Michigan Journal of International Law

Volume 13 | Issue 1

1991

"Liberalism's Dangerous Supplements": Medieval Ghosts of International Law

Anthony Carty
University of Glasgow School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjil

Part of the International Law Commons, and the Law and Philosophy Commons

Recommended Citation

Anthony Carty, *"Liberalism's Dangerous Supplements": Medieval Ghosts of International Law*, 13 MICH. J. INT'L L. 161 (1991).
Available at: https://repository.law.umich.edu/mjil/vol13/iss1/6

This Book Review is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BOOK REVIEW

"LIBERALISM'S DANGEROUS SUPPLEMENTS": MEDIEVAL GHOSTS OF INTERNATIONAL LAW

*Anthony Carty**

FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. By Martti Koskenniemi. Helsinki: Finnish Lawyers' Publishing Co., 1989. xxvi + 550 pp.

In this major work, Koskenniemi demonstrates that international lawyers are trapped within what might be called a liberal contractarian dilemma, which is an unavoidable part of the everyday work of the professional, "technically-minded" international lawyer. Koskenniemi proves his point through a tireless exposition of the contradictions within the actual practice of the discipline. In this sense, Koskenniemi's work is, perhaps surprisingly, not primarily one of theory. He does not debate in terms of legal philosophy the merits of liberal theory as against other theories of law. He simply assumes, in my view correctly, that the former is not viable. The heart of his immense work is the accumulation of overwhelming evidence that no part of the international lawyer's work can escape the uncertainty and, above all, contradictions, in the liberal theory of international law that he describes.

The dilemma posed by liberal contractarianism is simply that all law should be based on consent, but that not all law can be traced to consent. At the very start of his work, Koskenniemi points out that the standard technique for the reconciliation of this dilemma in the international law context is the notion of tacit consent. Although we assume that the law can only be based on consent, no present consent is required. The State is taken to have agreed by means of prior conduct. This means in practice that the legal interpreter knows better than the State what it has agreed to — that there is some non-acceptance-based criterion whereby we can judge whether acceptance is present.

* Professor of Law, University of Glasgow School of Law.

The heart of the book[1] demonstrates this with a deconstruction of the modern practice of international law over a whole range of subjects, under the rubric of chapters on sovereignty, sources, and custom. It is a magnificent panorama of the sterility of the liberal contractarianism of modern international legal science. Here, Koskenniemi has undertaken the painstaking, laborious, and inevitably repetitive work that is necessary to cajole his reluctant international law colleagues into accepting the inevitability and indeed the centrality of theory to the practice of international law. Just as the liberal concept of politics permeates the whole conceptual framework of international law, so too do its internal contradictions paralyze every aspect of its functioning. After Koskenniemi, it will no longer be possible for international lawyers to dismiss theory as pertinent only to the metalegal question whether international law is binding. Koskenniemi reveals the ways in which theory grapples with the substantive details of the discipline of international law.

Koskenniemi has undertaken what he argues may be called a deconstructionist approach to international legal argument. By this he refers not so much to metaphysical arguments as to a certain method.[2] He identifies what deconstructionism has in common with structuralism insofar as the latter attempts to explicate "internal laws" whereby experience reproduces itself; at the same time, his ambition is to demonstrate that each discursive topic, e.g., sovereignty or custom, is constituted by a conceptual opposition and that disagreement persists because it is impossible to prioritize one term over the other.[3] He mentions the deconstructionist thesis of Derrida concerning the dangerous supplement,[4] which Foucault in turn understands as local, disqualified, illegitimate knowledge, and suppressed discourses.[5] However, he remains above all a structuralist. He claims that his method will reveal how arguments that others imagine are opposed to one another turn out to depend on one another.[6]

This particular borderline form of deconstructionism attempts to describe controlling international legal *langue*, "the conditions for what can acceptably be said within it . . . . It does not attempt to make

---

1. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 192-421 (1989).

2. *Id.* at xvii.

