

# INTERNATIONAL LEGAL THEORY

## Symposium on the Changing Role of Scholarship in International Law

# Critical Scholarship and Responsible Practice of International Law. How Can the Two be Reconciled?

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### Abstract

How can I as an international lawyer, conscious that international law is deeply implicated in today's global injustices and that the course of history will not be changed by any grand legal design, practice law responsibly? Taking as a point of departure my own desire not to seek comfort in the formulation of a critique of law, but to aspire to a responsible practice, I consult two quite different bodies of work: first, critical theory of law and second, recent scholarship on international law that argues a practice guided by ethics may enhance the legitimacy of international law. I turn then to my own practice of international economic law focusing on my occasional role as legal expert on the so-called megaregionals the EU aims to conclude with Canada and the United States. I propose that the debate on international economic law lacks an investigation into the role of law in shaping political economy; that this lack can be explained by the compartmentalization of expertise which leads to justification gaps with respect to projects such as the megaregionals. One way lawyers can assume responsibility is to work on closing these gaps even if it means leaving the 'inside' of the legal discipline. Finally, I suggest that a responsible legal practice of social change might follow Roberto Unger's call for institutional imagination. Maybe I can satisfy my wish for a transformative practice by joining forces with friends in experimenting with institutions, hoping to build an alternative political economy.

### Keywords

critical theory of law; ethics; political economy; responsible practice; TTIP

## I. HOW NOT TO RUN FROM A HISTORY WE CANNOT CREATE?

What would it mean to be a human being who does not run from a history (s)he cannot create?<sup>1</sup> How can, or should I as an international lawyer practice

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<sup>1</sup> H.D. Kittsteiner, *Naturabsicht und Unsichtbare Hand. Zur Kritik des geschichtsphilosophischen Denkens* (1980), 221 'If one abandons the idea to master the process [of history] devoid of content, then also the task no longer matters to submit it through "societal practice" to some imaginary state of control, but one must seek for new determinations of what it might mean to be a living being that does not escape from a history it cannot make.' (My translation).

international law – knowing that the course of history will not be changed by any grand legal design, conscious that international law is deeply implicated in today's global injustices, and that law tends to betray its promises of emancipation, justice and prosperity?

These questions are very much on my mind these days. I am a lawyer specializing in international economic law. I have lost faith in international law.<sup>2</sup> Scholarship of international law, in my view, is being greatly enriched by the many different critical projects that seek to reveal and concretize international law's violence, its contributions to exploitation, rising inequality, environmental destruction, depoliticization and individualization. Yet, while the work of critique is never done, I yearn to complement critical scholarship with a responsible professional practice. As various worlds appear to be collapsing around us, as we cling to the Paris Climate Agreement while experiencing extreme storms, draughts and a rising sea, as we hold up the principle of non-refoulement while refugees are drowning and being stopped by fences and military at Europe's borders, and as we point to the prohibition of the use of force while war is waged in too many places, I am longing for a practice of change.

My wish to practice law responsibly, to become *as a lawyer* an agent of change, is not difficult to understand from a biographical perspective. I am a lawyer; law is what I spend my days on, and I want this time to be spent well. I strive to lead not only a successful and interesting, but also a good, professional life, and not make social engagement my pastime (especially since we have so little time beyond work these days and rarely simultaneously<sup>3</sup>). Hopefully, however, there is more to the search for a responsible practice of international law than the egocentric wish to make sense of a (possibly ill-chosen) profession (why did I not become a plumber?<sup>4</sup>). For two further reasons it appears to me important to reflect on practice. One is that even if I were to consider myself predominately a legal scholar engaged in the critique of law, there is no escape from practice. Not only can scholarship and

<sup>2</sup> On loss of faith in legal reasoning as an experience similar to losing faith in God, see D.W. Kennedy, 'The Critique of Rights in Critical Legal Studies', in W. Brown and J. Halley (eds.), *Left Legalism and Legal Critique* (2002), 178, 191–4; for an argument that faith in international law's promise of justice characterizes international law scholarship, see D.W. Kennedy, *A World of Struggles. How Power, Law, and Expertise Shape Global Political Economy* (2016), 226 et seq.

<sup>3</sup> On acceleration from a critical theory perspective, see H. Rosa, *Social Acceleration. A New Theory of Modernity* (2013) (original: *Beschleunigung. Die Veränderung der Zeitstrukturen in der Moderne* (2005)).

<sup>4</sup> I recurrently encounter the plumber in my work on this text: Antonios Tzanakopoulos cites Vaughan Lowe's admonition to lawyers: 'They [lawyers] offer one way of going about resolving some of the most crucial problems that face the world. But it is only one way among many. There are many times when it is much better to call upon a politician, or a priest, or a doctor, or a plumber.' (V. Lowe, *International Law* (2007), 290); A. Tzanakopoulos, 'The Right to Be Free From Economic Coercion', (2015) 5 *Cambridge Journal of International and Comparative Law* 616, at 633; Jan Klabbers writes: 'It is an open question whether one can legitimately expect the plumber to do his plumbing with charity or with empathy or temperance . . .', J. Klabbers, 'The Virtues of Expertise', in M. Ambrus, K. Arts, E. Hey and H. Raulus (eds.), *The Role of 'Experts' in International and European Decision-Making Processes. Advisors, Decision Makers or Irrelevant Actors?* (2014), 82, at 89; Joseph Weiler after listening to my doubts concerning career choices enthused about how immediately happy one can make people with plumbing, and finally Duncan Kennedy says about American pragmatists: 'The pragmatists took Hegel completely seriously when most British thinkers thought he was at best a plumber.' D. Kennedy, 'Left Theory and Left Practice: A Memoir in the Form of a Speech', (2015) 5 *Transnational Legal Theory* 577, at 591.

critique be regarded as forms of practice,<sup>5</sup> as an international lawyer I engage, as my colleagues do, in further kinds of practice, such as teaching, acting as a legal expert, convening conferences, publishing my own and others' work, networking and institution-building. Thus, I might ask to what extent through these practices I sustain a law (and scientific system) that I am critiquing. Take teaching, for example. As a law professor I teach students to speak the language of law well, knowing that when they become advocates, legal advisers, civil servants or judges, most of them will work to sustain this law. Another reason is the observation that lawyers may, indeed, become important agents of change. Strategic litigation, for example, has not only been motivated by, but has also effected important societal changes.<sup>6</sup> A further way in which lawyers may become agents of change (possibly of greater interest for an economic lawyer) is by using their legal expertise to build in concert with others institutions that incrementally transform and democratize the market economy.<sup>7</sup>

Thus, taking as a point of departure my own desire not to run from history, not to take comfort in the formulation of critique, but to aspire to a responsible practice, I first consult recent scholarship on law for instruction. I choose to look at two quite different bodies of work: (1) critical theory of law which specifies law's implications in injustice, but nonetheless holds on to law's emancipatory promise – to be realized through a different law or a different practice of law, and (2) scholarship on international law that focuses on practice and proposes that the legitimacy of international law and governance may be enhanced through a practice guided by ethics. In my rather superficial account, I cannot do justice to these literatures and they certainly merit a more differentiated treatment than I am offering here. Yet, grouping them in this way and giving them the cursory treatment I do, I wish to make the following two points: that a serious engagement with the critique of law in liberalism helps to clarify the relationship between law and politics; that to seek guidance in ethics might be futile in a world which generally provides little ethical orientation and within a political economy the workings of which remain largely obscure to the persons called upon to act ethically.

From my foray into contemporary critique of law and international law scholarship on practice, I turn, second, to my own practice of international economic law. I focus on my occasional role as a legal expert invited to pronounce on the so-called megaregionals – the Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) – that the EU seeks to conclude with Canada and the United States. I choose this thematic focus as my (and colleagues') public engagements with CETA and TTIP have prompted a lot of self-questioning on my part; but also because these two agreements have given rise to massive protests and debate by a wide variety of actors. These

<sup>5</sup> On theory as a form of practice, see L. Althusser, *Das Kapital lesen*, Vol. I (1972), 76 (original: *Lire le Capital* (1965)).

<sup>6</sup> On the limits of societal transformation through adjudication, see R. Unger, *What Should Legal Analysis Become* (1996), 30 et seq.

