

Claims to Modernity and the Politics of International Law

by

Maria Koblanck

BA, London School of Economic, 2002

MA, University of Padua/EIUC, 2003

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# Supervisory Committee

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**Supervisor**

Dr. Warren Magnusson, Department of Political Science.

**Departmental Member**

Dr. James Tully, Department of Political Science.

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Dr. Jeremy Webber, Faculty of Law.

**Outside Member**

## Abstract

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Many scholars have attempted to reframe our understanding of international law in order to re-establish the credibility of international norms in an age of widespread doubt about the powers of law. This study seeks to contribute to this project by examining how the relationship between a specific understanding of modernity and the assumption that the modern state is the only proper location of politics enables a discipline built on idealized categories framing active agency in relation to modern politics. The consequence is not only a tightly circumscribed discipline that constantly reproduces particular understandings of the future potential of international law but also limits what we understand meaningful practices of international law to be.

The specific example investigated is that of the Sami, the indigenous and transnationally nomadic people of Fennoscandia. Looking not only at how the Sami have made use of supranational avenues to challenge the sovereignty of the Swedish state (especially in the European Court of Human Rights) in the name of individual human rights, this case suggests that human rights are best understood as a political practice among other political practices rather than as a system of idealized, legal abstractions. The analysis works through a reading of international law as one of many modern political tools that may be used in order to engage political problems of modernity, just as, in other circumstances, we may think about political tools in terms of the possibilities of political contestation about the common interests of a society. One of the common assumptions shared by all the texts and writers under examination involves an understanding of modernity as a structured and ordered teleological process towards the realization of man's enlightened freedom. Considering the limited possibilities exposed by such texts suggest that if we want to re-imagine what we take international law to be then we must begin with engaging alternative understandings of modernity; more precisely, we must acknowledge the heterogeneity of contemporary experiences. My exploration of the joint implications of the work of Marshall Berman and Dipesh Chakrabarty concludes with a call to avoid reductionist accounts of international law and to think about the modern world as a dynamic, ever-changing and always malleable place, a place in which human experiences continuously alter the political orders within which we operate.

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I have also benefitted from being introduced to a global community of thinkers thanks to Dr. Rob Walker. The opportunity of being a part of the founding editorial team of *International Political Sociology* let me experience the fantastic creativity of academics driven by the desire to open up new critical spaces for discussion. To all of you who participated – thank you! I wish to especially thank Dr. Didier Bigo and Dr. Elspeth Guild for being great personal and professional mentors and for giving me ample opportunity to try my wings as a young academic.

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## Dedication

For Sid and Ravi

## 1. Introduction – Modern Life and International Law

To many students, a first class in international law is reassuring. A teacher steps in front of the class and tells them that international law is an attempt to order the chaos in which the world is mired. It is a powerful claim, widely reproduced, but it is not as reassuring as it may seem at first.

Imagine that you found yourself, in 1999, in your first year of university, getting ready for your first such class. While eating breakfast you watched the news, heard more about the atrocities that were being committed by Europeans *against* Europeans in the latest of many European wars. The first thing any student of international relations learns is that war is common. The truth is that they also learn that only a few of these wars occur in *civilized* Europe, and that the role of European military forces is to govern the brutality of others elsewhere.

The conflict in the Balkans thus reminded Europe of its violent past. The extended duration of the conflict, the reaction of the “rest of the world”, and the general inability to govern the conflict reminded everyone that all that seemed solid could quickly melt into air when bridges disappeared, cities were bombed and whole communities ceased to exist. At this point the world would have seemed more chaotic than ever and the chaos would have been recreated in a widespread sense of anxiety.

This is what I felt like as a first year student when I walked into class. The world was clearly chaotic. It needed to be tamed and ultimately saved from itself. As I took out my pen and paper and prepared myself, the Very Prominent Barrister walked into the lecture hall at the London School of Economics. The Barrister was confident. He was smart and funny and he told me, and the rest of the class, that there was method to the madness; that there were rules to be followed. He told us that there was International Law.

The first class was almost magical, partly because I had been given the keys to understand and explain what was going on in the world. The madness in the Balkans and the reaction to it could be explained in terms of articles, violations and sanctions. There was a system through which it was possible to both govern and explain the world.

To many (but not all) students, the first *impression* of international law is exactly that of giving order to what otherwise seems chaotic. The impression of ordering is often reflected in popular discourses on global politics, where we see occurrences or events explained in terms of adherence to and/or violation of such an order. The popular discourse of order and ordering does not have to be reflected in practice for this impression to be sustained, for we know all too well that international law is a very malleable tool.

Yet even if international law is breached, the fact that a delict can be identified allows and encourages the same discourse about order and chaos to be replayed over and over again. An introduction to international law allows for us to

structure, order and analyze the perceived chaos of global politics -- a feat that might seem trivial due to sustained chaos outside the classroom but a feat that carries great weight of historical, cultural, metaphysical and theological tradition.

The next course in international law that I took specifically dealt with international human rights law. Like many other students, I realized that the ordering principles of law in this context tend to be driven more by claims about exceptions than about norms and that the symbolic and political power of claims about human rights can be used both to sustain and to undermine any conception of human rights and international law. Following this line of thought, students can quickly lose any conviction that international law brings order to chaos. I was by all accounts rather distraught and confused.

Just like me, academic commentators have in the last twenty years been concerned with investigating the limits of international law in order to try to chart or predict its usefulness to people around the globe. Many have proclaimed that the pretensions of international law have been debunked. Some have continued to point out that international law is not linked to any given notion of justice and it is only constructed by self-interested actors for their own benefit, an understanding that only encourages claims about an eternal fate of domination and submission. Still, such extreme negativity seems misplaced, especially since on an everyday basis we still seem to employ international law and human rights in a multitude of manners with the purpose of critiquing state practice and challenging the legitimacy of domination and oppression.

It was necessary to investigate instances of what seemed to be fundamental paradoxes of international law without replaying a pervasive tendency of providing simplistic answers – to investigate how international law can both be a tool for liberation *and* a tool subjugation, an intrinsically colonial structure *and* a system of regional practices, an ordering legal principle and anarchical practice. Human rights here appears as one instance of international law that forces us to question preconceived ideas of international law in order to understand and explain how our analysis relates to the legal and political practices we witness on a daily basis.

Armed with a conviction that at least some aspects of global politics are affected by international legal norms, I realized that the project that was being exposed both by many of the practices of human rights law and by many currents of contemporary critical thought must focus on a re-conceptualization of the foundation of the system of international law as such. Many scholars have attempted reframe our understanding of international law in order to re-establish the credibility of international norms in an age of widespread doubt about its powers – in the context of this analysis we will look closer at the work of David Kennedy, Jack Donnelly and Martti Koskenniemi. To question our understanding we have to engage our understanding of modernity and what it means to live in the modern world but as we shall see there exists a widespread denial of this. Superficial alteration to a whole conceptual machinery will not do and will not yield any new insights and thus allow for an escape from anxiousness.

I also realized that my own learning experience as a student in moving between conviction and anxiety mirrored the disciplinary development of international law over the same time period. International law today is a discipline that sits on a middle ground between politics and law, shunned by lawyers as not proper law and distrusted by political scientists for its depoliticizing effect. Political scientists have been and are quick to point out that because lawyers, by virtue of their professional ethos, will ultimately be idealist and put their faith in law it is only by accepting international law's ultimate grounding in politics and state interest that a helpful understanding of international law can be created. One further effect of the "politicization" of international law has been that the idealism of international lawyers is now considered to be an anachronism.

If we return to the student of international law in this context, it had become clear to me that in the face of a sense of crisis brought about by mounting criticism of the multiple failures of international law, the discipline was still desperately trying to re-found, re-frame or re-conceptualize itself in order to retain its relevance.

This study seeks to contribute to this project by looking at how an acceptance of a teleological view of modernity coupled with a conviction that the modern state is the only proper location of politics results in a discipline that is built on idealized categories framing active agency in relation to modern politics. In order to engage the effects of this approach we need to focus our attention on the structural and historical conditions that determine where we think politics can take place and who can participate. The argument made here is that current scholarship is displaying a reliance on a philosophy of history and a particular perception of

what the modern world entails that makes such a re-conceptualization impossible despite the best of intentions.

What becomes the central question that runs throughout the present analysis is how we approach and try to understand the world within which we live.

Specifically, as we will see ample evidence of in academic interpretations of international law, modernity seems to stand for a teleological development towards the realizations of man's enlightened freedom, a process of development that is full of choices between "us" and "them", the "pre-moderns" and the "moderns", the "first world" and "the third world." The modern world becomes a project of building solid structures that guarantee that the achievements of today will remain in the future. To be modern becomes a status to achieve, levels of development to pass towards the realization of an ever-increasing sense of order.

Thus, as much as this might be a text that focuses on human rights, it is in essence an analysis of interpretations of international law and the cost of limiting ourselves in our understanding of the diversity of modern political practices that make up international law and that take place all over the world on an everyday basis. Since any claim involving human rights necessarily involves competing realms of rights and freedoms it is by looking at human rights that we can focus on the tension between national and international law – a tension we often see played out in the ambivalent status of modern man as both citizen and the human. The focus on human rights also allows for us to engage experiences that fall outside of 'normalcy' and chart a heterogeneity of modern experience that directly

challenges the teleological understanding of modernity that now dominates the discipline.

In an even wider perspective, and not only disciplinary political science, but also in terms of general cross-disciplinary concerns, the present work is intended to make a contribution to attempts that challenge hegemonic discourses in as much as it draws attention to the obfuscated assumptions linked to underlying assumptions about ‘modernity’. In so doing I point to the diversity intrinsic to modern political life - a tendency that we can find in scholarship at both on an international level (in terms of provincializing “Europe”) and on a local level (in terms of provincializing “the State”).

In relation to the attempt at provincializing an idea of an ideal universal in relation to processes of international law the most important insight here is that we have to start taking signs of a universal that *continuously alters* through and because of particular practices seriously, an insight that allows for us to overcome the tendency of re-creating strict delineations between perceived insides and outsides, national and international politics, particularities and universalities. Thus, the overarching question that we have to continuously return to is the question of how we can engage foundational paradoxes of modern life (of domination and submission, construction and destruction, particularity and universality and so on), without conflating them into mere oppositions (domination or submission, construction or destruction, particularity or universality and so on).

In this context, the even more specific claim that I want to sustain is that legal and political claims framed in terms of human rights both reveal and demand more creative responses to the foundational paradoxes that are usually effaced within discourses on international law, effaced, that is, in ways which enable the misleading opposition between “order” and “chaos” that has become so obviously inadequate as a ground for understanding international law, whether as a neophyte or as a professional.

Thus any focus on claims framed in terms of human rights requires us to address how international law still presupposes a specific division of the global realm of sovereignty. Claims made in terms of human rights also underline the difficulty of transposing the conditions under which rights have been framed within statist accounts of legitimate politics and legitimate laws, especially the separation of powers, to other spheres.

Claims about human rights thus present a challenge to international law that is inherent in its own logic because the claims bring to the fore the questions about the ‘proper’ location of modern politics, the aporetic tension between national and international law. By so doing, claims about human rights at same time both deny and affirm the status of modern man as both citizen and human. Furthermore, claims about human rights reveal an otherwise easily hidden progressivist reading of history as the unfolding of man’s enlightened freedom globally. In effect, I propose here, they present an immanent critique of the structure and processes of international law since if you critically engage claims about human rights you have to engage these foundational claims.

The specific example I will investigate in order to illustrate these concerns is that of the Sami, the indigenous and transnationally nomadic people of Fennoscandia. Looking not only at how the Sami have made use of supranational avenues to challenge the sovereignty of the Swedish state (especially in the European Court of Human Rights), in the name of individual human rights, this case suggests that human rights are best understood as a political practice among other political practices, rather than as a system of idealized, legal abstractions.

Consequently, the experience of the Sami brings to the fore a clearer view of debates and problems that are otherwise neglected within the discourse and practice of human rights. These debates have also been neglected within most forms of research on the situation of the Sami, primarily in the Nordic countries, which continue to treat them as a *national* problem, even though it has become increasingly evident that the lives of the Sami are closely linked to and shaped by global discourses and practices.<sup>1</sup> I hope that the research presented here will add some momentum to a much broader and less state-bound understanding of what is at stake in Sami political practices.

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<sup>1</sup> A brief visit to the website of Vaartoe – the Centre for Sami Research at Umeå University (the most notable research centre on Sami issues in Sweden), tells the visitor that last years' publication included a historical study of the institution of marriage in Sapmi, personal notes from Lars Thomasson (a Sami scholar and politician), a study of reindeer-herding as an industry, an historical perspective on Sami politics of culture in the Nordic countries, a study of the relationship between the Swedish church and the Sami and so on. The suggestion here is not that any of this research is either inconsequential or uninteresting in and of itself, but that read together the body of research illustrates how the situation of the Sami is 'naturally' framed as primarily a Swedish concern. Cesam's web-page is accessible at <http://www.cesam.umu.se/forskning/publikationer/?languageId=3>. Last visited 01/10/12.

In order to engage with what is at stake in recent controversies about the role of international law, especially as exposed by the Sami example, claims that attempt to respond to changing conditions of world politics have tended to reaffirm long established categories with the ultimate effect of depoliticizing processes of international law. Two conceptual problems need to be addressed. One concerns the ways in which we might now engage an understanding of the dynamics of the modern world that has been at the heart of both established forms of international law and of recent debates about its potential force.

The representatives of the Sami were instrumental in international development for the support of indigenous peoples, especially in terms of creating representational space for indigenous peoples within the structures of the United Nations.<sup>2</sup> They have turned to regional and supranational organizations in order to criticize the Swedish refusal to legally recognize them as an indigenous people. However, in terms of legal rights awarded or claims settled, the outcome has not been unambiguously successful; rather it has been the opposite. Still, the Sami continue to frame their critique in terms of human rights, thereby generating questions about why they would continue to do so if the strategy has so clearly failed. The answer to the question, I will suggest, lies in understanding international law as a set of modern political practices, one among many implying

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<sup>2</sup> See for example Henry Minde (2008) *The Destination and the Journey: Indigenous Peoples and the United Nation from 1960s through 1985* in Henry Minde (ed.): *Indigenous Peoples: Self-determination - Knowledge - Indigeneity*. Delft: Eburon, pp. 49-86.

that we should look for the effects by which we judge the “success” or “failure” of international law not necessarily only in courtrooms or in international normative developments.

Drawing from an analysis of the situation of the Sami, chapter one sets out a basis for why we should attempt to re-conceptualize our understanding of international law as a set of political practices rather than as an idealized status or a collection of legal text and enforcement mechanisms. The argument presented is that the discipline of international law must grapple with the challenge of addressing the Western-centricism intrinsic to the system *without* continuously re-victimizing persons and peoples that historically have fallen outside or been dominated through the structures and processes of international law. Again, most commentators on international law would consider the Sami *only* victims, while as the chapter suggests, they have successfully employed human rights on a number of occasions, just not always in a manner in which we expect them to do so.

Consequently, chapter two seeks to identify the general principles of international law that are at work in the practical problems faced by the Sami when they try to make use of human rights, and then examines how the discipline of international law interprets these events. With reference to questions raised both in the preceding analysis of the Sami and in some broader theoretical literature, the chapter then unpacks what I refer to as the “capsule” or set of debates that underpin the discipline, indeed enable its discursive architecture, which nonetheless almost always remain tacit within academic discussion. Particular attention is given to three aspects of this material.

First, I examine how the so-called “domestic analogy” is employed in order to create a sense of both legitimate politics *and* law by stipulating that we should understand the relation between law and politics as set out by liberal, constitutional theory. The domestic analogy allows for scholars to efface the foundational tension between national and international law and thus re-articulate an account of international law that despite the promise of universal humanity is depending on pitting ‘citizen’ against ‘man’, ‘us’ against ‘them’, ‘inside’ against ‘outside’.

Second, I examine assumptions about how rights, perceived as belonging to modern man, operate to further deny any tension between competing realms of freedom. It is at this instance that we can start to see how a particular understanding of modernity and the modern world underpins most commentaries on international law and how assumptions of modernity frame the field. Third, I examine the influence of some specific historicist assumptions that are linked to a particular understanding of *the* Enlightenment.

In order to give further illustration of the effects of “the capsule”, the same discursive structures are traced through the work of two exemplary scholars who have engaged with these principles: Jack Donnelly and David Kennedy. Donnelly and Kennedy, I suggest, can be appreciated as representatives of the opposite ends of a disciplinary spectrum. Donnelly turns to conceptual clarity (theory) while Kennedy turns to pragmatism (practice). I will argue that neither of them manages

to resolve the problems they set out, and that they ultimately re-affirm the thoroughly liberal foundation of the discipline.

The scholar who has most consistently tried to engage with the limits of thinking about international law in these terms is Martti Koskeniemi and Chapter three focuses on an analysis of his effort. Koskeniemi characterizes his own work as an attempt to breathe some life into the “dead legal formalism” that dominates the discipline. Responding initially to the tendency of contemporary critics to divide Koskeniemi’s body of work into different periods, I argue that all of Koskeniemi’s work should be read as integral parts of a single attempt to grapple with the complexity of international law. Understood in this way, Koskeniemi provides us with one of the most nuanced and effective critical engagements with international law so far.

However, Koskeniemi is clearly driven by a desire to re-establish faith in the liberal mission of ordering and thus also liberating international law. I argue that he ultimately fails to fulfill his own critical project. Koskeniemi’s own view is that the limits of his own thinking arise from the specific methods he uses, a view that has led him to explore various “experimental” methods. The more serious problem, in my view, arises from some of his foundational assumptions.

Koskeniemi remains unwilling to criticize his understanding of modernity, which he shares with the liberal theorists he sets out to critically engage, as the development towards achieving a particular status, in his case that of being “civilized” in accordance with European Enlightenment ideals. He thus bases his understanding of the possible future of international law on an idea of historical

development that, I will argue, re-affirms the limits of international law that he wishes to transcend in as much as the locus of historical development remains European. In this sense, his liberal commitments leads him into crucial difficulties to seriously engage the questions that he claims are the most pressing to contemporary international law.

In the course of this analysis, it will also become clear that the common assumption shared by all the texts and writers discussed, and which necessarily leads them into difficulties, involves an understanding of modernity as a structured and ordered teleological process towards the realization of man's enlightened freedom. If we want to re-imagine what we take international law to be then we must begin with engaging alternative understandings of modernity; more precisely, we must acknowledge the heterogeneity of modern experiences. Then we can see that what international law "is" is not pre-determined. It does not follow in any simple way from the Kantian principles which Koskeniemi, like most theorists of international law, want to save. But nor does international law follow simply from power politics as understood by thinkers who have sought to abstract the nation state from the demands of an international system. Rather, international law is a way of doing politics, a way that engages us for better and for worse and which demands our attention as political analysts.

Chapter four will explore this possibility in two ways. First, it will explore alternatives to any singular idea of modernity - as an unfolding of specific ideas of Enlightenment - in order to re-conceptualize international law as a dynamic political practice and a malleable political tool. Where Koskeniemmi and the

majority of scholars within the field tend to cling to a fairly tightly circumscribed idea of modernity, and to conventionally Kantian understandings of what this idea must mean, in ways that affirm a constant opposition between power politics and legal normativity, I want to pluralize and temporalize the meaning of modernity, resist the opposition of power and normativity, and push for a more practical understanding of law. This, of course, marks an affinity with thinkers who try to rethink the politics of international law by drawing on Aristotle, but I will draw more specifically on the writing of Marshall Berman, and particularly to his book *All that is Solid Melts Into Air*. Rather than the achievement of a particular status (that of being civilized) Berman's sense of the modern world is a much more fluid and non-teleological because modern men and women continuously alter the world the world within which they live.

Second, and following directly from the previous point, conceptual understanding of *the* enlightenment and modernity in relation to international political processes can be fruitfully engaged with the help of literatures that try to come to terms with the culturally specific sources of universalizing claims about humanity, the world and so on. As with claims about modernity, analyses of the Eurocentric character of international law have proved to be highly controversial. For every "postcolonial" complaint about ethnocentrism and hegemony there are examples of the various ways in which arguably ethnocentric concepts, like nationalism, have been adopted precisely as forms of resistance to colonial or imperial hegemony. In order to engage with some of this complexity, I will draw inspiration, in the second part of the chapter, from the work of Dipesh Chakrabarty and especially his book *Provincializing Europe*.

Bringing the two lines of analysis together, I will develop a reading of international law as one of many modern political tools that may be used in order to engage political problems of modernity, just as, in other circumstances, we may think about political tools in terms of the possibilities of political contestation about the common interests of a society. My exploration of the joint implications of the work of Berman and Chakrabarty concludes with a call to avoid reductionist accounts of international law and to think about the modern world as a dynamic, ever-changing and always malleable place. This insight, I suggest, has the potential to challenge our understanding of international law in ways that enable us to include the fact that human experiences continuously alter the political orders within which we operate.

The final chapter addresses the potential significance of a conception of international law as a political practice by examining how it works in relation to what is often taken to be one of the most foundational debates in the discipline of international law both conceptually and historically: that which counterposes the positions of Hans Kelsen and Carl Schmitt. As a ‘foundational’ moment this specific and indeed quite arcane confrontation speaks to the argument being developed here because it places an understanding of the fluidity of modern international law at its disciplinary center.

The fundamental point I want to develop is that understanding the world as non-teleological and fluid is nothing new to the discipline. On the contrary, we can actually find it at the very core of the discipline if we read Hans Kelsen and Carl

Schmitt together rather than as opposing accounts of international law. On the one hand, Kelsen's "pure theory of law" attempted to answer "the question what and how law *is*, not how it ought to be. The theory of pure law is a science of law (jurisprudence), not legal politics."<sup>3</sup> On the other hand Carl Schmitt claimed that the validity of a system of norms had to do with actual political power and that a legal system was merely a *form* of sovereign power.

Thus, in response to prevailing narratives about the form and force of international law, I seek to re-conceptualize international law as a set of modern political practices by insisting that there is nothing solid or given about modernity or the way we relate to modern life thus there is also nothing solid or ordered about international law and how we relate to it. Rather, modern men and women continuously partake, reform and alter modern life. If international law is indeed anachronistic to the chaos of modern politics, it is not only because it has been challenged by historical events but perhaps even more because its response to historical events has been to keep reproducing a very specific account of the character of both human beings and of law.

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<sup>3</sup> Kelsen, Hans. *Pure Theory of Law* (Los Angeles, University of California Press Berkley) 1967. p. 1.

## 2. The Sami and the Swedish State – indigenous people and international law

For Helena Omma being Swedish means to be young, Sami and Swedish; it means having to negotiate many identities, including being a citizen of Sweden and being a member of the Sami people. Being young and Sami in Sweden means that she will have to try identify her own position within the cultural, legal and political structures and processes that for long have defined what it means to be both Sami and what it means to be Swedish. Helena Omma was the head of the Swedish Sami youth association, *Sáminuorra*, between 2009 and 2012 and has given these questions a lot of thought. Talking about the situation of the Sami living in Sweden and answering the question as to what the biggest problems that they, as a people, face she points out that lack of interest in and information about what Sami culture entails make it very easy for the majority population to either stereotype or simply ignore Sami claims.

One effect of a lack of knowledge is that it is easy for Swedish interest to paint a picture of the Sami as historically backwards and pre-modern reindeer herders on skis and to use that picture to frame current debates. That, to Helena Omma, is to completely misunderstand what is at stake in the Sami demand for recognition. Describing what at the moment is of greatest concern to young Sami active in the youth association she answers “at the moment we are focusing on decolonization. To be allowed to do it our way and not copying Western models”.<sup>4</sup>

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<sup>4</sup> Rosengren, Jessika. Norrländska Socialdemokraten, 2010. <<http://www.nsd.se/nyheter/artikel.aspx?articleid=5166807>>, 2013, March 1.

As international law currently stands, indigenous peoples are dependent on internationally recognized states for the recognition of their right to self-determination. This falls within the same principle of self-determination (Article 1 of the Charter of the United Nations) under which a state can claim national sovereignty. According to current legal and political definitions there are about 370 million indigenous people living in 70 different nation states.<sup>5</sup> They are descendants of people inhabiting a geographical area before other people arrived and claimed sovereignty under the banner of modern nation states. Indigenous people are subsumed within or under new states and in most cases live as minorities, often under great political, legal, economical, social and cultural oppression and thus they are often thoroughly marginalized.

As much as the right to self-determination is enshrined in the UN charter a number of international norms further outline rights of indigenous peoples that are *independent* of individual states and include both group rights and individual human rights. To make the claim that the problems linked to the recognition of indigenous people are primarily a national problem (which many states including Sweden would like us to think) seems at best an over simplification. Rather, what is revealed in the process and discussion of recognition is that despite the promise enshrined in international law of universal freedom and independence, even international human rights law re-articulates the bounded, national freedom of the

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<sup>5</sup> For more information and statistics see the United Nations Permanent Forum on Indigenous Issues at <http://social.un.org/index/IndigenousPeoples.aspx>, 2013, jan 08.

citizen since individual human rights are dependent on the state under which a person live to uphold and protect those rights. Thus, in the case of recognition of indigenous people we can see how an uneasy distinction between the national and the international operates at the hart of *international* law.

The simple distinction between “national” and “international” continuously creates and re-creates a number of anomalies, outliers that do not fully partake in the system. Examples of these are indigenous peoples, refugees and nomads but on a daily basis we can see numerous other examples of alternative experiences of being in the modern world that are considered to fall outside of the system. The experience of indigenous people all over the world suggests that international law is badly adapted to cater for any alternative experiences of what it means to be an active member of modern society, so that it is difficult to successfully pursue claims to cultural particularity and self-determination.

However, to conclude that an actor such as the Sami *only* falls outside the structures and boundaries of international law would to paint a very simple picture of the ways in which international law can operate. This chapter will focus on the experience of the Sami living in Sweden to show how international law operates not so much as a set of institutions and structures as it is an intrinsically heterogeneous field of political interaction. Instead of *only* being caught by the status of being ‘outsiders’ in a system operating on a colonial logic and working against them, the Sami have reiterated their claims to basic rights outside of court rooms and parliament suggesting that international law is more than only a legal practice between states: it is indeed a field for political interaction. As will

become clear, in order to understand the dynamics and possibility of this field it is imperative that we focus on questioning the naturalness of the modern state as the primary space for political action.

### **The Sami and International Law – what is at stake?**

The Sami are particularly interesting in this regard since their transnational nomadic life-style continuously questions the logic of territorially determined nation states and bring to the fore the tension between national and international law. The Sami do not build their case for recognition on the basis of rights granted to them by either the state, the EU or the United Nations but on rights that they claim are inherent to them. Therefore, questions of jurisdiction are of less importance to them and different venues of law (being the Swedish Parliament, the European Court of Human Rights or the United Nations) are merely different occasions to articulate these inherent rights to self-determination as a people. In relation to the framing of indigenous claims in international law, it is important to remind ourselves that the legal and political problems that arise when modern states try to justify their incorporation of indigenous people within a “nation state” are not new to the practices of international law, they have been serious concerns since the moment we started to even frame issues as issues pertaining to modern *international law* in the first place.<sup>6</sup>

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<sup>6</sup> This is a thesis all in itself but in terms of schemes to arrange a population in order to make classic state functions easier to carry out see James Scott, (1998) *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed*. New Haven, CT: Yale University Press.

In many ways, that which we can call modern international law was articulated at the time of Europe's colonization of the "new world". As I shall argue in this text, the standard story about the origins of international law, which begins at the time of European expansion into the "New World" and elsewhere, needs be questioned, because it oversimplifies the history and obscures the multiple origins and multiple trajectories that we have to deal with. What is often forgotten is that the formative encounters did not only take place outside of Europe; it took hundreds of years for even the most "advanced" states in Europe to form themselves into coherent whole that could be easily defined and whose citizens could be distinguished from other non-citizens.

Nevertheless, there are two aspects of the standard story that are worth noting. First, there is often an emphasis on relations between emergent European states, at the expense of what we might call the colonial encounter, an encounter that brought Europeans into relation with peoples who did not "fit" with the emergent conception of settled nations living within states with definite borders. The most obvious of such encounters were in the Americas, Africa, and the Pacific; however, such encounters actually were common everywhere. This leads to the second point. The colonial encounter, if we want to call it that, was internal to Europe as well, an ever-present aspect of efforts to produce nations and states. Attempts to settle nomadic peoples, impose uniform dialects in the guise of

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It is interesting to note that Scott's inquiry grew out of a general concern of moving people v. sedentary political societies.

national languages, subordinate diverse lands to a single system of law, and demand conformity to a modern ensemble of approved identities have always come up against a more complex reality. So-called indigenous peoples, inside and outside of Europe, are poignant examples of a more general lack of fit.

What we can take from the standard story is that at the ‘beginning’ of that which we call modern international law we already have the distinction between the national and the international that operates as a distinction between the “inside” and “outside”, between what is normal and what can be considered an anomaly. Most students of international relations are given the impression that Hugo Grotius is the father of modern international law in as much as that he first articulated the type of pre-Kantian Kantianism geared towards a cosmopolitan society and global perpetual peace that we are used to associate with the operations of modern international law.<sup>7</sup>

It is correct that in his writings Hugo Grotius (an employee of the Dutch United East India Company) addressed the question of the existence of universal sociability, but his concern was primarily to locate a moral foundation for the Dutch imperial project. In being driven by a necessity to write an apology for the

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<sup>7</sup> For a good recent and engaged account of Immanuel Kant’s legacy within the discipline see Amanda Perreau – Saussine (2010) *Immanuel Kant on International Law* in *The Philosophy of International Law*, edited by Perreau – Saussine, Amanda. Oxford: Oxford University Press, pp. 53 – 78.

