CONNECTION IN A DIVIDED WORLD: RETHINKING 'COMMUNITY' IN INTERNATIONAL LAW

Fleur Johns

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The Annual T.M.C. Asser Lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. The Annual Lecture builds on his vision and mission, it invites distinguished international scholars to take inspiration from Asser's idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today.

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FOREWORD

Throughout her career, Prof. Fleur Johns has consistently pushed the boundaries of international law through her innovative research at the intersections of law, technology, and development. As a professor at the Faculty of Law & Justice at the University of New South Wales (UNSW) Sydney, Prof. Johns has established herself as a leading voice in examining the implications of digital technologies on humanitarian aid and global politics. Her latest work, *#Help: Digital Humanitarianism and the Remaking of International Order*, has been instrumental in elucidating how digital transformations are reshaping global humanitarian efforts and the legal frameworks that underpin them.

Prof. Johns' contributions to the field extend beyond her varied scholarly publications. As a Fellow of the Academy of the Social Sciences in Australia and an Australian Research Council Future Fellow, she has significantly influenced a wide spectrum of legal thought. Her roles on the editorial boards of prestigious journals, including the *American Journal of International Law*, further attest to her dedication to advancing the discourse in international law.

In this 2024 Asser Annual Lecture, Prof. Johns explores the evolving nature of community within the framework of international law. By examining recent cases before the International Court of Justice (ICJ), she analyzes how different modes of connection—enabled by digital-analogue entanglements—affect the articulation and understanding of international legal communities amidst conflict and division.

Prof. Johns underscores the necessity of rethinking traditional notions of community in international law, particularly in an era where digital technology plays an increasingly pivotal role. She asks: "How should international lawyers articulate and defend relations of community on the international plane? Can it be done without insisting on uni-

versal values that many scholars have shown to be partisan, and many peoples have found assimilatory?"

She introduces the concept of 'attenuated communities', which are communities that recognize, embrace, and navigate the conflicts and differences among their members. Rather than relying on seamlessly universal values or nostalgic evocations of homogeneity, the attenuated approach to legal communities embraces diversity and fosters resilience. Though often temporary, she notes that attenuated communities assemble solidarity to counter specific forms of community violence, such as genocide.

Prof. Johns' insights and propositions regarding international legal communities are both pertinent and timely, given the current geopolitical tensions that continue to divide families, groups, and nations. In these times of heightened pressure on international law to prevent, regulate, and mitigate the effects of conflict, international lawyers must innovate and find creative ways to build alliances. The Gambia's application to the ICJ concerning the alleged genocidal acts against the Rohingya group in Myanmar, as discussed by Prof. Johns in her lecture, exemplifies the potential of fostering attenuated communities in legal proceedings. This approach opens up new avenues beyond what international law has traditionally allowed for states to address legal concerns about committed crimes.

In the written version of the lecture before you, Prof. Johns upholds the Asser Institute's long-standing tradition of addressing current challenges on the international plane with a critical perspective on the role that international law can and should play in guiding and constraining these developments. Her thought-provoking analysis not only challenges us to reconsider our understanding of community in international law but also inspires us to envision new ways of fostering connection in a divided world.

Christophe Paulussen
Acting Chair of the Executive Board and
Academic Director of the T.M.C. Asser Instituut

CONNECTION IN A DIVIDED WORLD: RETHINKING 'COMMUNITY' IN INTERNATIONAL LAW

Fleur Johns*

I begin this 2024 Asser Lecture, in the prologue below, where international legal lectures do not often begin, at least not expressly so: in the domestic sphere, at home, amid mundane, family conversation. I begin, also, with attention to intergenerational difference. Connection, relation, friendship, allyship, community: these mean quite different things to people in different geographic, cultural, socio-economic, and demographic situations. Much depends on how connections are mediated, and on those infrastructures of relation that are available to articulate and sustain them. One cannot write of connection without knowing a little of how and where a given connection originates, the routes and formats through which it passes, how and by whom it is maintained, towards what or whom it is oriented, and how it bears upon other, overlapping connections. This is as true of connections drawn in international legal work as it is of those in any other field or medium.

* Professor, Faculty of Law & Justice, UNSW Sydney and Visiting Professor, University of Gothenburg, School of Business, Economics & Law, Sweden (at the time of this Lecture's delivery). I am grateful to the Academic Director, Christophe Paulussen, members of the Executive Board, staff and sponsors of the T.M.C. Asser Instituut for the invitation to deliver the 2024 Annual Lecture and for the hospitality extended to me and my family surrounding the event; to Bérénice Boutin for moderating; to the T.M.C. Asser Press for publishing this extended version of the Lecture; to all those who attended the Lecture; and to Courtney Hall for related research assistance. Thanks are due also to Jens Iverson of Leiden University and Andrea Leiter of the University of Amsterdam for convening an informal discussion after the event. Additional acknowledgements to colleagues who offered invaluable feedback on early drafts, or helpful provocations after the event, appear in footnotes below. Research towards this Lecture was supported by the Australian Government through an Australian Research Council Future Fellowship (FT200100656), 'Diplomatic Knowledge, Disasters and the Future of International Legal Order', but the views expressed herein are those of the author and are not necessarily those of the Australian Government or Australian Research Council.

This lecture reflects on some lines of connection and modes of commonality advanced recently by applicants to the International Court of Justice (the ICJ or the Court) in cases currently pending before the Court. Insofar as an idea of international legal community may be assembled from these applications, it is as differentiated as those connections evoked in the lecture's opening vignette below. And as in the intergenerational conversation recounted in that opening story, it also has an undertone of combativeness. The ICJ applications discussed in this lecture advance ideas of commonality forged amid conflict, not through the transcendence of conflict.

Tobias Asser, after whom this lecture is named, was no stranger to the difficulties of living in community. Arthur Eyffinger's two-volume biography indicates how much Asser was shaped by "a long family tradition of… social and political engagement within the forever boisterous Jewish community in Amsterdam".[1] It tells, too, of Asser's "regular clashes with exponents of the Dutch regent class".[2] For all his professional and academic success, Eyffinger reminds us, Asser was forever having to navigate "the ambivalent appreciation of the Jewry in the Netherlands".[3]

Asser was nonetheless deeply committed to nurturing and sustaining community amid this ambivalence, perhaps nowhere more so than in and around the university. Eyffinger records that Asser "treasured a soft spot for the student world all his life and remained forever committed to their projects, reunions and lustrums, both in Amsterdam and Leiden".[4] Similarly, his "ties of friendship with the academic community in his native town [of Amsterdam] would never wither".[5] Although Asser's efforts to shape international legal community have been far more widely celebrated, his friendships and household relations were, in Eyffinger's telling, also "striking" for their "outgoingness,

[1] Arthur Eyffinger, *TMC Asser (1838-1913): 'In Quest of Liberty, Justice, and Peace'* (Brill Nijhoff) 1791.
[2] Ibid 1794.
[3] Ibid 11.
[4] Ibid 171.
[5] Ibid 689.

openness and hospitality" as was Asser's "readiness to invite professional contacts of all denominations into the intimacy of family life".[6] Meanwhile, in his professional work, Asser was renowned for his "uncommonly creative" mobilization of international legal technique towards the "delicate unravelling of legal-political knots" and the "break[ing] [of] deadlock[s]".[7] It is precisely this kind of generative international legal creativity and connectivity (without Asser's particular brand of liberalism being a necessary component)[8] that we are seeing in recent applications to the ICJ.

As foreshadowed, this lecture begins in Part I with a brief vignette from family life introducing the distinct yet entwined logics of digital and analogue connection. Part II elaborates further on the difference between, and fraught entanglement of, those logics as they manifest in international law. Part III introduces the prospect of international community being attenuated on the international legal plane in the context of such fraught entanglement. This entails retaining community as a potent organizing motif for international legal thought and practice while acknowledging the perils of evoking and securing community; that is, it implies a mobilization of community in international legal work that keeps those dangers in view. Part IV discerns such an attenuated mode of community, or anti-community community, being articulated, through international legal doctrine, in a series of cases currently pending before the ICJ, namely: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar);[9] Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treat-

[6] Ibid 375.

[7] Ibid 843.

[8] Ibid 112 (noting Asser's "championship of liberal thought in all its manifestations: from concepts as *laissez faire* and the freedom of commerce and trade to the reform of legislation on religion, education and humanitarian issues, to the implementation of a constitutional monarchy, the growth of international solidarity and the harmonisation of private international law").

[9] *Application of the Convention on the Prevention and Punishment of Genocide (The Gambia v Myanmar)* (Provisional Measures) Application Instituting Proceedings and Request for the Indication of Provisional Measures, General List No. 178 [2019] ICJ 2.

ment or Punishment (Canada and the Netherlands v. Syrian Arab Republic); [10] and Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).[11] Part V discusses how the attenuated notion of community advanced in these ICJ cases both builds on, and departs from, prior thinking about international community in international legal practice and scholarship. Part VI focuses on what this attenuation of community makes of the disputes at issue in each of the aforementioned cases, arguing that it has a commoning effect on those disputes. Finally, Part VII concludes by returning to where the lecture began: that fraught entanglement of digital and analogue logics pervading global life and demanding renegotiation of relationships at an ever-increasing scale. This relational instability is occasioning great distress, and sometimes exploitation and violence, as documented in the literature on "artificial intimacy" for instance (concerning the kinds of proxied connections yielded by relations that are predominantly digitally mediated).[12] Yet it also might be provoking, at least in part, the provocative reconfiguration of notions of common interest in the face of devastation wrought by communal conflict—reconfigurations being attempted in recent international legal argument before the ICJ.

[10] *Application of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* (*Canada and the Netherlands v Syrian Arab Republic)* Joint Application Instituting Proceedings, 8 June 2023, <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-APP-01-00-EN.pdf> accessed 21 June 2024.

[11] *Application on the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* (Preliminary Objections) Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf> accessed 21 June 2024.

[12] Sherry Turkle, 'There Will Never Be an Age of Artificial Intimacy' *The New York Times* (New York, 11 August 2018); Todd Essig, Danielle Magaldi and Leora Trub, 'Technology, Intimacy and the Simulation of Intimacy' in Gurmeet Kanwal and Salman Akhtar (eds), *Intimacy: Clinical, Cultural, Digital and Developmental Perspectives* (Routledge 2018); Rob Brooks, *Artificial Intimacy: Virtual Friends, Digital Lovers, and Algorithmic Matchmakers* (Columbia University Press 2021).

I. PROLOGUE: DIFFERENTIATING CONNECTION

Not so long ago, my eldest child, then aged eighteen, made an observation in passing about my own connections. He remarked: "You are quite disconnected from a lot of your friends". "You mean that I don't travel in a pack?" I replied. "Yeah", he said, "why is that?". I could see why he might wonder. At the time, a dear old friend was in town, staying for a few weeks. We remain close and he could see that, but she lives in London, and I live in Sydney, and I see her once a year, if that. We correspond very sporadically: the odd text message or telephone call here and there. For my teenaged son, both physical proximity and constant communication are everything. For middle-aged me, connection is more a matter of feeling, something borne of past experiences as much as those in the present. I responded to this question with a meandering, parental disquisition on all the forms of friendship that I cherish. I got quite carried away. "Mmmm", my son replied, eyes glazing, and started fiddling with his phone: he disconnected.

If one were to caricature the difference between the approaches to connection evoked in the foregoing vignette, one might say that my son's sense of connection is characteristically digital in its logic.[13] That is, it is binary: on or off; in or out; something or nothing. It is centred on the discrete and oriented towards distinction. No value is ascribed to any intermediate state. Moreover, much as technologies of packet switching allow for concurrent transmission of lots of chunks of data across distributed networks, so my son is concurrently connected via multiple interfaces: talking to me, while on Snapchat, with one Air Pod in his ear tuned to a shared playlist.

My experience of connection, on the other hand, is more analogue in its logic.[14] It is concerned with comparisons and continuums; degrees of likeness and dissimilarity; relative closeness and remoteness across

[13] Anthony Wilden, 'Analog and Digital Communication: On the Relationship between Negation, Signification, and the Emergence of the Discrete Element' (1972) 6 Semiotica 50; Anthony Wilden, *System and Structure: Essays in Communication and Exchange* (2nd edn, Tavistock 1980).

[14] Ibid.

space and time, much as analogue technologies work with the continuously variable aspects of physical phenomena. Think of a ruler, a mercury thermometer, or the volume dial on an analogue radio, the latter increasing and decreasing resistance to electrical signals. I refer to this as a caricature because both my and my son's friendships are, of course, tangles of analogue and digital logic; they depend on both.

