



Review

# Home and the world: the legal imagination of Martti Koskenniemi

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## Abstract

The Finnish lawyer-historian Martti Koskenniemi's new book, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (2021), is the culmination of a 30-year-long project to deconstruct and historicise the reigning assumptions of the profession of international law. This article evaluates *To the Uttermost Parts of the Earth* in the context of Koskenniemi's larger critical project as well as within the historiography of international law from the late 19th century to the present. It argues that Koskenniemi's genealogical method is revealing and frustrating in equal measure: frustrating in its diffuseness and lack of overarching argument but revealing in its scope, in its erudition and in its ambitions to disrupt traditional teleologies, to reveal the constraining force of legal language and to expose European dialogues between 'domestic' and international law over more than 500 years.

## Keywords

genealogy, historiography, international law, law of nations

Mozart's *Marriage of Figaro* (1786) never appears in studies of international relations or international law. Perhaps it should. In both Lorenzo da Ponte's libretto and Beaumarchais's underlying play, the drama's controlling figure, Count Almaviva, shapes the law and speaks its language in domestic and foreign contexts alike. At home, he uses aristocratic authority to abolish the *ius primae noctis* or *droit de seigneur*, the mythic feudal right to rape his female tenants on the eve of their wedding. Yet when the Count falls for Susanna, his valet Figaro's fiancée, he hatches a plan to evade the change of law

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by going abroad. As the nefarious Count tells his two servants, they – and they alone – must travel with him to a faraway posting, where local customary law would no longer apply. The Spanish king has appointed Almoviva envoy to London where, Figaro surmises in alarm, he will be but a messenger (*corriero*) for the minister (*ministro*) and Susanna will become the Count's secret 'ministress' (*segreta ambasciatrice*) and mistress. Subject to diplomatic immunity under the law of nations, Almoviva would be dangerously beyond the reach of both English and Spanish domestic law.

Mozart's Count cloaks himself in the language of natural law and justice, but his immoral designs are all too clear. The opera's plot reveals the complex effort to undermine his extralegal scheme to rape Susanna. Many machinations later, with Susanna protected and the Count ashamed, he joins the final chorus of celebration: *Ah! Tutti contenti / saremo così* ('All happy, we'll be like this') the entire cast sing together in their frail humanity.<sup>1</sup> The Countess is forgiving and the Count forgiven; by keeping Susanna at home, they conform at last to local law. Almoviva knows how pliable the legal imagination can be even if, in the end, his legal skill fails him: he does not persuade, his manipulation fumbles, and he does not attain his libertine goal – though hardly for lack of trying. There will be no escape into an international realm where the strong do what they can and their subordinates suffer what they must. Outside the bounds of the opera's imagined world, maybe Almoviva does go to London as envoy and there claims immunity for some crime. Even if he did, Susanna would not be his victim.

Mozart and *The Marriage of Figaro* do not figure in the thousand pages of Martti Koskenniemi's massive, magisterial new study, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870*.<sup>2</sup> Yet they might have done. At first blush, *opera buffa* might seem a world away from the *magna opera* Koskenniemi concerns himself with: academic treatises, law codes, diplomatic handbooks, legal proceedings and tracts of political theory. Yet before the Count's legal language was Da Ponte's or Mozart's, it was Beaumarchais'. Pierre Augustin Caron de Beaumarchais, to give him his full name, was not just a dramatist and musician but a spy and a diplomat prominent in French support for the rebellious colonists during the American War of Independence.<sup>3</sup> He was also learned in the law. 'Lawsuits were meat and drink to him—he was in his element there', remarked Goethe: the rape plot in *The Marriage of Figaro* depended on the playwright's knowledge of customary law, the law of nations and the difference between them.<sup>4</sup> Koskenniemi surveys just this terrain, the realm of what he calls 'the legal imagination': that is, the field of possibilities the language of law defines but does not quite confine; the contexts where persuasion reigns over proof; the arena where rhetorical actors manipulate norms; and, above all, the space in which feats of legal virtuosity can bridge the gap between the domestic and the foreign, the municipal and the international. Count Almoviva is a creature of this legal imagination and a practitioner of it, the product of both his creator's experience of the *droit des gens* and his critical representation of ancien régime law.<sup>5</sup> Like Koskenniemi's own rich cast of characters, he knows how fluid the boundary between the 'domestic' and the 'international' is and how readily it might be manipulated.

The lawyer-scholar Martti Koskenniemi might be called the Mozart of international law. Prodigiously prolific and unceasingly creative, he spans genres, periods and perspectives *con brio*, with an enviable ability to combine complexity with clarity. All these

qualities define his countless articles and essays as well as his major books. Yet when it comes to those monographs, Mozart might not be quite the right comparison. The three works for which Koskenniemi is best known – *From Apology to Utopia: The Structure of International Legal Argument* (1989); *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2001); and, now, *To the Uttermost Parts of the Earth* – are on a scale of ambition, with a harmony of motifs and a serious unity of purpose, that might almost be described as Wagnerian.<sup>6</sup> His cycle of masterworks has only three parts (so far) to *The Ring*'s four, but it requires of its readers the kind of dedication, attention and sheer *Sitzfleisch* that Wagner demands of his audience. Unlike Wagner, Koskenniemi did not compose his sequence chronologically: in a banally descriptive sense, *To the Uttermost Parts of the Earth* is the chronological prequel to *The Gentle Civilizer of Nations*, his other major historical work published two decades ago. That earlier book spanned almost a century, from the founding moment of the Institut de droit international in 1873 to the post-War German-American origins of International Relations as a discipline. The bulk of his new work covers even more ground: it takes in over half a millennium and carries the story from the early 14th century to the early 19th century. An epilogue briskly carries the narrative up to the proposal to form the Institut as the scientific 'organ of the legal consciousness of the civilised world [*Rechtsbewusstsein der civilisierten Welt*]' (p. 967).<sup>7</sup> With this quotation, in the work's very last lines, Koskenniemi does not so much close the circle – or complete his own kind of *Ring* cycle – as solemnise the marriage of the two unequal parts of his grand narrative, now encompassing the European legal imagination in global perspective from the France of Philip the Fair in the early 1300s to the American empire of the 1960s.

