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# The Politics of International Law – Twenty Years Later: A Reply to Martti Koskenniemi<sup>†</sup>

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## 1 Overview

Koskenniemi's anniversary article is wide-ranging, drawing on both historical changes in international law and his own thinking over a 20-year period. If there is one dominant theme, however, in this article it is his hostility towards the managerialist.<sup>1</sup> Koskenniemi considers managerialists to be a pervasive force with a preference for 'informal regimes'.<sup>2</sup> He applies to them the methodology he used to great effect 20 years ago (and has done since), revealing that managerialism, by using and monopolizing terms such as governance, legitimacy, and regulation,<sup>3</sup> conceals its own preferences. The culture

created is one 'of apolitical expert rule',<sup>4</sup> while at the same time suppressing 'the role of will and randomness, passion and ideology in the way the world is governed, and their own implication in it'.<sup>5</sup>

This reply supports the concerns Koskenniemi has in relation to managerialists, but makes the point that he inadvertently concedes their 'expert rule' and inhibits other actors from challenging it when he creates the imagery '[t]he fantasy position of the managerialist is that of holding the prince's ear'.<sup>6</sup>

However, before we describe how this reinforces the place of the managerialist, an important preliminary point must be made about the nature of the fantasy prince – first, what he is not: Koskenniemi does not necessarily conceive of him as a 'legal' prince, i.e., an international court or a legal compliance structure like a tribunal. Interacting with the prince is not about claiming legal jurisdiction in the sense of *locus standi*: rather, the prince is

<sup>†</sup> Koskenniemi, 'The Politics of International Law – 20 Years Later', 20 *EJIL* (2009) 7, <http://ejil.oxfordjournals.org/cgi/reprint/20/1/7>.

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<sup>1</sup> Koskenniemi, 'The Politics of International Law – 20 Years Later', 20 *EJIL* (2009) 7, Section 3: 'Theory: Against Managerialism', at 14.

<sup>2</sup> *Ibid.*, at 15.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, at 17.

<sup>5</sup> *Ibid.*, at 16. Note: Koskenniemi considers this reflection equally applicable to 'the traditional (European) jurisprudence of exegesis'.

<sup>6</sup> *Ibid.*, at 15.

an administrative and functional entity<sup>7</sup> – someone who has access to power, who has interests and who makes decisions.<sup>8</sup>

This prince is not limited to the sovereign state, but includes the participants in what Koskenniemi identifies as ‘functional regimes’.<sup>9</sup> The important point to note is that while there are now many princes in these regimes their character has not been ‘transformed’ from the old sovereign state: the prince remains subject to the same dynamics of engagement as is the state – the urge, for example, to concentrate on ‘self absorption’ and ‘imperialism’.<sup>10</sup>

My response is in three parts: first, it will be argued that in creating this fantasy Koskenniemi inadvertently gives to the managerialists dominion over conversation with this prince, with its language and meaning. He explains how the managerialists’ aim in an encounter with the prince is influence – but in the background, ‘smoothing’<sup>11</sup> the way, creating a sense of inevitability. However, in explaining and exposing this relationship, Koskenniemi creates the exclusive fantasy of a relationship between two actors, as though their being together is inevitable and reinforces the intimacy of the relationship.

The second point: if we deconstruct the fantasy through adding other actors who could have/desire the prince’s ear, it contributes to Koskenniemi’s aim – that is, the diminution of expert rule and the managerialists’ apolitical culture. To fantasize that we can all demand an audience with the prince<sup>12</sup> is to turn the fantasy upside down, making the imagery anything but expert: rather, an egalitarian and emancipatory fantasy filled with possibilities.

I explore this deconstruction by adding to the fantasy the international legal academic as an actor. Throughout the article Koskenniemi calls for this type of reflection on one’s place in the international legal project.<sup>13</sup> However, his reflection on this place we can occupy seems stark: he suggests there is a place as insider (‘mundane’<sup>14</sup>/compromising) or outsider (martyr<sup>15</sup>). But I suggest that by expanding the fantasy we could re-conceive a direct, personal encounter with the prince during which we express our desires on our terms.

For example, an international legal academic has always been intrigued by Treaty X Article Y (which could concern indeed any matter in any treaty). S/he is

<sup>7</sup> *Ibid.*, at 12.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, at 12: ‘[g]lobalization may have shifted the locus of political engagement from “sovereign states” to “functional regimes”. But it has hardly transformed the dynamics of such engagement.’ Cf. also G. Teubner and A. Fischer-Lescano, *Regime-Kollisionen. zur Fragmentierung des globalen Rechts* (2006) for the term ‘functional regimes’.

<sup>10</sup> *Ibid.*, at 13.

<sup>11</sup> *Ibid.*, at 16: ‘so all that remain are technical questions, questions about how to smooth the prince’s path’.

