

ENGAGING THE WRITINGS OF MARTTI KOSKENNIEMI: INTRODUCTION TO THE SYMPOSIUM

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The papers in this special Symposium issue of the *Temple International and Comparative Law Journal* engage, explore, and extend the writings of Martti Koskenniemi. Earlier drafts of these papers were presented at the 2013 Laura H. Carnell Workshop at Temple University Beasley School of Law, where they were the subject of intensive discussion and critique among an outstanding group of scholars.¹ This issue is the result of an intensely collaborative effort involving Professor Koskenniemi, workshop participants, and *Journal* editors and staff.

This issue is the first of what will be a tradition of yearly Symposium publications in the *Journal*, and it is entirely appropriate that this series begins with an examination of Martti Koskenniemi's writings. Koskenniemi, a Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki, is a dazzlingly original and highly influential scholar. His well-known writings include *From Apology to Utopia: The Structure of International Legal Argument*, a ground-breaking analysis of international law's rhetorical structures; *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, a sophisticated intellectual history of the rise of a liberal sensibility in international legal thinking in the late nineteenth century and its subsequent decline after World War II; and *The Politics of International Law*, which reproduces many of his most influential journal articles. Over the years, his attention and professional engagements have shifted. As a result, his prolific output spans a wide range of subject areas, including jurisprudential topics, such as the rhetorical structure of international legal argument and the fragmentation of international law, and historical and sociological topics, such as the motivations and professional projects of individuals

* Laura H. Carnell Professor of Law, Temple University Beasley School of Law. The 2013 Laura H. Carnell Workshop and this special Symposium issue could not have taken place without the contributions of many people. I am grateful to Martti Koskenniemi, not only for his *oeuvre* that was the occasion for this project, but also for a keynote address that set the tone for the dialogue that followed and for displaying grace and insight in responding to searching and, at times, pointed critique of his work. I also owe a deep debt of gratitude to my colleague and friend Duncan Hollis, for guidance and good judgment throughout the planning process; to Temple Law School Dean JoAnne Epps, who provided characteristically unstinting encouragement and support; and to the extraordinarily talented group of workshop participants. I am also grateful to the editors of the *Temple International and Comparative Law Journal* for publishing this issue, and for the excellent editorial assistance they provided.

1. In addition to those publishing papers in this issue, scholars who attended the workshop include Margaret deGuzman, Noura Erakat, David Fagelson, Ryan Goodman, Craig Green, Duncan Hollis, Peter Holquist, David Kennedy, Karen Knop, Neysun Mahboubi, Fernanda Nicola, Jaya Ramji-Nogales, Henry Richardson, Brishen Rogers, Sophie Smyth, Peter Spiro, Andrew Strauss, and John Fabian Witt.

involved in creating the discipline of international law. In each area, his writings are elegant, powerful, and insightful. They provide new approaches to and perspectives on both classic and emerging international legal questions.

INTERNATIONAL LEGAL HISTORIES

The Symposium opens with *Histories of International Law: Significance and Problems for a Critical View*, a substantially revised and expanded version of the keynote address Koskenniemi delivered at Temple.² This paper, based on Koskenniemi's ongoing project of reconceptualizing the history of international law from the late Middle Ages through the Napoleonic Wars, represents both a synthesis of his earlier historical work and an important revision and extension of that work. It is not possible to briefly summarize the subtle arguments found in Koskenniemi's important contribution; suffice to say that the paper addresses several themes that recur in his historical writings, including particularly the problematic nature of teleological narratives of international law's development and of the Eurocentrism that characterizes international legal historiography. In the final part of the paper, Koskenniemi reflects on the "contextual turn" in international legal history, which suggests that ideas and concepts are products of their time and are necessarily embedded in particular vocabularies and systems of thought. Contextualism not only helps us understand authors on their own terms (rather than ours), but also usefully undermines the ideologies of progress that mark many international legal histories.

