

# DOES HUMANITY-LAW REQUIRE (OR IMPLY) A PROGRESSIVE THEORY OF HISTORY? (AND OTHER QUESTIONS FOR MARTTI KOSKENNIEMI)

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## I. INTRODUCTION

In a number of essays over the last decade or so,<sup>1</sup> Martti Koskenniemi has analyzed post-Cold War developments in international law, especially the human rights revolution or the emergence of “humanity-law.”<sup>2</sup> In these works, Koskenniemi asserts a close, if not essential, connection between optimistic or

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1. Those that we discuss here are: Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEORETICAL INQUIRIES L. 9 (2007) [hereinafter Koskenniemi, *Constitutionalism as Mindset*]; Martti Koskenniemi, *The Function of Law in the International Community: 75 Years After*, 79 BRIT. Y.B. INT’L L. 353 (2008); Martti Koskenniemi, *Global Governance and Public International Law*, 37 KRITISCHE JUSTIZ 241 (2004) [hereinafter Koskenniemi, *Global Governance*]; Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMAN. 47 (2010) [hereinafter Koskenniemi, *Human Rights Mainstreaming*]; Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492 (2004) [hereinafter Koskenniemi, *International Law as Political Theology*]; Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck’s Messianic World*, 35 N.Y.U. J. INT’L L. & POL. 471 (2003) [hereinafter Koskenniemi, *Legal Cosmopolitanism*]; Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT’L L. 229 (2004) [hereinafter Koskenniemi, *Learn from Karl Marx?*]; Martti Koskenniemi, *The Turn to Ethics in International Law*, (Nov. 4, 2002), <http://www.helsinki.fi/eci/Publications/Koskenniemi/Ethics.pdf> [hereinafter Koskenniemi, *The Turn to Ethics*]; Martti Koskenniemi, Book Review, 26 ETHICS & INT’L AFF. 395 (2012) (reviewing RUTI G. TEITEL, HUMANITY’S LAW (2012)) [hereinafter Koskenniemi, Review of HUMANITY’S LAW]. The arguments in our essay draw on numerous works of ours, authored either individually or jointly, including, RUTI G. TEITEL, HUMANITY’S LAW (2011) [hereinafter TEITEL, HUMANITY’S LAW]; Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL’Y 127 (2010) [hereinafter Howse & Teitel, *Beyond Compliance*]; Robert Howse & Ruti G. Teitel, *Beyond the Divide: The Covenant on Economic, Social and Cultural Rights and The World Trade Organization*, 30 DIALOGUE ON GLOBALIZATION OCCASIONAL PAPER 1 (FRIEDRICH EBERT STIFTUNG – GENEVA 2007) [hereinafter Howse & Teitel, *Beyond the Divide*]; Robert Howse & Ruti Teitel, *Cross Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT’L L. & POL. 959 (2009) [hereinafter Howse & Teitel, *Cross Judging*]; Ruti Teitel, *Author’s Response to Martti Koskenniemi’s Review of Humanity’s Law*, 27 ETHICS & INT’L AFF. 233 (2013).

2. TEITEL, HUMANITY’S LAW, *supra* note 1.

progressive theories of history and liberal, cosmopolitan, post-or anti-statist approaches to international law.

Koskenniemi, generally, argues that the humanity—or human rights—orientation in international law cannot deliver, or is not delivering on, the expectations projected onto it by the progressive view of history with which it is, purportedly, entangled. Hence, “[t]oday, we *know* that something about the project of cosmopolitanism failed . . . .”<sup>3</sup> Or, “[i]t has become increasingly difficult for international lawyers to find a meaningful place in the international world that would resonate with the expectations of progress and enlightenment that characterized the profession’s heroic period.”<sup>4</sup> At the same time, Koskenniemi seems to maintain that the goals imposed on international law by the progressive view of history are inherently questionable, regardless of whether international law can deliver on being its central agent.

In this article, we make an attempt to engage critically with Koskenniemi’s position. This is a welcome opportunity to theorize more deeply on the humanity-orientation in international law, thinking through its direct or indirect dependence of this orientation on certain assumptions about human nature and human history. How do we measure the success or failure of humanity-law as a project? What is the specific agency of law supposed by humanity-law?

We argue that the humanity-orientation in international law does not depend, or need not depend, upon the adoption of a progressive theory of history. None of the historical facts or phenomena raised by Koskenniemi have the effect of rendering the humanity-orientation in international law, or the goals of social and political change associated with it, unreasonable or incoherent. This does not mean that the humanity-orientation resolves or eliminates the kinds of normative conflicts or tensions that have been endemic in all places and times where legal norms are applied to social reality. Indeed, as Teitel has argued, the humanity-orientation in international law gives rise to a number of trade-offs and tensions within its own logic, but which are at the same time understandable through, and in principle, governable by that logic.<sup>5</sup>

Moreover, the humanity-law orientation does not suppose that at a fixed point in time a world will be achieved where no more war crimes will be committed or where political power is never exercised abusively. A strong commitment to the humanity-orientation in international law is in fact entirely consistent with the belief that human societies are in constant danger or could even be in permanent danger of relapse into brutal, inhumane violence, and political oppression.

When advocates of human rights speak of a world that is free and just, they are usually not making a claim of messianism or historical determinism, but rather they are simply expressing the ideal outcome implied by their underlying normative commitments. They could be better understood as engaging in a

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3. Koskenniemi, *Legal Cosmopolitanism*, *supra* note 1, at 475 (emphasis added).

4. Koskenniemi, *Learn from Karl Marx?*, *supra* note 1, at 230.

5. See TEITEL, *HUMANITY’S LAW*, *supra* note 1, at 216–25.

Dworkinian exercise of imagining the way in which the social and political world would look if the law's aim was fully attained. This is a very different project than the Kojevian/Hegelian exercise of articulating a claim about the end of history,<sup>6</sup> the point to which the historical process is inevitably taking us.

## II. INTERNATIONAL LAW AND COSMOPOLITAN HISTORY: THE CASE OF KANT

According to Koskenniemi, “the optimistic trajectory sketched by Kant in his 1784 essay on *The Idea for Universal History with a Cosmopolitan Purpose* . . . continues to inform *much* of the political project behind international law.”<sup>7</sup> Koskenniemi insists:

Six years into the French Revolution, in his *Zum ewigen Frieden* [(“On Perpetual Peace”)] Immanuel Kant sketched the structure of a cosmopolitan federation, the international world as a society of democratic states under the rule of law, individuals as the ultimate subjects of a single global order . . . . This federation was projected as a necessary stage in the development of human societies. This is the philosophical narrative, *many of us believe it*, though we find it difficult to say with conviction, why we do.<sup>8</sup>

The problems we see with Koskenniemi's account of the relation between the humanity-orientation in international law and progressive theory of history begin with his reading of Kant. While in this article we cannot explore all of our differences with Koskenniemi on Kant's teaching, it is necessary to summarize them in order to understand why we take another view of post-Cold War humanity-law.