3. *Id.* at xix-xx.

4. *Id.* at 474.

5. For a further discussion of the contribution of these thinkers to the theory of law, see POST-MODERN LAW (Anthony Carty ed., 1990). In particular, for a discussion of the work of Foucault on the symbiotically reactive nature of such suppressed discourses, see Anthony Carty, *Introduction* to POST-MODERN LAW, *id.* at 1, 18-37.

6. KOSKENNIEMI, *supra* note 1, at xxi.

new interpretations about the law but to explain how the making of interpretations in the first place is possible."[7] Koskenniemi notes that, at the *parole* level, human agents appear as conscious creators of their universe, while at the *langue* level, they are limited to the options provided by a historically given code.[8] We do not choose to use the concepts of international law when we enter international legal discourse; language precedes thought. Although Koskenniemi labels his approach a form of deconstructionism, a poststructuralist theory, he moves decisively within this structuralist perspective. Quoting Lévi-Strauss, he states that the language of international law "continues to mold discourse beyond the consciousness of the individual, imposing on his thought conceptual schemes which are taken as objective categories."[9] This structuralist viewpoint is especially acceptable to lawyers because it relies on the self-regulating nature of legal argument; it excludes any study of separate social, historical, or psychological influences.

The main theme of the chapter on sources[10] is the spuriousness of alleged recourse to "hard" State practice as evidence of legal consent. An essential feature of problem solving through resort to implied and presumed consent is the simple evasion of a conflict of sovereign wills. A court will interpret the conduct of one party as consistent with that of the other, i.e., it will imply consent given the context of previous behavior. In this way, the States in conflict can both be said to have consented to the same thing, with the result that the material dispute disappears.[11] So, to consider the *Nuclear Tests* case,[12] how are the key French declarations to be interpreted? Do they represent a foreign policy statement or a unilateral act somehow by its nature formally legally binding?[13] The difficulty, for Koskenniemi, is that declarations do not reveal their "objective" nature automatically. They are under-

---

7. *Id.* at xxi-xxii.

8. *Id.* at xxii.

9. *Id.* at xxiii (quoting CLAUDE LÉVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 217 (1979)).

10. KOSKENNIEMI, *supra* note 1, at 264-341.

11. *Id.* at 301.

12. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20). Australia and New Zealand instituted proceedings to halt atmospheric nuclear tests conducted by France in the South Pacific region; they asserted that the tests caused radioactive fallout to be deposited on their territories, posing health and environmental threats to their citizens. *Id.* at 257-58. Prior to the institution of the suit, the President of the French Republic had issued several public statements to the effect that the 1974 series of nuclear tests would be the last. *Id.* at 268-69. The court held that France had made these unilateral statements with the intention of creating an international obligation for itself; therefore, the court concluded, France was bound by the statements to cease its nuclear testing after 1974, and there was no need for the court to adjudicate the claims of Australia and New Zealand. *Id.* at 269-70.

13. KOSKENNIEMI, *supra* note 1, at 307-11.

stood in the light of interpretations made by other States or from the perspective of a nonsubjective standard of justice: objective ideals representing the interests of the international community as a whole. The French declarations assumed no express obligation; they merely stated that a particular round of tests would be the last. Yet the court interpreted the declarations as being binding on France, allowing France no arbitrary power of reconsideration.

Koskenniemi grasps that such reasoning is a variation of the "presumed consent" doctrines that underlie contractarian claims for legitimacy of authority. France's subjective will is construed by means of a hypothesis for which the court seeks no support from other consensual sources. Australia and New Zealand did not rely on the French declarations, and the court is forced to maintain that its interpretation of the declarations gives effect to French intent although the French dispute that interpretation. Koskenniemi argues that into the notion of tacit or presumed consent are pressed objective ideals, such as that of security of international intercourse, which a strictly consensual theory of law cannot support. In effect, as with Rousseau's social contract, States are being forced to be free.

