ruling of one such community, law provided the most appropriate vocabulary for that purpose. Religion, politics, science – they all needed law to explain society as it was supposed to be 'in reality'.

Another thing that the legal idiom offered to early modern theology and public affairs was an explanation of why some people could appropriate things and exclude other people from using those things. It explained the emergence and nature of private property. Again, the problem was that the Bible quite expressly provided that God gave the world to humans in common. But wherever people looked, they saw each other making exclusive claims over land, exchanging things and developing a commercial system of social relations. Of course, both in the early modern world and later, there have been people who have been very critical of this. The Franciscan poverty dispute almost broke up the Christian Church in the 13th and 14th centuries. Throughout history there have been people critical of the way some were appropriating things so that others could not use them. But the law of nations and civil law came in early to explain that even as there may have been an original community in things, human beings themselves decided to divide them. Thomas Aquinas explained that 'everyone is more diligent in procuring something for himself than something which is to belong to all or many'. Private property was created under the law of nations in order to allocate goods more efficiently and attain a more peaceful state of things.[6]

Those were the two wonderfully important things that legal idiom gave to theologians, philosophers, political counsellors, merchants and rulers: sovereignty and property. Law gave the means to justify the world as it started to show itself in the period of early modernity. You did have the alternative of saying, 'oh, the world is going to hell, everybody is a sinner' – but if you did say that sort of thing (as some did, and do), do you think that people will stop ruling over others, or will stop claiming property rights? No, if you say such a thing, they will continue doing those things and you will find yourself the marginal eccentric pushed outside of polite conversation. So, for ambitious men, and I of course underline and am continuously embarrassed that one must speak about whitemen in this history, it was

[6] T. Aquinas, 'Summa theologiae, IIa IIae 66 2 Resp', in *Political Writings* (R.W. Dyson ed., 2002), at 208.

important to be able to justify those two institutions, sovereignty and property. And that is what law does, that is why Vitoria and Kant and everyone else, including today's economists and political leaders, constantly go back to ideas about contract, property, sovereignty and so on. None of such institutions could exist without law.

4 The European Society of Bricoleurs?

Sarah Nouwen: You will probably diagnose the next question, too, as a symptom of anxiety: does your book give rise to a potential name change of the European Society of International Law? A core argument of your book is that legal imagination relies on other vocabularies, vocabularies that lie around – political, philosophical, but also colonial, racist, utilitarian and economic – and that international legal discourse then absorbs them. You characterize the ensuing construction of argumentation by the men – and as you said – they were all men, as *bricolage*.

Now bricolage is in and of itself a term that seems to be lying around: it is much in vogue and used in a variety of meanings. One can think of it as an artistic technique. I also came across the term in a piece on land arrangements in Darfur: there it referred to reusing, reworking and refashioning institutions to perform new functions.[7] Nehal Bhuta, in his introduction to the symposium on your book in the *European Journal of International Law*, uses Simmel's concept of bricolage as an *epistemological* and *psychological* strategy of modern life: modernity requires all of us to become *bricoleurs* of our personality; in order to have the feeling that we are making a difference, we need to bricolage our place in the world.[8] And if we ask Google Translate what bricolage is, it comes up with DIY. So, in what sense are we the 'European Society of Bricoleurs', a society of handymen and – these days also – handywomen?

Martti Koskenniemi: When I came to international law in the academy in the mid-1990s, I noticed that very little of that world provided a good image of the kinds of practices in which I had been engaged as a legal advisor in the foreign ministry for almost 20 years. It seemed to me that international law was divided into two different types of enterprise, one an intellectual effort to find scientific or theoretical justification for international legal rules and practices, the other a kind of craftmanship that went into pleading cases, participating in negotiations, advising governments and private actors, etc., and that there was no fit between the two.