Koskenniemi then introduces an important new theme, that of "the limits of contextualism." Contextualism runs the danger of encouraging "historical relativism," an uncritical attitude that suggests it is inappropriate to critique historical ideas in light of modern values. Koskenniemi suggests that both sides in the debate over historical relativism falsely elevate their own perspectives and preconceptions into universal standards that they seek to impose on others. He also observes, however, that there can be no rigid separation between the object of historical research and the researcher's own context and that any account of international law's history is necessarily rooted in contemporary concerns. In this sense, "complete freedom from anachronism is impossible." His paper closes with a series of insightful reflections on the unavoidably political nature of the choices historians make when they define the scope and the scale of the context that frames any account of international law's history.

The other papers in this issue are organized around several broad themes that have received sustained attention from Koskenniemi over the years, including international law and empire, the fragmentation of international law, interdisciplinary approaches to international law, reading—and misreading—the tradition of international law, the lawyer as ethical actor, and refining and extending Koskenniemi's ideas. In the remainder of this introduction, I seek to provide a flavor of these insightful articles.

2. Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, 27 TEMP. INT'L & COMP. L.J. 215 (2013).

INTERNATIONAL LAW AND EMPIRE

The complex relationship among international law, colonialization, and imperial projects has been a central theme of Koskenniemi's work. *The Gentle Civilizer of Nations* explores the ways that international law's founders—the “men of 1873”—supported their own state's colonial policies, and viewed colonialism as beneficial for colonized peoples. The book also uses the rhetoric of imperialism and colonialism in its discussions of contemporary international law. For example, Koskenniemi claims that contemporary international practice has become dominated “by the emergence of a depoliticised legal pragmatism on the one hand, and in the colonization of the profession by imperialist policy agendas on the other.”³ Reflections on the relationship between international law and colonialism can be found in many of Koskenniemi's other writings as well.

Kim Lane Scheppele, the Laurance S. Rockefeller Professor of Sociology and International Affairs in the Woodrow Wilson School and the University Center for Human Values at Princeton University and Director of Princeton's Program in Law and Public Affairs, provocatively claims that an unprecedented series of U.N. Security Council resolutions adopted after 9/11 provides the legal architecture for a new form of imperialism.⁴ Scheppele explains that in both the old and new forms of imperialism, core states use peripheral states to move resources to the center. While the classic form of imperialism focused on material resources, “in the new empire, ‘terrorists’ are produced and either killed on site or relocated to the center as the key activity of empire.” Moreover, Scheppele argues, like the old imperialism, the newer form can survive and flourish because it serves the interests of leaders in both the core and periphery. In particular, officials in periphery states comply with new legal mandates in large part because doing so enhances their power, in much the same ways that former colonial elites gained personal or institutional power from enforcing colonial law. Scheppele's claims in this paper are related to a larger project she is pursuing that explores how post-9/11 international law produced a series of parallel domestic states of emergency, transnationally coordinated, that purport to address transnational terrorism, but in fact are used in support of a variety of other domestic political agendas.

THE FRAGMENTATION OF INTERNATIONAL LAW

Koskenniemi has addressed the theme of fragmentation both as a scholar and as a member of the International Law Commission (ILC). As an academic, he not only played a key role in moving fragmentation to the center of the scholarly agenda,⁵ but also developed a sophisticated interpretation of the politics of

3. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* at 4 (2002) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*].

4. Kim Lane Scheppele, *The Empire of Security and the Security of Empire*, 27 TEMP. INT'L & COMP. L.J. 241 (2013).

5. E.g., Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002).

fragmentation that views this phenomenon largely in terms of hegemonic struggle among international legal regimes.⁶ As an ILC member, Koskenniemi was the principal force behind an ILC Study Group Report entitled *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC Report).⁷ Two Symposium papers address Koskenniemi's writings on fragmentation, and in particular the relations between his academic writings and the ILC Report.