Dutch colonial empire, he asked questions concerning the possibility of inherent moral and legal obligations between men as members of a global mankind.<sup>8</sup>

Only a cursory look at thinkers such as Bartholomé de las Casas, Thomas Hobbes, Samuel Pufendorf, Immanuel Kant, Hans Kelsen and Carl Schmitt show that they all concern themselves with questions such as the possibility of a global humanity holding shared legal obligations towards each other, rights and obligations that are inherent rights and independent of any alien authority.<sup>9</sup> The tension between the individual and his freedoms, particular ways of ordering society and the idea of a global humanity hence is foundational to the way we tend understanding how modern international law operate.

That Europe's encounter with the new world is the origin of international law is not only a historical instance but as much a structural point concerning the inherent logic of the existing system of international law. James Tully points to how the logic of a particular historical moment and the structures it produces are intrinsically intertwined:

European constitutional states, as state empires, developed *within* global systems of imperial and colonial law from the beginning, and this whole intertwined complex of

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<sup>8</sup> For an excellent account of Grotius writing on international law see Richard Tuck, (2000) *The Rights of War and Peace: political thought and the international order from Grotius to Kant*. Oxford University Press, USA, chapter 3.

<sup>9</sup> Needless to say, God is part of the equation for a very long time.

two classes of constitutional forms is the historical basis of the very recent, post-decolonization global legal order.<sup>10</sup>

Our contemporary system of international law can thus be understood as a direct product of the Western imperial project. It has been argued that the processes of decolonization that have dominated the global political agenda since the 1960s are now more or less concluded since ex-colonies are now for example considered fully independent, sovereign states and members of the United Nations. However, the United Nations itself is a product of a system of ordering politics by ways of privileging the principle of the modern state. The effect of this order is that other ways of being political – by choice or otherwise – are considered to be an anomaly and therefore less important. We categorize our world on the basis of the modern state and not very often does our society show any interest in stories that counters this particular narrative about what it takes to be modern. The Sami claims to rights as inherent and independent of this system thus become exceedingly important.

Problems arise in this context when the neat categories we employ to categorize and order political actions do not fit as well as we would like them to do. Our conception of modern society demands that politics be organized in terms of modern states; yet we are constantly reminded that there are other ways and other places that politics take place. International law is integral to this system in as

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<sup>10</sup> James, Tully. (2008) *Modern Constitutional Democracy and Imperialism*. *Osgoode Hall Law Journal*, p. 467.

much that it constantly reaffirms a simple distinction between “the national” and “the international” and that distinction underwrites a conceptual scheme that renders indigenous peoples, nomads, refugees as outsiders.<sup>11</sup>

In other words, what is taking place in the case of the Sami is the replaying of traditional, “modern” demands that politics be organized on the basis of a central tension between citizen and human, or national law and international law or, as I will argue in a subsequent chapter, the basic tension between Schmitt’s and Kelsen’s understanding of international law. This tension also gestures to a more fundamental question - can we participate in processes of international law in ways not predicated on the modern state? Most academic commentators on international law, as we shall see, ultimately say no. We need to address what is at stake in so doing and determine whether there are ways in which we can re-conceptualize our understanding of processes of international law.

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<sup>11</sup> Engin Isin investigates when “outsiders” become political by questioning sovereignty exercised on them in his book, *Being Political*. He distinguishes outsiders from others who are not full citizens. The present text mirrors some of his concerns. See Isin, Engin F Isin (2002) *Being political: genealogies of citizenship*. Minneapolis: University of Minnesota Press.

## **The Sami – a transnationally nomadic indigenous people<sup>12</sup>**

Anthony Anghie is one of the most prominent contemporary scholars commenting on the imperial legacy of international law begins one of his historical accounts by saying

The universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the “long nineteenth century.” The conquest of non-European<sup>13</sup> peoples for economic and political advantage was the most prominent feature of this period, which was termed by one eminent historian Eric Hobsbawm as the “Age of Empire.”<sup>14</sup>

Most accounts on international law, both the mainstream and the critics begin by drawing a distinction between Europe as the origin of modern international law followed by a subsequent spread throughout the world. Depending on the politics

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<sup>12</sup> Today issues pertaining to the recognition and situation of the Sami are considered, under international law, to fall within the jurisdiction of the different Scandinavian states. Because they have been considered issues pertaining to national politics, the treatment of the Sami has differed between jurisdictions. Norway has gone the furthest in recognizing the Sami as an indigenous people and after signing the International Labour Organization’s bill 169 (ILO169), sovereignty over the northern part of the country was put under Sami trusteeship. The ILO169 will be addressed in detail on pages 53-60. In Finland, which has not ratified ILO 169, the situation again is different in as much as the Sami have fewer distinct privileges—for example, reindeer herding is allowed also for non-Sami Finns—but the Sami still receive some support from the state.

When much could be gained from a comparison between the different countries, the interests that feed my argument lies in investigating the paradoxes of our understanding of international law, paradoxes that play out equally in all Scandinavian countries.

<sup>13</sup> Authors’ original footnote: “By “non-European” I refer to the areas that were the subject of colonial expansion in the late 19th century, that is, principally, Asia, Africa, and the Pacific. The impact of the Americas on the development of international law gives rise to an important and distinct set of issues, which I do not address here.”

<sup>14</sup> Anghie, Antony. (1999) Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law. *Harvard International Law Journal* 40:3.

of the commentator that spread is either considered to a process of liberation or subjugation. This following section will problematize this idea by see how themes related to international law and indigenous people previously addressed are mirrored in the experience of the Sami, the transnationally indigenous people of Fennoscandia. They are of particular interest in this context because they are European, and hence “inside” the place where the modern system of international law supposedly arose. They are both Europeans and the “non-Europeans” in Anghie’s account. Furthermore, they are a transnational people who live across the borders of four different states, two of which are in the European Union, three of which are Scandinavian and one that is outside of these different political spaces, Russia. A great part of the Sami live in Sweden and have to identify as Swedish citizens and Sami and as such they live in a country that many people consider still today to be the model modern country. Their experience carries ample evidence that such a notion is highly problematic. The purpose of this chapter is to see how the Sami, as an indigenous people in Europe are affected by and interact with international law and especially human rights. What we will see is that international law and national and international actors categorize the Sami in a way that is uncomfortable for them and they find it very difficult to assert their rights effectively under currents regimes since as an indigenous people they do not really ‘fit’ the mold of who can act within processes of international law. However, the Sami nonetheless make frequent use of both the law and the rhetoric of rights in order to frame and advance their claims. In so doing they find allies within the regimes they are contesting. The claim advanced here by looking at the experience of the Sami is that both international law and human rights are better

regarded as sites of political struggle than as fixed institutions that are bound to keep producing the same results according to fixed universal norms.

## **The Sami**

Traditionally living in bordering areas of the Arctic Circle not always suitable for farming, the Sami have live as hunters and gatherers, as they have done since time immemorial (today few Sami live of either reindeer herding or directly of nature). Archeological findings suggests that the Sami where several different groups of people that moved and mixed in the same areas and that as a group of people they acquired particular character traits from the environment in which they lived.<sup>15</sup> As a nomadic people negotiating the extreme climate, the Sami kept a small number of reindeers as work and milking animals. Remaining Swedish and Norwegian tax records documenting provisions for the division of land and its use between different Sami villages from the 16<sup>th</sup> century indicate that the main source of subsistence was still hunting, fishing and gathering as the areas allocated to each village would not sustain any large scale reindeer herding.<sup>16</sup>

The spread and location of the Sami villages and their income from the 16<sup>th</sup> century onwards are well-documented since the different Scandinavian kings managed to impose tax duties on the Sami, all payable in much coveted furs. The

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<sup>15</sup> Lennart Lundmark. (2008) *Stulet land: svensk makt på samisk mark*. Ordfront, Stockholm, p. 18.

<sup>16</sup> Large scale reindeer herding requires vast tracts of land and the capacity to move between seasonal grazing grounds that is why the area traditionally used by the Sami covers about one third of the whole of Fennoscandia.

tax records from the 16<sup>th</sup> century are extensive partly because sovereignty over the area was determined by the fact of the states actual capacity to tax the inhabitants.<sup>17</sup> However, the Sami's real control and knowledge of the Northern parts of Fennoscandia in combination with their nomadic lifestyle made them subjects difficult to manage by the different kingdoms. The fears on behalf of the competing kings were that if the state (to be precise, "the Crown") overtaxed the Sami, the Sami could always trade across the boundary and deprive the Crown of territorial control (since that was determined by the capacity to tax the inhabitants). As an effect the Sami generally paid lower taxes than settled subjects at a time of costly wars and numerous added war-taxes.

The increase in fur trade during the 16<sup>th</sup> century created a local economic boom, the effect of which could be seen in the growth of the Sami population during this time.<sup>18</sup> However the story unfolded like most fur-based-booms have, with a sharp decline in wild animals. The subsequent crisis in terms of Sami subsistence was augmented by the tax reform of 1607 necessitated by the need to feed a growing Swedish army which hiked taxes also for the Sami.<sup>19</sup> Even though taxes were alleviated within the next couple of decades the crisis had long-standing effects, perhaps the most important of which was that the Sami went from primarily living off hunting and fishing to become full-time reindeer herders in order to create a reliable and sustainable mode of subsistence. Large-scale reindeer herding turned

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<sup>17</sup> Lundmark, *op.cit.*, p. 26. One effect was that on the Norwegian coast the Sami could be unfortunate enough to have to pay more than one tax.

<sup>18</sup> Lundmark, *op.cit.*, p. 28

<sup>19</sup> On top of that every tenth, *Ibid.*, p. 29. Now each family had to pay two reindeers and a substantial amount of dried fish a year the Swedish king

the Sami village<sup>20</sup> into the basis for taxation and thus also legal recognition. From now on, the Swedish state would equate Samihood with reindeer herding.

Reindeer herding and taxes aside, the north of Sweden attracted the attention of the Scandinavian states for its potential wealth in natural resources. One person that decided to investigate its actual potential was Linnaeus, the famous systematic classifier of the natural world. Convinced of the correctness of “cameralist economics”, i.e., that the problem of a national export deficit could be addressed by changed domestic production and import substitution, Linnaeus travelled large parts of Sweden in order to catalogue the local flora and fauna. The idea was to take stock of not only what was actually available within the borders of Sweden but also to note what *could* be produced in different parts of the country. For example, Linnaeus was convinced that saffron would do particularly well in Lapland and if successfully cultivated there Sweden would not need to import the costly spice.<sup>21</sup> In 1732 Linnaeus planned and executed a trip to Lapland, where the study of the Sami and their means of subsistence was one of the main goals, with the purpose of ascertaining the possible benefits of further

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<sup>20</sup> The Sami village is called Sii'da in Sami. Traditionally “the Sii'da consists of two basic elements, first the “sii'da” territory, which is a naturally demarcated area maintained over time, and the second the “sii'da” members, a group of people recruited on diverse principles, of which common interests and standards of value seem to predominate over kinship relations.” Tom G. Svensson, (1982) *Local Communities in the South Sami Region - an Important Issue in a Legal Decision Regarding Rights of Principle in The Sami National Minority in Sweden*, ed. Birgitta Jahreskog. Stockholm: Almqvist & Wiksell International, p. 103.

<sup>21</sup> Koerner, Lisbet. (1999) *Linnaeus - Nature and Nation*. Cambridge, Massachusetts and London, U. K.: Harvard University Press, p. 80. Saffron was primarily used as dye at this time.

colonization.<sup>22</sup> Chronicled in his *Flora Lapponica*, his account of the trip became the basis for the image of the “pristine North” and the “native” Sami.<sup>23</sup>

It is worth lingering on Linnaeus’s trip for just a moment, because despite the unflattering prejudices regarding the Sami which he shared with most of his contemporaries, Linnaeus continued throughout his career to refer to the Sami as the natural ideal of Sweden and a people whose health and stature could be explained by their customs and way of life. For example, such a “modern” and “Swedish” social institution as breast-feeding Linnaeus considered a key reason for the Sami’s good health, so much so that upon his return to Uppsala he became a chief advocate for the practice. Linnaeus also started wearing Sami clothing on a daily basis, but primarily at times of official representation, even though the outfit that he was especially proud of was a hotchpotch of all sorts of different clothing and nothing remotely close to the colorful and grand clothing worn by some of the Sami.<sup>24</sup> His picture of the Sami as blissfully innocent was of course a romanticized account of a people already thoroughly colonized. Without in any way dismissing the obvious unequal power relations between the Sami and the Swedish majority society it is also important to note that the meeting between the Sami and “Sweden” also changed the Swedes. Koerner calls this meeting and its effects “local modernities” and illustrates that any linear, teleological accounts of the development of modernity can only be reductionist and empty of human

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<sup>22</sup> Ibid., p. 63.

<sup>23</sup> At this time there was only one recognized and published account of the area and its inhabitants at this time written by the ecclesiastic Olaus Magnus in the 1550s. In his account the North and its inhabitants were indeed depicted as savages.

<sup>24</sup> Linnaeus also used the outfit for other important moments like proposing to his future wife.

experiences.<sup>25</sup> This is what I think Emma Omma was referring to at the start of this chapter when she said that the Sami must have to be allowed to deal with modernity in their own way and we will return to this crucial point in subsequent chapters.

In 1751, soon after Linnaeus' trip, the Sami were first recognized in the so-called "Lapp Codicil" as a transnationally nomadic people and as such the bearers of particular rights and obligations.<sup>26</sup> They could be deemed "transnationally" nomadic precisely because the same treaty laid down the border between Norway and Sweden and it provided legal recognition of the Sami inasmuch as it stipulated Sami duties vis-à-vis the kingdoms and their right to move across the border. This is also the moment when Scandinavia (in terms of settled territorial borders) begins to resemble contemporary maps. From that moment the process through which the social, cultural, economic and cultural identity of those who were considered to be Sami were constantly defined and redefined as subjects through primarily the legal processes in the states within which they resided and paid taxes.<sup>27</sup>

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<sup>25</sup>Koerner, op. cit., Chapter 1. The focus of Chapter 4 of the present text is the necessary multiplicity of the our experiences of the modern world and how we can find "a ground on which to situate our thoughts about multiple ways of being human."

<sup>26</sup>At this point, of course, there were no Sami only 'Lapps'. Lapp is a derogative name used up until quite recently by the Swedish state and Swedes when referring to the Sami. For more information on Sami history prior to 1751 please see Lars Ivar Hansen and Bjørnar Olsen (2006) *Samernas Historia Fram Till 1750*, trans. Per Larson. Stockholm: Liber. and Karin Granqvist (2005) *Konfrontation Eller Förlikning? Samerna, Kronan Och Rätten I Lappmarken I 1600-Talets Sverige*. In *Ett Land, Ett Folk - Sapmi I Hiistoria Och Nutid*, ed. Peter Sköld Per Axelsson. Umeå: CESAM - Umeå University., pp. 49 - 67.

<sup>27</sup>Mörkenstam, Ulf. *Om "Lapparnas Privilegier"*, p. 79. For a good analysis of the legal framework relevant to Sami issues see Bertil Bengtsson, (2004) *Samerätt En Översikt*. Stockholm: Norstedts juridik. The method for Morkenstam's analysis is inspired by the

As is the story everywhere, there is little natural or given about the boundaries that cut through the Scandinavian region. Just as the Sami's belonging historically has been argued on the basis of tax collections and actual physical control (through collecting taxes) of territories so have boundaries defining the Scandinavian states been in constant negotiation. Sweden and Denmark have continuously fought wars over the control of the major parts of the Scandinavian peninsula and showed anything but neighborly friendliness towards each other historically. Today's perception of the pacific nature of Scandinavian countries rests on a history of 19 wars (and actual 134 years of conflict) between Denmark and Sweden.<sup>28</sup> Norway and parts of Finland have often been the subjects of the wars or had to share the burden as an ally. Sweden's ambitions as an imperial power did not only stretch north but was primarily set on controlling northern Europe by controlling the Baltic sea.<sup>29</sup> Denmark instead turned towards the Northern Sea and northern Atlantic and focused on Greenland to great effect for its indigenous people, the Inuits.<sup>30</sup> Despite being talked about as a rather homogenous geographic area even with shared values (primarily based on the extensive social welfare

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work of Michel Foucault and thus the meaning of the concept of "discourse" and "object of knowledge" should be read and understood in that light.

<sup>28</sup> Bondeson, Ulla. (2003) *Nordic Moral Climates: Value Continuities and Discontinuities in Denmark, Finland, Norway, and Sweden*. London: Transaction Publishers, p. 12. Even though the study is interesting both in its method and aim (in terms of even defining "moral climates") I strongly disagree with the overall image of a natural, pacific Nordic moral climate.

<sup>29</sup> For a more comprehensive account of Sweden's military strategy see Jan Lindegren (1985) *The Swedish 'military state', 1560–1720* *Scandinavian Journal of History* 10(4): 305-336.

<sup>30</sup> For an Arctic comparison see Sertori, Trisha. (2009) *First Peoples of the Arctic: Unangan of the Aleutian Islands, Inuit of Canada and Greenland, Sami of Sapmi*. South Yarra: Macmillan Education AU.

states established in all Scandinavian countries) it is an area with its long history of negotiation of political communities. The borders we are accustomed to see on the map were basically settled as late as 1917.<sup>31</sup>

There were the not immense direct effects of drawn state borders and greater territorial control on the living situation of the Sami since Norway and Sweden agreed upon respecting trans-border activities and Sami neutrality even in the event of a conflict between the two countries. As Patrik Lantto describes the situation of the Sami, they remained “a nation within a nation” and were considered a separate part of society.<sup>32</sup> Even in 1809 when Sweden lost Finland to Russia, the Sami were left unhindered to move across the borders in the north. This changed during the 19<sup>th</sup> century when a number of different treaties closed down the borders for the Sami. From 1852, border closings effectively forced individual Sami to declare citizenship in one or the other country, cementing an idea of there being “Swedish”, “Norwegian” and “Finnish” Sami.<sup>33</sup>

In 1889, with the passing of the first Reindeer Grazing act, the major Swedish policy objective became that of making it possible for the Sami to continue to herd reindeers whilst simultaneously subsuming the Sami under Swedish state authority. The legal solution was called “Lapp privileges”, rights related

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<sup>31</sup> For a cultural historical account of the region see the recent Neil Kent, *Soul of the North: A Social, Architectural and Cultural History of the Nordic Countries 1700-1940*. Reaktion books, 2004.

<sup>32</sup> Patrik Lantto and Peter Sköld. (1998) *Den Komplexa Kontinenten Staterna På Nordkalotten Och Samerna I Ett Historiskt Perspektiv* in Nordiska Samehistoriska Symposiet. Kautokeino : Umeå Universitet, p. 545.

<sup>33</sup> *Ibid.*, 548.

especially to reindeer herding given to the Sami but denied to other Swedish subjects. The approach has had the effect that the essence of the Sami culture was thus directly linked to the practice of reindeer husbandry. This definition of Samihood has remained essential to the formation of Swedish Sami policy and is, to say the least, highly problematic.

The reindeer herding part of the Sami people is today only about 10 percent of the whole population, albeit traditionally the part with greatest economic and social powers.<sup>34</sup> Furthermore, Sami society and reindeer herding is arranged around what is called the Sami village (siida), that holds recognized independent legal personality within the national legal system. The Sami village has the authority to determine who should be a member of the village, and thus also determines who should have access to rights accorded to the Sami people. The Chairman of the Sami Parliament Olov J. Sikku, in a 2004 speech highlighted the segregating effect of this legal definition:

The rest of the Sami [the non-reindeer herding Sami] are in reality considered to be Swedes by the Swedish state, even though the state has officially (but not legally) recognized the Sami as the indigenous people of Sweden.<sup>35</sup>

A major shift in the public discourse concerning the rights of the Sami took place after World War II. Instead of the previous justifications based on the claimed

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<sup>34</sup> Sami Parliament's official site, <<http://www.sametinget.se/1126>>, 2013, jan 10.

<sup>35</sup> Olov J. Sikku, Speech - the Attitude of the Swedish State Towards the Rights of the Sami People and the Development of Our Society (Prague: 2004-11-19).

racial inferiority of the Sami, the concept of ‘Modern Man’ and market economics prevailed in public policy discourse. The Sami were redefined as entrepreneurs and “the main discursively formulated problem was the necessity of organizing reindeer herding on modern rational principles.”<sup>36</sup>

In the context of this modern industrial logic the Sami and reindeer herding were generally viewed as an obstacle to development, a trace from a “pre-modern” world and the continuous practice of privileging reindeer herding Sami over other Sami was legitimized because the reindeer herders “were the bearers of authentic Sami culture.”<sup>37</sup> In the name of efficiency and the greater good, reindeer herding as an economic, social and cultural practice was also threatened by the arrival of modern large-scale industries, like forestry and mining.<sup>38</sup>

It was not until the late 1970s that the definition of Samihood widened to include a certain subjective criteria, i.e. whether an individual felt like he or she belonged to Sami society. This national development ran parallel to the international development of minority and indigenous rights that in itself was a direct effect of the process of decolonization. Again, it seems impossible to approach the recognition of the Sami as taking place within a particular national context.

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<sup>36</sup> Mörkenstam, Op. cit., p. 261.

<sup>37</sup> Ibid.

<sup>38</sup> “After the Second World War racist policies were no longer acceptable. The problems facing reindeer husbandry and the Sami culture in the modern age were related to the advent of large-scale forestry, hydropower exploitation, mining, roads, railways and later large-scale tourism. These developments also benefited the Sami, but there was less and less room for their way of life and their culture.” Lennart Lundmark in Ministry of Agriculture, Food and Consumer Affairs. 2005. Sami – An Indigenous People in Sweden. Edita Västra Aros, Västerås, p.15.

However, one effect of the close relation between national and international legal developments was that language became an important characteristic through which the Sami were identified.<sup>39</sup> Since 1971 and the passing of a Reindeer Herding Act that is still in force to date, the Sami have fought for formal legal recognition as the indigenous people of the region. The latest development is the process of signing into being a Nordic Sami Convention, a document that would recognize the Sami people as a transnational indigenous people and thus overcome some of the effects of enforced state boundaries.<sup>40</sup> The draft convention is considered a international legal document and has the aim "to confirm and strengthen such rights for the Sami people as to allow the Sami people to safeguard and develop their language, culture, livelihoods and way of life with the least possible interference by national borders".<sup>41</sup>

Up to date, the Sami are informally recognized by the Swedish state as an indigenous people through political speeches and in official documents and in other ways all that do not give rise to any legal obligations under international law

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<sup>39</sup> The use of linguistic criteria in determining whether or not an individual belongs to an ethnic or social group does not only apply to indigenous people like the Sami, but to all minorities. It is a legal definition that is directly linked to the international legal and social development in which the centrality of language in determining the concept of culture is emphasized.

<sup>40</sup> The Convention and the preparatory work can be accessed at <http://www.arcticgovernance.org/the-nordic-sami-convention-international-human-rights-self-determination-and-other-central-provisions.4644711-142902.html>. More will be said about this on page 60.

<sup>41</sup> Article 1, Nordic Sami Convention, draft. Ibid.

for the Swedish state.<sup>42</sup> Furthermore, even though the Sami have been informally recognized as an indigenous people, as has already been said, Sweden has refused to ratify the International Labor Organization's Convention on Indigenous and Tribal Peoples ("ILO 169") drafted in 1989.<sup>43</sup> The ILO 169 is the most extensive international, legal document concerning the rights of indigenous peoples, and contains provisions which address recognition not only in terms of legal rights but also in terms of active discrimination resulting from state policies and social programs.<sup>44</sup>

The most comprehensive government report published this far, which also represents the stand-point of the government, outlines the rights and obligations contained in the convention (with special emphasis on the nature of rights to natural resources) and concludes that since the committee's conclusion on possible boundaries was inconclusive, more committee work was needed.<sup>45</sup> The report involved a five-year plan but by 2013 nothing but preparatory committee work has been done.

The Sami response to such a conclusion has been understandably sardonic:

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<sup>42</sup> For example, the Ministry of Agriculture in 2004 published the booklet "Samer: Ett Ursprungsfolk I Sverige (the Sami - an Indigenous People in Sweden)," Op. cit.

<sup>43</sup> James Anaya calls it "a central feature." Anaya, S. James. (2004) *Indigenous peoples in international law*. Oxford: Oxford University Press, p. 58.

<sup>44</sup> For a brief introduction to international law concerning indigenous people see Philip Alston and Mary Robinson. *Human Rights and Development: Towards Mutual Reinforcement*. Oxford; New York: Oxford University Press, 2005, 1301 – 04 and James Crawford, "The Right to Self-Determination in International Law: Its Development and Future," In *Peoples' Rights*, ed. Philip Alston (Oxford: Oxford University Press, 2001), pp. 7 – 68.

<sup>45</sup> Statens Offentliga Utredningar (SOU), 1999. Samerna - ett ursprungsfolk i Sverige. Frågan om Sveriges anslutning till ILO:s konvention nr 169. Stockholm: SOU, p. 23

If Sweden were to sign up to ILO Convention 169, the state would also be forced to give up certain land areas and natural resources that Sweden currently believes belong to the state, which would naturally cost money. In summary, it can be said that Sweden has not signed up to ILO Convention 169 because it feels it would be too expensive.<sup>46</sup>

Outside the official legal sphere (and a perfect example of “internal self-determination” as referred to in international legal documents)<sup>47</sup> another development has been the establishment of a Sami parliament. The introduction on the web reads as follow:

The Sami Parliament was founded in 1993 as a Government authority with 31 members, elected in a general election by Sami entitled to vote. The Sami Parliament in Sweden has double roles, being both a popularly elected body and a Government authority at the same time. The Sami Parliament is not yet a self-governing body.<sup>48</sup>

In spite of its name, the Sami Parliament possesses little real power in relation to the issues deemed important to the Sami, chief among these the right to usage of, and passage over land. All Sami policy and the Parliament itself fall under the

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<sup>46</sup> It is estimated that the Sami land claim covers about 40% of Swedish land. Sapmi – the Swedish Sami Parliament, <[http://eng.samer.se/servlet/GetDoc?meta\\_id=1009](http://eng.samer.se/servlet/GetDoc?meta_id=1009)> 2013, Feb. 28.

<sup>47</sup> Internal self-determination for example means that indigenous people get a mandate to exercise legitimate authority over certain issues or a particular geographical area in a way that does not threaten the integrity of the central sovereign power. Internal self-determination can for example be realized through a reserve system or a limited mandate system linked to the members of an indigenous people.

<sup>48</sup> The web address for the Sami Parliament is [www.sametinget.se](http://www.sametinget.se), last visited on 2013-01-07.

jurisdiction of the Ministry of Agriculture. The parliament has also struggled with issues of legitimacy, especially in terms of low turnouts for elections.<sup>49</sup> As a representative parliament, the Sami parliament members are elected through popular elections open to all Sami, but its Chairman is still appointed by the Swedish government and approved by the Swedish Parliament.<sup>50</sup> In its conclusion, a committee set up by the Sami Parliament to analyze how the Sami's right to self-determination could and should be implemented stated that "the mandate of the Sami Parliament is, in order to advance the implementation of Sami self-determination, defined too narrowly to allow for anything but the bare minimum."<sup>51</sup>

We find the Sami today in an irresolvable conflict with Swedish landowners and the Swedish state. The major issue remains the Sami claim to the right of passage over and usage of land that accounts for about 40 per cent of Sweden. These rights

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<sup>49</sup> Since the first election in 1993, participation in elections has decreased. However the actual number of people that have registered to vote has increased. See Ministry of Justice, Sveriges Rapport Till Europarådet Om Ramkonventionen Om Skydd För Nationella Minoriteter, 2006. Stockholm, p. 49.

<sup>50</sup> The official rationale of this system is that since the Sami Parliament is also a government authority, and all chairmen of Swedish government authorities are appointed by the government, the chairman of the Sami Parliament thus has to be appointed by the Swedish government. The Swedish state does not dismiss that an elected chairman would increase the parliaments' credibility as an elected assembly, but the need to follow the appointment rules for government authorities is considered to supersede this concern. For an example of the government's reasoning see Konstitutionsutskottets Betänkande - Ett Ökat Samiskt Inflytande (an Increased Sami Influence)," June 2005, 2005/06:KU32, Stockholm, p. 9.

<sup>51</sup> Svenska Riksdagen (the Swedish Parliament), Betänkande Av Det Svenska Sametingets Kommitté Med Uppgift Att Ta Fram Ett Förslag Till Strategi För En Implementering Av Det Samiska Folkets Rätt Till Självbestämande På Den Svenska Sidan Av Sápmi, 2004, Stockholm, para. 1.4.

were in a limited form given to the Sami already in the codicil of 1751 but have since been retracted through subsequent legal developments.<sup>52</sup>

Through the “Härjedals-process”, a series of court cases starting in the mid-1990s and still ongoing, Swedish landowners have challenged particular rights linked to the passage and usage of land previously given to the Sami. For several reasons, two of them being the definition of the Sami imposed on the Sami by the Swedish government and a refusal to recognize some of the Sami’s particular historical, social, cultural and political characteristics, the Sami have lost most of the cases. Many of the cases were lost due to a lack of resources on the part of the Sami where, just as the case for many indigenous people, there just are not enough funds to continue fighting the state or big corporations.

