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TWENTY-FIRST ANNUAL GROTIUS LECTURE

Martti Koskenniemi of the University of Helsinki and discussant Anne Orford of the University of Melbourne Law School provided the Twenty-First Annual Grotius Lecture on Wednesday, March 27, 2019, at 5:00 p.m.*

ENCHANTED BY THE TOOLS? AN ENLIGHTENMENT PERSPECTIVE

*By Martti Koskenniemi***

"In this context the proposition that tools are prolongations of human organs can be inverted to state that the organs are also prolongations of the tools."[1]

The theme for this year's meeting of the American Society of International Law is "International Law as an Instrument." That invokes a modern, rational idea often associated with the European Enlightenment, making a distinction between means and ends and drawing attention from the latter to the former. Instead of engaging in complex, often interminable debates about the purposes of human activity, it invites us to think about the efficiency of the technical tools we use to seek to attain those purposes. This shift also has its well-known problems: is it possible, or useful, to think about the tools in abstraction of their *point*? A powerful current of twentieth century political thinking attacked what it called "instrumental rationality." One-sided attention to the tools of modern life, that is the argument, has created a techno-economic juggernaut that had contributed and continues to contribute to the destruction of important social values and may now threaten the survival of the human species. Even if one does not share the dystopian predictions of some of this critique, the "Dialectic of the Enlightenment" has long been part of our cultural baggage and justifies turning the assumptions behind this year's meeting on their head and asking, if international law is a tool, *what is it a tool for*?[2]

It is sometimes said that international law is an instrument of the "international community." But that view was always hard to defend. What is the "international community"? How do you know what it wants? There is a respectable, well-known literature on the "binding force of international law." Textbooks still rehearse theories from Austin to Kelsen, Jellinek to Hart, Lauterpacht to McDougal. Naturalism, sociological theories, rational choice, functionalism, legal process all

* These lectures will also be published in the *American University International Law Review* (*AUILR*), forthcoming 2020. Note for readers: this lecture reflects the style conventions of the *AUILR* as it is published in both publications.

** Professor of International Law (University of Helsinki), Member of the American Academy of Arts and Sciences. This was the "Grotius Lecture" given at the Annual Meeting of the American Society of International Law on March 26, 2019. I have preserved some of the spoken character of the lecture but also amplified it by passages from my T.M.C. Asser Lecture of 2019, "International Law and the Far Right: Reflections on Law and Cynicism" (published with T.M.C Asser Press 2019).

[1] Max Horkheimer, *Traditional and Critical Theory*, *in* CRITICAL THEORY: SELECTED ESSAYS, 188, 201 (1972).

[2] THEODOR ADORNO & MAX HORKHEIMER, THE DIALECTIC OF THE ENLIGHTENMENT xi (1974). Despite the power of that work, a good argument can be made so as to historicize it as an analysis of the mid-twentieth century situation of total war and the authoritarian turn in liberal-democratic societies. Although much of its analysis is still relevant, this is perhaps not true of the suggestion of state capitalism as the final form of liberal society.

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aim to explain the point of international law and why we should obey it. But all that feels somehow outdated. These theories come from the nineteenth and early twentieth century and virtually nothing fresh has been written on the issue of "basis of obligation" for decades.[3] I suppose this is an effect of the fact that, as Samuel Moyn has put it, we "live among the ruins of inconclusive confrontation and fragmentation" of legal theories, including theories about the purpose of international law.[4] Instead of reviewing these theories once again, I will assume that while they may explain some aspect of whatever faith some of us may have in international law, none of them explains why we—and I mean by "we" people whose business it is to work in and with those institutions and who are involved in their endless reforms—yield to it. We yield because it is so hard to imagine alternatives; we allow ourselves to be "enchanted" by it.

As the famous quote from the sixteenth century French lawyer Michel de Montaigne provides, "[n]ow the laws maintain their credit not because they are just, but because they are laws. This is the mystical basis of their authority; they have no other."[5] Montaigne made this point at a time of religious war to persuade Frenchmen not to look for transcendental foundation of authority. Just shut up and obey. Montaigne, like his lawyer-colleague Jean Bodin, agreed that it was better to live even under a tyranny than the endless civil war occasioned by religious-ideological conflict. Eventually, France would emerge from internal strife as a reasonably stable country. We have learned to call this unthinkingly respectful attitude to law "positivism," and to be critical about it.[6] Although it did help to end the bloodshed, it also founded royal absolutism. At which point it began again to seem useful to look for an explanation. Why, indeed should we obey the laws handed down to us by authority? "Man was born free, yet everywhere he is in chains," Rousseau quipped as he was interpreting the institutions of the old regime.[7] During a civil war, it may have seemed prudent to refrain from asking too many questions. But when the pragmatic benefit of obedience was no longer so obvious, and people would start posing the "why" question, then a wholly different world—I hesitate to say "can of worms"—was opened.

There was long a "Montaigne moment" in international law. During the cold war, we yielded because of the good pragmatic sense of "peaceful coexistence." The world was a dangerous place—let us not rock the boat. But obedience turned from choice to *enchantment* when we could no longer remember why it was we had once decided to yield. In the late 1980s and early 1990s I took part in perhaps a dozen UN General Assembly sessions, from mid-September all the way to Christmas. Flying back to Helsinki someone in the delegation would invariably exclaim "Oh what tough time we had. Such long meetings. And isn't it hard to think whether anything useful was achieved." And then in a hesitant voice, you would hear someone else make the point: "But

[3] Texts about "legitimacy" in which political and legal theorists (but rarely international lawyers) rehearse these topics within the conventions of analytical jurisprudence have been an odd outlier. *See, e.g.*, Allen Buchanan, *The Legitimacy of International Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010).

[4] Samuel Moyn, *Legal Theory Among the Ruins*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT, 99, 101 (Justin Desautels-Stein & Christopher Tomlins eds., 2017) [hereinafter Moyn, *Legal Theory Among the Ruins*].

[5] MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS, 353 (1993).

[6] One of the reasons for the outdated and unhelpful character of much of modern legal theory is that it tends to assume a fundamental opposition between "positivism" and "natural law." Lawyers such as Montaigne or Bodin were, however, both simultaneously finding the explanation for binding authority from natural (and perhaps ultimately divine) law while they deemed its content to be fixed in "positive" enactments by existing authority. "Naturalism" and "positivism" presuppose the correctness of each other (one answers the question of the binding force, the other of the content of the law). That is why a legal theory that presupposes their opposition goes nowhere. As rhetorical choices, however, the two have their sense, the one being more persuasive when fundamental questions about authority arise (at moments of "revolution," typically), the other when addressing well-established, stable institutions.

[7] Jean-Jacques Rousseau, *The Social Contract*, *in* THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES, 151, 156 (Susan Dunn ed., 2002).

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isn't it anyway better that we have the UN than that we wouldn't have it"? This was the voice of ideology. Enchantment was speaking. "How do you know?"