Tomer Broude, Vice-Dean and the Sylvan M. Cohen Chair in Law, Faculty of Law and Department of International Relations at the Hebrew University of Jerusalem, reflects on Koskenniemi's writings in light of the current state of fragmentation debates.⁸ Broude notes that although fragmentation as a defining element of international legal practice is "alive and well," fragmentation as a topic of scholarly discourse has been "normalized . . . as both politically inevitable and legally manageable." Broude's paper explains how the ILC Report played a significant role in the normalization process. At the same time, Broude identifies what he sees as the true anxiety that fragmentation triggers—not legal uncertainty, but rather "the propensity of fragmentation to promote anti-formalist managerialism in international affairs," a development Koskenniemi has repeatedly decried.

Sean Murphy, a member of the International Law Commission and Patricia Roberts Harris Research Professor of Law at George Washington University, also evaluates the impact of the ILC Report, and assesses its claims in light of Koskenniemi's scholarly writings.⁹ Murphy notes that the ILC Report is widely cited by scholars and practitioners and that it is likely to continue to inform debates over fragmentation. He argues that despite some tensions between the ILC Report and Koskenniemi's scholarship, both seek to equip international lawyers to use legal doctrine in a "cosmopolitan way, one that understands and seeks to advance the politics of differentiated regimes within the system of international law, without having to opt for a single abstract doctrine."

6. E.g., Martti Koskenniemi, *Hegemonic Regimes*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 305 (Margaret A. Young ed., 2012); Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197 (2007). For a discussion of the political implications of fragmentation, see Jeffrey L. Dunoff, *The Law and Politics of International Organizations*, in OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS (Jacob Katz Cogan, Ian Hurd & Ian Johnstone eds., forthcoming).

7. International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law Commission* U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), as corrected by U.N. Doc. A/CN.4/L.682/Corr.1 (Aug. 11, 2006) (finalized by Martti Koskenniemi).

8. Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMP. INT'L & COMP. L. J. 279 (2013).

9. Sean D. Murphy, *Deconstructing Fragmentation: Koskenniemi's 2006 ILC Project*, 27 TEMP. INT'L & COMP. L.J. 293 (2013).

INTERDISCIPLINARY APPROACHES TO INTERNATIONAL LAW

Another theme that recurs in Koskenniemi's writings is that of inter- and cross-disciplinarity. Koskenniemi's first book, *From Apology to Utopia*, is heavily influenced by structural linguistics, argument theory, and deconstructionism.¹⁰ His most recent works, including his keynote address, center upon international legal history. And in between, he frequently reflected upon questions of scholarly method. Two Symposium papers address Koskenniemi's complex and controversial orientation to methodological issues.

My contribution to the Symposium juxtaposes Koskenniemi's embrace of structuralism and history with his antipathy toward certain interdisciplinary projects, particularly writings that apply insights and methods from the discipline of international relations to international legal phenomena.¹¹ I argue that Koskenniemi's methodological commitments are intimately related to his understanding of international law's purpose. Koskenniemi's writings on interdisciplinarity suggest that lawyers should engage in a particular form of critique—namely, unmasking “false universals,” by identifying the particular that lies behind every claim of the universal. These writings also suggest an equally important affirmative task for law and lawyers—specifically, to understand and justify particular decisions in universal terms. I offer a way of reading Koskenniemi's writings on scholarly method that suggests how international lawyers can simultaneously find the particular in the universal and the universal in the particular.

Mark Pollack, Professor of Political Science and Jean Monnet Chair at Temple University, directly engages Koskenniemi's critique of interdisciplinary work using international relations.¹² Pollack argues that Koskenniemi views international relations as a discipline “dominated by realism, in thrall to American imperialist policy-makers, and firmly committed to an antiformalism that is corrosive to international law and to the international legal profession.” Pollack offers a competing characterization of the discipline of international relations that is far more theoretically diverse and far less supportive of U.S. policymakers than Koskenniemi suggests. Finally, taking issue with Koskenniemi's critique of international relations' “relentless antiformalism and commitment to interdisciplinarity,” Pollack argues that international relations is characterized “by precisely the opposite problems,” namely an overly formalistic approach to international law and a disciplinary insularity that has prevented international relations scholars from learning from international law scholarship.

10. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (Cambridge Univ. Press 2005) (1989).