Martti Koskenniemi (1953–) is a philosophically trained, critically inclined practitioner and scholar of international law and its history. Before becoming a law professor at the University of Helsinki, he was for many years a member of the Finnish diplomatic service, and later sat on the International Law Commission and was a judge for the Asian Development Bank, among other non-academic positions. Such passages between practice and scholarship are hardly unusual within the legal academy, where the two are often combined. Yet this movement is important to bear in mind when reading his scholarly works, which arise from the acute self-awareness Koskenniemi shares with other critical scholars in his field and out of equally sharp reflection on his experiences as a jobbing lawyer. Indeed, it is hard to resist the suspicion that, for all its temporal distance from the present and despite its formidable battery of disinterested erudition, *To the Uttermost Parts of the Earth*, like many of Koskenniemi's essays and earlier monographs, has a 'strong autobiographical aspect'.<sup>8</sup> Unlike those of us who are not and never have been lawyers, Koskenniemi knows what it means – and also how it *feels* – to use legal vocabularies in practice. It means viewing language as a kit of tools lying to hand for multiple jobs. It demands wielding those tools adversarially, to win arguments and justify positions, in specific environments shaped by existing institutions. It does not mean having a set of decision procedures or 'deductive inferences or algorithms' (p. 6) on tap to solve problems. Instead, it requires the nimbler activity Koskenniemi calls, invoking Claude Lévi-Strauss, *bricolage*: that is, adapting arguments to novel circumstances to assert authority and to speak for, or against, power.<sup>9</sup> These, at least, are the programmatic concerns Koskenniemi identifies at the outset as defining his conception of legal

imagination in the case studies that follow. It does not take the reader much imagination to infer that these conditions – of persuasion and justification, flexibility and constraint, advocacy and critique – are the remembered routines of Koskenniemi the highly placed lawyer as much as the techniques of the historically ‘ambitious men’ (and they are all male) he documents sympathetically in detail and at length.

*To the Uttermost Parts of the Earth* comprises a dozen dense essays book-ended by a succinct introduction and suggestive brief conclusion. Koskenniemi speaks in his own voice mostly in those 30 opening and closing pages; the author’s own judgements and arguments appear rarely and intermittently in the remaining 97% of the book and then usually just for a paragraph or two. Inclusion, exclusion and exposition stand in for the explicit elaboration of a thesis. For the most part, narrative – the ventriloquism of others’ arguments and their discursive and political contexts – subsumes Koskenniemi’s own thesis, often for hundreds of pages at a time. This makes reading *To the Uttermost Parts of the Earth* a challenging and occasionally bewildering experience. The book covers little less than large swathes of world history over five centuries in a series of illuminating episodes, mostly viewed from Europe. The first part, ‘Toward the Rule of Law’, comprises chapters on 14th-century France, on Spain and the Spanish Indies in the 16th century, on the rise of early modern reason of state and on the world of Hugo Grotius. The second section, ‘France: Law, Sovereignty and Revolution’, spans from the sovereignty doctrines of Jean Bodin to the Haitian Revolution via Bourbon absolutism, the emergence of political economy and the expansion of French colonies, corporations and the slave-trade. Part three, ‘Britain: Laws and Markets’, covers what might be called the juridico-ideological origins of the British Empire from the mid-16th century in England through to the hegemony of the East India Company in South Asia two centuries later. The fourth and final part, ‘Germany: Law, Government, Freedom’, treats the law of nature and nations as a peculiarly German discipline from roughly the Peace of Westphalia to the Napoleonic Wars as well as the emergence during that period of something structurally similar to the modern law of nations or international law.

Koskenniemi notes at the beginning of *To the Uttermost Parts of the Earth* that the book is ‘not a history of international law’ but rather ‘a history of the ways in which ambitious men, mostly in Europe, used the legal vocabularies available to them in order to react to important events in the surrounding world’ (p. 1). Because he does not explain his principles of selection, the reader must reverse-engineer an argument from Koskenniemi’s suite of case-studies and the trail of breadcrumbs he lays among them. His organising vocabulary provides one clue for the reader to navigate the labyrinth of his argument. The controlling term in *The Gentle Civilizer of Nations* was legal ‘sensibility’; legal ‘imagination’ is the equivalent in *To the Uttermost Parts of the Earth*. Though each faculty is capacious to the point of vagueness, they do allow Koskenniemi to tack between the Scylla of canonicity and the Charybdis of ideology. ‘Sensibility’ combined subjectivity with relationality, the self-conception of individual international lawyers with what held them loosely together as a profession. By using this tool, Koskenniemi shifted the focus of the history of international law from doctrines and canons to agents and institutions and away from its alleged origins in Westphalia or Vienna to its professionalisation by the ‘men of 1873’ who founded the Institut de droit international: a

history, that is, not of international law but of international *lawyers* and their ways of being in the world.

Since their origins in the late 18th century, most histories of international law had been constructed around a sequence of major, usually male, figures – Vitoria, Gentili, Grotius and the like – arranged into schools. Their major texts formed the stepping-stones in a narrative of an identifiable academic and professional discipline on its teleological march towards modernity.<sup>10</sup> ‘What we read in standard histories is a myth’, Koskenniemi has retorted.<sup>11</sup> *The Gentle Civilizer of Nations* avoided the temptations of mythography by treating international law as ‘not a set of ideas . . . nor of practices, but a *sensibility* that connotes both ideas and practices but also involves broader aspects of the political faith, image of self and society, as well as the structural constraints within which international law professionals live and work’ (my emphasis).<sup>12</sup> The subjectivity of sensibility oriented Koskenniemi’s previous book towards biography, while its relational element – the way it bound a community of international lawyers together and formed their professional identity through practice – tilted his method towards prosopography. This allowed him to trace historically the ways in which ‘[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology’, an oscillation he had earlier anatomised structurally and theoretically rather than historically and empirically in *From Apology to Utopia*.<sup>13</sup>