II. INTERNATIONAL LEGAL CONNECTIONS, DIGITAL AND ANALOGUE

International legal connections likewise now rest on both analogue and digital logics, and on their entanglement.[15] International lawyers are no strangers to binary logic. Consider international legal reliance on such binary classifications as the following: legal vs illegal; citizen vs non-citizen; and combatant vs non-combatant. These and other binaries have long been important in the field. Yet discrete elements and digital logic are arguably becoming more prominent features of the international legal field as states and international organizations turn to digital technology and digital data to conduct, analyse, and monitor international legal affairs.[16]

Digital mediation notwithstanding, we international lawyers still tend to trade predominantly in the more-or-less comparisons and analogies characteristic of analogue logic. Think of how, even in the absence of a doctrine of precedent, international lawyers reason from prior cases.[17] Or consider how would-be states must assert their statehood by demonstrating similarity to (that is, drawing an analogy to) other, existing

[15] See generally Fleur Johns, *#Help: Digital Humanitarianism and the Remaking of International Order* (Oxford University Press 2023).

[16] Fleur Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law' (2017) 111 American Journal of International Law 57; Fleur Johns, 'International Law and Digitalisation' in Dino Kritsiotis and Eyal Benvenisti (eds), *The Cambridge History of International Law*, vol XII (Cambridge University Press 2024).

[17] Harlan Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi and others (eds), *Interpretation in International Law* (Oxford University Press 2015).

states regarding territory, population, and government.[18] These are analogue connections, framed as continuums, and conveying expectations of continuity and comparability across time and space.

If analogue logic has tended to predominate in international legal work, while digital logic has long been a feature of it, then relations between these logics are by no means stable. In many areas of international legal work, as in many areas of global life, relations between these logics are being reconfigured as digital mediation becomes more prevalent. My opening vignette touched on one effect of digital technology pervading virtually everything, however unevenly, namely the remaking of friendship.[19] Likewise, pervasive digitalization enlivens anew, at every scale, from the personal to the global, dilemmas with which international law has long grappled, namely, how to live together without *living together*; how to structure and sustain legal relations at scale without presuming any perfect convergence of values or relying on constant copresence in time and space. One arrives at different answers to these questions depending on whether one prioritizes digital logic or analogue logic. My son finds my more analogue version of friendship unconvincing because it spans large distances and entails relatively infrequent communication. It is too detached from the day-to-day. I find his more digital version troubling, at times, because it seems overly transactional and a little thin—one might say insufficiently grounded in history, or too beholden to flux and fad.

We can hear versions of this tension between analogue and digital logics playing out in all sorts of international legal debates. We hear this especially wherever the ubiquity of digital technology is under discussion, when the tension between analogue and digital logics tends

[18] See, e.g., Gëzim Visoka, *Acting Like a State: Kosovo and the Everyday Making of Statehood* (Routledge 2018).

[19] For an indicative sample of the vast social science scholarship on the patchy pervasiveness of digital technology, and its global social, economic, and political effects, see James Ash, Rob Kitchin and Agnieszka Leszczynski (eds), *Digital Geographies* (Sage 2018); Jessica McLean, *Changing Digital Geographies: Technologies, Environments and People* (Springer International Publishing AG 2019); Corneliu Bjola and Markus Kornprobst (eds), *Digital International Relations: Technology, Agency and Order* (Taylor & Francis 2023).

to resurface in new ways.[20] A recurring phenomenon, whenever effects of digital technology are being debated in the international legal field, is profound disagreement about the relative value of relations structured mainly according to digital logic, and those structured primarily along analogue lines.

This discord is apparent, for instance, in the worries about so-called post-truth politics that are sometimes aired by scholars and practitioners of international law and adjacent disciplines. To some, the problem is that we have strayed too far from analogue ideas about truth. Institutions dedicated to defending those ideas about truth have been eroded or discredited; say, the independent, "quality" press or multilateral institutions such as the UN.[21] The latter may be cast as champions of analogue logic because they tend to position themselves on a more-or-less scale of human perfectibility. Even as they rely on binary coding too (such as the binaries of high/low and good/bad), they typically promote movement along a continuum, ideally from ignorance and violence towards greater insight and more peaceable deliberation. Meanwhile, forces marshalling against these institutions often seem to stress the digital more than the analogue. Think of the us/

[20] See, e.g., Fleur Johns, 'Data Territories: Changing Architectures of Association in International Law' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (TMC Asser Press 2017).

[21] See, e.g., Edward L. Carter and Rosalie Westenskow, 'Freedom of Journalism in International Human Rights Law' (2020) 25(2) *Communication Law and Policy*, 113, 115-116 ("free press, like democracy worldwide, is in a downward spiral"; "[t]he global independent news media… require[s] strong protection under international human rights law"); Oleksandr Vodiannikov, 'The Crisis of Trust in Contemporary Multilateralism: International Order in Times of Perplexity', in *The Crisis of Multilateral Legal Order* (Routledge 2022) 21, 21-22 ("Something is going wrong with the multilateral international order… The tectonic forces unleashed by the pandemic have reinvigorated and brought to the fore various anti-elitist protest movements across the globe, with… the potential to crash the existing legal (including international) order"); Emanuel Adler and Alena Drieschova, 'The Epistemological Challenge of Truth Subversion to the Liberal International Order' (2021) 75(2) *International Organization*, 359-386, 360 ("truth-subversion practices [are] a form of power aimed at undermining liberal norms and institutions for the sake of political domination").

them of the extremist or the populist, or the prominence of the discrete (that is, the countable) in distributed networks of social media.

To others, the problem of which post-truth politics is symptomatic rests precisely with prevailing, analogue-heavy institutions—their exclusiveness and hoarding of power. Some hope that dialing up digital logic might orient the work of such institutions in more egalitarian directions, countering accrued inequality and legacy privilege with masses of discrete data. Think of hopes surrounding citizen journalists armed with cell phones collecting evidence in anticipation of International Criminal Court or other judicial investigation.[22]

Disagreement about the relative value of digital and analogue connections is also apparent in international legal scholarship and practice surrounding military applications of artificial intelligence (AI). Much literature in this domain worries about analogue-heavy processes of human deliberation being subordinated to or displaced by digital logic as AI systems and other forms of automated decision-support enter into wider use.[23] Underpinning these worries is a cherishing of the value of analogue-dominant modes of grappling with information, especially battlefield information—capacities identified particularly with humans.[24] At the same time, there is a sizeable body of literature that regards the incursion of digital logic into the military domain, via AI and other socio-technical systems, as carrying certain advan-

[22] See, e.g., Kristina Hellwig, 'The Potential and the Challenges of Digital Evidence in International Criminal Proceedings' (2021) 22 International Criminal Law Review 965.

[23] See, e.g., Bérénice Boutin, 'State Responsibility in Relation to Military Applications of Artificial Intelligence' (2023) 36 Leiden Journal of International Law 133, 136–7; Nicholas Tsagourias, 'Digitalization and Its Systemic Impact on the Use of Force Regime: Legal Uncertainty and the Replacement of International Law' (2023) 24 German Law Journal 494, 495.

[24] Gregor Noll, 'War by Algorithm: The End of Law?' in Max Liljefors, Gregor Noll and Daniel Steuer (eds), *War and Algorithm* (Rowman & Littlefield International 2019). This recalls Hubert Dreyfus's mid-1960s circumspection about the prospects of artificial intelligence attaining or outstripping the capacities of the human brain: Hubert L Dreyfus, 'Alchemy and Artificial Intelligence' (RAND Corporation 1965).

tages for international law and lawyers.[25] Some scholars, of course, refuse to oppose digital to analogue in this either/or mode at all, highlighting instead their mutual imbrication in international legal work, and exploring the shifting politics of that imbrication. Markus Gunneflo and Gregor Noll's argument is illustrative of the latter; they contend that the rise of quantitative cost-benefit analysis in analogue decision-support tools (such as authoritative legal texts) paved the way for growing recourse to digital decision-support in armed conflict long before military AI started to spread.[26] In other words, they argue that the analogue has undone itself as much as it has been undone by the digital.

Whether in debates about post-truth politics, about military applications of AI, or in other domains, international lawyers are grappling with new instantiations of old questions about how to maintain collective senses of commonality and security and probing how recent efforts to do so bear upon the commonality and security of others. One could talk a lot more about how and where digital/analogue contradictions surface in the international legal field or unpack the corresponding digital/analogue tangles differently. However, my concern here is not with digital and analogue logics' relative value. Rather, I am interested in probing how their fraught entanglement at once unravels and enlivens aspects of international legal work.[27]

Among the international legal dilemmas newly enlivened by charged dynamics of digital-analogue entanglement is what one might call the problem of international community. How should international lawyers articulate and defend relations of community on the interna-

[25] See, e.g., Eric Talbot Jensen, 'The (Erroneous) Requirement for Human Judgment (and Error) in the Law of Armed Conflict' (2020) 96 International Law Studies 26 (arguing (at 26) that "weapons that incorporate machine learning and artificial intelligence… offer the promise of… greater… compliance" with the laws of armed conflict because of their capacities (at 56) for "more exacting distinction").

[26] Markus Gunneflo and Gregor Noll, 'Technologies of Decision Support and Proportionality in International Humanitarian Law' (2023) 92 Nordic Journal of International Law 93.

[27] Cf. Fleur Johns, 'Digital Humanitarian Mapping and the Limits of Imagination in International Law' (2023) 34 Law and Critique 341.

tional plane? Can it be done without insisting on universal values that many scholars have shown to be partisan, and many peoples have found assimilatory? Without subscribing to neoliberal fantasies of a level playing field and equal opportunity in the global markets? Without conceding too much power to those with the greatest hold over prevailing infrastructures of connection and communication? Without evoking communitarian romanticism and stirring reactionary attachments to blood, soil, and yesteryear? These are perennial questions for international law and lawyers. As my brief excursion into debates about post-truth politics and military applications of AI suggests, they are surfacing afresh wherever technological change is giving digital-analogue tensions renewed prominence.

III. ATTENUATED COMMUNITY

We have now come to this lecture's central concern: the problem of international community. Even though I suggested above that emergent entanglements of digital and analogue connection are posing this problem anew, technological change is cast into the background of this lecture from this point onwards, although we will return to digital and analogue logics in Part VII. Instead, most of the remainder of this lecture is devoted to what has been going on recently (as of the time of speaking and writing) in the International Court of Justice. For this purpose, I approach the workings of this institution as a general international lawyer rather than a specialist in the jurisprudence and procedure of the Court. My argument is that recent (and ongoing) efforts to flesh out doctrine and practice around *erga omnes partes* obligations, *erga omnes* obligations, and rights of intervention in the ICJ articulate an intriguing new approach to the problem of international community. This part introduces the features of this new approach before Part IV highlights how it is being articulated before the ICJ, and Part V shows how it differs from most prior versions of international community advanced in international legal work.

Community, in the version that I draw out of some recent ICJ applications, leverages both digital and analogue logics. I call this community attenuated to capture how it retains the potency of familiar evocations of international community even as their pernicious legacies and chauvinistic implications are acknowledged. I am drawing an analogy to an attenuated vaccine of a kind that immunologists create by taking steps to reduce the virulence of a pathogen while keeping that pathogen viable enough to ensure that an immune response is provoked.[28] This sense of attenuated community is at once active and inactive.

Assertions of attenuated community of the kind discernible in recent ICJ applications are *active* in that they have the effect of prizing open preexisting legal relations and settings of communal violence and inserting an expanded idea of interest within them. That is, they entail insistence that more people and more governments have a legal interest in those relations of violence than international law has traditionally allowed. Wherever this is asserted, however, that enlarged sphere of legal interest is not generic. Its opening bears the trace of long, complex histories of relations and solidarities—as well as tensions—among those concerned.

At the same time, assertions of attenuated community are *inactive* in that they do not seek to enclose those who endorse this enlarged sphere of common interest in a value-clique, interest group, or deliberative dialogue. Recent claims of community do not presume seamless agreement, singular viewpoint, reciprocal investment, undifferentiated identity of interests, absolute convergence of values or goals, geographic proximity, or any other kind of coherent oneness among those articulating common concern.[29]

[28] I am mindful of work in political theory, among writers in the tradition of affirmative biopolitics, that traces affinities between community (*communitas*) and immunity (*immunitas*). See Roberto Esposito, *Terms of the Political: Community, Immunity, Biopolitics* (Fordham University Press 2022). To be clear, I am not relying on that work here.

[29] Spivak remarks on the dislocated, incoherent commonality/non-commonality that Marx attributed to the small-holding peasants of mid-19th century France

Those making assertions of attenuated community do so combatively. The commonality that they advance cuts across other scales and versions of community in which international law trades. Importantly, this is done with specific, material and military asymmetries in view. Assertions of attenuated community emerge from a politics of egalitarianism, aimed at piercing through unequal power relations and countering communal violence—specifically, genocidal and torturous violence. In this sense, attenuated community entails an anti-community assertion of community. That is the case even though the politics of these ICJ applications are far from coherent, as Part IV will make plain. To borrow from Gayatri Spivak's reading of community in Marx's *Eighteenth Brumaire* essay, the commonality that recent ICJ cases evoke is advanced by the litigants in question as "a contestatory *replacement* as well as an *appropriation* (a *supplementation)*" of connections that were "'artificial' to begin with", namely the parties' prior entanglement in intersecting political, military, and economic predicaments, on which Part IV will elaborate.[30]

The common interest being asserted in the ICJ applications that I will discuss in Part IV is not transactional or borne of deal-making in a market. These are not *quid pro quo* interactions. In this respect, the attendant commonality is distinct from the kinds of international legal community that neoliberals have championed since the mid-late twentieth century. One archetype of neoliberal community is the cosmopolitan think tank, or loosely affiliated network of think tanks, advancing an ideological agenda mimetically, entrepreneurially, and through intensive capital investment, without dependence on popular organizing or widespread collective engagement, and with relative

who formed a class insofar as they lived under economic conditions that opposed them to other classes, but did not form a class insofar as the identity of their interests formed "no community, no national bond, and no political organization among them": Karl Marx, *The 18th Brumaire of Louis Bonaparte* (3rd edn, Wildside Press LLC 2008) 124; in this context, Spivak calls Marx's social history "a model of social indirection" aimed at critique of collective agency as much as individual agency: Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Patricia Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory: A Reader* (Columbia University Press 1994) 72.