<sup>12</sup> This idea of the emancipated individual who claims an interpretation was conceived by Koh, ‘Why Do Nations Obey International Law?’, 106 *Yale LJ* (1995) 2599, at 2651, in the context of international legal compliance. However, for me the end is not compliance (as it was for Koh), but rather the writing of a micro history of the interaction. On this idea of the micro history in the context of legal transplants cf. Graziadei, ‘Legal Transplants and the Frontiers of Legal Knowledge’, 10 *Theoretical Inquiries in Law* (2009) 723.

<sup>13</sup> Koskenniemi, *supra* note 1, at 8, speaking of the aims of the original article ‘what it wanted to “achieve” (apart from more complexity, more self-awareness within the profession)’ and at 13 and 14.

<sup>14</sup> *Ibid.*, at 14.

<sup>15</sup> *Ibid.*

not limited to waiting for a legal opportunity, a court, a jurisdiction: rather, in this expanded fantasy s/he brings a legal interpretation directly to the prince (whose treaty obligation it is). S/he states 'this is my legal interpretation', asking where is the evidence of the obligation, promised in and by Treaty X – the guidelines, e.g., or the committee report: whatever article s/he is investigating and is intrigued by. S/he takes the resulting dialogue/dialectic or silence from there. S/he has the prince's ear – neither as a mundane compromise nor as a martyr.

However, unlike those of the managerialists, this encounter is not to make his/her interest one with the prince's; it is not to demonstrate the persuasive power of the law or, necessarily, legal compliance; not even to point to the brilliance of the academic (although some or all or none of these qualities or outcomes may be present). The encounter is intended to provide a historical recount of the time with the prince – the turns, the silences, the impediments; of generating 'a' or 'any' legal meaning over the particular Treaty provision.

The exploration of this historical theme is the third section of this response. This draws from Koskenniemi's observation on the ameliorating effects of history from which 'alternative choices' can be created.<sup>16</sup> Here, the aim of expanding the fantasy by including a legal academic is to create a micro history<sup>17</sup> of his/her interactions with the prince. The micro history does not 'prove' anything – it is not a legal claim in the sense of a court or tribunal; rather, it tells of the academic's passion for Treaty X, the extent of the law's communicative abil-

ity, the character of the prince (as evidenced by the replies and engagements over Treaty X). However, in *not* proving anything and in creating a legal history of the engagement in the political arena, the idea that something is as sterile or as apolitical as the managerialists suppose is undermined.

## 2 The Bias and Limitation Inherent in the Fantasy

As Koskenniemi has illuminated over the years, in the way in which we conceive an idea, use language, or create a concept we must be aware that 'it receives independence; it becomes an autonomous carrier of a bias'.<sup>18</sup> The concept of the managerialists' fantasy being the prince's ear raises connotations of the exclusivity of the relationship: no-one else is mentioned. And it seems a fantasy with unsavoury overtones which seeks to achieve ends through intimate, exclusive access, given Koskenniemi's negativity with regard to the managerialists throughout the article.

Furthermore, the exclusion of all others cements divisions. Making the ear of the prince the fantasy of the managerialists limits imaginative choices,<sup>19</sup> fortifying the relationship between the prince and managerialists as appearing natural and inevitable. Employing Koskenniemi's own observations, 'it serves to *strengthen* . . . boundaries by taking them for granted and by perpetuating the . . . identifications of participants by casting them'<sup>20</sup> as having particular fantasies and aims. Thus, in

<sup>16</sup> *Ibid.*, at 18.

<sup>17</sup> On micro history for legal transplants and legal change see Graziadei, *supra* note 12.

<sup>18</sup> *Ibid.*, at 19.

<sup>19</sup> *Ibid.*, at 18. Koskenniemi considers such choices important: '[a]s a style of legal writing, however, historical narrative liberates the political imagination to move more freely in the world of alternative choices'.

<sup>20</sup> *Ibid.*, at 15: cf. n 17.

order to undermine the apolitical managerialists (one of the central themes of this anniversary article), it is a significant move to add other actors to this crucial fantasy sustaining their dominion.

### 3 Adding Actors to the Fantasy and Breaking the Alternation between Inside (Mundane) and Outside (Martyr)

Koskenniemi places an onus on individuals to marry their personal and professional lives ‘in regard to teaching students, writing articles, or co-operating with colleagues. One is to examine more closely the strategic choices that are opened by particular vocabularies of global governance.’<sup>21</sup> As well, he gives guidance in relation to these personal choices, cautioning that ‘remaining inside a structure’<sup>22</sup> is risking dilution of the law, ‘mundane’, ‘downsizing one’s preferences’;<sup>23</sup> while on the opposite side is the ‘risks marginalization, irrelevance, or even the hubris of martyrdom’.<sup>24</sup>

However, by expanding the fantasy there is a way to be both inside and outside – or at least to start imagining this. Consider the international legal academic who wants the prince’s ear on her own terms, neither inside nor outside, using the language of law but aware of its indeterminacy. The prince has become contactable, his metaphorical ear has never before been so open, in theory, to

the average international legal academic, who has the ability to track agencies and administrators through the Internet and contact them via e-mail – something which 20 years ago, along with managerialism, was a non-existent phenomenon. As Koskenniemi notes, much has changed in these 20 years: not only is the *EJIL* not accepting French manuscripts (as he mentions), but I would add to this another obvious change: that is, 20 years after its inception, the *EJIL* has an active and important blogging site. In the same vein, the prince has become contactable in a way simply not conceivable 20 years ago. Academics can access him with their version of formal international law, thereby colonizing the fantasy of the managerialists.