The subtle shift in *To the Uttermost Parts of the Earth* from sensibility to imagination accompanies a parallel move away from the lives and careers of international lawyers, whether alone or en bloc, towards incidents, events and moments, most involving political and legal actors who lacked any common identity – all lived and worked before ‘international lawyer’ became a professional persona – and few similar constraints beyond those of language itself. Moreover, like ‘sensibility’ in *The Gentle Civilizer of Nations*, ‘imagination’ occupies the conceptual space other writers might have filled with ideology. At times, Koskenniemi himself has loosely identified ideology with sensibility, in the sense of a set of guiding presuppositions, when speaking of a ‘judicial ideology’, for example; in *To the Uttermost Parts of the Earth* he more strictly sets ‘imagination’ at a distance from ideology.<sup>14</sup> Ideology is something only non-lawyers espouse – defenders of divine right, Tudors, royalists, merchants, agricultural improvers and the like (p. 36, 39, 218, 267, 333, 624, etc.) – inferentially because it is fixed and predetermining rather than plastic and circumstantial like imagination, the leading faculty of the legal (but not international-lawyerly) actors who populate *To the Uttermost Parts of the Earth*. The lens of imagination allows Koskenniemi to continue the historical project of *The Gentle Civilizer of Nations* for a period that lacked self-identifying practitioners of international law – at least, that is, until Jeremy Bentham introduced that designation in the 1780s (pp. 679–82). Imagination captures elements that ideology also encompasses – world-views, orientations, vocabularies that are learned and transmitted – without committing to any kind of holism while keeping open a wide latitude for innovation. Imaginations are, well, *imaginative*: that is, capable of making leaps and uniting seemingly unconnected elements. It is precisely that faculty of flexibility, even creativity, that Koskenniemi hopes to capture in his closely described array of chapters on the legal imagination and its articulation with international power.

On Koskenniemi's account, legal imagination is something learned and learned, the product of muscle memory in legal and political activity as well as of knowledge transmitted via formal education and engagement with treatises, handbooks and similar specialised genres. His imaginative actors comprise royal counsellors and diplomats; university teachers from Paris, Salamanca and Göttingen; jurists like Jean Bodin, Hugo Grotius and the baron de Montesquieu; canonical writers such as Hobbes, Locke, Hume, Rousseau, Kant and Hegel; and thinkers of what the historian Emma Rothschild has called "'medium' thoughts": that is, the likes of company officials, finance ministers, merchants, colonists and slaveholders.<sup>15</sup> Koskenniemi describes the struggles of these men to solve novel problems using 'the combination of materials lying around' (p. 958) they had picked up from their education and acquired from their experience. His goal is not to expose their false consciousness or even to compile their deliberations into trans-temporal traditions. Yet the deep past Koskenniemi portrays in *To the Uttermost Parts of the Earth* does share features with the present he has described elsewhere in his work. For instance, he has argued that the international legal 'project' itself has run into the sand of late, that any sense of its progress has stalled and that its lack of momentum presents an opportunity to take stock, to dismantle inherited mythologies and traditions and to 'develop a more complex and many layered concept of international law itself'.<sup>16</sup> *To the Uttermost Parts of the Earth* lays the historical groundwork for just such an enterprise. It remains to be seen whether Koskenniemi will pursue that project himself or leave it for others to construct.

Fragmentation; slipperiness; a lack of coherent identity: these are features of a contemporary project that have analogies in the pre-professional period before 'the rise and fall of international law' Koskenniemi tracked in *The Gentle Civilizer of Nations*. To understand the diffuse operations of power in the present, it is necessary to examine how it worked in the past. Koskenniemi's genealogical inspiration here seems to be Foucault and, behind him, Nietzsche. He is certainly no Marxist, reading off expressions of the legal imagination from the political or economic positions of his actors, nor is he much interested in their interests, material or otherwise. He is not even much of a post-Marxist: for Koskenniemi, 'imaginary' is almost always an adjective not a noun and he does not try to reconstruct the larger representations others might call social 'imaginaries'.<sup>17</sup> He is by temperament a Foucauldian sceptic, alert to the ubiquitous capillary presence of power, but even more fundamentally he is a Nietzschean genealogist. Nietzsche argued in *On the Genealogy of Morality* (1887) that 'anything in existence, having somehow come about, is continually interpreted anew, requisitioned anew, transformed and redirected to a new purpose by a power superior to it'.<sup>18</sup> Koskenniemi might prefer the plural 'powers' to 'power' in the singular, but *To the Uttermost Parts of the Earth* follows this Nietzschean programme by tracking the interpretations, appropriations and transformations of the European legal imagination across centuries and around the globe. The result lacks some of the narrative propulsion of *The Gentle Civilizer of Nations*, making it perhaps harder to read en bloc. However, it does not share that work's overt professional pessimism and introspection, potentially opening *To the Uttermost Parts of the Earth* to a wider range of academic audiences, to historians and scholars of International Relations as well as to students of international law itself.<sup>19</sup>

The scope of *To the Uttermost Parts of the Earth* encourages interdisciplinary openness. It rests on staggering erudition, the product of almost two decades' immersion in, and reflection upon, scholarship in at least six languages by political, intellectual, diplomatic, colonial and religious historians, as well as historians of law, and on the published sources behind their work. A frequent charge against such synthetic works is that the reader may suspect segments she knows well but must take on trust the ones she does not. That charge hardly applies here. Koskenniemi's grasp of the literature in the areas I am familiar with inspires confidence in those parts where I – like most readers, I suspect – do not have his sweeping command. The examples he has chosen do reflect traditional crises in conventional historical narratives – for example, the medieval struggle between Church and Empire; the rise of absolutism; the French Revolution – but they also follow more recent developments by focusing on slavery and empire, the East India Company and the Haitian Revolution. Only the fourth part, on the science of the state and the transformation of natural law in Germany, is likely to be of primary interest to intellectual historians, historians of philosophy and the more philosophically inclined students of international law like Koskenniemi himself. He makes this divergence in emphasis clear when he notes that '[i]nternational law is a specifically German discipline', with grammar derived from German debates concerning '[h]ow to square the circle of the simultaneous validity of imperial and territorial laws', a challenge he calls, 'the international law problem *par excellence*' (p. 800).<sup>20</sup> This final part of the book functions as the bridge from the concerns of its earlier sections, with their more diffuse sense of law's historical relation with power, to its conclusion and thence to the chronology and the concerns of *The Gentle Civilizer of Nations*.