Despite the fact that there are few successful cases, there are no statistics covering cases that are not brought or dropped because of limited resources and therefore two recent wins in the courtroom have to be viewed with some skepticism before we can take it to be a proof of a changing legal and political landscape.<sup>53</sup> For example in the standard setting Nordmaling case<sup>54</sup> the Supreme Court did uphold the Sami customary right to reindeer grazing against the local landowners but

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<sup>52</sup> This is indeed a simplification of a long and troublesome process, but for the purpose of this essay it will suffice, for a good account of the development see Peter Sköld and Patrik Lantto, *op. cit.*

<sup>53</sup> After years of fighting the dispute was settled with some guarantees as to access to grazing grounds given by the Swedish state. Bolling, Anders. April 29<sup>th</sup>, 2012. Stoppade Svenska Samer Polisanmälde Norsk Minister. Dagens Nyheter.

<sup>54</sup> As with all cases involving Sami claim, the name is derived from the name of the sami village (Sii’da) involved.

defined the geographic extent of that right exceedingly restrictive and thus the case might be used against other Sami villages pursuing other court cases.<sup>55</sup>

Moreover, more recent border treaties that have limit the cross-border mobility of the Sami, especially the Norwegian-Swedish convention of 1972, have had the effect that the Swedish Sami have lost 70% of their grazing lands in Norway. In the conflict that escalated in the summer of 2012 Norwegian landowners were themselves stopping the Sami at the border claiming that as Swedes they have no right to enter with reindeers. The Sami, referring to customary rights codified in the 1751 border treaty, claim that they have the right to access the fought over grazing pastures. The conflict is now being dealt with by a number of different legal and political institutions on both sides of the border.<sup>56</sup> The problematic that the Sami encounter within state borders are also replayed across them.

In current Swedish political life the Sami are marginalized and questions concerning their current situation and future policy changes have low priority. An evaluation of the different political parties' view on minorities carried out by the Swedish Ombudsman for Minorities in relation to the election 2010 showed for example the party currently in power, the right-leaning moderates, stating that Sami interest is best taken care of under current legislation protecting minorities.

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<sup>55</sup> In the case, Nordmalingmälet (involving the Sami villages of Vapsten, Ran and Umbyn) the supreme court upheld the Sami villages' immemorial right to the usage of the land in question but severely restricted the geographical extent of that land. Furthermore, they question the evidence presented to support historical usage of the land in direct conflict with expert witnesses. See the Sami Parliament. 2011. Processandet Över. <<http://www.samer.se/3617>>, 2013, March 5.

<sup>56</sup> Bolling, Anders, op.cit.

As will become apparent later on in this chapter, the elision between the rights of minorities and indigenous peoples only means to severely restrict the rights of the Sami.<sup>57</sup> Only three parties, the liberal party, the left party and the environmental party explicitly advocate that Sweden needs to sign and ratify the ILO169.<sup>58</sup>

On a national level it seems as if the Sami are caught in a political climate and legal structures that do not operate to their benefit and little space for the to operate in order to challenge this situation. Taking into consideration the relation between national and international law the subsequent part of the chapter will be focusing on how the Sami have tried to further their claim outside of Sweden in order to gain greater traction in their relation with the Swedish state. In order to fully comprehend what is politically and legally at stake in the case of the recognition of the Sami as a transnationally indigenous people, a note on the existing legal framework concerned with the rights of indigenous peoples is in order.

## **Indigenous People in International Law**

Keeping in mind that the issues pertaining to the recognition of indigenous peoples are ultimately issues of the recognition of sovereignty, the legal basis for all sovereign political authority post-World War II is enshrined in Article 1 of the Charter of the United Nations (“the Charter”). However, the inherent contradiction of the Charter concerning the principle of self-determination (article

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<sup>57</sup> See European legislation – pages 72-75.

<sup>58</sup> Sveriges Radio - Sapmi. Aug. 26, 2011. 22 års väntan – när antas ILO169?

1), the idea of absolute internal sovereignty (article 2.7) and chapter 7 (on actions with respect to threats to international peace), show that the establishment and exercise of political sovereignty is all but unproblematic.

An early indication of the effect of these contradictions can be found in Chapter 11 (concerning non-self governing territories), where the language of self-determination has been replaced with self-governance and independence.

Considering the purpose of its drafting, it is no surprise that the focus of the Charter remains the articulation of obligations on behalf of member states to “develop”, “assist”, “promote”, “ensure” etc., the “well-being” of the populations of non-self governing territories. In other words, the Charter is phrased in terms of obligations on behalf of member states rather than rights possessed by indigenous and/or colonized peoples.<sup>59</sup>

As an effect of the process of decolonization, the rights of indigenous peoples have been further codified even though the impact of the legislation is still primarily phrased in terms of state obligation and completely dependent on state consent.<sup>60</sup> If we keep this in mind, the most clearly worded, focused and enforceable legal document relating to rights of indigenous peoples is the ILO 169.

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<sup>59</sup> The charter of the United Nations is available online at <http://www.hrweb.org/legal/unchartr.html>.

<sup>60</sup> Rather than stating the rights of indigenous people many of the documents outline obligations on behalf of the state party with the result that the state party possesses all active agency in the process. All legal and political development thus become dependent on state consent.

The ILO 169 includes rights to sustain a particular culture, political institutions and natural resources as long as none of the above mentioned rights violate fundamental rights as laid out by national law.<sup>61</sup> Article 6(c) also mentions the need for the government to provide positive measures for indigenous peoples to develop their own institutions and initiatives. Ultimately, the rights and duties laid out in ILO 169 interpret the situation of indigenous peoples as one that is *internal to the state* within which they reside in as much as that self-determination is understood as internal self-determination and that all rights as laid out in the convention are conditional upon not contradicting fundamental human rights as determined by national legislation. Obviously these legal precepts are introduced to address states' fear of secession and succession: however, it is important to note that internal self-determination (which is what the Sami are asking for) does not threaten the territorial integrity of the nation state.

To date 22 countries have ratified the convention,<sup>62</sup> and in relation to the situation of the Sami, Norway is the only signatory. However, as a norm-creating document, the impact of the ILO 169 has had a much greater impact. In the case of Sweden, the public discussion for the last ten years has been directly related to Sweden's position regarding the ratification of the document. That public

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<sup>61</sup> See Article 7(2) – the provision is obviously there to make sure that the ILO169 cannot be used to support secession or violent rebellion, however, when a state party refuses to recognize and grant rights to indigenous people within its jurisdiction and rather become an oppressive and violent actor where do you draw the line?

<sup>62</sup> List of ratification is available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO), 2013, March 08.

discussion and other ripple effects must also be considered as an “effect” of ILO 169 as an international legal document.

Other international initiatives to promote and protect the rights of indigenous peoples include the work done in order to create a UN framework for the protection of indigenous peoples. In the 1970s the UN turned their attention to the situation of indigenous peoples and has since produced both numerous reports and declarations. In the context of the UN, the most important outcome of the work thus far is the Declaration on the Rights of Indigenous Peoples (“the Declaration”) adopted by the UN General Assembly in September 2007. 144 countries voted for the adoption, 4 against (Australia, Canada, New Zealand and the United States), and 11 abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).<sup>63</sup> Australia, New Zealand and Canada reversed their position since.

First of all, as a declaration it does not contain any legally binding provisions but can only act as an indicator of developing norms.<sup>64</sup> As such, the Declaration reasserts the right to self-determination and also puts an emphasis on the right to social, cultural and economic development. The right to development is framed in terms of a fundamental right of indigenous people to own and develop their traditional territories. At the same time however, the Declaration reaffirms that no

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<sup>63</sup> The declaration is available at <<http://www.un.org/esa/socdev/unpfii/en/declaration.html>>, 2013, March 01.

<sup>64</sup> For an introduction to legal standing of declaration see David J., Harris (2010) *Cases and Materials on International Law*. 7, revised ed. London: Sweet & Maxwell.

rights as set out in the declaration can in any way threaten the territorial integrity of the “sovereign and independent state.”<sup>65</sup>

What seems to emerge is an image of international law as continuously privileging the modern state over and beyond other actors, in this case, indigenous peoples. International law also seem to be playing out a tension between national and international law, a tension based on the fact that states (and state law), primarily, are both objects and subjects of international law. Outlined as such, it seems as if indigenous people have little recourse to legal principles independent of state consent and thus risk that their claims are always subsumed within the logic of the modern state. This also seems to fit very well with traditional definitions and understandings of international law as ‘the law that regulates behavior between states.’ Or in the words of Patrick Macklem:

International indigenous rights speak to the consequences of organizing international political reality, including indigenous political reality, into a legal system that vests sovereign power in certain collectives and not others. Not only does this mode of legal organization exclude indigenous peoples from participating in the distribution of sovereign power that it performs, it authorizes legal actors to whom it distributes sovereign power – States – to exercise such power over indigenous peoples and territory to their detriment.<sup>66</sup>

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<sup>65</sup> See note 61 on the paradox of the charter of the United Nations.

<sup>66</sup> Macklem, Patrick. (2008) Indigenous Recognition in International Law: Theoretical Observations. *Michigan Journal of International Law*. 30:178.

In terms of the reified categories with which we analyze process of international law, the point illustrated here in relation to the Sami is that attempts to box legal and political processes into the different levels of analysis are a marked oversimplification, because the process of recognition in this case has taken place on multiple levels and in numerous spaces of sovereign authority not only simultaneously but also concomitantly.

Thus if we think about an international system only predicated on the logic of modern states in a modern state system, or of international law as only existing between states then little space or active agency seem available to actors that do not fit within this structure: indigenous peoples, refugees, individuals, some international organizations or social movements etc. However, this conclusion only seems inevitable if we only think about one proper way to do law and politics within or between modern states. As we shall see, it is very difficult to frame such an issue as the recognition of the Sami in terms of modern statehood and a system of modern states. Furthermore, even if the modern state still remains even the most important organizing principle of international politics it does not mean that it is the only principle from which law and politics can originate. The case of the Sami to bring to the fore how claims framed in terms of human rights force us to face a number of paradoxical foundational – individual/citizen, national/international, law/politics - assumptions about where and when we take international law to take place. Consequently we need to pay these claims ample attention if we want to understand what processes of international law entail and what possibilities they might embody.

## **The Sami and the International**

When you access the major information portal on the internet for information concerning the Sami (run by the Swedish Sami parliament)<sup>67</sup> the Sami present what they view as potential political avenues for furthering their claim to recognition as an indigenous people under the heading “politics”. The political spaces that are mentioned as those in which the Sami are active are the “national”, “the regional”, the “European” and the “international”. In order to see how the Sami have worked in all these different venues to strengthen their claim to recognition the following section of this chapter will use the examples of the work done in the Nordic region, on the European level and some initiatives played out in global spaces.

The European level is particularly interesting, not only because according to the standard story that is where modern international law originated but also because the European Union and its agencies constitute intermediate authorities that in some respects are national and in other respects international. The Sami, as individual citizens, citizens of a member of the European Union, an indigenous people and part of humanity assert their rights at all these levels. The following section will show that despite the fact that what they confront in way of international law is highly problematic the Sami have found it useful politically to frame some of their claims in terms of human rights.

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<sup>67</sup> See the website [www.samer.se](http://www.samer.se).

It is important that looking at venues outside of Sweden that the Sami have used to challenge Swedish state authority does not become only an analytical exercise, but rather it mirrors what the Sami seem to include as possible avenues to pursue their claim for recognition. Generally, the Sami are asking for their history as a colonized indigenous people and transnational legal recognition for their right to self-determination as an indigenous people. To the Sami, their claim derives its legal rationale under international law from the fact that the Sami have continuously used the land since time immemorial. Despite the fact that the actual recognition of indigenous peoples' rights is primarily viewed as something of concern for national politics, the sources of legitimate authority that back these claims seem to be derived from outside the realm of the nation state.<sup>68</sup>

According to the Sami, the supposed role model in this respect is Norway. Norway changed its legal proceedings in cases concerning Sami land rights after it had become clear that the Norwegian legal system could not facilitate Sami claims. One effect of the new legislation was that the burden of proof has been shifted from the Sami to the landowners and since then the court cases against the Sami living in Norway have virtually stopped. The Norwegian government also covers the financial cost for court proceeding. These changes have not been implemented in the other Nordic countries. Just as is the case in the political program, the Sami have always emphasized their transnational character as a

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<sup>68</sup> The Sami Council, 1986. The Sami Political Program, <<http://www.saamicouncil.net/?deptid=2164>>, 2013, Dec 12.

people and that that it is the international community that protector/upholder of the Sami's rights, not individual nation states.<sup>69</sup>

### ***The Nordic Sami Convention***

The questions of a possible Nordic Sami Convention and future harmonization of the Sami policies of the countries in the region were first raised in 1986. The harmonization of Sami policy across Scandinavia is considered to be essential to the possibility of the Sami to live as a transnationally nomadic people. The core issues covered concern the Sami right to economic, political, social and cultural self-determination, and the link between the right to self-determination and Sami land claims. A draft convention was presented in November 2005 and was subsequently referred for opinion to a number of national governmental and non-governmental organizations in all three different countries.

In the meantime, the Sami Parliamentary Conference (consisting of representatives from all the three Sami parliaments and representatives from the Russian Sami community), adopted the Jokkmokk declaration stating that the Sami people generally supported the work on the Convention and that the

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<sup>69</sup> Lars-Anders Baer, s former head of the Sami parliament, has a long and eventful career within the international movement for the recognition of the rights of indigenous people. Many of his writings situate the Sami within an international context, see for example Lars-Anders Baer, "The Rights of Indigenous People - a Brief Introduction to the Context of the Sami," *International Journal on Minority and Group Rights* 12 (2005). See especially page 247, where the protector/upholder of indigenous peoples' rights are not individual states but instead the "international community."

Convention in itself should be considered a ‘milestone’ in Nordic Sami policy.<sup>70</sup>

The declaration also presses for the Nordic countries to work politically for the inclusion of Russia in the process in order to fully encompass the Sami’s transnational culture.<sup>71</sup> In 2011 negotiations between the three countries’ governments were initiated but they have yet to produce any tangible results. The set end-date for negotiations is 2016.<sup>72</sup>

In the preamble, the governments of Sweden, Finland and Norway recognize the Sami as the transnational indigenous people of the region and acknowledge the individual and collective responsibility that the states have, not only in terms of allowing, but also in terms of supporting Sami self-determination. The work on the Sami convention highlights the double bind that the Sami living in Russia finds themselves in. Being cut off from all contact with the Sami living in Finland, Sweden and Norway as an effect of the Cold War, the Sami living in Russia have faced a much harsher colonial process than the other Sami, residing elsewhere. They are not recognized as either an indigenous people or a minority and since

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<sup>70</sup> Sara, Johan Mikkel. Symposium on “The Right to Self-Determination in International Law” Organized by Unrepresented Nations and Peoples Organization (UNPO), Khmers Kampuchea-Krom Federation (KKF), Hawai’i Institute for Human Rights (HIHR),

Indigenous Governance of Self-Determination. The Saami model and the Saami

Parliament in Norway. 29 September – 1 October 2006. The Hague, Netherlands.

<sup>71</sup> Jokkmokksdeklarationen - Förklaring Från Den Första

Sameparlamentarikerkonferensen. 2005:3, Samefolket, esp point 14.

<sup>72</sup> Very little is said or published with references to the possibility of on-going negotiations. There are very few references, protocols or other political and legal ‘traces’ and thus by end of 2012 my professional guess is that the talks have not yet begun in anything but form.

they traditionally resided on quite rich land they have been victims of forced, internal migration. The Sami's particular industries and cultural practices are not protected and, as was the case for many minorities in Russia today, they live at the very margins of society.<sup>73</sup>

In response to the Sami's rejection of being considered only subjects of the national legal system, the convention only acknowledges the necessity for the individual states to respect Sami customary legal norms and that the structures of state law and the application of state law have to protect customary rights.<sup>74</sup>

Legally, it is argued that the right to self-determination is derived from international law but its content is still to be determined by national law.<sup>75</sup> On the international level the Sami people are supposed to represent themselves and the individual countries should make sure that the Sami are financially capable of doing so.<sup>76</sup> The experts drafting the Convention acknowledged that if Russia would be made party to Convention it would never be ratified. What remains in the current document is an appeal for the signing countries to work for the inclusion of Russia in the future and a guarantee that the rights in the document apply to all Sami residing in one of countries that sign the document and thus also to Russian Sami who move to one of these countries.<sup>77</sup>

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<sup>73</sup> Jorn Madslie. Dec. 2006. Russia's Sami Fight for Their Lives. BBC News.

<sup>74</sup> Article 9.

<sup>75</sup> Article 14.

<sup>76</sup> Article 19.

<sup>77</sup> Matthias Ahren et. al. (2007) The Nordic Sami Convention: International Human Rights, Self-Determination and other Central Provisions *Journal of Indigenous Peoples Rights*, para 3.3.

If we return to the rights as laid out in the convention, based on the usage of land since time immemorial, the Sami are considered to possess a continued right to the usage of the land without necessarily being considered to have a right to the ownership of that land.<sup>78</sup> If the Sami claim a right to the usage of land that is not their private property this right would have to be exercised in “a spirit of mutual respect.” What the criteria for “mutual respect” consist of we are not told; however, “particular consideration” should be given to the needs of reindeer herding Sami. Again we can see how reindeer herding Sami are given preferential treatment vis-à-vis other Sami. Furthermore, the article states that nothing should “impede that the forms of the usage of land shall be adapted to technological and economic developments.”<sup>79</sup> Recognition of indigenous people has for a long time been considered to contain only the right on behalf of the indigenous people to remain “different” or “original”, to remain indigenous without developing together with the modern world. In case of the Sami this is articulated as a demand that they remain only a reindeer herding and skiing people dressed in colorful and indigenous authentic looking clothes.

### ***Nordic Sami Convention – discussions and responses in Sweden***

Sweden has a civil law system and because of the particular characteristics of the system, most changes in the legal code are dependent on an intricate and lengthy committee system. Due to this fact, recent political developments in relation to the rights of the Sami have been at a virtual stand-still awaiting the findings of three

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<sup>78</sup> Article 34.

<sup>79</sup> Ibid.

reports: the findings of the committee on Reindeer Husbandry Policy, the Hunting and Fishing Rights Inquiry and the Boundary Commission. Since the Swedish government has refused to ratify ILO 169 before its complete impact had been clarified, especially that of Article 14, concerning the right to ownership of land, these reports have been seen as a necessary step towards ratification. However, the findings and conclusions have not lived up to expectations,<sup>80</sup> whereas the conflict between the landowners, the Swedish state and the Sami remains unaltered. It is within this context that the work on the Nordic Sami Convention must be understood.

After drafting, the convention was referred for consideration to a number of governmental and non-governmental organizations. According to the latest reports, the process is now awaiting the outcome of the Finnish analysis of the draft convention and the work is most likely to continue during the spring of 2011. The aspiration is to be able to have a framework for negotiations set and for the actual negotiations to start in the fall of 2011.<sup>81</sup> However, as mentioned previously, at the beginning of 2013 no signs of progress towards ratification have been seen.

One of the organizations that were asked to comment on the draft convention was the Sami parliament. That the Sami parliament is not included in the process can only be taken as another indication of the government's assumption that the

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<sup>80</sup> The desire of both landowners and Sami was to reach a settlement as to the conflict concerning land claims.

<sup>81</sup> The Sami parliament. 2007. Pressrelease. Nov 14.

responsibility to deal with the situation falls only on the shoulders of nation states. The Sami are only “subjects” and in the future the Convention will only be “applied” to them. However, the Sami parliament considers itself ready to accept the Sami convention as drafted on the condition that the rights outlined are considered minimum standards.<sup>82</sup> Using a comparison with the situation in Norway and Finland, the parliament emphasizes the issues that the Swedish government must address in order to even begin to fulfill the obligations contained in the Convention, the first one being the immediate ratification of the ILO 169.<sup>83</sup> The ratification process is, as has been pointed out previously, dependent on finding a solution to the problems related to Sami land claims vis-a-vis Swedish landowners.

It is not surprising then to see that the Sami parliament decided to give their support to the draft Convention on September 1st 2006. However, the parliament was not unanimous, having voted 21 for and 9 against. The dissenting individuals belong to the party the Hunting and Fishing Sami, the largest (by one seat) party in the Sami parliament.<sup>84</sup> Their major source of contention is that the Convention perpetuated a definition, established in the previous Sami legal code, of Samihood that excludes the majority of the Sami people. Since 1751, and up until today, reindeer herding has been considered to be the defining trait of the Sami people even though it is only a small part of the population that partake. The Hunting and

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<sup>82</sup> The Sami parliament, Comments to the draft Nordic Sámi Convention, Jokkmokk, 2006, p. 3.

<sup>83</sup> *Ibid.*, p. 6.

<sup>84</sup> Sami parliament. Pressrelease. Dec 20, 2006.

Fishing Sami wish not only to extend the definition of the Sami people to those who primarily make their living from hunting and fishing, or from traditional arts and craft, but even further to also include individuals living outside of the traditional territory and employed outside of any traditional industry.

In their response to the draft Convention, the Hunting and Fishing Sami state that the content of Article 42 (outlining the particular link between reindeer herding and Sami culture) is

insulting to the Sami that place their cultural origin elsewhere. The content should be formulated to include all Sami industries. This article will lead to further segregation of the Sami people.<sup>85</sup>

Furthermore, the suggested reliance on reindeer herding as a determining factor of Sami culture in the Convention will result in the partial resolution of Sami land claims, supporting not the Sami as an indigenous people but rather supporting the Sami employed in one particular industry. The link between being an active reindeer herder and membership in the Sami villages<sup>86</sup> further bars those Sami who are not reindeer herders from enjoying the rights that supposedly belong to them. Because reindeer herding is the defining characteristic of Samihood also under national law, the Hunting and Fishing Sami claim that even the articles

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<sup>85</sup> Jakt och Fiskesamerna. 2006. Jakt- och Fiskesamernas yttrande angående förslaget till "Nordisk samekonvention".

<<http://www.jaktochfiskesamerna.se/default.asp?pageid=17841>>, 2013 March 4.

<sup>86</sup> It should be noted that hunting and fishing rights are also dependent on membership in the Sami villages.

referring to “traditional usage of land” implicitly reinforce the same exclusionary policy.

The Hunting and Fishing Sami are not the only ones who have presented criticism of this kind against the Convention. The Equality Ombudsman (DO),<sup>87</sup> in her response to the Convention, also pointed out the potential problem of including a definition of Samihood in the Convention and suggested that instead the Sami should themselves be allowed to define the membership criteria of their people.<sup>88</sup> According to the DO, the link drawn in the Convention between Samihood and not only reindeer herding but also the capacity of speaking Sami can potentially cause further divisions of the Sami people. The DO had aired the same criticism against previous drafts for a new national, Sami legal code pointing out that “law should not decide who is Sami.”<sup>89</sup>

Furthermore, after engaging in conversation with the Hunting and Fishing Sami, Göran Lambertz, the Chancellor of Justice practically dismissed all recent work conducted towards both a new legal code, and also the potential Swedish ratification of ILO 169, saying

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<sup>87</sup> The office of the DO is a governmental agency, whose mandate is determined by the Swedish government on an annual basis. However, the DO operates independently in terms of his or her findings whilst in office. For further information as to the mandate of the DO see <[http://www.do.se/t/Page\\_\\_\\_406.aspx](http://www.do.se/t/Page___406.aspx)>, 2012, Dec 7.

<sup>88</sup> Ombudsmannen mot Etnisk Diskriminering, 2006. Remissvar - Nordisk Samekonvention. Stockholm.

<sup>89</sup> Ibid.

there is a risk implicit in [...] Sweden's accession to the ILO convention 169 that the injustices seemingly existing concerning membership in the Sami villages and the rights of Sami and other groups living outside of the Sami villages. It seems as if existing Sami legislation [...] has given too much emphasis on reindeer herding in relation to Sami rights.<sup>90</sup>

Despite these criticisms, the overall assessment of the work on a Nordic Sami Convention is still viewed as progress towards recognition of the Sami as a transnationally nomadic indigenous people. The United Nations Expert on Indigenous People, commenting on the re-start of negotiations, is himself “encouraged by the commitment of all parties and the progress that has already been made in advancing the human rights of indigenous people within the region.”<sup>91</sup>

What we can see already by only looking at the preparatory work done in relation to the Nordic Sami Convention is that legal and political roles are not neatly categorized, nor are boundaries of authority easily drawn. Some groups within the Sami together with some Swedish government agencies have forcefully argued for one issue while other Sami and other Swedish state agencies have argued as forcefully for the opposite view. To locate ‘the state’ or even ‘the indigenous people’ becomes problematic and both the ‘state’ and the ‘indigenous people’

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<sup>90</sup> The Chancellor of Justice, 2006. Additional Consideration. Dnr: 2081-06-80.

<sup>91</sup> United Nations Office at Geneva, June 2011. United Nations Expert on Indigenous Peoples Supports Restart on Negotiations on Nordic Sami Convention. <[http://unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/ACE67D5D949772BEC1257707004E4804?OpenDocument](http://unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/ACE67D5D949772BEC1257707004E4804?OpenDocument)>. 2013, Jan 05.

seem to be idealized categories that are quite ill suited to box up the complex processes that make up international law. The discussion on equality and inherent rights has also been mirrored within the Sami community leading to a discussion about unequal power relations between different groups of Sami. International law appears much more like a political process than a legal status, something that is reflected on how using international law and human rights as a tool for critique of state practice has been reflected within Sami community in these discussions.

This should not surprise us. Foucault reminds us not to look for the “single center” of power, but instead to “understand power in its most regional forms and institutions, and especially at the points where this power transgresses the rules of right that organize and delineate it [...]”<sup>92</sup> A part of the point of this text is to show how the process of recognition brings to the fore a multitude of different (power) relations. If that point is taken, then viewing the nation state or the Sami as monolithic homogenous entities is impossible. Boundaries, politics, subjects, identities and forms of recognition are always in flux. International law becomes another space where this constant negotiation of representation takes place: it becomes a heterogeneous field of political interaction. The responses to the Nordic Sami convention are also an occasion when human rights, outside of the court or other legal venues, have been used as a means for this negotiation of representation, by the Sami as a people but also within the Sami community as a people and by Swedes.

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<sup>92</sup> Michel Foucault et al., *Society Must Be Defended: Lectures at the Collège De France, 1975-76*, 1st Picador pbk. ed. (New York: Picador, 2003), p. 27.

## **The Sami, Europe and the European Union**

The Sami have tried to further challenge Swedish state authority within the framework of the European Union, and especially the European Court of Human Rights (ECHR). Having been quite unsuccessful in challenging the Swedish state through the national legal system, the Sami have made several attempts to challenge Swedish sovereign authority in front of the ECHR. As we have seen, the Sami demand to be recognized as a transnational people, something that actually might be easier to conceive of in an EU made up of regions and an open market, than by a nation state very much dependent on its borders for self-identification. However, within the European legal framework there exists no recognition of the special status of indigenous people, except through fleeting and rather general comments.

The EU 2011 Annual Report on Human Rights ('the 2011 report') repeats words like 'important', 'integrate', 'streamline', all known to be rather empty words in the official language used by the European institutions in Brussels. Out of the report's 320 pages 4 concern the rights of indigenous peoples<sup>93</sup> and indigenous issues warrants only one sub-heading. However, the initiatives highlighted in the report cover the work of EU subsidized organs carried out in "the regions of Latin America, South Asia and Central Africa," basically everywhere but in Europe.

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<sup>93</sup> One example brought to the reader's attention is that the perceived accessibility to grants for indigenous peoples have increased by the simple act of taking into consideration the relative small size of organizations working with indigenous peoples' issues.

Nowhere in the report are there any references to indigenous peoples in Europe, something that would reflect a footnote previously attached to EU's annual reports

There is no common position within the EU on the use of the term "indigenous peoples". Some Member States are of the view that indigenous peoples are not to be regarded as having the rights of self determination for the purpose of Article 1 of the ICCPR and the ICESR, and that use of the term does not imply that indigenous people or peoples are entitled to exercise collective rights.<sup>94</sup>

Even if the link between rights claims by indigenous peoples and human rights structure is already established, it is not too bold of a statement to say that legally, indigenous people do not exist within the European framework, and thus by extension in Europe. One effect of this legal omission is that any claim that the Sami bring before the Court cannot be worded as a claim on behalf of an indigenous people, but instead it has to be rephrased to fit within its charter. The only way to do so is for the Sami to legally re-define itself as a minority and file claims that fall within legislation covering non-discrimination or that individual Sami bring claims on their own behalf.<sup>95</sup>

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<sup>94</sup> The European Union, June 2012. Annual Report on Human Rights, A 266/12. p. 118.

