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International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted By the Tools? International Law and Enlightenment

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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.*

INTERNATIONAL LAW AND THE POPULIST MOMENT: A COMMENT ON MARTTI KOSKENNIEMI'S ENCHANTED BY THE TOOLS? INTERNATIONAL LAW AND ENLIGHTENMENT

ANNE ORFORD**

I. INTERPRETING THE BACKLASH.....	429
II. LIFE AFTER TRUTH	437

It is a great privilege to have been invited to discuss Professor Martti Koskenniemi's Grotius Lecture. Martti Koskenniemi is widely recognized as one of the most distinguished scholars, practitioners, and teachers of international law in our time, and he has been and continues to be an inspiration to many international lawyers around the world. It is a particular pleasure to have the honor of commenting on his lecture given its timely and pressing themes.

* This lecture was also published in the ASIL *Proceedings* of the 113th Annual Meeting (2019).

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Koskenniemi's lecture addresses the question of backlash against global governance and its relationship to international law.¹ There is a widespread consensus amongst commentators, policymakers, and academics that the form of international legal order that had emerged over the course of the twentieth century is today facing serious challenges. Many international lawyers share the sense that the myriad high-profile instances of leaving, denouncing, withdrawing, and unsigning over the past decade signal that something more significant than standard forms of resistance to or critique of specific legal regimes may be playing out. In addition, much commentary in the fields of international law and international relations interprets this moment of withdrawals and challenges as somehow related to the increasingly vocal backlash to global governance expressed by populist movements from both the left and the right.²

Koskenniemi frames his foray into that debate in the language of enlightenment and disenchantment. This is language made familiar through the sociology of Max Weber and in the legal thinking of Scandinavian and American legal realists. What those traditions share is a Protestant heritage. Felix Cohen once described American realism as “an assault upon all dogmas”—a mode of thinking that was, Cohen pointed out, “naturally of special prominence in a protestant movement.”³ Like many protestant movements, these forms of critique insist that we should not trust metaphysical or magical thinking or

1. Martti Koskenniemi, *Enchanted by the Tools? International Law and Enlightenment*, 35 AM. U. INT'L L. REV. 397, 397–426 (2020).

2. See, e.g., Craig Calhoun, *Brexit Is a Mutiny Against the Cosmopolitan Elite*, 33 NEW PERSP. Q. 50 (2016); Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1 (2017); Eric Posner, *Liberal Internationalism and the Populist Backlash* 1 (Univ. Chi., Public Law and Legal Theory Working Paper, No. 606, 2017); Francis Fukuyama & Robert Muggah, *Populism Is Poisoning the Global Liberal Order*, GLOBE & MAIL, Jan. 29, 2018; House of Lords Select Committee on International Relations, UK Foreign Policy in a Shifting World Order, HL Paper 250 (Dec. 2018); Constance Duncombe & Tim Dunne, *After Liberal World Order*, 94 INT'L AFF. 25 (2018); James Crawford, *The Current Political Discourse Concerning International Law*, 81 MOD. L. REV. 1 (2018); Laurence Burgorgue-Larsen, *Populism and Human Rights: From Disenchantment to Democratic Riposte* 1 (iCourts Working Paper Series, No. 156, 2019).

3. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 822 (1935).

place our faith in false icons or empty rituals—we should not think in terms of abstractions and become enchanted by our tools, but instead relentlessly subject our faith, our institutions, and our practices to critique.

This is a tradition of permanent revolution. Liberalism, and particularly liberal internationalism, is one site for the unfolding of this revolutionary tradition in the modern world. Liberals over the centuries have asserted the right and indeed duty of every person to exercise their liberty of conscience, have been committed to practices of militant iconoclasm and interpretative freedom, and have engaged in relentlessly anti-hierarchical and anti-institutional challenges to corruption and false prophets. This powerful and self-conflicted tradition is, in the words of James Simpson, “[i]n flight from nothing so energetically as from prior forms of itself.”⁴

Koskeniemi puts that tradition of Protestant self-critique to work in relation to the field of international law and its responsibility for the current moment of authoritarian populist backlash against global governance. His argument addresses two key themes in that regard. The first is that the backlash is in part due to a wrong turn toward a liberal culture war that the field took in the 1960s and that intensified in the 1990s. The second is that the backlash should be understood as a reaction to liberal claims of expertise. In the following sections I will respond to each claim.

