

PRIVATE LAWYER IN DISGUISE? ON THE ABSENCE OF PRIVATE LAW AND PRIVATE INTERNATIONAL LAW IN MARTTI KOSKENNIEMI'S WORK

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I. INTRODUCTION

Studies on the historical uses of particular concepts or doctrines should also trace their connections with the parallel concepts and doctrines within neighbouring areas such as private law, international relations or political theory and philosophy.¹

“Human rights are like love,” Koskenniemi suggests, “both necessary and impossible.”² An eccentricity? Equations of law and love may seem like the stuff of poets,³ not legal theorists, let alone practitioners.⁴ And yet, Koskenniemi, the leading public international lawyer, finds among legal theorists an unlikely ally in his claim that law and love are interrelated. Ernest Weinrib, perhaps the leading North American theorist of private law, makes the same claim for private law that

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1. Martti Koskenniemi, *Why History of International Law Today?*, 4 RECHTSGESCHICHTE 61, 64–65 (2004).

2. MARTTI KOSKENNIEMI, *Human Rights, Politics, and Love*, in THE POLITICS OF INTERNATIONAL LAW 153, 153 (2011) [hereinafter KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW]. Love features so prominently (and problematically) elsewhere in Koskenniemi's more recent work that the theme would deserve a whole article of its own. See, e.g., MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 598 (Cambridge Univ. Press 2005) (1989) [hereinafter KOSKENNIEMI, FROM APOLOGY TO UTOPIA] (“[C]onsensus-seeking (like appeals to love) may often hide a subtle authoritarianism.”); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 502 (2002) [hereinafter KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS] (“[The culture of formalism] insists that absent the possibility of building social life on unmediated love or universal reason, persuading people to bracket their own sensibilities and learn openness for others, is not worthless.”); Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1, 11 (2011) [hereinafter Koskenniemi, *Empire and International Law*] (“Love is often difficult to distinguish from a desire to dominate – which is not to say that no distinction should be made between them.”).

3. See, e.g., W.H. AUDEN, *Law Like Love*, in COLLECTED POEMS 262, 262–64 (Edward Mendelson ed., 1991).

4. With exceptions. See The Honorable Justice Michael Kirby AC CMG, Griffith University Graduation Ceremony: But the Greatest of These is Love (Dec. 16, 2008) (transcript available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_16dec08.pdf) (discussing the importance and role of love in politics and life). I thank Mary Keyes for pointing out this lecture to me. See generally DARYL DELLORA, MICHAEL KIRBY: LAW, LOVE AND LIFE (2012).

Koskenniemi makes for human rights: “private law is just like love.”⁵

Does that not mean, logically, that human rights are like private law? In one way, this parallel between two scholars is certainly a coincidence. It is hard to imagine that either Koskenniemi or Weinrib had the other in mind when they wrote about love. Indeed, it is hard to think, at first, of two authors more distant from each other. One of them works exclusively in public international law, the other exclusively in private law. One of them is a critic (though one with a peculiar bent), the other a formalist. One of them increasingly writes in a historical vein, the other draws on philosophical traditions. (Both, however, share an admiration for Kant, though Koskenniemi’s admiration seems more ambivalent).

And yet, I suggest that the surprising parallel does suggest that such a connection between Koskenniemi’s work and private law not only exists but also helps shed new light on Koskenniemi’s work. Such a connection is not immediately apparent in Koskenniemi’s own work. Although Koskenniemi’s work is incredibly far-reaching as concerns *public* international law, *private* international law is almost completely absent from it. Even the proclaimed unity of public and private international law, a prominent theme in the nineteenth century (and again today) is discussed at some length, as far as I can see, only in brief passages of an unpublished paper.⁶ Similarly, substantive private law appears, prominently, only in one recent article.⁷ If Koskenniemi is a private lawyer in disguise, as my title suggests, then the disguise has so far been quite complete. A discussion of private law and private international law in Martti Koskenniemi’s work is, largely, the discussion of an *absence*.

I speak, deliberately, of an absence *in*, not an absence *from*, Koskenniemi’s work. The absence of something is very much a presence.⁸ In an important sense, private international law and private law are, unavoidably, part of Koskenniemi’s work. This is so in a general and in a specific way. The more obvious general way is that we now know how public and private are neither neatly separate, nor collapse into each other. Rather, there is a public in the private, and a private in the

5. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 6 (Oxford Univ. Press 2012).

6. Martti Koskenniemi, Nationalism, Universalism, Empire: International Law in 1871 and 1919, at 15–20, 37–39 (Apr. 29, 2005) (unpublished manuscript), available at <http://www.helsinki.fi/eci/Publications/Koskenniemi/Columbia%200405.pdf>. Koskenniemi gives a gracious nod to Karen Knop’s, Annelise Riles’, and my own work on a conflict of laws style as an extension of his critical project in Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 *EUR. J. INT’L L.* 7, 15 n.14 (2009).

7. See, e.g., Koskenniemi, *Empire and International Law*, *supra* note 2 (arguing that the development of a language of private rights was the key legacy of the Salamanca scholars).

8. Jacques Derrida might speak of a trace. In a different context, the German theologian Dietrich Bonhoeffer expressed this beautifully and briefly before the Nazis murdered him: “Nothing can make up for the absence of someone whom we love, and it would be wrong to try to find a substitute; we must simply hold out and see it through. That sounds very hard at first, but at the same time it is a great consolation, for the gap, as long as it remains unfilled, preserves the bonds between us. It is nonsense to say that God fills the gap; God doesn’t fill it, but on the contrary, keeps it empty and so helps us to keep alive our former communion with each other, even at the cost of pain.” DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 176 (SCM Press 2001) (1953).

public. Whereas the presence of the public in private law has been discussed at length by legal realists and their successors, the presence of the private in the public has received comparably scant attention.

However, this suggests only that any discussion of public international also includes, somehow, elements of private law, even if that is not explicitly mentioned. I think it can be shown that Koskenniemi's work has more specific affinities with private law, too. Several of Koskenniemi's concerns—the relation between law and politics, the dichotomy between form and substance in legal argument, the challenge of legal fragmentation—bear specific affinities to private law discourse. And I also suggest that these affinities are not accidental—or somehow created by necessary structural characteristics of legal discourse. Instead, they emerge from proximity, both historically and structurally, between Koskenniemi's particular take on law, and the history and structure of private law discourse.

In order to be able to make this argument, I should say briefly what I mean by private law, and how it transcends, or differs from, the subject matter traditionally understood as private law. I do not primarily mean private law as a legal discipline, with its own rules and institutions, because as such, it remains relatively separate from international law. Elsewhere, Karen Knop, Annelise Riles, and I suggest that private international law is not only a discipline, however—it is also a particular technique, a style.⁹ That technique and that style are not exclusive to the discipline—I believe they can be found in other areas as well. It is especially this style that I will try to trace in Koskenniemi's work. At the same time, addressing private law as a style does not make its doctrine irrelevant. The style has developed largely in doctrinal discourse—in an important way, to be discussed later, it *is* doctrinal discourse—and, therefore, private law matters also as a discipline.

Viewing law as a style immediately raises concerns over the role of politics—a concern that has always been Koskenniemi's too. For this reason alone, I think, relating private and private international law as a technique to Koskenniemi's work would be fruitful. But I also see at least three more specific parallels, each of which is discussed in one of the remaining sections of this article. The first parallel concerns the theme, developed especially in *The Gentle Civilizer of Nations*, of international law as a system that limits, to some extent, what powerful states can do.¹⁰ Systematicity has been discussed most extensively in private law, and the connections with international law, elaborated especially by Hersch Lauterpacht, are worth a new analysis in light of Koskenniemi's work. The second parallel relates to the fragmentation of public international law, a topic Koskenniemi addressed influentially both as an academic and as a member of the International Law Commission. I juxtapose these with private international law as a discipline that deals with a horizontal plurality of legal systems. The third parallel is between Koskenniemi's (controversial) endorsement of a “culture of formalism,” exposed

9. Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 656 (2012).