<sup>7</sup> Unger, *supra* note 6; R. Unger, *Democracy Realized. The Progressive Alternative* (2000); R. Unger, *Free Trade Reimagined. The World division of Labor and the Method of Economics* (2007).

could provide an entry point for an even broader public debate on the institutional structure of the global political economy. Yet, in my experience a number of questions – in particular concerning distribution – which such a debate would need to address, are insufficiently formulated and discussed. As a consequence, many international lawyers contribute to ‘humanising the inevitable’<sup>8</sup> instead of ‘remaking the world’.<sup>9</sup> I propose that the dearth of debate (and understanding) of political economy, and law’s role in shaping it, can be explained by the compartmentalization of expertise which leads to justification gaps with respect to projects such as the megaregionals. One way lawyers may assume responsibility is to work on closing these gaps even if it means leaving the ‘inside’ of the legal discipline.

To satisfy my hunger for action, to go beyond thinking and start doing, I conclude, third, with my preliminary thoughts on a practice of change. Responsible practice of law could mean to follow Roberto Unger’s call for institutional imagination and, as indicated above, join forces with friends to build an alternative political economy through experimenting with institutions that not only may distribute more justly, but also have a politicizing and democratizing effect. Such institutional imagination and experimentation entails an entanglement of scholarship with practice as experimentation in practice feeds back into imagination in scholarship, and vice versa. Scholarship and practice then no longer remain ‘strange bedfellows’, but inform each other and even become indissociable.<sup>10</sup>

## 2. CRITIQUE OF LAW AND ITS IMPLICATIONS FOR PRACTICE

In my search for guidance on a responsible practice, I first consult critical theories of law, and in particular the recent work of Christoph Menke wherein he seeks to uncover law’s implication in violence and injustice.<sup>11</sup> Menke’s (as well as other critical theorists’) indictment of law as violence makes the question of how we

<sup>8</sup> Roberto Unger holds the ‘humanization of the impossible’ to be the leitmotif of the contemporary left in the United States as well as in Europe, see, for example, Interview by Stewart Wood with Roberto Unger on the Means and Ends of the Left, 18 November 2013, available at: [www.robertounger.com/progressive.php#8](http://www.robertounger.com/progressive.php#8).

<sup>9</sup> D.W. Kennedy, ‘When Renewal Repeats. Thinking Against the Box’, (2000) 32 *NYU Journal of International Law* 336; the question why international lawyers have paid so little attention to law’s impact on distribution and political economy is at the centre of David Kennedy’s most recent book *A World of Struggles*, *supra* note 2. Kennedy, for a few years, has been calling on international lawyers to engage with political economy, see D.W. Kennedy, ‘Law and the Political Economy of the World’, (2013) 26 *LJIL* 7; D.W. Kennedy, ‘Preface’, in J. Beneyto and D.W. Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences* (2012), at v.

<sup>10</sup> Duncan Kennedy in a recent reflection on his engagement in a housing law clinic at Harvard Law School noted that leftist practice and leftist theory in this experience were no strange bedfellows, that rather a number of important theoretical insights were produced from this practice, Kennedy, *supra* note 4, at 581, 582; see also Unger, *supra* note 6, at 5 (on the dialectical relationship between thinking about ideals and interests on the one hand, and practices and institutions on the other); J. Derrida, *On Cosmopolitanism*, in *On Cosmopolitanism and Forgiveness* (2005), 3, at 9 (original: *Cosmopolites de tous les pays, encore un effort!* (1996)) (describing the task of concretizing the idea of cities of refuge as ‘a theoretical task indissociable from its political implication (mis en oeuvre)’).

<sup>11</sup> C. Menke, *Recht und Gewalt* (2011); C. Menke, *Kritik der Rechte* (2015).

should practice a violent law, how through our practice we might bring about a different law, all the more pressing. The critique I am engaging with does not (and is not meant to) provide any concrete guidance to the practitioner of law. Yet, it gives some indications of how the individual applying the law may assume responsibility. Moreover, and more importantly, Menke's insights into the depoliticizing effects of the legal form of individual rights reveal the complexities of the relationship between law and politics. They have immediate implications for (and weaken) the proposition that to bring about societal transformation all we need to do is turn to politics to change the content of the law.

Jan Klabbers, as well as Robert Howse and Kalypso Nicolaïdis, who want to bring ethics to bear on international law and governance, provide more immediate guidance to a responsible practice.<sup>12</sup> Both Klabbers', and Howse and Nicolaïdis' engagements with practice are prompted by particular critiques of international law. Jan Klabbers' call for a virtue ethics responds to the indeterminacy critique: Given that law cannot guarantee final, predictable or right answers, virtuous practice shall ensure the accountability and responsibility of global governance. Howse and Nicolaïdis address legitimacy critiques of international economic law and governance and, with their proposal for a global trade ethics, intend to revive (or reinstate in a version adapted to globalization) the embedded liberalism which is said to have characterized the postwar Bretton Woods era before the 'neoliberal revolution'.<sup>13</sup> Yet, unlike Menke, neither Klabbers, nor Howse and Nicolaïdis question liberalism and the operation of law therein. Rather they appear to aim at improving liberalism by complementing law with ethics. If one does not share the commitment to liberalism their scholarship will thus not point the way to a satisfactory practice. Yet, even on its own terms it may be criticized (as I suggest below) for assuming we can recognize what constitutes ethical practice in a world not offering ethical guidance and in a political economy we do not understand.

### **2.1. The law puts an end to violence – the law is violence: Assuming responsibility for law's violence**

Today indeterminacy and violence of the law are most palpable when we look at the treatment of refugees in Europe and at its borders. The principle of non-refoulement is pitted against state sovereignty and, depending on political preference, one or the other prevails in legal argumentation on whether refugees may or may not be

<sup>12</sup> J. Klabbers, 'Controlling International Organizations: A Virtue Ethics Approach', (2011) 2 *Helsinki Review of Global Governance* 49; J. Klabbers, 'Law, Ethics and Global Governance. Accountability in Perspective', (2013) 11 *NZJPIIL* 309; J. Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', (2013) 27 *Temple International and Comparative Law Journal* 417; Klabbers, *supra* note 4; R. Howse and K. Nicolaïdis, 'Towards a Global Trade Ethics. Preliminary Building Blocks', in M. Eagleton-Pierce, E. Jones, and K. Nicolaïdis (eds.), *Building Blocks for a Global Trade Ethics* (2009), 6; R. Howse and K. Nicolaïdis, 'Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large', (2016) *Law and Contemporary Problems* 259.

<sup>13</sup> On the 'embedded liberalism' of the postwar era, see J. Ruggie, 'International Regimes, Transactions, and Change', (1982) 36 *International Organization* 379.

turned away at the border.<sup>14</sup> Law's violence takes the form of fences, police border patrols and deployment of military fleets to contain refugees travelling by boat.<sup>15</sup>

Christopher Menke specifies not only the link between law and violence;<sup>16</sup> in his most recent book *Kritik der Rechte (Critique of Rights)* he reveals how the liberal form of individual rights produces new forms of social domination: exploitation and normalization.<sup>17</sup> Menke goes beyond previous critiques of law with his stringent analysis of the legal form. He neither takes issue primarily with particular contents of the law,<sup>18</sup> nor does he address the structure of legal argumentation.<sup>19</sup> Rather, Menke inquires how the *legal form* overcomes the violence of other forms of justice (in particular the justice of revenge as it figures in Greek tragedy), and at the same time gives rise to a new violence; how modern law's self-reflection of its violence brings about the liberal form of individual rights; how the form of individual rights then blocks, however, law's self-reflection, and thus depoliticizes law and prevents it from becoming a force to transform society.

Menke begins his analysis of law's violence with the following exposition: The legitimation of law, its foundation, lies in its protection of equal liberty and its acceptability to all legal subjects. Thus, law's legitimation needs no violent confirmation. Yet, violence remains necessary to counter the latent risk of dissent; violence factually secures the consensus which the law normatively presupposes.<sup>20</sup> Menke does not end here. The violence of law becomes paradoxical, according to Menke, if we recognize that violence not only is instrumental to enforce the law, but that instead violence is a structural condition of the legal form; that the legitimation of law and law's violence form a unity; that violence and justice are intertwined. By developing law's violence in reference to Greek tragedy – and its treatment of revenge and law as two distinct forms of justice – Menke seeks to refine Walter Benjamin's critique of law's mythical violence.<sup>21</sup> In particular, he aims to show how law's violence follows

<sup>14</sup> Recently, a number of legal scholars have come forward in public to offer their opinion on questions of whether the German government is legally permitted to turn away refugees at Germany's borders or legally obliged to do so; whether it is permitted to admit refugees even though another EU member state may be responsible for the administration of refugee status or even obliged to do so given systemic failures within the otherwise competent states of first entry. Of course the legal arguments offered are more sophisticated than I depict here, interpreting and defining the relationship between norms of German administrative and constitutional law, international law, EU treaty law and various acts of secondary legislation. Nonetheless, I find it astonishing how self-confidently these scholars present their respective, frequently opposing, results as a matter of legal expertise in correctly interpreting the law. A number of these interventions can be found here: [verfassungsblog.de](http://verfassungsblog.de).