<sup>95</sup> Article 14 of the European Charter – banning any discrimination based on "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"

However, the difference between the term “indigenous people” and “minority”, is tremendous in terms of their legal implications. The term indigenous people is legally taken to indicate a population that are the descendants of groups of people who lived in the area before any people of another ethnic origin arrived, and who still today have preserved a particular way of life and is currently subsumed under a state structure different from theirs.<sup>96</sup> Under international law indigenous people have the right to self-determination.<sup>97</sup> The term minority, on the other hand, only indicates a sociological group, not a part of the majority of a society, and legal texts state that they have to be treated in fair and equitable manner, i.e. they have the right not to be discriminated against.<sup>98</sup> Minorities are not entitled the right to self-determination within the framework of international law.

In the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (the European Convention), Article 14 stipulates the right to non-discrimination within the European system. It reads:

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<sup>96</sup> The definition is taken from the UN Working Group on Indigenous Populations, (FICN. 41Sub.211983121 Add. § 3 79).

<sup>97</sup> Which does not mean that they have the right to secede. The Sami Parliament is often taken as an example of one way for indigenous people to exercise their right to self-determination.

<sup>98</sup> There are some rights prescribed to all minorities, for example the language rights, but I argue that whilst much progress has been made within the area of minority rights the Sami will never solve the issue of land rights by resorting to rephrasing their claims in relation to minority rights. A good introduction to international law related to the situation of minorities can be found in Gudmundur Alfredsson. (1998) *Minority Rights: International Standards and Monitoring Procedures. Latvian Human Rights Quarterly* 6:9-29.

Prohibition of discrimination - The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Cases brought before the ECHR by either minority groups or indigenous people are often filed under Article 14 read in conjunction with one or several other articles of the European Convention.

### ***The Case Law***

Three cases that have been argued before the court have direct relevance to the issues investigated here because the Court is forced to deal directly with the tension between state law and international law. All cases are framed in terms of the individual's inalienable rights but address such issues as the basis for Swedish sovereignty, legal personality under international law and by extension also the issue of internal self-determination. All cases are, as pointed out briefly above, cases concerning the absolute prohibition on discrimination. However, since the situation of the Sami balances the local and the global; the individual and a perceived universal humanity all within the framework of the modern state and a system of modern states the cases bring to the fore a number of problematic principles and paradoxes at play that can tell us much about the structural and historical conditions of modern international law.

In 1995 Kōnkämä and 38 other Saami villages filed a complaint before the Court<sup>99</sup> under Article 14. The case concerned new legislation passed by the Swedish government which lessened Sami influence on the process of granting licenses for game hunting above the cultivation line. The claim to have been discriminated against was based on the perceived impossibility by the Sami to challenge Swedish legislation on this matter. The case was found inadmissible on the basis that the Sami failed to exhaust local remedies before filing a complaint with the Court.

However, the Court did look at the merits of the case and in the reasoning leading up to the decision on its admissibility there are a few particularly interesting points. Firstly, even though the Sami Village is a legal entity before national courts, the Swedish government challenged the merits of the case by arguing that the Sami village instead should be considered a Non-Governmental Organization (NGO) and as such they cannot claim to have suffered damages before the Court since the court only considers injuries caused to individuals. The Court dismissed this argument stating that the recognition of the legal personality of a Sami village on the national level makes it impossible for the Swedish state to challenge this status on the European level. Secondly, the Court continued by stating that the case actually did not concern recent legislation but instead was a question of whether or not the Sami hold an immemorial, exclusive right to hunting and fishing in the area concerned.

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<sup>99</sup> When analyzing the case law, the European Court on Human Rights will be referred to as “the Court”.

Noting that this right is a matter of a long-going dispute between the Swedish State and the Sami and citing the conclusion of the Taxed Mountain Case,<sup>100</sup> the Court concluded that the Swedish legal system is competent to decide these issues:

Similarly, the Swedish courts would also appear to be competent to give a declaratory judgment on whether or not the Saami villages are holders under Swedish law of exclusive hunting and fishing rights in the areas concerned in the present case.<sup>101</sup>

Thus, judging from *Könkämä et.al. vs. Sweden*, the Court will not challenge the State's power to define its legal system and the rule of law within set national boundaries.

The next case is the case of Muonio Sami village to which the Court presented a decision in 2001. The background of the complaint was that contrary to the

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<sup>100</sup> The case was succinctly summarized by the European Court in the *Könkämä* case: "In the so-called Taxed Mountains Case (*Skattefjällsmålet*, NJA1981:1), five Saami villages of the county of Jämtland - the Saami villages Frostviken Norra, Frostviken Mellersta, Ratteväre, Hotagen and Offerdal, all applicants before the Commission in the present case - sought a declaratory judgment establishing that they had a "better right" than the State to certain areas of Jämtland, the main part known as the taxed mountains. They claimed that they had a right of ownership or, alternatively, several types of limited rights, including exclusive hunting and fishing rights, to the area in question. After extensive investigations made by courts at three levels, the Supreme Court (*Högsta domstolen*) rejected the villages' claims by judgment of 15 January 1981, although it acknowledged that the members of the Saami villages had a strongly protected right of usage (*bruksrätt*)." *Könkämä and 38 Other Saami Villages against Sweden*, B. Relevant domestic law and practice (1995). For further elaboration of the facts and implication of the case see Tomas Cramér, (2000) *Vinterstjärna: Sameägt Land Och Vatten Med Vinterbetesrätt: Skattemannarätt Med Adpertinenser*, vol. 30, *Samernas Vita Bok*. Stockholm: Svenska samernas riksförbund.

<sup>101</sup> *Muonio Village V. Sweden*, subheading "THE LAW" (1995).

opinion of the Sami village the government, whilst denying the application of members of the Sami village, decided to grant licenses to Sami individuals not from that particular village. Without any success Muonio village appealed the decision until all national remedies were exhausted. Because of the importance of the Sami village in terms of ordering Sami society, and also because the village possesses independent personality within the Swedish legal system, the issue of bypassing the village in the granting process is extremely significant. Due to the particular issues involved and the Sami rights at stake, a possible clarification of the applicable law by the Court could potentially have been of great value. However, the case was struck off the list due to a settlement between the two parties - a settlement that on the behalf of the Swedish government involved paying 65 000 sek (approx. 7000 Euro) in damages to the two claimants from Muonio Sami village.<sup>102</sup>

The case points to the inevitable conclusion that the power to set the parameters of both political and legal discourses at this level still remains unchallenged in the hands of the Swedish state. By agreeing to pay damages, none of the legal issues that the case involved were pondered upon by the judges, no decision could be presented that could set, in the eyes of the Swedish state, an uncomfortable precedent. The village was trying in their petition to question with what authority the Swedish state can determine what to the Sami are exclusive rights held by them and thus also the fundamentals of Swedish Sami policy. It seems that the cost of avoiding the question was not alarmingly high for the Swedish State.

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<sup>102</sup> Ibid.

The third case concerns the four Sami villages Handölsdalen, Mittådalen, Tåssåsen and Ruyhten Sijte and their right to use land for grazing. In 1990 legal proceedings were initiated by landowners against the Sami villages, seeking a declaratory judgment revoking the Sami right to grazing based on immemorial usage of the land. The landowners argued, in this case, that a right to grazing could only be established under modern contractual law.<sup>103</sup> The landowners argued that the Sami had not been using the land in these specific areas to underwrite a claim to grazing rights based on prescription from times immemorial. Swedish courts found that property right could not be established by custom and that the same logic applied to applicable provisions under international law. In other words, the Swedish courts found for the plaintiffs and the Sami were sentenced, among other things, to pay the legal fees related to the case.<sup>104</sup>

The complaint presented in front the ECHR was filed with a note concerning the requirement to exhaust local remedies, in which the Sami argued that the unequal distribution of resources between the landowners and the Sami effectively impaired their access to the Swedish legal system.<sup>105</sup> Furthermore, the Sami

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<sup>103</sup> The applicable law is considered to be (1) the immemorial rights (*urminnes hävd*) (2) the provisions of the reindeer grazing and reindeer husbandry acts of 1886, 1898, 1928 and 1971, (3) custom, or (4) public international law, more specifically Article 27 of the UN Convention on Civil and Political Rights, as compared with Chapter 1, section 2, of the Instrument of Government (*Regeringsformen*). Ibid.

<sup>104</sup> Ibid., 17.

<sup>105</sup> “The applicants asserted that, given the high legal costs of the proceedings, they did not have an effective access to court. They relied on Article 6 § 1 of the Convention which, *inter alia*, provides the following: “In the determination of his civil rights and obligations [...] everyone is entitled to a fair [...] hearing within a reasonable time by [a] tribunal...” Ibid., 48.

claimed that the excessive cost and length of the proceedings impaired the Sami capacity to exercise their rights “practically and effectively”. The ECHR rejected the claim stating in conclusion that:

the Court does not doubt that the applicants' adversaries, the landowners, had greater financial resources. Moreover, the complexity of the case, having a bearing also on the length of the proceedings, certainly contributed to the costs that the applicants had to bear. However, examining the proceedings as a whole, the Court finds that the applicants were afforded a reasonable opportunity to present their case effectively before the national courts and that there was not such an inequality of arms *vis-à-vis* the landowners as to involve a violation of Article 6 § 1 of the Convention.<sup>106</sup>

However, the court did think that the case had failed to meet the “reasonable time” requirement and awarded the Sami 14 000 Euro in non-pecuniary damages.

Again, the sum seems minimal in comparison to the legal implications of its findings. According to the finding of the case it seems that human rights are in this particular instance not employable in order to address structural inequalities in court. The burden of proof and the high legal fees are issues of equality that have been acknowledged as actual discrimination in a number of other instances and countries.<sup>107</sup>

Furthermore, what seems to be the case is that for the Sami to have their cases heard within the European setting they have to shed all the particular

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<sup>106</sup> Ibid., 59.

<sup>107</sup> The prohibitive cost of litigation has been recognized by the courts in Norway, Canada and the UN and it is also mentioned preparatory work on the Nordic convention.

characteristics that make them a people different from Swedes – they can only stand before the court as one of many equal individuals that make up a globally spanning humanity (or at least a European family of citizens). Because of this it is difficult to see how a body like the ECHR or international law can help clarify problems related to the Sami demand for recognition as the indigenous people of the region, since that is a claim based on everything that sets the Sami apart from other Swedish subjects. All three cases are thus a reminder that there exist a very real tension between the universal freedom promised to every individual human under international law and the nationally bounded freedom of the citizen.

What stands out clearly from the three cases is that the ECHR is not an instance through which to challenge the supremacy of the Swedish legal system. It appears difficult for the Sami to make international law work in their favor in settings like the ECHR, or within structures that are predicated on the modern state and state consent or based on rights framed in terms of the single individual as equal member of a global mankind. It seems as the only way for the Sami to possess active agency in the international setting is if they adhere to the boundaries set to politics by the idea of the modern nation state. The denial of legal personality to NGOs would be another illustration of this point.

There are however other avenues, and in this regard it is important to note that the Sami themselves have repeatedly talked about international law and human rights as a powerful tool in negotiating the political relationships that they find themselves in. If, as argued before in the case of the ECHR, it seems as if human rights work counter to Sami interests, how can we make sense of this claim? Their

insistence on human rights being a useful tool for them must be the product of understanding the international sphere in terms of avenues and political spaces different from those that we are used to.

The Sami have not only used international avenues as means to react to government policies but have for long worked more generally for the furthering of rights of indigenous peoples globally. Lars-Ander Baer, current President of the Swedish Sami Parliament has been involved in initiatives by United Nation and the ILO since early 1980s.<sup>108</sup> Within the UN structures, the Sami have been active participants for as long. For example, Lars-Anders Baer has been a member of the UN Working Group on Indigenous Peoples (established as a subsidiary body in 1982) since 1983, and since 2002 he is also the Sami representative in the Permanent Forum. The Sami have also been very active members within both organizations and they have managed to get support also from other UN organs.

It seems as if the work the Sami does resonate within UN structures. In 1988 the UN Human Rights Committee decided on a complaint filed by Mr Kitok against Sweden. The logic of the case concerned membership in a Sami village and Mr Kitok claimed that Sweden by allowing for the Sami village to decide on its membership violated his right to freely enjoy his culture, in this case by keeping reindeers. Since Mr Kitok had been denied membership he was legally prohibited from reindeer herding. The Committee first pointed out that an individual could

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<sup>108</sup> Lars Anders Baer's CV is accessible through the UN at [http://www.un.org/esa/socdev/unpfii/en/member\\_baer.html](http://www.un.org/esa/socdev/unpfii/en/member_baer.html).

not bring a claim based on a right to self-determination and that secondly, the balance between individual rights and group rights (self-determination exercised through the sami villages) must be struck. The committee dismissed Mr Kitok complaint whilst at the same time underwriting the idea that the Sami held special rights based on their status as indigenous people.<sup>109</sup>

This is one instance of several that the Commission on Human Rights and especially its Special Rapporteur has levied critique against Sweden's treatment of the Sami.<sup>110</sup> The Special Rapporteur has the mandate to collect and exchange information concerning the situation of indigenous peoples around the world and propose recommendations and remedies in the case of violations.<sup>111</sup> In April 2010 the current Special Rapporteur Professor James Anaya commented on the special situation that the transnational Sami find themselves dealing with by saying that he was hoping that future work in terms the "novel approach for looking at the human rights situation of a specific indigenous people of human rights" would set a precedent to advance the "human rights concerns of indigenous peoples that continue to live in their traditional territories spanning the formal boundaries of States."<sup>112</sup> The novelty lies in the transnational nature of the rights that the Sami claim (as evident in the Nordic Sami convention). However, a further point is essential to make and that is that the term, "human rights," is subject to so many

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<sup>109</sup> Ivan Kitok v. Sweden. 1985. Minutes available at <<http://www1.umn.edu/humanrts/undocs/197-1985.html>>. 2013, March 5.

<sup>110</sup> Some mentioned earlier, p. 87.

<sup>111</sup> James Anaya. 2010. Opening Statement of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people. Sami conference, Rovaniemi, Finland. 15-16 April.

<sup>112</sup> Ibid.

interpretations. Just like “freedom” or “equality” or “justice” or “democracy” are continuously claimed and re-claimed so is human rights a malleable tool that can be used free of its origins and can offer ground for critique of the institutions and practices that first produced it.

Thus, despite little success inside the courtroom the Sami still seem to find it politically useful to frame some of their claims in terms of human rights. When discussing political issues in the media the Sami always reference to Sami immemorial rights as codified in international law. Issues pertaining to the Sami situation receive little attention in national media and primarily concern short reports on court cases and legal conflicts. The lack of coverage can be attributed to the Stockholm-centrism of most media and the limits set to public discourse by the fact that Sweden never acknowledged its colonial past. The most important outlet is the Sami’s own national radio channel that broadcasts within the structures of Swedish public radio.

Following the reporting and minutes from the Sami parliament it seems as if unofficial avenues are considered to be potentially more powerful in terms of raising awareness about the Sami situation. One example mentioned is how a young male Sami, Per Johan Partapuoli, is part of an advisory panel for leading Stockholm social democrats.<sup>113</sup> Commenting on the experience Per Johan said that

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<sup>113</sup> Labba, Nils Gustav. June 2, 2008. Ungdomsrådgivare åt Mona Salin. <<http://www.samer.se/2694>>, 2013 March 5.

he felt that this was a very effective way of making sure that Sami issues received attention.

In addition, the Sami are working actively within the structures of the European Union and especially in relation to the structural funds. They have received support for example to make resources about Sami available and visible. ”Saemieh Saepmesne –(“The Sami Space”) is an EU project that focuses on documenting and making visible the Southern Sami physical presence in the landscape, trying to address exactly how to make the Sami visible to the majority population. The structural funds play a very important role in supporting the Sami to establish their own voice as a transnational people since one of the articulated goals of the funds is to guarantee that national borders do not hinder development and integration in Europe.<sup>114</sup> In relation to the EU initiatives the reference to the Sami human rights underlines that they are rights independent on any one agency, be it local, national, regional or global, granting them.

With regard to a number of issues that Sami are getting more and more organized and participate in informal networks tie people together in terms of interest rather than ethnicity. One recent example is how various actors join together by a threat of further exploitation of natural resources by national and international mining companies.<sup>115</sup> This issue has given rise to a national discussion since the Sami’s

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<sup>114</sup> The Sami Parliament, Ongoing. InterReg Programmet. IV A Nord Sapmi. <<http://sametinget.se/6292>>, 2013 March 5.

<sup>115</sup> Wanhatalo, Inger. Det är vi unga som måste engagera oss. <<http://www.samer.se/3947>>, June 5<sup>th</sup>, 2013.

concerns in northern Sweden have been tied together with concerns of primarily wealthy summer house owners in the southern Sweden also threatened by mining. Niila Inga, a reindeer herder and one of the persons behind the anti-mining movement points to the necessity of “thinking outside of the box” and creating new avenues when commenting on these issue-driven alliances.<sup>116</sup>

Niila was part of a delegation that travelled to London to try to raise awareness about the situation of the Sami at the global mining conference “Mining and Money” where they picketed the conference site and distributed information. They were forcefully removed from the site but by claiming their right to be in a public space stayed in the vicinity of the conference.<sup>117</sup> The action was a part of a collaboration with London Mining Network, an international “alliance of human rights, development and environmental groups.”<sup>118</sup> The hope was to create recognition for the situation of the Sami in international press.

The Sami are also trying to raise awareness with an active cultural policy, both nationally and internationally. An important point to the Sami is to have the possibility to show what Sami identity today might be. As Fia Kaddik, a photographer, puts it “representations of how we lived you can find in a museum,

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<sup>116</sup> Ibid. It is very interesting to note that the Sami representative suggests that it is easier for him to talk to Canadian company than to representatives for local industries.

<sup>117</sup> Samebyar Utkörda från Gruvkonferens Dec. 6<sup>th</sup>, 2011. Sveriges Radio. Available at <<http://sverigesradio.se/sida/artikel.aspx?programid=2327&artikel=4841378>>, June 1<sup>st</sup>, 2013.

<sup>118</sup> For more information goto <http://londonminingnetwork.org>.

but very little about how we live now.”<sup>119</sup> Her concern mirrors some of the commentary on the Nordic Sami convention where some Sami reacted to pre-modern archetype of reindeer herding Sami on skis.

Sami representatives participate in cultural exchanges in order to further develop knowledge about the Sami outside of the Nordic countries – with for example music performances, crafts shows and theater production. The fear of being turned into a spectacle in traditional clothing is present in the discussion around these initiatives but as one Sami representative put it - the problem for the Sami as an indigenous people is not over-exposure but under-exposure and that the Sami people need to create a greater presence in Swedish daily life.<sup>120</sup>

All these attempts at staking out maneuvering space are the mirroring of legal activities in other spaces. These spaces together create a field of political action in which the idea of human rights, variously interpreted, plays a role in relation to national and international law on the one hand and divergent political aspirations on the other. In this respect, the active role of the Sami in a multitude of international spaces might even work to provide a precedent for how think about indigenous people globally and how we understand processes of international law.

### **Sami and Human Rights – a modern political practice?**

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<sup>119</sup> Labba, Elin-Anna. Hon Berättar Om Hur Samer Lever Idag. <<http://www.samer.se/3843>>, March 5<sup>th</sup>, 2013.

<sup>120</sup> Sjögren, Pia. Samisk Kultur till Europeer. <[http://samer.se/GetDoc?meta\\_id=4025](http://samer.se/GetDoc?meta_id=4025)>, March 5<sup>th</sup>, 2013.

This text has thus far tried to engage with questions pertaining to how a group of people like an indigenous people not yet recognized through national and international law have employed international law and human rights in order to further their hold on the process of recognition. As we have seen, the result in the courtroom has not been unambiguously good (quite the opposite). But, if the legal system appears “bunk”, is the only option to dismiss law and refuse to engage in legal processes? If we think about international law in terms of *one* proper way of achieving a particular legal and political status then this has to be our conclusion. If this is what we believe then by extension of the same logic, international law can only be imperial, the Sami can only be subjugated and the Sami will always *only* be victims of structural injustices.

There is undoubtedly evidence in the case of the Sami for this conclusion. Historically colonized the Sami have fought both legal and political marginalization with limited success. To some extent they have achieved internal self-determination, but only within a logic determined by the Scandinavian states. When the Sami have tried to challenge the limits of their self-determination and fought for full recognition as a transnationally nomadic people through venues and processes determined by international law, they have seen little actual success. The court cases in front of the ECHR not only referred the issues pertaining to indigeneity as falling under national jurisdiction but they also underscored that human rights as such belong to each individual as a claim of being a part of a greater humanity – to use human rights to claim cultural particularity is tricky to say the least. As was gestured to in the introduction, minority groups or alternative ways of living, whether voluntary or involuntary,

are constantly framed as either falling outside of international law or alternatively as victims of international law since they seem difficult to accommodate within a modern state or a system of modern states.

As such the experience of the Sami become a paradigmatic example of the how the state is considered to the primary modern political space and how that automatically creates a tension between national and international law. This tension is directly addressed in the cases involving the Sami since they all negotiate the differing rights of the citizen and the individual as bearer of human rights. Furthermore, this idea that there is one proper way to do politics (played out in international law) also gives rise to a number of legal and political abstract categories that operate to frame active agency.

The Sami undoubtedly struggle to make the concept of a transnationally nomadic indigenous people gain traction within existing structures of international law. Their attempts to re-define themselves as group of people exercising their individual human rights communally have also created problems since Non-Governmental Organizations are not recognized under the European Charter. Only as an individual citizen of Sweden does a Sami seem to gain any legal standing but that is a claim that automatically sheds all links to rights pertaining to being a member of an indigenous people. Wherever someone decides to draw the line to legal and political belonging, the Sami end up in the middle of a very complex dynamic.

If we understand this we might be able to reach greater clarity of what is at stake by listening to those who tell us that the Sami and people and peoples like them, at best, will always only be marginal in processes of international law. If we try to work outside these idealized categories that frame active agency and see that signs of that agency in a multitude of actions carried out by the Sami then we open up for understanding how international law still be considered a useful tool for the Sami in their work for recognition as indigenous people.

Not only are abstract categories unhelpful to understand the role and agency of the Sami, they are difficult to identify across the board. In a more recent statement from the Sami Parliament the parliament levied a scathing critique of the Swedish State's work that supposedly will lead to further legal recognition of the Sami. Signed by Sarah Larsson (current Head of the Sami Parliament) and Katri Linna (the national Equality Ombudsman), the text goes through point by point the preparatory work covered in previous section and repeatedly makes the point that the Swedish state agencies continuously violate the human rights of the Sami. The two writers suggest, in conclusion, that the only way to work around the Swedish State's unwillingness to answer critique is to continue working for the further strengthening of Sami rights by cooperating with other Nordic Equality Ombudspersons.<sup>121</sup> This is only one of several examples where state agents, in this case the Nordic Equality Ombudsmen, have started cooperating across state boundaries, following the self-identification of the Sami as a Nordic people. The

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<sup>121</sup> Larsson, Sara and Katri Linna. Regeringen Kränker Samers Mänskliga Rättigheter. <<http://www.sametinget.se/11877>>, June 5<sup>th</sup>, 2011.

modern state as the primary political space has started to come apart and its boundaries are blurred.

Within this context, claims for recognition of social, political or ethnic particularity are almost always articulated and rearticulated in legal language. However, is it possible that the focus on structures in general, and the focus on what constitutes “proper” law has the effect of neglecting the dynamic relation between the different forces at play? Maybe we should be asking questions about how law and politics interact and sustain each other and how this interaction necessarily brings into play a multitude of relations between different systems of norms and different ways of social organization. A focus on the moment of recognition is vital inasmuch as it necessitates a move beyond the analytically comfortable boundaries of the modern nation state, since instances of recognition (as we have seen in the case of the Sami) derive their legal and political rationale not only from the realm of the national but also from the realm of the “international”.

I thus see the case of the Sami as bringing to the fore a number of concerns about international law that are often obfuscated by given notions of where and when international law takes place. We have seen how the modern nation state is taken for granted as the proper place of doing politics whilst at the same time the Sami and Sweden have tried to negotiate how that space relates to international law and the Sami’s transnational ambitions. In this process abstracted categories of actors have turned out to be difficult to identify - several state agencies have argued at cross purposes, different segments of Sami society have been trying to negotiate

different forms of political active agency and the European Court of Human Rights putting an emphasis on the single, free human being. Tying all of these tension together are a number of historical and structural conditions that tell us who we are and what we can be.

As we have seen in this case, the modern state and the concept of citizenship are perhaps the most powerful of these conditions. What is further illustrated by the moment of recognition is that what gives structures life is a notion of process, of historical agency – the process of recognition is a process *towards* the realization of man's enlightened freedom. The moment of recognition becomes the moment when status is affirmed, freedoms achieved and active agency defined.

Our understanding of history thus become central in the context of international law in as much as it is a progressivist reading of history as an agent of freedom that underpins our understanding of international law and our understanding of what international law can achieve. We see this clearly in the preparatory work on the Nordic Sami Convention where the Sami are considered to be too 'modern' and not modern enough at the same time (as was the case of not being democratically apt enough to gain greater political influence). Thus, operating through the questions of the location of politics, the boundaries of nation state, the state as a site for freedom is a very particular but often repeated account of modernity.

International law and politics therefore constantly reaffirm an understanding of the historical development of world politics as one in which Europe, and more

generally now, the Western world, takes the lead and the rest of the world follows as it reaches the same level of political maturity. But since we do not live in a perfect world and international law is not fully implemented globally, even Europe is getting still working on their record this approach to world politics cement a hierarchy of development and progress in as much as the that the rest of the world will always be behind the Western world trying to but never capable to catch up.<sup>122</sup> Both normative development and implementation still underwrites this version of development.

This is the frame within which we have to understand the situation of the Sami as an example of what and where we take international law to be. The Sami, as most people and peoples, continuously negotiate and re-negotiate their political identity since everyone's identity in the modern world is dependent on the constant negotiation and re-negotiation of our positions within fluid cultural, legal and political structures and processes. Political identities evolve as situations evolve and that is why we would gain greatly from thinking about recognition in particular but international law in general as a heterogeneous field of political interaction. Recognition is not a status to achieve once all at once, nor is freedom national or international. Both involves a continuous process of negotiation; a process that changes when the world around us changes.

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<sup>122</sup> Gearty, Conor. (2010) Terms of Art. *London Review of Books* 32(5): 27-29.

### 3. Sami, Human Rights and The Limits Of The Discipline Of International Law

In the previous chapter we saw how the Sami, the transnationally nomadic indigenous people of Fennoscandia, have pursued their claim for recognition for a long time with the help of both national and international law. According to the joint Nordic political program, the Sami are asking for internal self-determination and recognition as a Nordic people, and are demanding that the governments of the Nordic states work together to make this possible. The Sami demand for transnational recognition is indeed viewed as highly problematic by the Scandinavian states. In the case of Sweden, the major obstacles are the economic effects of Sami land claims to the use and passage of over 40% of Swedish territory, as well as the historic marginalization of Sami.

The problem for the Sami is that until there is some political will on the side of the Swedish state to settle the Sami claim little will be achieved. The Sami are caught in a paradoxical situation; on the one hand their claim for recognition questions Swedish sovereignty in the name of self-determination and on the other hand their rights can be granted only by the Swedish state. The experience of indigenous people around the world tells us that very few states are willing or able to grant such recognition. Thus, indigenous people with alternative ways of living, whether voluntary or involuntary, are constantly framed as either falling outside of international law or as victims of international law. It seems they are difficult to accommodate to within a modern state or a system of modern states. The transnational nomadic lifestyle of the Sami questions the standard notion that the modern state is the only proper location for doing politics - a challenge articulated

by the Sami through their claiming of an alternative political space, Sapmi. It is obvious however that also Sapmi, as a political space, is dependent on the concept of the modern state, in as much as it is the Nordic states that have to sign it into being.

In the processes of recognition, problematic foundations and hidden assumptions regarding the ways we often think about international law come to the fore. The often-repeated standard story is that the relation between national law and international law is hierarchical with international law overarching different national legal systems. In the case of the Sami however, we see a constant balancing of the tension between the several spaces for politics. The Sami are both Swedes and members of a global community, and the Swedish state is both the violator and the granter of rights. Thus national and international law appears co-constitutive. Many academics who comment on international law find these themes difficult to engage. This difficulty is made even more troublesome due to the fact that underneath the surface of arguments about active agency, human freedom and its global spread, lurks an unengaged account of modern man and the modern world that sets the limits of the discussion and imagination.

In interpretations and analysis of global politics, international law is seen as operating by constantly underwriting a division between the national and the international. The ultimate question – constantly replayed in terms of the conflict between realism and idealism - is a choice as to where man's moral obligation lies. Do we relate as moral beings to a global humanity, or to the much more limited idea of the modern state? To push for a simple answer to that question is

to force us to produce over-simplified answers to questions of political active agency and the potential power of international law.

However, we can resist this temptation by looking at how the Sami continue to frame their claims in terms of human rights, despite the fact that most people, and especially academic interpreters, understand their attempts as rather unsuccessful. This is not a question of idealism of a global political space inhabited by a universal humanity, nor is it a question of the narrowly defined idea of national power politics. It is rather a question of understanding that international law is a dynamic process taking place in a multitude of different spaces.