From Apology to Utopia was very largely a critique of the view that international legal practices were, or ought to be, derived from philosophical or moral axioms. Of

[7] Bromwich, 'Natural Resources, Conflict and Peacebuilding in Darfur: The Challenge to Detraumatise Social and Environmental Change', in S.M.H. Nouwen, L.M. James and S. Srinivasan (eds), *Making and Breaking Peace in Sudan and South Sudan: The Comprehensive Peace Agreement and Beyond* (2020) 191, at 205, relying on Cleaver and de Koning,'Furthering Critical Institutionalism', *International Journal of the Commons*, 9(1) (2015), 1, at 4.

[8] Bhuta, '"Let us suppose that universals do not exist": *Bricoleur* and *Bricolage* in Martti Koskenniemi's *To the Uttermost Parts of the Earth*', 32 *European Journal of International Law* (*Eur. J. Int'l L.*) (2021) 943.

course, I understood that academic debates were also a craftmanship of their own kind, but only very loosely, if at all, related to the world outside. When I later wanted to understand the practical and historical development of the field – this was the project of *The Gentle Civilizer* – that had to be done largely independently from the theoretical and methodological jargon that constituted the academic debates. I looked back into the writings of one of my intellectual heroes, Claude Lévi-Strauss, and anthropology especially, which spoke about the 'science of the concrete' where the indigenous bricoleur operates in the world known to him or her in very concrete ways, combining things, partly by tradition, partly by using imagination; always employing things that are lying around and combining them so as to carry out whatever task needs to be carried out. I began to think of competent international legal practice as something like that. And in the recent book, I then borrowed Lévi-Strauss's notion of 'bricolage' to describe it.

I now think of legal practice as bricolage; the use of legal idioms that are lying around in one's cultural and professional surroundings, texts, precedents and so on, in order to persuade audiences, especially audiences in authoritative positions. In order to be persuasive, practising lawyers must have a sense of what their audience might think of as good arguments, what they might expect that competent jurists should offer to them.

Sarah Nouwen: That brings us to the central theme of the conference – global lawmaking: past and present. In order to be able to know what has changed in global lawmaking, we need to know whether something has changed in what is being *recognized as* law. When writing your book about the entire period between 1300 and 1870, when did you recognize something as *legal* imagination? When is something philosophical, political, theological imagination? And when does that take a legal turn? When do you recognize it as law? And is that different from today? And if so, what has changed in the vocabulary or in the imagination that we, in this audience, share?

Martti Koskenniemi: Well, those are huge questions, so I can barely scratch the surface. But let me start by what you also started out with, namely that the book starts with the sentence 'this is not a book on international law' or 'not a history of international law'. It was important for me to show that in order for us to talk about international law in the kind of historically totalizing way that I do, we have to step outside it in order to say something about where it comes from and where its limits are. To talk about pedigree and limits, you have to step out of the given or the familiar notion of international law itself, so as to show how it came about, what other alternatives there may have been, how it received precisely the content that it has. You have to get to 'before international law'.

Now, in that new book, I chose to examine the way ambitious men chose to address the exercise of power in international contexts through a legal idiom. This became, I think, most visible in the 13th century, when French lawyers educated in Bologna and Orléans became the closest advisors to the French king, Philip IV (or Philip the Fair). These were lawyers who spoke Roman law and started to address the ruler in the

way Roman law had treated the emperor. This made the king no longer just a feudal suzerain but an 'emperor in his realm', that is to say, a 'sovereign'. That was the moment when, I think, the sphere of ruling became colonized by legal language in a way that had tremendous effects both for the domestic as well as the international realm. The idea and practice of 'sovereignty' extended rapidly thereafter through the spread of Roman law across Europe. Also in Britain as I tried to show, kings and rulers started to find it advantageous to use this language because it strengthened their hand towards nobles at home and rivals abroad.

Similar arguments apply with respect to property. The very complex Roman law on contracts became instrumental for the spread of a new commercial ethic across Europe in the 15th and 16th centuries. As merchants learned the rules of property and contract, they stepped into a new world of law that promised them the security and stability that they would need in order to work as merchants. That promise – although it was never really realized – would then make it possible for a monetary economy to emerge that would, again, make it possible, as John Locke would see so clearly, to begin accumulating wealth without violating the ethical precept against hoarding land or other commodities of a limited stock.