I. INTERPRETING THE BACKLASH

Trying to make sense of the relations between backlash to global rule, populist politics, the rise of authoritarian leaders, and specific international legal arrangements is not straightforward. International law and institutions do not represent a coherent project, and it is difficult to diagnose what precisely has fueled populist support for withdrawal from international legal regimes or institutions even within a particular country, let alone globally. It is possible to attribute the causes of anti-globalist backlash to any one of numerous projects, institutions, events, or agreements. As a result, the attempts to connect

4. JAMES SIMPSON, *PERMANENT REVOLUTION: THE REFORMATION AND THE ILLIBERAL ROOTS OF LIBERALISM* (2019).

the dots between populism, backlash, and international law often seem more like the conduct of a Rorschach test, in which each commentator reveals their perception of where the ambitions of international law went too far. For some, the problem is the institutionalization of far-reaching trade and investment agreements. For others, the mistake was the resort to force in the name of liberal values. For yet others, the overambitious expansion of human rights, leading to the breakup of national cultures and threats to social and religious norms, was the step too far that led to the backlash and to the emergence of culture wars that now threaten the institutions of global governance. What these approaches share is a broader set of arguments around the legitimacy or illegitimacy of an overly ambitious liberal internationalism.

For Koskenniemi, the populist backlash should be understood in relation to the wrong turn that the field took when it moved in the 1960s beyond the traditional form of liberal internationalism that treated nation states as the bearers of autonomy and of self-determination. That form of liberalism, he argues, understood itself to be limited—it did not purport to constrain the politics or the “culture” within each state. Deciding upon the nature and limits of government was left to the authority of those who ruled. The wrong turn that international law took after the 1960s involved moving beyond that horizontal form of liberalism toward a focus on the liberties of individuals within states. For Koskenniemi, the 1990s was the decade in which that wrong turn was consolidated. He gives as a key example Thomas Franck’s manifesto for a new world, entitled *The Empowered Self*. Koskenniemi cites Franck’s claim that “each individual is entitled to choose an identity reflecting personal preference,”⁵ treating it as part of a longer argument arcing back to the Hart-Devlin debate in the 1960s according to which “[s]ociety had no legitimate claim to enforce ‘morals.’”⁶ For Koskenniemi, these examples explain both the enchantment and the disenchantment with rights:

5. Koskenniemi, *supra* note 1 (citing THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 39 (1999)).

6. *See id.* (Koskenniemi refers there to “the famous Hart-Devlin debate in the 1960s.”). *See generally* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); H.L.A. HART, *LAW, LIBERTY, MORALITY* (1963) (The Hart-Devlin debate over the relation between law and morality took place in the context of Wolfenden Committee proposal to decriminalize male homosexual activity in private).

This explains the initial enchantment with rights. What could be greater than to have a preference to override every other consideration? As more and more preferences were translated into rights, activists began to worry. If everything was a right, nothing was. How to separate “genuine” from “fake” rights?⁷

So in Koskenniemi’s telling, it is the human rights project of liberal elites, consolidated in the 1990s, that has resulted in “the break-up of homogenous national cultures; the loosening of social and religious norms; the rise of commercially incentivized non-conformism,” and led to the backlash conducted in the style of “culture wars.” For Koskenniemi, “the backlash is not about economic deprivation” but is rather the expression of a form of “status anxiety” motivated by “the emergence of a universal politics of human rights that was deeply intolerant of traditional values and hierarchies.”⁸

I agree with Koskenniemi’s analysis that the populist moment is a symptom of the limits of certain forms of liberalism pursued on a global scale. However, I disagree with his diagnosis of which aspects of international legal liberalism have fueled the backlash to international law, with his interpretation of the limits to the liberal project being cultural rather than material, and with his interpretation of what the populist moment represents in relation to those questions.