11. Jeffrey L. Dunoff, *From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?*, 27 TEMP. INT'L & COMP. L.J. 309 (2013).

12. Mark A. Pollack, *Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi*, 27 TEMP. INT'L & COMP. L.J. 339 (2013).

READING—AND MISREADING—THE TRADITION

Much of Koskenniemi's scholarly energies have been devoted to locating various scholars and schools of thought within one or another tradition of international legal discourse, and many of these writings highlight one or another "misreading" of these traditions. So it is perhaps not surprising that several Symposium contributions challenge Koskenniemi's reading of these traditions.

Robert Howse, Lloyd C. Nelson Professor of International Law at New York University School of Law, and Ruti Teitel, Ernst C. Stiefel Professor of Comparative Law at New York Law School, contest Koskenniemi's reading of both old and new international law traditions.¹³ They claim that in a series of recent writings, Koskenniemi has asserted a close, if not essential, connection between progressive theories of history, said to be derived from Kant's writings, and liberal, cosmopolitan, and post-statist approaches to international law. Howse and Teitel offer two central arguments in response. The first is that Koskenniemi misreads Kant, in particular by mistakenly attributing to Kant a historically determined claim of cosmopolitan progress in history. Instead, Howse and Teitel argue, Kant explicitly resists predictions of certain and irreversible progress. Howse and Teitel also claim that Koskenniemi misapprehends the stance of humanity-oriented liberal legal institutionalism toward history and mistakenly asserts that humanity-oriented law represents a false universalism. Howse and Teitel respond that humanity-oriented conceptions of law fully recognize historical contingency and that when these approaches "speak of a world that is free and just," they are "expressing the ideal outcome implied by their underlying normative commitments," not rendering historical predictions.

Samuel Moyn, James Bryce Professor of European Legal History at Columbia University, focuses on the concluding chapter of *The Gentle Civilizer of Nations*.¹⁴ Moyn's paper highlights the power and influence of Koskenniemi's account of Carl Schmitt's and Hans Morgenthau's impact on postwar U.S. international lawyers, including by disabusing them of the moralistic and idealistic hopes of their interwar predecessors. But Moyn questions why Koskenniemi's account of international law in the United States ends in the 1960s. Moyn claims that by ending his narrative there, Koskenniemi fails to account for a dramatic transformation in American international law over the next decade, in particular the massive turn to human rights, which led to a "moralistic surge . . . simply without precedent in America's postwar public life." Moyn suggests that, had he adopted a slightly different timeframe, Koskenniemi might have reached substantially different conclusions regarding Schmitt's and Morgenthau's influence. In a sense, Moyn's critique instantiates a theme Koskenniemi explores in his keynote address: how do international legal historians decide the scale and scope of their object of inquiry, and what are the political implications of these

13. Robert Howse & Ruti Teitel, *Does Humanity-Law Require (or Imply) a Progressive Theory of History? (and Other Questions for Martti Koskenniemi)*, 27 TEMP. INT'L & COMP. L.J. 377 (2013).

14. Samuel Moyn, *The International Law That Is America: Reflections on the Last Chapter of The Gentle Civilizer of Nations*, 27 TEMP. INT'L & COMP. L.J. 399 (2013).

selections?

THE INTERNATIONAL LAWYER AS ETHICAL AGENT

In a variety of papers, Koskenniemi emphasizes the agency of international lawyers. Two papers pick up on this theme, although from quite different angles. The first paper is by Jan Klabbers, who holds the Academy of Finland Martti Ahtisaari Chair and is a Professor of International Law at the University of Helsinki.¹⁵ Klabbers's point of departure is a controversial passage near the end of *The Gentle Civilizer of Nations*, in which Koskenniemi urges international lawyers to embrace a "culture of formalism," understood as "a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it."¹⁶ As in his subsequent calls for international lawyers to embrace "constitutionalism as a mindset,"¹⁷ Klabbers takes Koskenniemi to be advocating not for any particular legal position but rather for lawyers to embrace an ethical position. Klabbers argues that Koskenniemi's approach shows "great affinity with the classic tradition of virtue ethics." Klabbers then begins to sketch how a theory of virtue ethics could be applied in the realm of international affairs. Ultimately, Klabbers is attracted to virtue ethics because it provides an additional vocabulary to evaluate political action and thus increases the likelihood of inducing critical perspectives on public action.