Let me give an example, chosen because it involves a question of ‘governance’: the managerialist’s traditional purview. It demonstrates that the academic can interrogate ‘governance’ by using international law and not be overtaken by alternative expert or apolitical vocabularies.

Consider the US Bilateral Free Trade Agreement with Oman. In this Agreement there are treaty requirements which impact on notions of governance: for example, the primary administrative body established under the treaty, the Joint Committee, is obliged to establish a code of conduct<sup>25</sup> and also

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, at 14.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> United States–Oman Free Trade Agreement, 26 Sept. 2006, Art. 19(1), available at: [www.ustr.gov/assets/Trade\\_Agreements/Bilateral/Oman\\_FTA/Final\\_Text/asset\\_upload\\_file375\\_8803.pdf](http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/asset_upload_file375_8803.pdf) (hereinafter US–Oman FTA) Art. 20.7(4)(c). This relates to the code of conduct for dispute resolution under the agreement. The creation of the code is the responsibility of the joint committee

a preference for the establishment of rules of procedure.<sup>26</sup> Engaging with the prince in this context means not debating the nature of 'governance' directly nor making a legal claim (the prince not being a legal entity); but contacting the relevant administrator – in this case the US Trade Representative (USTR) – presenting your formal interpretation of the Agreement and demanding a copy of the code of conduct or the procedures, formally required under the treaty; then awaiting the reply, re-engaging, and reflecting on, recording, and discussing the results.<sup>27</sup>

The aim is to have the prince's ear about the academic interpretation of a treaty, and not because you have a monopoly on the interpretation of governance in FTAs – that is the managerialists' claim. Nor because your interpretation is reactive in the sense of narrating. The interpretation is active and arises from the attitude of having a right to be within the administration of the Agreement, raising interesting questions: has the USTR complied with the requirements which support openness in dealing with the Middle Eastern state, given the ease of compliance, the mandatory nature of the obligation; if not, why not; what did the prince say and why; if it is only silence, what does this mean?

Instead of interrogating these issues from the outside, the legal interaction with the prince gives a base from which to build a grounded reflection.

## 4 The End of the Fantasy; Micro History; not Proof of Law's Effectiveness

The fantasy leads to a micro interaction with international law and a micro retelling of an interaction.<sup>28</sup> It is the international law of small things;<sup>29</sup> it is contextually open and contingent, not apolitical or dispassionate.

For Koskenniemi the act of history is important in and of itself, as he notes: '[o]ne antidote to exegesis and managerialism lies in a turn to history so visible in international law recently. As a style of legal writing, however, historical narrative liberates the political imagination to move more freely in the world of alternative choices, illuminating both its false necessities and false contingencies'.<sup>30</sup>

And that is the true potential of expanding the fantasy: there is no 'search for a right answer',<sup>31</sup> but there is a history of the reception by the 'prince' of the presentation of legal reasoning. The expansion of the fantasy reverses its end, the end being to write the history of the interaction with the prince over the meaning of an international law rather than the managerialists'

<sup>26</sup> *Ibid.*, Art. 19(2)(3)(a) (rules of procedure which the joint committee may establish).

<sup>27</sup> Koh, *supra* note 12, at 2651.

<sup>28</sup> Graziadei, *supra* note 12, with ref. to the importance of human agency.

<sup>29</sup> Referring (of course) to A. Roy, *The God of Small Things* (1997). Cf. also Charlesworth, 'International Law: A Discipline of Crisis', 65 *MLR* (2002) 377, at 377: '[o]ne way forward is to refocus international law on issues of structural justice that underpin everyday life. What might an international law of every day life look like?'. This comment is not as ambitious: it is a call to look to the prince's everyday operations and their application of the law.

<sup>30</sup> Koskenniemi, *supra* note 1, at 18.

<sup>31</sup> *Ibid.*, at 16.

end – to present the outcome as though there was *no history*, only the inevitable interests of the prince, which have been realized.

I have proposed in this response that the international legal academic be included in the fantasy; however,

every person could wish, equally, to have the prince's ear. The purpose of my response has been to unpack the fantasy and describe a possible 'open door'<sup>32</sup> which Koskenniemi has been inviting us to walk through these 20 years.

<sup>32</sup> *Ibid.*, at 19.