[30] Spivak (n 29) 72.

indifference to history.[31] The attenuated commonalities being advanced in ICJ applications to counter material and military asymmetry do not fit this model. What this attenuated community *does* share with neoliberal community, nevertheless, is an embrace of contingency. When international community is attenuated, it is not meant to serve for all places and times; it is advanced in and for the context of a particular conflict. It is at once solidaristic, and open to continuous negotiation.

Recent ICJ applications' articulation of common legal interest in addressing genocidal or torturous violence—read here as assertions of attenuated community—could be viewed as culminations of many decades of anti-imperialist advocacy by colonized and racialized peoples worldwide.[32] At least one of the ICJ applications discussed in Part IV, that of South Africa, carries that implication, as highlighted below. Prior ICJ applications, such as those made by Ethiopia and Liberia in the *Southwest Africa Cases*, could be arrayed to support this reading.[33] One could characterize the anti-apartheid solidarity of Ethiopia and Liberia with the peoples of Southwest Africa (now Namibia), in their efforts to have the ICJ enforce against South Africa its obligations as mandate-holder under the League of Nations Covenant, as a harbinger of recent ICJ applications by the African states The Gambia and South Africa, to which we will turn in Part IV.[34]

The commonalities to which recent ICJ applications lay claim resist, however, such a transhistorical or progressive interpretation, even

[31] Philip Mirowski and Dieter Plehwe, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009); Marie Laure Djelic and Reza Mousavi, 'How the Neoliberal Think Tank Went Global: The Atlas Network, 1981 to the Present' in Dieter Plehwe, Quinn Slobodian and Philip Mirowski (eds), *Nine Lives of Neoliberalism* (Verso Books 2020).

[32] I am indebted to Dimitri Van Den Meerssche for pushing me on this point in discussion following the Asser Lecture.

[33] *Southwest Africa Cases (Ethiopia v South Africa; Liberia v South Africa)* (Preliminary Objections, Judgment) [1962] ICJ Rep 319; *Southwest Africa Cases* (Second Phase, Judgment) [1966] ICJ Rep 6.

[34] I am indebted to Prof. Aman of Jindal Global Law School (and UNSW Sydney) for raising this upon reading an earlier version of this lecture.

though they are clearly historically informed. They are not alliances or arguments towards which oppressed peoples have been working for decades. They express no generalizable quality or natural outcome of peoples' struggles for justice. Indeed, to suggest that recent assertions of attenuated community comprise part of an historically continuous movement of uprising or resistance would be to refute their legibility as expressions of community. It is inconsistent with community to think of it as a continuous projection of prior work, filling out a mold previously laid out for it, because that would negate the collective agency that community implies. As the philosopher Jean-Luc Nancy has argued, "community has never taken place along the lines of our projections of it".[35] Wherever activated politically, community always exceeds its actual or prospective concretization. Assertions of attenuated community acknowledge the propensity of communities to overrun any advance modelling insofar as they dispense with ideas of international community previously propagated in the international legal field.

To bring these ideas to life, Part IV will consider how some recent and pending ICJ applications advance an attenuated idea of community or common interest, and Part V will explore how they stand apart, in this respect, from other, more familiar evocations of community in the international legal field.

IV. COMMUNITY AND COMMON INTEREST IN RECENT ICJ CASES

What has been apparent, at least since the ICJ's 2012 judgment in the case known as *Questions relating to the Obligation to Prosecute or Extradite*[36]—a dispute between Belgium and Senegal regarding criminal proceedings under the Convention against Torture—is a gradual widening of states' capacity to sue other states before the ICJ by al-

[35] Jean-Luc Nancy, *The Inoperative Community* (Peter Connor and others (trs), University of Minnesota Press 1991) 11.

[36] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (Judgment) [2012] ICJ Rep 422.

leging breach of *erga omnes partes* obligations. Those are obligations that a State Party to a multilateral treaty owes to all the other States Parties to that treaty in view of all those parties having an interest in the treaty being upheld, given the importance of its subject matter. By relying on obligations *erga omnes partes*, any state that is party to a multilateral treaty giving rise to such obligations may institute legal proceedings against another State Party protesting non-compliance with that treaty, regardless of whether the complainant state or its nationals were directly injured or materially affected by the breach alleged.

Correspondingly, the doctrine of *erga omnes* obligations allows any state to enforce a subset of obligations under general, customary international law that concern rights so important that all states are held to have a legal interest in their protection. Famously, the ICJ observed in 1970, in a dictum of the *Barcelona Traction Case*, that "[s]uch obligations derive, for example… from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination". [37] Each state owes these customary law obligations to each and all other state(s), and is answerable for their breach vis-à-vis every other state, without regard to (a) plaintiff state(s) or its nationals having suffered injury. As we shall see, however, the gradual widening of entitlement to enforce *erga omnes partes* obligations before the ICJ has not yet extended to *erga omnes* obligations despite litigants' efforts to expand both.

The doctrine and scholarship relating to *erga omnes partes* and *erga omnes* obligations goes back further than 2012, of course. I will not chart its major routes and landmarks here; these have already been

[37] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 33, [34]; see generally Maurizio Ragazzi, 'The Appearance of the Concept of Obligations Erga Omnes on the Agenda: The Dictum of the International Court in the Barcelona Traction Case', *The Concept of International Obligations Erga Omnes* (Oxford University Press 2000).

well surveyed by many, including René Figueredo Corrales,[38] Pok Yin Chow,[39] Mariko Kawano,[40] Christian Tams,[41] Yoshifumi Tanaka,[42] Priya Urs,[43] and the former ICJ judge Bruno Simma,[44] among others. Moreover, relevant ICJ jurisprudence is not restricted to cases in which breaches of *erga omnes* or *erga omnes partes* obligations have been pleaded. As suggested above, one might locate an earlier, related articulation of legal interest in Ethiopia's and Liberia's applications in the *Southwest Africa Cases* of the 1960s.[45] Ultimately without success, those two states sought to have the ICJ recognize and enforce their legal interest in the observance by South Africa of its obligations under the mandate system established by the League of Nations Covenant: obligations that they alleged were violated by South Africa's apartheid administration of Southwest Africa (later renamed Namibia). However, this lecture does not set out to trace such transhistorical connections. Instead, it is concerned with the commonalities outlined, and possibilities presented, in three ICJ applications currently still pending before the Court.

[38] René Figueredo Corrales, 'In the Pursuit of High Purposes: The International Court of Justice, Obligations Erga Omnes and the Prohibition of Genocide' (2023) 22 The Law & Practice of International Courts and Tribunals 62.

[39] Pok Yin S Chow, 'On Obligations Erga Omnes Partes' (2021) 52 Georgetown Journal of International Law 469.

[40] Mariko Kawano, 'Standing of a State in the Contentious Proceedings of the International Court of Justice Recent Trends and Challenges of the ICJ Jurisprudence' (2012) 55 Japanese Yearbook of International Law 208.

[41] Christian J Tams, '"International Community" as a Legal Notion' (Global Cooperation Research Papers 2018) Working Paper 21 <https://www.econstor.eu/handle/10419/214714> accessed 21 June 2024; Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press 2005).

[42] Yoshifumi Tanaka, 'The Legal Consequences of Obligations Erga Omnes in International Law' (2021) 68 Netherlands International Law Review 1.the legal consequences of those obligations are not adequately clarified in international law. Thus this article explores the legal effects of obligations erga omnes in general international law. After an examination of the criteria for the identification of obligations erga omnes, this article considers three possible legal consequences of those obligations: (1

[43] Priya Urs, 'Obligations Erga Omnes and the Question of Standing before the International Court of Justice' (2021) 34 Leiden Journal of International Law 505.

[44] Bruno Simma, 'From Bilateralism to Community Interest in International Law (Volume 250)', *Collected Courses of the Hague Academy of International Law* (Brill 1994).

[45] *Southwest Africa Cases* (n 33).

In 2019, the small West African state of The Gambia, with a population of just over two and a half million people, about 96% of whom are Muslim, filed an application with the ICJ, with support from the Organization of Islamic Cooperation.[46] This application concerned actions taken in Myanmar, a Southeast Asian state some eleven and a half thousand kilometres away, that The Gambia is in many ways unalike.[47] Myanmar is about sixty times the size of The Gambia territorially speaking and has an ethnically diverse population more than twenty times larger.[48] That population is predominantly Buddhist, but Myanmar is also home to a small Muslim minority. The two states are also quite distinct politically and economically. Myanmar, a conflict-riven state under contested military rule, has large reserves of gas and precious stones and levels of public debt below the Asia-Pacific regional average. The Gambia, a multi-party democracy, relies primarily on agriculture and less lucrative commodity-based industries and it is heavily indebted. Nevertheless, they have economic disadvantage in common; The Gambia and Myanmar are two of the most impoverished countries in the world.[49] To the media, The Gambia's former Attorney General and Justice Minister, Abubacarr Tambadou, described the state's ICJ application as an initiative informed by his

[46] *The Gambia v Myanmar* (n 9); Johannes Buabeng-Baidoo, 'The Gambia' in Gerhard Robbers (ed), *The Encyclopedia of Law and Religion Online* (Brill Nijhoff 2015) <https://referenceworks-brill-com.wwwproxy1.library.unsw.edu.au/display/entries/ELRO/COM-000079.xml?rskey=2gUeSC&result=1> accessed 21 June 2024.

[47] Ryan Lenora Brown, 'Rohingya Ruling: How a Tiny African Country Brought Myanmar to Court', (Christian Science Monitor, 13 Feb 2020) <https://www.csmonitor.com/World/Africa/2020/0213/Rohingya-ruling-How-a-tiny-African-country-brought-Myanmar-to-court> accessed 21 June 2024.

[48] David Steinberg, Michael Arthur Aung-Thwin and Maung Htin Aung, 'Myanmar' (*Encyclopedia Britannica,* 9 April 2024) <https://www.britannica.com/place/Myanmar> accessed 21 June 2024; Harry A. Gailey, Andrew Clark and Enid R.A. Forde, 'The Gambia' (*Encyclopedia Britannica*, 10 May 2024) <https://www.britannica.com/place/The-Gambia/additional-info#contributors> accessed 21 June 2024.

[49] The World Bank, 'The Gambia: Country Overview' (*The World Bank*, 10 April 2024) <https://www.worldbank.org/en/country/gambia/overview> accessed 21 June 2024; Asia Development Bank, 'Myanmar and ADB' (*Asia Development Bank*, 9 April 2024) <https://www.adb.org/where-we-work/myanmar/economy> accessed 21 June 2024.

country's endurance of twenty-two years of brutal dictatorship.[50] This was not without some irony, however, given that its current President, Adama Barrow, has faced criticism for reneging on a promise to step down from office and cracking down on protestors at home.[51]

Before the ICJ, The Gambia sought "to establish Myanmar's responsibility for violations of the Genocide Convention" through what it alleged are "its genocidal acts against the Rohingya group", a distinct ethnic, racial, and religious group residing primarily in Myanmar's Rakhine state at the far west of its border with Bangladesh.[52] The Gambia did so invoking both *erga omnes partes* obligations under the Genocide Convention (to which both The Gambia and Myanmar are parties) and *erga omnes* obligations owed under general, customary international law. All states, The Gambia argued, have a common interest—a common *legal* interest—in preventing the alleged genocidal treatment of the Rohingya. In 2022, the ICJ ruled by fifteen votes to one that it has jurisdiction to hear the case, rejecting Myanmar's claims that The Gambia had no legally recognizable stake in the Rohingya's mistreatment. In so doing, the Court acknowledged The Gambia's treaty-based interests, but not its claim that all states are owed *erga omnes* obligations under customary law as well. The Court was silent on the latter.[53]

In late 2023, The Gambia's assertion of this common interest was echoed by seven states that exercised their right to intervene in the case, and did so in terms supportive of The Gambia, thereby agreeing to be bound by its outcome. They were Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom, acting togeth-

[50] Aaron Ross, 'With Memories of Rwanda: The Gambian Minister Taking on Suu Kyi' (*Reuters*, 6 December 2019) <https://www.reuters.com/article/us-myanmar-rohingya-world-court-gambia/with-memories-of-rwanda-the-gambian-minister-taking-on-suu-kyi-idUSKBN1Y91HA/> accessed 21 June 2024.

