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»This is not a history of international law«.
A Brief Introduction into the Debate on
Martti Koskenniemi's *To the Uttermost Parts
of the Earth*

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»This is not a history of international law«. A Brief Introduction into the Debate on Martti Koskenniemi's *To the Uttermost Parts of the Earth*

The history of international law has been one of the most dynamically growing fields of legal historical research of the last two decades. Remarkably, the so-called »historical turn« in the scholarship of international law did not emanate so much from historians as from the legal discipline of international law itself. Perhaps this is why, despite important early impulses – not least from the recently deceased Michael Stolleis, to whom we dedicate a brief obituary in this issue¹ – this research has developed institutionally and to some extent also intellectually largely alongside the realm of legal history.

The emergence of this international field has led to fascinating insights and fruitful irritations not least for legal historians. Traditionally nationally-oriented legal history suddenly found itself confronted with a mostly English-language legal historical discussion on international and transnational law. Postcolonial theories and politics resonated in the arena of legal history. Historical analyses of law, which often seemed rather marginalized in law schools, suddenly became down-right trendy. At the same time, however, research on the history of international law developed in some cases with a certain intellectual independence from the state of research in history and legal history. Particularly in the debates about the relationship between law and history, about concepts and methods, many problems have been hyped that (legal) historians had been dealing with for many decades at least, leading to a somewhat distorted and in some cases simplistic picture about (legal) historical methods.²

If there is one person to be identified as the center of this fascinating »historical turn«, it is undoubtedly Martti Koskenniemi. His pivotal role has been highlighted on several occasions. However, he is an exceptional phenomenon not only

because of his charismatic intellectual leadership in the field, but also because of his method – and the book that is the subject of this debate is the latest and best proof of this. Because, like few others, he combines political *impetus* with patient close reading of historical sources. More than any, he tries to follow the avalanche of research and debates in the major European languages in the history of international law, history of political theory and history of empires. Not least, he has experienced legal practice and knows that legal knowledge is, as it has been rightly said, »an activity of mind, a way of doing something with the rules and cases and other materials of law, an activity that is itself not reducible to a set of directions or any fixed description. It is a species of cultural competence, like learning a language«.³ For many years, he has been concentrating on a major project to place his *Gentle Civilizer of Nations* in a broader historical context leading from the Middle Ages to modern times: What could be more natural than to put this book up for debate – and, through the venue, and above all the choice of participants, create a forum in which the often separately conducted discussions about the history of international law and (legal) history of the late Middle Ages and modern times are brought together?

The book and the contributors to the debate

To the Uttermost Parts of the Earth contains twelve chapters, with a brief introduction and conclusion, and a 101-page bibliography. It is divided into three parts: Part 1: *Towards the Rule of Law*, with chapters starting with the conflict between Philip IV (the Fair) and Pope Boniface VIII, which led, at the beginning of the 14th century, to the Pope issuing the famous *Unam Sanctam* bull. It leads the reader

1 See in this issue DUVE (2021b).

2 See on this for example BENTON (2019); FITZMAURICE (2018).

3 WHITE (2002) 1399.

into the emergence of the new understanding of *ius gentium*, *dominium* and sovereignty, and presents the political theology of *ius gentium* and Italian and Dutch readings and interpretations, not least by Hugo Grotius. Parts 2 and 3 are dedicated to *France* and *Britain* as the central imperial powers that shaped the language of law, while part 4 covers *Germany*, its natural law discourse and the many reinventions of natural law between the 16th and early 19th century, mainly in academic discourse. It ends where his *Gentle Civilizer of Nations* started.

Undoubtedly, a book of this breadth cannot be reviewed by a single person, even less so in the short statements our contributors were asked to deliver. We are all the more grateful to those colleagues that have, nonetheless, agreed to participate in the debate and sent us their thoughts. With Tamar Herzog, Jean-Louis Halpérin, Amalia Kessler, Cristina Nogueira da Silva, we are lucky to have statements from leading legal historians from France, Portugal and the US, working on the early modern and modern legal history of France, Germany, Spain, Portugal and their imperial formations in comparative perspectives. Jean-Frédéric Schaub, Bartolomé Yun-Casalilla, Jörn Leonhard are most prominent historians of the European empires and their global histories. Chen Li's fascinating research on Sino-Western relations and the global history of Empires and Jessica Marglin's impressive expertise on the legal history of modern North Africa and the Mediterranean made it possible to set Martti Koskenniemi's book into »non-North-Western« perspectives. Jean d'Aspremont, Inge Van Hulle, Madeleine Herren, Gunnar Folke Schuppert, all of them leading historians of international law, the history of international organizations, transnational movements and experts in analyzing the language of law, have shared their views on Martti Koskenniemi's book with us. Martti Koskenniemi himself immediately agreed to our suggestion for a debate and was willing to respond to the comments, written on the basis of the proofs that were facilitated to us by CUP. I am sure that the observations made in the debate as well as Martti Koskenniemi's response can help to

integrate the diverse disciplines into a larger conversation that overarches academic and regional traditions.

Questions raised

It is not the part of the convenor of a debate to comment on the comments, or on the response. Although it would be tempting to relate the book with the methodological reflection on legal history as a history of knowledge creation through translation published in this same journal, or to the research on global legal history, or the »School of Salamanca«, developed at the Max Planck Institute.⁴ Neither will I summarize the praise of the book, rightly called an encyclopedic treatment proposing a clear idea about how law is being produced. Nor does it make sense to discuss the points raised by the contributors to the debate in their concise statements, to which Martti Koskenniemi is responding.