10. See generally KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2.

in the epilogue of his *The Gentle Civilizer of Nations* and elsewhere, and the special role of form and technique in private law and private international law.

II. SYSTEM AND PRIVATE LAW

Here is a battle European jurisprudence seems to have won. Law is a whole or in the words of the first conclusion made by the ILC Study Group, ‘International law is a legal system.’ You cannot just take one finger out of it and pretend it is alive. For the finger to work, the whole body must come along.¹¹

In one way, the absence of private international law and private law in Koskenniemi’s work is unsurprising. Most contemporary scholars of public international law, especially—but by no means exclusively—in the European tradition,¹² do not address questions of private law, or private international law.¹³ Thus, the schism between public and private international law is relatively firmly established as an institutional one, despite the frequent calls that the boundaries should be overcome or are even claimed to be nonexistent (claims made more often by private than public international law scholars).¹⁴

And yet, in Koskenniemi’s case, the relative absence of private and private international law is a little more interesting than in other scholars’ works. This is so especially because of Koskenniemi’s deep interest in critical theory and matters of disciplinary history. In critical theory, the breakdown of the public/private distinction has almost become a cliché. In the history of international law, private law and private international law reemerge repeatedly.¹⁵ Private law doctrine provided the basis (the “domestic analogy”) for the natural lawyers’ conception of international law as some kind of private law among states; it was discussed again as an analogy for international law in the twentieth century. Koskenniemi’s work rarely takes on these connections in full. But he does address them, and how he does so sheds light on his own approach.

A. Lauterpacht’s Private Law Sources and Analogies

The best starting point to trace the absence of private law in Koskenniemi’s

11. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 17 (2007) [hereinafter Koskenniemi, *The Fate of Public International Law*].

12. See generally Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 J. OF PRIVATE INT’L L. 121 (2008).

13. For a similar critique, see generally Christine E.J. Schwöbel, *Whither the Private in Global Governance?*, 10 INT’L J. OF CONST. L. 1106 (2012).

14. See, e.g., ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARY IN THE INTERNATIONAL CONSTITUTION ORDERING OF PRIVATE LAW 211 (2009); Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT’L LEGAL THEORY 347 (2011) (discussing how international law was eventually divided into public and private spheres and the benefits of bridging the two spheres).

15. Th.M. de Boer, *Living Apart Together: The Relationship Between Public and Private International Law*, 57 NETH. INT’L L. REV. 183 (2010); Alex Mills, *The Private History of International Law*, 55 INT’L & COMP. L.Q. 1 (2006).

work is in his texts on Lauterpacht, whom he has discussed perhaps more than any other scholar.¹⁶ Lauterpacht, in his early work, made the private law foundations of international law the core of his research; his first English monograph was called *Private Law Sources and Analogies of International Law*.¹⁷ He opposed the strict international law positivism that rejected any private law analogies in public international law, and especially the idea that all international law rested on sovereignty, thus leaving no space for any law outside of the will of nations.¹⁸ In fact, he demonstrated widespread use of private law analogies in many areas of international law. And this seemed a good thing: “A critical examination shows that the use of private law analogy exercised, in the great majority of cases, a beneficial influence upon the development of international law”¹⁹

Koskenniemi, in his discussions of Lauterpacht, devotes comparatively little attention to this book and of Lauterpacht’s later monograph on international law’s function,²⁰ but what he writes is important. Koskenniemi emphasizes Lauterpacht’s project as that of establishing that international law is a complete system,²¹ no less advanced or complete than other branches of law.²² In connection with that, he

16. See, e.g., Martti Koskenniemi, *Hersch Lauterpacht 1897-1960*, in JURISTS UPROOTED: GERMAN-SPEAKING EMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 601 (Jack Beatson & Reinhard Zimmermann eds., 2004) [hereinafter Koskenniemi, *Hersch Lauterpacht*] (following, in parts very closely, the article on the Victorian Tradition cited below); Martti Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, 2 J. INT’L CRIM. JUST. 810 (2004) [hereinafter Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*] (discussing Lauterpacht’s relevance for international criminal law); Martti Koskenniemi, *Lauterpacht: the Victorian Tradition in International Law*, 8 EUR. J. INT’L L. 215 (1997) (exploring Lauterpacht’s work in international law). In addition, the book *The Gentle Civilizer of Nations* emerged from Koskenniemi’s Lauterpacht lectures given in Cambridge in 1998. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at xi. Its core was Koskenniemi’s earlier article on the Victorian tradition that later became, with changes, its fifth chapter.

17. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927) [hereinafter LAUTERPACHT]. Lauterpacht had treated questions of private law analogy earlier (and more critically). HERSCH LAUTERPACHT, DAS VÖLKERRECHTLICHE MANDAT IN DER SATZUNG DES VÖLKERBUNDES: ZUGLEICH EIN BEITRAG ZUR FRAGE DER ANWENDUNG VON PRIVATRECHTLICHEN BEGRIFFEN IM VÖLKERRECHT (1922). An English translation has been published as HERSCH LAUTERPACHT, *The Mandate under International Law in the Covenant of the League of Nations*, in 3 INTERNATIONAL LAW: COLLECTED PAPERS 29 (E. Lauterpacht ed., 1977). The subtitle translates as “[b]eing also a contribution to the question of the application of private law concepts in international law.” *Id.* at 29; see also *id.* at 51–61 (discussing the application of private law concepts to international law).

18. See, e.g., LAUTERPACHT, *supra* note 17, at 43–87.

19. *Id.* at viii, quoted in KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 375 (alteration in original).

20. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (1933).

21. Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, *supra* note 16, at 812.

22. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 366.

points out Lauterpacht's emphasis on "the primacy of law over politics."²³ This all seems accurate, as far as it goes. However, from reading Koskenniemi one would hardly glimpse that the body of law Lauterpacht invokes is private law. Instead, Koskenniemi just speaks, vaguely, of the invocation of "individual rules,"²⁴ "domestic law,"²⁵ "municipal law,"²⁶ "maxims of municipal jurisprudence and general principles of law."²⁷ From reading Koskenniemi's account, it would seem that Lauterpacht chose private law for mere convenience—this was an area that would be familiar to domestic lawyers.²⁸

But for Lauterpacht, the choice of private law was not arbitrary at all. He pointed out explicitly that where international lawyers have regard to domestic law they rarely find anything in criminal or administrative law; they have to go to private law.²⁹ Indeed, even the reference to "domestic" or "municipal" law is inexact; Lauterpacht expressly rejected analogies with any one private law system and instead used only analogies with private law concepts and ideas common to all legal systems³⁰—general principles of law like in Article 38(c) of the International Court of Justice (ICJ) Statute, which is central to his argument.³¹ Thus, it appears that, for Lauterpacht, establishing international law as a comprehensive system presupposes similarities with private law, not with any body of law.³²

B. Private Law and Natural Law

But does Lauterpacht really mean private law when he says so? Maybe private law really was merely a placeholder for natural law? Note that Koskenniemi himself discusses explicitly the role of private law and natural law

23. *Id.* at 379.

24. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 2, at 53.

25. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 366; Koskenniemi, *Hersch Lauterpacht*, *supra* note 16, at 616–17.

26. Koskenniemi, *Hersch Lauterpacht*, *supra* note 16, at 618.

27. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 364; Koskenniemi, *Hersch Lauterpacht*, *supra* note 16, at 617–18.

28. Koskenniemi, *Hersch Lauterpacht and the Development of International Criminal Law*, *supra* note 16, at 815.

29. LAUTERPACHT, *supra* note 17, at 35.

30. *Id.* at 34, 84–85.