[51] Ryan Lenora Brown (n 47); Isaac Mugabi, *Free Speech: Is Gambia Sliding Back into Dictatorship?*, DW.COM (Oct. 10, 2023), https://www.dw.com/en/free-speech-is-gambia-sliding-back-into-dictatorship/a-67053483 accessed 21 June 2024.

[52] *The Gambia v Myanmar* (n 9), 12, [15].

[53] *The Gambia v Myanmar* (Preliminary Objections, Judgment) [2022] ICJ Rep 477, 492-496.

er, and The Maldives acting independently.[54] Historically, this kind of intervention by other states in an ICJ dispute has been quite rare, but intervention of this kind has been happening a lot more lately. This phenomenon, the ICJ's handling of it, and the relationship between standing to institute ICJ proceedings to enforce *erga omnes* obligations and standing to intervene in ICJ proceedings, are the subjects of extensive scholarly discussion that will not be recapitulated here.[55]

The Gambia's was the first case ever brought before the ICJ under the Genocide Convention by a state not alleging that any of its nationals have been victims of genocide. For non-lawyer readers, this is significant because of the way that it breaks with the idea that the ICJ is and should be primarily concerned with resolving bilateral disputes between alleged offender states and alleged victim states where the latter can show they have been directly harmed by the offender's illegality. The ICJ has always had the capacity to give legal advice beyond the scope of such disputes, by issuing Advisory Opinions.[56] Also, as noted already, its rules allow for other states to intervene in bilateral disputes.[57] Even so, its dispute resolution work has not historically entailed much arbitration of common legal interests among otherwise disparate states.

[54] *The Gambia v Myanmar*, (Intervention) Joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, 15 November 2023, <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-01-00-en.pdf> accessed 21 June 2024; *The Gambia v Myanmar* (Pending) Joint declaration of intervention of Maldives 2023 <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231115-wri-02-00-en.pdf> accessed 21 June 2024.

[55] See, e.g., Shabtai Rosenne, *Intervention in the International Court of Justice* (Kluwer Academic Publishers 1993); Craig Eggett and Sarah Thin, 'Third-Party Intervention before the International Court of Justice: A Tool for Litigation in the Public Interest?', *Public Interest Litigation in International Law* (Routledge 2023); Brian McGarry, 'Decoding Nicaragua's Historic Request to Intervene in South Africa v Israel' (*EJIL: Talk!*, 21 February 2024) <https://www.ejiltalk.org/decoding-nicaraguas-historic-request-to-intervene-in-south-africa-v-israel/> accessed 21 June 2024.

[56] Statute of the International Court of Justice,1946, 33 UNTS 993, art 65(1).

[57] Statute of the International Court of Justice,1946, 33 UNTS 993, arts 62(1), 63(2).

Indeed, in contrast to the ICJ's ruling on The Gambia's standing in its recent case against Myanmar, the Court has been somewhat hostile to common interest claims in the past. The ICJ's infamous 1966 ruling against Ethiopia and Liberia in the *Southwest Africa Cases* is a case in point.[58] One might think, also, of the Court's 1970 ruling against Belgium in the *Barcelona Traction Case*, the very case in which the ICJ first stated explicitly that states owe certain international legal obligations *erga omnes*, or to all other states. Even as it affirmed that idea in principle, the ICJ found that Belgium had no legal standing to exercise diplomatic protection for the benefit of Belgian shareholders in a company incorporated in Canada in respect of measures taken against that company in Spain. Instead, the ICJ maintained that "an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection".[59]

The persistence and efficacy of African states' leadership, despite historical setbacks in the *Southwest Africa Cases* and elsewhere, is a noteworthy feature of the international legal (re)thinking of community that this lecture probes.[60] In 2023, two other states, Canada and The Netherlands, followed The Gambia's lead.[61] Canada and The Netherlands did so by instituting proceedings against another African state, Syria, for failure to comply with a different multilateral treaty, the Torture Convention, in relation to Syria's mistreatment of activists and dissidents. Like The Gambia, they did so without alleging that any of their nationals had been victims of torture. Again, they invoked common interest in ensuring compliance with the Torture Convention. Syria contended, in response, that the obligations arising from human rights treaties, including the Torture Convention, are "indi-

[58] *Southwest Africa Cases* (n 33) (Second Phase, Judgment) [1966] ICJ Rep 6.

[59] *Barcelona Traction* (n 37) [33]. I am indebted to Lucas Lixinski for a note on this in an earlier draft of this lecture which he was kind enough to read.

[60] On African leadership in international legal work more broadly, and scholarly inattention to that leadership, see James Thuo Gathii, 'The Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996-2019 as an Appendix) Twenty-Second Annual Grotius Lecture' (2020) 114 Proceedings of the Annual Meeting, Published by the American Society of International Law 165.

[61] *Canada and the Netherlands v Syrian Arab Republic* (n 10).

vidual obligations of states, and don't have the potential to create a dispute among the state parties, as long as it is not proven that damage has been caused to another party".[62] Rejecting Syria's argument, the ICJ once again ruled that the common interest of the applicants in enforcing *erga omnes partes* obligations was a sufficient basis for moving forward with the proceedings.[63] The case demonstrates how The Gambia's *erga omnes partes* claim has had broader resonance, and helped to establish a new normal in international legal relations.

The politics of this Canadian-Dutch gesture of *erga omnes* interest are, however, quite different to those underpinning The Gambia's case against Myanmar. As allies of the US, both Canada and The Netherlands were active in the war against Islamic State in the 2010s, in which context both states participated in the bombing of Syrian territory, no doubt killing civilians in the process.[64] Those operations were justified to domestic constituencies in part by the need to support the Syrian opposition.[65] Thus, Canada and The Netherlands have been directly implicated in violence in Syria in a way that The Gambia has never been in Myanmar. This made the Dutch and Canadian effort to position themselves on the side of the Syrian people against President Bashar al-Assad rather awkward—awkwardness compounded by collective memory of those years during which Western states more-

[62] *Canada and the Netherlands v Syrian Arab Republic* (Provisional Measures) Observations of Syria on the joint request for the indication of provisional Measures submitted by Canada and the Netherlands, 10 October 2023, [6] <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231010-wri-01-00-en.pdf> accessed 21 June 2024.

[63] *Canada and the Netherlands v Syrian Arab Republic* (Provisional Measures: Order) General List No 188 [2023] ICJ 2, [50], [57] <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf> accessed 21 June 2024.

[64] Andrew Mumford, *The West's War Against Islamic State: Operation Inherent Resolve in Syria and Iraq* (Bloomsbury Publishing 2021).

[65] Gelijn Molier and Martijn Hekkenberg, 'The Dutch Contribution to the Armed Coalition Against ISIS' in Martin Kuijer and Wouter Werner (eds), *Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law* (TMC Asser Press 2017); Aaron Ettinger and Jeffrey Rice, 'Hell Is Other People's Schedules: Canada's Limited-Term Military Commitments, 2001–2015' (2016) 71 International Journal 371; Thomas Juneau, 'The Civil War in Syria and Canada's Containment Policy' (2015) 70 International Journal 471.

or-less shrugged when Syrian people terrorized by the al-Assad regime sounded warnings or issued pleas for help.[66]

A further, noteworthy point of difference is the framing of Canada and The Netherlands' concern for those suffering at the hands of the al-Assad regime. Whereas The Gambia's concerns about violence towards Rohingya Muslims were channeled through the Organization of Islamic Cooperation, the concerns of Canada and The Netherlands were expressed in more generic, human rights terms, with those targeted by the Syrian regime identified only as "dissidents", "activists", "protestors" and "demonstrators".[67] Saying relatively little about those suffering the alleged torture at the heart of the case (beyond noting that children and both men and women were among those detained),[68] the application was expressed more as a statement of principle than a gesture of solidarity. In this way, the Canadian-Dutch application effectively side-stepped the ideological diversity apparent among the forces opposing al-Assad.[69] At the same time, it studiously avoided any direct engagement of those states supporting al-Assad, Iran and Russia, while keeping distance also from the main state sponsor of the Syrian opposition, Turkey.[70] Notably, these proceedings have not attracted any intervenors, in contrast to other recent *erga omnes*-based claims. In view of this non-intervention, Canada and The Netherlands' application may be construed as a failed assertion of attenuated com-

[66] Eyal Zisser, 'Does Bashar Al-Assad Rule Syria?' (2003) Winter 2003 Middle East Quarterly 15 (noting that "Bashar continued to bask in optimistic Western expectations even after he took office"); see also Alex Bellamy, 'Friday Essay: How the West Betrayed Syria' (The Conversation, 2 December 2022) <http://theconversation.com/friday-essay-how-the-west-betrayed-syria-194245> accessed 21 June 2024.

[67] *Canada and the Netherlands v Syrian Arab Republic* (n 10) [4], [5], [7], [14], [26], [28], [29].

[68] Ibid [2], [26], [41], [44], and [46]-[48].

[69] Regine Schwab, 'Same Same but Different? Ideological Differentiation and Intra-Jihadist Competition in the Syrian Civil War' (2023) 8 Journal of Global Security Studies ogac045.

[70] Bayram Balci and Nicolas Monceau (eds), *Turkey, Russia and Iran in the Middle East: Establishing a New Regional Order* (Springer International Publishing 2021).

munity—unsuccessful in inviting others into its reframing of the dispute.

In late 2023, another African state, this time South Africa, instituted ICJ proceedings under the Genocide Convention invoking a common interest in ensuring genocide is prevented and punished.[71] As is well known, these proceedings concern the overwhelming violence wrought by Israel, and the denigratory statements of representatives of Israel, against the Palestinian people in the wake of the Hamas attacks on Israel of 7 October 2023. Like The Gambia, South Africa invoked both treaty-based *erga omnes partes* obligations owed to it by Israel, and obligations *erga omnes* under general customary law. It did so against the background of longstanding political allyship between South Africa and Palestine. The African National Congress and the Palestine Liberation Organization maintained close relations throughout the latter part of the twentieth century, and Palestine has garnered support from the Congress of South African Trade Unions. Since the 1970s at least, the South African government has been mostly steadfast in its support of the Palestinian cause. [72]

In contrast to the application of The Gambia, which began its story of Rohingya oppression "around October 2016" (while noting a "backdrop of longstanding persecution and discrimination"),[73] and the Canadian-Dutch application which began its account in 2011 (rather than with preceding decades of Hafez al-Assad's brutally oppressive rule),[74] South Africa's application set the suffering of Palestinian people in a broader historical and political context spanning decades.

[71] *South Africa v Israel* (n 11).

[72] Makhura B Rapanyane, 'Consistency and Inconsistency in the Foreign Policy of the Republic of South Africa towards Israel' (2022) 22 Journal of Public Affairs e2746; Asher Lubotzky, 'Before the Apartheid Analogy: South African Radicals and Israel/Palestine, 1940s–1970s' (PhD thesis, Indiana University 2023) (noting the "unwavering pro-Palestinian and anti-Zionist stance of South Africa's anti-apartheid movement and its subsequent post-apartheid government… since the early 1970s" but also tracing South Africans' "more fluid engagement with Zionism and the State of Israel… between the 1940s and 1960s").

[73] *The Gambia v Myanmar* (n 9) [6].

[74] *Canada and the Netherlands v Syrian Arab Republic* (n 10) [2].

"The Nakba [of 1948] and the mass displacement associated with it… features prominently in the history and consciousness of Palestinians in Gaza, as it does for the wider Palestinian people", the application observed. It recalled, too, that Palestinians are still seeking refuge after decades-long displacement "from towns and villages in what is now the State of Israel".[75]

In this way, South Africa's application aligned itself with an anti-imperialist rather than a liberal, human rights-based understanding of genocide, placing it at odds with the Canadian-Dutch rendering of torture in Syria. Such an approach treats genocide as a manifestation of abiding historical phenomena, traceable to practices of imperial conquest and colonial subjugation including the Spanish and Portuguese conquest of Latin America, the British and French conquest of North America; Indigenous dispossession in the face of US expansion; and the British and European conquest of Africa, Australia, New Zealand, and parts of Asia. In contrast, liberal understandings of genocide tend to associate genocide with totalitarianism and treat the Holocaust as an axiomatic instance of it.[76]

Unlike The Gambia and unlike Canada and The Netherlands, South Africa faced no opposition to its standing in the case against Israel. Israel has contested the application on other grounds before the Court, but it has not contended that South Africa lacks a legally recognizable interest in Israel's treatment of the Palestinian people.[77] In a January 2024 ruling, the first of a series of rulings on provisional measures sought by South Africa, the ICJ signaled its *prima facie* acceptance of South Africa's treaty-based interest in the case—that is, its invocation of *erga omnes partes* obligations. Again, the Court did not address

[75] *South Africa v Israel* (n 11) [22].

[76] Philip Spencer, 'Imperialism, Anti-Imperialism and the Problem of Genocide, Past and Present' (2013) 98 History 606.