And then throughout the period that I treat in this new book, I try to follow how the legal idiom was used by both powerful and less powerful actors to justify, stabilize and sometimes also critique the worlds that sovereignty and property were in the process of creating. Theologians were often out there as authoritative interpreters of natural law towards the indigenous peoples during colonization, while legal advisors and political thinkers canvassed an expanding world of commerce and diplomacy by idioms such as the law of nations, *lex mercatoria*, royal prerogative and the public law of Europe. Each idiom operated in formalist and casuist versions that allowed the emergence of an increasingly dense network of doctrines and principles to justify and stabilize a hierarchy of international actors as well as what later came to be called the public and the private worlds of European societies.

In one of my chapters, I try to show how law loses to economics in the context of the late 18th and early 19th centuries. This was the moment when legal advice had justified the power of the ruler as the power of a sovereign and produced a detailed casuistry of property rights but had little or nothing to say about how they were to be used. This opened the door to another vocabulary, namely economics, to produce utilitarian arguments about how to employ public or private resources in a way that is most beneficial to the ones whom law had pointed to as their beneficiaries. That was really a defining moment for modern law, its self-limitation as against economics. It is quite significant that Adam Smith produced his *Wealth of Nations* as an outcome of a project to provide an empirical concept of jurisprudence directly in the line from Grotius and Pufendorf onwards.

Sarah Nouwen: This answer immediately challenges one of the underlying assumptions of the discussion that we are having during this conference on the transformations in global lawmaking, and that is that of 'deformalization'. Perhaps we can speak of 'deformalization' if we compare international lawmaking in the 2020s with

that of the 1980s. But when I read how the protagonists in your book are at work, whether it is de Vitoria, Gentili, Grotius or Wolff, they, too, seem to be bricolaging their arguments together. To what extent, if international law is indeed a field of bricolage, can it ever be reconciled with an idea of formalism? Do you see this shift? And how do you see these two things go together?

Martti Koskenniemi: I am a little bit frustrated with the formalism debate. I have three answers to give to you.

Let me start with the most abstract one. Formalism and anti-formalism are not features of the world. They are features of the way we perceive the world. Someone may find it hard to understand the world as its parts do not appear to realize any distinct form, such that it can be brought under a pre-existing conceptualization. Whereas others may have no difficulty at all in formalizing their perception and acting with it. I often use the example of Kandinsky's work in the early 20th century. When those lines and squares and round forms for the first time were presented in canvases, in exhibitions in Paris, many people had a hard time understanding them. Their idea of proper artistic form was created in the 19th century as against which Kandinsky appeared just utterly deformalized bits and pieces across a canvas. But then again, very rapidly, people started to understand 'constructivism'. And all of a sudden, every line, every square and every circle, those famous reds and greens, began to make sense as an utterly formal arrangement of things and contextualized as part of a certain early modernist feature of art. So, my first response is we have to see that formalism and anti-formalism are in the eye of the beholder, not in the world. They are ways to communicate with the world and to try to grasp its significance.

But I have another answer, and this is the more familiar one. This is Max Weber's analysis of modern law to which I subscribe wholly. Weber writes that as modern society becomes increasingly more complex, it is impossible to deal with it with hard-and-fast – formal – rules. Rules will have to have more and more exceptions, you will have to use more and more 'soft' notions, such as 'reasonable', 'good faith', 'proportionality', etc., in order to grasp the individuality of situations. There is, I think, some historical continuity in ways in which cultural units (such as law, theology, art or economics) first take on a strictly 'formal' and inflexible guise against older units held to have degenerated into corrupt forms with no longer any compelling authority. But as the new unit then meets with the requirements of the world outside, it will begin to make accommodations, produce exceptions to its principles and finally develop into an overall casuistry that will eventually appear only as a corrupt version of its once-upon-a-time pristine forms. For example, the rise of 'human rights' in the 1970s was a formalist response to the apparent injustices produced by the increasingly casuistic operation of modern bureaucratic law at the time. Since then, human rights have been utterly deformalized by recourse to proportionality or margin of appreciation as well as the ubiquitous practice of balancing. One waits for the formalist retort – perhaps economic 'modelling'? Sometimes it is 'formalism', sometimes 'anti-formalism' that stands for orthodoxy or critique. Often the only significant question is what you use your formalism or anti-formalism for.