31. *See id.* at viii–ix (describing the significance of the enactment of Article 38(c) of the ICJ Statute). It is worth noting the influence the idea of general principles had on comparative law, from Schlesinger's Common Core Project to the UNIDROIT Principles of International Commercial Contracts. See Axel Metzger, *General Principles of Law*, in I Max Planck Encyclopedia of European Private Law 777 (Jürgen Basedow et al. eds., 2009).

32. Recently, the argument has been made that Lauterpacht's thought should be understood as arising from Rabbinical Law: Reut Yael Paz, *Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law*, 4 GOETTINGEN J. OF INT'L L. 417 (2013). I see no contradiction: the ideas the author identifies as Rabbinical (primacy of law over politics, jurists and scholars over sovereigns; *id.* at 442) are also those of private law. For more connections between Jewish law and private law, see Chaim Saiman, *Public Law, Private Law, and Legal Science*, 56 AM. J. COMP. L. 691, and in *BEYOND THE STATE: RETHINKING PRIVATE LAW* 269 (Nils Jansen & Ralf Michaels eds., 2008).

within international law for another set of historical authors, namely the Late Scholastics.³³ Here, he quite ingeniously points out that their international law writings should not be viewed in separation from their writings on private law.³⁴ Rather, he suggests, convincingly, that private law and international law combine, in Vitoria and his contemporaries and successors, to form the law of empire.³⁵ Thus, their project was not just, not even primarily, a humanitarian one.³⁶ Rather, their contribution lay in “the development of a whole vocabulary that has since come to delineate the imperial dimensions of international law.”³⁷ That vocabulary consisted primarily of (Roman) law notions.³⁸ Koskenniemi discusses three, of which one (*dominium*) stems from private law, one (*ius gentium*) concerns, historically, mainly private law, and only one (*bellum iustum*) does not.³⁹ And he emphasizes the extent to which a general concept of property provided the basis for a transnational law of commerce. But he also suggests that an important distinction existed, for the Late Scholastics, between moral theology and natural law on the one hand, and private law on the other.⁴⁰

And yet, even if the Late Scholastics distinguished natural from private law, what they established as private law is what subsequently influenced natural law theory.⁴¹ In the familiar dichotomy of positive and natural law, the private law of individual states falls on the side of positive law, but private law as an (imagined) transnational law shares more with natural law. Grotius, a core figure in the history of (not surprisingly) both international and private law, treats the positive private law of the Netherlands separately from natural law, and natural law—as the basis of international law—is mostly private law.⁴²

33. See generally Koskenniemi, *Empire and International Law*, *supra* note 2.

34. Probably the corollary is true as well: their private law writings should not be viewed in isolation from their international law writings (as they usually are). For a recent example, see JANSEN, *infra* note 40. But cf. JAMES GORDLEY, *THE JURISTS—A CRITICAL HISTORY*, 101–05 (2013) (discussing what the Late Scholastics said about international law).

35. See generally Koskenniemi, *Empire and International Law*, *supra* note 2.

36. *Id.* at 11.

37. *Id.*

38. See generally Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT’L L. 25 (2005) (illustrating the role of Roman law concepts in international law).

39. Koskenniemi, *Empire and International Law*, *supra* note 2, at 11–16.

40. This may be contested. See generally NILS JANSEN, *THEOLOGIE, PHILOSOPHIE UND JURISPRUDENZ IN DER SPÄTSCHOLASTISCHEN LEHRE VON DER RESTITUTION: AUßERVERTRAGLICHE AUSGLEICHANSPRÜCHE IM FRÜHNEUZEITLICHEN NATURRECHTSDISKURS* (2013) (suggesting that moral theology provides the foundation of private law in the Late Scholastics).

41. Similarly, “positivism emerged as a logical development of natural law in order to answer those practical questions that arose once a naturalist worldview had consolidated as part of educated European common sense.” Martti Koskenniemi, *Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law*, 18 CONSTELLATIONS 189, 190 (2008) [hereinafter, Koskenniemi, *Into Positivism*].

42. See generally HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (1625), available at <http://babel.hathitrust.org/cgi/pt?id=ucm.532377566x;view=1up;seq=1>; HUGO GROTIUS,

That same distinction between particular positive private law on the one hand, and general private law as quasi-natural law on the other, can also be found in Lauterpacht's work. Granted, his fight against the autarky of international law from private law was part of his fight against the positivism of his time and, therefore can be viewed as an endorsement of some type of natural law.⁴³ And indeed, he saw in private law the embodiment of equity and justice and thus invoked the natural law affinities of private law.⁴⁴ But it still matters that this was private law. Lauterpacht criticized authors who claimed that what they used by analogy was not private law, but instead something called "general law," "general jurisprudence," or even "philosophy of law"—that general law, he pointed out, was drawn almost exclusively from private law; it was thus not very different.⁴⁵ And when he opposed analogies with private law, he meant analogies with the (positive) private law of individual states, not the general principles of law.⁴⁶ In other words, if private law serves as a placeholder for natural law, this makes it more, not less, important that private law, rather than some other body of law, serves as the foundation of international law.

C. *The Role of System*

Why, then, is it relevant that Lauterpacht chooses private law, and why does Koskenniemi not pick up on this aspect? I suggest that for Lauterpacht, the main force of private law (rather than another body of law) as the foundation of international law lies not in its vocabulary or its scope of application. It lies in the specific affinity to the *system* that private law has traditionally had. Koskenniemi does not make that connection because he focuses on different aspects: In his work on the Late Scholastics, Koskenniemi focuses on private law, but not on its systemic character. In his work on Lauterpacht, Koskenniemi focuses on the systemic character of the law, but not on its explicit roots in private law. Koskenniemi therefore overlooks, unfortunately, the close relation between systematicity and private law.

Where does the concern with the law's systematicity and comprehensiveness come from in the first place? Mario Prost has recently shown, admirably, how unclear the concept of unity—and thus, by extension, systematicity—of current

INLEIDINGE TOT DE HOLLANDSCHE RECHTS-GELEERTHEYD (1631) (on which see R.W. Lee, *The Introduction to the Jurisprudence of Holland* (Inleiding tot de Hollandsche Rechts-Geleertheyd) of Hugo Grotius, TRANSACTIONS OF THE GROTIUS SOCIETY 29 (1930)); Edward Dumbauld, *Grotius' Introduction to the Jurisprudence of Holland*, 2 J. PUB. L. 112 (1953).

43. See, e.g., LAUTERPACHT, *supra* note 17, at 7–8 (describing the conflict between the positivist and natural law schools of thought during the late nineteenth century and positivism's emphasis on the self-sufficiency of international law); cf. *id.* at 50–51 (proposing that positivism's emphasis on autonomy was a major reason for private law's poor reception in the international public law domain).

44. See *id.* at 67 (equating decisions made in accord with justice to decisions made based on private law).

45. *Id.* at 34–37.

46. *Id.*

international law actually is today.⁴⁷ Koskenniemi, with his rich background in public international law's history, can provide parts of an answer: "Systemic thinking has always been a preserve of academics, especially German academics."⁴⁸ In two insightful recent pieces, Koskenniemi points out how much of current public international law thinking derives from German public law.⁴⁹ He rightly points to the positivist, scientific, classificatory, and anti-political nature of German public law scholarship in the eighteenth and nineteenth centuries.⁵⁰ He does not, however, take the further step of analyzing the extent to which this specific character of German public law scholarship itself emerges from German private law scholarship.⁵¹ For the nineteenth century, this emergence seems quite clear.⁵² Gerber and Laband, whom Koskenniemi rightly identifies as central to the foundations of an emerging German public law and, in consequence, public international law⁵³ drew, in turn, on private law scholarship.⁵⁴ Paul Laband not only did for public law what Friedrich Carl von Savigny had done earlier for private law; he explicitly drew on Savigny's system of private law, almost copying his methodology.⁵⁵ Without much exaggeration, one can say that the particular

47. See generally MARIO PROST, *THE CONCEPT OF UNITY IN INTERNATIONAL LAW* (2012).

48. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 559 (2002) [hereinafter Koskenniemi & Leino, *Postmodern Anxieties*]; see also Martti Koskenniemi, *Between Coordination and Constitution: International Law as a German Discipline*, 15 REDESCRIPTIONS 45, 63 (2011) [hereinafter Koskenniemi, *Between Coordination and Constitution*] (naming systematicity as one theme of German thought on international law).