<sup>15</sup> The violence of law also takes much more subtle forms than military force, of course. An example from refugee law would be the legal distinction drawn between political and economic refugees.

<sup>16</sup> Law's violence is the subject of C. Menke, *Recht und Gewalt* (2011).

<sup>17</sup> C. Menke, *Kritik der Rechte* (2015).

<sup>18</sup> Menke criticizes Critical Legal Studies (CLS) for only looking at the content of rights and not their form. Quoting Karl Marx he notes that CLS never asked 'warum dieser Inhalt jene Form annimmt' (why this content takes that form), Menke, *supra* note 17, at 409, note 8 (with reference to K. Marx, *Das Kapital*, Vol. I [MEW, Vol. XXIII], 94 et seq.).

<sup>19</sup> David Kennedy and Martti Koskenniemi both have provided critical analyses of international law focusing on the structure of argumentation: D.W. Kennedy, *International Legal Structures* (1987); M. Koskenniemi, *From Apology to Utopia. The Structure of Legal Argument* (1989, re-issue 2005).

<sup>20</sup> Menke, *supra* note 16, at 9.

<sup>21</sup> W. Benjamin, 'Zur Kritik der Gewalt', in *Zur Kritik der Gewalt und andere Aufsätze* (edition suhrkamp 1965), 29.

from its political-procedural character and how law's violence and legitimation fall in one.<sup>22</sup>

The justice of revenge, as depicted in the *Oresteia*, produces never ending violence. Each act of injustice is followed by an act of revenge, which at the same time can be interpreted as a new act of injustice prompting a further act of revenge. The restitution of justice endlessly repeats itself.<sup>23</sup> Law then overcomes the endless violence of revenge through proceduralization and politicization. Law knows that each narrative in a dispute about justice can be opposed with a counternarrative. Thus law institutes the procedure of hearing both parties to a dispute with their respective narratives of justice. Truth becomes the result of a contentious procedure at the end of which a third party, the judge, delivers a decision. The legal procedure is political because it establishes political relations of equality (between the parties) and authority (between the parties and the judge). The equality between the parties realizes the political equality of citizens. The legal judgement enforces the authority of the political unity over the partial individuals.<sup>24</sup> For Menke, it is this political-procedural form of law which constitutes law's particular violence.<sup>25</sup> As law links justice to the political unity of citizens, it produces an outside of the law, an outside of justice. Consequently, law not only needs to secure its decisions against competing interpretations of the law. Rather, it also needs to protect its rule against the non-legal, that which is outside the law and which it has itself produced and continuously reproduces. The opposition between law and non-law cannot be mediated by reasons as the relationship between law and non-law is neither normative nor cognitive. It is a relationship of pure enforcement, of pure violence.<sup>26</sup> In light of law's need to assert itself against non-law, Menke interprets the concept of the autonomy of law and legal subjects as necessary for law to secure its authority. Autonomy relieves law from the need to rely exclusively on threat for protecting its rule against the non-legal. By forcing its subjects to become autonomous it forces them to internalize law's authority, to judge themselves.<sup>27</sup> This is, according to Menke, how we should understand Plato's curse of the law: 'It is the "curse of law" that the individuals become the own, the self of the law.'<sup>28</sup> Thus law's autonomy, the violence of law and its normative justification fall in one.

Having exposed the structural violence of law, Menke raises the question how law may be freed from its violent rule over the non-legal. Doing away with law is not an option as rejection of law would entail falling back to another violence, such as the fateful and never-ending violence of revenge. Menke also dismisses overcoming the difference of law and non-law as an answer. Greek law, according to Menke, was a law which intended to overcome the difference between the

<sup>22</sup> Menke, *supra* note 16, at 13–57.

<sup>23</sup> *Ibid.*, at 39.

<sup>24</sup> *Ibid.*, at 20–30.

<sup>25</sup> According to Menke, by just looking at the appearance of violence, realists must miss the particularity of law's violence as it appears the same as the violence of revenge (*ibid.*, at 34).

<sup>26</sup> *Ibid.*, at 40.

<sup>27</sup> *Ibid.*, 45–6.

<sup>28</sup> 'Der "Fluch des Gesetzes" ist es, dass die Individuen zum Eigenen, zum Selbst des Gesetzes werden' (*ibid.*, at 46).

non-law and law through education. It was paideic and sought to transform ‘bare life’ into ‘formed life’. At the end of such transformation law is superfluous as the *polis* has become second nature to its subjects; the difference between law and nature has disappeared.<sup>29</sup> The answer modern law has chosen, and Menke endorses, is to become self-reflexive. Self-reflexive law not only differs from the non-legal, but it knows that it can only be produced through this difference. It includes the non-legal in itself. Self-reflexivity, according to Menke, lets non-legal forces become effective in the law. Self-reflexivity bears the potential of making law a revolutionary force; if it not only means letting extralegal, societal forces become effective in the law, but if law in the process fundamentally transforms them to overcome social domination and achieve equality.<sup>30</sup>

In liberalism the self-reflection of law, according to Menke, has been institutionalized in the form of individual rights. In ‘*Die Kritik der Rechte*’ Menke submits individual rights to a critique of their form. Taking as a point of departure Marx’s ‘riddle of rights’ – the riddle that political emancipation becomes a means to declare and maintain rights to the effect of giving up the newly won political power – he asks not, *why* the declaration of rights debases politics, but rather *how* it does so.<sup>31</sup> He seeks to confront rights with their genesis and foundation in law’s self-reflection. The individual right is an answer to the ‘curse of law’ that produces the self-judging autonomous legal subject. Individual rights are rights against the law, rights not to be an equal part, but a free individual. Individual rights thus bring about civil society. Individual rights on the one hand are rights of the individual to exercise its will and in this exercise to be free from interference by others and the state. This is the private law dimension of rights.<sup>32</sup> On the other hand individual rights are rights to pursue interests. In order to enable individuals to use their rights in pursuit of their interests, rights of participation are being established. This is the social law dimension of rights.<sup>33</sup> Both the private law and the social law produce new forms of domination. While the private law (the defining feature of which is the individual right to property) enables exploitation, the social law of participation, according to Menke, necessarily leads to normalization.<sup>34</sup> Even though individual rights have their foundation in the self-reflection of modern law, they block the kind of self-reflection that would overcome social domination. They do so by naturalizing the social. They approach the non-legal (or nature or the social), namely the will and interests of the individual in an empiricist and positivist fashion. Thus, they transform the social into something factual, pre-legal and as a consequence withdraw it from transformative politics.<sup>35</sup>

Menke’s is a critique mainly of domestic law in liberal constitutional democracies. Yet, it appears to me of immediate relevance for international law, even if a

<sup>29</sup> Ibid., at 67.

<sup>30</sup> Menke, *supra* note 17, at 122–7.

<sup>31</sup> Ibid., at 9

<sup>32</sup> Ibid., at 81 et seq.; Menke, *supra* note 16, at 80 et seq.

<sup>33</sup> Menke, *supra* note 17, at 89 et seq.

<sup>34</sup> Ibid., 266–307.

<sup>35</sup> Ibid., 136 et seq.

more serious engagement is needed to fully grasp the extent of this relevance.<sup>36</sup> China Mieville put forward a form critique of international law<sup>37</sup> based on Evgeny Pashukanis' critique of the domestic legal form, in particular the right to property.<sup>38</sup> Mieville does not doubt the applicability of Pashukanis' critique to international law given 'that the logic of modern inter-state relations is defined by the same logic that regulates individuals in capitalism, because since the system's birth – and in the underlying precepts of international law – states, like individuals, interact as property owners'.<sup>39</sup> A potentially more fruitful avenue for international lawyers to engage with Menke than postulating the interchangeability of state and individual might be to look at the interplay and interdependencies between a 'private law' and 'social law' in international law. Many of the observations that Menke makes with the help of this distinction on law in liberal constitutionalism resonate with recent writings on international law. Emmanuelle Jouannet, for example, distinguishes between a liberal and a welfarist international law,<sup>40</sup> and Sundhya Pahuja analyzes the interplay between the right to political self-determination and the pursuit by international law and institutions of economic development.<sup>41</sup> An engagement with Menke may help us specify the particular implication of the legal form in the distinction between liberal and welfarist law observed by Jouannet, or in the perpetual undermining of the promise of political self-determination in the name of development diagnosed by Pahuja.