First of all, Koskenniemi gets wrong the nature of the historical process sketched by Kant and the role of law within it. Kant does not describe a process by which international law will bring about “a society of democratic states under the rule of law.”<sup>9</sup> Indeed, Kant's critique of the older publicists such as Grotius<sup>10</sup>—to which Koskenniemi sometimes himself alludes—suggests considerable skepticism about the effective agency of international law to bring about the desired outcome of perpetual peace. The definitive articles of perpetual peace, which might be regarded as the strictly *international* law in Kant that sustains the federation of the states with republican constitutions, *presuppose* that those states already have such constitutions. In other words, perpetual peace is viewed by Kant as the outcome, not the cause of a process of political development where, in the first instance,

6. See Robert Howse & Bryan-Paul Frost, *Introductory Essay, The Plausibility of the Universal and Homogenous State*, in ALEXANDRE KOJÈVE, *OUTLINE OF A PHENOMENOLOGY OF RIGHT 1*, 1–27 (Bryan-Paul Frost ed., Bryan-Paul Frost & Robert Howse trans., 2007) (analyzing Kojève's views on the end of history concept and philosophy of law and globalization).

7. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 1, at 12 (emphasis added).

8. Koskenniemi, *Global Governance*, *supra* note 1, at 2 (emphasis added).

9. *Id.*

10. See IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795), *reprinted in* KANT: *POLITICAL WRITINGS* 93, 103 (H.S. Reiss ed., H.B. Nisbet trans., 2d ed. 1991) [hereinafter KANT, *PERPETUAL PEACE*].

through revolutions, despotic regimes have been replaced by republics based upon the rule of law and representative government. There is no direct non-stop route from Westphalia to cosmopolitanism, which can be led by international law or through transforming international law.<sup>11</sup> The core of Kant's argument is this: if each state has a constitutional order that allows internal disagreement to be settled juridically, and thus, peacefully through an order where the freedom of each is compatible to the maximum extent with the freedom of all, then it is logically possible also to settle conflicts between states juridically, without recourse to war.

Another of Koskenniemi's readings of the Kantian narrative that we need to question is his attribution to Kant of "extraordinary optimism" and even triumphalism concerning the cosmopolitan project.<sup>12</sup> Presumably based on a misreading of Kant's notion of a guarantee of perpetual peace, Koskenniemi presents Kant's argument as one of *historical inevitability* of perpetual peace through republican federation: "This federation was projected [by Kant] as a necessary stage in the development of human societies."<sup>13</sup>

But here is what Kant actually says about the *content* of the guarantee of perpetual peace: "[W]hile the likelihood of its being attained is not sufficient to enable us to *prophesy* the future theoretically, it is enough for practical purposes. It makes it our duty to work our way towards this goal, which is more than an empty chimera."<sup>14</sup> In other words, while working towards perpetual peace is logically required by the idea of right, which implies cosmopolitan right, and is thus *normatively* necessary, Kant's analysis of historical mechanisms does not prove that it is necessary in the sense of being *inevitable* within a definite time frame or that its realization is not subject to chance. Rather, Kant is claiming much more modestly that perpetual peace is possible or plausible within realistic assumptions about human nature (thus, Kant's often cited, and misinterpreted, remark in *Perpetual Peace* about a nation of devils being capable of solving the problem of social order, if they can reason).<sup>15</sup> Properly applying Kant's criterion, we would have to ask whether any of the facts or phenomena invoked by Koskenniemi can establish that the Kantian liberal internationalist vision is an "empty chimera."

The most extensive of Koskenniemi's presentations of "Kant's extraordinary optimism" is to be found in his essay *Constitutionalism as Mindset: Reflections on*

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11. Habermas tends to see this as a defect or gap in Kant to be remedied through a developed understanding of how international law is to be constitutionalized. JÜRGEN HABERMAS, *Does the Constitutionalization of International Law Still Have a Chance?*, in THE DIVIDED WEST 115–93 (Ciaran Cronin ed. & trans., 2006). We also have serious difficulties with Habermas's reading of Kant's essays and these are connected with more general differences with the "constitutionalist" view of international law espoused by, for example, Anne Peters. Why the humanity-orientation in international law does not lead to or imply a notion of global constitutionalism is explored by TEITEL, HUMANITY'S LAW, *supra* note 1, at 165–92.

12. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 1, at 34.

13. Koskenniemi, *Global Governance*, *supra* note 1, at 2.

14. KANT, PERPETUAL PEACE, *supra* note 10, at 114.

15. *Id.* at 112–13.

*Kantian Themes About International Law and Globalization*.<sup>16</sup> As evidence of this optimism, Koskenniemi cites Kant's statement that what has been taught by the Revolution "can never be forgotten," whatever setbacks might occur.<sup>17</sup> Koskenniemi seems to interpret this as optimism in the sense that Kant believes that progress to the goal of perpetual peace under republican federation is inevitable or unstoppable.

But this is not what Kant means; instead, what Kant intends to suggest is that even the greatest reversals of progress do not render it *impossible* to *restart* progress, since they do not eliminate the knowledge or understanding on the basis of which human beings can start moving again towards the goal in question. Once again, Koskenniemi misreads Kant as making an optimistic *prophecy*. But Kant is merely stating why it is still reasonable, despite what are clearly setbacks or reversals, to believe that progress towards the normatively necessary goal is possible. For Kant, this *possibility* is sufficient to ground the duty to advance perpetual peace. The reasonable belief in the enduring possibility of progress is a far cry from Koskenniemi's suggestion of "manifest destiny, Messianic myth of the better tomorrow."<sup>18</sup>

Thus, in *Idea for a Universal History with a Cosmopolitan Purpose*, Kant is at pains to stress: "It would be a misrepresentation of my position to contend that I meant this idea of a universal history, which to some extent follows as *a priori* rule, to supersede the task of history proper, that of *empirical* composition."<sup>19</sup> In "The Contest of Faculties," Kant goes further still in distinguishing his idea of cosmopolitan progress from historical determinism.<sup>20</sup> Kant writes:

Even if it were found that the human race as a whole had been moving forward and progressing for an indefinitely long time, no-one could guarantee that its era of decline was not beginning at that very moment . . . . For we are dealing with freely acting beings to whom one can *dictate* in advance what they *ought* to do, but of whom one cannot *predict* what they actually *will* do . . . .<sup>21</sup>

Contrary to Schmitt's suggestion in the *Concept of the Political* that the liberal cosmopolitan vision of humanity implies an anthropological confession of faith in man's essentially "good" nature,<sup>22</sup> Kant precisely resists prediction of certain and irreversible progress because "man's natural endowments consist of a mixture of evil and goodness in unknown proportions."<sup>23</sup> Kant's tentative

16. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 1.

17. *Id.* at 34.

18. Koskenniemi, *Global Governance*, *supra* note 1, at 17.

19. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose* (1784), reprinted in KANT: POLITICAL WRITINGS, *supra* note 10, at 41, 53.

20. IMMANUEL KANT, *The Contest of Faculties* (1798), reprinted in KANT: POLITICAL WRITINGS, *supra* note 10, at 176 [hereinafter KANT, CONTEST OF FACULTIES].

