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## Notes Towards a Socio-Legal History of International Law

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In an article published in 2016, Martti Koskenniemi suggests new ways to approach the history of international law.<sup>1</sup> He calls for weaning scholars of their almost exclusive focus on relations among European states and on the established canon of jurists (Gentili, Pufendorf, Grotius et al.). *To the Uttermost Parts of the Earth* masterfully rewrites the history of international law along these lines. In these pages, the usual suspects share space with thinkers better known for their contributions to other fields, such as Machiavelli, Adam Smith, and Jeremy Bentham. European colonial expansion is not an afterthought but a central dimension of international law. And questions of inter-state relations are deeply embedded in theology, political economy, and philosophy.

Yet not all elements of the agenda Koskenniemi laid out five years ago are as apparent in *To the Uttermost Parts of the Earth*. His 2016 article also notes the absence of social history in the study of international law: this, I fear, largely remains the case. Other sub-fields of legal history expanded beyond the study of ideas decades ago, and scholars have long recognized the advantages of combining legal (and extra-legal) thought with the experience of law on the ground. The work of socio-legal historians is filled with archival references, correspondence, legal briefs, courtroom proceedings, and rulings. Yet scholars of international law have largely remained in the realm of intellectual history.

What might it look like to write a history of international law not from the perspective of those who *thought* about it, but from the perspective of the individuals who *lived* it? Beyond the walls of the universities and government offices where great men wrote about law, ordinary people pursued unpaid debts, married and divorced, inherited, bought and sold across political and legal frontiers. Low-level judiciary were tasked with making decisions about how international law

should regulate these people's lives. And consuls and statesmen navigated the daily business of managing international relations in accord with a diverse array of legal norms. As Lauren Benton and Lisa Ford observed, »some of the most important conversations about global order were occurring far away from law schools and halls of diplomacy«.<sup>2</sup>

Needless to say, no book can do everything, and Koskenniemi's latest does plenty. Nor do I mean to imply that Koskenniemi is unaware of how a socio-legal approach might change our view of international law (he quotes the above line from Benton and Ford, 792). Nonetheless, it is worth observing what remains beyond our field of vision when we focus on the intellectual history of law. From my perspective – as an historian of North Africa and the Middle East – the Islamic world is largely out of sight in Koskenniemi's account. The Ottomans were by far one of the most powerful early modern empires in Europe, and a crucial trading partner for Venice, France, Britain, the Netherlands, the Habsburg Empire, and many other European polities. Yet the Ottoman Empire apparently did not figure prominently in the juridical, economic, and political thought relating to international law – and thus occupies very little space in Koskenniemi's pages. Readers of *To the Uttermost Parts of the Earth* might understandably conclude that the Ottomans hold little interest for the history of international law.

But the work of historians who base their studies on archives, court rulings, and legal briefs suggests quite the opposite. Take the question of whether Muslim-ruled polities like the Ottoman Empire, or its semi-autonomous provinces like Tunisia, should be included within the purview of international law. Was the law of nations limited to Christendom, or did it reflect a universal set of principles that could be applied to all polities? Throughout *To the Uttermost Parts of the*

1 MARTTI KOSKENNIEMI, Expanding Histories of International Law, in: American Journal of Legal History 56,1 (2016) 104–112.

2 LAUREN BENTON, LISA FORD, Rage for Order: The British Empire and the Origins of International Law, 1800–1850, Cambridge (MA) 2016, 4.

*Earth*, Koskenniemi tracks a range of responses to this question, including many thinkers who derived the law of nations from natural law and thus, like Aquinas, considered it applicable »to conditions of human life everywhere« (81).

Yet in instances when European courts had to decide how to apply international law to states like Tunisia, many balked at the prospect of extending the law of nations beyond the boundaries of Christendom (including Christian-ruled colonies). In a drawn-out lawsuit from the early 17th century, Murad Bey, the Bey of Tunis, sued a Corsican merchant living in Livorno. To adjudicate the lawsuit, Tuscan jurists had to decide whether to apply the Islamic law of inheritance and obligations.<sup>3</sup> The Corsican merchant's side argued that the religious barrier separating Christians from Muslims meant that the Livornese court could ignore Islamic legal principles with impunity; their duty was to favor the rights of Christians over those of Muslims. In a case involving the estate of a Tunisian who died in Livorno in 1873, some Italian lawyers contended that the law of nations only applied to Christendom: general principles of international law – such as the freedom of expatriation – did not extend to Tunisia. Others contended that Tunisia had been part of the Roman Empire, and thus that *ius commune* applied there – making this North African state part of the »family of nations«.<sup>4</sup> Neither the blatant pro-Christian favoritism of the Murad Bey case, nor the idea that the previous territory of the Roman Empire should determine the boundaries of the international, were prominent strands in legal thought. Yet these were the ideas put forward in cases that hinged on putting the principles of international law into action.

The importance of law-in-action becomes even more apparent when we try to understand how non-Western polities conceived of international law. While a handful of studies examine »Islamic

international law«, the very category artificially imposes European modes of legal thinking onto Islamic jurisprudence, at least for the pre-modern period. Yet again, this may be a matter of needing to ask different questions and look at different sources. Rather than seek out an intellectual history of »Islamic international law« in books of *fiqh* (Islamic jurisprudence), we might be better served by examining the practices of Muslim-ruled polities in their relations with other states, regarding the rights and responsibilities of their subjects towards foreigners, and concerning the laws of war and peace. The study of *responsa* (Arabic, *fatāwā*; Ottoman, *fetvalar*) written by the Ottoman *şeyhülislams* (heads of the Ottoman legal and religious hierarchy) suggests the importance of treaties in Ottoman legal thought. In a *fetva* from the early 17th century, the *şeyhülislam* explained that raids against Venetian subjects carried out by Ottoman provincial governors were against Islamic law. This was because such raids contravened the treaties (*ahdnames*) between the Sultan and Venice.<sup>5</sup>

Koskenniemi's scholarship – not only in this book, but throughout his distinguished career – does an enormous service to expand and reshape our understanding of international law. But more remains to be done. Especially for those of us working on the Middle East and North Africa, we still require more granular histories that tell stories about how law traveled across political, cultural, and religious frontiers. It is this bottom-up approach that can tell us how questions of international law intersected with some of the most pressing matters of the day, from the quotidian concerns of merchants to the diplomatic relationships among states.



3 GUILLAUME CALAFAT, Jurisdictional Pluralism in a Litigious Sea (1590–1630): Hard Cases, Multi-Sited Trials and Legal Enforcement between North Africa and Italy, in: Past and Present 242 (2019) 142–178.

4 JESSICA M. MARGLIN, Nationality on Trial: International Private Law

Across the Mediterranean, in: Annales. Histoire, Sciences Sociales 73,1 (2018) 83–118.

5 JOSHUA WHITE, Fetva Diplomacy: The Ottoman Şeyhülislam as Trans-Imperial Intermediary, in: Journal of Early Modern History 19 (2015) 199–221.