This is what I mean by "enchanted by the tools." The readiness to support international law independently of any clear view of how what it does relates to its ends, out of the sense that we cannot live without it. If asked why it is there, we may provide some historicist cliché—like "universal history with a cosmopolitan purpose," for example—or refer to some sociology of interdependence or a generalization about the nature of the human species. Such responses are both convincing and fragile, less matters of argument than objects of unthinking commitment. Perhaps they no longer seem that powerful? What about Brexit or American disengagement from multilateralism? Or the recent revolt in Europe and North America against the transatlantic and transpacific trade and investment treaties, stalling the expansion of free trade, and the coming paralysis of the World Trade Organization (WTO) Appellate Body owning to U.S. reluctance to appoint new members. In his address to the UN General Assembly in 2019, the president of the United States said this: "The future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbors, and honor the differences that make each country special and unique."

The president of the United States gave voice to those who have been disenchanted by what he chose to call "globalism." His speechwriters might have included international law, at least international law in its "global governance mode," had they given the matter any thought, which they probably had not. That is the mode of law that arose in the 1990s and suggested that nation-states had become hopelessly inadequate as mechanisms for managing the world's problems. Under this mode, the world was to be ruled by global institutions, governmental as well as supranational, public as well as private, by reference to objectives that had nothing essential to do with nation-states: free trade, clean environment, economic development, human rights, post-conflict governance and so on. Each "issue-area" would be ruled in global regimes with its own type of professionalism and teleology.[8]

The U.S. president's attack against "globalists" no doubt resonated among those in his audience who had become disenchanted with the 1990s global governance ethos and felt that something about it was responsible for the grievances they felt. Of course, disenchantment is not at all necessarily a bad thing. As Leonard Cohen once put it, "[t]here is a crack in everything, and that's how the light gets in." Disenchantment involves loss of unthinking faith, and perhaps realization that something about that faith had not only been mistaken but the very source of our troubles. The shackles of what Kant used to call our "self-incurred immaturity" are broken.[9] This might then enable a sharper (more "mature") awareness of the world, and our place in it. That is one theory. But then there is another kind of disenchantment. A faith is lost. But instead of this leading to the dissolution of "immaturity," and the opening up of a world where (as Kant hoped) we would treat each other "as an end, and never merely as a means,"[10] we find ourselves with all of the critical tools of enlightenment, but none of its promised liberation. The ideals of universal solidarity and progress, born with the imperative of critique, proved excessively ambitious. Failing to reach them, we did not fall back to where we started, but to a different place where those ideals began to appear as the very instruments of our enslavement. The outcome is rage against those whose theories brought us nothing but misery.[11]

The vocabularies and institutions of global governance that arose in the 1990s are being challenged from many sides today. These challenges build on different kinds of experience and their

[8] *See* Martti Koskenniemi, *International Law as "Global Governance," in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT, *supra* note 4, 199 (Justin Desautels-Stein & Christopher Tomlins eds., 2017).

[9] IMMANUEL KANT, KANT'S POLITICAL WRITINGS, 54 (Hans Reiss ed., 1971).

[10] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, 38 (Mary Gregor ed., 1998).

[11] *See generally* PETER SLOTERDIJK, CRITIQUE OF CYNICAL REASON (1987).

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local themes vary. But they are united by a certain disappointment with the turn to global governance in 1990s. This disappointment may have both an enlightened and cynical effect. In order to understand the ongoing anti-globalist surge, I suggest examining, first, the way in which the professional classes in Europe and the United States were enchanted by the tools of global governance. I will then move to discuss how that enchantment wore off among the populations of the developed north with respect to two of its key aspects: expert knowledge and the politics of rights. In the final section I will take up the question of what it would require turning that disenchantment from its presently cynical manifestations into constructive work so as to move beyond the globalism of the 1990s. If at all possible, this seems to require nothing less than reimagining the nature and roles of technical expertise and politics in the government of our increasingly vulnerable societies.

I. Enchantment: 1960 to 2000

The 1960s was a time of massive cultural change in the secular West. The truths of earlier generations—their patriotism, their legalism, and their Cold War spirit—became old hat. Wolfgang Friedmann's 1964 book *The Changing Structures of International Law* provides a wonderfully perceptive account of that moment. Sketching what he called a move from *co-existence* to *cooperation*, Friedmann used the vocabulary of interdependence and expansion to stress the fundamentally *international* nature of that moment: technological progress, environment, trade, development: "… beside the level of interstate relations of a diplomatic character there develops a new and constantly expanding area of co-operative international relations." He imagined that the European Communities might be seen as "a possible precursor of a future integration of mankind."[12] "[T]he national state," Friedmann wrote, "and its symbol, national sovereignty, are becoming increasingly inadequate to meet the needs of our time."[13] The 1960s was tough on the traditional values, national, religious, agrarian, bourgeois. It appreciated plurality and individualism:

> [T]he necessity to protect the individual as such internationally, even against his own state, has become an accepted postulate of international lawyers, and the recurrent subject of international debate.[14]

"Even against his own state"—it was not surprising that a refugee from Germany would make this point. But many other international lawyers followed suit, and not only in the United States.

Now flash forward to the 1990s: the end of the Cold War, the emergence of the European Union, intensification of international cooperation in trade, development, environment technology, resource management, even democracy— all of such developments outlined and celebrated by Thomas Franck from New York University in 1998.[15] Analysts everywhere began to write about a "New World Order" that could include anything from cooperation between the judicial branches of different countries, to humanitarian intervention, from supranational environmental regulation to the establishment of an International Criminal Court.[16] With the WTO, regulatory focus shifted from customs tariffs to domestic industrial, labor, and environmental policies, some of the core functions of statehood.[17] Human rights bodies would begin to undertake close

[12] Wolfgang Friedmann, The Changing Structure of International Law, 19 (1964).

[13] *Id.* at 365–66.

[14] *Id.* at 376.

[15] *See generally* Thomas M. Franck, Fairness in International Law and Institutions (1995).

[16] Moyn, *Legal Theory Among the Ruins*, *supra* note 4, at 101–02.

[17] Andrew Lang, World Trade Law after Neoliberalism: Reimagining the Global Economic Order, 221, 229, 230, 270 (2011); Anne Orford, *Theorizing Free Trade*, *in* Oxford Handbook of the Theory of International Law, 731–33 (Anne Orford & Florian Hoffmann eds., 2016).