However, many of the points raised in the debate refer to fundamental problems of writing transnational or global legal history. I am just listing some of them which seem especially promising for the future debate on how to write global legal history:⁵ How to relate national and transnational legal histories, and what consequences does it have if the emplotment starts with, as in this case, France, and not with, for example, Italy (Halpérin, Herzog)? How to adequately balance the roles different European empires played, emancipating from all kinds of black legends (Schaub)? What about empires like the Russian, or Swedish, that played a major historical role, but only a marginal one in the writing of Global History (Leonhard)? What about the Islamic worlds (Marglin, Schaub) and China and their impact on the European legal imagination (Li)? How to write a history that necessarily follows a certain temporality without making the different temporalities leading into a teleological narrative invisible (Herren, Leonhard, with slightly different appreciations)? How to deal with the incommensurability of »law« and other modes of normativity, especially if not stemming

4 On legal history as a process of knowledge creation see in this issue DUVE (2021c); for the research on the School of Salamanca see DUVE (2021a).

5 On the challenges and opportunities see DUVE (2020).

from the Christian tradition (Marglin), and what does this mean for the recognition of historical information as a legal historical source (Li)? How much »state« is there still inherent in our history telling (Herzog)? How to integrate the norm-creating practice, institutions, ordinary people, and the agency of non-Europeans into this history (Halpérin, Kessler, Leonhard, Nogueira, Schaub, Yun-Casalilla)? How to write a legal history in its own right, trying to understand the recursive structure of the production of law, while at the same time recognizing that law might only be »the code of capital« or at least deeply embedded into a political economy (Schuppert, Van Hulle, Yun-Casalilla)? How much of what was »lying around« can and must be integrated into the »conceptual cage of intellectual history« (Herren)? How to understand the processes of (cultural) translation of normative knowledge from different periods and times – as *bricolage* or with other notions – and what are the drivers in this process (Herren, Leonhard)? To what extent does legal imagination change the limits of the language (d’Aspremont) – and what does this mean for the shifting limits of our worlds?

Dealing with Eurocentrism

These questions already show that, in fact, as Martti Koskenniemi stated at the beginning, his book »is not a history of international law« (Koskenniemi 2021, 1). It is much more: »It is a history of the legal imagination as it operates in relationship to the use of power in contexts that we would today call international«. It aims at nothing less than providing a historical model for the production of law – or the legal argument – before modernity.

A lot could be said about this ambitious goal that is in a certain way rooted in his early writings.⁶ However, as the same debate shows, due to the author and his position in the field, the book will inescapably be read as a history of international law. It might not least be this way of reading the book that induces one to suspect a certain Eurocentrism in his writing. But, one wonders, how can Martti Koskenniemi be »Eurocentric«, if he spent

decades of his life uncovering and denouncing western legal imperialism?

A brief look at a text published precisely ten years ago in this same journal might help: *Histories of International law: Dealing with Eurocentrism*.⁷ In this contribution to a special issue on the occasion of the 70th birthday of Michael Stolleis, Martti Koskenniemi sketched out »four directions to deal with Eurocentrism in the history of International law« (Koskenniemi 2011, 171). Looking at this article today, with his new book in hand, the piece not only reads as an introduction into the position of *To the Uttermost Parts* in the wider historiographical field. More importantly, one can clearly see the choice he made from the four options described ten years ago. A first direction, he summarized in 2011, »consists of the careful demonstration of the colonial origins of an international legal rule or institution« (Koskenniemi 2011, 171). Here, dealing with Eurocentrism means showing how international law has imposed Eurocentric ideas on others. »Another way of dealing with Eurocentrism is by focusing on the encounter between Europe and the New World as an important, even foundational moment to the discipline itself« (Koskenniemi 2011, 172). In this approach, non-European actors receive a certain, although passive, role in the creation of international law. The third way of dealing with Eurocentrism directs the »attention to the hybridization of the legal concepts as they travel from the colonial metropolis to the colonies and their changing uses in the hands of the colonized« (Koskenniemi 2011, 173). These studies complicate the idea of a Europeanization of the world. Finally, the fourth technique is to »exoticize (provincialize) Europe and European laws« (Koskenniemi 2011, 174).

Martti Koskenniemi – I believe – opted for the fourth way of dealing with Eurocentrism, developing an analytical framework of how legal imagination operates (see especially Koskenniemi 2021, 4–8, as well as the Conclusion and Epilogue) that goes far beyond what he laid out in *From Apology to Utopia*. Thus, with the thorough description of the European debates from the 14th to 19th century, he is not only following his »obsession« to »think

6 See KOSKENNIEMI (1989), especially on the reversibility of the legal argument, 449; in the Introduction, XXIII,

he draws on Claude Lévi-Strauss’ ideas that language molds discourse beyond consciousness.

7 KOSKENNIEMI (2011).

about law in the context of power, namely the power of law as language« (Koskenniemi 2021, 8). Moreover, he is putting the strategy of exoticizing our past into practice. The aim of his intellectual history is to unmask seemingly timeless and universal ideas as contextually bound to particular projects or interests. »Eurocentrism might then

be destabilized with the realization that »Europe, too, is just a continent with its particular interests and neurosis, wisdom and stupidity – rather like realizing that the choice for a French restaurant is also to opt for ethnic food« (Koskenniemi 2011, 175). ■

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