What – if anything – follows from this kind of critique? Does it take a constructive turn which may provide guidance to practice?<sup>42</sup> For Menke 'true' critique prepares the ground for a new law by making visible law's internal contradictions, by developing from modern law's foundation in self-reflection a radical contestation of the existing law blocking self-reflection.<sup>43</sup> The new law, which Menke envisages, is a law of counter-rights to reverse depoliticization without lapsing into the totalitarianism of communist law.<sup>44</sup> It is not a law without violence, because without violence it would be powerless to confront the violence of society; it could not be a party in the political fight against social domination and a force for societal transformation.<sup>45</sup>

To concretize the question of 'how can we think the paradoxical unity of violence and justice in existing law and at the same time the possibility of its radical

<sup>36</sup> For an engagement with Menke's critique of law's violence from a transnational law perspective, see A. Fischer-Lescano, *Rechtskraft* (2013).

<sup>37</sup> C. Mieville, 'The Commodity-Form Theory of International Law. An Introduction' 17 (2004) LJIL 271; C. Mieville, *Between Equal Rights. A Marxist Theory of International Law* (2004).

<sup>38</sup> E. Pashukanis, *Allgemeine Rechtslehre und Marxismus. Versuch einer Kritik der juristischen Grundbegriffe* (1929).

<sup>39</sup> Mieville, 'The Commodity-Form Theory of International Law', *supra* note 37, at 274.

<sup>40</sup> E. Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law* (2012).

<sup>41</sup> S. Pahuja, *Decolonizing International Law. Development, Economic Growth and the Politics of Universality* (2011).

<sup>42</sup> For Mieville the answer is in the negative, he sees 'no prospect of any systematic progressive political project or emancipatory dynamic coming out of international law', C. Mieville, 'The Commodity-Form Theory of International Law', *supra* note 37, at 301.

<sup>43</sup> Menke, *supra* note 17, at 11, 12.

<sup>44</sup> *Ibid.*, 369–401.

<sup>45</sup> Thus Menke rebuts Andreas Fischer-Lescano who criticizes him for stopping short of proposing a more radical transformation of law to overcome its violence, see C. Menke, 'Die Möglichkeit eines anderen Rechts. Zur Auseinandersetzung mit Andreas Fischer-Lescano', (2014) 62 *Deutsche Zeitschrift für Philosophie* 136, at 138. For Andreas Fischer-Lescano's review of Menke, see *ibid.*, 'Postmoderne Rechtstheorie als kritische Theorie', (2013) 61 *Deutsche Zeitschrift für Philosophie* 179.

transformation into “another law”<sup>46</sup> requires further theoretical work. Legal theory and doctrine will need to inquire into ways of how self-reflection can be integrated into the operations of the law.<sup>47</sup> Yet, can self-reflection also be promoted in the practice of law-application? Menke appears to suggest as much in his interpretation of Heiner Müller’s *Wolokolamsker Chaussee I*.<sup>48</sup> In this play the commander of a Soviet battalion expecting the encounter with German troupes gives the order to execute a deserter. Yet, he doubts the lawfulness of his order. When the execution committee is already positioned, the commander suddenly reverses his order only for it to be executed immediately following a brief moment of general relief and joy. Menke takes this scene as an illustration of how an individual who applies the law can deal with law’s violence. According to Menke, the commander assumed responsibility for his decision to have the deserter executed. He did not eschew responsibility by attributing responsibility for the order to the law. Neither did he expect acceptance for his decision from the convicted, but made his decision appear as open violence. Thus, according to Menke, he could break with the fatefulness of law’s violence. For Menke such is the deposition (or depotentiation) of law proposed by Benjamin; not a doing away with law, but a break with the violence that is fateful (or mythical) because law asserts its right against the non-law. Depotentiation must mean, according to Menke, a different way of applying the law.<sup>49</sup> Andreas Fischer-Lescano in his own critique of the violence of law<sup>50</sup> proposes a similar posture in the application of the law. He advocates an aestheticization of the law, meaning that law should develop a distaste of its own violence. Yet, he makes very clear that such emotional posture cannot be demanded from the person taking a legal decision, but rather that law itself in its operations must develop a sensitivity for its own violence.<sup>51</sup>

Again we may detect similarities between this constructive turn in critical theory on law’s violence and recent work by Pahuja in which she, like Menke (if not like Fischer-Lescano), raises the question of how a person applying the law should situate herself in relation to law’s violence.<sup>52</sup> For Pahuja international law’s violence consists in the continuous actualization of its claim to authority against competing jurisdictions – against collectives who authorize a different law. Pahuja calls on international lawyers not only to recognize that the universality of international law (or the universality of the state as produced by international law) needs to be continuously reasserted, partly through violent action, but to take responsibility for this violence. As international lawyers we must be aware that even when our practice aims at critiquing international law from within – we still participate in

<sup>46</sup> Ibid., at 137 (my translation, footnote omitted).

<sup>47</sup> See also G. Teubner, *Recht als autopoietisches System* (1989), 29.

<sup>48</sup> H. Müller, *Wolokolamsker Chaussee I*: Wald bei Moskau, in *Werke Vol. V* (2002), 85–96; for Menke’s interpretation, see Menke, *supra* note 16, at 93–101.

<sup>49</sup> While Menke agrees with Agamben’s interpretation of Benjamin, as not suggesting a Schmittian suspension of the law, he disagrees, however, with Agamben’s proposal to overcome law’s violence by ceasing to apply the law, ceasing to judge and instead using it in other ways such as study or play. See Menke, *supra* note 17, at 127–30.

<sup>50</sup> Fischer-Lescano, *supra* note 36.

<sup>51</sup> Ibid., at 102.

<sup>52</sup> S. Pahuja, ‘Laws of Encounter. A Jurisdictional Account of International Law’, (2013) 1 *London Review of International Law* 63.

the actualization of international law's claim to authority. Responsibility follows from consciously choosing your law – in this respect, Pahuja appears very close to Menke.<sup>53</sup>

Menke's ideas about responsible law-application by breaking with the fatefulness of law's violence, by depotentiation, Fischer-Lescano's proposal for an aestheticization of law and Pahuja's call on international lawyers to consciously choose their law, may all be read as answers to a question Outi Korhonen addressed 20 years ago to the *New Approaches to International Law*. Korhonen asked: 'How is one to study or practice international law if the uncovering of foundational controversies is paving the way to utter nihilism?'<sup>54</sup> She dismissed nihilism as a consequence of critique just as she dismissed the defence of the international law discipline after its deconstruction. For her the latter meant a falling behind the insights yielded by critique that 'has no grounds or reasons other than a noble one – a certain nobility'.<sup>55</sup> She was of the view that what international lawyers needed to strive for after critique was 'radically new paths of thinking, although this means constant shattering of one's totality, recurrent crises of mind'.<sup>56</sup>

Menke, Fischer-Lescano and Pahuja are all three engaged in exploring such paths. None succumbs to nihilism, rather they seek to think about another law for the future while at the same time addressing the responsibility of the individual practicing law now (thus, at least, in my reading of Menke and Pahuja). And yet, the international lawyer longing for a practice of change might feel disappointed. Pahuja's 'choosing one's law', Fischer-Lescano's 'distaste of the law' or Menke's 'depotentiation of the law' may change nothing if only the way we understand our actions.<sup>57</sup>

## 2.2. The turn to ethics

While calls for a self-reflexive law raise many puzzles of 'implementation', Jan Klabbers' proposal for a virtue ethics approach to global governance,<sup>58</sup> and Robert Howse and Kalypso Nicolaidis' concept of a global trade ethics,<sup>59</sup> directly speak to practice. To be sure, these authors pursue a very different project from the critical theorists of law. While the latter's project is not only a critique of law, but at the same time a critique of liberalism, the former, in a sense, seeks to perfect the liberal project through finding ways to enhance the legitimacy of international law and global governance.

Klabbers proposes to build on the Aristotelian tradition of virtue ethics in order to improve the accountability of persons performing public roles and exercising public power. For him, virtue ethics can offer guidance where the law – due to its indeterminacy – does not.<sup>60</sup> Virtue ethics, according to Klabbbers, offer no blueprint

<sup>53</sup> *Ibid.*, 92, 93, see also M. Koskenniemi, 'International Law in Europe, Between Tradition and Renewal', (2015) 16 *EJIL* 113, at 123; D.W. Kennedy, *Of War and Law* (2006).