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surveys of administrative practices; there was talk about lifting the immunity of domestic political leaders in face of international prosecutions. The World Development Report of 1997 by the World Bank chose to reimagine the streamlined functions of the state in a global world. The time of "technocrats" with "fanciful schemes" was over. Although at several places, the Bank reported that its objective was not to "dismantle the state," it was clear that it was to be restricted to its basic functions, especially to providing security, while its role in producing social services was to be limited to a minimum as much more could be done in "partnerships with firms and citizens." The thrust was on "market liberalization and privatization."[18]

Never has law played a more visible role in international life than in the long 1990s.[19] When confronted with a problem, the first thing we learned to ask was "what has international law to say about this"? If there was international violence, we wanted to know whether Chapter VII of the UN Charter had been applied. A political crisis arose—and we are worried about basic human rights. Have crimes against humanity been committed? Should prosecutions begin with the International Criminal Court? If there was friction with free trade—we enquired if a domestic policy, for example a labor or agricultural policy, amounted to "unfair" protectionism prohibited under the WTO treaties. Should a panel or the Appellate Body be seized? And what about political unrest at home? Has there been discrimination? Have basic human rights standards been applied? Have courts been appropriately seized and standards of due process adequately followed? A lot of ink was spent by academic jurists on the "constitutionalization" of this or that aspect of foreign policy. Some were keen to develop a "global administrative law."[20]

The audiences at home were often unimpressed. What they felt at home was austerity, the narrowing down of possibilities of political contestation, and the rise of a new technocracy wedded to what the historian Timothy Snyder has called the "politics of inevitability."[21] While the UN, the European Union, and countless "global governance" institutions were busily engaged in their problem-solving tasks, domestic audiences were feeling an increasing sense of alienation. In the 2010s, this alienation was given voice by far-right manipulators pointing to the coincidence between the expansion of global governance and the stagnation of the middle classes in Europe and the United States. Where was the process going? Was global governance more than a ploy by "unaccountable elites" to consolidate their privileges? Today, far-right demagogues have enlisted popular disenchantment in support of "taking *back* control," a cynical effort to push through a reactionary political agenda. The immediate target was the neoliberal spirit of the 1990s, but the political attack has been channeled to the opening of the West since the 1960s to the world outside that reversed the hierarchies of tradition. Slogans like "Make America Great *Again*" propagate a return to a supposedly better past. It seeks to restore a system of control familiar from a previous generation, control by white men over their homes and societies, a time when *cosmopolitan elitists, feminists, Jewish philanthropists, gay journalists, and African refugees did not tell us how to think or what to do*!

II. Disenchantment 1: Knowledge

What irritates the anti-globalists to no end is that the power of global institutions does not at all present itself as values or preferences—as conventional politics—but as knowledge; international experts rule because they are experts, because they *know* that climate change is true, that increasing prison sentences has no effect on criminality, and that the greatest to suffer from Brexit are its

[18] World Development Report 1997: The State in a Changing World, 6, 61–62 (1997).

[19] Marcel Gauchet, L'avènement de la démocratie: Le nouveau monde, 521–604 (2017).

[20] *See* Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & Contemp. Probs. 15 (2005).

[21] *See* Timothy Snyder, The Road to Unfreedom: Russia, Europe, America 7 (2018).

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supporters. *Check the facts*! That exchange is patronizing; there is no conversation, only surrender is available. On the one side, truth, and on the other, ignorance. And yet, as the experts themselves know very well, opinion and choice exist at both ends. Positivism died long ago, replaced by the more complex tools of structuralism and hermeneutics, all the fuzzy science that tells us that "facts" always appear in regimes of knowledge which, though true on their own terms, are no longer solid when we compare them with each other, or look inside their constituent elements. If there is anything international lawyers have learned from the debate on "fragmentation" it is that what one may want to say on a given problem depends on which type of knowledge one uses to look at it.[22] And as soon as one has found the relevant knowledge, one will find out that it is divided into an orthodox and a heterodox view. The backlashers have noticed this; the institutions do not represent "facts," but rather opinions. The enchantment is broken. Behind the façade there are policies that can and ought to be contested. "Austerity" is a choice, not a necessity.

The instruments of global law operate in a field of great complexity. Environment, trade, investment, development, and security—each toolbox invokes specialized knowledge but also value: each has a powerful ethos or a project, a policy to advance. To be a trade lawyer is also to think of trade law as good. To have been educated in environmental law is also to have internalized the goals of environmental law. But what if both deal with the same issue? Which to choose? Trade or environment? Security or privacy? Global governance is a clash of knowledges, clash of rival and incompatible instrumentalities: each tool with its objectives, its professional culture and its value-system. Once you know which institution will deal with a problem, you already know how it will be dealt with. Is crisis in Central Africa a human rights problem or an economic development problem? The answer depends on whom you ask, the High Commissioner of Human Rights or the World Bank? And is post-conflict governance in Kosovo a matter of security, of adequate housing and employment or of educating girls? Peacekeeping professionals, social development experts, and human rights activists will each provide a different answer, each with equal conviction. Truth is not one but many. And they are in struggle.[23]

The anti-globalists have noticed this. The trade expert wants more trade, and the environmental scientist more protection, the interior ministry wants more surveillance, the justice ministry less. It is all so predictable. Imagine a discussion on post-conflict governance between a police officer, a human rights lawyer, a teacher and an architect. The police officer will want to eradicate insecurity in the streets, the human rights lawyer points to poverty in the community. The teacher would prefer expanding the education of the girls while the architect has in mind a housing project. Each possesses a view of the objectives and instrumentalities of the international world, as suggested by the techniques they have learned to master. Each believes available resources would be best used if directed to *their* field, if their project became a project for that society itself. The unavoidable impression with the outsider is that the *certainty* each side claims for its knowledge is only a sham. What the experts are *actually* doing, is trying to monopolize available resources and prestige not for the general but for private advantage. No doubt, experts may often be brought into consultation with one another, to debate their varying objectives in meetings at Geneva, New York, or any other such global center.[24] But the anti-globalists know that however the debate will go, they will

[22] *See* U.N. Secretary-General, *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law*, ¶¶ 21–26, U.N. Doc. A/CN/4/L.682 (April 13, 2006); *see also* ANNE-CHARLOTTE MARTINEAU, LE DÉBAT SUR LA FRAGMENTATION DU DROIT INTERNATIONAL: UNE ANALYSE CRITIQUE (2015).

[23] DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2016).

[24] *See* Jeffrey L. Dunoff, *How to Avoid Regime Collisions*, *in* CONTESTED REGIME COLLISIONS: NORM FRAGMENTATION IN WORLD SOCIETY, 58–70 (Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard & Stefan Oeter eds., 2016).

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have no say in it. They have none of those languages. Instead they have one recollection, namely that "*whatever the expertise—we will always lose in the end; whatever the policy, it is bound to treat us as an ignorant underclass*."

In principle, it might seem possible to back down from this infighting by suggesting that it is up to the governments that fund them to their objectives. Sovereign states are, after all, supposedly the "masters of the treaties." But modern government is just a local version of an international negotiation. A country's delegate in the conference of the parties to an environmental treaty speak one language, the same country's representatives in a World Bank meeting another. The environment minister represents an environmental knowledge that is utterly global; the finance ministry is a kind of local bureau of the World Bank or the European Central Bank—while the justice minister never ceases reminding everyone of the protections the offered by the human rights treaty system. Domestic departments operate on the basis of systems of knowledge that have nothing "domestic" about them. No wonder. Their personnel were once Erasmus students and are now constantly on travel to Brussels, Washington, Beijing…. All governance today is global governance. No surprise the anti-globalists feel alienated; they do not sit at those meetings; but even if they did, they would not know what to say.