[77] *South Africa v Israel* (Provisional Measures) Observations of the State of Israel on the request for additional measures under Article 75(1) of the Rules of the Court,15 February 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240215-wri-01-00-en-1.pdf> accessed 21 June 2024.

whether South Africa could invoke similar, customary obligations in the absence of a treaty.[78]

Nicaragua has applied to the Court for permission to intervene in this case, invoking "the same *erga omnes* legal rights and obligations" as those on which South Africa's case is based.[79] Once again, there is a fraught history of political allegiances and antagonisms underpinning that move. In Nicaragua's case, that is a history of Sandinista-Palestinian political allegiance dating back decades. It is also one of long-standing antagonism with Israel traceable to that nation's support for the Somoza government and the Contras, and allegations of anti-semitism made against the Sandinista National Liberation Front (FSLN) that has held power in Nicaragua intermittently since its 1979 revolution.[80] More recently, Nicaragua has instituted related ICJ proceedings against Germany arguing that its military and adjacent support for Israel, in the context of Israel's ongoing war in Gaza, is inconsistent with Germany's obligations under the Genocide Convention.[81]

Colombia too has filed a declaration of intervention in South Africa's case against Israel as a party to the Genocide Convention, explaining that it is "endeavouring to act as a responsible member of the international community" and trying to advance "joint and coordinated

[78] *South Africa v Israel* (Order, Request for the Indication of Provisional Measures) General List No 192 [2024] ICJ 1; see also the Court's later provisional measures in *South Africa v Israel* (Order, Request for the Modification of the Order of 26 January 2024 Indicting Provisional Measures).

[79] *South Africa v Israel* (Intervention) Application for Permission to Intervene submitted by Nicaragua, 23 January 2024 <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240123-int-01-00-en.pdf> accessed 21 June 2024; McGarry (n 55).

[80] Marshall Yurow, 'Evolving Relationships: Nicaragua, Israel, and the Palestinians' (2019) 46 Latin American Perspectives 149.

[81] *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)* (Provisional Measures) Application Instituting Proceedings and Request for Provisional Measures, 1 March 2024 <https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf> accessed 21 June 2024.

action of the international community".[82] Yet again, the background to this assertion of community is important, and differs from those of other states involved. Unlike Nicaragua, Colombia's relations have historically been far stronger with Israel than with Palestine.[83] Even so, Colombia officially recognized the state of Palestine in 2018, recalled its Ambassador from Tel Aviv in late 2023, and in May 2024 announced plans to open an embassy in Ramallah.[84]

In late May 2024, Mexico became the third Latin American state to seek to intervene in South Africa's case by filing a declaration of intervention with the Court.[85] Mexico did so laying as much emphasis on the *erga omnes* character of the genocide prohibition under customary international law as on its treaty-based counterpart, arguably nudging the Court to expand the scope of its analysis beyond consideration of *erga omnes partes* obligations.[86] Mexico's application also voiced particular concern about the destruction of cultural sites, museums, and symbols of cultural significance as well as about starvation and denial of access to humanitarian aid. [87] This represented something of a foreign policy departure, under the centre-left President Andrés Manuel López Obrador, from Mexico's historic prioritization of its relationship with the US, and its longstanding (if sometimes tepid) support for Israel, with which it maintains significant defence and

[82] *South Africa v Israel* (Intervention) Declaration of Intervention filed by Colombia, 5 April 2024, [19], [70] <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240405-int-01-00-en.pdf> accessed 21 June 2024.

[83] Les W Field, 'The Colombia-Israel Nexus: Toward Historical and Analytic Contexts' (2017) 52 Latin American Research Review 639.

[84] Flora Charner and James Masters, 'Colombia Recognizes Palestine as Sovereign State' (*CNN*) <https://edition.cnn.com/2018/08/09/americas/colombia-israel-palestinians-intl/index.html> accessed 21 June 2024; Oscar Medina, 'Colombia Plans to Open an Embassy to Palestine in Ramallah' (*Bloomberg.com* 23 May 2024) <https://www.bloomberg.com/news/articles/2024-05-22/colombia-plans-to-open-an-embassy-to-palestine-in-ramallah> accessed 21 June 2024.

[85] *South Africa v Israel* (Intervention) Declaration of Intervention filed by Mexico, 24 May 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-int-01-00-en.pdf> accessed 21 June 2024.

[86] Ibid [6], [10]-[12], [16]-[20].

[87] Ibid [34]-[43].

security links.[88] Mexico has previously been described as indifferent towards the Middle East.[89] It is also home to a much smaller Palestinian diaspora than some other Latin American countries.[90] This apparent change of heart might reflect the impact of Mexico's relations with other states (including other Latin American states), the effect of domestic protest, and/or the foreign policy interests of its President-elect Claudia Sheinbaum Pardo (also centre-left and of Jewish faith), who has previously written in support of Palestinian liberation.[91] Mexico's somewhat more equivocal positioning vis-à-vis the matters in dispute between South Africa and Israel was nonetheless reflected in the doctrinal focus and tenor of its declaration, seeming to indicate that its interest in the case was as much technical as political.

At greater proximity (geographically) to the subject matter of the dispute between South Africa and Israel, Libya has filed a declaration of intervention in the case.[92] Libya's engagement in the ICJ proceedings, amid ongoing political disunity domestically, could perhaps be linked to its particular stake in the interpretation of international humanitarian law, given the ongoing International Criminal Court's (ICC) investigation into the post-2011 situation in Syria (noting that the declaration of intervention was signed by Professor Ahmed El Gehani, Libya's representative at the ICC).[93] At the same time, it harks

[88] Marta Tawil Kuri, 'Mexico's Foreign Policy toward the Middle East: Individual Preferences and Bureaucratic Politics in a Changing International Environment', *Latin American Relations with the Middle East* (Routledge 2022) 171–3.

[89] Alejandra Galindo Marines, 'Mexico's Elusive Foreign Policy towards the Middle East: Between Indifference and Engagement' (2011) 4 Contemporary Arab Affairs 341.

[90] Yousef M Aljamal and Philipp O Amour, 'Palestinian Diaspora Communities in Latin America and Palestinian Statehood' (2020) 19 Journal of Holy Land & Palestine Studies 101, 108.

[91] Lillian Perlmutter, 'Mexico's Election Puts Lopez Obrador's Stance on Israel under Microscope' (*Al Jazeera News*) <https://www.aljazeera.com/news/2024/6/2/mexicos-election-puts-lopez-obradors-stance-on-israel-under-microscope> accessed 21 June 2024.

[92] *South Africa v Israel* (Intervention) Declaration of Intervention filed by Libya, 10 May 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240510-int-01-00-en.pdf> accessed 21 June 2024.

[93] International Criminal Court, 'Statement of ICC Prosecutor Karim A.A. Khan KC to the UN Security Council on the Situation in Libya, pursuant to Reso-

back to Libya's long-term support for the Palestinian cause, and its practice of supporting anti-imperialist causes worldwide throughout the 1970s and 1980s.[94]

Palestine has similarly filed both a declaration of intervention in these proceedings and, in the alternative, an application for permission to intervene in the case.[95] By making these filings with the ICJ, accompanied by a declaration accepting the jurisdiction of the Court to resolve disputes arising under the Genocide Convention, Palestine has formally "associate[d] itself" with South Africa's application and endorsed South Africa's presentation of the relevant facts.[96] Palestine's application also supports the idea that "every State Party to the Genocide Convention has a legal interest sufficient to provide it with standing", while noting in addition that Palestine has a "special interest" in the proceedings.[97] This course of action is broadly in line with Palestine's long-running efforts to engage support for its cause within the United Nations (UN), including by litigating on its own behalf in the ICJ (in a still-pending case filed against the US in 2018 regarding the relocation of the US embassy to Jerusalem).[98] It also follows the May 2024 affirmation, by the UN General Assembly, of Palestine's eligibility for full UN membership (as distinct from the status that it has enjoyed since 2012, as non-member observer state) notwithstanding the UN

lution 1970 (2011)' (Office of the Prosecutor, 9 November 2023) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-united-nations-security-council-situation-libya-0> accessed 21 June 2024.

[94] Jamal Hashim Ahmad Dhuwaib and Barakat Mohammed Suleiman, 'The Role of Libyan Resisters in the War of Palestine 1948' (2013) 4 Mediterranean Journal of Social Sciences 237; Matteo Capasso, 'The Perils of Capitalist Modernity for the Global South: The Case of Libya' (2023) 30 Review of International Political Economy 632, 636.

[95] *South Africa v Israel* (Intervention) Application for Permission to Intervene and Declaration of Intervention submitted by Palestine, 3 June 2024, <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240603-int-01-00-en.pdf> accessed 21 June 2024.

[96] Ibid [3], [4].

[97] Ibid [25]-[26].

[98] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* Application Instituting Proceedings, General List No 176 [2018] ICJ 1.

Security Council's failure to recommend its admittance in April 2024, and the 2011 thwarting of an earlier bid for full membership.[99]

Belgium, Chile, Egypt, Ireland, the Maldives, Spain and Turkey have also reportedly voiced intentions to intervene in the case. However, at the time of writing they had not filed with the ICJ any correspondence to that effect.[100]

What does all this activity in the ICJ have to do with ideas of community in international law? At the outset, it must be said that the ICJ's willingness to hear at least some of these kinds of common interest claims does not necessarily entail or foreshadow any fleshing out of the international legal notion of community on the part of the Court itself. At the end of an expansive survey of the concept of international community in international legal scholarship and ICJ jurisprudence, as it stood in 2013, Gleider Hernández observed that "the Court [has] not arrogate[d] for itself any central role in sketching the contours of the notion of 'international community'". Hernández continued, "there is nothing to suggest that the Court is anything but most reticent to engage in any [such] project".[101] I agree with Hernández's assessment in this regard. The interim rulings issued so far in these cases exhibit caution, on the part of the ICJ, on the *erga omnes* front: caution apparent in their unwillingness to entertain *erga omnes* claims under customary international law alongside treaty-based *erga omnes partes* claims, for instance. Moreover, references to the international community have been notably scarce in most of the relevant

[99] GA Res. A/ES-10/L.30/Rev.1, 10 May 2024; Enzo Cannizzaro, 'The Strange Story of the "Conditional" Admission of the State of Palestine to the United Nations' (*EJIL: Talk!*, 11 June 2024) <https://www.ejiltalk.org/the-strange-story-of-the-conditional-admission-of-the-state-of-palestine-to-the-united-nations/> accessed 21 June 2024.

[100] AJLabs, 'Which Countries Have Joined South Africa's Case against Israel at the ICJ?' (*Al Jazeera,* 6 June 2024) <https://www.aljazeera.com/news/2024/6/6/which-countries-have-joined-south-africas-case-against-israel-at-the-icj> accessed 21 June 2024.

[101] Gleider I Hernández, 'A Reluctant Guardian: The International Court of Justice and the Concept of "International Community"' (2013) 83 British Yearbook of International Law 13, 58.

pleadings and the ICJ's corresponding rulings so far. Except for Nicaragua's application, which referenced international community quite extensively, and that of Canada and The Netherlands, which did so to a lesser extent,[102] the language of "common interest" has mostly taken centre stage rather than that of "community".[103]

Nonetheless, what is striking in this recent lineup of cases are the overlapping yet partly misaligned strategic alliances that they express, and the way that these applications work, for the most part, in concert against modes of community in which international lawyers have typically traded: that is, against universalism; against nostalgic communitarianism; and against market-oriented instrumentalism, as Part V will explain. As a result, these cases bear very significantly on how international lawyers have mobilized, and might yet mobilize, notions of international community and common interest in international legal work.

V. COMMUNITY IN INTERNATIONAL LAW

The novelty of the approaches to international community taken in the applications just discussed hinges on their both building on and departing from prior thinking on community in international legal practice and scholarship. How exactly, then, have international lawyers tended to think and talk about community to date?

In general, international community has often been cast as something lacking. The notion of international community does a great deal of work in the international legal field in a negative register: as something lesser than promised, or, in some writings, entirely phantasmic. Surrounding international legal scholarship has tended to focus on what is *not* achieved by mobilizing "international community" more than

[102] *South Africa v Israel* (Intervention) (n 79) [11], [17], [23]; *Canada and the Netherlands v Syrian Arab Republic* (n 10) [2].