21. *Id.* at 180 (emphasis in original).

22. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 25–27 (George Schwab trans., Univ. of Chicago Press expanded ed. 2007) (1927).

23. KANT, CONTEST OF FACULTIES, *supra* note 20, at 181.

hopefulness is premised on a conception of ineradicable collective learning and collective memory rather than on linear moral improvement or perfection. He states:

[I]f a people's revolution or constitutional reform were ultimately to fail, or if, after the latter had lasted for a certain time, everything were to be brought back onto its original course (as politicians now claim to prophesy) . . . the occurrence in question is too momentous, too intimately interwoven with the interests of humanity and too widespread in its influence upon all parts of the world for nations not to be reminded of it when favorable circumstances present themselves, and to rise up and make renewed attempts of the same kind as before.<sup>24</sup>

This view of Kant's about collective learning and memory turns out to be prescient of the trajectory of humanity-law: for humanity's progress has not been characterized by a step-by-step advance but rather through its reconstructive activity after great reversions to barbarism—the two world wars being the prime examples.<sup>25</sup>

Koskenniemi also misreads Kant as suggesting that “federation” is a “necessary stage in the development of human societies” toward a “single global order,” a “single world society,”<sup>26</sup> or a democratic and rule governed Kantian *Völkerstaat*. In fact, Kant explicitly disassociates himself from the notion of *Völkerstaat*, distinguishing it clearly from his own proposal for a federation of republican states (*Völkerbund*): “Dies wäre ein *Völkerbund*, der aber gleichwohl kein *Völkerstaat* sein müßte.” (second emphasis added). A good translation would be: “This would be a *federation of peoples* but this does not have the necessary implication of a world state.”<sup>27</sup>

Indeed, a “Kantian *Völkerstaat*” is a contradiction in terms. Kant's emphasis on federation in *Perpetual Peace* comes not from the view that it is a stage toward a “single world society,” in Koskenniemi's expression, but on the contrary, from the insight that a “single world society” would endanger cosmopolitan right rather than securing it. Thus, Kant writes: “[L]aws progressively lose their impact as the government increases its range, and a soulless despotism, after crushing the germs of goodness, will finally lapse into anarchy.”<sup>28</sup> It follows that the republican federation must bring nations together to the extent required to ensure that they will no longer be required to settle their differences through war and for individuals to be subjects of cosmopolitan right. Here, cosmopolitan right means that individuals must be regarded and treated as human, as rights bearers, regardless of national boundaries.

24. *Id.* at 185.

25. See TEITEL, HUMANITY'S LAW, *supra* note 1, at 19–33 (describing the evolution of humanity-law as the product of brutality followed by reconstruction, using the atrocities of the two World Wars followed by the Nuremberg Trials as an example).

26. Koskenniemi, *Global Governance*, *supra* note 1, at 2.

27. See KANT, PERPETUAL PEACE, *supra* note 10, at 102.

28. *Id.* at 113.

In sum, according to Kant, we need the state as well as an order of cosmopolitan right where individuals can claim, as humans, to be treated in a certain way regardless of territorial boundaries. The relativization of the state, the subjection of the strong sovereignty claim to cosmopolitan right, still preserves a world of separate political communities and of nations.

Not following Kant here leads Koskenniemi to misread the cosmopolitan project as intrinsically oriented to world government, and indeed as anti-political (whereas it is really only aimed against the “state” or the “political” understood in Schmitt-like terms). Of course there are some thinkers who deploy a cosmopolitan reasoning to argue for the abolition of the state or who rather dogmatically promote global constitutionalism—for example, Anne Peters. But those scholars might simply be wrong about what cosmopolitan right implies.

We, by contrast, emphasize that the post-Cold War human rights or humanity-law trend encompasses demands of economic justice against the state and the revival of social and economic rights (human security). This means that the relevant concept of cosmopolitan right implies not only the preservation of the state, but the enhancement of its responsibilities. And where these are not fulfilled, the state risks displacement by other political actors. The fundamental point is that this enhanced responsibility is concomitant with relativized sovereignty—the state is internationally accountable for how and to what extent it realizes responsibilities for social and economic justice among others.

### III. WHAT CAN HUMANITY-ORIENTED LIBERAL LEGAL INTERNATIONALISM REASONABLY HOPE FOR? WHY THE HUMANITY-LAW PROJECT DOES NOT AND SHOULD NOT DEPEND ON HISTORICAL DETERMINISM

Koskenniemi’s misreading of Kant can be seen in terms of a broader error in the history of philosophy. “Whig” or liberal progressive ideas get conflated or synthesized with notions of historical determinism that emerge out of a later stage in German philosophy so as to produce a myth of “liberal triumphalism.” A careful examination of John Stuart Mill, Lord Acton, Benjamin Constant, to name a few liberal progressives, would show that none of them embraces historical determinism. It is instructive that one pundit, Francis Fukuyama, who did seek to construct a liberal triumphalist narrative,<sup>29</sup> was forced to borrow from and distort the thought of Alexandre Kojève, a Hegelian Marxist, in order to do so.

The notion that the ideal *must* become actual is antithetical to the liberal conception of freedom, for reasons that are well-articulated by Isaiah Berlin in his famous essay *Historical Inevitability*.<sup>30</sup> Further, as we have seen in our brief sketch of what Kant actually writes about these issues, for liberals, nature including human nature does not have the character of something that can be simply understood—as in the manner of Kojève’s atheistic interpretation of Hegel—as

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29. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

30. ISAIAH BERLIN, *Historical Inevitability*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 94 (Henry Hardy ed., 2002) (1954).

pure negativity—as that *against which* man creates, and recreates, his humanity. Nature remains, in liberalism, a framework within which (human) history occurs and which can decisively, indeed disastrously, influence its course. By contrast, historical determinism leads to an attitude of complacency or acceptance of the human sacrifices that are made in the course of achieving the purported inevitable outcome of progress. Individuals can be thought of as mere tools or means in the process by which historical necessity works itself out. This is certainly in tension with the account of human autonomy and dignity in Kantian liberalism.

Where does this lead in terms of the stance of humanity-oriented liberal legal internationalism toward history? One can point to evidence from the last fifty years that the *possibility* of states ordering relationships between themselves and their citizens *juridically*, based upon a collective commitment to human rights and to peace is not, in Kant's language, "a mere chimera." The European Union has shown this. More generally, it is illustrated by the way in which liberal states and their citizens increasingly conduct their dealings with one another, through law.<sup>31</sup> Of course, the extent to which this is due to traditional *international* law is plainly limited. Just as Kant did not mean by cosmopolitan right international law as understood in his time, notions like "global law" and "humanity-law" imply that the legal normativity in question tends to transform itself into something other than Westphalian (inter-state) international law, precisely as it becomes most effective in ordering juridical relations across and between states. That international law is at its *most* effective when it does not purport to operate as an autonomous legal system, but rather through the construction or reconstruction of other normative legal orders,<sup>32</sup> may be deflating to a certain coterie or generation of international lawyers. But it by no means suggests that the impact of international law is trivial.