<sup>54</sup> O. Korhonen, 'New International Law. Silence, Defence or Deliverance', (1996) 7 *EJIL* 1, at 3.

<sup>55</sup> *Ibid.*, at 21.

<sup>56</sup> *Ibid.*, at 27.

<sup>57</sup> Pahuja, *supra* note 52, at 65, 66.

<sup>58</sup> Klabbbers, *supra* note 12.

<sup>59</sup> Howse and Nicolaidis, *supra* note 12.

<sup>60</sup> Klabbbers, 'The Virtues of Expertise', *supra* note 12, at 101.

for a better world'.<sup>61</sup> Yet, they may provide an additional evaluative vocabulary and remind us of our common responsibility for our common world.<sup>62</sup> Virtue ethics may thus also help to escape the managerialist grip of global governance in that they appeal to a person's judgment of what is the right thing to do in terms of basic human virtues.<sup>63</sup> Klabbers suggests operationalizing virtue ethics in global governance by first identifying those roles, the performance of which should be assessed in terms of virtuous behaviour. Klabbers' non-exhaustive list includes Secretaries General of international organizations, leaders of NGOs, and policy or other experts. Second, specification is required as to which virtues should be expected of a person acting in a particular role. For the role of expert (to which I revert below) the virtues he considers pertinent include honesty, temperance and justice.<sup>64</sup>

Howse and Nicolaidis do not explicitly appeal to the virtuous character traits of the individuals performing public roles. Rather their proposal for a global trade ethics is guided by a more substantive vision, which includes elements of democracy and distributive justice and seeks to restore (a modified version of the post-war) embedded liberalism.<sup>65</sup> From their normative ideal of embedded liberalism it follows that international economic law should seek to secure mutually beneficial bargains between states while leaving flexibility for governments and international institutions to adopt redistributive policies. Even though they do not explicitly endorse virtue ethics but propose a political ethics of guiding principles, Howse and Nicolaidis, too, place a strong emphasis on the behaviour of individuals in positions of power. Like Klabbers, they hold that legitimacy cannot be ensured exclusively by a particular institutional architecture, or rules orientation.<sup>66</sup> Rather the legitimacy of global economic governance requires that 'the *agents* of governance conduct themselves in accordance with a global trade ethics – informed by norms such as inclusiveness, mutual respect, transparency, value pluralism, procedural justice and rational deliberation'.<sup>67</sup> Howse and Nicolaidis stress that there exist no definite expert answers to the question (at the heart of their work) of how to regulate the interface between multiple constituencies, both inter-state and intra-state.<sup>68</sup> The proposed global trade ethics seeks to give guidance to practitioners in global economic governance on how to use the indeterminacies or flexibilities of existing trade law in the endeavour to promote the social-welfarist ideal of embedded liberalism, and to counter a technocratic trade rule.

### 2.3. Footnotes on virtue

I wish to add three brief footnotes on a discourse on virtues and ethics. The first two observations are anecdotal and not immediately related to the proposal to join ethics

<sup>61</sup> Klabbers, 'Towards a Culture of Formalism?', *supra* note 12, at 425.

<sup>62</sup> Klabbers, 'The Virtues of Expertise', *supra* note 12, at 89 (referring to H. Arendt, *The Human Condition* (1958)).

<sup>63</sup> Klabbers, 'Towards a Culture of Formalism?', *supra* note 12, at 431.

<sup>64</sup> *Ibid.*, 429–30.

<sup>65</sup> Howse and Nicolaidis, *supra* note 12.

<sup>66</sup> Howse and Nicolaidis, 'Toward a Global Ethics of Trade Governance', *supra* note 12, at 6.

<sup>67</sup> *Ibid.*

<sup>68</sup> See also R. Howse, 'From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime', (2002) 96 AJIL 94.

and international law to enhance the legitimacy of global governance. Yet, they may point to a problem entailed in the turn to ethics which I attempt to formulate in the third.

### 2.2.1. *Virtues as weapons*

Public discourse today evidences a tendency to criticize resistance and social protests by pointing to a lack of virtues in the protesters. During the negotiations last summer of the latest bail-out for Greece, Greek politicians were accused, by German politicians and in the media alike, of immodesty (while Germans were depicted as frugal); German railway unionists initiating strikes allegedly are pursuing their individual avarice at the expense of the public that depend on railroads to get to work in time; protesters against TTIP and CETA are said to lack the courage to endorse new forms of governance necessary to prosper in a changing world. All of these judgments employ notions of virtuousness – even if in an ignorant fashion – as argumentative weapons. Moreover, a discourse on virtuousness in the constellations just mentioned is led at the expense of public debate on the distributive questions at stake. It reduces complex political economies to questions with seemingly simple answers – can't we all agree at some basic level on what virtuous behaviour means?<sup>69</sup>

### 2.2.2. *Self-questioning*

Self-questioning with regard to the virtuousness of our actions as international scholars can certainly be useful and prevent us from externalizing responsibility (to the system, the law, the rules of the academic game, etc.). A productive incidence of self-questioning can be found in an issue of the *Leiden Journal of International Law* (LJIL) from 2004.<sup>70</sup> In their contribution Matthew Craven, Gerry Simpson, Susan Marks and Ralph Wilde reflect on an open letter they sent – together with some other international law professors – to Tony Blair and which was published in *The Guardian*. In this letter entitled 'We are teachers of international law' they criticize the (at the time) imminent war against Iraq as a violation of Article 2(4) UN Charter. In LJIL, they express discomfort with their own activism. Didn't they, as critical lawyers, subscribe to the indeterminacy of international law? Weren't they usually criticizing the dominance of expertise in international law? And were they not also critical of the existing rules of the law of force – rules that did not require more to legalize the war against Iraq than a Security Council Resolution under Chapter VII? Did they not betray these stances by taking a firm position as to the illegality of the war (which they considered a bad idea for several other reasons), by claiming their expertise as international lawyers to give weight to their voice? Were they not being dishonest, they asked, possibly only seeking self-gratification? Thus, in a sense they question whether they acted virtuously – whether they were honest and not self-righteous. They do not merely ask: Were we doing what was most effective to stop the war? Even if they do not provide conclusive answers to their

<sup>69</sup> Cf. Klabbers, 'The Virtues of Expertise', *supra* note 12, at 94.

<sup>70</sup> M. Craven, G. Simpson, S. Marks, and R. Wilde, 'We Are Teachers of International Law', (2004) 17 LJIL 363.

questions (one being that their intervention was justified as ideology critique),<sup>71</sup> I find their self-questioning instructive (for further thinking about the responsibilities associated with our different roles, including as legal experts and activists),<sup>72</sup> and a refreshing contrast to the self-confidence which characterizes the current battles over the interpretation of refugee law in Germany.<sup>73</sup>

But what if we were to systematically submit our practices to the evaluative language of virtue ethics? What if I inquired about the virtuousness of my nomadic life-style prompted by temporary academic contracts, which disrupts emotional ties and communal life, my participation in way too many conferences financed by public money, where I present half-baked papers instead of spending time with my daughter, with my students or to read and think? Nothing appears virtuous in flying from meeting to workshop to conference or in contributing to a publishing industry which produces growth but little scholarship worthy to last. If I were to ask seriously how through my actions I 'take care of our common world', could I really ignore the by-products of my practice?

### 2.2.3. *Wrong life cannot be lived rightly*

As Klabbers notes, for Aristotle virtues were indispensable to lead a good life, a flourishing life as a political being. Yet, the context of the Greek *polis* is very different from the context of global governance and international law. Menke juxtaposes Greek law with modern law by pointing to Greek law's educative character. Greek law employed its force to transform people into virtuous members of the *polis*.<sup>74</sup> By contrast, modern law does not seek to give ethical guidance. Can virtue ethics nonetheless, in the context of today's system of law and governance, play a useful role in complementing law to enhance its legitimacy? What would it mean for ECB President Mario Draghi, when faced with 'nervous markets' to act virtuously? Would acting honestly and with temperance mandate instituting a programme of 'Outright Monetary Transactions' or to stick with conventional monetary policy? When Howse and Nicolaïdis propose that actors in global governance seek guidance from a global trade ethics to enhance democratic legitimacy and distributive justice they presuppose that we know enough about the various interconnections between economic and political institutions and the resulting distributive effects. Yet, if we know much too little in this respect,<sup>75</sup> as I argue in the next section, how can we begin to assess whether Draghi acts according to an ethics of embedded liberalism?