So again, in the *Nuclear Tests* case,[14] Australia and New Zealand argued that the radioactive fallout violated their sovereignty. France, likewise, replied with a sovereignty argument. The court noted the mirror-image nature of the claims: Australia could invoke sovereignty to resist pollution, and France could invoke it in terms of its right to carry out tests on its territory.[15] Koskenniemi relies on this example to illustrate a fundamental critique of the liberal theory of politics, namely the unfounded supposition that the sovereign equality of States, as a basic principle of this international legal order, really affords an objective criterion for the resolution of inter-State conflict. There is no fixed content to the notion of sovereignty which dictates any antecedent material rule to determine the boundaries of State liberty regardless of the subjective will or interest of any particular State.[16] This liberal theory of the sovereign equality and independence of States is also present in the *Lotus Case*,[17] where a State's sovereignty was presumed unrestricted in the absence of rules of law having arisen to govern its exercise. Koskenniemi calls this the "pure fact" approach to sovereignty.[18] It supposes a natural liberty that must be

14. 1974 I.C.J. 253.

15. KOSKENNIEMI, *supra* note 1, at 213.

16. *Id.* at 209.

17. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

18. KOSKENNIEMI, *supra* note 1, at 199.

given effect when rules are lacking. Koskenniemi again points out how, in the *Right of Passage* case[19] and the *Asylum* case,[20] a preference for interpreting sovereignty restrictively could lead nowhere because we would not know which of the two States' sovereignty to prefer.[21]

This very lucid argument is demonstrated patiently through numerous cases. Indeed, the book is so long because of the author's determination to be exhaustive. Examples which spring to attention are the *Gulf of Maine*, the *Reservations*, the *Admissions*, and the *South West Africa* cases and opinions.[22] The exposition is delightfully clear and largely free of jargon. Koskenniemi's conclusion is that legal argument and judgment resort to presumed or tacit consent of States to overcome the absence of agreed objective standards of justice in the liberal concept of the international legal order, thereby overcoming at the same time the dilemma that law based merely upon the expressed consent of States would be no more than an apology for their political interests and strengths.

It seems to me that Koskenniemi breaks with his own approach, albeit very constructively; he goes beyond an internal structuralist critique of legal language by linking express legal arguments to the underlying code of the liberal theory of politics. This link he has demonstrated as historical fact. Lawyers operate within a "modernist" or "classical" epistemology of acceptable political argument. Yet Koskenniemi's adherence to a form of deconstructionism impels him to demonstrate that in every single case international legal argument is caught within the following dilemma. It claims to distinguish itself from the international political order by assuming that it tells people what to do and does not simply describe what they are doing. At the same time it assumes that it goes beyond simple dependence on subjective beliefs about what the order among States should be. On the one hand, the creation of law is a matter of subjective political choice. On the other hand, it is assumed to be binding regardless of the interests or opinions of the State against whom it is invoked. If law lacked connection with practice, it could not demonstrate its norms in a tangible fashion. It would be utopian. If law lacked critical distance

19. Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Apr. 12).

20. Asylum (Colom. v. Peru), 1950 I.C.J. 266 (Nov. 20); Haya de la Torre (Colom. v. Peru), 1951 I.C.J. 4 (Order of Jan. 3).

21. KOSKENNIEMI, *supra* note 1, at 208-09, 213-14.

22. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28); Conditions of Admission of a State to Membership in the United Nations (Charter, Art. 4), 1948 I.C.J. 57 (May 28); South West Africa, Second Phase (Eth. v. S. Afr.) (Liber. v. S. Afr.), 1966 I.C.J. 4 (July 18).

from State behavior, it would be unable to oppose breaches of the standards to which States had agreed to adhere. It would appear apologist.