49. Koskenniemi, *Between Coordination and Constitution*, *supra* note 48, at 45–46; Koskenniemi, *Into Positivism*, *supra* note 41, at 190–91; see also KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 179–265.

50. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 179–265.

51. See generally Ralf Michaels, *Systemfragen des Schuldrechts*, in II HISTORISCH-KRITISCHER KOMMENTAR ZUM BGB I (Mathias Schmoeckel et al. eds., 2007).

52. This is not to say that all of German public law was invented in private law. See Michael Stolleis, *Die Historische Schule und das öffentliche Recht*, in DIE BEDEUTUNG DER WÖRTER: STUDIEN ZUR EUROPÄISCHEN RECHTSGESCHICHTE: Festschrift für Sten Gagnér zum 70. Geburtstag 495, 495–508 (Michael Stolleis et al. eds., 1991) (explaining the origins of a historical school in German public law prior to, or at least [partly] independent of, the historical school in private law).

53. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 183–85.

54. See generally WALTER WILHELM, *ZUR JURISTISCHEN METHODENLEHRE IM 19. JAHRHUNDERT: DIE HERKUNFT DER METHODE PAUL LABANDS AUS DER PRIVATRECHTSWISSENSCHAFT* (1958). For a review in English, see A.G. Chloros, Book Review, 8 INT'L & COMP. L. Q. 425 (1959). For this reason, I would see less continuity between Gerber's and Laband's positivism on the one hand and Kelsen's on the other than does Koskenniemi; Kelsen, unlike Gerber and Laband, argues from an explicit public law perspective. See also WALTER PAULY, *DER METHODENWANDEL IM DEUTSCHEN SPÄTKONSTITUTIONALISMUS: EIN BEITRAG ZUR ENTWICKLUNG UND GESTALT DER WISSENSCHAFT VOM ÖFFENTLICHEN RECHT IM 19. JAHRHUNDERT* 112 (1993) (describing Gerber's conception of the connection between public and private law); MICHAEL STOLLEIS, *PUBLIC LAW IN GERMANY 1800-1914* (2001).

55. See generally WILHELM, *supra* note 54; Chloros, *supra* note 54, at 426 (summarizing Savigny's contributions).

juridical character of nineteenth century German public law is a private law style.

Thus, for German academics, the search for a system has roots in legal philosophy, but it finds its greatest scope of application in private law. Indeed, the systematic character of law has long been an interest (one might even say an obsession) for private lawyers.⁵⁶ One need only read the letters in which Bernhard Windscheid, a leading German private lawyer of the nineteenth century, analyzes the best order for individual technical rules in the new German Civil Code to appreciate the amazing importance of order and systematicity for private lawyers.⁵⁷ This is not to say that private law entirely dominated systematization of public international law,⁵⁸ but it appears correct to say that systematization was a concern for private lawyers more than for public lawyers, at least after the end of natural law systems.

There is a reason for the particular interests private lawyers had in systematizing the law. Public law did not need to be coherent; each rule could derive its authority from the sovereign's command. Private law could in theory be based on such a command as well, and in the twentieth century, the conviction grew that it actually does. Yet, for a long time it was considered instead as a law prior to the sovereign's command—a law that transcends states in a way not dissimilar from the way in which international law transcends states. Sovereigns could interfere with this law, but they could not disrupt it altogether. This was so only because private law was able to develop its own, internal rationality, and this seemed possible only through systematization. Individual rules could not yield answers to hard cases (the perennial problem of legal formalism), but the system at large could be considered sufficiently comprehensive to make such answers possible.⁵⁹

The realist critique of such attempts of systematization—which had predecessors in the nineteenth century already—made two important points. The first is a point that we also find prominently in Koskenniemi's work on public international law: any system of law is necessarily internally incoherent, because it must attempt to combine opposing principles and sets of values.⁶⁰ The second point is less obvious but perhaps more important. Systematization is an attempt to protect the law from political interference, the creation of a superstructure that shapes the way we think. A systematized private law is relatively immune against political interventionist law. Interventionist law stands necessarily isolated within the larger system, and the system may confine its scope to a minimum. Rules on

56. The most comprehensive monography I am aware of is PAOLO CAPPELLINI, *SYSTEMA IURIS* (2 Vols, 1984-85).

57. See Werner Schubert, *Windscheids Briefe an Planck und seine für Planck bestimmten Stellungnahmen zum Schuldrechtssystem und zum Besitzrecht der 1. BGB-Kommission*, 95 *ZEITSCHRIFT FÜR RECHTSGESCHICHTE—ROMANISTISCHE ABTEILUNG* 283, 312–14 (1978).

58. See, e.g., CARL BARON KALTENBORN VON STACHAU, *KRITIK DES VÖLKERRECHTS NACH DEM JETZIGEN STANDPUNKTE DER WISSENSCHAFT* 286–305 (1847).

59. For what follows, see generally Ralf Michaels, *Of Islands and the Ocean: The Two Rationalities of European Private Law*, in *THE FOUNDATIONS OF EUROPEAN PRIVATE LAW* 139 (Roger Brownsword, Hans-Wolfgang Micklitz, Leone Niglia & Stephen Weatherill eds., 2011).

60. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 590–96.

the strict interpretation of statutes that existed both in the common and the civil law are good examples. The German opposition to a specialized consumer law is another example—the critique may have been political, but it was also aesthetic: a consumer law would undermine the harmonious architecture of traditional law. We find these concerns also in public international law. Attempts to systematize the law were attempts to free the law from the eccentricities of sovereigns and thus give international law any relevancy at all.

Lauterpacht's suggestion to use private law could thus be seen as an attempt to depoliticize international law. But this is not the only possible interpretation. His more direct project is to repoliticize international law as a system that goes beyond the mere exercise of sovereign discretion. That idea—to save international law from pure power—is a project that still seems attractive to Koskenniemi as well, particularly in light of neorealist and impoverished visions of international law, presented especially by some American authors, as being no more than that. This project—to save international law from the mere exercise of brute power—is what inspired the quote about international law as the gentle civilizer of nations, which Koskenniemi borrowed from George Kennan.⁶¹ Moreover, it highlights one aspect that international law and private law share. Both are, in an important way, not the laws of a state. Of course, international law is based, to a large extent, on states' actions. Of course, private law has become a domain of the state. And yet, both areas of law still share a history, and also an attitude, that puts them beyond states. Therefore, their systematicity develops as a necessary alternative to sovereign command and creates an important point of conceptual overlap.

III. PLURALISM AND PRIVATE INTERNATIONAL LAW

From the perspective of classical public international lawyers, conflicts between normative systems are, however, pathological.⁶²

The question is never whether or not to go by law but by which law or whose law.⁶³

Systematicity, as discussed in the previous section, creates and presupposes a certain degree of coherence. One of today's concerns—Koskenniemi has called it an “anxiety”—in international law is that such coherence no longer exists, in view of the “fragmentation of international law.”⁶⁴ Koskenniemi himself has worked extensively on fragmentation, both as an academic and as a member of the

61. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at v (quoting GEORGE KENNAN, AMERICAN DIPLOMACY 53–54 (Univ. Chicago Press 1984)). The epilogue, however, clarifies that Koskenniemi's claim is not, as is often thought, that international law today actually functions as a “gentle civilizer.” He is quite explicit that the idealism that inspired the gentle civilizer idea represented a historical period and that that period is over. *Id.*, at 510–17.

62. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48, at 560.

63. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 2, at xiv.