[103] *The Gambia v Myanmar* (n 9) [122], [124]; *South Africa v Israel* (n 11) [131]-[133].

what this has managed to, or might yet, bring about. Harlan Cohen has written, for instance, that the term community is "vague and over-used".[104] Monica Hakimi has argued that *erga omnes* obligations—and their counterpart, *jus cogens* or peremptory norms—"do not meaningfully foster the kind of community that they depict on their face".[105] Dino Kritsiotis has summarized international community's shortcomings as follows: "Our 'international community' is 'deep' enough to have conceived of the idea of *jus cogens* but not deep enough to know what to do with it".[106] To Andreas Paulus, international community is a diminutive, functional term: a "shortcut… for the endeavour to tackle common problems".[107] Christian Tams has observed that it is often a marker of failure, writing: "many a catastrophe—from Aleppo to climate change—is portrayed as a failure of the international community".[108]

Another way that international lawyers have written about community is to show how it has sometimes been assimilationist or racist. TWAIL scholarship has been important in this regard.[109] The argument that I have in mind runs roughly as follows. Whenever international lawyers evoke a unity—as in the international comm*unity*—the forging of this unity demands that divergent forces be identified and externalized, and those actors cast as divergent have often been racialized. Racist accounts of a community of nations comprised of the "civilized" are indicative. Among the most famous are those propagated by the nineteenth-century Scottish international lawyer, James

[104] Harlan Grant Cohen, 'Finding International Law, Part II: Our Fragmenting Legal Community' (2011) 44 New York University Journal of International Law and Politics 1049, 1065.

[105] Monica Hakimi, 'Constructing an International Community' (2017) 111 American Journal of International Law 317, 332.

[106] Dino Kritsiotis, 'Imagining the International Community' (2002) 13 European Journal of International Law 961, 990.

[107] Andreas Paulus, 'International Community', *Max Planck Encyclopedia of Public International Law* (2013) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1422> accessed 21 June 2024.

[108] Tams, '"International Community" as a Legal Notion' (n 41) 4.

[109] See generally James Thuo Gathii, 'Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)' (2020) 114 Proceedings of the ASIL Annual Meeting 165.

Lorimer, one of the founders of the *Institut de Droit International* together with Tobias Asser.[110] International law, Lorimer wrote in 1883, must admit "inferior races" into its political community on the basis of "perpetual pupilarity and guardianship" so long as "the preponderance of proximate power remains with the superior race".[111] In these terms, Lorimer evoked racist nostalgia for community lost—for supposedly simpler times when the international legal order was perceived (by some) as more religiously and racially homogenous, or more effectively hierarchized.

A more contemporary version of this vision of community through stratification entails prioritizing the views, properties, and experiences of "developed" nations over those imagined to be at an earlier developmental stage along a single evolutionary spectrum. Sundhya Pahuja has written of this dynamic as follows: "in the period of the newly 'universalised' international law, in formal legal terms, new states and other non-Western states were of the same order as 'developed' states, so were included in the international community, but only on the understanding that they would change to become the same".[112] Whether expressed in racial terms or developmentally, the unity of international community often depends on the scapegoating and subordination of forces and peoples identified with disunity or deficiency.

Not all commentators in the international legal field identify the unity of community with racist assimilation and nostalgia, of course. Some identify international community with a planetary consciousness. In a series of ICJ cases, including the Fisheries Jurisdiction case between Spain and Canada of 1998, the Pulp Mills case between

[110] Eyffinger's biography of Asser does not indicate how Asser felt about Lorimer's racist and antisemitic views. It merely mentions their working together on the founding of the *Institut* and that Lorimer may have instigated Asser's being awarded an honorary doctorate from the University of Edinburgh. Eyffinger (n 1) 545, 1604.

[111] James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (W Blackwood and Sons 1883) 158.

[112] Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press 2011) 31.

Argentina and Uruguay of 2010, and the Whaling case between Australia and Japan of 2014, judges of the ICJ have drawn strong links between environmental concern and a sense of international legal community or community of interest among states.[113] More broadly, international legal scholars have quite frequently used the term international community alongside references to 'Earth' or 'one planet', suggesting that humans' co-location in the universe implies their unavoidable normative convergence.[114]

This 'one planet, one law' idea, too, has a potentially negative dimension, however. It tends to flatten community into a concern with spatial distribution and biology, stripping 'ecology' of its relational, hybridizing implications.[115] It also downplays regional affiliations and countervailing internationalist projects, past and present. In addition, community in the 'one planet; one law' version overstates the extent to which people do, in fact, inhabit the same space and time globally. This disregards all that historians and anthropologists have shown us about how people inhabit multiple, misaligned space-times.[116] The sense of tomorrow with which I am most familiar bears little-to-no resemblance to the tomorrow of people on death row,[117] for instance,

[113] *Fisheries Jurisdiction (Spain v. Canada)* (Judgment) Separate Opinion of Judge Oda [1998] ICJ Rep 474, 499 [13]-[14]; *Pulp Mills on the River Uruguay (Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14, 104 [281]; *Whaling in the Antarctic (Australia v Japan: New Zealand intervening*) (Judgment) [2014] ICJ Rep 226, 254 [69].

[114] See, e.g., Samantha Franks, 'The Trees Speak for Themselves: Nature's Rights under International Law' (2020) 42 Michigan Journal of International Law 633.

[115] Cf., Nicole Seymour, 'Queer Ecologies and Queer Environmentalisms' in Siobhan B Somerville (ed), *The Cambridge Companion to Queer Studies* (Cambridge University Press 2020). I am indebted to Bronwen Morgan for drawing my attention to queer ecology scholarship, and for reading and providing helpful feedback on an early draft of this lecture.

[116] See, e.g., Sarah Sharma, *In the Meantime: Temporality and Cultural Politics* (Duke University Press 2014).

[117] C Lee Harrington, 'Time to Piddle: Death Row Incarceration, Craftswork, and the Meaning of Time' [1997] The Journal of Arts Management, Law, and Society 54 ("Long-term prisoners are often successful at reconceptualizing time so that their personal timetables have little to do with the clock or the calendar but instead reflect the passing of seasons, the gaps between visits and letters, or time spent in a particular security wing".)

or the tomorrow of those who inhabit soon-to-be-inundated islands of the Pacific.[118]

Even those who champion community in the international legal field tend to lean into a sense of its deficiency by casting international community as something aspirational or nascent—always yet to appear. In 1998, Georges Abi-Saab cast international community as an evolutionary stage in the international legal order that would result from the progressive thickening of the law of cooperation. At the same time, he worried that the end of the Cold War had unleashed forces moving in an opposite direction, fostering indifference towards the protection of common interests.[119] Twenty years later Eyal Benvenisti and Georg Nolte (before Professor Nolte became an ICJ judge) still insisted that it was "too early to tell" whether or not we are "on the road to more inclusive, community-oriented global institutions" on the international legal plane.[120]

What we are seeing in these recent ICJ cases is a newly generative version of this negativity (albeit not entirely new, given the precedents and parallels highlighted above). These cases make something fresh out of what international community is not, by explicitly countering community action in modes that the applicants allege, with good reason, are violent and oppressive. The common interests being articulated in these cases are worlds away from nostalgic evocations of homogenous community lost, or aspirational projections of community-to-come. Moreover, they are anything but purist; they are deeply fraught—indeed, explicitly so. The move that these ICJ applications make is towards community in a near-present, defiant mode. The appeals made to common interest in each case evoke a progressive community assembled for the time being to counter those specific

[118] See, e.g., Celia McMichael and Manasa Katonivualiku, 'Thick Temporalities of Planned Relocation in Fiji' (2020) 108 Geoforum 286.

[119] Georges Abi-Saab, 'Whither the International Community? Symposium: The Changing Structure of International Law Revisited (Part 4)' (1998) 9 European Journal of International Law 248.

[120] Eyal Benvenisti and others (eds), 'Introduction', *Community Interests Across International Law* (Oxford University Press 2018).

forms of community violence that are alleged in each instance. This is the targeted, attenuated community introduced above.

In each of the ICJ cases that I mentioned, the implied community of common legal interest has been combatively asserted against other, specific community-based claims. The connections drawn are in each case carefully calibrated and targeted, not universalized or romanticized. For example, The Gambia drew attention to Myanmar's 'racist and exclusionary vision' of national community in which the Rohingya are afforded no rightful place.[121] Canada and The Netherlands (generic human rights terminology notwithstanding) distinguished the common legal interest that they were asserting from that upon which Syria has relied when defending its conduct as necessary to ensure the security of the community against 'terrorists'.[122] South Africa's application referenced Israeli national laws claiming a 'united' Jerusalem and noted Israel's support for settler communities in the West Bank.[123] In each case, the applicants cast communal claims made by the defendant states as destructive of community in other modes and evoked the 'international community' against them.[124] This is what I mean by an anti-community assertion of community.

This attenuated version of community is also distinct from an instrumental use of community. The applicant states are clearly advancing their own interests in these claims, but they are not trying to cloak self-interest in the guise of community interest.[125] The difference hinges, in each case, on the complex and specific political histories of

[121] *The Gambia v Myanmar* (n 9) [30].
[122] *Canada and the Netherlands v Syrian Arab Republic* (n 10) [5].
[123] *South Africa v Israel* (n 11) [33]
[124] *Gambia v Myanmar* (n 9) [117]; *Canada and the Netherlands v Syrian Arab Republic* (n 10) [3]; *South Africa v Israel* (n 11) [46].
[125] Contra William D. Jackson, 'Thinking About International Community and Its Alternatives', in Kenneth W. Thompson (ed), *Community, Diversity, and a New World Order: Essays in Honor of Inis L. Claude, Jr.* (University Press of America 1994) 3, 6 ("The importance of the quest for legitimacy in international politics should not be underestimated. In this general and continuing quest, states or international institutions find it useful to claim that their actions are expressions of or are done in the service of an international community").

struggle from which the applicants' claims of common interest are derived. As is acknowledged by the applicants in every one of the cases that I mentioned, the common interest that they assert does not and cannot serve the purposes of one state or one administration alone. It is too unwieldy and sharp-edged to be instrumentally reliable.

In The Gambia's application, for instance, the common interest asserted is one forged among the fifty-seven states of the Organization of Islamic Cooperation (OIC), amid their quite different interpretations of Islamic doctrine. The Gambia made 'no secret' of this in its written submissions to the Court.[126] The application of Canada and The Netherlands likewise recalled their combined attempts to negotiate with Syria—efforts materialized in several multilateral resolutions.[127] As such, their common interest was advanced through the fraught politics of international institutions, with their fragile military alliance against the Islamic State, and proxied engagement with Russia, Iran and Turkey, forming a troublesome second layer to that terrain. South Africa's assertion of common interest similarly depends as much on Black South Africans and Palestinians' partially overlapping histories of struggle, as it does on the efforts of South Africa's President Cyril Ramaphosa and its Minister for International Relations and Cooperation, Naledi Pandor, to recalibrate a foreign policy of non-alignment and position South Africa assertively within it.[128] In none of these contexts can common interest be relied upon to do a single state's or single ruler's bidding.

[126] *The Gambia v Myanmar* (Preliminary Objection) Written Observations of The Gambia on the Preliminary Objections raised by Myanmar, 20 April 2021, [2.17] <https://www.icj-cij.org/sites/default/files/case-related/178/178-20210420-WRI-01-00-EN.pdf> accessed 21 June 2024.

[127] *Canada and the Netherlands v Syrian Arab Republic* (n 10) [14].

[128] Anthoni van Nieuwkerk, 'South Africa's Foreign Policy under Ramaphosa Has Seen Diplomatic Tools Being Used to Provide Leadership as Global Power Relations Shift' (*The Conversation*, 12 December 2023) <http://theconversation.com/south-africas-foreign-policy-under-ramaphosa-has-seen-diplomatic-tools-being-used-to-provide-leadership-as-global-power-relations-shift-218966> accessed 21 June 2024; Naledi Pandor, 'Ministerial Statement on the Ongoing Israeli-Palestinian Conflict' (National Assembly House of Parliament, 7 November 2023) <https://www.gov.za/news/media-statements/minister-naledi-pandor-ongoing-israeli-palestinian-conflict-07-nov-2023> accessed 21 June 2024.

This attenuated community is also distinct from an idea of ethical and political community created through dialogue or liberal proceduralism. As became apparent in the discussion above of the substantive differences between South Africa's invocation of its interest in averting genocide and Canada and The Netherlands' interest in enforcing obligations against torture, these cases do not advance an ethical union or manifest concerted endeavour. Theirs is not a "shared governance project" borne of ethical balance-striking along the lines that Monica Hakimi has eloquently sketched, taking the 'WTO community' as an exemplar.[129] These intersecting legal strategies of commoning are also not outcomes of the intensification of communication or economic activity; Marshall McLuhan's global village this is most certainly not.[130]

The claims of attenuated community that The Gambia, Canada and The Netherlands, South Africa and Nicaragua have articulated in different ways, and with varying degrees of success, are premised, instead, on their holding something substantive partially in common with other states and communities, for the time being. What is held in common are intensely contested commitments to anti-racism and the value of people living in conditions of political, cultural, and religious plurality: in each case commitments differently derived. This is part of what is made common through the appeal to common interest in these recent ICJ cases.

VI. ICJ DISPUTES AS COMMUNAL PROPERTY

My argument is that we should read the claims to commonality being made in recent ICJ cases through the specifics of particular disputes and intersecting experiences of struggle, rather than in a register of universalism or ethico-political communion. What the attenuated appeal to common interest does, in each of these cases, is prevent the violence alleged from being enclosed in the cell of a bilateral dispute.

[129] Hakimi (n 105) 320.