<sup>71</sup> Ibid., at 374.

<sup>72</sup> For some thoughts on the different responsibilities of practitioners and scholars, see I. Feichtner, 'Realizing Utopia Through the Practice of International Law', (2012) 23 EJIL 1143; specifically on the distinct roles of legal advisor, activist and academic, see M. Koskenniemi, 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice', in *United Nations, Collection of Essays by Legal Advisors of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law* (1999), 495.

<sup>73</sup> See *supra* note 14.

<sup>74</sup> For Menke's reconstruction of law in Aristotle's Greece, see Menke, *supra* note 17, at 43–6.

<sup>75</sup> Renewed scholarly attention on money is, however, already yielding important results, see, e.g., C. Desan, *Making Money. Coin, Currency, and the Coming of Capitalism* (2014); D. Fox and W. Ernst (eds.), *Money in the Western Legal Tradition. Middle Ages to Bretton Woods* (2016).

Pondering the question what ethics demand from actors in global governance – and also from myself in my daily practice – I am reminded of Theodor Adorno's famous sentence 'wrong life cannot be lived rightly'.<sup>76</sup> Menke interprets this line as a critique of a 'culture for not providing the models nor expounding the capabilities which allow individuals simply to achieve an appropriate *idea* of the accomplishment of their individual existence'.<sup>77</sup> How and on the basis of which models can we form an idea, we may ask, of the right life as an international lawyer?<sup>78</sup> Given the world we live in, maybe the only ethical stance available to us will frequently be one of expressing our distaste of violence and injustice.<sup>79</sup>

### 3. QUESTIONING MY OWN PRACTICE OF INTERNATIONAL ECONOMIC LAW

Thinking about my own practice of international economic law I benefitted from the works discussed above in two respects in particular. First, the writings of critical theorists of law serve as a reminder that it is too easy to channel discontent with the state of international economic law into a call for political action. In light of Menke's critique of rights in liberalism, a proposal like that recently formulated by Antonios Tzanakopoulos – 'Do you want there to be a fundamental right of States to be free from economic coercion? Splendid! Go out there and make one' – bears little promise.<sup>80</sup> More specifically, it presents itself as the consequence of a critique which, according to Menke, is characteristic of liberalism and which Marx calls 'vulgar critique', namely a critique which confronts that which exists with good and legitimate intentions without, however, analyzing the legal form as the mechanism through which intentions create effects.<sup>81</sup> It may be disappointing to realize that not only the content of the law, but the legal form itself limits the possibilities for a remaking of the global political economy through political action.<sup>82</sup> Yet, at the same time the genealogical critique of rights offers inspiration for thinking about how law can contribute to a repoliticization of society. Second, engaging with the turn to ethics in global governance has helped me clarify my discomfort in acting as an expert on international economic law. In the following I explicate this uneasiness as well as the conclusion I draw from this experience for my scholarship and practice: Do you want global political economy to change? Splendid! But first you need to understand how it works.

<sup>76</sup> T. Adorno: *Minima Moralia. Reflexionen aus dem beschädigten Leben* (Suhrkamp 2003 (1951)), at 42.

<sup>77</sup> C. Menke, 'Genealogy and Critique: Two Forms of Ethical Questioning of Morality', in T. Huhn (ed.), *The Cambridge Companion to Adorno* (2004), 302 at 309.

<sup>78</sup> Klabbers suggests looking to art and literature in 'Towards a Culture of Formalism?', *supra* note 12, at 435.

<sup>79</sup> T. Adorno, *Probleme der Moralphilosophie* (Suhrkamp 2010), at 258.

<sup>80</sup> Tzanakopoulos, *supra* note 4.

<sup>81</sup> Menke, *supra* note 17, at 11, citing Karl Marx, Kritik des Hegelschen Staatsrechts, in MEW, Vol. I, 203, at 296.

<sup>82</sup> Menke, in revealing the depoliticizing effects of the legal form in liberalism, goes further than Koskenniemi who points out how liberalism controls the content of international law (and thus withdraws certain contents from the realm of legal change). See Koskenniemi, *supra* note 19, at 5, 6 and 89 et seq.

### 3.1. Acting like an expert

A side effect of the strong public resistance against CETA and TTIP in Germany is the high demand for experts in international economic law to act as panellists at public events, or advisors for political parties, ministries, parliament, cities, unions, etc. Moreover, we are invited to explain CETA and TTIP to school children and participate in workshops on strategies on how to prevent the agreements from entering into force. *Critical* international economic lawyers are particularly sought after (there still seem to be rather few of them) and some conveners are especially keen to invite *female* international economic lawyers to achieve some semblance of gender balance.<sup>83</sup> As a consequence I enjoy frequent opportunities to share my learnings on international economic law with a wider audience and even on occasion to offer my views to persons in positions of power. Yet, many times I also feel uneasy.

The discomfort I experience in my 'expert role' results mainly from a mismatch between my (supposed) expertise and the questions I think should be at the centre of public debate. Klabbers, expounding on the virtues of expertise, stresses the importance of the honesty of experts, but also their temperance – experts should 'resist the temptation to "push the envelope"',<sup>84</sup> which I understand to mean that experts should stick to what they know. He adds an explanation for the need for temperance, namely the compartmentalization which is typical for expert knowledge.

Assessing my own practice in light of these virtues I admit that frequently I am tempted to 'push the envelope' – for the reason that in my view most debates 'miss the point', miss what is potentially worrisome about the agreements we are discussing. And the reason we do miss the point might in fact be due to the virtuousness of experts, their sticking to their compartmentalized area of knowledge (yet, also probably a certain laziness of the mind leading to repetitive exchanges of well-known positions).

To be sure, CETA and TTIP raise many important *legal* questions. These concern, for example, the extent of the substantive obligations for trade liberalization or investment protection; the implications of the infamous 'right to regulate'; the regulatory techniques of norm concretization in annexes and of including in 'negative lists' measures to be exempted from legal commitments. From an institutional law perspective the agreements are challenging for the international lawyer as new bodies are being negotiated such as regulatory co-operation councils, or an investment court system. Finally, the division of competences between the EU and its member states and the resulting requirements for ratification raise tricky legal issues. In public debate many interventions focus on investment protection and Investor State Dispute Settlement, not – in my view – because they pose the most difficult legal questions or because they raise greater legitimacy concerns than the other parts of the agreements. Rather, I believe the reasons to be that the *problématique* of international investment law is relatively straightforward, easy to explain to a lay audience

<sup>83</sup> Although it seems to me that it is becoming customary again (especially in academia) to convene events including not a single female speaker, or 'employing' women as moderator, commentator or microphone-holder (or has it always been this way?).

<sup>84</sup> Klabbers, 'The Virtues of Expertise', *supra* note 12, at 97.

and that the relevant legal texts are much shorter and easier to work through, than the thousands of pages of the remaining parts, plus annexes which would need to be understood to fully grasp, for example, the extent to which the agreements regulate and liberalize trade in services.

Thus, when I am invited to one of the events on TTIP and CETA, I regularly do as I am asked (and expected) to do and formulate a variation of the critique of international investment law and Investor State Dispute Settlement (as so many other international lawyers do these days). In addition, (to feel better) I draw attention to the other parts of the agreements, indicating that they deserve intensive study.<sup>85</sup> Yet, what I think needs to be most urgently addressed, are questions concerning the justification of these agreements in terms of social welfare, their distributive effects and their impact on the global, regional and national political economies. At the events I attend as a 'legal expert' I attempt to formulate what I hold to be the most pressing questions, but I usually do not give satisfying answers. And strangely enough, my fellow experts from economics or political science also give but very partial responses.