International law did not become a vehicle for forms of liberalism directed at protecting the rights of individuals only after the 1960s. To be specific, international law has been a vehicle for protecting the rights and property of foreign nationals from at least as far back as the

7. *Id.*

8. See Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism*, ANNUAL T.M.C. ASSER LECTURE 2018 (Nov. 29, 2018), <https://www.asser.nl/annual-lecture/annual-tmc-asser-lecture-2018>; see also Joseph Weiler, *The European Culture War 2003–2019*, Herbert W. Vaughan Memorial Lecture, The Federalist Society, Harvard Law School (Feb. 6, 2019) (arguing similarly that the backlash against the European Union is a result of the “culture war” conducted by E.U. institutions in the name of human rights against Christian values, identity, and patriotism rather than by a concern with inequality or economic well-being); see Erick Trickey, *Europe’s Culture Crisis*, HARV. L. TODAY (Feb. 13, 2019), <https://today.law.harvard.edu/europes-culture-crisis> (providing a report on this lecture).

Jay Treaty Commissions of 1794, and this aspect of liberal internationalism has been steadily consolidated and extended in the centuries since. The 1960s does represent a turning point in that respect, but the turning point is not the “commercially-incentivized non-conformism” produced by human rights (to use Koskenniemi’s phrase), but rather the turn to international law as a vehicle for protecting the rights of property-holders and investors against the risks of redistribution, whether in the form of decolonization in the South or of leftist social policymaking in the North.

During the 1960s, foreign investors and their home states began to perceive decolonization as posing a potential threat to the security and profitability of investments in newly independent states and sought to introduce greater protections for investments and private property. A key procedural step was the development by the World Bank of a form of international machinery to address disputes between states and investors, with the resulting International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1966 establishing a center for arbitration and providing that the resulting awards would be recognized and enforceable in the courts of member states.⁹ In addition, as states entered into a growing number of bilateral investment treaties (BITs), broad interpretations of substantive provisions addressing direct or indirect “expropriation” increasingly served to protect investors against the effects on profits of routine government regulation aimed at protecting public health, the environment, or consumer safety. Whereas in the century following the Jay Treaty, international claims processes had been directed toward loss suffered during conflict, in the era of BITs the focus of arbitral scrutiny became the everyday conduct of government regulation and its impact on the profits of foreign investors.¹⁰

The creation of a transnational regime for investment protection was consolidated and expanded during the 1990s with the negotiation

9. ANTONIO R. PARRA, *THE HISTORY OF ICSID* 25 (2012).

10. Heather L. Bray, *Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration*, in *INTERNATIONAL INVESTMENT LAW AND HISTORY* 102, 104, 118 (Stephan W. Schill, Christian J. Tams & Rainer Hofmann eds., 2018).

of many new BITs and other broad-reaching agreements such as the Energy Charter Treaty and the North American Free Trade Agreement (NAFTA). To give some sense of the reach of this form of international adjudication, by the end of 2017, a total of 855 known investor-state claims had been brought, of which the majority were brought against “developing countries” or “transitional economies,” and the majority brought by developed country investors (with 257 claimants from the United States and the Netherlands alone).¹¹ In cases decided against the state in favor of the investor, the average amount claimed was \$1.3 billion and the average amount awarded was \$504 million.¹²