At the same time, the evidence of success in ordering juridical relations between "liberal" or "democratic" states and their citizens goes hand in hand with the persistence of the Schmittean "political" in the world where liberal democracy is unstable or undeveloped or underdeveloped. This is entirely consistent with Kant's important condition that cosmopolitan right presupposes relations among states with republican constitutions, and the possibility—not certainty—that the number of these states can increase—"gradually expanding" is how Kant puts it in *Perpetual Peace*.<sup>33</sup> This is also consistent with the best evidence we have today.<sup>34</sup>

Invoking the specter of Empire, Koskeniemi attempts to deflate the kind of reasonable cosmopolitan hopefulness just discussed, through an appeal to the post-modern sensibility. Can one discern certain kinds of hegemonic power structures

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31. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

32. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

33. KANT, *PERPETUAL PEACE*, *supra* note 10, at 104.

34. MOISES NAÍM, *THE END OF POWER: FROM BOARDROOMS TO BATTLEFIELDS AND CHURCHES TO STATES, WHY BEING IN CHARGE ISN'T WHAT IT USED TO BE* 76–95 (2013).



underlying or supporting “law among liberal nations”? Perhaps, but why should this be fatal to our hopefulness concerning the direction of the project itself? Kant did not think that the state of affairs he presents as perpetual peace under republican federation would be brought about through political idealism alone, or that it will as such equalize power relations between states. The important point is to empower citizens or subjects of the various states, who will no longer have to fear being pawns in the conflicts between sovereigns, who can imagine themselves as pertaining to a human community despite sovereigns making them into enemies of one another. Of course, Empire has often been terrible. And it is a testimony to Kant’s subtlety that in *Perpetual Peace* he is able to present the brutality and injustice of imperial conquest while also indicating the contribution of Empire to the bringing about of interconnection across societies and cultures, which can ultimately underpin cosmopolitan right.

Nor will it do to deploy post-modernism to delegitimize the narrative of hopefulness about cosmopolitan right as “Western.” Post-modernism is equally, if not more so, a parochially Western narrative than cosmopolitanism or liberal political rationalism. It depends on the particular trajectory of secularization and/or rationalization in the West being experienced as the loss of, and longing for, the Biblical—really the Christian—God who has been looked to as guarantor of ontological certainty and a “true” way of life, as seen in Friedrich Nietzsche, Max Weber, and Martin Heidegger’s work.<sup>35</sup>

As is abundantly clear, the relation between political rationalism and “faith” is playing itself out beyond the “West” and quite beyond the playbook of this nineteenth and early twentieth century European story of “the death of God.” The agents of political and legal change outside of the West are fortunately not so in the grip of anti-colonial *ressentiment* that they hesitate to draw freely on the kind of legal normativity, or even “ethics” represented by humanity-law. They also operate within “Western” institutions of international law, often quite effectively, without worrying about re-colonizing themselves. Worrying on their behalf, as Koskenniemi sometimes seems to be doing,<sup>36</sup> indeed seems a form of neo-colonial condescension.

#### IV. CONTINGENCY, UNIVERSALITY, HUMANITY, AND HISTORY

Following Carl Schmitt,<sup>37</sup> Koskenniemi opens up the possibility of humanity-

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35. See generally GIANNI VATTIMO, *DIALOGUE WITH NIETZSCHE* (William McCuig trans., 2006); GIANNI VATTIMO, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POSTMODERN CULTURE* (Jon R. Snyder trans., 1988).

36. Koskenniemi, Review of *HUMANITY’S LAW*, *supra* note 1, at 395.

37. To avoid any misunderstanding, we must always bear in mind that Koskenniemi likes to deploy arguments without endorsing them (the case with Schmitt and also with Marxism and post-modernism). While using Schmitt to contribute to his goal of creating unease about humanity-based liberal legal internationalism, Koskenniemi takes pains to allow us to believe that there are aspects of Schmitt’s vision and commitments from which he wishes to keep a safe distance. In this very distancing he does homage to Schmitt’s notion of all normative argumentation being strategic, polemical and situational.

based liberal legal internationalism being a false universalism. It is suggested that the claim to universalism or the claim on behalf of humanity as a whole, is essentially a strategy of particular powers, or particular kinds of interests, which seek hegemony or dominance by masking what benefits them as what is good or right universally.

If the idea is that norms that claim universal force can be and are invoked by actors with particular ends as a justification for the exercise of power to achieve those ends, then it is well-worn, if not trite. The pretextual invocation of right by imperial powers was already a central theme in Thucydides' *Peloponnesian Wars*. David Luban notes:

Anyone who voluntarily has recourse to the institutions of the law has ulterior motives: nobody ever files a lawsuit out of disinterested curiosity in the answer to a legal question. In everyday litigation, we hardly think it noteworthy or morally condemnable to learn that a plaintiff has a self-interested motive for the suit.<sup>38</sup>

What gives the rhetoric of Schmitt and now Koskenniemi its punch—apart from the political incorrectness of liking anything that can be plausibly associated with Empire or America among a not inconsiderable part of Koskenniemi's audience—is the implication or assumption that use or abuse of the universal claim in the service of domination undermines the normative logic of the universal claim itself and/or leads to a result that even those who are supportive of the universal claim would admit is unambiguously undesirable. Koskenniemi muddies the waters by also making what could be called epistemological arguments concerning “false universalism” on post-modern philosophical premises (at the same time, Koskenniemi realizes that pushing those arguments too far can lead to a loss of the possibility of critical normativity. So, he pushes them only so far as is needed to score points off his cosmopolitan “enemies.”).

For Schmitt, the universal humanity claim is, fundamentally, a specious claim for a peaceful human community where violence is eliminated everywhere. What this ostensible goal used to justify, according to Schmitt, is an imperial project to eliminate all “enemies”—real and potential belligerents. Schmitt says this could even entail total war, on the grounds that a war to end all war can justify any horror in light of its utopian goal and the notion of its being fought on behalf of “humanity” itself. Thus, Schmitt is saying that the result of invoking humanity is the greatest inhumanity (the contradiction of the normative logic itself as well as a result that seems unambiguously horrible—war that is inhuman without limits).<sup>39</sup> But as we shall see, fundamental to the humanity-orientation in legal internationalism, as Teitel elaborates, is a *rejection* of war without limits, precisely in the name of values of humanity. Humanity-law knows its own normative logic, and requires humanity in means as well as ends, Schmitt and Koskenniemi argue that humanity-law knows its own normative logic, and requires humanity in means

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38. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 CASE W. RES. J. INT'L L. 457, 462 (2010).

39. See CARL SCHMITT, *supra* note 22, at 54-55.

as well as ends.