But not only have expert languages colonized everything so that it seems impossible to choose between them, they are also utterly split within themselves. I used to take part in the public debates around 2015 concerning the proposed treaty on transatlantic trade and investment (TTIP) and its follow-up, the EU Canada (CETA) initiative. The question often arose whether private-public arbitration in those treaties might enhance investment—whether it made economic sense for a state to accept the possibility of being sued by an investor in an international arbitration process. There were always two economists. One claimed that the presence of such clauses invariably attracted investors—the other retorted that they made no difference whatsoever.[25] Once they had made their points, they then began to attack the respective "models" they had used to come to their opposite conclusions. The feeling of disbelief and frustration in the audience was tangible—"*must we really take a stand on the relative merits of economic models in order to decide whether to support investment agreements or not?*"

Of course, they would not. And of course, models do not work like that. As the Harvard economist Dani Rodrik reminds us, "The correct answer to almost any question is: It depends. Different models, each equally respectable, provide different answers."[26] From this the backlashers have drawn the conclusion that there really is no difference between expert "knowledge" and opinion, truth and bias. You could always find an economist, a lawyer, an engineer, to defend whatever needs defending. What the expert says is just cynically dressed as knowledge so as to lift it outside political contestation *so as to exclude me*!

The knowledge-systems that support global governance are not homogeneous billiard balls. Like sovereign states, they are divided between those who rule and those who are in the opposition, orthodoxy, and heterodoxy. The best experts know very well that their field is fundamentally divided, especially about the fundamentals. While appearances can be kept by agreeing on what lies on the surface, problems emerge on how to explain it. Their disenchantment has infected their audiences. Everyone has seen experts speak from boundless self-confidence—yet constantly contradicting each other or being shown to have been mistaken or biased. But there has been no accountability. So, the anti-globalists have concluded that these are just people in bad faith,

[25] *See* Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, The Political Economy of the Investment Treaty Regime 155–79 (2017).

[26] Dani Rodrik, Economics Rules: Why Economics Works, When It Fails, and How to Tell the Difference, 17 (2015).

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speaking down to us in esoteric languages. Privilege disguised as knowledge. According to a study by Pew Research in the United States from July 2017, 58 percent of Republicans and Republican-leaning independents say colleges and universities have a *negative effect* on the way things are going in the country.[27]

The rise of global governance institutions in the 1990s took place almost accidentally, without much discussion of its social effects. Discussing in the 1950s the interwar internationalization of economic decisions, Karl Polanyi said once that the "separa[tion of] the people from power over their own economic life" had been an important contributor to the rise of Fascism in Europe.[28] History never repeats itself as such. But as the philosopher Didier Eribon has shown more recently, today's resentment takes the same direction. There is a sense that the values of the city have received automatic priority so that the provincial town is left to decay economically, socially, and culturally. Eribon remembers how his father, together with his father's trade union friends, everyone active as communists, used to struggle for improved labor conditions in the factory, expressing solidarity with Turkish guest workers. Now the factory is gone, and so is solidarity. Everyone now votes for Marine Le Pen.[29] In her study of popular attitudes in rural Wisconsin, Katherine Cramer has found out that there is feeling that the "people of the city," especially those with jobs with the government, have utterly lost touch with the greatest part of the country. With their fancy jobs they now look down on everyone else and show no respect. When the inhabitants of rural Wisconsin (and of many other places) look around, they remember (rightly or not) that maybe twenty, maybe forty years ago, these towns and those fields looked prosperous and were well looked after. And now the factories have closed, farming hardly pays off and the young have moved away. No resources are directed from the capital to the towns any longer, and the only visit politicians make there is the single trip just before the elections.[30]

Anti-globalism appeals to that experience and that resentment. This is not absolute deprivation, of course—the people in Wisconsin are not "poor" by any standard. But the decline is real and prompts the memory of a better past, a time of confidence in one's status, and the further improvement to come. And when the loss of this confidence is explained as unavoidable owing to the "facts" of globalization, while the "facts" are less than solid, rejection no longer seems incomprehensible. Instead of knowledge, "fake news."

III. Disenchantment 2: Politics

The other aspect of the disenchantment about the tools of global governance has to do with the diminishing space left for political engagement—or at least engagement not packaged in the narrow terms of global governance speech, institutional reform, and budgetary allocations. Focusing on the instrumentalities and efficiencies is so much easier than trying to address the opaque worlds of desire and value somewhere beyond what it is we presently do. But if international law's

[27] Hannah Fingerhut, *Republicans Skeptical of Colleges' Impact on U.S., but Most See Benefits for Workplace Preparation*, Pew Res. Ctr. (July 20, 2017), http://www.pewresearch.org/fact-tank/2017/07/20/republicans-skeptical-of-colleges-impact-on-u-s-but-most-see-benefits-for-workforce-preparation. *See also* Tom Nichols, *How America Lost Faith in Expertise*, For. Aff. (Apr. 2017), https://www.foreignaffairs.com/articles/united-states/2017-02-13/how-america-lost-faith-expertise.

[28] Karl Polanyi, The Great Transformation: The Political and Economic Origins of Our Time, 231, 233–34 (2001).

[29] Didier Eribon, Returning to Reims (2013).

[30] *See* Katherine Cramer, The Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker 131–37 (2016); *see also* Katherine Cramer, *The Politics of Resentment in Contemporary US Populism Conference Amsterdam*, Youtube (Jan. 8, 2018), https://www.youtube.com/watch?v=My3_lb8x-gM (including an update after the 2016 election as a public lecture).

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fragmentation is a special case of what social theorists have analyzed as the functional differentiation of our societies (as I have argued elsewhere), then a real difficulty emerges to point out a uniting *telos* somewhere beyond the special *teloi* of our practices and the respective regimes of technical knowledge-production.[31] "Functional differentiation in general causes systemic and social, problems which the systems themselves cannot solve."[32] The "systemic problem" here is the absence of a unifying morality or a standpoint, a superior set of standards (such as a religion) by reference to which the special objectivities of regimes and toolsets could be weighted and their appropriate place in some overall structure be determined.

International lawyers have often been a vanguard against the "death of metanarratives" so characteristic of the twentieth century experience. When professional international law emerged toward the end of the nineteenth century, it had a reasonably clear sense of the direction where history was going and where its own stakes lay: to assist the march of history was to spread liberal legislation in Europe and to civilize the colonies. With modernity, things would get more international. The *esprit d'internationalité* that inspired that first generation of international jurist projected nationalism and socialism as potentially dangerous, essentially anachronistic movements to be overcome by what Gustave Rolin-Jaequemyns chose to call in the first issue of the first international law journal in 1869 "a more elevated patriotism" that would take account of the needs and interests of neighboring nations and engage in the international solution of common problems.[33] In the aftermath of World War I, jurists began to think of nationalism and sovereignty themselves as obstructions on history's natural course. Had it not been precisely their misguided patriotism that had driven Europeans to die on the battlefield in defense of causes that few would understand.