The 1990s was also the point at which international law began to be seen as a vehicle for entrenching a particular approach to economic policymaking through regional and international economic integration. To take one example, the creation of the World Trade Organization (WTO) at the completion of the Uruguay Round led to a significant expansion in the range of activities brought within the scope of the international trade regime. The idea that international integration should ensure that trade was not only “free” but also “fair” had been argued by trade lawyers during the 1970s and 1980s and became a rallying cry for the U.S. administration during the Uruguay Round negotiations. The ambition was to address “the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) government aids to exports.”¹³ In the words of trade lawyer John Jackson, while consumers in importing countries may benefit from the cheaper prices of commodities produced with the support of foreign governments, “the domestic producer feels outraged that while playing by the free enterprise rules he is losing the game to producers not abiding by such rules.”¹⁴ The Uruguay Round negotiations resulted in a raft of new trade agreements that took an ambitious approach to disciplining state regulation in the interests of economic liberalization. Those agreements significantly expanded the range of activities brought within the scope of the multilateral trade regime to include

11. UNCTAD, *WORLD INVESTMENT REPORT 2018*, at 91 (2018).

12. *Id.* at 95.

13. John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 *J. WORLD TRADE* 93, 95 (1978).

14. *Id.*

trade-related aspects of intellectual property, trade in services, technical barriers to trade (such as rules relating to product labelling), and the harmonization of public health and safety regulations.

The WTO dispute settlement system was referred to as the “jewel in the crown” of the organization.¹⁵ Scholars argued that “the importance of the mere existence of the Appellate Body to a shift in organizational legal culture could not be overestimated.”¹⁶ It was lauded as an approach to mandatory dispute settlement that “surpasses” in “effectiveness and sophistication” anything “achieved by other international tribunals, such as the International Court of Justice.”¹⁷ For those who saw international law as contributing to the creation of a liberal international order, “WTO admission and participation would set up a kind of tutorial in rule-of-law values” and might provide the means to push a state “not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on.”¹⁸

It is these economic aspects of liberal internationalism that have been the subject of the most intense backlash politics.¹⁹ International investment law was the first field in which commentators began to express concerns about a backlash against liberal internationalism, in the context of mounting criticism of the perceived excesses of investor-state dispute settlement (or ISDS) awards.²⁰ This began with

15. Cosette D. Creamer, *From the WTO's Crown Jewel to its Crown of Thorns*, 113 AJIL UNBOUND 51 (2019).

16. Joseph H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 J. WORLD TRADE 191, 199 (2001).

17. See Robert Howse, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in *THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 35 (Joseph H.H. Weiler ed., 2000).

18. Remarks of Lori Fisler Damrosch, *Human Rights, Terrorism and Trade*, 96 ASIL PROC. 128, 130 (2002).

19. See also Anne Orford, *A Global Rule of Law*, in *THE CAMBRIDGE COMPANION TO THE RULE OF LAW* (Martin Loughlin & Jens Meierhenrich eds., forthcoming 2019).

20. See *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* (Michael Waibel, Asha Kaushal, Kyo-Hwa Chung & Claire Balchin eds., 2010).

the withdrawal from the procedural ICSID Convention by a group of Latin American states (Bolivia, Ecuador, and Venezuela) beginning in 2007, part of a broader process through which the newly elected left-wing governments in the region responded to the popular backlash against neoliberal policies and attempted to reverse the privatization of essential services and resources that had taken place under International Monetary Fund and World Bank supervision during the 1990s.²¹ Since then, numerous states in Latin America, Asia, and Africa have announced their intention to terminate some or all of their bilateral investment treaties or BITs, including Bolivia, Ecuador, India, Indonesia, South Africa, and Venezuela.

Perhaps more strikingly, as Western states increasingly became respondents in investor-state proceedings, a growing political resistance to ISDS emerged within Canada, Europe, and more recently the United States, as evidenced by the popular challenge to inclusion of ISDS provisions in the Transatlantic Trade and Investment Partnership between the EU and the United States and the EU-Canada Comprehensive Economic and Trade Agreement. In March 2018, the Court of Justice of the EU held in the *Achmea* case that ISDS provisions in BITs between EU member states were incompatible with EU law, and all EU member states have since declared their agreement to terminate their intra-EU BITs by December 2019. In addition, Italy and Russia have withdrawn from or unsigned the Energy Charter Treaty, one of the major multilateral agreements under which ISDS proceedings have been brought in recent years. According to UNCTAD, in 2017 the investment treaty regime “reached a turning point,” with only eighteen new investment treaties concluded, the lowest number since 1983. Perhaps more significantly, for the first time the number of effective investment treaty terminations in that year (twenty-two) was higher than the number of new treaties concluded.²²