64. See Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48, at 553–56 (providing specific instances of concern or anxiety among the international legal community).

International Law Commission.⁶⁵ Again, there are important, but underexplored, affinities between Koskenniemi's work on public international law and the modes of thought in private law, in this case especially private international law.⁶⁶

A. Fragmentation and the Fragmentation Report

Fragmentation was considered an issue, sometimes even a problem, in international law before Koskenniemi addressed it, but Koskenniemi has certainly been instrumental in bringing it to prominence, both through scholarly publications⁶⁷ and his leading role in the International Law Commission Report on Fragmentation.⁶⁸ Koskenniemi's own position on fragmentation (like on many other issues) is deliberately ambivalent. On the one hand, he discards the anxieties over fragmentation as a fear for loss of control, expressed, not surprisingly, most often by representatives of the International Court of Justice.⁶⁹ Here, Koskenniemi cuts through the claims for order and system and points to their underlying political motivations. On the other hand, he expresses fears that fragmentation will lead to a “*managerial* approach . . . that envisages law beyond the state as an instrument for particular values, interests, preferences” and would thus “give up the universalism that ought to animate international law and provide the *conditions* within which international actors may pursue their purposes without subscribing to those purposes itself.”⁷⁰

65. See Tomer Brode, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMP. INT'L & COMP. L.J. 279 (2013) (describing Koskenniemi's contribution to the fragmentation debate).

66. I ignore here discussions on the fragmentation of private law, though those are prominent too. See generally COHERENCE AND FRAGMENTATION IN EUROPEAN PRIVATE LAW (Pia Letto-Vanamo & Jan Smits eds., 2012); Christian Joerges, *Die Überarbeitung des BGB-Schuldrechts, die Sonderprivatrechte und die Unbestimmtheit des Rechts*, 20 KRITISCHE JUSTIZ 166 (1987); Gunther Teubner, *After Privatization? The Many Autonomies of Private Law*, 51 CURRENT LEGAL PROBS. 393 (1998); Thomas Wilhelmsson, *Private Law in the EU: Harmonised or Fragmented Europeanisation?*, 10 EUR. REV. PRIV. L. 77 (2002).

67. See generally KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW, *supra* note 2, at 334; Martti Koskenniemi, *Formalism, Fragmentations, Freedom: Kantian Themes in Today's International Law*, 4 NO FOUNDS. 7 (2007); Martti Koskenniemi, *Hegemonic Regimes*, in REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 305 (Margaret A. Young ed., 2012); Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEG. STUD. (2006) [hereinafter Koskenniemi, *Constitutionalism*]; Martti Koskenniemi, *Legal Fragmentation(s). An Essay on Fluidity and Form*, in SOZIOLOGISCHE JURISPRUDENZ. FESTSCHRIFT FÜR GUNTHER TEUBNER 795 (Gralf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch, & Peer Zumbansen eds., 2009); Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48; Martti Koskenniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought* (March 5, 2005), <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d%5b1%5d.pdf>.

68. See Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Rep. of the Study Group of the Int'l Law Comm'n*, 58th Sess., May 1–June 9, July 3–August 11, 2006, U.N. Doc. A/CN.4/L.682, as corrected U.N. Doc. A/CN.4/L.682/Corr. 1 (Aug. 11, 2006) [hereinafter Int'l Law Comm'n] (finalized by Martti Koskenniemi).

69. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48, at 574–79.

70. Koskenniemi, *Constitutionalism*, *supra* note 67, at 2.

The concern with fragmentation is not just a concern with our intellectual ability (or inability) to conceptualize, systematize, or order the law, a concern mentioned in the previous section. It is also a concern over political realities—“hard facts.” If Koskenniemi is more concerned about fragmentation than some of his intellectual allies,⁷¹ his unease is simultaneously intellectual and political.⁷² The intellectual concern is that fragmentation can lead to the loss of a comprehensive understanding. The political concern is that fragmentation can prompt the decline of international law into technocratic and particularistic discourse.

However, students of fragmentation have long seen themselves between a rock and a hard place. They have often tried to resort to legal tools borrowed from domestic legal systems that tell us how to deal with conflicts within one legal system.⁷³ The problem with such an approach is, however, that the tools from domestic law—*lex posterior*, *lex specialis*, etc.—were developed for the relatively coherent systems of domestic law that have a hierarchy of norms and institutions, a central legislator, and highest courts with comprehensive jurisdiction. These tools, therefore, become increasingly difficult to apply the more international law behaves not like a system, but instead like a multitude of subsystems. Alternatively, it seems that students of fragmentation could accept fragmentation and pluralism, and give up attempts to resolve the ensuing conflicts through legal means. Instead, they could resort to politics and deliberations as a way to resolve such conflicts.⁷⁴ In other words, the legal tools are not fitting and the fitting tools are not legal.

The fragmentation report⁷⁵ takes, by and large, the first route, no doubt in part because Koskenniemi felt that the path through legal tools, inadequate as they may be, was more promising than political deference to specialized experts. The report’s main goal is systemic integration.⁷⁶ It addresses at length principles like *lex specialis derogat lege generali*,⁷⁷ *lex posterior derogat lege priori*,⁷⁸ norm hierarchy,⁷⁹ and, explicitly, systemic integration.⁸⁰ In this approach (as in the

71. See, e.g., NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010); David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641 (2007).

72. See Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48, at 578 (calling for a more direct approach when dealing with issues of fragmentation beyond relying on “reasonableness”).

73. For the earliest and most comprehensive such study, see generally JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

74. See, e.g., KRISCH, *supra* note 71, at 69–103 (arguing for the virtues of pluralism and making a case for its utility in international law).

75. Int’l Law Comm’n, *supra* note 68.

76. *Id.* at 25–28.

77. *Id.* at 30–115.

78. *Id.* at 115–65.

79. *Id.* at 44.

80. *Id.* at 206–13.

literature on fragmentation more generally), self-contained (special) regimes⁸¹ become problematic. The report emphasizes “the need of a residual application, or a ‘fall-back’ onto the general law” when existing standards are diluted⁸²—an approach very much in accordance with Lauterpacht’s emphasis on international law as a comprehensive system.

B. The Forgotten Private International Law

Fragmentation is a puzzle because conflicts are pathological for public international lawyers.⁸³ By contrast, such conflicts are the very foundation of private international law. Therefore, it is puzzling that the fragmentation report lacks, almost completely, references to the legal discipline that deals explicitly with conflicts between legal rules, namely conflict of laws. This is something of a surprise. When Koskenniemi suggests, “[t]he question is never whether or not to go by law but by *which law* or *whose law*,”⁸⁴ he uses, without acknowledging (or perhaps even recognizing) it, the very definition of choice of law. The discussion in the report concerning the difference between jurisdiction and applicable law marks a core theme of private international law.⁸⁵ Indeed, Koskenniemi reports that already sixty years earlier Jenks had proposed analogies to conflict of laws to deal with fragmentation.⁸⁶ And yet, where conflict of laws is discussed in the report at all, reference is made only to the few attempts (by Teubner and others) to transfer, by way of analogy, insights from conflict of laws to the functional differentiation of world society,⁸⁷ which is only a small subset of the legal conflicts in international law.

This lack of attention to conflict of laws may be explainable, in part, through Koskenniemi’s admitted relative lack of expertise in private international law.⁸⁸ Indeed, Koskenniemi’s work, so rich in other respects, is almost devoid of any discussion of private international law. Indeed, whereas historians of *private* international law are usually very aware of the relation,⁸⁹ *public* international

81. See Int’l Law Comm’n, *supra* note 68, at 65–100 (discussing how self-contained regimes become problematic with increased fragmentation).

82. *Id.* at 73.

83. Koskenniemi & Leino, *Postmodern Anxieties*, *supra* note 48, at 560.

84. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 2, at xiv.