"Internationalism," "functionalism," "solidarity," "progress"—these were some of the new watchwords with which interwar jurists debate the teleology of international law. In the Francophone world, Durkheimian lawyers such as Georges Scelle speculated about the forces of solidarity that would bring nations together to administer the constantly expanding realm of common interests. In the Anglophone realm, Paul Reinisch inaugurated a "functionalism" that focused on the practical work of technical institutions and would, as Jan Klabbers has noted, draw inspiration from colonial government so as to launch "a century of writing on international institutional law … postulating an ethical duty to cooperate on the international level, reinforced by practical necessities and resulting in a 'concrete and practical' cosmopolitanism."[34] Of course, not everyone agreed. Realist lawyers in Britain, such as Sir Alfred Zimmern, were deeply skeptical about projecting supranational ambitions to the League.[35] That the Covenant had been drafted as part of the peace treaty with Germany lent credence to Carl Schmitt's view of it as an instrument of Anglo-American hegemony—an analysis that realist political thinkers such as EH Carr would be the first to approve, though in a different idiom.[36] During the Cold War, it would become utterly unrealistic to postulate shared objectives behind international law. "Peaceful coexistence" was all

[31] *See* Martti Koskenniemi, *Hegemonic Regimes*, *in* Regime Interaction in International Law: Facing Fragmentation, at 305, 313 (Margaret Young ed., 2011).

[32] Hauke Brunkhorst, Critical Theory of Legal Revolutions: Evolutionary Perspectives, 54 (2014).

[33] Gustave Rolin-Jaequemyns, *De l'étude de la législation comparée et du droit international*, *in* Revue de droit international et de législation comparée 1, 16–17 (1869). *See also* Martti Koskenniemi & Ville Kari, *A More Elevated Patriotism: The Emergence of International and Comparative Law (19th Century)*, *in* Oxford Handbook of European Legal History, 974–99 (Heikki Pihlajamäki, Markus Dubber & Mark Godfrey eds., 2018).

[34] Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 Eur. J. Int'l L. 645, 674–75 (2014).

[35] Alfred Zimmern, The League of Nations and the Rule of Law 1918–1935 (1936).

[36] Carl Schmitt, Der Nomos Der Erde Im Völkerrecht Des Jus Publicum Europaeum (1950); Edward Hallett Carr, The Twenty Years' Crisis 1919–1939 (1946).

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that could be achieved; at a time of mutual threat of nuclear annihilation, that did not seem at all too bad. Objectives of free trade could always be pursued under the General Agreement on Tariffs and Trade (GATT) system that, however, way into the 1980s was more about tariff reductions than intervening in domestic industrial and labor policies in view of their potentially distorting effects on free trade. The 1948 Universal Declaration on Human Rights did rally liberal politicians and nations in efforts to give human rights a more determined and legally binding form—an effort eventually crystallizing in the 1966 covenants of Economic, Social and Cultural Rights and Civil and Political Rights. But more significant advances were attained within the confines of regional institutions.[37] International law remained a coordinating devise, as Friedmann had analyzed it.

No doubt, we often think of the technical tools offered by international law as instruments of international "justice." Despite the semantic openness of that notion, it would not be hard to identify as the most important set of justice-objectives in post-war international law those that were supported by states emerging from decolonization in the 1960s. Although those claims were often dressed in traditional terms as the justice of sovereignty, as one leading Third World jurist, Mohammed Bedjaoui, stressed, this did not mean simply or even predominantly *political* independence. Sovereignty that did not extend to economic relations was a mere "phantom sovereignty."[38] The idea of sovereign equality, a basic principle of the UN Charter, was not to be understood in a narrow and legalistic way. It was "substantive equality" ("*égalité compensatrice*"), an objective enshrined in countless UN General Assembly resolutions on permanent sovereignty over natural resources and eventually the Declaration of the New International Economic Order of 1974.[39]

That the tools of international law no longer operate to bring about the new international economic order reflects the political defeat of the third world in the 1980s. No doubt, "justice" remained a widely endorsed objective, but in the 1990s it was assumed that it is better achieved by deregulation and state facilitation of private enterprise and free trade and that it must anyway be balanced with other types of justice, including those of overall growth and development, environmental protection, rule of law, and political stability. It is rarely cited today, perhaps because it is both open-ended and tainted with connotations to state planning and redistribution. But even if "justice" was the name for the objective of international legal instruments, the practical experience is that these instruments emerge as compromises so that there is no single datum—no simple "justice"—anywhere "behind" them to which they could be reduced.[40] In a time of fragmentation, the Montaigne Principle imposed itself on us.

Instead, jurists have much more readily endorsed human rights to address the teleology of international legal instruments. In the 1960s, Friedmann was still careful to limit the influence of rights to regional institutions. The "Third Basket" of the Helsinki accords of 1975 did recognize the value of rights also in East-West relations. And as legal theorists began to endow rights with trumping quality over institutional policies, an increasing number of projects and preferences began to be labelled in terms of the "human rights" of those who held them. Looking around in the 1990s, Tom Franck wrote that "each individual is entitled to choose an identity reflecting personal preference … in composing that identity, each may select more than one allegiance."[41] Characteristically optimistic. Such free-floating individualism arose from the cultural

[37] European Convention on Human Rights, https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c= (last visited Nov. 20, 2019).

[38] Mohammed Bedjaoui, *Non-alignement et droit international*, 151 Recueil des Cours 339, 386 (1976).

[39] G.A. Res. 3201 (S-VI), Declaration on the Establishment of a New International Economic Order 3 (May 1, 1974).

[40] Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823, 1883, 1885–86 (2002).

[41] Thomas M. Franck, The Empowered Self: Law and Society in the Age of Individualism, 39 (2001).

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transformations of the 1960s, the collapse of religious, patriarchal and nationalist values, and the rise of what would later be called "identity politics." In due course, rights were available everywhere in the West to counter the discretion that had become an intrinsic part of modern, deformalized law whose open-ended standards seemed to have empowered the law-appliers to simply to do what they taught best. That was okay as long as those preferences broadly reflected those of the relevant audience. But if they did not….

Eventually, human rights turned into extremely valuable assets. What could be greater than having a preference that would override every countervailing preference? As more and more preferences were translated into the rights of their holders, activists began to worry. If everything was a right, nothing was. How to separate "genuine" from "fake" rights? There was no litmus test. A theory of natural rights was invoked by some—but it could hardly be operated in the context of modern administrative or juridical institutions. And thus the sphere of politics was colonized by rights-talk. Some of this was innocuous, or genuinely helpful. But one could see where this was going. Did racists or misogynists have the right of free speech? Was there a right to bear arms in public places? What about the religious fundamentalist's preference to educate their children at home? Did affirmative action violate the rights of white men? The right to "security" is undoubtedly an important human right—did this then mean that increasing policing resources and the presence of CCTV cameras in public localities should be seen as important human rights measures?