21. See Fabio Costa Morosini & Michelle Sanchez Badin, *Petrobras in Bolivia: Is There a Rule of Law in the “Primitive” World?*, in *GLOBAL PRIVATE INTERNATIONAL LAW: ADJUDICATION WITHOUT FRONTIERS* 381 (Horatia Muir Watt, Lucia Bíziková, Agatha Brandão de Oliveira & Diego P. Fernández Arroyo eds., 2019) (providing a discussion of the context informing legal disputes over energy resources in Bolivia during that period).

22. See UNCTAD, *supra* note 11, at 88; see also UNCTAD, *WORLD*

A similar backlash against global economic governance is evident in the field of trade agreements, with the United States initiating a renegotiation of NAFTA and “unsigning” the Trans-Pacific Partnership, and the UK signaling its withdrawal from the EU. In addition, many states have bridled at the limitations on freedom of action and regulation that the expansive interpretations of WTO disciplines by the Appellate Body have imposed. In particular, the United States has initiated efforts to restore the balance of rights and obligations to which it understands itself to have agreed. Both the Obama and Trump administrations have blocked appointments to the Appellate Body in protest at a series of decisions about which the United States disagreed, leading to a situation in which the Appellate Body may cease to be able to function after December 2019.²³ For trade lawyers, the challenge to NAFTA and the impasse at the WTO Appellate Body are symptoms of “the curtailment of key features of the liberal order, primarily international legal adjudication”,²⁴ and signal ‘the end of an era.’²⁵

The 1960s is not then significant because it saw liberal lawyers go too far in relation to human rights. Indeed, there is nothing in the field of international human rights law that comes close to the systems for enforcing investment protection and economic integration discussed above, and outside Europe and the Inter-American system the impact of international human rights law domestically is minimal. International human rights lawyers can only dream of such influence and effect. Rather, the 1960s was a decade in which liberation movements in the North and South placed the question of the material limits to the liberal economic order squarely on the international agenda. As I have argued in detail elsewhere, the colonies had long served as one vehicle for dealing with the material conditions of

INVESTMENT REPORT (2019) (showing that the number of terminations continued to rise to twenty-four in 2018, but countries entered into forty new investment agreements).

23. Manfred Elsig et al., *Trump Is Fighting an Open War on Trade. His Stealth War on Trade May Be Even More Important*, WASH. POST (Sept. 27, 2017); Gregory Shaffer, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 YALE J. INT'L L. 1 (2019).

24. Sergio Puig, *The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order*, 113 AJIL UNBOUND 56 (2019).

25. Shaffer, *supra* note 23, at 17.

liberalization—that is, for offering the space perceived as necessary for addressing perceived problems of “surplus” populations produced by economic liberalization, and for ensuring access to new sources of resources and markets.²⁶ With decolonization, the material limits to economic liberalism have become international rather than colonial questions. Those material limits register both in terms of human limits and of ecological limits—how to respond to the people who are routinely dispossessed or displaced to enable new forms of economic liberalization, and how to address the exhaustion of the capacity of the natural world to act as energy resource and waste disposal unit?

The interrelated financial, climate, and refugee crises of the early twenty-first century gave a new urgency to questions about the capacity of international law and institutions to respond to radical social, economic, political, and ecological transformations. It seems clear, as it has seemed clear to those resisting the excesses of industrial capitalism for centuries, that a planet full of people exercising the kinds of liberty imagined for European men in previous eras is not sustainable.²⁷ For communities that are vulnerable, the disruptions posed by climate change will present as a matter of survival—for communities that are prosperous, they will present as a matter of security and geopolitics. From either perspective, the need to find policy solutions to mass displacement and resource insecurity on a global scale, while the dominant transnational political class is committed to deregulation and minimal state intervention, seems daunting. Where then does that leave international law?