Koskenniemi has elsewhere professed his admiration for 'grand structural narratives' of global history, like those of Fernand Braudel and the *Annales* school or (less to his taste) the world-systems theory of Immanuel Wallerstein and his followers. He rightly notes that they generally overlooked law – including international law – but speculates that law itself might be inassimilable to such totalising accounts.<sup>21</sup> In the mid-20th century, at least some international lawyers, Carl Schmitt, Wilhelm Grewe and C. H. Alexandrowicz among them, had theorised global history through law: Koskenniemi begins afresh.<sup>22</sup> *To the Uttermost Parts of the Earth* does not attempt a multicausal or, following Braudel, multitemporal analysis, for example by examining the intersection of law over the *longue durée* with its more immediate, *événementielle* manifestations. Nor does Koskenniemi propose a structural theory of law's role in forming the segmented, hierarchical worlds of empires and states that populated global history between the late Middle Ages and the Age of Revolutions.<sup>23</sup> Instead, he tacks back and forth between individuals and their institutional and intellectual contexts to show how they used the faculty of legal imagination to navigate novelty and creatively shape their environments in response to new challenges. The resulting analysis is rich in profuse detail, at times overwhelmingly so for the reader who might need a more explicit argument to guide her through the forest.

Various possible routes among the trees present themselves but a few seem tolerably clear: the complex dance between property (*dominium*) and sovereignty (*imperium*); the relationship between private law and public law; and, most fundamental of all – and, like all foundations, deepest hidden – the dialogue between the domestic and the international

over the centuries. The first two place Koskenniemi in a distinguished line of students of international law who have traced its origins back to Roman law, especially Roman private law, most notably Henry Sumner Maine and Hersch Lauterpacht.<sup>24</sup> The third, though more lightly sketched, joins him with scholars who have anatomised the boundary work that gradually separated the inside and the outside of the state, and thus the domestic from the foreign, the municipal from the international.<sup>25</sup> Koskenniemi's version of this story of separating spheres is overwhelmingly metropolitan in focus: '*bricolage* begins at home' (p. 9), he says early in the book, before reaffirming close to its end that 'imagining starts at home' (p. 956). 'Home' here means within individual lawyers' 'legal education and local experience' (p. 955) as well as the realm of private law, of the domestic and the municipal. It also describes where the imaginative bricolage generally takes place throughout the book – that is, not in the 'uttermost parts of the earth', in central America, the Caribbean, sub-Saharan Africa or, for the most part, in South Asia, but rather back 'home' in Europe: in Rome, Salamanca, Paris, Amsterdam, Geneva, Neuchâtel, Oxford, London, Göttingen or Königsberg.<sup>26</sup> Koskenniemi is self-critical about the limits of such 'hopeless Eurocentrism' (p. 956), but it does help to ensure that his stories of property and sovereignty, private law and public law and the domestic and the international, and of their entanglement, are coherent even if confessedly not comprehensive.<sup>27</sup>

This trio of mutually reinforcing narratives does not exhaust the resources in *To the Uttermost Parts of the Earth* but it might help the reader coming to Koskenniemi's work for the first time to find her way through its dense thickets. The forest comes clearly into view from the outside – or, within the scope of the book, looking back from its conclusion. It is in those closing pages that Koskenniemi reveals what had been at stake all along in his episodic treatment of the legal imagination. 'My ambition', he writes, 'has been to show that European power is neither the power of sovereignty nor of property but always a particular, locally specific combination of the two. *Sovereignty and property are the yin and yang of European power*' (p. 959; Koskenniemi's emphasis). Sovereignty and the critique of sovereignty were the focus of *The Gentle Civilizer of Nations*; here, Koskenniemi adds property – the object of contracts, commerce and capitalism – to his ambitious account of European power and its projection across the world.

As Koskenniemi shows, Roman law, and in particular the *ius gentium*, provided resources for princes and their legally adept counsellors to justify overlordship without threatening subordinate property rights, except when the common good demanded it. Roman law had conceptually encoded the distinction between sovereignty and property as one between *imperium* and *dominium*. To possess *imperium*, as the emperor did in his capacity as *dominus mundi*, meant the ability to give orders across the (known) world, but did not imply universal ownership. *Imperium* and *dominium* were separable but often conjoined. This was true at the pinnacle of the social order in the figure of the Roman emperors and their successors, as well as in the capacities of princes who from the 13th century onwards took upon themselves imperious claims to independence – summed up in the famous formula 'the king is an emperor in his own kingdom' (*rex est imperator in regno suo*) and its variants – that would, in turn, collide with the feudal rights and privileges of their subordinate lords.

By the early 14th century, the *ius gentium* made divisions of princely territory, or *regna*, and of private property legible across Christian Europe (p. 72): legible, but of



course still litigable. Koskenniemi argues that the first generations of lawyers trained in a revived Roman law at the universities of Bologna, Orleans and Montpellier picked up tools to square the circle between moral assumptions of original sin and the divine donation of the earth on the one hand and, on the other, the facts of accumulated wealth and a burgeoning commercial society. The *ius gentium* expanded their legal imaginations and thereby made them ‘indispensable associates to the [French] king’ (p. 115). Koskenniemi implies, but does not state explicitly, that the moment other scholars have located as foundational for modern political thought was also the beginning of an instrumental relationship between law and power that would endure, with permutations, to the 19th century and beyond.<sup>28</sup> Certainly, his post-medieval narrative assumes that complicity over the following 500 years.