Now no good human rights lawyer would ever think this. They would immediately retort that such policies are not part of "genuine" human rights. Again, the anti-globalists are outraged: "*So you say that everyone's rights are of equal concern—but in your practice, you always override priorities that WE think of as important! Hypocrites!*" In the absence of clear criteria to distinguish "real" from "fake" rights, the human rights camp seems to be merely trying to impose its values on the world. "*Why would their political priorities somehow automatically override ours!*" Think about economic, social, and cultural rights (ESC rights), brought into the canon as a cold war maneuver to finish up the implementation of the Universal Declaration of Human Rights (1948/1966). This seemed especially important in order to show that human rights were blind to larger social problems. Rights also had to do with distributing resources in a just way. If they only had a "programmatic" character (as it was usual to assume), did they not operate as a kind of party program designed to bind the hands of legislators and finance ministries outside electoral policies? Were human rights in truth social-democratic policies of the welfare state, cleverly disguising themselves as "non-political" projects of realizing pre-existing "rights"? For example, Philip Alston's recent work as UN special rapporteur on the relation of privatization to extreme poverty is an excellent example of sophisticated human rights policy.[42] But it is also economic policy and the question is whether it has *any* distance to sophisticated *socialist* attention to capitalism's dark side? And if there is no difference—well, then what about the claims about "universal and inalienable" or about the view of rights as a non-political *limit* to politics? For those not already committed, human rights could only appear as a *leftist policy in unpolitical disguise*.

Among institutions undermined were political parties and the political process. A particularly important moment was when the social democrats, panicking over declining electoral support, co-opted rights as part of the "Third Way." Tony Blair, Bill Clinton, and Gerhard Schröder rose to power by supporting the rights of women, minorities, and disadvantaged groups as well as internationalist agendas of humanitarian intervention and the environment. But the neoliberal co-optation of the Third Way undermined its credibility, eventually bringing social democracy down and threatening to take human rights with it.[43] By the time the financial crisis of 2008 had set in rights

[42] *See generally* U.N. Secretary-General, *Extreme Poverty and Human Rights*, 2/25 U.N. Doc. A/73/396 (Sept. 26, 2018).

[43] *See generally* Samuel Moyn, Not Enough: Human Rights in an Unequal World (2018).

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had become infected by their association with a centrist elite that spoke of free trade and privatization while presiding over unending austerity and a massive growth of domestic and international inequality. The Left had lost its bearings and left in its wake an increasingly cynical electorate looking for revenge in iconoclastic attacks on political correctness and a reactionary attachment to nationalist nostalgia.

None of this is to say that human rights have become meaningless, of course. They still associate with inclusion and progressive change, mostly because such are the objectives of that group of institutional actors who identify themselves with that language. But human rights have also, in the 1990s, become part of the routine of global governance by institutions whose policies have become subject to widespread disenchantment. As a result, that disenchantment has also infected human rights. In the 1990s, human rights were able to claim that they stood outside and above specific institutions, both international and domestic. Having entered those institutions, rights now find themselves just one type of technical knowledge among others—security, development, environment—and with alternative objectives. In such situation, politics will either become a struggle between knowledges, with access limited to those who have obtained the required expertise, or then an indignant rejection of all "knowledge" as simply an unfair camouflage over contestable priorities.

IV. Thinking About Disenchantment

I began this talk by referencing a powerful current of political thinking in the mid-twentieth century that was highly critical of the way modern men and women had become enchanted by the technical and economic tools at their disposal. Max Horkheimer, Theodor Adorno, and Herbert Marcuse believed that the rise of Fascism and Nazism had to do with the way that enchantment had nullified moral sensibilities and distorted the political culture, allowing access to power for demagogues and extremists. Studies conducted under the auspices of the Frankfurt school looked for an explanation for the disaster in the development of what they called the authoritarian personality, a particular type of human being that readily accepted and even looked for a "strong leader" to resolve the anxieties that modernity had awoken.[44] One of the late representatives of that line of thinking, Zygmunt Bauman, even suggested that the Holocaust was a child of modernity, that it could not have taken place in any other conditions.[45] Does today's anti-globalism resemble that earlier moment? History never quite repeats itself as such. It does not provide ready-made "lessons." Nevertheless, it is a storehouse of experiences and narratives through which the present may be assessed. Apart from untried utopias for the future, needed as they are, what else is there to reflect on in the present?

In the 1960s and early 1970s, great political and cultural changes took place in the North as well as in the South. Some of these changes were recorded in Friedmann's *Changing Structures*, and supported decolonization and the rise of human rights, the calls for economic justice and national liberation. There was much violence around the globe, some sped up by the Vietnam War, some with roots in local injustices. The political roles of science and technology in governing an increasingly globalized modernity was debated on many forums. One of them was the German Sociological Association that went through the so-called "positivism struggle" in the 1960s. On the Right, men such as Ralf Dahrendorf, Karl Popper, and Hans Albert engaged with the members of the Frankfurt school in analyzing the effects of an increasingly economic and technological

[44] *See generally* Theodor Adorno et al., The Authoritarian Personality (Verso ed., 2019) (including a new Introduction by Robert Gordon).

[45] Zygmunt Bauman, Modernity and the Holocaust 6–7, 12 (1989).

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civilization on politics and society. The debate was underlain by the theme of "enchanted by the tools" and although the protagonists differed on many of its aspects they shared a concern about the way such enchantment (that they identified with "positivism") seemed to lead into decisionism, undermining what they called "reason" in politics, impoverishing political debate and supporting demagogues and extremists of all kinds. Both sides included participants who shared the trauma of Nazism.

It is striking, as the reporter of the debate, Dahrendorf, wrote, that none of the discussants endorsed "positivism" and that each in their own way highlighted the interdependence between science and value, reason and politics.[46] Popperian "fallibilism" shook hands with the "dialectical" view of Adorno and others in reserving an important role for politics in the analysis and government of societies. Each believed that enchantment with the technical or economic tools of governance—the one-sided association of reason with instrumental reason—tended toward irrationalism and tyranny. Each declared themselves a supporter of enlightenment against myth —although they utterly disagreed on which side myth stood.