For example, in a venue like the European Court of Human Rights, human rights seemed to work counter to Sami interest. On the national level, human rights provided the basis for criticizing the treatment by the Swedish state of the Sami, and within the context of the United Nations, the Sami have been a driving force in developing norms of international law. More importantly, we saw how the framing of their claims in terms of international law could be politically beneficial even if the claims themselves were not legally successful. By also including claims framed in terms of human rights in spaces where we do not normally look for international law – art exhibitions, miners’ meetings and educational material – in the analysis a fuller account of international law as a dynamic modern political practice appears.

The legal framing of the Sami claim to recognition also played a larger role in as much as the discussion on equality is mirrored within the Sami community. The

preparatory work on the Sami Convention raised criticism against traditional social structures and power relations among the Sami themselves, and a concern about how to negotiate the modern world became a topic of conversation. Stefan Mikaelsson, Sami and current President of the Swedish parliament recently came out as queer and has said that it has made him feel very confident as a “modern man”. He talks of his own experience as one that is part of making Sami men feel less afraid of modern society and more comfortable in participating in it.<sup>123</sup> His experience and the internal debate that has run parallel to the Sami claim for recognition is undoubtedly part of the process of Sami as a people making themselves at “home” in the modern world. The criticism that has led to an opening of Sami society is almost always one framed in terms of human rights and the necessity of being a modern people.

In a thought-provoking analysis of the Enlightenment, Dorinda Outram, refers to how “*the*” Enlightenment should not be viewed as a unitary historical reality but rather “a capsule containing sets of debates which appears to be characteristic of the way in which ideas and opinions interacted with society and politics.”<sup>124</sup> The sense here is that this is a helpful way of also engaging our understanding of international law. The subsequent section will try to explain exactly how we can view contemporary academic discourse concerning international law and human rights in the same way - as a capsule containing a set of debates. Often enough the

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<sup>123</sup> Letmark, Peter. För Mig känns det bra att vara Queer. July 26<sup>th</sup>, 2012. Dagens Nyheter.

<sup>124</sup> Dorinda Outram (2005) *The Enlightenment*. Cambridge; New York: Cambridge University Press, p 8.

discipline argues about war and peace, international trade or human rights. As will become evident, these are actually arguments concerning our understanding of modern politics predicated on a particular philosophy of history and a very singular understanding of the human experience of modernity.

In this context, to talk about human rights in relation to recognition is to gesture towards a disjuncture existing within structures and processes of international law. Not only are abstract categories such as “the national”, “the international”, “the state” and “the indigenous peoples” unhelpful in understanding the role and agency of the Sami, they are also difficult to identify across the board in the complex dynamic that is the process of recognition for the Sami. What we will see is that despite what academic interpreters of international law identify as the discipline’s limits in terms of actors, structures and ideology, it is actually an underpinning understanding of modernity and the modern world that really determines the outline of the discipline. It is claims about modernity that need to be addressed if we are to open up to the understanding of international law as the heterogeneous field of modern political interaction that it is.

International lawyers and political scientists commenting on processes of international law seem to prefer to leave the concept of modernity unengaged. By doing so they constantly replay the same story about how we came to be, where we are today, and where we can be tomorrow. If we do not engage in how to understand the modern world in relation to international law, we run the risk of seeing actors like the Sami being stuck in the same perpetual logic according to which they can only be victims lagging behind a more modern world elsewhere.

The focus of this chapter will thus be on how standard stories about international law rests on claims to modernity, claims that often receive little attention but claims that in the end makes in impossible to produce anything but simplistic answers to questions concerning international law.

### **International Law as a Discipline**

When it comes to questions of law and politics we are often presented with an idea of an idealized division between theory and practice. The idea runs deep and is reflected also within the field of international law, where there are ample titles such as “Human Rights in Practice”, “The Theory of International Law” and so on. It is also a divide replayed in terms of the link between actual events and research carried out in academia. These kinds of concerns can be rephrased quite crudely in relation to the Sami. For instance, what is the relevance of academic discourses on international law to the concerns raised by the experience of the Sami?

International law is an old tradition, but one that has rather recently been re-framed within academia.<sup>125</sup> It is also a field that has passed through what would surmount to a disciplinary revolution in recent years due to changing global politics, and what to many looks like the resurgence of importance afforded to

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<sup>125</sup> See Ed. Falk, Richard et. al (1999) Symposium: Re-Framing International Law for the 21<sup>st</sup> Century. *Transnational Law & Contemporary Problems*. 9:422-733 for a clearly stated call for re-framing. See Berman, P. S. (2005). From international law to law and globalization. *Bepress Legal Series*, 6 for a example of more recent attempts to answer the challenge posed by the authors above.

international norms.<sup>126</sup> Besides being a generally multidisciplinary topic today, many of the most prominent contemporary scholars have either worked within the field before turning to academia or they are holding important non-academic positions in the field due to their academic work. People like Professor James Anaya (UN Special Rapporteur on the Rights of Indigenous Peoples and at the University of Arizona) already quoted in the previous chapter and David Kennedy who is the focus of part of this chapter, matter because they have framed, and are framing the field both practically and theoretically.

Thus, the point here is that the Sami case exemplifies a challenge to the conventions of international law because it challenges the idea of the modern state as the primary political space. It also challenges the abstracted categories that we employ in order to explain modern international law. This chapter will begin by looking at how the modern state and the tension between national and international law is reflected in contemporary debates on international law. By looking at how a particular understanding of modernity is defining the discipline of international law we will see how the discipline expresses and reproduces a view of the workings of international law that makes it difficult for most people within the discipline to understand what is at stake in the Sami case.

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<sup>126</sup> You can chart a development that begin with people like for example Risse-Kappen, Thomas, Stephen C. Ropp, and Kathryn Sikkink, (Eds.). (1999). *The power of human rights: International norms and domestic change*. Cambridge: Cambridge University Press and is still reflected in more contemporary literature like Armstrong, David, Theo Farrell, and Hélène Lambert. (2012) *International law and international relations*. Cambridge: Cambridge University Press.

## ***International Law – the capsule***

Gerry Simpson, Professor at the London School of Economics and an academic who has worked extensively within the field of human rights and international law claims that there are “three myths of international law” that determine how we understand the relation between international law and politics. Either “international law is viewed as essentially peripheral and metaphysical”, or “international law is articulated as two fields masquerading as one. There is real international law (concrete, functional, determinate) on one hand, and the projections and aspirations of optimistic scholars or hubristic international organizations on the other”. Finally, international law is considered “as a one-off mechanism for constraining reluctant sovereigns.”

In response to the insistent interlocutor’s question concerning “what international law *really* was” he responds

My response was fairly standard, too: international law ought to be judged by its successes as well as its failures; it was more than simply enforcement; the system remained inchoate and, in some ways, primitive; municipal law, the gold standard, turned out not to glisten as brightly as we might hope; and, finally, weren’t there powerful new international legal norms in existence now that would have been regarded as impossible whimsy in the time of Morgenthau? I used the international economic order as an example of the latter. My interlocutor replied that indeed there were international norms (as with some IR scholars he could not quite bring himself to use

the word 'law') in some areas such as economics or civil aviation but that in spheres such as the use of force or human rights what we had were unenforceable aspirations.<sup>127</sup>

The exchange concerning the marginal role of modern international "norms" outlined above is something that any academic who deals with international law has partaken in. The importance of "norms" in relation to international power politics is something that is still a contested subject.

Gerry Simpson's answer is that the idea of embracing a less naïve ideal, more nuanced, picture of the operations of global law represents the most fruitful possibility for intellectual exchange between the two disciplines. The following part follows very much in his footsteps since it claims that if we pay less attention to idealized categories linked to an idea of progress, we can appreciate the heterogeneous ways of doing international law - an insight that would allow for us to better appreciate what is at stake in the case of the Sami and to learn from it.

Before turning to specific academic commentators on international law, I would like to make one more point in order to explain my focus on claims about human rights. Within the field of international law, human rights have a tendency to be viewed either as the pinnacle of success or as a sub-field not law proper.<sup>128</sup>

Contrary to this view, I would like to argue that human rights present an

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<sup>127</sup> Gerry Simpson, "Duelling Agendas" *International Law and International Relations (Again) Journal of International Law and International Relations*, p. 66.

<sup>128</sup> See the edited collection *Hierarchy and International Law* edited by Erika De Wet and Jure Vidmar which devotes 368 pages to a positivist analysis of whether human rights are overriding norms or merely a sub-category of public international law.

immanent critique of the system of international law. Whilst conventional understanding of international law tells us that international law concerns relations between states, *or* the relation between states and certain actors, *or* some other type of supranational concern claims framed in terms of human rights, claims framed in terms of human rights force us to consider *all* types of claims by *numerous* bodies and in *numerous* places at the same time. As such, human rights reflect the heterogeneity of modern politics as enacted and articulated through international law.

As we saw in the case of the Sami, their claim to recognition cut across schematic levels of political representation (local/national/regional/transnational/supranational/universal) and they articulated their claims in a multitude of venues at numerous occasions. As such, claims involving human rights forces us *automatically* to deal with the tension between different levels of politics and analysis because it is already embedded in the claim as such. Therefore, even though this is a text about international law, the subsequent chapter will focus on commentaries about the form and function of human rights, in particular because the contention is that by doing so we can learn more about international law than if we would focus on what has traditionally been considered international law proper.

Traditionally, we are told that human rights are universal not only by virtue of their form and content but also by the various structures and avenues open to pursuing them. We have also been told that this is how we should view structures of human rights, that

Supranational, national, and sub-national systems of law create various human rights. The content of these rights and of any corresponding legal obligations and burdens depends on the legislative, judicial, and executive bodies that maintain and interpret the laws in question.<sup>129</sup>

It is undoubtedly true that the globe is covered by a net of human rights articulated and enforced through a number of different structures and processes, but this is not what makes them particularly interesting here. Rather, the greatest indication of the special nature of human rights claims is the last decades of legal development of the idea of extraterritoriality and universal jurisdiction. The notion of extraterritoriality and universal jurisdiction is predicated on the fact that sovereignty is *not* linked to territoriality alone but that there is a notion of legitimacy that transcends national borders both in terms of rights and obligations.<sup>130</sup> Thus, even though the focus here lies on how the Sami as a transnationally indigenous people use human rights to establish a politics that transcends borders, the Sami experience is paradigmatic of challenges articulated and enacted through international law.

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<sup>129</sup> When analyzing claims to universal rights and duties it is especially instructive to look at texts covering specific issues since the logic of universality is played out more clearly than through abstract claims of universality. In this case the text concerns the situation of the severely poor globally and the necessity for institutional reform. Pogge, Thomas. (2005). Recognized and violated by international law: the human rights of the global poor. *Leiden Journal of International Law*, 18(4), p. 17.

<sup>130</sup> Just as mentioned above, these claims are well illustrated by looking how they play out in particular instances. In this case one can look at how arguments about the legal valance of 'soft law' in order to understand challenges to link between statehood, jurisdiction and universality. See Goldmann, Matthias. (2012). We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law. *Leiden Journal of International Law*, 25(02), 335-368.

This is exactly the reason why the Sami should be moved from being of marginal concern, an exceptional case or a peripheral experience, to being a central, indicative case of foundational concern to international law. It is by reference to a human right without a granter or an enforcer that the Sami have been trying to make a case against Sweden. It is with reference to the *naturalness* of movement across borders rather than within borders that they have challenged Swedish sovereignty outside of Sweden, and it is with reference to the heterogeneity of modern experience that they claimed a right to be modern. All of these claims have been articulated in terms of human, universal and inalienable rights.

This might place the experience of the Sami right at the center of the concern of academia, but it does more than that. The Sami are well organized, educated and share a sense of purpose within their group. Their experience also mirrors that of numerous peoples around the world who tend to be viewed *only* as victims. These are all groups that for one reason or another cannot expect, or do not want the protection of a modern state and therefore have to rely on extraterritorial claims framed in terms of human rights. These claims lay bare the logic of modern international law, its focus on the modern state, and its framework as to where and when politics can take place.<sup>131</sup> In order to bring to the fore the underlying logic of

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<sup>131</sup> Global movements of refugees challenge more traditional, and nationally based, notions of human rights by advancing an individual-centered right to protection with specific implications for people who seek to cross international borders. This is often articulated ‘responsibility to protect’ principle. See for an example of this Glanville, Luke. (2012). The Responsibility to Protect Beyond Borders. *Human Rights Law Review*, 12(1), 1-32.

claims concerning international law, the focus of this chapter is on how a foundational logic plays out in academic comments on international law.

***Negotiating the tension between the national and the international– “the Domestic Analogy”***

In fields of studying global politics, the tension between a presumed national level and a presumed international level is almost always the key to understanding how we can make claims in the areas of both national and international politics.<sup>132</sup> In relation to international law, this is a perpetual problem that is commonly understood in terms of idealism versus realism: idealists hoping for a change that would bring national sovereigns under the reign of international law, and realists insisting that no such resolution is conceivable. It is the insight that the ultimate tension between idealism and realism can only be resolved through a political choice that makes the tension itself worth studying in detail.<sup>133</sup>

In this context, the concept of “domestic analogy” refers to the practice of applying an understanding of the interaction between law and politics derived from a national level to issues of world politics. The practice effaces the inherent

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<sup>132</sup> Hedley Bull’s *Anarchical Society* is one of the best illustrations of this point and since its publication in 1977 his main concerns about the conditions of possibility of an international society have shaped the discipline of International Relations. Bull, Hedley. (2002). *The anarchical society: a study of order in world politics*. Columbia University Press.

<sup>133</sup> Chapter 5 is dedicated to this question illustrated by the debate between Hans Kelsen and Carl Schmitt.

tension between the two levels.<sup>134</sup> In order to see what happens when you lift an understanding of how law operates in relation to politics from the national to the international, it is important to turn our attention to the concept of “legal formalism”. Legal formalism is important to the analysis that follows because it is by looking at the interaction between law and politics that we can see how people understand the nature and force of modern international law.

To analyze the dynamic of modern international law one should note that within legal theory, “formalism” is generally taken to stand for an approach to law that views a legal system as complete and consistent in and of itself – a system within which law is exercised by identifying the correct legal norm and applying it to the circumstances of the case. Within the discipline of international law most scholars derive their understanding of what constitutes a legitimate political arrangement from liberal constitutional theory where the formal aspect of legal neutrality is taken to be essential to guarantee the legitimacy of constitutional arrangements.<sup>135</sup>

The degree of legal neutrality is considered extreme in many cases. A more nuanced description suggests that we should consider legal formalism as the

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<sup>134</sup> Friedrich Kratochwil has examined how the domestic analogy, i.e. an understanding of how political institutions, law and order lifted from the national level has limited our understanding of international relations in as much as it has made us incapable of appreciating the difference between the national and international realm. Friedrich V Kratochwil (1991) *Rules, Norms, and Decisions : On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge; New York: Cambridge University Press, esp. 2-3, 256. For a typological analysis with less focus on norm creation see Hidemi Suganami (1989) *The Domestic Analogy and World Order Proposals*. Cambridge ; New York: Cambridge University Press, esp. p. 165-197.

<sup>135</sup> *Ibid.*, p. 129 – 164. (often with a nod to Kant and his search for the ultimate unity of law and politics within the confines of the nation state),

“view that the authoritative interpretation of legal rules can and should be insulated from the normative controversies that contend in the political arena of a liberal pluralist society.”<sup>136</sup> Andrew Altman for example, sees no opposition in claiming that the making or altering of law might be conceived of as a fundamentally political process, but that its application should follow certain, formal rules. In other words, the making of law can be politicized but its application remains “pure”.

This has important effects because it determines what is and what is not the legitimate exercise of sovereign power, and it thus also determines where and when political action can *and should* take place. The effect of such assumptions as to the structure of the system of international law becomes apparent Mark V. Tushnet’s comment concerning legal formalism that “more contemporary definitions of formalism [...] assert that the legal system has an immanent moral rationality.”<sup>137</sup>

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<sup>136</sup> Andrew Altman commenting on Roberto Unger in Andrew Altman, *Critical Legal Studies : A Liberal Critique* (Princeton, N.J.: Princeton University Press, 1993)., p. 79. Aptly enough the heading of the chapter is *Legal Neutrality and the Law-Politics Division*.

<sup>137</sup> Mark Tushnet, in Martin P Golding and William A Edmundson, (2005) *The Blackwell Guide to the Philosophy of Law and Legal Theory*. Malden, MA: Blackwell Publishing, p. 81. It might be because of the rise of Critical Legal Studies within the discipline of law in the 1970s and its assertion that law was much more closely related to politics (“Law is politics”, as David Kairy put it in 1982), than what the discipline formerly acknowledged that international lawyers writing on law have subsequently showed greater sensitivity when discussing the relation between law and politics in the international sphere.

Just as Hart's idea of primary and secondary rules<sup>138</sup> solves the problem of the necessity of legal neutrality in the light of political developments on the national level, there are similar distinctions at play in relation to international law. That which is at stake in the issue of formalism is not only elementary comments concerning hierarchy of legal systems etc. but even more importantly, the possibility of critiquing international law. Inherent in any definition of international law is an implicit statement about what it is *not*.<sup>139</sup> Thus, the focus that the majority of analysts of international law put on treaties, conventions and mechanism for enforcement, is an effect of a positivist bias based on a formalist understanding of international law.

For example, references to principles of *ius cogens* and human rights within structural descriptions of international law suggests that most international law scholars hold the view that a similar distinction between primary and secondary rules solves the problem also on an international level.<sup>140</sup> Anne Peters, Professor in Public International Law at University of Basel and a scholar focusing on constitutional theories of international law, ascribes to international law the

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<sup>138</sup> Rules of obligation that specify perfect social duties and additional rules that apply when, for example, a society grows too complex to be ruled by primary rules alone allow for a procedure to identify primary rule. See H L A Hart, *The Concept of Law* (New York: Clarendon Press, 1961), 84-96.

<sup>139</sup> Kammerhofer, Jörg. (2011) *Uncertainty in International Law. A Kelsenian Perspective*. Oxon & New York: Routledge. In a recent review piece on legal formalism in the *European Journal of International Law* Monica Garcia-Salmones points out that what is at stake in the issue of formalism is not just an "elementary respect for the rule of law", but also "the possibility of critique of international legal rules". Garcia-Salmones, Monica. (2012) Briefly Noted. *European Journal of International Law*, 23:906.

<sup>140</sup> For two different versions of the same logic see Hafner, Gerhard. (2003). Pros and cons ensuing from fragmentation of international law. *Michigan's Journal of International Law*, 25:849 and Riphagen, Willem. (1987). From Soft Law to Ius Cogens and Back. *Victoria University Wellington Law Review* 17:81-98.

necessity to neatly draw its boundaries when she concludes one of her papers by saying

although no international constitution in a formal sense exists, fundamental norms in the international legal order do fulfill constitutional functions. Because those norms can reasonably be qualified as having a constitutional quality, they may not be summarily discarded in the event of a conflict with domestic constitutional law.<sup>141</sup>

Thus, for the majority of scholars within the field, and despite evidence of the dynamic nature of modern international law, a certain degree of formalism guarantees not only law's neutrality on the international level, but also the higher grounding of international law.

Academic commentators on international law make similar distinctions between hard law and soft law and between soft law and non-legal instruments linked to legal processes (like information about rights etc).<sup>142</sup> This suggests that in order to be able to continue to articulate, enforce and follow international law it is necessary to keep international law formally independent from international politics. However, to give privilege to, and isolate international law from

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<sup>141</sup> Peters, Anne. (2006). Compensatory constitutionalism: the function and potential of fundamental international norms and structures. *Leiden Journal of International Law*, 19(3):579.

<sup>142</sup> See for example Matthias Goldmann's piece on international soft law, op. cit.

international politics, creates a tension between its perceived, idealized function, and an actual practice of international law.<sup>143</sup>

The conceptual differentiation between processes of law and politics thus produces both *legitimate* law and *legitimate* politics in relation to international law.<sup>144</sup> Scholars seem to sense a necessity of effacing the inherent paradox presented by the co-constitution of law and politics in order to preserve a certain degree of legal neutrality for the sake of also preserving the possibility of legitimate political power on a global level. However, as we have seen with the Sami, reproducing claims that legitimize both law and politics on an international level comes at the cost of reaffirming the limits of international law, limits that then declare that some peoples and some actors cannot or are not allowed to partake in processes of international law. Indigenous peoples are one example, but the limit also applies to refugees, internally displaced peoples, externally displaced peoples (like the Roma) and so on.

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<sup>143</sup> Plenty has been written on the tension between the theory and practice of international law (and often enough the idealized separation between the two is not questioned. See for example Oscar Schachter, (1991) *International Law in Theory and Practice*. Dordrecht, The Netherlands ; Boston: Martinus Nijhoff Publishers; Leila Nadya Sadat and Michael P Scharf (2008) *The Theory and Practice of International Criminal Law : Essays in Honor of M. Cherif Bassiouni*. Leiden: BRILL. and Thomas J Biersteker. (2007) *International Law and International Relations : Bridging Theory and Practice* (illustrated ed.). London: Taylor & Francis.

<sup>144</sup> In their popular textbook on human rights Henry Steiner and Philip Alston reflects this position very well when they in the end discuss “contemporary topics” ranging from self-determination to globalization. Henry J Steiner and Philip Alston, (2000) *International Human Rights in Context: Law, Politics, Morals - Text and Materials*. Oxford ; New York: Oxford University Press, esp. p. 1248 – 1314.

By bridging, or bringing together *whilst at the same time separating* national and international law the domestic analogy guarantees that the tension between national and international law does not become a major concern. The tension however becomes obvious in the case of claims framed in terms of human because human rights linked to the individual constantly balance different realms of rights, different legal spaces and different sources of authority and legitimacy. In the case of the Sami their claim for recognition remained similar but was articulated differently in different venues and thus also received different responses.

The claims pursued through the ECHR had to be rephrased in the form of individual rights, even though the questions raised concerned the legal limits of Sami rights. It is difficult to negotiate this tension because the structures of international law and politics and the way that we understand them, leave very little space for the Sami to operate simultaneously as a an individual, a Sami, a Swede and a human being. Everyone is constantly told that we must choose between our different legal personalities. The reason for this is that all international law is understood and realized through the modern state, despite its universal pretensions. What we saw in the first chapter was how the Sami struggled to live with this tension within the structures of the modern state.

***Negotiate the tension between national and international law – human rights***

The preliminary analysis offered is that the conflation of state and system (the domestic analogy) works to efface the contradiction between state and system, national law and international law. Similarly, as I will argue in chapter 4, so do

also Carl Schmitt and Hans Kelsen. To efface the contradiction between state and state system is to deny inherent dynamics of modern politics and to deny the politics inherent in international law, since politics can only take place within a modern state or between modern states. The use of the domestic analogy when analyzing international law thus operates to curtail attempts to 'do' international law 'otherwise'. As we saw in the previous chapter, the Sami have used various forums to pursue their claims to recognition, including the legal processes. By doing so, they appeal to law and to rights as seems necessary to their purposes. However, they seem to move freely over across the distinction between national and international law and thus suggest that such delineation is fluid and always contested. By focusing on claims framed in terms of human rights, it is much easier to appreciate how ideas regarding the fluidity of process and structures of international law work and how they can enrich our understanding of international law.

Through the use of the domestic analogy, commentators on international law suggest that legal processes *within* the modern state becomes the measure as to what the *proper* processes of law are outside of the state and by extension also the measure by which we determine the "failure" and "success" of international law. Human rights, by the fact that any claim framed in terms of human rights include all levels of political power forces us to question this transposition from of an idea of legitimate law from the national level. Furthermore, putting an emphasis on human rights allows for us to further engage what is at stake in this approach to international law since the view of human rights as the frontier of legal and moral

development frames standard narratives about international law as primarily “modern” narratives.<sup>145</sup>

Since human rights are considered to be international law’s greatest success, its development suggests a *history* of international law and a history of the unfolding of the inherent purpose of international law. The standard version of where this development has brought us, often articulated in introductory classes to international law, is that through globalization, the absolute sovereignty of the individual state has had to retreat in face of growing international, supranational and global cooperation.<sup>146</sup> Thus some writers will suggest that primary moral allegiance previously sworn to a particular state has now been replaced by a higher moral and ethical duty to humanity. Human rights, understood as the pinnacle of this development, must then also be the example of the greatest achievement of international law. Human rights have also replaced national sovereignty as the origin of legitimate power.

As an example of this Antonio Cassese writes:

Essentially [the human rights regime] is meant to tear aside the veil that in the past protected sovereignty and gave each State the appearance of a fully armored titanic structure, perceived by other States only ‘as a whole’, the inner mechanisms of which

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<sup>145</sup> The quotation marks here only illustrate an unease regarding how modernity is conceived of here, not an unease with the concept of modernity as such.

<sup>146</sup> Susan Rice’s recent foreword to the Centre for a New American Security report *Strategic leadership: framework for a 21st century national security strategy* is a great indication of this type of analysis. See Slaughter, Anne-Marie. (2008). *Strategic leadership: framework for a 21st century national security strategy*. Center for a New American Security.

could not be tampered with. Today the human rights doctrine forces States to give account of how they treat their nationals, administrate justice, run prisons, and so on. Potentially, therefore, it can subvert their domestic order and, consequently, the traditional configuration of the international community as well.<sup>147</sup>

Human rights have externalized what was previously considered the hidden inner (sovereign) workings of the modern state. Now external forces, other states and the international community can use the standards of human rights to question, criticize and also revoke privileges related to the principle of national sovereignty as held and exercised by the modern state. Universal human rights and the individual that holds them have thus gone from being inconsequential subjects of the modern state to becoming the underwriters of the legitimacy of national sovereignty all together.

To disregard legal and political developments such as these, and to continuously reify modern political practices on national, international and universal levels, as most commentators on international law have a tendency of doing, is thus to divide up the modern world in idealistic categories where the primary function is to tell us when and where politics can take place in the first place. In order to fit in this schema, the Sami would either have to be individuals, citizens, a member of an indigenous people, Europeans, or members of a global humanity.

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<sup>147</sup> Antonio Cassese, (2001) *International Law* (reprint ed.). Oxford: Oxford University Press, p.375.

It is an understanding of international law that denies the Sami the possibility of moving from being a marginal actor at best, to becoming an actor operating independently of an already dogmatic notion of where and when international law can take place. It is also an approach that would shut down the possibility for the Sami (and others)<sup>148</sup> to use the discourse of human rights to advance their claims politically, a use that does not necessarily mean the Sami believe that their rights derive from national or international law but rather indicates that they think that human rights are *sui generis*. The way that the Sami always refer to immemorial human rights that are independent of any of the Scandinavian states would be an indication of this view. Despite the openings gestured to by recourse to framing claims in terms of human rights, there are inherent dangers in so doing.

Thinking about human rights as the ultimate achievement of international law introduces particular historicist assumptions into the logic of international law since the history of international law becomes the history of the realization of its inherent *telos*.<sup>149</sup> This perceived *telos* of human rights establishes a direct link between human rights and particular views on what modernity is and what the modern world entails. In other words, *what* the modern world *entails* is already

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<sup>148</sup> I would, for example, argue that internally displaced people constitute a mirror site being caught in a situation displaying a similar situation to that that the Sami find themselves in. Most scholars have a tremendous problem resolving its inherent aporetics, especially the tension between national and international law. For a legal framework see Kalin, Walter (2008). Guiding principles on internal displacement. *Stud. Transnational Legal Polity* 38:1 or, dealing with the inherent tension between national and international law in particular Francis. M. Deng (1995). Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced. *Leiden Journal of International Law*, 8:249-286.

<sup>149</sup> Which in this case, following Immanuel Kant, is the global enlightened freedom of man.

inscribed in international law itself. However, there is nothing new in drawing attention to the limits of teleological assumptions. We are used to criticizing it in relation to other concepts, like *economic development* or just even *development*, due to its inherent historicist assumptions and the categories that they produce. Sundhya Pahuja, Professor at Melbourne Law School, has made similar points in relation to how a “rhetoric” of development operates underwrite an international law that interjects in processes of national law and underwrites unequal power. The end result of this process is according to Pahuja, the “juridification” of produced and technical universals.<sup>150</sup>

Europe, being at the forefront of this development finds itself at an unsatisfactory end where practice does not necessarily fit what theory prescribes. It is a moment where the road to the realization of a thoroughly legalized global space has already been mapped out. As Anne-Charlotte Martineau put it in a recent piece on the ‘fragmentation of international law’

International lawyers – especially in Europe – have sought to combat the fragmentation of international law through the vocabulary of constitutionalism. They interpret the world as already constituted, so that unity and diversity are held together in constitutional terms.<sup>151</sup>

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<sup>150</sup> See especially Pahuja, Sundhya. (2005). The Postcoloniality of International Law. *Harvard International Law Journal*, 46:459-473 and Buchanan, Ruth and Pahuja, Sundhya. (2004). *Legal imperialism: empire’s invisible hand?*. *Empire’s new clothes*, New York: Routledge, pp. 73-95.

<sup>151</sup> Martineau, Anne-Charlotte. (2009). The Rhetoric of Fragmentation: Fear and Faith in International Law. *Leiden Journal of International Law*, 22(01):25. The piece is a response to the “fragmentation debate” and mirrors some of the concerns raised here.