[130] Cf. Marshall McLuhan, *Understanding Media: The Extensions of Man* (Critical Edition, Gingko Press 2013) 70.

It also obstructs the elevation of these disputes to any generic, universal realm. It prevents them from becoming disputes "about the contours of [a singular] governance association" or "battles over" which "commitments… are universally shared" on the international plane, *pace* Hakimi.[131] Instead, the attenuated common interest claims made in the ICJ cases discussed above restate and wedge open that specific tangle of interlaced struggles that has informed the violence in each case, so that others may enter and articulate what is distinctly at stake for them in those struggles.

We know from the work of criminologist Nils Christie that it is possible to think of conflicts as property that may be stolen, given away, hoarded, or shared. We can also think of a conflict as a resource for struggling to figure out how to live with others, without resolving difference.[132] Holding resources in common always demands adherence to certain rules. Accordingly, one might say that the rules around *erga omnes partes* obligations and intervention in ICJ proceedings have a commoning effect, in that they counter the enclosure of a conflict and its exploitation or domination by a few. In making an *erga omnes partes* claim, The Gambia does not purport to make the Rohingya's grievances towards Myanmar its joint and equal property. Instead, The Gambia is finding an adjacent and intersecting place in the specifics of this conflict through appeal to international legal technique.

What The Gambia's claim does do is insert another set of rule-based relationships into relations between the Rohingya and Myanmar. The Gambia's claim crosshatches the violent conflict between them with another, partially overlapping set of legal struggles, demanding that

[131] Cf. Hakimi (n 105) 331-2 (arguing that "law can be the mechanism through which community members fight about the contours of their governance association—and in the process, construct it as a going concern that binds them" and that "*erga omnes* obligations help constitute an international community not by defining commitments that are universally shared but by inviting loosely connected actors to battle over what those commitments are or might be")

[132] Nils Christie, 'Conflicts as Property' (1977) 17 The British Journal of Criminology 1. I am indebted to Amy Cohen for drawing this illuminating connection to Christie's work, and for conversations that were vital to the development of this lecture.

Myanmar engage with both at the same time. This advances an attenuated notion of international community because the states involved expressly oppose any reading of their claims as signs of integrated unity on the international plane. In its submissions to the ICJ, The Gambia said that it is "proud" to enjoy the diplomatic and political support of Member States of the OIC, and a number of non-Islamic nations, but insisted that "[i]t was The Gambia alone" that initiated the ICJ proceedings.[133]

Over the course of The Gambia's pleadings, however, even the apparent unity of 'The Gambia alone' was broken down, as it was spoken through several different agents. For example, in oral argument before the Court, one of The Gambia's agents Paul S. Reichler described a short video that he had just seen, recorded in one of the "overcrowded refugee camps of Bangladesh" featuring "[t]housands upon thousands of Rohingya… gathered in an open field… chanting rhythmically: Gam-bi-a! Gam-bi-a! Gam-bi-a!". "[T]he Rohingya are continuing to follow this case very closely", Reichler observed, "and they have no doubt… about which party is seeking to hold Myanmar accountable for its genocidal acts against them". [134] In this way, The Gambia at once rejected Myanmar's claim that it was merely an OIC proxy and allowed the significance of its claims to be refracted through multiple eyes, screens, bodies, and voices. The complaint was The Gambia's, and no one else's, Reichler insisted, but it was also open to being 'owned', in distinct ways, by countless people, including crowds of people in a refugee camp. Likewise, Nicaragua's application to intervene in the case against Israel refused to regard South Africa as playing any representative or proxy role on behalf of a larger group, insisting that "South Africa is not acting as sole representative of the

[133] *The Gambia v Myanmar* (n 126) 77; see also *The Gambia v Myanmar* (Preliminary Objections) Verbatim Record CR 2022/4, 21 [3] <https://www.icj-cij.org/sites/default/files/case-related/178/178-20220228-ORA-01-00-BI.pdf> accessed 21 June 2024.

[134] *Gambia v Myanmar* (Preliminary Objections) Verbatim Record CR 2022/4, 4-5 <https://www.icj-cij.org/sites/default/files/case-related/178/178-20220228-ORA-01-00-BI.pdf> accessed 21 June 2024.

international community" in the case.[135] What South Africa has done, instead, is create an opening for states like Nicaragua and other communities to enter into its dispute with Israel on their own terms.

The attenuated community evoked by these assertions of common interest is not just differentiated substantively according to various points of view or entry. It is also variegated in time. Part of what is being transected and wedged open by these claims of common interest is the sense of a precise historical moment as something inhabited by all in the same way. I noted above that South Africa's application linked Israel's latest actions to decades of Palestinian dispossession. Likewise, Abubacarr Tambadou made The Gambia's dispute with Myanmar about something much more enduring than recent events. In oral argument, Tambadou remarked that "we in The Gambia know only too well how it feels like to be unable to tell your story to the world, to be unable to share your pain in the hope that someone somewhere will hear and help, to feel helpless" after experiencing "[t]wenty-two years of a brutal dictatorship".[136] At the same time, The Gambia's application also attested to any number of discrete, incomparable sufferings, each a space-time unto itself, as Tambadou noted when observing that "[e]very death is being mourned by a family among the Rohingya in Myanmar".[137] These claims exhibit analogue temporal logic in the sense that they posit a continuum of suffering and of ensuing legal obligations, with only some such obligations having an *erga omnes* quality. Yet they also leverage digital temporal logic because the claims being made are explicitly discontinuous with other factual settings and dimensions of legal relation.

The attenuation of these common interest claims prevents them from being subject to a 'more-of-the-same' diagnosis or being reduced to any familiar Global South position. African states have shown outsized leadership in the articulation of attenuated community before the ICJ. As noted above, this may be traced to Ethiopia and Liberia's ac-

[135] *South Africa v Israel* (n 79) [17].
[136] *Gambia v Myanmar* (n 134) 19 [14].
[137] Ibid 19 [13].

tions in the Southwest Africa cases. Even so, these latest articulations of commonality are not identical to those advanced concurrently by Ethiopia and Liberia in the 1960s. They are likewise not reducible to the common interest professed by the Asian-African states that participated in the 1955 Bandung Conference, as they expressed "discontent with the international (Western) community", in Nahed Samour's words.[138] These recent ICJ cases are also not indicative of 1990s optimism about imminent prospects for international community's realization; there is no end of history in sight in these claims.

Recent ICJ applications enforcing *erga omnes* obligations make a commons of an ICJ dispute, not an enclosure. Like all commons, these claims demand that those that wish to partake of them work to maintain and extend them.[139] Yet they do not stipulate exactly what should be made of the commoned dispute. They do not require that only those who subscribe to a shared understanding of the international community may lay claim to such a dispute. On the contrary, these cases allow for multiple pathways to entry. By setting their *erga omnes* claims in several timeframes at once and allowing for them to be replayed and rearticulated from a number of different vantage points, the applicants in these ICJ cases have attenuated the commonality that they assert. Giving them multiple edges, points of interface or engagement, and sites of origin, they make it harder for any community that might be extrapolated from these cases to be sealed over, ensuring that arguments about their insides and outsides and struggles over their substantive content remain ongoing.

[138] Nahed Samour, 'Palestine at Bandung: The Longwinded Start of a Reimagined International Law' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017) 595.

[139] Cf. Maria Mies, 'No Commons without a Community' (2014) 49 Community Development Journal i106.

VII. CONCLUSION: COMMONALITY AMID CONFLICT

It is precisely because assertions of international community seem so hard to make at the current time that we may be seeing them take this targeted, attenuated form, highly attuned to the perils that surround any avowal of commonality on the international plane. This claim, that assertions of international commonality are especially perilous at this time, takes me back to the conversation with my son with which I began. One possibility—one hunch that I have—is that recent assertions of attenuated community before the ICJ are expressive of the fraught entanglement of digital and analogue logics by which relations at every scale are now being troubled, including in my own family. What the applicants in each of the ICJ cases that I have discussed seem to be leveraging is a sense that legal and political relationships are undergoing profound transformation globally. And the mediation of those relationships by unresolved combinations of digital and analogue technology—about which I have written and spoken elsewhere[140]—could have something to do with their seeming newly negotiable in the ICJ.

Any one of these disputes before the ICJ could, on closer inspection, be shown to depend in part on tension between digital and analogue logics. For instance, Myanmar's 1982 Citizenship Law exhibits digital logic in its refusal of any interim or transitional state between membership of the so-called 'national races' and membership of 'associate' or 'naturalized' categories.[141] Only the former are afforded full citizenship, while those in the latter category—including the Rohingya—are effectively treated as aliens.[142] In Myanmar, people are by law either one or the other and their life chances are altered accordingly. At the

[140] Fleur Johns, 'Governance by Data' (2021) 17 Annual Review of Law and Social Science 53; Johns, *#Help: Digital Humanitarianism and the Remaking of International Order* (n 15)

[141] The Pyithu Hluttaw Law No. 4 (Burma Citizenship Law) of 1982, unofficial translation available at: <https://www.refworld.org/legal/legislation/natlegbod/1982/en/49622> accessed 21 June 2024.

[142] Elizabeth L Rhoads, 'Citizenship Denied, Deferred and Assumed: A Legal History of Racialized Citizenship in Myanmar' (2023) 27 Citizenship Studies 38.

same time, the government in Myanmar justifies its actions by reference to analogue legal and policy commitments aimed at 'inclusive and continuous development' in pursuit of 'balance' across all states and regions.[143] The widely documented involvement of Facebook systems in promoting hatred against the Rohingya shows, too, how digital-analogue conflicts are in many ways at the heart of this ongoing violence.[144]

Whatever the myriad forces informing them, recent moves at the ICJ in and around the negative space of international community announce an intriguing new chapter in collective efforts to tackle the problem of international community. It is one to which it is worthwhile attending very closely, with a sense of excitement, even, about the collective configurations and experimental commonalities that they could inspire. That is the case even as the circumstances in which these claims have been made are utterly devastating. I will certainly be watching closely, reflecting on what can and cannot be made possible in the register of common interest in these darkest of times. As for the kids? That is, my own children, and the young people bearing the brunt of global crises, and leading political protest against them?[145] They will doubtless have their own distinct, multi-platform takes, and I will be listening out for what I can learn from them too, even if that attention is not always reciprocated.

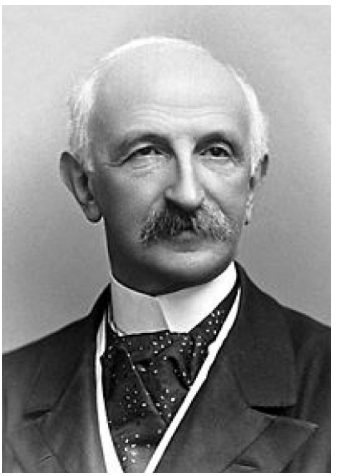
[143] Ministry of Planning and Finance, *Myanmar Sustainable Development Plan 2018-2030*, (Government of the Republic of the Union of Myanmar, August 2018) <https://policy.asiapacificenergy.org/node/3345> accessed 21 June 2024.

[144] Christina Fink, 'Dangerous Speech, Anti-Muslim Violence, and Facebook in Myanmar' (2018) 71 Journal of International Affairs 43.

[145] UNICEF, '1 in 4 children globally live in severe child food poverty due to inequity, conflict, and climate crises' (UNICEF, 5 June 2024) <https://www.unicef.org/press-releases/1-4-children-globally-live-severe-child-food-poverty-due-inequity-conflict-and#:~:text=Five%20rounds%20of%20data%20collected,fewer%20food%20groups%20per%20day> accessed 21 June 2024; Camila Teixeira, 'Youth, Protests, and the Polycrisis' (UNICEF, March 2024) <https://www.unicef.org/innocenti/reports/youth-protests-and-polycrisis>, accessed 21 June 2024.

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

A Mission for Our Time



INTRODUCTION

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

MISSION

Tobias Asser was a man with a vision. A man who kept his finger on the pulse of his time, and who managed to shape the legal develop-

ments during his days.[1] In his Inaugural Address upon the acceptance of his professorship at the University of Amsterdam in 1862, Asser explained that it was his 'vocation' to reflect on commercial law and its 'import', while 'taking into consideration the condition of society in [his] century'.[2] What we learn from his lecture extends beyond the field of commercial law; it shows Asser's view of the law more generally: 'law serves primarily to cultivate trust'.[3]

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

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

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

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

3 Ibid., p. 22.

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

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

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

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

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

In spite of well-known complications and dark sides,[9] in this context the Rule of Law and the principles of human rights are paramount. These may provide direction in our considerations about trust and respect in relation to challenges brought by, for example, globalisation, urbanisation, (global) migration, the atomisation of society, climate change, environmental degradation, the complexity of the traditional North-South divide, the dangers of a renewed international arms race, and the dilemmas of new global actors such as the EU.