Humanity-oriented liberal legal internationalism is not naive, especially in its original Kantian version, about the logic of cosmopolitanism being oriented in the direction of a project of world government justified by the ideal of human community. Kant is fully aware that a world state would very likely have to be a despotism, given the suppression of diversity required for the imposition of a single order globally. Thus, Kant warns: “It is . . . the desire of every state (or its ruler) to achieve lasting peace by thus dominating the whole world if at all possible.”<sup>40</sup> Precisely because he understood what Schmitt would present more than a century later as an extraordinary unmasking of what is behind typically universalist *political* ambition, Kant took pains to caution against attempting to realize cosmopolitan right through a world *state*, whether called a “universal monarchy” or something else.<sup>41</sup> Koskenniemi underestimates the self-awareness of humanity-oriented liberal legal internationalism, and its own consciousness of the risk that universalism will be misdirected in a manner that courts with despotism. As we have already noted, he mistakes Kant’s project of cosmopolitan right for that of a unitary order, whereas, what Kant has in mind is a human community of rights-bearers, where one’s status as human gives rise to rights that do not *begin* or *end* at the territorial boundaries of the state.

Echoing Schmitt’s invocation of Proudhon’s “whoever invokes humanity wants to cheat,” Koskenniemi refers to “the ease with which such purportedly universal terms [as humanity] may be used for dubious purposes.”<sup>42</sup> Whatever one thinks of humanitarian intervention-type justifications of the Iraq War by a handful of pundits such as Michael Ignatieff, is there any evidence that they actually in any way *enabled* the Bush Administration to execute what Koskenniemi sees as this part of an imperial project? Elsewhere, Koskenniemi distinguishes “false” universalism from the true “universalism” reflected in the critique of the Iraq War based on an asserted consensus about it violating international law.<sup>43</sup> Koskenniemi concedes that universalism can be a source of resistance to hegemonic and oppressive power as well as a means of exercising it.<sup>44</sup> The danger of false universalism now has to be weighed against the promise of true or benign universalism. Well, the universalism of humanity-based liberal legal internationalism has played a significant role in the opposition to the abuses of the war on terror.<sup>45</sup>

What is more real, given the data we have—humanity-law’s negative potential “to be used for dubious purposes”<sup>46</sup> or its capacity to thwart some of the worst harms done in the pursuit of dubious purposes? Indeed, Koskenniemi

40. KANT, PERPETUAL PEACE, *supra* note 10, at 113.

41. *Id.* at 113.

42. Koskenniemi, Review of HUMANITY’S LAW, *supra* note 1, at 397.

43. Koskenniemi, *Learn from Karl Marx?*, *supra* note 1, at 232–33.

44. *See generally id.*

45. TEITEL, HUMANITY’S LAW, *supra* note 1, at 105–38.

46. Koskenniemi, Review of HUMANITY’S LAW, *supra* note 1, at 397.

supported the bombing of Serbia in 1999 as “formally illegal and morally necessary.”<sup>47</sup> He simply prefers to see benign humanitarian intervention as a Schmittean exception to the law than to integrate it into legal normativity through the relativization of sovereignty in the name of humanity. What Koskenniemi seems most concerned with is disparaging a kind of simple moralism detectable in certain human rights advocates, undoing their purported pretension to purity, and messianism. This is hardly a substitute for weighing the results on the ground, positive and negative, of humanity-based liberal legal internationalism, given that it can be pursued not only by good and smart people but also stupid or naive people, and even, potentially, co-opted by bad people.

Of some significance in assessing how much bite there is in the Schmitt-like critique is the reaction of humanity-oriented liberal legal internationalism to instances of inhumanity, and indeed violations of humanity-oriented international law that have occurred in the service of projects justified or supported on humanity-law grounds. This takes us back to the rejection of the “history is a slaughter-bench” view of historical determinism. The reaction is not to say that we make these sacrifices as part of the historical necessity that brings about the utopian end, but to demand that the means of humanity-law be consonant with its goals.<sup>48</sup> Thus, humanity-law opens the door to the legitimacy of humanitarian intervention through privileging the humanity norm over the sovereignty norm, but far from being comfortable in taking the gloves off and legitimizing total war a la Schmitt’s caricature, humanity-law considerably narrows the window for humanitarian intervention by insisting that its agents and its beneficiaries comport themselves in accord with humanity-law obligations. Is it a contradiction to support regime change in Libya and then express concern that the victorious revolutionaries are wreaking extra-legal violence on the deposed tyrant and his family? No, it shows an awareness of humanity-law’s inner normative logic and its intrinsically self-limiting character.

#### V. DECISION OR DIFFUSION AS A MODEL FOR THE DETERMINATE EFFECT OF NORMS IN THE WORLD?

Koskenniemi suggests that in reality human rights means giving the sovereign the authority over the very rights that are supposed to reign in the sovereign. “Human rights cannot trump the power of the Inquisitor, since jurisdiction over what those rights are, and how conflicts over them should be resolved belong to him.”<sup>49</sup> We think that this ignores what is precisely the contribution of international law to the evolution of rights. Where human rights are embedded in *international* law, no particular authority can gain ultimate control, even interpretative control over rights, which are subject to application, interpretation, and contestation by multiple actors and institutions across the boundaries of

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47. Martti Koskenniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 162 (2002).

48. TEITEL, HUMANITY’S LAW, *supra* note 1, at 34–72.

49. Koskenniemi, *Learn from Karl Marx?*, *supra* note 1, at 235.

nation-states and even, as we explain in *Cross Judging*, the boundaries of specific international or transnational regimes.<sup>50</sup>

The standoff between the Security Council and the European Court of Justice—and to some extent the European Court of Human Rights—in the *Kadi* affair, and related disputes, signifies that no one institution can exercise ultimate authority over the balance between the human right to due process and the fulfillment of the right to life and security of the person through anti-terrorist measures. Koskenniemi presents the conflict between institutions as reflecting an indeterminacy that is somehow fatal to the liberal legal internationalist claim. But non-hierarchical contestation and interaction between institutions does produce determinate *outcomes* in the real juridical world. Admittedly, it will unlikely ever lead to intellectual or conceptual consensus about the abstract meaning or parameters of each legal norm but nor is that needed to advance the project.

Koskenniemi often conflates unresolved philosophical or conceptual controversy with indeterminacy in the application of legal norms in context. He maintains that “if legal rules do not spell out the conditions of their application, there is no guarantee of predictability or, where predictability *does* exist, no guarantee that it would not result from political bias rather than from the law.”<sup>51</sup> In responding to Habermas,<sup>52</sup> Koskenniemi simply asserts that institutions that make determinate legal norms through their application to particulars can never plausibly claim that they are an “unbiased third party”—“each contestant invokes institutions . . . the other regards as biased.”<sup>53</sup>

We doubt the validity of this claim. As our *Kadi* example illustrates, and as do many other examples in *Beyond Compliance* and *Cross-Judging*, international legal normativity rarely becomes effective through the authoritative judgment of a single interpreter. Disagreement about the limits of legitimate authority of each institution involved in decision-making about the content and application of the law do not simply reduce to dueling charges of bias. When the European Court of Justice in *Kadi* insisted that it must apply human rights principles as understood in the particular normative order of which it was the guardian,<sup>54</sup> it was not accusing the U.N. Security Council of bias; likewise, however obscure and susceptible to doctrinal critique, the decision of the U.S. Supreme Court in *Medellin*, concerning

50. Howse & Teitel, *Cross Judging*, *supra* note 1, at 973–76.

51. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 1, at 25.