Since that time, the notions of enlightenment and reason shared by the debaters have been attacked as having themselves offshoots of large, often Eurocentric myths about universal progress. Critical theorists have had to grapple with post-colonial, post-structuralist, and feminist challenges. The debate is anything but over.[47] But one of the shared assumptions of critics on both sides has to do with the need to look more closely into the assumptions of what it is we believe we know, and what kind of politics that knowledge offers. One of the participants in that debate, Jürgen Habermas, put forward at the time what I believe is still a useful distinction between three types of interest of knowledge (*Erkenntnisintresse*) with which we approach the world that we hope to govern—technical, normative, and emancipatory.[48]

A technical interest has to do with the tools we have; are they good for the purposes we use them? Can they be improved? Should other tools be used instead? These are questions about the efficiency of our practices that take the *objectives* of those practices for granted. I see much of this in the ongoing debates on investment protection, especially on the controversy over whether the relevant tools—bilateral investment treaties (BITs)—adequately respond to the objectives of stimulating investment and supporting domestic development. Although opinions are divided, the notions are so abstract that experts have no difficulty to reduce them to each other and to move directly to the techniques whereby they might be realized without further controversy.[49] How to make sure that the procedure is non-biased, and that the arbitrators or judges are elected in the appropriate way? Focus is directed on jurisdiction, composition, and procedure. But this hardly satisfies even the technical interest of knowledge. For there still is no clear view of their effects, including who wins and who loses. A recent study by the Organisation for Economic Co-operation and Development (OECD) on the costs and benefits of international investment agreements (IIAs) concluded its review on the matter as follows:

> While this increasingly rich literature makes important contributions on what has and continues to motivate conclusions of IIAs, it offers little information on the extent to which IIAs have actually delivered on these expectations; this information is required to assess societal benefits and costs in this area.[50]

[46] *See* Ralf Dahrendorf, *Remarks on the Discussion*, *in* THEODOR W. ADORNO, ET AL., THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY, 123, 125–27, 129 (1977).

[47] *See* AMY ALLEN, THE END OF PROGRESS: DECOLONIZING THE NORMATIVE FOUNDATIONS OF CRITICAL THEORY (2016).

[48] *See* JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1987).

[49] *See* Martti Koskenniemi, *It's Not the Cases, It's the System*, 18 J. WORLD INV. & TRADE 343, 349, 352 (2017).

[50] Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* 71 (OECD Working Papers on International Investment, No. 2018/01, 2018). The executive

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To be enchanted by a tool is to believe that there really are no other relevant problems than technical ones. The course is cast, the objectives are set, and the only question is how to reach them efficiently and without friction. If only the system operates "as it is supposed," all will be fine. Much of 1990s global law—the expanding authority of WTO panels, the International Criminal Court, the many UN-sponsored post-conflict governance projects—now seems a little like that. Progress was about things becoming more "international," less tied down in the bureaucratic structures of the state, to be managed from the heights of New York or Geneva, Washington or Brussels. Insisting on the actual effects, hard to measure as they anyway were, seemed disruptive, perhaps even disloyal. Like my interlocutor(s) on the plane back from New York, many of us had a stake in believing, and having others believe, just that.[51]

But there are other questions. As long as it is conducted among investment experts, the debate on the proposed investment court, for example, is bound to be limited to a technical-procedural question. What "increasing investment" or "domestic development" might *mean*, whether they are the appropriate objectives, will not be studied in any depth. As long as thinking does not encompass the *concepts* on which legal techniques operate, the way they are translated into policies and ultimate "effects," it remains imprisoned—"enchanted"—by those techniques as they have consolidated in time. The passing of a resolution, or signing of a convention, is just a beginning. The problem exists everywhere in international legal practice. What do expressions such as "legitimate expectations," "immunity of state officials," "war on terror," "sustainable development," or "non-tariff barrier" *mean*? How do they allocate powers and vulnerabilities? Each is the product of a historical moment, carrier of a project, and the effect of some consensus. Each is also blurred in its boundaries and often contested in its substance. The notion of "development" in investment law cannot be pinned down in numerical data derived from domestic GDPs because it is not clear that the GDP can be taken as the relevant standard.[52]

The normative interest of knowledge directs attention from the tools to what they are tools *for*, and seeks to penetrate through the abstract and diplomatic descriptions of technical analyses of particular tool-regimes to their actual effects, provoking questions about choosing between contrasting preferences of competing regimes—trade and environment; human rights and security; autonomy and integration. What is it that we *want*? And who are *we*? These are questions that it is utterly insufficient to examine in the bodies whose members are already enchanted by the tools of which they are the experts. They touch upon incommensurable value schemes, choosing

summary of the Report begins its conclusion with the following caveat: "While a large number of claims have been made with respect to the societal benefits and costs of IIAs, very few of them have been empirically tested, and a few of those that have been tested have been confirmed empirically." *Id.* at 4.

[51] Having been involved in the setting up of the Iraqi sanctions regime in the U.N. Security Council in 1990, I can testify to the utter unpreparedness of the Council and its Secretariat, as well as the delegations, to the management of what would gradually turn out to be a disaster for the vulnerable populations in Iraq and one of the worst scandals of corruption in U.N. history, "Oil for Food." This was an extreme case of being enchanted by the rules and the sudden ability of U.N. delegations to apply them "as they were supposed." Martti Koskenniemi, *Le Comité Des Sanctions (crée par la résolution 661 (1990) du Conseil de securité)*, 37 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 119 (1991).

[52] Many would suggest that the Human Development Indicators, or in some broader way the U.N. sustainable development goals, would provide a more relevant standard. *See* Robert Costanza, *Why GDP Is Not an Accurate Measure of Economic Growth*, World Economic Forum (Dec. 9, 2014), https://www.weforum.org/agenda/2014/12/why-gdp-is-not-an-accurate-measure-of-economic-growth/ (claiming that GDP is not a measure of overall societal well-being as it does not measure the "real economy," which includes "all things that support human well-being"); *see also* OECD, *Beyond GDP: Measuring What Counts for Economic and Social Performance* 13 (2018) (arguing that countries should look "Beyond GDP" to alternative indicators to measure a country's development because GDP statistics alone do not accurately portray the health of a country).

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between "winners and losers." They cannot be decided by empirical methods or algorithms but require the involvement of the political community.[53]

But there is also a third interest of knowledge; one that is not only about what our values or ends are, or how to realize them, but which asks the question: "*are they the values we should have, in view of everything that we know about the world*"? As our knowledge increases, we may have reason to change our politics. This is the most difficult of the three interests because it requires turning against the commonsense view that we share to find out if some pathological distortion already infects that view. The theme of enlightenment against myth receives now a slightly different form. To be enchanted by one's tools is to share the commonsense view of their place in the overall scheme of things—how is it then possible to take a critical view one's enchantment? Two alternatives seem available. Either one adopts some external critique of that "overall scheme"—with the risk of losing one's audience and having to justify that "external" view against an *a priori* reluctant audience. Or using the "internal" contradictions, gaps and inconsistencies in the overall scheme of things so as to seek to affect a change. One possible way forward here is to break the boundary between knowledge and value, science and politics. As Habermas once put it in one of his early articles, "the truth of statements is ultimately tied up with the intention to live the true life."[54] Here the interest of knowledge departs from the tools and their objectives, highlighting the tensions within and choices to be made inside the "overall scheme of things," inviting disenchantment with purely economic-technical practices with the view to a larger view of their place in the whole.[55] This would be very demanding, of course, and the possibility, perhaps even likelihood, remains that all that is attained is what Sloterdijk labelled "enlightened false consciousness," the strategic exploitation of that larger view so as benefit one's short-term interests.[56] I will provide examples of this at the end of this talk.