What I am missing is an engagement that would include, briefly sketched, the following elements. First, we need, in my view, a more systematic account of the objectives pursued (explicitly and implicitly) by the agreements and the means by which they shall be achieved. While the predominant objectives are economic – increased trade and investment, the creation of jobs and growth<sup>86</sup> – it is not clear to what extent this is the case for all parts of the agreements. As concerns investment protection, for example, neither opponents nor proponents concisely set out and differentiate between different objectives and their justifications. Are the objectives pursued by the substantive standards for investment protection as well as the procedures for Investor State Dispute Settlement merely of an economic nature – increases in investment, increases in growth – or do they also aim to promote (as is frequently alleged) the protection of the rule of law, the protection of individual rights or the establishment of global standards? If it is held that international investment protection produces economic gains these often are not specified. Are they to accrue to the host state in the form of an increase in foreign investment? And is an increase in foreign investment by itself considered an economic gain, or is the expected gain the creation of jobs or growth? Another potential economic objective could be the creation of gains for the home state (yet what kind of gains?). Or do the agreements pursue the objective to protect investors independently of any economic benefits to host or home state? And if the latter was the case how is this objective justified? Why should investors be granted individual rights beyond the rights guaranteed in existing human rights treaties? To be sure the exposition of objectives and their justifications is a highly contentious exercise. One aim of this exercise will indeed be to

<sup>85</sup> The best studies of the agreements I have encountered so far, are studies published by civil society organizations: see, e.g., S. Sinclair, S. Trew, and H. Mertins-Kirkwood (eds.), *Making Sense of CETA. An Analysis of the Final Text of the Canada-European Union Comprehensive Economic and Trade Agreement* (2014).

<sup>86</sup> See the TTIP and CETA negotiating mandates from the Council of the EU to the Commission.

uncover the contentiousness of objectives and underlying normative assumptions frequently presented as uncontentious, or a matter of economic necessity.

Scrutiny of impact evaluations is a second element of the engagement I envisage. As the main objectives of the agreements are economic, it is not surprising that economic impact assessment plays an important role. Yet, such assessment is complicated by the fact that the primary means to generate economic benefits in these new kinds of trade agreements are not tariff reductions but rather the reduction of so-called non-tariff barriers, for example, through regulatory co-operation. The economic benefits of regulatory co-operation, as well as of investment protection, are much more difficult to assess than the effects of tariff reductions. Moreover, conventional impact assessments do not capture many of the non-economic effects that regulatory co-operation or investment protection may have. Not only may they lead to 'deregulation' or 'regulatory chill' that impose environmental or social costs, they also, and maybe more importantly, change political economy by modifying legislative procedures and judicial review of government measures. A number of economists are pointing to the deficits of the computable general equilibrium models which are predominately used to calculate costs and benefits from trade agreements.<sup>87</sup> Critique concerns the assumptions the models work on (such as full employment); the way they calculate the impacts of non-tariff barriers (estimates by businesses); their gaps (insufficient calculation of the social costs of non-tariff barrier reductions, no comprehensive assessment of the effects of investment protection<sup>88</sup>), and deficits in capturing distributive effects (that may result, for example, from a severe reduction of inner-EU trade).<sup>89</sup> This critique of economists by economists is important as it provides the basis for contestation of the economic benefits presented to the public by the negotiators.

To assess the ways these agreements will affect not only the economy, but also politics and in particular the interplay of government and economy, we need – third – analyses of the agreements in their larger political-economy context. Such analysis should address the 'geo-economics' of these agreements,<sup>90</sup> the emphasis placed on competitiveness (of the parties to the agreements vis-à-vis the 'rest of the world'), and explain its relevance in the current system of global capitalism.<sup>91</sup> It should

<sup>87</sup> For an analysis of the benefits of TTIP for the EU Commission, see Centre for Economic Policy Research, *Reducing Transatlantic Barriers to Trade and Investment. An Economic Assessment* (March 2013), available at [trade.ec.europa.eu/doclib/press/index.cfm?id=968](http://trade.ec.europa.eu/doclib/press/index.cfm?id=968).

<sup>88</sup> For an important empirical study on the financial benefits from investment arbitration, see G. v. Harten and P. Malysheuski, 'Who Has Benefitted Financially From Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants', (2016) 12 *Osgoode Hall Law School Legal Studies Research Paper Series* No 14.

<sup>89</sup> See F. Ackerman, 'Still Dead After All These Years: Interpreting the Failure of General Equilibrium Theory', (2002) 9 *Journal of Economic Methodology* 119; F. Ackerman and K. Gallagher, 'The Shrinking Gains from Global Trade Liberalization in Computable General Equilibrium Models. A Critical Assessment', (2008) 37 *International Journal of Political Economy* 50; W. Raza, J. Grumiller, L. Taylor, B. Tröster and R. v. Arnim, 'An Economic Assessment of the Claimed Benefits of the Transatlantic Trade and Investment Partnership', in C. Scherrer (ed.), *The Transatlantic Trade and Investment Partnership (TTIP). Implications for Labor* (2014), 41; J. Capaldo, 'The Trans-Atlantic Trade and Investment Partnership. European Disintegration, Unemployment and Instability', *Global Development and Environment Institute Working Paper* No. 14-03.

<sup>90</sup> D. Hamilton and S. Blockmans, 'The Geostrategic Implications of TTIP', *CEPS Special Report*, No 105, April 2015.

<sup>91</sup> I. Wallerstein, *World-Systems Analysis. An Introduction* (2004), 25 et seq. (explaining why capitalism relies on protectionism and monopolistic features for capital accumulation).

furthermore raise questions such as: What are the limits to increasing competitiveness? Who loses in the race for competitiveness? How do these trade agreements – following the logic of competitiveness and growth – make it more difficult to modify the legal construction of our political economies in the future?<sup>92</sup> How do they impede transformations which would reduce reliance on tax and transfer measures to contain inequality and promote social cohesion? Do they allow us to construct a political economy in which we need not worry about how ‘globalization losers’ may be compensated so as to prevent the rise of populism and fascism,<sup>93</sup> in which we may abandon the (unhelpful) distinction between globalization ‘winners’ and ‘losers’ altogether?

A research programme addressing these questions would enable a critique that is no longer internal to law; which is neither critique of the legal form nor legal content, but rather one that exposes law’s constitutive role in political economy – a critique of political economy.

### 3.2. Compartmentalization of expertise and modest reform

While I have some things to say on the questions outlined in the previous section, it is still way too little. It took me a while to realize that it might be futile to wait for others to take them up; that indeed the interplay of politics and economics and how it is shaped, constructed and restricted by law often falls within the gaps of the various disciplinary compartments of expertise. Revealing in this respect were not only the TTIP and CETA debates I attended but also a recent talk at Goethe University given by Raghuram Rajan, Governor of the Reserve Bank of India.<sup>94</sup> In his presentation Rajan assessed different ways to stimulate growth – from fiscal policy, to increases in competitiveness through regulatory reform, to monetary policy. I was familiar with these themes from other events organized by the economics department at Goethe University. Yet, Rajan’s lecture was different. He did not stop at evaluating avenues for growth. He also made clear that in his view, much too little was understood (by anyone) of the interplay between political and economic institutions. Moreover, referring to John Maynard Keynes’ vision formulated in ‘Economic Possibilities for our Grandchildren’,<sup>95</sup> he proposed that growth was not the only way to achieve prosperity once a certain level of economic output had been achieved. Since the economy today generated sufficient profit for all of humanity to live well, Rajan suggested that better distribution would offer an alternative to growth.<sup>96</sup> Unfortunately, he decided not to pursue this path. When asked why, he said he had not done sufficient research to say anything significant about an economy not dependent on growth. It is easy to see why not. The question how to achieve better distribution – especially if the answer envisages going beyond conventional tax and

<sup>92</sup> On this question, see C. Cutler and S. Gill (eds.), *New Constitutionalism and World Order* (2014).

<sup>93</sup> See, e.g., M. Wolf, The Economic Losers are in Revolt Against the Elites, *Financial Times*, 26 January 2016 (warning of the fascist threats posed by discontented ‘globalization losers’).

<sup>94</sup> A video recording of his lecture ‘Rules of the Game in the Global Financial System’ on 10 November 2015 at Goethe University Frankfurt can be found here: [www.youtube.com/watch?v=GE5\\_XjUaVS4](http://www.youtube.com/watch?v=GE5_XjUaVS4).

<sup>95</sup> J.M. Keynes, ‘Economic Possibilities for Our Grandchildren’, in *Essays in Persuasion* (1963), 358.