52. See generally Jurgen Habermas, *Kant's Ideal of Perpetual Peace, with the Benefit of Two Hundred Years' Hindsight*, in PERPETUAL PEACE: ESSAYS ON KANT'S COSMOPOLITAN IDEAL 113, 113–53 (James Bohmann & Matthias Lutz-Bachmann eds., 1996).

53. Koskenniemi, *International Law as Political Theology*, *supra* note 1, at 506.

54. See *Kadi*, 2008 E.C.R. I-6351, ¶ 44 (“[T]he Court cannot always assert a monopoly on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect.”).

the effect of International Court of Justice (ICJ) decisions in U.S. law, did not turn in any way on a concept of bias in the ICJ.<sup>55</sup>

In a fragmented, decentralized, weakly hierarchized legal universe, where the law's effects are produced in multiple instances of interpretative authority, the dynamic of tension, recognition, accommodation, adjustment, and transformation entailed in the diffusion of norms through interpretive moves by multiple decision-makers renders it implausible that the determinate effect of the legal norm would simply be attributable to the bias of a single authority. The absence of a *unique* objective judge situated above the parties who are contesting legal meanings and outcomes has not resulted in normative chaos on the ground, or collapse into general delegitimization, such that the agents withdraw from legal institutions and revert to pure *rappports de force* or legally unconstrained political bargaining to deal with their differences. For example, in international criminal law, very closely connected, as Koskenniemi says, to the humanity-oriented legal liberal internationalism that is his target, the meaning of complementarity in the International Criminal Court (ICC) statute is contested among activists, the ICC Prosecutor's office, states parties, and states-non-parties to the ICC. The frontier between international and domestic responsibility for ensuring non-impunity is unstable and debated, yet the norm of anti-impunity remains strong, such that even when its instincts revert to the Westphalian, such as in the *Arrest Warrants* case, the ICJ takes care to emphasize that what is left of sovereign immunity does not mean "impunity."<sup>56</sup>

## VI. MISREADING HOW INTERNATIONAL LAW REALLY WORKS

One strategy that Koskenniemi uses for deflating the utopian or "triumphalist" expectations that he attributes to humanity-based liberal internationalism is to claim that, despite all the efforts of World War II and now post-Cold War human rights-based international law activism, "instances of law-application are few and the benefits of abstract law-obedience obscure."<sup>57</sup> "International law has never been a sociologically thick aspect of the international world."<sup>58</sup> This claim is closely linked to Koskenniemi's assertion that "deformalization" undermines or circumvents the normative force of international law—"the increasing management of the world's affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively."<sup>59</sup>

Koskenniemi gives little weight to how the decisions and practices of the networks in question are increasingly shaped by international legal normativity,

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55. See *Medellin v. Texas*, 552 U.S. 491, 510–11 (2008).

56. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo. v. Belg.), Judgment, 2002 I.C.J. 3, ¶ 60 (Feb. 14) ("The Court emphasizes, however, that the *immunity* from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy *impunity* in respect of any crimes they might have committed . . .").

57. See Koskenniemi, *Global Governance*, *supra* note 1, at 15.

58. Koskenniemi, *Constitutionalism as Mindset*, *supra* note 1, at 12.

59. Koskenniemi, *Global Governance*, *supra* note 1, at 3.

largely though far from entirely outside the application of international law rules to states through the public authority of institutions such as the Security Council or the ICJ among others. His failure to do so, however, may also relate to some kind of commitment to a formalist understanding of legality or legal normativity.<sup>60</sup>

In recent work, we have attempted to conceptualize the way in which international law works today “beyond compliance” to shape the interests, activities, decisions, and opportunities of multiple actors. This is one of the central meanings of international law becoming human-centered. Take the case of international trade. Notoriously unenforced and unenforceable soft-law, environmental, and “sustainability” norms, as well as international human rights and the International Labour Organization’s (ILO) core labor standards, etc. have become embedded in codes of conduct, voluntary standards, and product labels that have observable effects on the consumer, and therefore, firm behavior. At the same time, at odds with Koskeniemi’s assertion that international trade is regulated by some *lex mercatoria* largely unaffected by the public international law of the World Trade Organization (WTO), the day-to-day business of supply-chain managers, customs brokers, logistics and freight and courier companies, trade finance operators, and political risk insurers is so affected by WTO rules, World Customs Organization (WCO) rules, and rules of regional and bilateral public international law regimes, that these actors follow legal developments in all these regimes closely and their real-world uses of public international law surely dwarfs that of states (as one WTO dispute panel actually noted in the *US-Section 301* case). In the case of investment, the capacity of investors to sue host states is not a product of “private international arbitration” but the public international law of the International Centre for Settlement of Investment Disputes (ICSID) and the New York Conventions, as well as of a vast network of treaties, bilateral and regional. Since here the route to compliance only rarely passes through state-to-state dispute settlement, Koskeniemi is blind to it, and yet the way in which investor’s rights are defined and delimited in these disputes is profoundly shaped

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60. Thus, while as we have sketched earlier in this essay, Koskeniemi is quite preoccupied by the critique of what he sees (wrongly in our view) as Kantian cosmopolitan history and the Kantian project of a *Völkerstatt*. Somewhat buried or muted within his engagement with Kant’s historical writings is the suggestion of desirable possibilities that are opened up by Kant’s thinking about law as such: “fidelity to law . . . irrespective of . . . substance,” Koskeniemi, *Constitutionalism as Mindset*, *supra* note 1, at 31, and “law as crystallization of personal virtue,” *id.* at 33. Eyal Benvenisti and Doreen Lustig have encouraged us to assess these aspects of Koskeniemi’s engagement with Kant. This, however, would require a consideration of the *Metaphysics of Morals* as a whole, not the least aspect of which would be understanding the relation between its two parts, “the Metaphysics of Right” and “the Metaphysics of Virtue.” Our focus here is by contrast on the extent to which Koskeniemi’s misreading of Kant’s cosmopolitanism and philosophy of history informs his attack on humanity law or the human rights, post-Westphalian movement in international law. Joseph Weiler has suggested that we engage with the foundational assumptions and general sensibility that underlie Koskeniemi’s *mode* of polemical critique. If we undertake that exercise in further work, we will have to consider in depth Koskeniemi’s invocation of Kant for the notion of “law as crystallization of personal virtue.” *Id.*, at 33.

by, for example, the International Law Commission (ILC) Articles on State Responsibility and the customary international law of diplomatic protection of aliens, very often as originally interpreted and applied by the ICJ—and its predecessor, the Permanent Court of International Justice (PCIJ).