Dr. Martineau continues

To no one's surprise, the pretension that the 'eternal laws of power' can explain two millennia of world history has been identified as hidden idealism in orthodox realist theory. This is the criticism the cosmopolitan narrative lodges against the counter-narrative: it aims to reconcile unity and diversity by privileging diversity, but diversity makes sense only under some unifying principle.<sup>152</sup>

International law becomes a highly modern project, based on a particular idea of what constitutes modernity and the dynamics inherent in it. David Kennedy describes the logic as:

For today's international lawyer, the twentieth century is truly an exceptional one, a time of new ideas, new institutions, new scholarly methods, and new roles for international lawyers and scholars. More than a gap in memory, the nineteenth century offers an image of the pre-modern, a baseline against which to measure the discipline's progress and this century's exceptionalism.<sup>153</sup>

This particular idea of modernity also underwrites all sets of critique, since if you subscribe to developmental logic of international law most possibilities to account for the inherent heterogeneity of modern politics are effaced and dismissed. If we are to engage the foundational logic of international law and if we are to try to

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<sup>152</sup> Ibid., 26 – 27.

<sup>153</sup> Kennedy, David. (1997). *International Law and the Nineteenth Century: History of an Illusion*. *QLR*, 17:96.

understand the possibilities in its heterogeneity then we need to begin by exploring what is at stake in understanding and envisaging modernity itself.

***Negotiating the national and international – “modernity”***

A particular narrative positing what living in the modern world entails and what doing modern politics means frames the experience of the Sami in Chapter 1. Often enough the Sami do not fight only for immemorial rights, but for their rights to exercise those rights in relation to the world in which they live today. An example brought up in conjunction with the work of the Nordic Sami Convention was how the fact that the Sami used “modern” equipment such as snow-mobiles, was a sign that they had stop living in their authentic, indigenous ways and therefore could not claim rights linked to that “pre-modern” culture. Sami culture had become modern, and therefore the only rights available to them were modern, individual rights (as articulated under national and/or international law).

As much as teleological understanding of international law has to do with outward emanations, it has as much to do with an inward, moral development. Clark Butler uses references to Hegel in order to build an argument for an essentialist, and a universal – and thus teleological —notion of dignity and right:

Yet, if I am right that some ethics as such as the human rights ethics presented here holds the promise of bringing the history of normative ethics to an end, a universal

consensus with possible sources in Karl Popper, Jürgen Habermas and Georg Wilhelm Friedrich Hegel is conceivable in the theory of human rights law.<sup>154</sup>

Thus, subscribing to an idea that human rights is the ultimate achievement of international law, automatically also suggests that international law operates with man's enlightened freedom as its teleological goal. In this regard, the reliance on Hegel and his insistence on a relation between legal, political and moral development results in an assumption that the unfolding of enlightenment ideas are teleologically given and directly linked to the moral quality inherent in a system of right.

We see this teleology most clearly in the historicist assumptions that underpin the discipline of international law, namely, that the ideals underpinning man's modern condition originated in Europe, spread throughout the world . Questions concerning human rights then become a question of the maturity of modern man, underwriting narratives of a morally more mature Europe (at the forefront of human rights development) and a morally lagging "rest-of-the-world".

With Forsythe, it becomes clear how this view of international law allows for the discipline to brush aside criticism raised against any intimations of Euro-centrism:

It cannot be stressed too much that whereas certainly the practice of politics on the basis of respect for the notion of human rights was extensively developed in certain western

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<sup>154</sup> Clark Butler, (2008) *Human Rights Ethics: A Rational Approach*. West Lafayette, Ind.: Purdue University Press, p. 248.

states, the idea of human rights is a defense against the abuse of power everywhere. Wherever the bicycle was invented, its utility is not limited to that historical and geographical situation. So it is also with the idea and practice of human rights.<sup>155</sup>

Here, human rights are “tools”,<sup>156</sup> applicable to all situations in the same manner and providing a defense against illegitimate political practices.<sup>157</sup> The realization of human rights all around the world also seems to presuppose that human rights will be realized in the same way, everywhere and by all people. Thus not only is modernity teleological but it is also homogeneous.

However, is it correct to assume that bikes can only be used in one way? For example on bike lanes prepared to give you a smooth ride in Victoria, BC? Anyone who has braved the Italian traffic or joined the thousands and thousands of cyclists in Beijing would probably attest to a different experience. Forsythe seems to suggest that there is uniformity to human experience, and that universal human rights will therefore be exercised in the same way. In the example of the Sami it is obvious that Swedish state agencies and the different Sami groupings have different opinions of what human rights are and how they should be used.

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<sup>155</sup> David P Forsythe, (2000) *Human Rights and Comparative Foreign Policy*. Tokyo ; New York: United Nations University Press, p. 219.

<sup>156</sup> Michael Ignatieff relies heavily on the metaphor of the tool box when he talks about international human rights. See Michael Ignatieff and Amy Gutmann (2001) *Human Rights As Politics and Idolatry*. University Center for Human Values series. Princeton, N.J.: Princeton University Press.

<sup>157</sup> A well argued example of how international law in general, and human rights in particular have been used against the people that it is suppose to protect is presented by Eyal Weizman and his work on “lawfare”; the use of law as a weapon of war. For an introduction see Weizman, Eyal. (2009). *Lawfare in Gaza: legislative attack*. <<http://www.opendemocracy.net/article/legislative-attack>>, April 16, 2013.

The Sami continuously claim, just as did Helena Omma at the beginning of the previous chapter, that they must possess the right to use human rights in their way, to create their own modernity. In direct opposition to this, many of the other interlocutors in the process of recognizing the Sami continuously suggest that there is one ultimate choice to make for the Sami; either to continue to live in an “authentically” indigenous way, or to fully embrace one particular notion of what it means to be modern.

There is an even graver effect to the historicist assumptions concerning the progress of time – that it is subsequently equated with a spatial move from here (the western or liberal world) to there (the developing or non-liberal world). A particular philosophy of history legitimizes the way that the world is divided today and, furthermore, also underwrites our future, since by logical necessity the only way of development is a linear progression from pre-modern to modern. Challenging a western-biased epistemology has fueled ample amounts of scholarship across disciplines for decades and has also been reflected in the field of international law.<sup>158</sup> However, what becomes evident when you look at commentators on human rights is that subscribing to a teleological understanding of modernity makes it impossible to overcome this limit.

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<sup>158</sup> See for example Kapur, Rana. (2002). The Tragedy of Victimization Rhetoric: Ressurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics. *Harvard Human Rights Journal* 15:1-21; Rajagopal, B. *International Law From Below: Development, Social Movements, and Third World Resistance*. Cambridge Univ Pr, 2003. Anghie, Anthony. (2005) *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, Cambridge. Orford, Anne. (2006) *International Law and Its Others*. Cambridge University Press.

In the subsequent chapter, Koskenniemi in *The Gentle Civilizers of Nations*, provides an attempt to trace the development of a liberal sensibility identified as the core process driving the development of international law, starting with “the men who set up the *institute de Droit international* in 1873”. Other similar accounts tell the same story with references to Hugo Grotius, Samuel Pufendorf or Kant. The point is that very rarely do we see references to Bartholome de las Casas or any writers with a different origin, background, sex and/or experience.<sup>159</sup> It is not that people other than white, male international lawyers have influenced the development of international law, it is quite simply that we forget to both look for other actors and to write about them. Thus the discipline of international law and its scholars become a conceptual machine that underwrites the idea that there is only one way of doing international law and one place to it, which more or less excludes people like people like the Sami.

### **In the Details – Jack Donnelly and David Kennedy**

When Jack Donnelly published his book *Universal Human Rights in Theory and Practice* it was lauded as a challenge that instantaneously became “central” to understanding human rights.<sup>160</sup> The *European Journal of International Law* in their review of David Kennedy’s book *The Dark Sides of Virtue* called him one of

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<sup>159</sup> Feminist critique against the theory and practice of human rights illustrates the effects of the lack of disciplinary multiplicity on both theory and practice. Hilary Charlesworth and Christine M. Chinkin in their (2000) *The Boundaries of International Law: A Feminist Analysis*. Manchester: Juris Publishing provided the starting point, many have taken up their challenge.

<sup>160</sup> American Political Science Review as quoted by Donnelly himself on the back of the book. The quote is from a review of the first edition.

the “founding fathers of New Approaches to International Law”.<sup>161</sup> Both authors set out to criticize what they conceive of as a dominant liberal theory of politics and law, and they share some of the concerns brought up in the previous part of this chapter. However, as we will see, the limit of our understanding of modern international law is difficult to transcend.

I suggest that both Donnelly and Kennedy are representative of critical scholarship on international law that the discipline has internalized, and that Donnelly and Kennedy represent what is now conventional approaches to international law. The overarching point is to draw attention to both thinkers’ hidden account of modernity in order to illustrate how the limits confronted in their work is paradigmatic for the entire discipline. Their approaches are diametrically opposed – Donnelly relies on abstract theorizing to establish a legitimate foundation for truly universal human rights and Kennedy dismisses abstractions by grounding the legitimacy of human rights in what he calls ‘humanitarian pragmatism’. Together they constitute a double move and reveal the general span of the discipline and its critical limit.

### ***Jack Donnelly***

Jack Donnelly is often referred to as one of the more engaged and critical scholars commenting on human rights. His book *Universal Human Right in Theory and Practice* is one of the most recurrent books on reading lists of human rights

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<sup>161</sup> de la Rasilla del Moral, Ignacio. (2006) Book Review. *European Journal of International Law*, 17:866.

courses both within Political Science and Law departments. The focus of this section will be on how Donnelly provides a telling illustration of the theoretical limits of the discipline because of his reliance on a particular narrative about modernity and the insistence on the modern state (or relations between modern states) as the place where politics can be done.

In Donnelly's *Universal Human Rights in Theory and Practice*<sup>162</sup>, he presents the purpose of his book as advancing "a right-based liberal defense of the Universal Declaration model."<sup>163</sup> He sees himself as "opposed to neoliberal or efficiency models" and rather identifies with a more general focus on the needs of individuals, a focus that he deems to be the foundation of the "welfare states of Europe and North America".<sup>164</sup>

He frames the liberal political theory that he wants to distance himself from by referring to Locke, and providing the inspiration for its foundational values. He refers specifically to Locke's emphasis on individual life, liberty and property as basic and necessary human rights:

Liberals give central political place to *individual* autonomy, rather than to the liberty of society, the state, or other corporate actors.<sup>165</sup>

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<sup>162</sup> Which he also describes as most characteristic of his writing on his webpage.

<sup>163</sup> Jack Donnelly, (2002) *Universal Human Rights in Theory and Practice*. Ithaca: Cornell University Press, p. 47. The Universal Declaration model suggests that the UN Universal Declaration on Human Rights contains the essential and given universal core of international human rights. Everything above what is enshrined in the declaration can constitute an over-extension of human rights and anything less constitutes inhuman treatment.

<sup>164</sup> Ibid.

<sup>165</sup> Ibid., p. 47.

Donnelly wants to “advance a rights-based liberal defense of the Universal Declaration model”, which makes him turn away from “utilitarian neoliberalism”, focusing on the dual forces of human rights and welfare rights.<sup>166</sup> Donnelly’s concern is not only abstract equality, but also actual equality in partaking in modern life.

Within this general liberal framework Donnelly conceives of human rights primarily as a response to particular social and political developments linked to “modernity” (the quotation marks are Donnelly’s):

the rise of modern markets and modern states and the rise of political claims of equality and toleration. As a result, a hierarchical world of rulers and subjects was transformed into a more egalitarian world of office holders and citizens.<sup>167</sup>

Donnelly proceeds by “reducing half a millennium to a few paragraphs”,<sup>168</sup> and re-tells the story of the coming of being of evermore powerful (capitalist) markets and (sovereign, bureaucratic) states which gradually penetrated first Europe and then the globe and

[i]n the process, traditional communities, and their systems of mutual support and obligation, were disrupted, destroyed, or radically transformed, typically with traumatic

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<sup>166</sup> Ibid., p. 60.

<sup>167</sup> Ibid., p. 58.

<sup>168</sup> Ibid.

consequences. These changes created the problems that human rights were “designed” to solve: vast numbers of (relatively) separate families and individuals left to face a growing range of increasingly unbuffered economic and political threats to their interests and dignity.<sup>169</sup>

It is in relation to history of industrialization and the establishment of modern liberal democracies and representational government that we should understand the urge to articulate human needs in terms of human rights. Just as Forsythe told us earlier, human rights are tools to solve particular problems.

To Donnelly the most pressing problems that human rights are designed solve are threats arising in the modern world against the individual

[Human rights] emerge [...] from the concrete experiences, especially the sufferings, of real human beings and their political struggles to defend or realize their dignity.

Internationally recognized human rights reflect a politically driven process of **social learning**. [my emphasis]<sup>170</sup>

That ‘social learning’ becomes problematic in Donnelly’s account is something that will be analyzed at greater length subsequently. At this point, however, the interesting aspect is that the idea of ‘social learning’ allows for Donnelly to introduce change and development into his account of “universal human rights”. Since we, as a society, have the capacity of learning, it means that our shared moral sense also can develop. In other words, societies that have not yet become

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid., p. 58.

fully modern will see that upholding human rights is the morally sound thing to do in the modern world. Donnelly adds that he is aware of the liberal temptation of writing a “whiggish” history of “a gradual unfolding of the inherent logic of natural rights”, since human rights “[reflect] a contingent response to historically specific conditions.”<sup>171</sup>

However, despite the awareness of the liberal temptation to cast historical development as teleological, the “modernity” that Donnelly describes, with the human reaction to the concomitant social, cultural, technological and political developments, seems just as teleological in terms of the development of international human rights.

It is teleological because the notion of what modernity entails is set, and so are also the possible responses. Do we want to see what is happening to China when China “modernizes”? Just look at what happened in Europe when it became modern:

[W]estern culture only accidentally and in so far as it has been shaped by modern markets and states (and the associated ideas and practices of human rights). Social structure, not “culture,” does the explanatory work. When the West was filled with “traditional societies,” it had social and political ideas and practices strikingly similar to those of traditional Asia, Africa and the Near East. Conversely, as those regions and

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<sup>171</sup> Ibid, p. 61.

civilizations have been similarly penetrated by modern markets and states, the social conditions that demand human rights have been created.<sup>172</sup>

Donnelly's philosophy of history and the goal of universal human rights have framed his ideas about where and when politics can take place.

In this context, and as was gestured to in the beginning of this chapter, "globalization" is generally taken to have led to an erosion of national sovereignty by virtue of a greater interconnectedness between states that has increased the external pressure that effects the decisions that states make. Donnelly gives centrality to the modern state as the location of politics, despite wanting to articulate an idea of human rights that derives legitimacy from universal notion of human morality rather than the modern state. However, he concedes that

The restriction of international human rights obligations to nationals, residents, and visitors also reflects the central role of the sovereign state in modern politics.<sup>173</sup>

And furthermore,

[t]he essential point is that although states are no longer (and perhaps never were) the sole important international actors, they remain the central actors in contemporary

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<sup>172</sup> Ibid., p. 78.

<sup>173</sup> Ibid., p. 35.

international relations in general, and in the international politics of human rights in particular.<sup>174</sup>

The state remains the main actor and thus also the place where politics take place. Donnelly negotiates the tension between national and international law previously addressed by suggesting that national law and national sovereignty triumph over international law.

However, the tension is tremendously more difficult to negotiate if the main focus is establishing legitimacy for a universal set of human rights. Donnelly continues:

“[i]nternationally recognized human rights provide a standard of political legitimacy. In the contemporary world – the world in which there is an overlapping consensus on the Universal Declaration model – states are legitimate largely to the extent that they respect, protect and implement the rights of their citizens.”<sup>175</sup>

Here we see an example of what Anne Peters talked about earlier. On this account, international human rights and therefore also the individual as a member of a global community has replaced the citizen as the basis for legitimate sovereign power. Donnelly takes it even further, suggesting that not only do human rights now provide the legitimate basis for sovereign power, but also the condition of possibility of modern states and interactions between modern states:

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<sup>174</sup> Ibid., p. 67.

<sup>175</sup> Ibid., p. 43.

Human rights, rather than a timeless system of essential moral principles, are a set of social practices that regulate relations between, and help to constitute, citizens and states in “modern” societies.<sup>176</sup>

Human rights belong to every single individual. However, they can only be exercised in a meaningful way if that individual is a citizen. Donnelly, whilst reinforcing this notion, argues that his aim is to suggest a counter-argument for “truly” global human rights by placing its origin in what he calls “conceptual universality”.<sup>177</sup> To Donnelly “a conceptual theory delimits a field of inquiry and provides a *relatively* uncontroversial (because substantially thin) starting point for analysis.”<sup>178</sup> These are the norms, the products of social learning that can globally be agreed upon.

The history of human rights, since human rights are responses to certain modern conditions, is an indicator of the level of “social learning” of human societies. Somehow, however, human rights are supposed to remain a vehicle for the social, cultural and political struggle that gave birth to them in the first place. This is exactly the tension described in the previous section that is impossible to efface without a tremendous effect as to who possesses active agency in relation to modern political processes. Approaching international law on these terms makes it very difficult to imagine the possibility of space for active agency for the Sami. Rather, we see an image very similar to that of the findings of the ECHR, namely

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<sup>176</sup> Ibid., p. 61.

<sup>177</sup> Ibid., p. 21.

<sup>178</sup> Ibid., p. 17.

that the only way to enjoy your individual human rights is as a modern individual. To find support for indigenous, alternative ways of living in the modern world is unlikely. Human rights, to Donnelly, are abstracted, universally accepted norms, but only for those happy or capable of availing themselves to the protection of the modern state of which they are citizens.

However, there are greater effects of the system of human rights that Donnelly suggests for marginal or alternative actors like the Sami. The purpose of Donnelly's theorizing about human rights is providing a defense against the criticism raised against an idea of universal human rights in the name of cultural relativism. Having set this as his goal— to establish an “international normative universality of human rights”<sup>179</sup>— Donnelly begins his account with what he calls

a descriptive, empirical claim: human rights have become a hegemonic political discourse, or what Marwyn Frost (1996:104-111) calls “settled norms” of contemporary international society, principles that are widely accepted as authoritative within the society of states. Both nationally and internationally, political legitimacy is increasingly judged by and expressed in terms of human rights.<sup>180</sup>

This “empirical claim”, by which he seems to mean self-evident and simple, together with the view of modernity and historical development addressed above, sets the foundation for Donnelly's critique.

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<sup>179</sup> Ibid., p. 1.

<sup>180</sup> Ibid., p. 38.

Donnelly continues by saying that the modern world as we know it has also changed, primarily because of globalization and the “retreat of the state”, and now individuals instead find themselves in a world where

the transition from nationalist to territorial and juridical conceptions of political community has been closely associated with an ideology of human rights. One’s rights depend not on who one is (e.g. a well-born English Protestant male property owner) but simply on the fact that one is a human being. In a world of states, this has taken the form of an emphasis on equal rights for all citizens.<sup>181</sup>

His example of something falling within the category of “conceptually universal” is the 1948 UN Declaration on Human Rights. It has, he argues, set a universal norm and has developed from being a declaration setting out a number of goals in the protection of individual freedoms, to becoming the most important evidence of a universal “overlapping consensus”.

By overlapping consensus Donnelly, with direct reference to Rawls, means that “different comprehensive doctrines” reach some agreement on “a political concept of justice.”<sup>182</sup> The universality of this “overlapping consensus” is evident because

In principle, a great variety of social practices other than human rights might provide the basis for politically implementing foundational egalitarian values. In practice, [...] human rights have become the preferred option.<sup>183</sup>

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<sup>181</sup> Ibid., p. 64.

<sup>182</sup> Ibid., p. 40.

Thus human rights are social constructs, as a community we reach a consensus as to what human life should entail. Human rights have become universal because they are articulated as response to the same predicament of modern life happening to people globally.

The underpinning logic, departing from a particular historicist position and carried through by a discourse of ethics of various Hegelian denominations,<sup>184</sup> might be internally coherent. However, it does not address what Donnelly conceived of as being the most serious criticism against any idea of universal human rights (namely, criticism in the name of cultural relativism) for two reasons. Firstly, its end-product (a universal consensus) is so abstracted that it will never be the global “tool” that he sets out legitimize.<sup>185</sup> Secondly, as we shall see, by freezing the idea of human rights in time, he denies peoples around the world the capacity of living through heterogeneous and modern political process that gave birth to human rights in the first place.

The insistence on focusing on a conceptual level creates a tension in relation to Donnelly’s own description of human rights as social construction. He describes human rights as having come out of “political struggles that have changed our

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<sup>183</sup> Ibid., p. 41.

<sup>184</sup> Hegelian in as much it displays different versions of Hegelian historicism and thus teleology.

<sup>185</sup> Anne Orford has written an interesting commentary on another attempt to find a true universal in the UN Charter that highlights and engages with similar limits but has done so through those excluded at the limits of essentialist approaches. A Orford, *International Law and Its Others* (Cambridge University Press, 2006).

understanding of human dignity<sup>186</sup> and at the same time it has today become a fixed, hegemonic discourse as enshrined within the UN Declaration. Despite its origin in continuous political struggles around the globe, the norms are now fixed to such an extent that

human rights, as specified in the Universal Declaration and the Covenants, represent the international community's best effort to define the social and political parameters of our common humanity. **Within these limits, all is possible. Outside of them, little should be allowed.**<sup>187</sup>

Donnelly, by retreating into a world of conceptual clarity does away with the political, social and cultural processes that according to him make up the basis for legitimacy of contemporary human rights. The enlightenment ideals that have been codified in the UN Declaration of Human Rights, i.e. Donnelly's idea of universal human morality, is based on a particular type of political struggle at a particular time and place in history involving only a restricted number of people, something that creates a problem in relation to Donnelly's criticism of the culturally relative foundations of human rights.

Additionally, the "Western" vision of political legitimacy has come to largely dominate international discussions – because of the collapse of leading alternatives; because of

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<sup>186</sup> Donnelly, Jack. Op. cit., p. 61.

<sup>187</sup> Ibid., p. 123. My emphasis added.

Western military, political and economic power; but also because of the normative power of the Western practice of human rights.<sup>188</sup>

Donnelly seems to acknowledge that international legal structures have an imperial legacy, *but* that Western notions of human rights are normatively the most mature and good. This is an argument that seems as a rather weak counter argument to relativist critique of a universality of human rights.

To Donnelly, the process of social and political struggle during which ideas of human rights and potential universality were articulated and contested and modified is over and the same struggles are not afforded to societies and peoples today. The world is modern and as Donnelly has told us, we know where the modern world is heading. He suggests overcoming the problem by thinking about the development of human rights by saying “although human rights are indeed an important part of the Western heritage, my focus on universality and overlapping consensus clearly indicates that they **have also become** an important part of the heritage of every culture, religion, or civilization.”<sup>189</sup> And with more force, if any doubts about Donnelly’s standpoint remained, he continues: “internationally human rights have been (or are at least being) and **ought** to be adopted, with modest adaptations, by peoples and cultures across the world.”<sup>190</sup>

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<sup>188</sup> Ibid., p. 63.

<sup>189</sup> Ibid., p. 63.

<sup>190</sup> Ibid., p. 63-64.

The concerns underpinning criticism of the legitimacy of universal human rights (the difficult negotiation between particularity and universality, of submission and domination) are thus brushed aside and remain unanswered. The people who are supposedly the ones who should be able to resort to human rights in order to empower themselves in the name of social justice during political struggles around the world, are left to reproduce the struggle as it took place in Europe because that is the quintessential “modern” struggle.

Donnelly gives the impression of being aware that his limit-condition is a problem because despite his emphasis on “conceptual clarity” he feels the need to explain exceptional practices and he does so by introducing the idea of “relative universality in practice” (as opposed to “conceptual universality”). Relative universality in practice implies that conceptual universality, which is an absolute norm based on overlapping consensus, sets the limit of what is admissible practice. Within that limit the concept of human rights can be realized in a multitude of different manners. Outside of that limit no deviations should be allowed.

Having said that, there is no tolerance to exceptions to the norm. Donnelly dismisses all criticism levied against a monolithic idea of human rights, calling them mere deviations or transgressions.<sup>191</sup> Recall that Donnelly argued that

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<sup>191</sup> Basically what he says is that all situations that do not follow Donnelly’s conceptual universal norms should either be punished or are normatively irrelevant. Needless to say, I would not agree with this particularly since much has been said as to what can be learned from exceptions rather than the norm. See Andrew Neal (2010) *Exceptionalism and the Politics of Counter-Terrorism : Liberty, Security, and the War on Terror*. Milton

cultures that have not accepted these norms as enshrined in the UN declaration, should indeed do so in the future. As such, there is no room for disagreement, discussion, engagement or further development in the field of human rights; the practice that is human rights is frozen in history. To Donnelly, then, human rights might be a tool to contest the exercise of sovereign authority but it comes at the cost of denying it to great many people around the world.

Donnelly's attempt to mesh "conceptual universality" with "relative universality in practice" serves the purpose of drawing our attention to one way of trying to overcome the boundaries to state-centric understanding of international law. Not only does Donnelly argue for the importance of human rights as a way of check and balance state practice, he also tries to show how despite being historically linked to particular historical conditions, international human rights norms are at least conceptually universal.

Looking closer at his argument shows that underneath the superficial differences, Donnelly displays a remarkably similar logic to the scholarship he seeks to discredit. His universals are frozen in time and space, and for those who still have not yet recognized the norms in the Universal Declaration on Human Rights it is only a question of developing the political sensitivity to realize that they represent the natural shape of human society. He fails to see that his view on human rights would indeed threaten alternative subjectivities and force individuals to deal with

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Park, Abingdon, Oxon: Taylor & Francis for a good account of why we should pay attention to the exception. The role of exceptional politics will also be addressed through the writings of Carl Schmitt in chapter 5.

the modern world in one unitary fashion - a position at odds with his constant reaffirmation of equality and autonomy as the basis for all human rights. Donnelly does not allow for the political struggles that were the basis for the articulation of human rights in the first place, to continue or to be carried out in a different manner, in a different space or at a different time. In the end he displays exactly that type of Western “cultural arrogance” that he continuously says he is not guilty of.<sup>192</sup>

### ***David Kennedy***

Another scholar who has acknowledged the politicized nature of international law and who has argued consistently for the importance of understanding international law as closely connected with politics is David Kennedy. He has tried to transcend the limits of the discipline in a manner diametrically opposed to Donnelly’s. Rather than seeking conceptual clarity he attempts to re-ground human rights in what works “practically”, through what he calls “humanitarian pragmatism”.

Kennedy is an acknowledged international law scholar, influential through the New Haven School and often credited with bringing Critical Legal Studies (CLS) to the attention of scholars concerned with issues pertaining to international law.<sup>193</sup>

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<sup>192</sup> Donnelly, Jack. Op. cit., p. 76.

<sup>193</sup> Kennedy’s bibliography of Critical Legal Studies (CLS) published in 1984 is still influential in terms of defining the movement in relation to general international law, David Kennedy and K E Klare, (1984) A Bibliography of Critical Legal Studies. *Yale Law Journal* 94:461-1855. See Richard M Unger, (1983) The Critical Legal Studies Movement. *Harvard Law Review* 96: 561-675 for a general take on the influence of CLS on international law.

He is worth paying attention to because the influence of his indefatigable defense of the primacy of the actual exercise of human rights over abstract norms. As a practicing lawyer turned scholar, much of his scholarship concerns how we can make sense of the chaotic state of world politics when “doing good” does not necessarily always end-up producing good.<sup>194</sup>

In many ways, read all together, Kennedy’s *oeuvre* addresses the discrepancy between the *impression* of international law as a civilizing force and its multiple effects. What Kennedy’s scholarship, especially over the last 15 years has sought to do, is to question how the impression of international law has had the effect of “naturalizing” or “normalizing” the most atrocious and exceptional circumstances.<sup>195</sup>

Kennedy’s *The Dark Sides – reassessing international humanitarianism* constitutes the focus of the chapter because it is written as Kennedy’s own “coming of age story” (as a critical scholar of international law) and also because, in many ways, it reflects more general changes in the discipline of international law. His writing is a reflection of how the discipline of international law has tried to understand how such a promising and emancipatory “tool” as human rights continuously fails to produce its desired outcome; the enlightened state of universal freedom. By looking closely Kennedy’s recent *The Dark Sides of Virtue*

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<sup>194</sup> It would be unfair to characterize Kennedy *only* as an international lawyer since he has written extensively on legal issues of both national and international nature, however, the focus on his scholarship on international law is here merited by the *influence* he has had on the discipline of international law.

<sup>195</sup> See especially David Kennedy (2006) *Of War and Law*. Princeton [N.J.]: Princeton University Press, p.141 – 164.

which synthesizes much of his previous work,<sup>196</sup> the purpose here is to bring to fore the limits of Kennedy's critical endeavor in terms of who possesses active agency in relation to modern international law.

As we will see, it is those who are traditionally marginalized, like the Sami, will continue to be considered victims because it is they who will bear the "costs" (in terms of a loss of heterogeneity) of the realization of human rights world-wide. If we accept that point, then we can continue working in the defense of human rights. Just as with Donnelly, Kennedy's work is paradigmatic of the discipline of international law's reliance on a particular narrative of modernity. As a part of that narrative, the state remains the central actor to Kennedy and his work, for good or for bad.