The question that arises immediately is whether Koskenniemi, in his apparent anxiety to give full place to both structuralist and deconstructionist arguments, forces his material into a Procrustean bed of quite unnecessary conflict, so that his argument becomes repetitive to the point of being obsessive. He insists that there are only two current styles of legal argument about order and justice in international affairs. The first treats justice, common interests, and other liberal values as anterior to State behavior, while the second starts from State interest. The first affords normativity, while the second affords concreteness. Koskennieni insists that the two patterns are both exhaustive and mutually exclusive; a point about world order can be either "descending" or "ascending" and is unable to be both at the same time.[23] Under the former, law becomes constraining, based not on factual power but on normative ideas. Under the latter, the justifiability of State behavior rests upon the facts of State behavior. Each must regard the other as inconclusive while standing alone.

Koskenniemi commits himself to the view that the law is indeterminate at its core because it derives from structures of law that are fundamentally contradictory. If law bears no relation to what States have accepted, it rests on pure naturalism, an objective theory of justice. If it is merely subjective acceptance by States that counts, then we lose the law's normativity. In international legal argument, both strategies must be used in order to make law seem objective and concrete, anterior to and yet based on State behavior. To avoid apologism, we must argue that law binds a State regardless of its behavior. To avoid utopianism, we must argue that it corresponds to concrete practice. To appear defensible, each argument must appear both concrete and normative. This tension produces constant association and disassociation.

Koskenniemi does not claim a monopoly of deconstructive wisdom. His use of the word is nonetheless permissible, since his ambition is quite simply to demolish the force of dominant international legal discourse. However, it has to be said that a favorite tactic of deconstructive analysis is to turn against itself and to demolish its own theses. This may show itself in a variety of ways, two of which I will illustrate in concluding this review. The first concerns the type of deconstructionism represented by Derrida and Foucault, which I have

23. KOSKENNIEMI, *supra* note 1, at 41.

previously mentioned.[24] This is the notion of recovering the supplementary or suppressed discourse. Koskenniemi is rather summary in his dismissal of premodern theory, and his distinction between a historical and structural exposition of the history of international legal ideas heralds the laying of a Procrustean bed for these ideas. The periodization of premodern, modern, and postmodern international legal theory that Koskenniemi undertakes invites the reemergence of supposedly repressed traces of outmoded forms of argument. Indeed, for a good part of the chapter on custom, Koskenniemi engages in aggressive exposure of the continued presence of naturalist discourses, but with such disapproval as to suggest that he is largely committed to the liberal enterprise of exorcising such ghosts before "true progress" in the development of international legal argument can be made. Whatever sympathy one might have with this enterprise, it is unfortunate that his understanding of this "opponent" appears the weakest part of the book.

So Koskenniemi lists a long series of lapses into naturalism. In *Military and Paramilitary Activities In and Against Nicaragua*,[25] the court stated that Article 51 of the U.N. Charter could hardly be other than of a customary nature. As no reference was made to practice, Koskenniemi would conclude that the court's custom is in fact no different from a naturalistic principle.[26] That is, Koskenniemi equates naturalism with dogmatism. He dismisses attempts to treat State practice as custom because it conforms to "reasonableness" or "moral utility" as utopian naturalism. Such notions are *subjective* (his emphasis).[27] Equally, the notion that *opinio juris* might rest upon a national unconsciousness is also *naturalistic* because it supposes that a nation has an intelligible essence.[28] More fundamental still is the contradiction which Koskenniemi sees as implied in supposing that a State can come to know that it is bound by a custom. In liberal theory, knowledge and will are, as objective and subjective, in opposition.[29]

In the same vein is Koskenniemi's criticism of the lack of an established hierarchy between general and particular custom. While the argument itself is convincingly demonstrated, why does Koskenniemi see no worth in a contextual evaluation of obligation? He asks, con-

24. Carty, *supra* note 5, at 4-5. Deconstructionism is not a mischievous wordplay, but rather an uncovering of an underlying nihilism in specifically modern social theory.

25. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

26. KOSKENNIEMI, *supra* note 1, at 358.

27. *Id.* at 365.

28. *Id.* at 367.