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

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

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

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

BACKGROUND

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

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

With the economic policies of the late 19th century the European empires spurred on the process of modern globalisation in the industrial era. Asser had a keen interest in economics and as the head of a (commercial) law practice for most of his life,[14] he is likely to have been especially sensitive to the process. In his view, transnational trade and commerce were crucial for societies to thrive and develop peace-

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

11 Eyffinger, p. 67.

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

13 Eyffinger, p. 79.

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

fully. In that sense, his perspective on free trade and commerce was utilitarian – in the service of 'public welfare'.[15] Hence, his stance was not uncritical; transnational trade and commerce facilitated by law and legal institutions were to serve peace and justice, but not to exploit or violate 'the inalienable rights of a free people'.[16]

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

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

While Asser's vision of law and legal institutions was all about the ideals of peace, prosperity and justice, he was concrete and prag-

15 Hirsch Ballin, p. 19.
16 Ibid., p. 33.
17 Eyffinger, p. 13.
18 Hirsch Ballin, p. 13.

matic when aiming to shape developments in private and public international law.

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

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

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

Tobias Asser's legacy is almost too vast for one man. No wonder his role was recognized by the Nobel Prize Committee in 1911. The

Committee portrayed Asser as 'the Hugo Grotius of his day'.[19] Certainly they both aimed to strengthen the Rule of Law in a global society.[20]

In contemporary international legal scholarship, Professor T.M.C. Asser was one of the international lawyers Martti Koskenniemi has famously called the 'Men of 1873': twenty to thirty European men who were actively engaged in the development of international law and who, thanks to among others Asser and his dear friend Rolin, established the *Institut de Droit International* in 1873.[21] They were interested in 'extending the mores of an *esprit d'internationalité* within and beyond Europe. … [they were the] "founders" of the modern international law profession.'[22]

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

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

> For Asser, for instance, the tasks of the *jurisconsulte* in the codification of private international law followed "from the necessity to subordinate

19 See for the Nobel Peace Prize 1911 speech: <http://www.nobelprize.org/nobel_prizes/peace/laureates/1911/press.html>.

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

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

22 Ibid., p. 92.

23 Koskenniemi, pp. 93–94.

24 Ibid., p. 57.

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

BUILDING ON TOBIAS ASSER'S VISION AND MISSION

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

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

The rich and somewhat complex heritage of internationalism does not leave room for naïve ideas about international law as an instrument only for the good of liberal-humanitarian reform; if '[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology… [and i]f there is no perspective-

25 Ibid., pp. 57–58.

26 Hirsch Ballin, pp. 12 and 2.

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

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

independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?'[29]

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

Prof Dr Janne E. Nijman
Professor of International Law at the Geneva Graduate Institute and Professor of History and Theory of International Law of the University of Amsterdam.

29 Koskenniemi, p. 513.
30 Ibid., p. 516.

RETHINKING PUBLIC INTEREST IN INTERNATIONAL AND EUROPEAN LAW

Pairing critical reflection with perspectives for action – Contours of the strategic research agenda of the Asser Institute 2022-2026

The notion of 'public interest' plays a central yet contested role in international and European law. The Asser Institute's research agenda 'Rethinking public interests in International and European law', argues for a critical re-examination of how public interest is understood and applied. By doing so, the Institute aims to reclaim its emancipatory potential.

A cascade of global crises – climate change, ecocide, transnational terrorism, unsustainable capitalism, widening social inequality, the digital divide, mass migration, and the looming threat of breaching planetary boundaries – has thrust a critical question to the forefront: How can law be harnessed to safeguard our social and natural world?

Although frequently invoked in legal and political discourse, the concept of 'public interest' remains surprisingly understudied in legal scholarship. This ambiguity is particularly troubling given its growing importance in navigating these complex challenges. The term's lack of clear definition allows international and European actors to manipulate its meaning for their own benefit, sometimes disguising private agendas as concerns for the public good. Moreover, this lack of clarity can lead to policy formulations that disproportionately favour powerful factions, perpetuating a cycle of inequality and eroding public trust in international and European institutions.

By critically examining the notion 'public interest', the Asser Institute aims to reclaim its emancipatory potential. Critical scrutiny may open up a space for alternative conceptions of the public interest to guide law- and policymaking. The goal is to help develop public interest

arguments that offer pathways towards restoring trust and ensuring that international and European law functions in the best interests of society.

Our research agenda emphasises the need to understand how 'public interest' is constructed through legal arguments and public discourse. Who participates in these discussions? Whose voices are heard, and whose are excluded? Most importantly, what are the societal consequences of different interpretations of public interest? Do they promote fairness and justice, or do they exacerbate existing inequalities? The research questions that we will address in the coming years are:

- How do legal processes and institutions create and reproduce 'public interest'?
- How do international and European law and policy shape the publics involved in defining public interest?
- Who benefits from particular understandings of public interest?
- How can competing public interest claims be reconciled?
- How are public interests addressed in international courts and institutions?

Research strand 'In the public interest: accountability of the state and the prosecution of crimes'

This research strand examines the accountability of states, both individually and collectively (e.g., the United Nations or the European Union), in light of public interest standards in the context of counterterrorism. Moreover, this strand looks into the prosecution of individuals for international and transnational crimes in the public interest. Finally, to ensure both the accountability of states and the prosecution of individuals for international and transnational crimes in the public interest, this research strand also investigates the role of journalists, digital media, human rights NGOs, and academics in protecting and promoting public interest standards.

Research strand 'Regulation in the public interest: Disruptive technologies in peace and security'

The proliferation of disruptive technologies in warfare raises critical questions about international regulation. This strand examines how to develop an international regulatory framework to address the military applications of disruptive technologies, such as autonomous weapons and biological threats, and the resulting arms race in both conventional and non-conventional weapons. Ultimately, this research aims to safeguard public interests and promote peace and security in the face of these emerging challenges.

Research strand 'Transnational public interests: constituting public interest beyond and below the state'

In the past century, national governments embodied the pursuit of the public interest on issues like environmental protection or human rights. Yet, since the turn of the century, the influence of non-state actors, such as corporations, NGOs or international organisations like the European Union on global issues such as environmental protection, human rights or digital safety has grown rapidly. Researchers in this strand examine how non-state actors are increasingly shaping and defending the transnational/European public interest on critical issues and, conversely, how this public turn affects their operations. They raise fundamental questions, such as: how do we ensure that the interests pursued are actually those of the public? And, more fundamentally, who is the public in this context?

THE ANNUAL T.M.C. ASSER LECTURE SERIES

The Annual T.M.C. Asser Lecture is a platform for a critical, multidisciplinary and constructive reflection on the role of law in the (potentially radically) changing global society of the 21st century, and a high-level event within the context of our research programme.

In 2015, Professor Joseph Weiler (President of the European University Institute in Florence, and University Professor at NYU School of Law) delivered the Inaugural Annual T.M.C. Asser Lecture on *'Peace in the Middle East: has International Law failed?'* in which he identified an indeterminacy issue in the legal framework of belligerent occupation that allows for different interpretations. This, according to Weiler, has turned into a political dispute about the facts, for which international law can provide no more than a roadmap.

In 2016, Onora O'Neill, Professor Emeritus of Philosophy at the University of Cambridge and crossbench member of the British House of Lords, spoke about '*Accountable Institutions, Trustworthy Cultures*' and how rules are not enough. The ethics and culture of institutions, international or otherwise, are important for the trustworthiness of these institutions. This is an important argument that still resonates in these days of institutional distrust.[1]

In 2017, Saskia Sassen, Robert S. Lynd Professor of Sociology at Colombia University (NY), discussed the relations between globalisation, economic development and global migration in the lecture entitled '*A Third Emergent Migrant Subject Unrecognized in Law: Refugees from "Development"*'. She asked: 'Is there any role for inter-

1 O. O'Neill, *Accountable Institutions, Trustworthy Cultures* (The Hague, T.M.C. Asser Press 2017).

national law in the prevention of, and protection against, expulsions caused by the accelerating destruction of land and water bodies?'[2]

In 2018, Martti Koskenniemi, Professor of International Law at the University of Helsinki and Director of the Erik Castrén Institute of International Law and Human Rights, gave the lecture '*International Law and the Far Right: Reflections on Law and Cynicism*' in which he critically reflected on the general state of international law, as well as on its role in the rise of the far right.[3]

The Fifth Annual T.M.C. Asser Lecture, held in 2019, was delivered by Anne Orford, Professor of International Law at Melbourne Law School and was entitled '*International Law and the Social Question*'. It placed the social question, the value of solidarity and social justice back on the table of international lawyers.[4]

The Sixth Annual T.M.C. Asser Lecture '*Almost Human: Law and Human Agency in the Time of Artificial Intelligence*' was delivered by Prof Andrew Murray from the London School of Economics via the internet, due to COVID-restrictions. The lecture challenges the process of datafication in society: the reduction of the complexity of the world to data values, which threatens the fabric of human agency and the rule of law.[5]

In 2022, Brigid Laffan, Emeritus Professor at the European University Institute, addressed in the Seventh Annual T.M.C. Asser Lecture *'Can Collective Power Europe Emerge from Putin's War?'* the implications of the Russian invasion of Ukraine in 2022 for the security and po-

2 S. Sassen, *A Third Emergent Migrant Subject Unrecognized in Law: Refugees from 'Development'* (The Hague, T.M.C. Asser Press, 2018).

3 M. Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (The Hague, T.M.C. Asser Press, 2019).

4 A. Orford, *International Law and the Social Question* (The Hague, T.M.C. Asser Press, 2019).

5 A. Murray, *Almost Human: Law and Human Agency in the Time of Artificial Intelligence* (The Hague, T.M.C. Asser Press, 2021).

litical economy architecture of Europe and the wider world for decades to come.[6]

Michael Fakhri, the UN Special Rapporteur on the Right to Food since 2020 and a Professor at the University of Oregon School of Law, explains in the Eighth Annual T.M.C. Asser Lecture *'The Right to Food, Violence, and Food Systems'* (2023) how systems not only produce food but also amplify and produce forms of violence that make people more poor, vulnerable, and marginalized.[7]

For more information on the Annual Lecture Series, registration and programme, please go to: https://www. asser.nl/annual-lecture, or contact TMCAsserLecture@asser.nl

6 B. Laffan, *Can Collective Power Europe Emerge from Putin's War?* (The Hague, T.M.C. Asser Press, 2022).

7 M. Fakhri, *The Right to Food, Violence, and Food Systems* (The Hague, T.M.C. Asser Press, 2024).

ABOUT THE AUTHOR

Fleur Johns is Professor in the Faculty of Law & Justice at the University of New South Wales (UNSW) Sydney (Australia). She works in international law, legal theory, law and development, and law and technology. In February 2025, she will take up the role of Dean and Head of School of Sydney Law School at the University of Sydney (Australia).

Fleur Johns serves on the editorial boards of renowned journals like the *American Journal of International Law* and she has published five books prior to this one, the most recent of which is *#Help: Digital Humanitarianism and the Remaking of International Order* (Oxford University Press, 2023) on the transformation of humanitarian aid by digital technologies, and why this matters for law and politics on a global scale. Professor Johns is a Fellow of the Academy of the Social Sciences in Australia, an Australian Research Council Future Fellow (2021-2025), and a Visiting Professor at the University of Gothenburg, Sweden (2021-2024), and has held visiting appointments in Canada, Europe, the UK, and the US.

Fleur Johns on her lecture *Connection in a Divided World: Rethinking 'Community' in International Law*:

"The concept of 'community' (as in the 'international community' or the 'community of nations') has been a cornerstone of international law, sometimes aiding the articulation and promotion of public interests. For example, recent attempts to forge international agreement on pandemic prevention, preparedness and response have been spurred by governments acknowledging "the catastrophic failure of the international community" to ensure solidarity and equity in response to the COVID-19 pandemic.
And lately, international legal litigants have invoked 'community interest' in seeking to hold states accountable for alleged violations of international law. Such claims have been central to recent proceedings brought before the International Court of Justice (ICJ) alleging genocide or torture: by The Gambia against Myanmar; by Canada and the Netherlands against the Syrian Republic; and by South Africa against Israel.

Nonetheless, international legal notions of 'community' have also served racist, exclusionary purposes. The 19th century international lawyer James Lorimer famously argued that some religious and racialised peoples could never be full members of a community of nations under international law. Current international legal vocabularies, such as the ICJ Statute's reference to the "law recognized by civilized nations" for example, remain redolent of this racist idea of community-as-privilege.
In view of their ambivalence, claims about 'international community' should be made with caution. They often imply commonality of experience and shared value on a global scale when the experiences and values at issue may, in fact, be partial or contested, perhaps increasingly so. Digital technologies have changed how nations and peoples are brought together or connect, creating new disparities between those made more vulnerable to violence and injustice by digital connectivity, and those who benefit from the uneven global spread of computation.

This lecture will examine the concept of 'community' in today's international law, especially in the context of humanitarianism and the growing use of technology. We will revisit key texts such as Georges Abi-Saab's 1998 article: *Whither the International Community?* Ideas of 'community' have long played a role in making insiders and outsiders in international law, and continue to do so. Yet techniques of community-making in international law may nevertheless present egalitarian possibilities—or so this lecture will show."

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