II. LIFE AFTER TRUTH

This then brings me to the second major theme of Koskenniemi’s

26. Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11 J. INT’L L. & INT’L REL. 1 (2015); Anne Orford, *Law, Economics, and the History of Free Trade: A Response*, 11 J. INT’L L. & INT’L REL. 155 (2015).

27. See AMITAV GHOSH, *THE GREAT DERANGEMENT: CLIMATE CHANGE AND THE UNTHINKABLE* 111 (2016) (noting that while industrial capitalism has met with resistance on every continent, in Asia this resistance was articulated by figures of great moral authority who pointed directly to the issue of the material limits of liberalism. Ghosh quotes the 1928 pronouncement of Mahatma Gandhi: “God forbid that India should ever take to industrialism after the manner of the West. If an entire nation of 300 millions took to similar economic exploitation, it would strip the world bare like locusts.”).

lecture, an analysis of the relation of our current populist era of politics to more fundamental questions about knowledge, facts, and expertise. Here I am in furious agreement with Koskenniemi's prioritizing of these questions, and specifically his relating of a faith in instrumentalized reason to the question of climate politics. I would, however, like to complicate somewhat his sense that in the face of this challenge, "we should adopt the species perspective."²⁸

Climate change is indeed presented to us as a "species" or planetary problem—indeed it emerged out of planetary sciences (it was James Hansen, the director of NASA's Goddard Institute of Space Studies, who was one of the first scientists to begin alerting governments and journalists to the "greenhouse effect"). Yet there are no political institutions that are adequate to a problem constituted on this scale, or that can provide a basis for the kind of global regulation or governance that would be capable of addressing a problem understood in planetary terms. Big data creates "hyperobjects" for which we as yet have no political subject.²⁹ Attempts to rely upon international politics and lawmaking in their existing forms—the forms that brought us economic globalization—have failed to produce a solution to the problem of climate change. As Dipesh Chakrabarty has argued, "the *global* in *global warming* means something different from the *global* in *globalization*."³⁰ The globe of global warming involves the earth as a planet—the globe of globalization involves a web of human relations that have been created in pursuit of profit and power. The problem of global warming has consequences for how we think about the history and the future of globalization. The politics of international lawmaking that has brought us both globalization and global warming is not proving capable of addressing the ecological, financial, political and social upheavals to which this experiment in revolutionary liberalism is leading.

We can see this illustrated in the battleground over facts and science in current debates about climate change. Despite, or perhaps because of, the weight that has been given to facts as established by science

28. Koskenniemi, *supra* note 1.

29. TIMOTHY MORTON, *HYPEROBJECTS: PHILOSOPHY AND ECOLOGY AFTER THE END OF THE WORLD* (2013).

30. Dipesh Chakrabarty, *Afterword*, 116 S. ATL. Q. 163, 166 (2017).

and expertise in public policy, the idea of science as an authoritative form of knowledge is subjected to growing skepticism. This is a field in which we see populist and counter-populist attempts to shape climate politics from the right and the left, illustrated by the *Gilets Jaunes* protests in France, the Extinction Rebellion actions in London, and student climate strikes globally.³¹ The significance of scientific expertise, including that of legal science, is being posed as a political or democratic question because of the weight that such scientific expertise is today being asked to bear in policymaking. Political concerns about the viability and justice of a particular political and economic system of resource extraction and distribution have been translated into a highly technical debate about levels and effects of carbon emissions.³² The effect of the demands that this policy reliance on data places upon scientific method is well illustrated by the resulting attacks on science by climate change deniers.