The Symposium contribution from Andrew Lang, Reader in Law at the London School of Economics, and Susan Marks, Professor of International Law at the London School of Economics, also explores the moral dimensions of the international lawyer's agency.¹⁸ They do so by examining both the autobiographical elements in Koskenniemi's works and the biographical writings on Lauterpacht and others that form part of his historical scholarship. Lang and Marks argue that Koskenniemi's attention to biography is deeply linked to his claim that the politics of international law "is ultimately the politics of individual lawyers." That is, for Koskenniemi, actions are determined less by international legal arguments, which are in any event indeterminate, than by the proclivities, commitments, and projects of individual lawyers. Lang and Marks argue that in highlighting the intellectual assumptions, character, and emotional make-up of early international lawyers, Koskenniemi is not only making "an historical claim about how our discipline has evolved," but also sending "a personal reminder of our own agency in the field, and of the relationships which we . . . form with our forerunners through our professional practice."

15. Jan Klabbers, *Towards a Culture of Formalism? Martti Koskenniemi and the Virtues*, 27 TEMP. INT'L & COMP. L.J. 417 (2013).

16. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 3, at 500.

17. E.g., Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9 (2007).

18. Andrew Lang & Susan Marks, *People with Projects: Writing the Lives of International Lawyers*, 27 TEMP. INT'L & COMP. L.J. 437 (2013).

REFINING AND EXTENDING KOSKENNIEMI'S IDEAS

One measure of a scholar's influence is the extent to which other academics seek to develop and extend his or her ideas in new directions. The Symposium includes two papers that use Koskenniemi's work as a point of departure and inspiration. The first is by Frédéric Mégret, an Associate Professor and Canada Research Chair in the Law of Human Rights and Legal Pluralism on the faculty of law at McGill University.¹⁹ Mégret observes that human rights play a relatively marginal role in Koskenniemi's writings, and, in particular, that his critique of international law and his critique of human rights constitute "almost distinct genres in Koskenniemi's work." Mégret seeks to join these two lines of argument through a focus on the practice of human rights in a highly institutionalized international form, in particular at the European Court of Human Rights. Mégret argues that the move to a highly technical, positivist practice of human rights law threatens to impose a considerable cost on the cause of human rights, rendering it "vulnerable to ossification, conservatism, and enterprises of domination."

The final Symposium contribution is authored by Ralf Michaels, the Arthur Larson Professor of Law at Duke University School of Law.²⁰ Michaels's starting point is the absence of private international law and private law from Koskenniemi's writings. Michaels argues that this absence is curious, given that Koskenniemi's work bears several affinities to private law discourse, including his approach to the relation between law and politics, the dichotomy between form and substance in legal argument, and the challenge of fragmentation in systems that address a horizontal plurality of legal systems. Michaels claims that these affinities arise out of a conceptual proximity between Koskenniemi's conceptualization of law and the history and structure of private law discourse.

CONCLUSION

When my colleagues and I first discussed holding a Symposium on Martti Koskenniemi's scholarship, we strongly suspected that the topic would be attractive to a large group of distinguished scholars. While that prediction proved accurate, we underestimated the intellectual energy and dynamism that the group would generate and how stimulating the resulting papers would be. Both individually and in the aggregate, these papers do much to extend a number of important scholarly dialogues that Martti Koskenniemi's work has triggered. It was an honor to organize the workshop that led to this issue. We are grateful to all of the authors for their efforts and proud to publish this collection of papers.

19. Frédéric Mégret, *The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law*, 27 TEMP. INT'L & COMP. L.J. 455 (2013).

20. Ralf Michaels, *Private Lawyer in Disguise? On the Absence of Private Law and Private International Law in Martti Koskenniemi's Work*, 27 TEMP. INT'L & COMP. L.J. 499 (2013).