In *The Dark Sides* Kennedy sets out to investigate one particular problem – international humanitarians have not dared, been able to, or sought out the possible negative effects of their engagement with humanitarian issues. The core of the problem, according to Kennedy, is that the "international humanitarians" refuse to acknowledge that they partake in the exercise of power. If they were to embrace that power, it would be possible to work more effectively towards humanitarian goals in the future.

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<sup>196</sup> Kennedy himself begins the book by saying that the purpose of the book is exactly to synthesis his experience of working in the field with human rights. David Kennedy (2004) *The Dark Sides of Virtue : Reassessing International Humanitarianism*. Princeton, N.J.: Princeton University Press, p. x.

In his closing remarks he says that in order:

to confront the dark sides of humanitarian policy making, we need a policy-making style which welcomes, rather than obscures, the hard choices of governance. We need to develop a new posture or character for international humanitarianism – informed by the vertiginous experience of disenchantment, of seeing that one is responsible and yet does not already know. That we must act on faith and hope for grace.<sup>197</sup>

According to Kennedy, “international humanitarians” must retain fidelity to their humanitarian commitment and believe that they are doing good, but they must also assess their work through realism in relation to its consequences. Thus they have to understand, and embrace, the hard choices made by policy-makers and to think about their work in the same way. The feeling of vertigo arises from the realization that power does not always embrace virtue<sup>198</sup> and that virtue in itself also have dark sides.

In this context *The Dark Sides* sets out to open up questions about the possible “costs” involved in working for the realization of humanitarian law on a global scale. We will focus on three different issues arising from Kennedy’s book. Firstly, what Kennedy means by pragmatism, in order for us to see why his pragmatism underwrites the same abstract notions that it seeks to dismiss. Secondly, how Kennedy’s critique of the type of theorizing that Donnelly represents produces similar limits in terms of active agency. Thirdly, how we can

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<sup>197</sup> Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, p. 347.

<sup>198</sup> I.e. do not be surprised if no one listens to you.

save modern international law as a liberating project. In doing so we will see that despite his assertion of pushing the limits of the discipline, underlying Kennedy's thoughts on the issue of "international humanitarianism", is a teleological understanding of history that has great effect on who possesses active agency in relation to processes of international law.

The aim of Kennedy's book is to "propose a posture of sensibility for humanitarian work [...] and engage the dark sides of our work, to work through them strategically and pragmatically, and to act on our humanitarian yearnings, even when our analysis leaves us uncertain."<sup>199</sup> He does this by retelling his own experience from the field, focusing on the people that Kennedy personally identifies with: "us" the humanitarians. The "Us" include activists, advocates, policy-makers and soldiers. In his own words, his focus is "on the humanitarian work I know best – the efforts of well-meaning people, usually in the United States, to express their humanitarian yearnings on the global stage."<sup>200</sup>

Through the eyes of Kennedy we are brought back in time, and across continents, as he revisits a number of issues including refugee law, international trade, human rights and the force that backs its implementation. To Kennedy "humanitarian pragmatism" seems to mean that international humanitarians always must keep the goal of their work in mind, "that humanitarian intentions are realized,"<sup>201</sup> but

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<sup>199</sup> Ibid., xiv.

<sup>200</sup> Those are "the humanitarians most familiar to me are professionals – international lawyers, political scientists, economists, development specialists, international civil servants, human rights activists, and academics." Ibid., p. xv.

<sup>201</sup> Ibid., p. 4.

that they must also employ a sound amount of criticism to scrutinize the ways they go about achieving those particular goals. The most important question to Kennedy is

assuming that the goals and intentions of humanitarian action are clear, how we can improve our ability to assess whether humanitarian work in fact contributes more to “the solution” than to “the problem”.<sup>202</sup>

The problem is the costs of humanitarian work around the globe. These problems range from the loss of certain social, cultural and political multiplicity, to the actual human suffering involved in any intervention, not only military.<sup>203</sup>

In calling his approach to human rights practices “humanitarian pragmatism”, Kennedy’s thoughts mirror some of the concerns that were raised by the type of American pragmatism that grew out of the writings of people like Charles S. Pierce, John Dewey and William James and many more.

The turn of the century American pragmatism originated in a perceived need for a practical, rather than abstract, approach to knowledge that was generally a response to the Hegel-inspired, European philosophy of that time. The goal was, as one recent commentator puts it, to “bring ideas and principles and beliefs down

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<sup>202</sup> Ibid., p. 29.

<sup>203</sup> Ibid., see for example p. xxiii. Specific costs are not Kennedy’s point, rather Kennedy returns to the general point that we have to be able to acknowledge that supporting and spreading human rights practices across the globe comes at the price throughout the book.

to a human level because they wished to avoid the violence they saw hidden in abstractions.”<sup>204</sup>

In aiming to achieve practicality, pragmatic epistemology is one deliberation that places “the truth” in terms of what works well, rather than what is “known”, or “perceived of”, as true. Many contemporary “neo-pragmatists” tend to equate deliberation with participation, conceiving of the future as one of growing engagement on behalf of the citizens in (Western) liberal democracies.<sup>205</sup> By placing truth in a process of deliberation, pragmatism claims to have “avoided both the illusions of metaphysics and the illusion of skepticism.”<sup>206</sup>

If we return briefly to Donnelly, it is worth pointing out how his idea of “overlapping consensus” shares some fundamental character traits with Pierce’s notion of truth as “ultimate consensus” and what James later would call “abstract truth” understood as “the final opinion to be converged to and determined by reality.”<sup>207</sup>

Keeping the close resemblance between a pragmatic notion of truth and Donnelly’s work in mind, it is interesting to notice how in many ways Kennedy’s

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<sup>204</sup> Louis Menand quoted in Robert B Westbrook, (2005) *Democratic Hope: Pragmatism and the Politics of Truth*. Ithaca, N.Y.: Cornell University Press, p. xv.

<sup>205</sup> Robert B. Westbrook and the title of his book *Democratic Hope: Pragmatism and the Politics of Truth*, is a good example of this link between pragmatism and a more participatory type of democracy. On the contrary, Richard Rorty is someone who challenges the direct link between pragmatism as a philosophy and Western liberal democracies.

<sup>206</sup> Hilary Putnam, (1992) *Renewing Philosophy*. Cambridge, Mass.: Harvard University Press, p. 180.

<sup>207</sup> *Ibid.*, p. 170.

book is a response to the type of abstract theorizing that Donnelly uses in order to argue for the universal reach of human rights. Kennedy says

Traditional debates about whether human rights do or do not express a social consensus, in one society or across the globe, are similarly beside the point. Indeed, we could see them as updated ways of asking whether human rights really exist. Let us say that they do express a social consensus – how does this affect their usefulness? Perhaps being able to say they express consensus weakens them, thins them out, skews their usefulness in various ways; perhaps it strengthens them. To decide, as my grandmother used to ask “whether that’s a good thing or a bad thing” we still need to know whether once strengthened or skewed or weakened or whatever they are useful, and if so for what and for whom?<sup>208</sup>

Philosophical theorizing does not matter unless we always preoccupy ourselves with a question of outcomes and effects i.e. whether or not human rights are universal or particular does not matter unless we know how they can be used, for what purpose and for the benefit of whom.

Kennedy fills the claimed pragmatic space between metaphysics and skepticism with his own version of a pragmatic philosophy – a mix of “pragmatism of intentions” and “pragmatism of consequences”. The first is concerned with the

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<sup>208</sup> Kennedy, *The Dark Sides of Virtue : Reassessing International Humanitarianism.*, Kindle version, location 475.

“gap between our good impulses and their bad expression,”<sup>209</sup> and the latter with “attention [to] good outcomes rather than good intentions.”<sup>210</sup>

By not only questioning the impulses, but also the intentions in relation to outcomes of ‘humanitarian’ deeds,<sup>211</sup> Kennedy argues that international humanitarianism can achieve

a more thorough-going pragmatism. By rooting out bias, disenchanting the doctrines and institutional tools which substitute for analysis, insisting on a rigorous pragmatic analysis of costs and benefits, we might achieve a humanitarianism which could throw light on its dark sides.<sup>212</sup>

The doctrines that need to be “disenchanted” and critiqued are

Western Enlightenment ideas which make the human rights movement part of the problem rather than the solution include the following: the economy *preexists* politics, politics *preexists* law, the private *preexists* the public, just as the animal preexists the human, faith preexists reason, or the feudal preexists the modern.<sup>213</sup>

Kennedy wants us to see that this is not the case, which should help us make sense of both the Sami experience and the experience of questioning the modern state and location of modern politics. He illustrates this well by defining the problem as

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<sup>209</sup> Ibid., p. xx.

<sup>210</sup> Ibid., xxii.

<sup>211</sup> I have a hard time to see how you can differentiate between the two.

<sup>212</sup> Ibid., p. 309.

<sup>213</sup> Kennedy, David. Kindle version, location 668.

[H]uman rights is too quick to conclude that emancipation *means* progress forward from the natural passions of politics into the civilized reason of law.<sup>214</sup>

His definition raises some of the problems from the first chapter about the Sami and it seems as if underneath the surface of Kennedy's text there exists an understanding of heterogeneity of modern politics and the many ways of being human.

However, the ultimate belief in the good of human rights, despite its dark sides, comes through as he continues:

As liberal Western intellectuals, we think of the move to rights as an escape from the unfreedom of social conditions into the freedom of citizenship, but we repeatedly forget that there can **also** be a loss – a loss of the experience of belonging, of the habit of willing in conditions of indeterminacy, of innovating collectively in a way unchanneled by an available program of rights [my emphasis].<sup>215</sup>

Human rights are a sign of progress to which there are *additional costs*.

Citizenship and nationality is the basis for partaking in modern politics, and the goodness of that is not up for questioning.

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<sup>214</sup> Ibid., location 671.

<sup>215</sup> Ibid., location 671.

By pointing out the effects of imposing one way of being modern Kennedy *also* affirms the state as the site of freedom,

Although human rights advocates express relentless suspicion of the state, human rights places the state at the centre of the emancipatory process, structuring liberation as a relationship between an individual right holder and the state. However much one may insist on the priority or preexistence of rights in the end rights are enforced, granted, recognized, implemented, and their violations remedied by the state.<sup>216</sup>

Kennedy wants to question the notion of progress by bringing to the fore the costs involved in doing good. Through his pragmatism, Kennedy, rather than critiquing our understanding of modern international law tells us to just see it in a different light, to accept that international humanitarianism has its dark sides. If we do that, the general idea of what modern human rights entails is still pretty close to the best possible understanding of what is going on in the world.

This sense of accepting the underlying narrative of the work for human rights as a work for progress becomes clearer towards the end of Kennedy's coming-of-age story as an international humanitarian. His goal remains an enlightened, peaceful, cosmopolitan humanity, and its opposite is "primitivism, tribalism, barbarism [that] could undo the entire project of placing legitimacy in the hands of the international community."<sup>217</sup> The enemy at the gate, in other words the forces that can undo the successes of the international human rights movement are exactly

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<sup>216</sup> Ibid., location 621.

<sup>217</sup> Kennedy, David. Op. cit., p. 306.

the same as we saw in Donnelly's text – the backward, the tribal and the primitive – the pre-modern. Interestingly, this quote was removed from later re-prints of Kennedy's book, something that should make us even more suspicious of the standpoint that animated its inclusion from the beginning.

In his closing remarks Kennedy continues to underwrite a notion of progress based on the belief that “once humanitarianism comes to seem a work in progress, however, the question will be how far along more backwards peoples have come, how much they may deviate from best practice among advanced peoples”.<sup>218</sup> Also this part of the text was removed in re-prints.

Throughout his text, Kennedy has questioned and critically engaged with the cost of imposing limits on our understanding of processes of modern international law by taking the state as the location of politics for granted. He questions a history of philosophy that necessarily equates modernity with progress towards the realization of humanity's true potential. Despite that he can't carry it through. The cost of radically reconfiguring our ideas of human rights is too great for him (as practicing human rights lawyer that is understandable).

He has moved from the logical space between skepticism and metaphysics and firmly placed himself in the realm of the latter. He is not alone though; there are various scholars who present versions of Hegelian inspired accounts of human rights and international law as working inevitably towards the progress of

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<sup>218</sup> Ibid.

humanity – Ignatieff, Held, Habermas, are just a few examples. Thus, Kennedy’s mission is not to think critically about “international humanitarianism” at all. Instead it is to reassert his faith in the fact that humanity is indeed progressing. This belief in the continuous progress of man is directly linked to Kennedy’s conclusion that since we have “fallen from knowledge”, we can only be saved through grace.

Despite its obvious religious connotations, grace can either mean mercy and clemency or a favor rendered by someone who needs not to do so. Thus, who should the “international humanitarians” seek grace from? What does he mean when he says “I propose we rethink our humanitarian traditions as the search for grace in government”? It is through the concepts of faith and grace that Kennedy also brings us back to the American pragmatists at the turn of the century. To save man, not only from a continuous fall from knowledge and a regression into barbarism, but also from the despairing skepticism that a Cartesian anxiety has caused, he has to justify his doubts, as well as his beliefs, in terms of practicability.<sup>219</sup> To the American pragmatists, this doubt is not necessarily troubling, and Pierce is quoted saying that “let us not pretend to doubt in philosophy what we do not doubt in our heart”.<sup>220</sup>

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<sup>219</sup> To quote Bernstein - “either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos.” Richard J Bernstein. (1983) *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis*. Philadelphia: University of Pennsylvania Press., p. 18.

<sup>220</sup> Westbrook, *Democratic Hope : Pragmatism and the Politics of Truth.*, p. 2.

Rather than saying that Kennedy fails his critical project, the point is that his understanding of human rights and the struggle he has with negotiating a belief in the inherent good of human rights as articulated in law with a sense of its cost in terms of heterogeneity of human life, is that his text is an example of the inherent contradictions, discriminations and exclusions that operate at the very heart of a liberal notion of universalizing laws.

### **Claims to Modernity and the limits of International Law**

I have relied primarily on the scholarship by Jack Donnelly and David Kennedy to illustrate how the limits of the discipline of international law are not easy to overcome and that the restrictions that they impose on our understanding of modern international law have great implications in terms ways of ‘doing’ international law.

Perhaps the most entrenched limit is the belief that we have to approach international law by privileging the modern state as the proper location of politics, illustrated previously by addressing what here has been referred to as the “domestic analogy”. Despite wanting to question the force and function of human rights in relation to international politics both Donnelly and Kennedy reinforced this idea and both did so with reference to having to accept the ‘reality’ of the presence and power of modern states.<sup>221</sup>

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<sup>221</sup> See page pp. 123.

The example of the Sami shows us that there are challenges to presuming that the centrality of the modern state to modern politics is both natural and eternal. In pursuing their claim through different avenues the Sami continuously question the naturalness of the modern (Swedish) state and claimed a transnational political space (Sapmi) through recourse to human rights existing outside/above the Swedish state. The Sami experience suggests that they do not view international politics as hierarchical and given but rather as fluid and constantly changing processes. Our sense of belonging, our political identities, our social structures and so much more is continuously morphing. Donnelly's idea of a universal human rights regime set in stone thus becomes utterly anachronistic to a fluid and constantly changing modern world.

However, as we saw in preceding commentaries, allowing for international law to be *international*, the discipline re-affirms a hierarchical understanding of politics. It does so by employing an understanding of legal and political practices as derived from the constitutional arrangements within liberal democracies that allows for the possibility of international law to conceptually check and balance international politics despite the lack of a global 'sovereign'.

That this is analytically and politically troublesome is not difficult to see, however, we do not often address what the effects of this approach are on *what* and *where* we take politics to be. Again, the experience of the Sami suggest that we are better off by understanding international law as a way of doing politics. The level of legal abstraction and formalism and its idealized categories fit badly with the messy reality of modern international law. The neatness of Kennedy's

equation as to the good and bad sides of international humanitarianism seems quite at odds with the messiness of both norms and actors that we saw in the case of the Sami.

The messiness of modern politics is difficult to deal with and analyzing it is not a neat endeavor. However, it is in relation to this sense of chaos that academics and practitioners still want to perceive of international law as the force that somehow could lend order to it. This is the reason why both Kennedy and Donnelly despite the best intentions reassert a notion that international law in general and human rights in particular will reign in the madness.

They are not alone in trying to re-establish order. International law as a discipline orders this perceived chaos first and foremost by dividing and re-establishing a differentiation between a national, international and universal level of politics. International law does so partly by stipulating that anything that exceeds national boundaries of political action is to be governed by internationally agreed upon and accepted laws. In so doing international law overcomes, or avoids, the foundational paradoxes that constitute the modern international world in the first place, namely that of sovereign states claiming to speak for numerous nations and peoples within a system of sovereign states that is grounded in an idea of universal law that is ultimately based upon claims about inalienable human rights.

Thus, human rights appears as the immanent critique of international law in as much as it cuts across boundaries, perceived levels and joins several sources of authority. It is a critique that leads us down the road to the inherent aporetics of

international law – that of competing realms of both freedom and sovereignty. This became clear in the case of the Sami who could not stand in front of the European Court of Human Rights as both a member of the Sami community *and* as a member of universal mankind.

Both Donnelly and Kennedy try to overcome the aporetic nature of international law by collapsing the aporetics into a simple dichotomy with reference to the idea that we have to accept the ‘real’ state of global politics. Yes, there might be a tension between the freedom of the citizen and the human but at the end they both argue for replacing the former with the latter. The reason for this, they argue, is that in the end we cannot disregard the presence of the modern state nor its key role in processes of international law. But the Sami have refused to make this choice and they have refused to accept that their only avenue to creating a political space goes through the Swedish state. They have also continuously underlined that it is a choice that can never finally be made. Therefore they are affirming but also denying the ambivalent status of modern man as both citizen and human, an affirmation that in the end operates through and is undermined by the insoluble tension between state and system.

Despite both authors’ insistence on their reliance on different liberal theories of politics, the underlying assumptions upon which they base their account of modern international law is not simply “liberal”: their apparent liberalism is actually bound up with a particular, largely unanalyzed philosophy of history that derives from Kant and Hegel. The point of this chapter has been to show how most approaches to international law are underpinned by a progressivist

philosophy of the history of modernity. As long as we do not engage that understanding of modernity very little of what you imagine international law to be will change. In other words – if we are to engage the limits of international law, re-found it or present a critique of how we understand its potential then we need to engage the underlying, teleological understanding of history.

A teleological understanding of modernity continuously operates to suggest that we are always at a cross-road forcing us to make a choice with reference to where we are going. Ethnologist Marie Roué, director of research at the CNRS / Museum of natural history, Paris and a specialist on Arctic peoples describes the Sami's current choice

The Sami stand at the crossroads of major contemporary issues: how to remain traditional while becoming modern, how to remain oneself without folklorizing? They're developing strategies to answer all these questions, and do appear as quite a model in the courage they show taking up all these challenges implied by modernity.<sup>222</sup>

While the next few chapters will argue that the dichotomy suggested by Mdm Roué is false, the suggestion is rather that it is exactly the strategies employed by the Sami to make sense of the modern world that should be our focus if we are to understand what is at stake in claims to modernity in relation to international law. These strategies, strategies to make yourself feel at home in the modern world are,

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<sup>222</sup> Roue, Marie. Sorosoro – so the languages of the world may prosper. <<http://blog.sorosoro.org/en/the-sami-a-model-in-their-ability-to-bridge-modernity-and-a-traditional-lifestyle>>, 2013, 21 june.

as we saw in the case of the Sami, considered a far greater problem for people outside many indigenous communities. The unease with the 'pre-modern' or 'extra-modern' was also reflected in both Donnelly and Kennedy's accounts.

The question with which to proceed is what does this sense of modernity and its philosophy of history entail and what effect does it have on where and when we take politics to take place in relation to processes of international law? Why is it that it is so difficult to engage, and why is so easy to try to avoid, the inherent aporetics of a teleological understanding of the progress of history.

#### 4. Limits Engaged - Koskenniemi, Liberalism and the Anxiety of the 'Gentle Civilizers'

The teleological assumption that underpins the idea of modernity as the unfolding of enlightenment ideals and the concomitant focus on Europe as its dynamic locus must concern us greatly, not only because it is the often repeated story of how we ended up here and now, but because the narrative also charts our trajectory in terms of what the future might hold in store. Focusing on an era since the mid-19th century it is a discussion that is rooted in the standard assumptions about the national and the international, and as such it reproduces all the problems with those assumptions.<sup>223</sup>

It is within this framework that most analysis of the role of international law is produced. If international law does not seem to have the intended effect in terms of regulating political action, then the conclusion is that international law has failed. As illustrated earlier, international law thus either becomes an ideal yet to be properly implemented, or merely an effect of power politics. As we soon shall

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<sup>223</sup> R.B.J. Walker has spent the last 30 years trying to explain the logic of this problem to scholars of various denominations. A recent attempt states that "It is certainly no accident, [...] that one of the most pervasive moves in contemporary political analysis involves an almost automatic resort to the terminology of "levels" arrayed on a scale of higher and lower: a terminology that affirms much of what we call common sense yet is uncannily reminiscent of hierarchical world of the "great chain of being" against which modern forms of political life struggled so hard in order to affirm the possibilities and the limits of modern freedoms, equalities, securities, and especially the forms of sovereign authorization expressed by the modern state." Walker, R B J. (2010) *After the Globe, Before the World*. New York: NY, Routledge.

see, it either becomes “utopian” in terms of political ideals or “apologetic” of current political practices.

The debate thus continuously replicates a perceived conflict between idealism and realism, something that is especially true for the scholars within the field of international law. The effect is that our understanding of international law becomes overly abstract, idealized in terms of both actors and possible actions and thus falls short of explaining the very complex modern political practice that international law actually consists of. For example, the experience of the Sami is treated as an exception, as an rather than an experience that is intrinsic to international law.<sup>224</sup>

Directly linked to an understanding of modernity that underpins the discipline is a particular reading of the relation between law and politics, more often than not consisting of a conceptual differentiation of legal and political processes as derived from constitutional arrangements within liberal democracies (here analyzed through a focus on the use of the “domestic analogy”). By lifting an understanding of the interaction between law and politics from a national setting to international law gives rise to widespread formalism, that is a, an understanding for the necessity of the separation between processes of law and processes of politics in order to guarantee the *possibility* of both legitimate law and legitimate politics.

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<sup>224</sup> The following chapter will explain this move further.

As the second chapter pointed out, based on an acceptance of these foundational assumptions the discipline of International Law as such fails to engage with major critiques of the order it presumes. The previous chapter illustrated how international law is viewed as a legal status rather than a political process, how our understanding of international law re-affirms uneven power relations and how particular historicist assumptions make sure that those power relations remain unchanged in the future. Martti Koskenniemi, a practicing international lawyer turned scholar, is someone who has continuously tried to engage how the actual practice of international law is linked to a notion of abstracted and idealized theorizing.

### **Martti Koskenniemi**

Martti Koskenniemi is best known for his first book *From Apology to Utopia – The Structure of International Legal Argument* (“From Apology to Utopia”) and his subsequent *The Gentle Civilizers of Nations – The Rise and Fall of International Law 1870 – 1960* (“The Gentle Civilizers”), but his impact is reflected in numerous articles and public lectures. It is not an exceedingly original to claim that Koskenniemi has produced the most engaged, informed and nuanced critical appreciation of the processes of international law to date.<sup>225</sup>

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<sup>225</sup> A quick search for reviews of Koskenniemi’s work published in peer-reviewed journals returns more than 40 results. A selection of the more informative in relations to Koskenniemi’s influence on the discipline of international law. See for example Galindo Bandeira, George. (2005) Martti Koskenniemi and the Historiographical Turn in International Law, *European Journal of International Law* 16:539; Clark, Iain. (2004) Review The Australian Yearbook of International Law 23:203; Scobbie, Iain. (1990) Towards the Elimination of International Law: Some Radical Scepticism About Sceptical

In evidence of his influence, the *German Law Review* collected and presented an impressive group of scholars for their 2006 issue marking the reissuing of *From Apology to Utopia*; among others David Kennedy, Anne Orford, Jochen von Bernstorff, Balakrishnan Rajagopal and of course, Koskenniemi himself. By lining up some of the most influential contemporary scholars the special issue is a clear testament to the importance of Koskenniemi's scholarship to the field, and also to the effort made to engage with some of the issues that Koskenniemi raises, especially those pertaining to the politics that frames both structures and processes of international law.

The journal did not merely mark the reissuing of the book but rather reinforced the notion that the book

represents a plea to question our assumptions about our practice of international law whether as practitioners or as academics, as a call to search out the inherent biases in the structures and institutions that we use, to recognize the choices we make and to take responsibility for them.<sup>226</sup>

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Radicalism, *British Yearbook of International Law* 61:339; Onuf, Nicholas. (1990) Review, *The American Journal of International Law*, 84:771; Simons, Penelope (2006) Review, *Journal of the History of International Law*, 8:1087; Clark, Iain (2004) Review, *The Australian Yearbook of International Law* 23:203.

<sup>226</sup> Goodwin, Morag, and Alexandra Kemmerer. (2007) Editorial: The same performance, and so different. Marking the re-publication of *From Apology to Utopia*. *German Law Review*, 7:980.

In the same vein as for example David Kennedy, Koskenniemi wants to bring to the fore the material consequences that strengthening of international law can have.<sup>227</sup> As the practitioner he is, Koskenniemi pays close attention to what practitioners do and in the end he places his hope in a professional ethos of international lawyers. Koskenniemi's great achievement is, as a practitioner, to have drawn attention to the politicized nature of international law and seriously questioned the assumptions that underpin the discipline. His central claim is that to critically engage with the effect of their work international lawyers have to question the normative framework within which they operate. The reviews at the time of the re-issuing of *From Apology to Utopia* can be read as an account of how it is imperative for the discipline of international law to take up Koskenniemi's challenge to question the real effects of the normative structures that determine the discipline.

He describes this challenge himself as an attempt to breathe some life into the "dead legal formalism" which has ensnared the discipline of international law. Koskenniemi develops one important critical theme with respect to international law, namely that we have to regard international law as a kind of political practice, not as a structure out there to be observed. He calls to account the type of analysis that we saw in the case of David Kennedy and Jack Donnelly in terms of its structural and historical limits and he tries to theorize an universal that is

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<sup>227</sup> See the following quote.

neither solid nor given while at the same time not being too malleable to power politics.<sup>228</sup>

Pondering the post-war chaos and the paralyzing sense of having lost control Koskenniemi asks: “between the arrogance of universality and the indifference of particularity, what else is there apart from the civilizing manners of gentle spirits?”<sup>229</sup> International lawyers, the gentle civilizers in Koskenniemi’s story are thus our *ultimate* resort in case we want to restore some hope for a better, more peaceful world. As this chapter will show, however, his hope in the gently civilizing ethics of international lawyers is paradigmatic of a teleological philosophy of history that we also saw reflected in the work of Donnelly and Kennedy and an example of the same philosophy of history that underpins the majority of scholarship on international law. Indicative of a theoretical kinship is that Koskenniemi also replays now familiar questions about the relation between law and politics, the centrality of the modern state and the function of human rights.

Ignacio de la Rasilla del Moral, lecturer at Brunel University, suggests that Koskenniemi’s work “champions a profoundly ethical-oriented awakening call

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<sup>228</sup> See the recent book *The Politics of International Law* (2011). This chapter will not explicitly deal with this book since in many ways it is a restatement of Koskenniemi’s starting point - Koskenniemi, Martti. (1990) "Politics of International Law, The." *Eur. J. Int'l L.* 1:4, and the salient themes are covered through the focus on From Apology to Utopia and The Gentle Civilizers. This point should not be read as indication that Koskenniemi’s latest book is not worth considering merely that it is a collection of texts and thoughts that have been published previously.

<sup>229</sup> Koskenniemi, Martti. (2002) *From Apology to Utopia : The Structure of International Legal Argument*. New York: Cambridge University Press, p. 515.

addressed to his contemporary doctrinal counterparts”.<sup>230</sup> This chapter will trace such ethics through the themes raised previously – modern conceptions of state, state system and its underpinning account of modernity and suggest that such hope in an professional ethics comes at the cost of re-asserting conventional limits to international law.

### ***From Apology to Utopia***

In order to chart the magnitude of Koskenniemi’s scholarly work, the analysis of his work is chronological because much of his later work can be characterized as attempts to answer the challenges raised by his earlier work. The focus will lie on his two most influential monographs, *From Apology to Utopia – The Structure of International Legal Argument* (“*From Apology to Utopia*”) and *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870 – 1960* (“*The Gentle Civilizer*”) since they provide the outline of his very extensive scholarship.<sup>231</sup> In its final analysis this section draws from all his work.

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<sup>230</sup> de la Rasilla del Moral, Ignacio. (2010) "Martti Koskenniemi and the Spirit of the Beehive in International Law." *Global Jurist* 10:4.