Just as private standards have been increasingly shaped by the normativity of public international law, public international law has become a vehicle for the diffusion of what are originally non-governmentally created standards: a clear example here is the WTO Technical Barriers to Trade (TBT) Agreement which, subject to certain exceptions and limitations, requires as a treaty obligation that WTO Members use international standards, including those of private bodies, as a basis for their domestic regulations. In turn, the WTO TBT Committee has imposed criteria of transparency, inclusiveness, and participation for these, often private, international standardization bodies as a logical corollary of their standardization activities having been transformed through the treaty norms into exercises of public authority in the sense used by Armin Von Bogdandy and Ingo Venzke as well as Bogdandy and Matthias Goldmann.<sup>61</sup>

These criteria, closely connected to ideas of publicity and deliberation in the liberal progressive tradition from Kant to Habermas, have now been adopted by the Appellate Body of the WTO as guidance for the reading of the treaty itself, based upon the canons of interpretation in the *Vienna Convention on the Law of Treaties*. As a result, private actors, their activities now guided by liberal conceptions of legitimate public authority, in effect create norms that automatically become sources of public international law obligation (in a largely unlimited domain of regulatory activity). In sum, exactly contrary to what Koskenniemi argues, the destabilization of the public/private divide and deformalization greatly enhance the diffusion and effects of public international law, rather than the reverse.

Let us return to Koskenniemi's attempted deflation of the end of impunity as reflected in the rise of international criminal law and the creation of the ICC—often regarded as a key achievement of humanity-based international law. According to Koskenniemi, liberal legal internationalists should not be so certain of this achievement: “[T]he Vienna Convention on the Law of Treaties does provide impeccable arguments for bilateral agreements to release the hegemon from the jurisdiction of the International Criminal Court.”<sup>62</sup> But, as Teitel has argued elsewhere, the humanity-law normative move toward ending impunity, reflected in the public international law framework of the ICC, serves to further unleash universal jurisdiction in domestic courts (where it has been relativized by

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61. See Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 57–59 (2013); Armin Von Bogdandy & Matthias Goldmann, *Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law*, in SOVEREIGN FINANCING AND INTERNATIONAL LAW: THE UNCTAD PRINCIPLES ON RESPONSIBLE SOVEREIGN LENDING AND BORROWING (Carlos Esposito, et al. eds., 2013).

62. Koskenniemi, *Legal Cosmopolitanism*, *supra* note 1, at 476.



domestic law), and becomes embedded in the very logic of revolutions whose core political aims entail the bringing to account of corrupt or tyrannical leaders for their past abuses. Here, humanity-law is doing its work not in the palaces of The Hague and Geneva, but in the streets of Tunis and Cairo. To attribute revolutionary force to the idea of an end to impunity is by no means to deny its normative complexities. Sometimes criminal justice can threaten, rather than advance, political reconciliation, leading to complex strategies such as South Africa's Truth and Reconciliation Commissions, which, wrongly, may be mistaken for the endorsement of blanket amnesties.

## VII. FRAGMENTATION

As with “deformalization,” Koskeniemi claims that fragmentation is a “threat” to humanity-based liberal legal internationalism. We, however, see fragmentation as a mode of the dissemination and impregnation of humanity-law normativity in multiple sites of deliberation and decision-making.<sup>63</sup> Once again, the error of Koskeniemi is ultimately rooted in his misreading of Kant—the mistaken projection onto the Kantian vision of the longing for “a single global order” or a “single international law” or “code.”<sup>64</sup> The multiplication of sites is itself in part due to the humanity-orientation; no longer does one need a state or even (directly) to address oneself to a state to make a claim that sounds in international law. This is a meaning to humanity that has nothing to do with, and indeed is contrary to, the hegemonic sense suggested by Schmitt and Koskeniemi—international law belongs to all of us *qua* human. It is not the exclusive property of states, or a set of agents closely associated with states.

On the one hand, Koskeniemi critiques what he calls the “ethics” of humanity-based liberal legal internationalism for being trapped by particular international law regimes concerned with topics such as terrorism, war punishment, and sanctions and thus indifferent to economic justice or injustice.<sup>65</sup> On the other hand, when humanity-based liberal legal internationalism does bring human rights into the international regimes and processes concerned with globalization, this is a bad thing. Koskeniemi writes, “[t]here is much to be said in favor of human rights—including human rights experts—staying *outside regular administrative procedures*, as critics and watchdogs, flagging the interests of those who are not regularly represented.”<sup>66</sup> Behind this judgment are two related

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63. See, e.g., Howse & Teitel, *Beyond Compliance*, *supra* note 1; Howse & Teitel, *Cross-Judging*, *supra* note 1.

64. See Koskeniemi, *Global Governance*, *supra* note 1, at 2–3 (“Kant sketched the structure of a cosmopolitan federation, the international world as a society of democratic states under the rule of law . . .”).

65. See Koskeniemi, *The Turn to Ethics*, *supra* note 1, at 22–23 (“The peace that will be enforced will not be racial harmony in Los Angeles and the terrorism that shall be branded as the enemy of humanity will not be an intellectual property system that allows hundreds of thousands of Africans march into early death by sexually transmitted disease.”).

66. Koskeniemi, *Human Rights Mainstreaming*, *supra* note 1, at 55.

false dichotomies.

First is the dichotomy between the languages of rights and administration, the former presented as one of absolutes, even pseudo-natural law, and the latter of interest-balancing and brokering trade-offs about outcomes. For Koskenniemi, once human rights becomes part of the “regular political process” it loses all its distinctive normative force, with any old interest being claimed as a right, and balancing of interests dressed up as balancing of “rights” themselves.<sup>67</sup> The fallacy deployed here is this: unless one can invoke a right claimed as a trump or absolute, as a norm beyond political disagreement, then the language of right is meaningless, incoherent, or even mendacious, as Schmitt would have it.

We have a very different view of human rights and how they interact with politics, global and local. This has to do with paying close attention to the “human” as it bears on the meaning of what it is to have a “right.” As we have seen, Koskenniemi’s analysis of “humanity” largely stops at the Schmittian presumption that “humanity” is simply an artifice for the legitimation of hegemonic or imperial power.

For us, to stake a *human* rights claim is to demand that the decision-maker, the political process take something into account by virtue of its importance or connection to the very humanity of the claimant (i.e., not because she is a voter, a citizen, or a subject in a closed polity, but regardless of the status she may already have in any such polity). The specific force of this sense of the “human” in “human rights,” and why it implies a project of international law, is taken up in Teitel’s *Humanity’s Law* and articulated by Catherine MacKinnon in *Are Women Human?*<sup>68</sup> But the phenomenological or experiential ground of this notion of humanity, and the relevant notion of universality, are already stated simply and eloquently by Kant in *Perpetual Peace*: “The *peoples* of the earth have . . . entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*.”<sup>69</sup> Kant’s reference to peoples here is significant—the “universal community” he has in mind as a foundation of cosmopolitan right is not, as comes through particularly clear in this passage, a single universal *state* or, “order,” or even a global “constitution,” but a community of persons and peoples.

This, of course, says nothing about how the claim being asserted in this specific sense as a “*human* right” must be balanced with other human rights. This balancing depends on the content of the rights in question, the specific policy and institutional context, and so forth. Koskenniemi merely asserts that all that happens, or could happen, is interest-balancing or policy trade-offs, dressed up in human rights terms. But it might well be that there is a pattern of principle and normative coherence to be discerned in the way that specific “human rights” have been brought in or could be brought in to processes of global economic

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67. See *id.* at 48–49.