V. Breaking the Enchantment

Let me finish by examining what learning from this three-partite interests of knowledge might mean for today's international law and lawyers. There should clearly be more and more reliable analyses of the effects our tools have in the world, to what extent they realize the purposes we attribute to them. Or are they merely a routine that we continue to follow because we are enchanted by it? Such analyses satisfy an important technical interest; and we know they should be closely aligned with the normative interest, that is to say, the interest we have in being clear about what their purposes are, and their distributive consequences. As long as enchantment continues, we keep doing what we have always done, reproducing the world as we have come to know it. So, it is often necessary to step outside the legal-institutional world that is familiar to us and to ask about its effects in the world. Might those effects be better realized by some other institution?

But better strategic awareness—the ability to choose the right tool to better attain an objective we have set for ourselves—may not always suffice. For this takes those objectives for granted and is unable to capture the way they are part of a larger, historical world of meanings and understandings that offers us only certain, limited objectives. One of the problems of politics, understood as a calculation and management of preferences, is that it takes those preferences as given, without asking the question about how we came to have them or whether they are good for us. Or to put it more

[53] In many fields of international cooperation, producing relevant empirical data is hard or impossible. The above-mentioned OECD study on the benefits and costs of IIAs, for example, laments the fact that much of the relevant data is not publicly available. Pohl, *supra* note 50, at 7.

[54] Jürgen Habermas, *Knowledge and Interest*, 9 Inquiry 285, 300 (1966).

[55] *See* Sigmund Freud, Civilization and its Discontents 968 (2018).

[56] *See generally* Sloterdijk, *supra* note 11.

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concretely, whether the ideas of continuous growth and commercialism are ultimately in our interest? Disenchantment should also lead to taking those *preferences* themselves under scrutiny in view of what it is that we have learned of the world. It asks the question of whether they are right and sustainable and based on the best available (though always incomplete) knowledge. Whose interests do they serve and whose do they push aside? The emancipatory interest of knowledge seeks, in a way, to alienate us from our inherited preferences, inviting us to take a critical look at our politics with a view of what we have learned of the world. This seems to me especially worthy for an *international* law, one that aims to take a general, or *global perspective* on the practices and preferences that people in different places and positions have. To ask not only the question of how to fulfill our preferences but what preferences we should have is to think of science and value, or knowledge and politics, facts and norms, as inextricably linked.

No myth has enchanted modern lawyers more deeply than the Promethean one about humans taking nature for their use. It is time to let go of that myth. Marx—another enlightenment hero—was on to something when he attacked human rights as the rights of an egoistic individual and contrasted merely "political emancipation" with emancipation of the human species. For Marx the life of every human being was dependent on the nature of the social relations where they lived.[57] But in limiting his analysis to *social* relations he did not go far enough. Today we know the human species is utterly dependent on the life of other species and, indeed, the natural world itself. Many of our most powerful economic, technical, or legal tools have not only shown themselves useless for managing the relationship between the human species and the surrounding world but have been uniformly directed to the exploitation of the latter. That is a preference we have reason to be critical of. While each tool may separately carry out a useful-seeming narrow task, when they operate jointly as part of an economic-technological world-system, they lead us into a future we have no reason to wish for.

No knowledge, even if produced by the best available techniques, is absolutely and unconditionally "true." There is reason to be skeptical. But there is no reason to be ignorant. We have little choice but to operate with knowledge emanating from sources that we have reason to believe have the greatest concern for and interest in truthfulness. The most relevant datum regarding the human species today comes often with numbers, especially numbers signifying trends. Every month, close to seven million new human beings are born; about 1.5 new Finlands descend on Earth. That makes annually eighty-two million new humans. World population is now about 7.7 billion, a number expected to attain eleven billion in 2100. How long can that continue? In most places, even raising the theme of birth control is taboo. The growth of the human species is the most significant natural element determining the conditions of life on earth. That growth is largely responsible for global warming. According to the latest Intergovernmental Panel on Climate Change (IPCC) Special Report, an increase of the global temperature by 1.5 degrees may already be attained in 2030, at the latest in 2054. In the conservative, carefully worded language of the report that concentrates on comparing the effects of a rise of 1,5 degrees to the (quite possible) 2 degrees, "[s]ome impacts may be long-lasting or irreversible, such as the loss of some ecosystems." Arctic areas will be hit two-three times harder than other areas. Sea level rise up to 2100 will be anything from 0.27 to 0.77 meters, though local variations will be great. Extreme weather conditions will become more common. Marine ecosystems, and through them, fisheries, will be dramatically reduced, and the reduction will double in case there is a rise of 2 degrees.[58] The growth of the human species is paralleled by the disappearance of other species. According to a report by the

[57] *See* Karl Marx, *Theses on Feuerbach*, *in* LUDWIG FEUERBACH AND THE END OF CLASSICAL GERMAN PHILOSOPHY (1st ed., 1976).

[58] *See* IPCC, *Summary for Policymakers*, *in* GLOBAL WARMING OF 1.5°C 10 (2018).

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Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) from May 2019:

> An average of around 25 per cent of species in assessed animal and plant groups are threatened …, suggesting that around 1 million species already face extinction, many within decades, unless action is taken to reduce the intensity of drivers of biodiversity loss. Without such action, there will be a further acceleration in the global rate of species extinction, which is already at least tens to hundreds of times higher than it has averaged over the past 10 million years.[59]

We should learn to be critical of our preferences. They are unsustainable by what we know. Breaking the Promethean myth is both very difficult and very easy. How so? Leaving Helsinki to teach my course at NYU last year, I asked my daughter Aino if she would like to accompany me like in many earlier years. She looked at me a little sadly and said, "Dad, I think our family's carbon footprint is already large enough."

Epilogue

On this day, November 5, 2019, when I am finishing the written text of my Grotius talk, *The Guardian* publishes a report signed by 11,000 scientists around the world according to which climate change is proceeding much faster than foreseen and that "the planet earth is facing a climate emergency." The report, originally published as a "Viewpoint" in *Bioscience* concludes that "an immense increase of scale in endeavors to conserve our biosphere is needed to avoid untold suffering due to the climate crisis."[60] On this day, November 5, 2019, *The New York Times* publishes an article with the title "E.P.A. Relaxes Rules that Limit Water Pollution from Coal Plants." According to the article, the new rules "are part of President Trump's vast environmental deregulation agenda aimed largely at eliminating rules the fossil fuel industry finds burdensome and extending the life of coal-burning power plants."[61]

[59] IPBES, *Report of the Plenary of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on the Work of its Seventh Session*, 4 IPBES/7/10/Add.1 (May 29, 2019).

[60] William J. Ripple, et al., *World Scientists' Warning of a Climate Emergency*, BioScience (Nov. 5, 2019), https://academic.oup.com/bioscience/advance-article/doi/10.1093/biosci/biz088/5610806.

[61] Lisa Friedman, *E.P.A. Weakens Rules Governing Toxic Water Pollution from Coal Plants*, N.Y. Times (Nov. 4, 2019), https://www.nytimes.com/2019/11/04/climate/coal-ash-water-pollution-trump.html.

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