The conventional designation of the 16th and 17th centuries as ‘early modern’ means one thing if it concerns ‘modern’ political thought, but something quite different if take to point towards modern *international* thought, and more particularly towards international law. Koskenniemi balances his positive debt to the classic histories of political thought with a revisionist attitude towards traditional just-so stories in the history of international law. Like International Relations, international law has long worshipped a canon of founding ‘fathers’ (*sic*), though both fields are at last recovering their female and non-binary contributors, too.<sup>29</sup> Competing national and confessional origin stories have claimed three distinct progenitors for international law: the Spanish Dominican Francisco de Vitoria (1483–1546), the Protestant Italian Alberico Gentili (1552–1608) and the more ecumenical Protestant Dutchman, Hugo Grotius (1583–1645). In his opening chapters, Koskenniemi treats each of these men and their work in detail, mainly to topple them from their pedestals in the international lawyers’ pantheon by presenting them as instrumental to the elaboration of empire, reason of state and the expansion of transnational corporations. More positively, he argues that their repurposing of concepts from Roman law – more specifically, Roman *private* law – facilitated the extension of state power and the flourishing of commercial capitalism in a novel narrative, woven out of some canonical materials but informed by critical rather than celebratory motifs.

When juridically minded Europeans grappled with the governance of Indigenous peoples in the Americas in the first half of the 16th century, *imperium* and *dominium*, duly refurbished, remained key terms. After lingering at the court of Philip the Fair, Koskenniemi vaults over two centuries to the halls of the university of Salamanca, following a well-travelled itinerary in the history of political thought.<sup>30</sup> Here the Dominican Francisco de Vitoria and his followers argued for ‘civil power and private ownership—*dominium iurisdictionis* and *dominium proprietatis*’ (p. 118) as the institutions humans needed to secure happiness on earth and felicity thereafter. Koskenniemi does not put Vitoria into the service of a future he could not have foreseen and the friar does not appear here as a ‘founder’ of international law: *To the Uttermost Parts of the Earth* provides no such genealogy.<sup>31</sup> Vitoria confronts the dilemmas of his own moment, from the sacrament of penance and the challenge of Protestant Reformers to the status of Native Americans and the economic impact of transatlantic empire on the Spanish Monarchy. Yet he and his fellow Salamancans did provide royal counsel, casuistic argument and commentaries on Aquinas that provided a flexible interpretation of *ius gentium*, in order ‘to look for a middle way that allowed freedom of action in ways that seemed socially

useful' (p. 138). The prominence of Thomistic commentary in this chapter raises the question why Koskenniemi did not begin his story with Aquinas. Among the answers must be that the Angelic Doctor himself was not as pliable, or as instrumental, as his later glossators and that Koskenniemi places praxis – the imaginative application of arguments – above exegesis, thereby absolving himself from expounding Aquinas, his predecessors and most of his heirs. He explores instead how the Salamancans tempered Thomist natural law into a conception of *ius gentium* adequate to fallen humanity and able to justify institutions like property (*dominium*), contract and commerce. Ultimately, Koskenniemi argues, the Salamancans, in person and by publication, moved from being conscientious counsellors to instruments of hardening royal *Realpolitik*. They refashioned the *ius gentium* to serve the immediate ends of Spanish Habsburg *imperium* not to lay the groundwork for later international law. The 'real Spanish contribution' to later international law was less the justification of concerns central to what would later be termed 'public law' – war and conquest, for instance – than the operation of 'private' law, under the sign of *dominium*, to facilitate imperialism.<sup>32</sup>

The Salamancans' instrumental construction of the *ius gentium* greatly narrowed any gap between the enduring traditions of natural law and the ideology, newly emergent in the 16th century, of reason of state (*ragion di stato* or *raison d'état*). Koskenniemi's exemplary figure in this tradition is not one of the usual suspects among historians of political and international thought. Rather than, say, Machiavelli, Francesco Guicciardini or Giovanni Botero, the exiled Protestant civil lawyer Alberico Gentili appears here providing 'less a kind of philosophical jurisprudence' (as patriotic Italian lawyers pegging him as a 'father' of their field might prefer) 'than pragmatic counselling for the English government' (p. 232): a more realist form of argument for identifiable patrons and concrete purposes.<sup>33</sup> Gentili used history, and especially Roman history, to ground his practical wisdom, but he did so within the jurisprudential language of the civil law.<sup>34</sup> His major contribution, Koskenniemi argues, was to leach normative struggle out of combat by arguing for war as just on both sides within 'an altogether secular *ius gentium*' (p. 267), in line with Gentili's most famous bon mot, that theologians should keep their noses out of other people's business (*Silete theologi in munere alieno*).<sup>35</sup> Gentili inspired the so-called 'forward' English Protestants under Elizabeth I who promoted an aggressive foreign policy, especially in the Low Countries, but Koskenniemi has to admit that Gentili's broader political influence was limited and that his breakthroughs came in the realm of ideas. Even then, because Gentili 'made no clear distinction between public and private power' (p. 270), he could not quite exemplify the ways in which the *ius gentium* mediated between the two but 'isolated political decision-making about external affairs from concerns of domestic justice' (p. 282). Accordingly, Gentili stands here as a liminal figure, deeply indebted to Roman private law while inspiring his more famous Dutch admirer, Hugo Grotius, to sharpen his own sense of the distinction between the two realms in both law and policy, partly in response to the theorists of reason of state.