Which brings me to my third response that is more directly about international law. Many people were puzzled when at the end of *The Gentle Civilizer*, I appeared to endorse a 'culture of formalism'. They thought 'ha, now we got him! He is a hopeless European formalist'. There I sided with Wolfgang Friedmann in a public debate that took place in the US in the 1960s concerning American imperial military manoeuvres in the Dominican Republic against the anti-formal arguments of some US State Department jurists. If you wanted to be on the right side of history, I suggested, then you needed to be on Friedmann's side. But because I did not want to make an overall commitment to any kind of formalism (because it could be used for good and for bad causes), I used the expression 'culture of formalism', in a way that I thought was ironic – for surely, if there are two things that do not fit together, these are culture and formalism. By putting those two things together I nevertheless wished to highlight that, in *that* context, transferring decision-making powers to US foreign policy makers (for that is what anti-formalism did) was the wrong way to go. But that may have been an overly subtle way of trying to square my political preferences with my assumptions about the operations of law.

So, formalism and anti-formalism are part of the legal instruments lying around in places where lawyers argue. By this time, we can be both formalists and anti-formalists – it all depends on which audience we speak to and how we expect them to respond to our arguments. It is one thing to speak to a Greenpeace audience, another to address the International Court of Justice. One context requires anti-formalism, the other context requires formalism. Only a lousy lawyer would fixate a priori to either one or the other.

Sarah Nouwen: This answer leads us to the third part of the discussion: the politics of it all. If there is no grand theory of formalization or deformalization, this means that the politics of formalization or deformalization – including the question of who wins, who loses – needs to be assessed for each and every issue area and for every specific moment. This is reassuring for all of us who are sitting here and aim to write another article or book. But this field-making, the making of what international law is about, has its own politics. At a previous ESIL conference you argued something along the lines of 'international law is what international lawyers consider to be international law'. If that is so, deformalization may also be the result of lawyers expanding their field of study by going beyond what is traditionally recognized as law.[9] What are the politics of this field-making: Who wins, who loses in these decisions about what this field is about?

Martti Koskenniemi: Well, the field is very divided. It is possible to speak international law in many different idioms, in different international and domestic institutions. Within those institutions, it is then used to set up and reinforce what I and others have called 'structural biases', patterned ways to link justifications with outcomes. And those outcomes have to do with the distribution of resources, both material and

[9] See also d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', 19(5) *Eur. J.l Int.l L.* (2008) 897.

spiritual, as well as powers and vulnerabilities. Law in this sense constantly reproduces the world through the structural biases of the institutions that use legal vocabulary.

It is well known that legal idioms proliferate. A few years ago, I was engaged with the fragmentation question. This was a moment when many lawyers were worried about the different types of bias emerging in different institutions applying international law. I think the worry has now passed. Diversification may even be seen as useful; let many flowers bloom! On the other hand, as David Kennedy would say, law is a field of struggle. Different legal institutions do struggle over authority and seek to make their specific priorities the general priority – let human rights, security, trade, environment rule! This is what is often called 'politics of expertise'. By turning to a specific legal expertise, we choose a specific set of institutional biases and with it, a specific distributional pattern.

I think it is good to remember that even as we are all international lawyers, we do not share a definite view about what the world is like or where its greatest injustices are. Students, for example, are not taught to ask the question about who wins and who loses in particular legal arrangements. We still invite them to commit to international law – without asking the question of what type of hierarchy this commitment upholds. In particular, we often fail to remind students that law is also responsible for the way the world is, including the way it is unjust. This is why committing to law in itself involves no virtue.