Is the answer to this era of post-truth to return to an era of truth and to faith in reason? This is, after all, the suggestion we hear repeatedly. Many commentators diagnose the problem today as being that everyone has their own news bubble—the solution is to go back to respected sources of news, like the *New York Times*, or respected sources of intelligence, like the CIA or MI6. Yet, to take just one example, for someone who has read the Chilcot Inquiry report detailing the forms of intelligence failure involved in the move to the war against Iraq in 2003, this is not a straightforward proposition. Should we really take on trust that the information that is collected, analyzed, and made available to the public through the interface between intelligence, political, and media organizations represents the

31. See Cihan Aksan & Jon Bailes, *One Question Gilets Jaunes*, ST. NATURE (June 6, 2019), <https://stateofnatureblog.com/one-question-gilets-jaunes> (providing a range of analyses of the *Gilets Jaunes* movement that address its relation to and significance for broader political struggles of working people); see also Étienne Balibar, “*Gilets Jaunes*”: *The Meaning of the Confrontation*, OPEN DEMOCRACY (Dec. 20, 2018), <https://www.opendemocracy.net/en/can-europe-make-it/gilets-jaunes-meaning-of-confrontation> (presenting an interpretation of the *Gilets Jaunes* as inventing a form of “counter-populism”).

32. See Gert Goeminne & Karen François, *The Thing Called Environment: What It Is and How to Be Concerned with It*, 32 OXFORD LIT. REV. 109 (2010); Julia Dehm, *One Tonne of Carbon Dioxide Equivalent (1tCO_{2e})*, in INTERNATIONAL LAW’S OBJECTS 305 (Jessie Hohmann & Daniel Joyce eds., 2018).

“facts,”³³ or even more ambitiously, the “truth”? Was there ever a time or a world in which people all accepted the truth purveyed by powerful officials or influential journalists without question? Is the challenge of the #MeToo movement, to mention another populist movement of our era, posed by the fact that women are now allowed to make claims about the conduct of powerful men where once we all believed what the mainstream media told us about them? Or did mainstream audiences, however we imagine them, just not know about those other bubbles of whispered communication within which such stories have always circulated, because those stories were not reflected in the broadsheet press or the “public” sphere?

Of course, an era in which politicians in many countries invoke the concept of “fake news” takes questions about truth, lies, facts, and fictions to another level. In the face of the flexible approach to the truth that dominates public debate at present, the desire for some source of authoritative knowledge or information can be overwhelming. Yet in this post-truth world, it is not just historians of science but the communities on Twitter and Facebook who recognize that facts only mean something and are only intelligible within a broader system, and that the broader system will shape why facts are produced and how they are used.³⁴

I agree with Koskeniemi that there is no way back to a pre-post truth world from here.³⁵ It is difficult for lawyers in particular to sustain a good faith appeal to the power and objectivity of “reason” after a centuries-long discussion of the limits of such appeals, informed by anti-formalist realism, aggressive originalist contextualism, and the deployment of a “hermeneutic of suspicion” against the idealist appeals of our opponents.³⁶ To the extent we remain

33. See Mark Phythian, *Intelligence Failure as a Mutually Reinforcing Politico-Intelligence Dynamic: The Chilcot Report and the Nature of the Iraq WMD Intelligence Failure*, 87 BRIT. Y.B. INT'L L. 196 (2018) (providing an analysis of the aspects of the Chilcot Report that address intelligence failure).

34. See MARY POOVEY, *A HISTORY OF THE MODERN FACT: PROBLEMS OF KNOWLEDGE IN THE SCIENCES OF WEALTH AND SOCIETY* (1998) (discussing the relation between facts and the broader system within which they are produced).

35. See, e.g., MARTIN JAY, *REASON AFTER ITS ECLIPSE: ON LATE CRITICAL THEORY* (2016).

36. See Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 L. & CRITIQUE 91 (2014) (providing further discussion

“prisoners of reason,” this is not a form of reason that claims the ability to establish a transcendent truth that lies beyond partisan politics or argumentative practice.³⁷ Rather, we operate according to a more chastened form of reason, grounded on the logic of game theory, public choice, or behavioral economics, in which the truth we are invited to share is that each individual or nation state acts to further their own self-interest.