Grotius's contribution to the debate, Koskenniemi argues, was precisely his separation of law from instrumental reason and of justice from political prudence. For Grotius, law was not confined to domestic relations between rulers and subjects within the commonwealth: it was 'an autonomous system of governing human action' (p. 284) that extended globally, from Europe to both Indies, West and East. From his earliest writings,

Grotius accepted the force of interest, especially self-interest, in human affairs, but balanced it with human love and sociability – what he would call, in his *De iure belli ac pacis* (1625/31), the desire for society (*appetitus societatis*). He elaborated his arguments gradually, beginning with the expansive legal brief he wrote to justify the Dutch East India Company's violent incursions against the Portuguese in Southeast Asia. Here, in *De jure praedae* (1604), Grotius laid out his foundational arguments on subjective individual right as a hired gun for one of the earliest transnational corporations: an instrumental position Koskenniemi might have been expected to make more of this as he carefully unpicks the filigree of Grotius's argumentation.<sup>36</sup> He does emphasise the common contexts, of commerce and war, that informed Grotius's arguments, especially in *De iure belli ac pacis*, and defined their effect, particularly with regard to the genesis of property rights and just war theories: conflict and trade spanned domestic and transnational circumstances even as they pressed the bounds of Grotius's argument to expand globally. 'This immensely influential sketch of a global system of ownership and exchange', Koskenniemi concludes, 'was underlain by divine providence' not by consequentialist maxims of prudence (p. 345). Grotius appears here not as the *tertium quid* between Hobbes and Kant (as in international relations theories derived from the English School) nor as a canonical, let alone foundational, figure in the history of international law, like Vitoria and Gentili before him. Instead, he emerges as the deftly persuasive *bricoleur* of 'a natural law governing both polities at home as well as in the international world of commerce and war' (pp. 343–4).

Grotius's rapprochement between universal justice and the needs of commercial imperialism was not immediately successful as an export, as Koskenniemi illustrates by the cagy exchanges between the Dutchman and the omniscient French cardinal Richelieu that begin his exposition of law, sovereignty and revolution in France from Bodin in the late 16th century to the age of Napoleon. Grotius had good reason not to throw in his lot with the Bourbons but, as Koskenniemi shows, though *raison d'état* reigned for two centuries, a home-grown tradition of natural law flourished in France as the political economy of the absolutist state expanded within and beyond Europe.<sup>37</sup> By the late 17th century, the language of the *ius gentium* had become a subtly critical tool – 'Have you ever studied seriously that which is called the law of nations?', the courtly archbishop Fénelon impertinently asked Louis XIV (cit., p. 405) – as well as an ideology of monarchy, albeit one incompatible with the rights and freedoms Grotius had espoused. However, unlike in Germany and Scandinavia, the law of nations was never institutionalised as a university discipline in France. Until the cataclysm of the French Revolution transformed the 'public law of Europe', political economy flourished alongside a discourse of peace associated with thinkers from the abbé de Saint-Pierre to Rousseau and their successors.<sup>38</sup>

An authoritative Cook's tour of Enlightened political thought in French – Mably, Montesquieu, the Physiocrats, the abbé Sieyès, the Revolution and the *Ideologues* – sharpens when Koskenniemi turns to France's 'colonies, companies and slaves'. He deftly pinpoints the peculiarities of French empire in relation to human bondage and the role of the state in overseas colonialism. With regard to slavery, the inheritors of Roman civil law were well aware that natural law condemned human bondage while the law of nations condoned it. French justifications for *dominium* over human beings effectively

exploded the notion, increasingly institutionalised in Protestant Europe, that there was a unitary *ius naturae et gentium*, or law of nature and nations. The effect of code-switching between *imperium* and *dominium* distinctively shaped French discussions: ‘when chattel slavery was framed rather in property than in sovereignty terms, it was easier to debate it as a purely economic matter’ (p. 499), as proponents and critics on both sides of the Atlantic did. In parallel, the French state, from Richelieu and Colbert onwards, was more interventionist than its Spanish and English counterparts. It exercised sovereignty more aggressively, even when outsourcing empire by creating commercial companies, more than 75 of which were created globally between 1599 and 1785.<sup>39</sup> The superprofits enslaved persons generated for planters in the French Atlantic powered the empire above all: the major legal intervention of the period was the regulation of property in the slave system via the 1685 *Code Noir*. When revolution came to the metropole, emancipation of the enslaved in the colonies was not on the agenda. After former slaves freed themselves through armed struggle on Saint-Domingue, France joined Britain, Spain and the United States in refusing to recognise the new Black republic of Haïti: the US only did so under Abraham Lincoln in 1862.<sup>40</sup> How these epochal developments shaped, or were shaped by, the ‘legal imagination’, Koskenniemi declines to tell us. Was there a logic of universals at play here? Was the Haitian Revolution the fulfilment of all that came before, its subversion or some kind of Hegelian *Aufhebung*?<sup>41</sup> We must, it seems, make our own minds up, here as elsewhere.

The chapters on France conclude inconclusively; Koskenniemi then abruptly leaps back in time, to the very different legal context of Britain and its overseas extensions from the 1450s to the 1860s. The reader is left undoubtedly well informed about the current state of French colonial history yet somewhat disoriented by the lack of critical commentary from our erudite guide. The outlines of a thesis are sharper in the equally dense, similarly sure-footed and yet more extensive section on ‘Britain: Laws and Markets’.<sup>42</sup> By the middle of the 18th century, when Britons reflected on the nature of their political community, they mostly imagined themselves as part of an empire that was Protestant, commercial, maritime and free.<sup>43</sup> Koskenniemi is less interested in how Protestant freedom became normative or in the maritime definition of empire than he is in the rise of England’s – after 1707, Britain’s – self-image as a nation of merchants, traders and shopkeepers, as Napoleon opprobriously put it. Using legal treatises, texts of political thought, pamphlets and case law, Koskenniemi constructs a narrative of the accelerating absorption of the law of nations into ‘the uses of the legal vocabularies leading up to an ideal of the commercial society that the British believed they saw when they looked in the mirror’ (p. 700). By the era of Sir William Blackstone in the 1750s, it was a commonplace among English lawyers that the law of nations was part of the law of England: Blackstone himself was pivotal in cementing that orthodoxy early in his career but Koskenniemi shows that the road to consilience was hardly straightforward. As the English community of civilians – that is, trained practitioners of Roman civil law – dwindled over time, the *ius gentium* appeared increasingly foreign while institutional support in Britain for the law of nations and, later, international law lagged behind its European counterparts.<sup>44</sup> Creative *bricoleurs* managed to re-purpose it for seemingly contradictory purposes, from supporting monarchical absolutism in the early 17th century to protecting private property against royal incursions. More mutually affirming was the alliance

between an expansive law merchant (*lex mercatoria*) and an equally aggressive conception of sovereignty, both articulated within the law of nations. On that basis, Koskenniemi bracingly argues, the Anglo-British state could imperiously 'give law to the world' even though 'Britain's global dominance from the French Revolution to the mid-nineteenth century gave birth to no significant stream of thinking about the law of nations' (p. 688).