<sup>96</sup> Obviously, it is not the content of this statement that is surprising, but rather that it was made in this particular setting and before an audience that usually does not engage in post-growth debates.

transfer measures<sup>97</sup> – is exactly of the kind that currently falls into the gaps between the expertise pursued by different disciplines, notably law and economics.<sup>98</sup> This consequence of the compartmentalization of expertise is unfortunate as economic and legal experts today play such a significant (even if often unacknowledged) role in governing. It not only leads to the justification problem outlined above with respect to the megaregionals, but also prevents true renewal. As David Kennedy notes, experts (like Rajan) ‘rarely think they are “governing the world.” Their mandate and project is always far more specific, their language more universal. As a result, their powers remain obscure, the opportunity to identify and contest their rulership vanishing point rare’.<sup>99</sup> While limited contestation of expert power is one problem, another, and the one I focus on here, is the lack of understanding resulting from the experts’ specific mandates, but also more generally from disciplinary limitations.<sup>100</sup>

Understanding how political economy is constructed by law, and how changes to legal rules, institutions and procedures modify political economy is a prerequisite for thinking about change, to concretize visions of alternative political economies through institutional changes which amount to more than modest reform and humanizing the inevitable.<sup>101</sup> It requires a different expertise. It demands the kind of analysis, proposed by Roberto Unger, that relates ‘thinking about ideals and interests and thinking about institutions and practices’, which is oriented by social theory that seeks to understand why institutions are as they are (and could be different) in their context of social forces and is directed towards institutional imagination and experimentation.<sup>102</sup>

For Unger, lawyers (in co-operation with political economists)<sup>103</sup> are particularly well equipped for this endeavour as they can build on what Unger considers the ‘genius of contemporary law’, namely that it seeks to realize ‘a binary system of rights of choice and of arrangements withdrawn from the scope of choice the better to make the exercise of choice real and effective’<sup>104</sup> without assuming – like nineteenth century legal thought – that particular sets of legal rights and institutions will automatically protect political and economic freedom. And indeed I have come to agree that as a lawyer I am well equipped to participate in the endeavour of understanding the political economy of the world, and to imagine institutions for its reconstruction. Not only is our political economy constructed by law,<sup>105</sup> it is

<sup>97</sup> For a proposal to address inequality with taxation, see T. Piketty, *Capital in the 21<sup>st</sup> Century* (2014) (original: *Le Capital au XXI<sup>e</sup> siècle* 2013).

<sup>98</sup> There are exceptions of course, one being Dani Rodrik, see D. Rodrik, *The Globalization Paradox. Globalization and the Future of the World Economy* (2011).

<sup>99</sup> Kennedy, *A World of Struggle*, *supra* note 2, at 18.

<sup>100</sup> It is no coincidence, I believe, that many of the more interesting contributions to understanding our political economy as well as thinking about alternatives these days do not come from academics, but from independent journalists who are not in the same way impeded in their thinking by disciplinary divisions. See, e.g., P. Mason, *Post-Capitalism. A Guide to Our Future* (2015).

<sup>101</sup> See *supra* note 7.

<sup>102</sup> See Unger, *supra* note 6.

<sup>103</sup> According to Unger, both political economy and legal analysis ought to be recast as institutional imagination, see Unger, *supra* note 6, at 2.

<sup>104</sup> *Ibid.*, at 27.

<sup>105</sup> In the aftermath of the financial crisis a number of legal projects stress the constitutive role of law; for finance see, e.g., K. Pistor, ‘A Legal Theory of Finance’, (2013) 41 *Journal of Comparative Economics* 315.

lawyers who have played and continue to play an important role in the construction process.<sup>106</sup> Moreover, as we lawyers also know, law cannot be reduced to a mere tool to attain certain (economic) aims. The legal form always entails its own shaping of the world, beyond its intended instrumental effects.<sup>107</sup>

#### 4. FOR THE MOMENT THERE IS THINKING, BUT THERE WILL BE DOING<sup>108</sup>

I began this article by formulating my desire for a responsible practice of law, and, more specifically, a practice of change. Through my disappointing experiences as an expert of international economic law, I have come to the conclusion that my scholarship should change to allow for a more satisfying practice; that I should work towards closing the gaps of expertise and towards an understanding of how international economic law is shaping global, regional and national political economies. Thus, hopefully, when called as an expert again I would be able to go beyond raising questions and offer some answers.

But what about my wish to engage in a practice of change? In this quest, I intend to pursue Roberto Unger's ideas on combining programmatic thinking with institutional imagination and experimentation. His work is guided by the insight of social theory that we cannot change the course of history by grand design. It is informed by critical theory in its attempt to find overlap between conditions for securing material human needs and individual emancipation. Yet, it also points to the need to move ahead of theoretical insight and engage in institutional imagination to be tested through experimentation.<sup>109</sup>

So how may we get to work as (international) economic lawyers? If as international lawyers we engage in institution-building it is mostly because we are being engaged by governments or intergovernmental institutions to do so – to draft, for example, elements of a trade or investment agreement. In many cases this kind of work will not contribute to the institutional remaking I have in mind, but rather constitute exercises of modest reform. I therefore look somewhat jealously to my private law colleagues. Are they not busily engaged in constructing and reconstructing, constantly inventing new institutions? What, if not the complex securitization deals of the early 2000s, the credit default swaps, collateral debt obligations – all drafted by legal experts – have fundamentally changed and remade our world? They did not change the world to my liking, but they serve as a useful reminder of the power that lawyers have outside public roles as civil servants or policy advisors.<sup>110</sup> To be sure we cannot remake the world on our own, and ultimately maybe also

<sup>106</sup> See, e.g., S. Dezalay (ed.), *Lawyers in Africa: Building the State, Brokering Globalization* (2016) (forthcoming).

<sup>107</sup> Apart from the works of Menke that I discuss in this text, see also Joseph Weiler's ongoing work on values and virtues in European Union law, in which he argues, *inter alia*, that EU law by placing the individual at the centre produces self-centred individuals.

<sup>108</sup> Korhonen, *supra* note 54, at 28.

<sup>109</sup> See Unger, *supra* note 7; David Kennedy, too, is calling for institutional experimentation, see Kennedy, 'Preface', *supra* note 9, at x.

<sup>110</sup> Fischer-Lescano points to the anarchic potential for societal appropriation of the law in the transnational constellation, see Fischer-Lescano, *supra* note 36, at 37 et seq.

not without government involvement, but no one prevents us – in collaboration with friends, like-minded institutions or progressive governments – from becoming creative, from exploring the space for institutional renewal and to engage in experimentation, for example with parallel currencies, alternative investment institutions, co-operative banks or sovereign money. As lawyers we are not bound to merely apply the law (even though this is what some of the critique of law seems to suggest). We can also use the law in remaking the institutional structures of political economy and through experimentation contribute to a repoliticization and democratization of society.<sup>111</sup>

This search of mine for a responsible practice is as much about my own emancipation as it is about contributing to social change. Emancipation requires, as Unger notes, a ‘thickening of practical, cognitive and emotional ties’.<sup>112</sup> Institutional experimentation in our cities, regions, countries together with governments, city councils and the local economy may restore the ties disrupted by academic nomadism. We may again ‘attach ourselves to lived territories’ and in our efforts to maintain ties to those across the globe who are engaging in similar endeavours, we may together begin to remake the world through institutional experimentation.<sup>113</sup> Institutional experimentation might not empower us to keep the last word for ourselves, rather than leaving it to history.<sup>114</sup> But it might keep me from running.

<sup>111</sup> Unger, *Free Trade Reimagined*, *supra* note 7, at 215 (‘Such a radicalization of the principle of democratic experimentalism can be achieved only through renovation of the narrow repertory of institutional arrangements to which contemporary societies remain bound.’); G. Teubner, ‘Societal Constitutionalism and the Politics of the Common’, (2010) 21 *Finnish Yearbook of International Law* 2, at 8 (‘There is no alternative but to experiment with constitutionalization.’).

<sup>112</sup> See Unger, *Democracy Realized*, *supra* note 7, at 8.

<sup>113</sup> I take inspiration here from *The Invisible Committee*, *To our Friends* (2015) (original: *Comité invisible, A nos amis* (2014)), available at: [theanarchistlibrary.org/library/the-invisible-committee-to-our-friends](http://theanarchistlibrary.org/library/the-invisible-committee-to-our-friends), reflecting on how to navigate between the local and the global in social struggle:

Every declared commune calls a new geography into existence around it, and sometimes even at a distance from it. Where there had only been a uniform territory, a plain where everything was interchangeable, in the greyness of generalized equivalence, it raises up a chain of mountains, a whole variegated relief with passes, peaks, incredible pathways between friendly things, and forbidding precipitous terrain between enemy things. Nothing is simple anymore, or is simple in a different way. Every commune *creates* a political territory that extends out and ramifies as it grows. It is in this movement that it marks out the paths leading to other communes, that it forms the lines and links making up our party. Our strength won’t come from our naming of the enemy, but from the effort made to enter one another’s geography (at 78, 79).

<sup>114</sup> Cf. Unger, *Free Trade Reimagined*, *supra* note 7, at 220 (noting that ‘a willingness to give the last word to history rather than to keep it for ourselves’ is a superstition threatening our thought).