The only way out of this dilemma, then, is onward, to what we might call a post-post-truth world.³⁸ The task facing us in the post-post-truth world involves breaking down the separation between facts and values. In order to move beyond the strict separation of fact and value, the task we face is not to abandon the appeal to facts or to truth, but to recognize that the language of truth and facts is no longer a trump card. There is no authority to which we can appeal that will establish that our version of truth or our account of facts is the correct one. There is an inescapable link between what we know and the social conditions underpinning how we have come to know it. This helps to make sense of why people might trust something that is “liked” by their “friends” (to use the language of social media), rather than trusting something that they are told is a “fact” by an expert. What counts as evidence or facts or even truth is an effect of mediating institutions, of particular techniques, of emotional attachments, and of communities. Which truth we should prefer is then properly a question of politics and of whose authority we trust.

Indeed if we look back to the birth of the experiment as a foundation of scientific practice in Restoration England, we can see that the “experimental philosophers” of the Enlightenment thought of the laboratory not just as a place where experiments with air-pumps could be conducted, but as a place where experiments in social order could be attempted. These experiments took place in a context in which revolutionary evangelical ideals of authenticity, transparency, and visibility had sought to distinguish new social orders from corrupt older institutions of church and monarchy. In that climate, the

on the operation of the “hermeneutic of suspicion”).

37. S. M. AMADAE, *PRISONERS OF REASON: GAME THEORY AND NEOLIBERAL POLITICAL ECONOMY* (2016).

38. I thank James Der Derian for this formulation.

community of experimental philosophers was presented as a “model of the ideal polity.”³⁹ This was a community without an arbitrary ruler, inhabiting a public space, involving free men who faithfully testified to the results of the experiments they witnessed in order to produce useful knowledge.⁴⁰ The authority of scientific knowledge has always been an effect of the political communities and the social relations within and through which it is produced, and not just the techniques of its production.⁴¹

The recognition that there are contested accounts of the facts and values that found the practice of international law is then not the end of the story, but rather the beginning of a new chapter. A particular neoliberal model of international law triumphed in the late twentieth century. Its potential displacement poses challenges and opportunities for contemporary thinking about the role of law in international politics. International legal systems and the politics they represent must be “chosen and defended.”⁴² The return of history into this story is valuable because it allows us to experience that sense of choice and responsibility anew. The lesson from attempts at skirting around the politics of issues such as energy policy is that there is no obvious way forward except through embedding international law solutions to big distributional questions within democratic politics.

Populism has returned as “a way of doing politics”—a way of doing politics that involves “constructing a new subject of collective action”—the people—“capable of reconfiguring a social order experienced as unjust.”⁴³ Yet that populist politics is ideologically contested. This is why Chantal Mouffe has suggested we understand our era as a “populist moment,” in which the dominant order is in crisis, multiple struggles in the name of the people are being

39. STEVEN SHAPIN & SIMON SCHAFFER, *LEVIATHAN AND THE AIR-PUMP: HOBBS, BOYLE, AND THE EXPERIMENTAL LIFE* 341 (1985).

40. *Id.*

41. See Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 *EUR. J. INT'L L.* 369 (2014) (discussing the broader implications of this insight for international law).

42. See Judith N. Shklar, *Political Theory and the Rule of Law*, in *POLITICAL THOUGHT AND POLITICAL THINKERS* 25 (Stanley Hoffmann ed., 1998) (discussing this point in relation to the rule of law more broadly).

43. CHANTAL MOUFFE, *FOR A LEFT POPULISM* 11 (2018).

conducted, and no one political project has yet emerged victorious.⁴⁴ Much will depend on which subjects of collective action are able to gain the sympathy of experts, politicians, and the broader public—which people as the subjects of populist politics are able to see their demands treated with serious attention. The question to which today’s anti-globalist politics gives rise, then, is not whether or not international law should take account of the populist moment, but *which* populism will succeed in universalizing its demands and what role international lawyers will play in that process.

44. *Id.*; see also ENZO TRAVERSO, *THE NEW FACES OF FASCISM: POPULISM AND THE FAR RIGHT* (2019).