Sarah Nouwen: One of the points to look at when figuring out the who-wins-who-loses question is the relationship between international law and property – a key theme of your new book. In *To the Uttermost*, sovereignty and property always seem to go hand in hand. Where sovereignty appears, property is backing it up or where property appears, sovereignty is backing it up. As you just mentioned, in your earlier work you have exposed the politics of fragmentation. In the current world of a fragmented international law, is property and sovereignty as, in your terms, 'the yin and yang' of international law, or at least the yin and yang of European power in international law, still so visible? Can we see sovereignty and property go together in, say, international environmental law or only in specific regimes, such as investment law, or is this combination still pervasive even in general international law?

Martti Koskenniemi: There was a time when the interlocking of sovereignty and property was easily visible; for example, at the time when colonial companies received their authorization from the king, and carried out administrative duties in their settlements. And of course, the wars of sovereigns have always been funded and controlled by financial interests. Today, we see issues about taxation – including tax avoidance – connect with sovereign policies in complex ways. Many people focus on the protection of private investments and the clash it involves with the political priorities of the host sovereign. Sovereignty and property empower different people, but history shows that it is especially when those people come together that you see where the heart of power is. Of course, often that collaboration takes place outside the sphere of public scrutiny. But I think that questions about taxation should become much more important also for the analysis of international law. How do powerful private actors, owners of various kinds of

property, enlist states as their assistants when they create an increasingly globalized legal world? This touches of course the very heart of the topic of this conference. My wish for the conference would be that once we begin to talk about the politics of global lawmaking, we do not fall into the trap that we believe this takes place only on the sovereignty side, on the side of public law and treaty-making, but that we understand that global lawmaking happens everywhere where law is spoken, in the private as well as in the public sphere and very often in cooperation between the two. It is those cooperative channels that I think future research in international law, in ESIL, should make transparent.

Sarah Nouwen: You have already ended with a wish for the European Society. I have one more question. One way to discuss politics is to ask the question: Who does what to whom?[10] In your book, the protagonists are all white European men and they are imagining the entire world from home. In your response in the EJIL Symposium,[11] you explain that the Salamanca jurists and theologians had actually never left the Iberian Peninsula when they came up with the law for the entire world. And according to you, actually, we may all be stuck in Salamanca: 'Perhaps those theologians are not that different from modern-day experts in global law projecting the texts we have collected from our academic and professional contexts across space and time so as to influence decision-makers and grant institutions.' Is there a reason to hope that there is a difference? And that is that we are more aware of the enormous diversity of the 'homes' for the imagination of international law and the significance of these homes and also the significance these homes have always had on challenging the white European man that you have mentioned? Is it too idealistic to hope that there are more meaningful encounters among the various homes in which international law is being imagined? Because, perhaps ultimately, that too, is an objective of a conference like this one.

Martti Koskenniemi: Well, I appreciate the attempted optimism towards the end of this hour. But if it is true that we are more aware of the world's diversity than the Salamancans of the 16th century were, then surely this means that the scandal of the world's injustice is today greater than it then was, and our responsibility is even greater than theirs. If there is reason to be critical of the injustices of the past, then I think it is in order to be aware of those in the present.

Sarah Nouwen: That is an excellent call for action at the end of an introductory event.

Martti Koskenniemi: Thank you so much, Sarah, I thoroughly enjoyed this.

Sarah Nouwen: Same here. Unfortunately, we cannot assess the atmosphere in the audience.

Martti Koskenniemi: No, it is hard. We will be hearing from them, I am sure.

[10] See also, adding, 'for whose benefit', R. Geuss, *Philosophy and Real Politics* (2008), at 25.

[11] Koskenniemi, '"Stuck in Salamanca": A Response', 32 *Eur. J. Intl L.* (2021) 1043.