29. *Id.* at 374.

sistently with his own espousal of liberalism, how such an evaluation can be imposed on a State that does not share the evaluator's view of contextual significance. Finally, in a concluding section on custom as bilateral equity, Koskenniemi argues that the character of ideal social organization is a matter of political dispute, that we possess no metatheory by which to balance conflicting principles. So he continually represses a premodern discourse with a modern tool, the liberal theory that bases international law on State consent, which, he never tires of saying, is itself sterile. The eventual effect is to induce ennui in the reader. It is a major thesis of postmodernist analysis in the Derridean school to argue that premodern "ghosts" of transcendence are everywhere among us, insinuating their way throughout humanist rationalist thought. Derrida calls them white mythologies in his *Margins of Philosophy*.[30] These "ghosts" should at least cause Koskenniemi to wonder about his linear progression in the history of international legal ideas.

A second instance in which Koskenniemi's deconstructionist analysis turns on itself occurs when he makes a difficult distinction between history (diachrony) and structure (synchrony), a distinction itself taken from structuralism. He does not elaborate on this crucial point, but uses it to excuse the fact that he is less interested in the causes of the rise of classical doctrine than in demonstrating what was taken as given and problematic within it. So it seems, in my view, rather too summary for him to assert that the medieval order allowed no individual freedom, no private realm. "If there was freedom, it was allocated from above and retrievable at any time."[31] This representation of the premodern is crucial to the presumably historically as well as structurally necessary contradiction that Koskenniemi insists exists in international legal practice. After presenting classical-modern international law as having its starting point with the social contract that sovereigns made with the Peace of Westphalia, he devotes a mere ten pages to criticism of premodern scholarship.

In his view, writers such as Vitoria equated faith and reason; both concepts were seen as grasping at a preexisting normative order, discoverable either in immediate reflection or by deduction from first principles. There follows a conclusion that is crucial for international law. In premodern theory, a *consensus gentium*, or custom, may be evidence of rules *agreed to* (just as it may be evidence of God's exist-

30. JACQUES DERRIDA, MARGINS OF PHILOSOPHY 213 (1982); *see also* Carty, *supra* note 5, at 2-7.

31. KOSKENNIEMI, *supra* note 1, at 57.

ence), but such custom has no independent binding authority.[32] By definition, human law cannot enter into conflict with natural law because if it did, it would not be law. So conflicts between freedom and order are simply defined away in favor of the latter.[33] This is a very cursory treatment of the background to modern scholarship, a point to which I will return.

In fact, Koskenniemi is constructing a kind of school of premodern law that lacks any dynamic capacity to resolve conflict. For instance, "God had given territory to Indians and thereby established their legitimate authority. Any human attempt to interfere with it is invalid *ab initio*."[34] This loses the essential dimension of Aristotelian ethical and political theory which mixed a teleological anthropology with a situationalist or contextual application of "considerations of equity" to favor a casuistic elaboration of the justice of a particular case.[35] So much is neglected when Koskenniemi equates premodern reason with faith and sets up the claims of premodern "order" as arbitrary and destructive of any notion of human autonomy. Indeed, he appears naive in his representation of this period when he says that it was troubled by the fact that many sovereigns who had committed clear outrages against natural law nonetheless continued to be sovereigns.[36] Since he devotes so much energy to deploring the tendency of modern scholarship to serve as an apologist for what sovereigns wish, it appears to me strange that he seems somehow determined to reject any theory of international law critical of State conduct as utopian, simply by virtue of the distance that it sets between that conduct and its own standard.

Koskenniemi concludes that there are neither facts nor rules. The dichotomy forced by liberal theory, between "facticity" and normativity, between apology and utopia, is false. There are only texts open to a potentially unlimited number of interpretations. For instance, defining "aggression" through a list of further expressions such as "armed force" or "invasion" does not relieve us of the burden of having to interpret those expressions. The crisis of international law is in finding that there is no objective meaning to legal concepts and no extratextual referent.[37] Koskenniemi recognizes this condition as postmodern.