68. See generally CATHERINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (2006).

69. KANT, *PERPETUAL PEACE*, *supra* note 10, at 107–08 (first emphasis added).

governance. For example, one cannot know if “human rights have completely lost their specificity,”<sup>70</sup> unless one stops to examine the details of the rights, actors, institutions, and policy substance, which we attempt to do. We attempt this, in a modest way, in *Beyond the Divide*, where we examine how human rights claims may bear on the decision-making in the WTO, singling out particular rights as positivized in the U.N. Covenant on Social and Economic Rights, and particular norms, institutions, and policy challenges of the multilateral trading order.<sup>71</sup> Koskenniemi’s sweeping claim that rights are “unlimited and (thus inevitably) conflictual” can hardly count as a demonstration that the positive international law of human rights has in fact failed to give meaningful delimited content to human rights or guidance in managing the conflict between rights in a manner that does not unduly destabilize or render devoid of determining meaning the rights themselves.<sup>72</sup> Indeed, perhaps the largest contribution of international law to cosmopolitan right is not through human rights “compliance” as such. Rather, it is the very act of positivizing human rights, which makes (international) human rights more than a sentiment, and gives it an inter-subjective public form that frees human rights claims from the need for recourse to “natural law.”

The other Koskenniemi dichotomy—equally false—is between the stance of the revolutionary activist and that of the manager/administrator. For the human rights activist to plunge into administration, according to Koskenniemi, is to jettison what Koskenniemi now admits to be something positive about human rights—its critical, revolutionary edge. But is this true, or is it merely an assertion of tired Weberian ideal types? Kojève, the radical philosopher, did not disappear when he went into the French bureaucracy; while he was negotiating for France in the General Agreement on Tariffs and Trade as the chair of the original legal drafting sub-committee, Kojève was also engaged in an on-going philosophical defense of Hegelian Marxism, most notably in his public and private exchanges with Leo Strauss.<sup>73</sup> While helping to construct Bretton Woods within the Roosevelt Administration, Harry White was devising a radical program for integrating America and the Soviet Union into an economic structure that would fundamentally marginalize the role of private capital in shaping economy and society (and he was spying for Moscow!).<sup>74</sup>

Often David Kennedy’s and Koskenniemi’s critical perspectives on international law are viewed as similar or identical. Yet, Kennedy grasps the fluidity and interchangeability of roles and identities; indeed, for Kennedy, the activist who denies that she is also a functionary suffers from a lack of self-

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70. Koskenniemi, *Human Rights Mainstreaming*, *supra* note 1, at 50.

71. See Howse & Teitel, *Beyond the Divide*, *supra* note 1, at 3–12.

72. Koskenniemi, *Human Rights Mainstreaming*, *supra* note 1, at 50.

73. See generally MARCO FILONI, *LE PHILOSOPHE DU DIMANCHE: LA VIE ET LA PENSÉE D’ALEXANDRE KOJÈVE* (2010).

74. See generally BENN STEIL, *THE BATTLE OF BRETTON WOODS: JOHN MAYNARD KEYNES, HARRY DEXTER WHITE, AND THE MAKING OF A NEW WORLD ORDER* 6 (2013).

conscious knowledge, one that is dangerous.<sup>75</sup> This brings into relief one of the main reasons why Koskenniemi ignores the complexity and subtlety of the sensibility behind humanity-oriented legal internationalism. Koskenniemi deploys the usual arguments of contingency and indeterminacy against humanity-oriented legal internationalism. But contingency and indeterminacy are only problems if they necessarily translate into normative incoherence or contradiction, if they cannot be understood and governed *within* a comprehensible and legitimate normative logic of humanity-based international law.

To present a picture of incoherence or contradiction, Koskenniemi has to revert to a set of supposedly fatal dichotomies, which ultimately depend upon fixed categories and distinctions with purportedly stable meanings and boundaries between them;—"law" versus "politics;" bureaucratic governance versus radical utopianism; "the iron laws of power" versus ideal or utopian challenges. As Leo Strauss shrewdly observed of Carl Schmitt,<sup>76</sup> because Koskenniemi is locked into polemics *against* a certain liberal internationalist vision, he is forced to essentialize a reality *contra* the enemy—and thus to assert what he calls in one place "iron laws of power."<sup>77</sup> But perhaps "power" itself is a shifting reality, and these shifts are intertwined with humanity law in complex ways.<sup>78</sup> In fact, Koskenniemi's deployment of "deconstruction," "postmodernity," "contingency," and "indeterminacy" at the very same time supposes stable or permanent meanings to notions such as "empire," "power," "law," and "politics."

By contrast, we share with David Kennedy the notion that we free ourselves to grasp the humanity-law moment as a new conjunction of forces, a situation of fluidity that demands clarity about both the risks and opportunities through the endlessly dynamic relation of law to social reality as appreciated already by Grotius and Montesquieu (and perhaps even Aristotle).<sup>79</sup>

### VIII. CONCLUSION

In the post-Cold War period, Martti Koskenniemi has critiqued humanity-law on a number of different grounds. In this essay, we engage this critique; in particular, we challenge Koskenniemi's arguments that humanity-law is associated with a dogmatically progressive theory of history, that it is oriented toward a world government, that it relies on a version of historical determinism, that it posits a false universalism, and that legal indeterminacy undermines its claims. Many of our disagreements are related to Koskenniemi's reading of Kant, and we explained in some detail where our readings diverge. Other differences reflect our competing

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75. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

76. Leo Strauss, *Notes on Carl Schmitt, the Concept of the Political*, in CARL SCHMITT AND LEO STRAUSS: *THE HIDDEN DIALOGUE* 97 (Harvey Lomax trans., 1995).

77. Koskenniemi, *Learn from Karl Marx?*, *supra* note 1, at 246.

78. See generally NAÍM, *supra* note 34.

79. See generally ARISTOTLE, *NICOMACHEAN ETHICS* 67–85 (Terence Irwin trans., Hackett Publ'g Co. 2d ed. 1999).

notions of how contemporary law works, particularly the significance of non-state actors and the effects of international law beyond and below the state. Invoking Carl Schmitt, Koskenniemi refers to “the ease with which such purportedly universal terms [as humanity] may be used for dubious purposes.”<sup>80</sup> But far from being comfortable in legitimizing total war à la Schmitt and Koskenniemi caricature, humanity-law considerably narrows the window for humanitarian intervention by insisting that its agents and its beneficiaries comport themselves in accord with humanity-law demands. Exploring these various differences offers an important opportunity to address some misconceptions about humanity-law found in Koskenniemi’s writings, as well as to theorize more deeply about the assumptions and implications of a humanity-orientation to international law, including the precise senses in which the notion of concept of humanity informs or underpins this vision of international legal order.

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80. Koskenniemi, Review of HUMANITY’S LAW, *supra* note 1, at 397.