85. See *id.* at 247–50 (exploring how domestic jurisdiction translates into a distinction between public and private international law); Knop, Michaels & Riles, *supra* note 9, at 632–34 (discussing the splitting of jurisdictional questions from choice of law questions and the differences related to both).

86. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 2, at 10 (referring to C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT’L L. 401, 403).

87. See *id.* at 10–11 (discussing how legal argument proceeds from a system of functional differentiations and analogously arguing that international law arguments and doctrines are a contingent surface of a socially shared manner of visualizing international law).

88. See Martti Koskenniemi, *The Case for Comparative International Law*, 20 FINNISH Y.B. INT’L L. 1, 7 (2009) (“I am envious of Italian colleagues, for example, whose association with private international law has given them an ease with conflicts of laws my public law orientation lacks”).

89. See Mills, *supra* note 15, at 7–15 (discussing how the conflict of laws and private law

lawyers, by contrast, frequently ignore private international law.⁹⁰ But the lack of attention may also arise from the fact that private international law, until recently, has been largely confined to conflicts between the laws of states. Therefore, it was not a discipline of legal fragmentation either.

Still, it can be useful for the fragmentation of international law, but not in its traditional shape. In order to be relevant for public international lawyers, private international law would need to be translated back into public international law. In particular, it would be necessary to draw from private international law thinking a new conflict of laws approach that goes beyond the traditional focus on conflicts between state laws and encompasses conflicts between legal regimes.

Two such approaches exist. One approach, associated with Gunther Teubner and his co-authors, and briefly discussed in the fragmentation report, suggests that legal fragmentation is a mirror of the functional differentiation of world society—different regimes represent different rationalities that are relatively autonomous from each other.⁹¹ In earlier writings, Teubner had already suggested to translate the idea of conflict of laws to the relations between systems in systems theory.⁹² More recently, he has attempted to translate this sociological approach back into the law.⁹³ What emerges, however, is a conflict of laws that shares little with the actual doctrine. Because, as Teubner argues, societal conflicts between different functional regimes do not resemble the conflicts between state laws, traditional conflict of laws yields no responses. Instead, what is needed is a new substantive law.

Although the approach is fascinating, his solution is, I suggest, something of a disappointment. First, the attraction of conflict of laws for systems theory (and also

interact throughout history).

90. See de Boer, *supra* note 15, at 184–85 (discussing how private international law is of no concern to scholars of public international law); see also PROST, *supra* note 47, at 19 (confining his discussion of the unity of international law to public international law).

91. See Int'l Law Comm'n, *supra* note 68, at 249 (discussing how the law in modern states emerges from quasi-autonomous sources); see also Gunther Teubner, *De collisione discursuum: Communicative Rationalities in Law, Morality and Politics*, 17 CARDOZO L. REV. 901, 901–04 (1996) (describing fragmentation and the idea that there is more than one rationality).

92. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* chapter 6 (Zenon Bankowski ed., Anne Bankowska & Ruth Adler trans.) (1993) (discussing an “intersystemic” conflicts law); Teubner, *supra* note 89 (explaining how the conflict of laws helps in systems theory).

93. See generally GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* 162–166 (2012) (arguing that the only way to protect the particularities of regional cultures is by using the language of modern law); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004) (dealing with a conflicts approach to legal fragmentation); ANDREAS FISCHER-LESCANO & GUNTHER TEUBNER, *REGIME-KOLLISIONEN: ZUR FRAGMENTIERUNG DES GLOBALEN RECHTS* (2006); Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* 23 (Margaret A. Young ed., 2012) (discussing different solutions for different legal conflicts).

for fragmented international law) was always that it allowed for the resolution of conflicts without a hierarchically superior viewpoint—every subsystem would draw the delimitation between itself and its environment. The substantive law approach, by contrast, presumes that there is a superior viewpoint from which the respective subsystems can be balanced. The conflict is thereby suppressed. Second, the approach works for functionally differentiated sub-regimes, but not really for other conflicts, for example between North American Free Trade Association (NAFTA) and World Trade Organization (WTO) law.

Joost Pauwelyn and I have made a different proposal to use private international law for fragmentation issues.⁹⁴ Our suggestion is that one should distinguish between intrasystemic and intersystemic conflicts in international law. Intrasystemic conflicts can be resolved with traditional rules from substantive law, like *lex specialis*, etc. Intersystemic conflicts, by contrast, require the development of actual conflicts rules. Although we suggest some guidelines on how such rules should be developed, we leave their actual development to further research. Recently, this suggestion has been taken up in the development of somewhat more concrete rules for the conflicts between intellectual property, trade, investment, and health law.⁹⁵

It is not clear that the fragmentation report would have looked significantly different in result, had our approach already been developed at the time the report was drafted. It is unfortunate, however, that conflict of laws as a technique is all but absent from it. Arguably, the approach would have provided a way to avoid the unhappy choice between law that does not fit, and tools that are not law. It might have provided a way to retain the attractions of law, without sacrificing the insight that there is fragmentation. Thus, private international law offers something that private law cannot offer—a way of dealing with big political questions through law even in situations in which conflicts exist not just between different positions but between whole different rationalities.⁹⁶

IV. FORM AND TECHNIQUE AND THE PRIVATE

In the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before.⁹⁷

International law increasingly appears as that which resists being reduced to a technique of governance.⁹⁸

94. See generally Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 19 (Yuval Shany & Tomer Broude eds., 2011), reprinted in 22 DUKE J. COMP. & INT'L L. 349 (2012) (using private international law to resolve some fragmentation issues).

95. See Henning Grosse Ruse-Kahn, *A Conflict-of-Laws Approach to Competing Rationalities in International Law: The Case of Plain Packaging Between Intellectual Property, Trade, Investment and Health*, 9 J. PRIVATE INT'L L. 309, 330–33 (2013).

96. See Knop, Michaels & Riles, *supra* note 9, at 656.

97. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 516.

98. KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW, *supra* note 2, at 360.

Private law and private international law thus emerge as ways—techniques—to deal with obviously political problems through the language of law. Thus, they should look appealing to Koskenniemi, who, particularly in his more recent work, has defended the language of law over other languages. So far, I have argued two ways in which this technique is made possible. Private law does so through the establishment of systems. Private international law expands on this for the communication with systems. What is lacking is a closer examination of the formal and technical way in which private and private international law achieve this, and whether that has particular lessons for public international law.

In Koskenniemi's own work, direct parallels between private law and public international law yield few answers. His discussion of the private law underpinnings of the Late Scholastics and their international law project, discussed earlier,⁹⁹ is, in all its richness, a successor to leftist critiques of law, and especially private law, as superstructure to both enable and conceal the exercise of power and violence. Private law becomes complicit, indeed a major component, of the political project of empire, established and shielded from criticism through the language of law. Here, private law is deeply suspect.

If we look elsewhere, however, we see important parallels. Recently, Koskenniemi has praised “a ‘culture of formalism’ as a progressive choice,”¹⁰⁰ thereby angering many of his political allies. This approach to formalism invites a comparison with private law. After all, it is in private law that most debates on formalism have been held. What characterizes private law, at least in its classical version, is what is today often (and often misleadingly) called legal formalism. In turn, anti-formalist and instrumentalist approaches to private law regularly often deny its “private” character. This is not to say that only private law is necessarily formal, and Koskenniemi's advocacy of a “culture of formalism” alone does not turn his project into a private law project. But it does open up a particularly promising avenue towards a comparison between his work and theoretical work on private law.

A. Anti-Instrumentalism and Form

For this purpose, it is helpful to return to the juxtaposition, presented in the introduction, between Koskenniemi and Weinrib. Their most important similarity may be that both oppose instrumentalist conceptualizations of law. Koskenniemi asks about the purpose of international law and finds four purposes, the last of which is of particular relevance here: “international law's objective is always also international law itself.”¹⁰¹ This self-referentiality flies in the face of most thinking not just in public but also in private law. But he could have borrowed the idea, again, from Weinrib who says almost the same thing about private law:

99. See Koskenniemi, *Empire and International Law*, *supra* note 2, at 35–36.

100. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 500–09 (discussing formalism as a culture of resistance to power); see also KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 616.

101. KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW*, *supra* note 2, at 266.

Private law . . . is to be grasped only from within and not as the juridical manifestation of a set of external purposes. If we *must* express this intelligibility in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.¹⁰²

What is the hope that lies in anti-instrumentalism and self-referentiality? For some time, viewing law as a tool seemed the best way to rip law from its inherent conservatism, to let it serve effectively towards progressive goals. This view of law as a tool has become commonplace today, even though the twentieth century has actually shown the limits of this perspective.¹⁰³ These limits are not only practical; they are also ideological: law as a tool has become a tool for the powerful. In private law, this becomes most obvious in the economic analysis of law,¹⁰⁴ which, although in principle should be ideologically neutral, has mostly enabled either conservative or centrist positions.¹⁰⁵ In international law, similar political biases are present not just in neorealist views of international law as an extension of sovereign power, but more so perhaps in the concealed hegemonialism of human rights law.¹⁰⁶ In fact, the main concern over instrumentalism is not that it promotes primarily conservative goals, but rather, that thinking about law as a mere means to an end, more generally promotes a restrictive view of law.¹⁰⁷

When offered as an alternative to a dominant instrumentalism, legal formalism suddenly changes its character: it becomes an instrument not of conservatism, but of subversion. Weinrib, though certainly not a political radical, explicitly emphasizes the critical potential of formalism.¹⁰⁸ Koskenniemi is more explicit: “[I]n a thoroughly policy-oriented legal environment, formalism may sometimes be used as a counter-hegemonic strategy.”¹⁰⁹ “International law increasingly appears as that which resists being reduced to a technique of governance.”¹¹⁰ This is so not because it would be possible to ignore the eminently political character of the conflicts with which the law deals. Quite to the contrary, this is so because the political character of these conflicts requires a language with

102. WEINRIB, *supra* note 5, at 5.

103. See generally PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (2001) (describing responsive law as a reaction to the limitations of regulatory law).

104. ERNEST WEINRIB, CORRECTIVE JUSTICE 302–06 (2012) (criticizing law and economics).

105. For possible alternatives, see 2 Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465, 468–73 (Peter Newman ed., 1998) (discussing how both conservatives and liberals manipulate the Kaldor-Hicks theory as needed to support their positions).

106. For Koskenniemi’s own take on realism and instrumentalism, see, e.g., KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 479–80, 485–87.

107. See Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 974–75 (2005) (explaining that instrumentalists limit their understanding of law to its instrumentality).

108. See WEINRIB, *supra* note 5, at 23 (arguing that formalism provides insight into law’s senses of morality and rationality).

109. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 2, at 602.

110. Koskenniemi, *The Fate of Public International Law*, *supra* note 11, at 30.

which they can be addressed as something other than just clashes, a language that avoids the idea that pure power always wins. Koskenniemi makes this point so beautifully that this deserves a longer quotation:

In the absence of agreement over, or knowledge of the ‘true’ objectives of political community—that is to say, in an agnostic world—the pure form of international law provides the shared surface—the *only* such surface—on which political adversaries recognise each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion—‘outlawry’—of the other. Its value and its misery lie in its being the fragile surface of political community among social agents—states, other communities, individuals—who disagree about social purposes but do this within a structure that invites them to argue in terms of an assumed universality.¹¹¹

He could have borrowed this idea from private law discourse. (And he and Weinrib may both be indebted to Kant here.) The idea that law has its own internal logic, and that this logic keeps the law insulated from outside projects, is, at heart, a private law idea. It is also this idea that has been responsible for much of the criticism of private law. Law professors in South Africa under apartheid have been criticized for teaching Roman-Dutch private law, while outside the classrooms there were riots. It is not always sufficiently appreciated to what extent the teaching of Roman-Dutch private law itself under these circumstances can have an emancipatory, even a subversive, character.

If private law has its own logic, it becomes compatible with societies with deep internal fissures. It has sometimes been argued that private law presumes a relatively homogenous society; that it breaks down in the face of societal fragmentation. Thus, Koskenniemi’s Finnish compatriot Thomas Wilhelmsson has argued that the time for private law codification has necessarily passed.¹¹² But the argument seems just as plausibly to run in the other direction: it is precisely in the face of societal fragmentation that private law, with its counterfactual reduction of individuals to legal subjects, provides a (fragile) common language for addressing social conflicts. German private law theoretician and historian Franz Wieacker has pointed out “that the BGB tried to reconcile several different value-systems which nineteenth century German society had allowed to coexist without coalescing; it is not the mouthpiece of a united social and political movement.”¹¹³ Koskenniemi seems to transpose this private law idea into public international law when he views the form of law as the only universalism that remains in view of political

111. Martti Koskenniemi, *What is International Law For?*, in INTERNATIONAL LAW 89, 110–11 (Malcolm D. Evans ed., Oxford Univ. Press 2003).

112. See Thomas Wilhelmsson, *The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law*, in THE NEED FOR A EUROPEAN CONTRACT LAW: EMPIRICAL AND LEGAL PERSPECTIVES 123, 136–40 (Jan Smits ed., 2005) (analyzing the complications of enacting a uniform European contract code).

113. FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 380 (Tony Weir trans., Oxford Univ. Press 1995); cf. Ralf Michaels, *Why We Have no Theory of European Private Law Pluralism*, in PLURALISM AND EUROPEAN PRIVATE LAW 139, 153–57 (Leone Niglia ed., 2013).

clashes.¹¹⁴

B. Technique and Politics

A return to formalism is not an unsuspecting project, of course; it smacks of the kind of liberalism with its claim to neutrality that Koskenniemi opposed especially in *From Apology to Utopia*.¹¹⁵ The most important criticism, namely that law is neither neutral nor determined, can be found in Critical Legal Studies (CLS), much of which was devoted to private law. It emerges in Koskenniemi's work and has justified referring to Koskenniemi as a proponent of CLS. It has been voiced yet more damningly against private law formalism.

But the projects of (some) CLS proponents and of Koskenniemi are not the same. In the United States, much of the CLS critique of the biases within private law emerged as critique of law and legal language writ large: if law is really politics, it is argued, then its language should give way to the language of politics. Koskenniemi's project is different. He does point out, especially in *From Apology to Utopia*, that law is neither neutral nor determined, that any such claim to neutrality and determinacy is ideological because it conceals the political element in societal conflicts.¹¹⁶ And yet, his response to these insights is not to give up on law. Koskenniemi's theory of the role of legal doctrine is more complex and more interesting than that of many critics of law. On the one hand, he suggests that law is inseparably linked to its context.¹¹⁷ Law is, thus, political. On the other hand, he is adamant in his insistence that the language—or, as he puts it, the grammar—of law cannot be replaced by another language that can more forcefully resolve the problems law aims to solve—not economics, not international relations, not even (or especially not) politics.¹¹⁸ Thus, in the 2005 Epilogue in *From Apology to Utopia*, he argues: “[i]f the law is already, in its core, irreducibly ‘political,’ then the call for political jurisprudence simply fails to make sense.”¹¹⁹ “Little seemed to be gained by thinking about international legal argument as being ‘in fact’ about something other than law.”¹²⁰ “[T]here is no other professional grammar (of ‘international relations’, say, or ‘political theory’) in which the world’s problems

114. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 505–06 (claiming oppressed groups use the same form of law against their oppressors upon revolution).

115. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 4–6 and *passim*.

116. *Id.* at 590–92.