There may have been little British thinking *about* the law of nations, but there was plenty of thinking *with* the law of nations, especially as imperial ambition spread beyond the Atlantic archipelago of Britain and Ireland. Koskenniemi quotes the poet-preacher John Donne speaking in 1622: 'In the law of nature and nations, a land never inhabited by any . . . becomes theirs that will possess it' (cit., p. 701).<sup>45</sup> This was an early charter for Indigenous dispossession, laid out in Donne's sermon to the Virginia Company on the biblical text that lends the book its title: 'ye shall be witnesses unto me both in Jerusalem, and in all Judaea, and in Samaria, and unto the uttermost part of the earth' (Acts 1:8 KJV). St Paul presumably imagined the Mediterranean ecumene as a universal mission-ground; similarly Donne, the Indies, West and perhaps East. However, as Koskenniemi's title implies, the law of nations was global from the get-go, both ineluctably entangled with empire and propelled by an evangelical impulse. His detailed account of Anglo-British empire from the early Stuarts to its Victorian zenith is frustratingly non-linear, in both chronology and argument, but it does cover a great deal of conceptual and territorial ground from Virginia to Bengal and beyond. The story is mostly metrocentric until it reaches the domains of the East India Company in South Asia; its major actors are generally not the middling local entrepreneurs of legal *bricolage* others have identified as sitting at the imperial 'origins of international law' in locales well beyond Britain.<sup>46</sup> The causal arrow must run the other way – the law of nations helped to create empire, rather than vice versa. Just what readers should conclude from this remains elusive as Koskenniemi ends this section of the book only with an aphorism on indirect rule: 'Empires thrive in part by imposing the rules, but more efficiently by sitting back and letting others consent to them' (p. 794). By declining to point the moral, Koskenniemi himself effectively sits back and asks his readers to consent to his account.

The basis for that account finally becomes clear in the final section of the book, where Koskenniemi describes the immense effort inhabitants of the German lands put into thinking about, as well as thinking with, the law of nations. We are here on territory familiar from later structural narratives and oppositions familiar to students of both international law and international relations. In the wake of the Peace of Westphalia (1648), the constitutional struggles within the Holy Roman Empire foreshadow the central problematic of international order itself: 'How to reconcile national sovereignty with an overarching legal order is simply the "German problem" of jurisdictional limitation between territorial estates and the empire, writ large' (p. 808). 'Simply' bears a great deal of weight here, but the point is clear: the combination of these urgent juridical and political questions with a uniquely well developed academic culture focused on interpreting the law of nature and nations rendered Germany a fertile matrix for both practical problems and theoretical perspectives upon them.<sup>47</sup> 'So powerful has the frame been', Koskenniemi argues, 'that most studies of German (or indeed any) law have been habitually classed as either more or less "naturalist" or "positivist"' (p. 818), a framing he dedicated *The Gentle Civilizer of Nations* to unpicking. Yet by ending this section around 1815,

Koskenniemi surely overdetermines his narrative, precisely to link up with the concerns of *The Gentle Civilizer of Nations* and, before it, *From Apology to Utopia*. A less tunnel-visioned account would give equal or even greater prominence to Friedrich Carl von Savigny and the rise of the Historical School, an evolution whose implications arguably more powerfully shaped the later course of international law.<sup>48</sup>

The cast of characters in these chapters is more canonical than elsewhere in the book – Althusius, Pufendorf, Thomasio, Wolff, Vattel, Justi, Kant, Friedrich von Martens, Hegel – and the exposition accordingly more textual and technical. It is also more teleological. Koskenniemi documents the obsolescence of a dominant ‘form of intellectual imagining’ (p. 876) as the German lands reached peak natural law in the 1790s. The detachment of that natural law from *Staatsräson* and more broadly from policy led, he argues, to a fragmentation that generated ‘four languages that would take its place in the nineteenth century and beyond: the languages of empirical political science, economics, critical philosophy and [the] modern law of nations’ (p. 877). Out of what Kant termed the contest of the faculties (*Streit der Fakultäten*) there emerged an array of modern disciplines, among them the profession of international law, that would never quite shake off their origins.<sup>49</sup> ‘Whenever the legal imagination moves in the sphere of the universal’, Koskenniemi concludes, ‘it will be accompanied by the familiar eighteenth-century languages, means of measurement, standards and criteria that we associated with science and enlightenment’ (p. 951).<sup>50</sup> He argues that this universalistic imagination spawned the sensibility informing ‘the legal consciousness of the civilised world’. The stage is set for the emergence of professional international law – and, hardly coincidentally, for Koskenniemi’s *The Gentle Civilizer of Nations*.

Koskenniemi’s conception of law, international and otherwise, is ultimately agonistic: ‘Law is struggle’, he has recently written.<sup>51</sup> The characters populating *To the Uttermost Parts of the Earth* wrestle with their adversaries, with history and with language itself. They compete for dominance in arenas of argument and reach for whatever comes to hand to bring them victory. History – the sedimented knowledge of the law as well as the law’s own record of its past – was one such weapon and Koskenniemi does much to demythologise its argumentative deployment, especially within disciplinary just-so stories of origins and continuities. Language is more resistant to demystification, being both harder to escape and more essential to scrutinise. In the book’s conclusion, Koskenniemi disavows the strong notion ‘the language we have determines for us the experience we have of the world, and in particular what alternatives for action we perceive’, at least as that applies to human cognition in general, but nonetheless affirms it ‘as a very good rule of thumb when trying to understand the complexities of the governance of the international world’ by imaginative legal practitioners (p. 952). For Koskenniemi, language may be a prison-house yet, paradoxically perhaps, it contains many mansions. It is constricting but capacious, roomy even if necessarily bounded. Debate and disagreement can only take place within its confines but that does not mean we – lawyers, scholars, citizens more generally – cannot make the effort to stand outside it, to review the choices made within its charmed circle.