32. *Id.* at 77.

33. *Id.* at 77-78.

34. *Id.* at 79 (explaining Vitoria's treatment of Spanish rights in America).

35. *See generally* MICHEL VILLEY, LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE (1968).

36. KOSKENNIEMI, *supra* note 1, at 79-80.

37. *Id.* at 474-75.

If the solution of international normative problems is possible only through denial of their existence (recourse to tacit consent), refusal to find a substantive solution (recourse to procedure), or abandonment of legal concepts altogether (recourse to equity), critical reflection leads to legal nihilism.[38]

Is it possible to escape from such an incommensurability, where one interpretation can be given no more weight than another? Koskenniemi proposes that there is no alternative to a *practice* of attempting to reach the most acceptable solution to a case, not by the application of general rules, but through a conversation. He is thinking of Habermas's ideal, uncoerced discourse where full discussion of alternative material justifications can take place on the basis that the conversation can only be ongoing.[39] Regression to nostalgic visions of religious, social, or historical necessity promises to repress authentic community. Conflict will remain. By recognizing this and by declining to solve it by reference to objective rules, one may gradually decrease domination and increase the sense of authentic community between disagreeing social agents.[40] Criticism must provide knowledge both of social activity and of alternatives. Precisely because it cannot simply be a matter of interpreting what is already there, it will have to involve an attempt to *imagine* (his emphasis) new ways to cope with social conflict.[41]

In such a postmodern environment, the professional identity of the international lawyer is so far lost that he or she may not even see the social world as divided into given "international" and "national" realms. The interminable discussion of whether the "true" subjects of international law are States or individuals fails to recognize the differences in our communal ties.[42] Koskenniemi ends on a thoroughly postmodern note:

> There is no "deep-structural" logic or meta-narrative (of history, economics, etc.) to which we could refer to wipe existing conflict away . . . Normative solutions need to be justified by respecting the existence of conflicting ideals of social organisation and by seeking to secure the revisability of each agreed arrangement. The argument will remain indeterminate and political.[43]

Koskenniemi's work does not lay claim to originality. His basic methodological principle of contradiction (within the legal paradigm

38. *Id.* at 478.
39. *Id.* at 486-87.
40. *Id.* at 488-89.
41. *Id.* at 498.
42. *Id.* at 498-99.
43. *Id.* at 500.

of liberalism) has already been developed in David Kennedy's *International Legal Structures*.[44] His concluding call for a foundationless equity is already very current in the writings of Habermas and others such as Vattimo and Rorty.[45] They encourage a purportedly "groundless" conversational form along lines that I have also wished to follow in *The Decay of International Law?*[46] I retain the hope that a sufficiently textured and complex historical, cultural context can overcome the indeterminacy of legal categories. It is for such reasons that I am particularly uneasy about the Procrustean bed into which Koskenniemi fits modern Western international law history. Nonetheless, I have also grown *increasingly* uneasy about the groundlessness (!?) of the foundationless rationalist optimism with which he concludes his *magnum opus*. The reason is that it shows traces of a more refined version of the "apologist," consent-based horn of the liberal, contractarian dilemma. As I have argued elsewhere, the arch postmodernist, Lyotard, has demonstrated that the concept of obligation must include some element of compulsion, however understood; the idea of Law is more than a conversation.[47]

Whatever points of disagreement I may have with Koskenniemi's work, I consider it a most remarkable and delightful contribution to the theory of international law. It is a work of such lucidity and industry that it guarantees a central place for legal theory in the future study of our discipline.

---

44. DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987).

45. *See, e.g.*, LA SÉCULARISATION DE LA PENSÉE (Gianni Vattimo ed., 1988); Richard Rorty, *Du primat de la démocratie sur la philosophie*, *in id.*, at 39.

46. ANTHONY CARTY, THE DECAY OF INTERNATIONAL LAW? 113-15 (1986).

47. Carty, *supra* note 5, at 28-37.