117. *Id.*

118. See Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L REL. 3, 19–21 (2011) (emphasizing law's dependence upon style and the method of framing an argument over reliance upon empirical data); see also Martti Koskenniemi, *Miserable Comforters: International Relations as a New Natural Law*, 15 EUR. J. INT. REL. 395, 416 (2009) (arguing the indeterminacy of international law allows competing views to work toward a standard of universality). I think this particular element in Koskenniemi's critique—a critique of interdisciplinarity, or of replacing international law with international relations—is not grasped in the defense by Mark A. Pollack, *Is International Relations Corrosive of International Law? A Reply to Martti Koskenniemi*, 27 TEMP. INT'L & COMP. L.J. 339 (2013).

119. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 601–02.

120. *Id.* at 564.

would have been resolved in a more satisfactory way.”¹²¹

This is an endorsement of legal technique as it can be found, most purely, in private law, the discipline of legal technique par excellence. Of course, we may think that the *practice* of private law lacks this sophistication. We may think that private lawyers believe in the real existence of its concepts—property, contract, etc.—and do not recognize that these are only idealizations, simplifications, and reductions of actual social world events. And indeed, much private law argument, especially—but not exclusively—in the nineteenth century, appears to juggle antiseptical concepts as though law had nothing to do with real life. But this reading may be too ungenerous. Lauterpacht, for one, certainly thought otherwise. He endeavored “to show that it is precisely that empirical and sociological treatment of the foundations of the international society and of its needs which leads to the adoption of analogy to private law in the most essential parts of the law of nations.”¹²² Perhaps—and I have neither space nor time here to substantiate this—the experience in private law with technique, which is undoubtedly greater than in other legal disciplines, is also an experience in Koskenniemi’s project; the formulation of an internal logic not in ignorance of the surrounding circumstances, but rather in response to them.

The question remains how such an apolitical language can be defended in view of the openly political nature of the issues with which it deals—a criticism that has been voiced repeatedly against Koskenniemi’s culture of formalism.¹²³ Karen Knop, Annelise Riles, and I have suggested what we call an “as if” mode.¹²⁴ Legal discourse, we suggest, can succeed only as a fictitious discourse—in awareness of the politics, but held as if the politics did not exist. Like mathematicians who use the concept of a line, while recognizing that such infinitely thin lines do not exist in reality, private lawyers recognize that formal private law discourse operates with fictions, and we have argued that these fictions are necessary to make meaningful statements.¹²⁵

Koskenniemi might want to go further and assign more actual value to legal discourse as the actual language in which the problems of law are best presented.¹²⁶ His perspective has always also been that of a legal practitioner, and

121. *Id.* at 605.

122. LAUTERPACHT, *supra* note 17, at 305; *see also* Koskenniemi, *Hersch Lauterpacht, supra* note 16, at 810, 815–16 (discussing Lauterpacht’s work in relation to the role of individuals in international law).

123. *See, e.g.*, Jason A. Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, 7 GER. L.J. 1045 (2006) (questioning the limits, radicality and utility, of Koskenniemi’s recent writings); Florian Hoffmann, *An Epilogue on an Epilogue*, 7 Ger. L.J. 1095 (2006) (criticizing Koskenniemi’s “culture of legal formalism”); Paavo Kotiaho, *A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture*, 7 Ger. L.J. 483 (2006) (arguing against what is seen as an idealization of international law).

124. Knop, Michaels & Riles, *supra* note 9, at 645–46.

125. *Id.*

126. *See also* Ralf Michaels, *Post-critical Private International Law: From Politics to Technique. A Sketch*, in PRIVATE INTERNATIONAL LAW AS GLOBAL GOVERNANCE (Diego

he—again like Weinrib¹²⁷—prioritizes the viewpoint of lawyers on the law over that of others. When he suggests that, “[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before,”¹²⁸ he appears to view this as a danger, but it may also be a promise. Politics is not absent from law but inseparably inscribed into it: “The politics of international law is what competent international lawyers do. And competence is the ability to use grammar in order to generate meaning by doing things in argument.”¹²⁹ This is an understanding of law that—precisely because it is formally constrained¹³⁰—is substantively liberating. In this understanding, the vernacular of private law does not cut off discourse; instead, it makes discourse possible. Private law *theory* may often have little to offer to this, even though the picture drawn by its detractors is not correct. Private law *practice*, however—and Koskenniemi has always emphasized the interrelation between theory and practice¹³¹—is the richest field by far for such experience.

V. CONCLUSION

My claim is that, by concentrating merely on what [the men who are regularly thought of as the originators of international law] say on such public law issues as territory, jurisdiction, and formal war and by ignoring those aspects of their work that deal with the universal operation of property and contract, we receive a truncated and one-sided image not only of what they were doing but of the nature of the legal system that was emerging at the time when they were writing and that has persisted much more powerfully as part of global history than did any formal empire.¹³²

In this quote, Koskenniemi suggests that to properly understand an international law scholar, we also must understand what she says about other areas of the law. In this article, I have suggested that to properly understand Koskenniemi, we should understand even what he does not say, explicitly, about other areas of law. I have suggested three themes in Koskenniemi’s work: system, fragmentation, and form. I have suggested that private law furnishes three

Fernandez Arroyo & Horatia Muir Watt eds., Oxford Univ. Press 2014).

127. See WEINRIB, *supra* note 5, at 15 (emphasizing the role lawyers play in building law’s “self-understanding” because they subordinate their own normative ideas to the cause of understanding the law itself).

128. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 516.

129. KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 571 (emphasis omitted).

130. See, e.g., KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 507 (exploring the dichotomy between the rigid rule of law and the unfixed culture of formalism); see also MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 180–82 (1988) (describing the efficacy of the “constraint of form”).

131. Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT’L L. 351, 356 (1999) (“I always have difficulties distinguishing [academic theory and doctrine] from each other”); see also KOSKENNIEMI, *FROM APOLOGY TO UTOPIA*, *supra* note 2, at 1–4 (describing the tension between normativity and concreteness in international law).

132. Koskenniemi, *Empire and International Law*, *supra* note 2, at 2–3.

responses to these themes—private law as a system, private international law as a legal discipline to deal with plurality, and legal technique as a way to treat political conflicts. Koskenniemi does not address these three responses explicitly. Yet, it seems to me they are implicit in what he says. Adding a private law perspective to his work does not seem to add a new dimension, but rather to highlight what is already there, albeit, as of now, as an absence.

Even those who agree that the three themes are somewhat characteristic of Koskenniemi's work may disagree with my implication that much can be learned from private law. Indeed, the actual contribution that private law knowledge could make to public international law in general, and Martti Koskenniemi's work in particular, would require more detailed analysis than is possible here. And of course, Koskenniemi himself makes the argument difficult because private law is so absent in his work. And yet, just as he suggests that the Late Scholastics on international law must also be understood in light of what they say about private law, so I suggest Koskenniemi himself is understood in light of what he says, or does not say, about private law.

I hope that a more general point emerges from these pages: several of Koskenniemi's ideas, most openly perhaps the recent call for a "culture of formalism," draw the ire of many because they seem to invoke something that we thought we had overcome: the idea that a depoliticized law is possible, let alone desirable. I do not think that a careful reading of Koskenniemi's work really allows for such a criticism. But it seems relevant to point out that the idea of a depoliticized law is an idea that has been especially prominent in critiques of private law. In this sense, what Koskenniemi invokes (and what may be called post-critical law) is, at heart, an idea of private law that should be attractive to private lawyers as well—not the private law of its detractors, not perhaps even the private law of many private lawyers, but an understanding of private law that may be reemerging. The private law I have in mind is a law that engages through technique with its issues, in the knowledge that they are political, with the humility that a legal discourse can never do full justice to this political aspect, and yet in the confident knowledge that such a legal discourse is the only discourse with which we can hope to grasp social and political problems. The private lawyer I have in mind is the lawyer who uses the language—or grammar—of law in awareness of its politics, but also in awareness that no better language is available. In this sense, I hope it will be clear that the absence of private law in Koskenniemi's work is very much a presence. And I hope that when I call Koskenniemi a private lawyer in disguise, it becomes clear why this is not an insult at all.