For scholars beyond Koskenniemi’s professional community of lawyers and legal academics, the rewards of such critical distance are manifold. Teleologies dissolve but without losing the prospect of progress.<sup>52</sup> Affirmative narratives strung along

transtemporal traditions lose their charm. Distinctions between the foreign and the domestic, the inside and the outside of the polity, blur when their contested histories are exposed. The relevance of the law of nations for forming modern political imaginaries – at least in the metropolitan centres of the ‘West’ – stands in higher relief. And multiple pasts stand not as inert contexts but rather as vibrant matrices for our fractured present. All in all, *To the Uttermost Parts of the Earth* should leave patient readers better equipped to escape disciplinary constraints, whether in the fields of history, international law or International Relations. To quote the *Marriage of Figaro* one final time: *Tutti contenti / saremo così*.

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## Notes

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7. ‘Das internationale Institut für Völkerrecht . . . soll dem gemeinssamen Rechtsbewusstsein der civilizierten Welt zum Wissenschaftliche Organen sollen’: Johann Caspar Bluntschli to the Grand Duke of Baden (3 March 1873) in Bluntschli, *Denkwürdiges aus meinem Leben*, Rudolf Seyerlen (ed.), 3 Vols. (Nordlingen: C. H. Beck, 1884), III, p. 331.
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13. Koskenniemi, *The Gentle Civilizer of Nations*, p. 513; Koskenniemi, *From Apology to Utopia*.
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19. See, for example, the multidisciplinary symposia on the book in *European Journal of International Law*, 32(3), August 2021, and *Völkerrechtsblog*, 23–27 August 2021, available at: <https://voelkerrechtsblog.org/symposium/to-the-uttermost-parts-of-the-earth/> (accessed 14 October 2022).
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26. Compare Prabhakar Singh, 'The Koskenniemi Sutra: Britain, Empire, and Legal Imaginations', *Völkerrechtsblog*, 24 August 2021, available at: <https://voelkerrechtsblog.org/the-koskenniemi-sutra-britain-empire-and-legal-imaginations/>; Priya Satia, 'Risking a Colonial Anticolonialism: Chapter 10: Global Law: Ruling the British Empire', *European Journal of International Law*, 32(3), 2021, pp. 1017–26.
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35. On Gentili see now also Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca. 1550–1750* (Oxford: Oxford University Press, 2021), pp. 77–104; Claire

- Vergerio, *War, States, and International Order: Alberico Gentili and the Foundational Myth of the Laws of War* (Cambridge: Cambridge University Press, 2022).
36. As Martine van Ittersum has done, for instance: Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (Leiden, The Netherlands: Brill, 2006).
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  39. Elizabeth Cross, *Company Politics: Commerce, Scandal, and French Visions of Indian Empire in the Revolutionary Era* (Oxford: Oxford University Press, forthcoming); more generally, see Andrew Phillips and J. C. Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton, NJ: Princeton University Press, 2020); Philip J. Stern, *Empire, Inc.: A History of British Venture Colonialism* (Cambridge, MA: Harvard University Press, 2023).
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  44. Andrew Fitzmaurice, *King Leopold’s Ghostwriter: The Creation of Persons and States in the Nineteenth Century* (Princeton, NJ: Princeton University Press, 2022), pp. 74–80; David Armitage and Ignacio de la Rasilla, ‘“The Most Neglected Province”: British Historiography of International Law’, in Randall Lesaffer and Anne Peters (eds), *The Cambridge History of International Law, I: Introduction* (Cambridge: Cambridge University Press, forthcoming).
  45. John Donne, *A Sermon upon the VIII. Verse of the I. Chapter of the Acts of the Apostles. Preach’d to the Honourable Company of the Virginian Plantation, 13o. Novemb. 1622* (London: Thomas Jones, 1622), p. 26. On the context of Donne’s sermon, see Andrew Fitzmaurice, ‘“Every Man, That Prints, Adventures”: The Rhetoric of the Virginia Company Sermons’, in Lori Anne Ferrell and Peter McCullough (eds), *The English Sermon Revised: Religion, Literature and History 1500–1750* (Manchester: Manchester University Press, 2000), pp. 24–42.
  46. Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law* (Cambridge, MA: Harvard University Press, 2016); Lisa Ford, *The King’s Peace: Law and Order in the British Empire* (Cambridge, MA: Harvard University Press, 2021).
  47. Though it has been argued that the germinal contribution of the German lands was more proximal, in the late nineteenth and early twentieth centuries and in the legal response to the collapse of the Habsburg Empire: Mira L. Siegelberg, *Statelessness: A Modern History*

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48. Robert Schütze, ‘German Idealism After Kant: Nineteenth-Century Foundations of International Law’, *Journal of the History of International Law*. Epub ahead of print 25 July 2022. DOI: 10.1163/15718050-bja10078. <https://doi-org.ezp-prod1.hul.harvard.edu/10.1163/15718050-bja10078> (accessed 14 October 2022).
  49. Martti Koskenniemi, ‘Law of Nations and the “Conflict of the Faculties”’, *History of the Present*, 18(1), 2018, pp. 4–28.
  50. For parallel arguments about the convergence of natural law(s)—scientific and normative—in the eighteenth century, see Lorraine Daston and Michael Stolte (eds), *Natural Laws and the Laws of Nature in Early Modern Europe: Jurisprudence, Theology, Moral and Natural Philosophy* (Abingdon: Routledge, 2008); Lorraine Daston, *Rules: A Short History of What we Live by* (Princeton, NJ: Princeton University Press, 2022).
  51. Martti Koskenniemi, ‘The Past According to International Law: A Practice of History and Histories of a Practice’, in Annabel Brett, Megan Donaldson and Martti Koskenniemi (eds), *History, Politics, Law: Thinking Through the International* (Cambridge: Cambridge University Press, 2021), pp. 49–68, at p. 66. See also David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016).
  52. Martti Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counter-disciplinarity’, *International Relations*, 26(1), 2012, pp. 3–34.

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