<sup>231</sup> When presenting all of his scholarly work Koskenniemi himself highlights what he thinks is his 10 most important pieces - (2011) *The Politics of International Law*, Oxford, Hart. (2011), *The Cambridge Companion to International Law* (Co-edited with James Crawford) Cambridge: Cambridge University Press; (2005) *From Apology to Utopia. The Structure of International legal Argument*. Reissue with a New Epilogue. Cambridge, Cambridge University Press. (2001) *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (2002). Cambridge: Cambridge University Press. *Empire and International Law: The Real Spanish Contribution*, *University of Toronto Law Journal*, 61:1-36; (2010) *International Law and Raison d'état: Rethinking the Prehistory of International Law in The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* edited by B. Kingsbury and Benjamin Straumann Oxford, Oxford University Press, pp. 297-339; (2009) *Miserable Comforters. International Relations as a New Natural Law*. *European Journal of International Relations*, 15:395-422; (2007) *The Fate of International Law. Between*

In his first book *From Apology to Utopia* Koskenniemi provided a challenge to international lawyers and scholars in terms of engaging the effects of the politics of international law on the work of international lawyers.<sup>232</sup> In the book Koskenniemi sets out to provide a

disentanglement, that is, [...] an exposition and critical discussion of the assumptions which control modern discourses about international law. [...] In a sense, the whole international legal “talk” is an extended effort to solve certain problems created by a particular way of understanding the relationship between description and prescription, facts and norms in international life.<sup>233</sup>

He proceeds by identifying what he calls a “liberal theory of international politics” (sometimes also referred to as simply “liberalism” by Koskenniemi) shaping international lawyers’ understanding of international law.<sup>234</sup> According to

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Technique and Politics, *The Modern Law Review*, 70:1-32; (2002) Between Impunity and Show Trials. *Max Planck Yearbook for United Nations Law*, 6:1-36; (2002) The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law, *The Modern Law Review* 65:159-175.

<sup>232</sup> The importance of Koskenniemi’s challenge is well reflected in the reviews of both the first and second edition. Below follows just a selection of reviews that especially highlights Koskenniemi’s attempt to raise the discipline’s critical awareness. Rasulov, Akbar (2006) Book Review, *Law and Politics Book Review* 16:583; Elberling, Björn (2005) Book Review, *German Yearbook of International Law*, 712; D’Aspremont, Jean (2006) International Law as a Grammar: Koskenniemi’s *From Apology to Utopia* Revisited, *Global Law Books* 1; D’Aspremont, Jean (2007) Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi’s *From Apology to Utopia* revisited, *Revue québécoise de droit international* 19:353.

<sup>233</sup> Koskenniemi, Martti (2002) *From Apology to Utopia: The Structure of International Legal Argument* (New York: Cambridge University Press), p.4.

<sup>234</sup> *Ibid.*, p. 5.

Koskenniemi we need to engage with liberalism because our theoretical understanding of politics shapes our actions:

It is difficult to understand “liberalism” as materially controlling because it does not accept for itself the status of a grand political theory. It claims to be unpolitical and is even hostile to politics. It claims to provide simply a framework *within* which substantive political choices can be made. But, as I shall attempt to show, it controls normative argument within international law in a manner which creates ultimately unacceptable material consequences for international life.<sup>235</sup>

A liberal theory of politics is according to Koskenniemi primarily concerned with how the “international order exists to protect the freedom and to enhance the purpose of individual states” and that “it is clear that sovereign equality [...] is a liberal premise.”<sup>236</sup>

Koskenniemi sets out his problem in opposition to this liberal theory of politics because he thinks that as a theory it does not

accept for itself the status of a grand theory. It claims to be apolitical and is even hostile to politics. It claims to simply provide a framework *within* which substantive political choices can be made.<sup>237</sup>

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<sup>235</sup> Ibid.

<sup>236</sup> Ibid., p. 93. The omission involves a quote from Cassese reading [fundamental premise on which all international relations rest].

<sup>237</sup> Ibid., p. 5.

It is with reference to structural linguistics<sup>238</sup> that Koskenniemi embarks on what he called a “deconstructive analysis” of the practice and discourse of international law, using deconstruction as

less [of a] certain metaphysical doctrine than a method, a general outlook towards analyzing intellectual operations through which the social world appears to us in the way it does.<sup>239</sup>

Koskenniemi’s understanding of structural linguistics leads him to start off his analysis with the claim that the field is dependent on a number of operational dichotomies – for example “description/prediction” and “facts/norms”, “naturalism/positivism.” Most importantly claims about international law balances “politics” and “natural morality (justice).”<sup>240</sup> By equating justice with natural morality he introduces an essentialism that is the origin of his final hope in the pacifying force of profession of international lawyers.

Just as ‘naturally given’ that Koskenniemi’s definition of justice is it also seems as if we can take for granted what politics is to Koskenniemi since he does not give us an explicit definition of his understanding of politics. Koskenniemi’s understanding of politics is best derived and summarized from his references and general descriptions of political processes. Koskenniemi seems to understand politics as a practice derived from power politics and opposed to justice:

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<sup>238</sup> Ibid.,

<sup>239</sup> Ibid., p. 6.

<sup>240</sup> Ibid. 23.

there is a distinct discourse, called “international law” which is situated somewhere between politics and natural morality (justice) without being either. I shall concentrate, in particular, on the view that these distinctions can be maintained through seeing international law as objective in comparison to the subjectivity involved in politics and theories of justice.<sup>241</sup>

Rather than an account of actual events, Koskenniemi tries to achieve a sense of the structure of discourses of international law and its foundational normative values in order to understand the limits of possible legal arguments that are constructed within that structure.<sup>242</sup>

We do not choose to use the concepts of international law when we enter international legal discourse. Rather, we must take a pre-existing language, a pre-existing system of interpreting the world and move within it if we wish to be heard and understood.<sup>243</sup>

It is the language of international law that determines acts of international law. Koskenniemi struggles to come up with an opening for those stuck in the middle of international law’s oppositional dichotomies, like the Sami. If the Sami were to accept Koskenniemi’s description of how international law operates, they would have to also accept the idea of the modern politics that underpins it. It might very well be that Koskenniemi tries to develop a critical practice of international law

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<sup>241</sup> Ibid., also see the Epilogue.

<sup>242</sup> Ibid., p. 7.

<sup>243</sup> Ibid., p. 12.

but as we shall see, because of his technocratic emphasis, he fails to be critical of the practice of international law.

Addressing the division between theory and legal practice, his point is that the dichotomy necessarily produces two sides of the same coin.<sup>244</sup> Thus

although the participants believe that the terms are fundamentally opposing [...] they turn out to depend on each other. This will make the *problematique* appear as a false dilemma; the opposing positions turn out to be the same.<sup>245</sup>

Koskenniemi's conclusion is his now famous description of international law as the constant oscillation between "apologetic" and "utopian" arguments (or speech acts), an argument that re-states the old distinction between realism and idealism.<sup>246</sup> To Koskenniemi, apologetic arguments are those in which law only becomes an opportunity to present power political issues as ethically sound and on the other hand utopian arguments are those in which the notion of international law regresses into unattainable idealism.<sup>247</sup>

However, the oscillation that he mapped out lacked direction, with no teleological end in terms of a "better" or more peaceful world and this remains a critical

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<sup>244</sup> A point for which he is highly indebted to Jacques Derrida and his work on the aporetic foundations of law, especially see Derrida, Jacques (1992) "Force of law: The mystical foundation of authority" in D. Cornell and Michel Rosenfeld, eds. *Deconstruction and the Possibility of Justice*. New York, Routledge Chapman & Hall.

<sup>245</sup> Ibid.

<sup>246</sup> Koskenniemi, Martti. *From Apology to Utopia*. Op. cit., p. 9.

<sup>247</sup> Ibid., pp. 10-11.

problem to Koskenniemi because “criticism without an ideal of community is without direction and degenerates into cynicism”.<sup>248</sup> The fear of cynicism is a point that is muted in *Apology/Utopia* but comes through with much greater force in his later work because the moment Koskenniemi concluded his deconstruction of the field, his project became that of *overcoming* the “false dilemmas” and to reinsert some sense of human active agency in his understanding of the processes of international law. That insight seems to have been the origin of the desire to escape the aporetics he himself articulated that drives all of his subsequent work.

### ***The Gentle Civilizer***

Koskenniemi considers the book, in relation to his earlier work, a major shift since it in and of itself

constitutes an experiment in departing from the constraints of the structural method in order to infuse the study of international law with a sense of historical motion and political, even personal, struggle.<sup>249</sup>

Despite his methodological shift the problems that Koskenniemi tries to grapple with are the same as in his previous book and reflect concerns raised here in the previous chapter as he still seeks to “examine the rather surprising hold that a small number of intellectual assumptions and emotional dispositions have had on

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<sup>248</sup> Koskenniemi, Martti. *The Gentle Civilizer of Nations : The Rise and Fall of International Law, 1870-1960.*, Op. cit., 547.

<sup>249</sup> Ibid., p. 2.

international law during its professional period”.<sup>250</sup> He hopes that by filling the history of international law with personal struggle the lack of life, the dead formalism that he shuns, will abate.

Koskenniemi is still concerned with improving practice, that international lawyers should critically engage with the field’s normative assumptions, be more imaginative and thus “open [their] horizons”:

It may be *too* much to say that international law is *only* what international lawyers do or think. But at least it is that, and examining it from a perspective of its past practitioners might enhance the self-understanding of today’s international lawyers in a manner that would not necessarily leave things as they are.<sup>251</sup>

International law is thus primarily what international lawyers do and by learning from the predecessors within the profession we can create a more critical practice of international law.

Koskenniemi’s ambition with *The Gentle Civilizers* is to show that

[L]ike other social phenomena, international law is a complex set of practices and ideas, as well as interpretations of those practices and ideas, and the way we engage them or interpret them cannot be dissociated from the larger professional, academic or political projects we have. [...] International law is also a terrain of fear and ambition, fantasy

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<sup>250</sup> Ibid., p. 2.

<sup>251</sup> Ibid., p. 7.

and desire, conflict and utopia, and a host of other aspects of the phenomenological lives of its practitioners.<sup>252</sup>

Koskenniemi thus turns from the structural linguistics of his first book to what he calls “history.” In so doing he sets out to trace the development of what he calls a particular “sensitivity” shared by international lawyers over the last 150 years. According to Koskenniemi, this sensitivity consists not only of ideas and practices but also beliefs and faith, and he continues by tracing the development of this particular “sensitivity” through a number of personal experiences of balancing a “moderate nationalism with [a] liberal internationalism”.<sup>253</sup>

His intention is to

bring international law down from the epochal and conceptual abstractions [to] examine the way that it has developed as a career choice for internationally minded lawyers.<sup>254</sup>

However, the lawyers are all European, they are all men and they are all already established as epochal figures in conventional “grand” histories of international law; for Henri Rolin, George Jellinek, Hans Kelsen, Georges Scelle, Carl Schmitt and Hans Morgenthau. This is an important point since Koskenniemi at the beginning of the book claims that his intention is not to tell a “grand history”

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<sup>252</sup> Ibid., p. 7.

<sup>253</sup> Ibid., p. 6.

<sup>254</sup> Ibid., pp. 6-7.

which to him “would imply philosophical, methodological and political assumptions that are hard sustain.”<sup>255</sup> The effects of telling this particular story of the development of international law will be discussed further shortly.

Koskenniemi’s account of international law takes as the modern state as the natural place for politics and it reproduces a definition of law and politics that overlaps with the accounts of chapter 2. On an international level politics is equated with national interest, a point that Koskenniemi was more clear about in *From Apology to Utopia*. In his first book he acknowledged that international law can just as easily be co-opted in order to cover over the imposition of particular national interests as it is used to underpin idealized notions of a cosmopolitan society and thus also reproduce assumptions about the national and international divide.<sup>256</sup>

Following directly from this notion of politics, Koskenniemi refers to law outside of the nation state as “the process of articulating political preference into legal claims.”<sup>257</sup> However,

little [seems] to be gained by thinking about international legal argument as being ‘in fact’ about something other than law.<sup>258</sup>

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<sup>255</sup> Ibid., p. 48; p. 55.

<sup>256</sup> In as much as international law being apologetic of the interest of nation states as one of the possible position within the linguistic structure of international law.

<sup>257</sup> Martti Koskenniemi, (1997) Hierarchy in International Law. *European Journal of International Law* 8:568.

<sup>258</sup> Koskenniemi, Martti. *From Apology to Utopia: The Structure of International Legal Argument*. Op. cit., p. 564.

Law is distinct from politics but by nature highly politicized and easily corrupted by the powerful few to advance their particular interest, in the words of Koskenniemi it is a “hegemonic practice” disguised by references to universal values.<sup>259</sup>

International law does not only become highly politicized but also a social and cultural project where any limit to the exercise of power in the name of particular national interests can only be found in a sense of community;

Freedom and equality, however, can be realized only if the international world is understood as a political community, that is, a form of interaction where social power turns into political authority by claims about rights and duties that are universalizable, that is claims of law.<sup>260</sup>

Legal claims are thus the result of the channeling and synthesis of heterogeneous political claims. Koskenniemi continues by defining ethics exactly as an act of balancing where it is the balancing that guarantees that international law remains socially grounded rather than a vehicle for hegemonic power. Even though Koskenniemi draws our attention to the highly politicized nature of international

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<sup>259</sup> Ibid., p. 570.

<sup>260</sup> Ibid., p. 580.

law, he still places a naturally given ethics as articulated through international law as the ultimate limit of the exercise of political power.<sup>261</sup>

By putting the capacity of “balancing” in the hands of a few international lawyers Koskenniemi acknowledges he runs the risk of producing a highly discriminatory account and

[i]f all the protagonists in this book are white men, for instance, that reflects my concern to retell the narrative of the mainstream as a story about its cosmopolitan sensibilities and political projects: indeed to articulate precisely in what the limits of its horizons consisted. This should not, however, be read so as to exclude the possibility – **indeed the likelihood** – that in the margins for instance as objects of administrative regimes developed by or with the assistance of international lawyers, there have been women and non-Europeans whose stories desperately require telling so as to provide a more complete image of the profession’s political heritage. [my emphasis]<sup>262</sup>

That Koskenniemi is a middle-aged, white Western European who “acknowledges” even “the likelihood” of alternative experiences of modern international law is another paradigmatic example of the Euro-centrism of the discipline. In retelling the history of the development of the profession of international law through the protagonists that he choose, Koskenniemi reaffirms

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<sup>261</sup> And by continuation thus law becomes the naturally given ethic to the exercise of political power, see *Ibid.*, p. 579, and for a further articulation of the link between law, ethics and virtue see Koskenniemi, Martti and Päivi Leino, (2002). Fragmentation of international law? Postmodern anxieties. *Leiden Journal of International Law*, 15(03), 553-579.

<sup>262</sup> *Ibid.*, p. 9.

the image of modern international law as an exceedingly modern and European project, one that is closely connected to a progressivist philosophy of history and grounded in the enlightenment ambitions of achieving independence, freedom and equality on a global scale. This epistemological position is crucial to understand if we are to chart the “material effects” of Koskenniemi’s position.

A pertinent example of the effects of Koskenniemi’s epistemology is the chapter titled *Sovereignty: A gift of Civilization*. The chapter covers the years between 1870 – 1914, events like the Berlin Conference and themes such as “the myth of civilization”, “between universality and relativism” and “the limits of sovereignty”. It is a chapter that reflects many of the major concerns raised here like the centrality of the modern state, the negotiation between universality and particularities and an understanding of the dynamics of the modern world that locates the locus for historical change in Europe (and in the hands of international lawyers).

In 1875 the *Institute de Droit*, to Koskenniemi *the* vehicle for the development of modern international law in the 19<sup>th</sup> century,<sup>263</sup> was put in charge to see how international law could be applied “in the Orient”. According to Koskenniemi the work of the Institute shows how people at the time of the height of the colonial project viewed sovereignty as a reward for successfully civilizing – as the gift of civilization.

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<sup>263</sup> For an extended account of the work of the Institute see *Ibid.*, p. 98 to 178.

The reward received at time of national coming of age was the acknowledgement that colonized people were able to independently and legitimately rule their own country. According to Koskenniemi, whether colonized people could be considered ready to receive “the gift of sovereignty” was judged on the basis of whether or not the realization of self-rule resembled European ideas and practices of sovereignty.

The idea of being “civilized” was thus derived from European ideas of the proper (“civilized”) ways of doing modern politics. Whether or not an independent state would be allowed into the club of sovereign states was dependent on European recognition. Koskenniemi points out how sovereignty at the same time could be vehicle for liberation and at the same time a vehicle for subjugation:

Here was the paradox: if there was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approved, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove that they played by European rules, the more suspect they became.<sup>264</sup>

Koskenniemi suggests that Non-European states could never be fully recognized by the European since there was no external standard to judge civilization by. Since “modernity”, as a process of development, had originated in Europe and

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<sup>264</sup> Ibid., p. 135.

subsequently spread through the world, European countries would always be superior to non-European countries.

One further problem arose in this situation according to Koskenniemi. In its application outside of Europe the limits of sovereignty were unveiled. There were no guarantees that its application followed the *spirit of the law*, no guarantees that the whole idea of international law did not become a vehicle for particular, imperial ambitions.

Sovereignty as a legal concept ran the risk of being betrayed by the messiness of modern politics:

International lawyers were unable to safeguard the effective extension of the benefits of Western sovereignty into the Orient. [...] Despite criticism, protectorates continued to mean whatever the protecting power wanted them to mean. It was still possible to make extensive spheres of interest and *Hinterland* claims that had nothing to do with the civilizing mission.<sup>265</sup>

The problem to Koskenniemi was that international lawyers were unable to safeguard the benefits supposedly enshrined in a civilizing and thus liberating body of international law. Rather, politicians used international law to make legal arguments for the annexation of colonies without granting the colony any benefits

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<sup>265</sup> Ibid., 151.

under international law. This, to Koskenniemi meant that the civilizing mission that drove international lawyers to act was “betrayed” by power politics.

However, it turns out that it is the *failure* for international law to be a vehicle for political emancipation that allows for Koskenniemi to save the hope in the civilizing mission:

The story of international law and formal empire in 1870 – 1914 **may be** a story of arrogance, misplaced ambition, and sheer cruelty. But it is indissociable from the wider narrative of liberal internationalism that thinks of itself as the “legal *conscience* of the civilized world. [my emphasis]<sup>266</sup>

There are few people today who do not accept the “story of arrogance, misplaced ambition and sheer cruelty” that the colonial project entailed. By now conventional accounts of imperialism would see the violence done in the name of empire coalesce *with* and *driven by* a liberal internationalism for exactly the reasons that Koskenniemi himself brought up just pages earlier. But to Koskenniemi this is a misplaced notion of blame because “those institutions [like that of sovereignty] do not carry the good society with themselves,”<sup>267</sup> rather “institutions do not *replace* politics but *enact* them.”<sup>268</sup>

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<sup>266</sup> Ibid., p. 176.

<sup>267</sup> Ibid.

<sup>268</sup> Ibid., p. 177.

It is in his concluding remarks of the chapter that the importance of his formalism (in terms of a necessary separation of politics and law) shines through:

A colonial officer, an international administrator, and an indigenous politician may each be susceptible to corruption – but each may be equally able to organize the building of a school, a hospital or a department store. This is not to say that it should be a matter of complete indifference as to who should rule us, and which technique of rule is being employed. History may teach us to lean in one direction rather than the another. In particular, it may often suggest that it is better to live in a political society whose administrators speak our language, share our rituals and know our ways of life. But there is no magic about such relationship, and communities that are closed to outsiders will rot from the inside.”<sup>269</sup>

Building on his point that sovereignty is not necessarily a vehicle for emancipation in terms of recognition, the opposite is also true to Koskenniemi. The concept of sovereignty, as arising from a European experience of modernity, is not *necessarily* part of an oppressive, colonial political structure. As he says, a colonial officer might do just as good job as an indigenous chief in bringing about the liberating promise enshrined in the concept of sovereignty. The outcome is solely dependent on the context. By continuation, it is also not clear, that self-determination is a necessary good for indigenous people.

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<sup>269</sup> Ibid., p. 177 – 178.

To judge these situations we should rely on international lawyers and a notion of “facts and evidence” that Koskenniemi does not define:

[b]ut whatever the choice of institution, it should be a matter of debate and evidence, and not of the application of universal principles about “civilization,” “democracy,” or “the rule of law”.<sup>270</sup>

It is the problem of judging between particularities and universalities that haunts Koskenniemi. He criticizes “grand narratives” of the unfolding of modern, liberal values globally and at the same time he sets up his problem as one that can only be judged by some universal and “natural” ethical standard.<sup>271</sup> In the chapter on the gift of civilization it becomes clear that the Archimedean point for resolving the balancing between particular and universal experiences of modernity fundamentally remains the running of modern, European states. Since modernity is a process of maturing and developing, it is only through learning from our elders (the Europeans) that we can judge relative development.

To Koskenniemi, what was wrong with the imperial project and the process of decolonization was that the Europeans recognized rights without imposing the correlating duties. Sovereignty is only the gift of civilization if it successfully regulates the rights of a sovereign state with the obligations of belonging to a society of states. We need not follow Koskenniemi down the path of re-writing

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<sup>270</sup> Ibid.

<sup>271</sup> See the discussion on the naturalness of ethics in the previous section of this chapter, p. 164.

other peoples' experience of decolonization to acknowledge that balancing sovereign rights and duties is highly problematic within the politicized context of international law. For example we need merely to gesture to contemporary debates on the humanitarian intervention. However, what Koskenniemi sets up is again a moment of judgment, a moment where previously not sovereign peoples are deemed to modern enough to govern themselves, a narrative painfully present in the experience of the Sami. Chapter 1 showed how even the mandate of the Sami parliament was limited by the idea that the Sami are not democratically mature enough to be trusted to realize full self-determination in legitimate manner.<sup>272</sup>

Thus, the “gift” of sovereignty risks becoming a failed attempt at universalizing a particular experience of modernity. However, the juxtaposition between the “success” and “failure” of realizing modern state sovereignty outside of Europe badly covers the fact that Koskenniemi replays the same logic of universalizing a particular historical experience that he claims to critically distance himself from. He fails in his critical endeavor because he is recreating a perceived (and imposed) view of a separation between the experiences of modernity *outside* of Europe with a singular experience of modernity in Europe.

In the following chapter the work of Dipesh Chakrabarty in his book *Provincializing Europe* will help us to understand what is at stake in making such a separation between the west and the rest of the world. At this point it suffices to

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<sup>272</sup> See page pp. 65 – 72.

conclude that Koskenniemi, despite the best of intentions, executes a historical revision of the colonial experience to set-up a virtuous fight in the name of the global emancipation that Kant promised modern man. However, just as Kant told us, winning means that you disappear because virtue cannot be individual: virtue is, as Koskenniemi told us, dependent on the society within which we live – a heterogeneous, global and modern society.

What Koskenniemi laments when he reflects on the tremendously violent Western imperial project, is not the loss of life, or the loss of cultures and social structures but the loss of a language belonging to a civilizing mission that is not available to contemporary international lawyers. Now it is at least politically difficult to say, for example, that due to some mismanagement or corruption an African country might be more successfully govern by “a colonial officer”, “an international administrator” or “an indigenous politician”. It is also difficult to pursue a line of argumentation that sets up the “international lawyer” as the judge the moment at which a people is deemed capable of participating in world politics as a sovereign people. Had this been the case, then the Sami, following the lead of the European Court would still have been kept in the anti-chamber of the civilized playing fields of international law.

The Europe that Koskenniemi both criticizes and embraces returns in some of his more recent work on the eurocentrism of international law. After having pointed out how international law originated in Europe and how that has led to a

disciplinary focus on Europe he explores a number of possibilities for how to broaden the disciplinary horizon.

Among the possibilities he sees is

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. This approach might, for example, examine particular colonial actors – jurists, politicians, resistance fighters – using European concepts but turning them to support of a particular indigenous project or preference. [my emphasis]<sup>273</sup>

Despite the best of intentions international law remains a system originating in Europe and in which Europe remains the vehicle for historical change. According to Koskenniemi, heterogeneity of processes of international law it can be found in a diverse application of the original legal concepts.

If we return to the Sami we can see how part of their experience seems to reflect this point. As chapter one pointed out the work on the Sami claim to recognition on international law gave birth to an internal discussion about equality and what it

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<sup>273</sup>Koskenniemi, Martti. (2011). Histories of International Law: Dealing with Eurocentrism., *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte*, 19:173. Available at <http://igitur-archive.library.uu.nl/oratie/2012-0106-200353/UUindex.html>, June 12.

means to be a modern individual in the Sami community. This I think is what Koskenniemi means by hybridization of legal concepts. However, Koskenniemi's opening does not either allow for or explain why Sami feel empowered by international law. To him, actual active agency in relation to international law remains the privy of international lawyers. As such it is a system built on a particular philosophy of history, a centrality of sovereignty and statehood.

Koskenniemi is considered to be at the critical forefront of the discipline of international law but he leaves little to no room for voices, like the Sami, that structurally and historically have been marginalized. His horizon narrows because as he goes on he falls back on a conventional understanding of modernity. His account becomes paradigmatic of a discipline that reaffirms a spatio-temporal understanding of modern politics that considers Europe the motor of historical development. At one point Koskenniemi mentions that we are where we are today because of "histories that could have gone otherwise" and had he thought of the future in a similar way then perhaps he would have transcended the limits that he set out to overcome.

Hybridization as Koskenniemi describes it is not an opening for international law to reflect the fluidity of modern life nor does it actually reflect contemporary practices because Europe remains the static origin in a solid structure. Thus, the openings Koskenniemi sees are closed down immediately. It is exactly a need to "provincialize" this Eurocentric understanding of international law that is the main focus of the following chapter and the necessary starting point for attempts to produce an understanding of international law that mirrors the heterogeneity of

modern political life. In order to understand that it is essential to shift focus to what here has been argued is a discipline wide understanding of modernity that underpins the discipline of international law.

Koskenniemi concludes the book with a reference to the purpose of his scholarship:

What is this message? To put it simply, and I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power, that those who are in a positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing for meaningful distinction between lawful constraint and the application of naked power.<sup>274</sup>

Despite positing his whole project as a critique of the prevailing liberalism within the discipline, herein lies his return to a very particular philosophy of history and its apparent liberalism. The return is closely connected to a particular, largely unanalyzed philosophy of history that is derived from Kant and Hegel – a philosophy of history that produces a teleological account of modernity.

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<sup>274</sup> Koskenniemi, Martti. (2005) *The Gentle Civilizer of Nations : The Rise and Fall of International Law*, Op. cit., p. 502.

At moments like this, the general weakness of Koskenniemi's critical project is revealed. His project is to provide a profession with its language, its history and also its future. Koskenniemi's work thus produce a technocratic – legalistic attempt to breathe life not only into the legal formalism of the discipline but also breath life into the civilizing mission of international lawyers.

A feeling of disappointment and nostalgia for a lost opportunity to write the story of a “history that might have gone a different way” permeates Koskenniemi's account of these “heroic” individuals and it comes through with most force in his epilogue.<sup>275</sup> He accepts a complex interaction of law and politics that he spent his whole academic career trying to bring to the fore *but* he still places his faith in

a mild cosmopolitan progressivism: human rights, protection of the environment, peaceful settlement, preference for the universal over the particular, integration over sovereignty in the *commitment to international law*.<sup>276</sup>

It is by positioning international lawyers as the mediators between realism and idealism where Koskenniemi truly embarks on his task of breathing some life into the formalism that to him ensnared the discipline of international law. It is also in this claim that we see his view on law and politics being reflected, something that needs to be explored if we are to understand how international lawyers become mediators.

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<sup>275</sup> Ibid., p. 511.

<sup>276</sup> Ibid., p. 512.

## Martti Koskenniemi – what to bring with us?

In Koskenniemi we find a particular version of a civilizing notion of law as a system that checks and balances the exercise of sovereign power without which we can have neither legitimate law nor legitimate politics. He describes the full function of law as a *culture of formalism*:

I would like to invoke formalism as a horizon of universality, embedded in a *culture* of restraint, a *commitment* to listening to others' claims and seeking to take them into account. [...] Formalism as critique.<sup>277</sup>

As gestured towards earlier, a culture of formalism is necessary because without legal regulation politics can easily be coopted by power alone. We also need a standard by which to judge situations and make decisions:

If there is no truth, there is no ideology. Politics becomes only a clash of incommensurate “value-systems” none of which can be rationally preferred.”<sup>278</sup>

Thus, after worked hard at opening up the discipline of international law to the politicization of international legal processes Koskenniemi’s problem is to understand that he himself is caught between acknowledging how politicized the application of law is and at the same time holding on to a formal understanding of

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<sup>277</sup> Koskenniemi, Martti. (2002) *The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law*, Op. cit., p. 161.

<sup>278</sup> Koskenniemi, Martti. (2005) *The Gentle Civilizer of Nations : The Rise and Fall of International Law*, Op. cit., p. 505.

law and its link to an ideal notion of ethics. Based on a felt necessity to ultimately distinguish between the processes of law and politics Koskenniemi describes his greatest fears by invoking Schmitt:

when everything is politics, ...nothing is. Without the ability to articulate political visions and critiques international law becomes pragmatism all the way down, an all encompassing internationalization, symbol and re-affirmation of power.<sup>279</sup>

Despite recognizing the *politicization* of international law, law remains the *limit* of politics, the limit that guarantees the condition of *possibility* of legitimate politics.

Koskenniemi questions whether or not hope in the public law institutions is still sustainable or if it is a hope eternally caught between “cosmopolitan humanism and imperial legalism”.<sup>280</sup> He questions what will happen without the gently civilizing ethos of international law and future of humanity is one framed by realist power politics:

if there is no perspective-independent meaning to public law institutions and norms, what then becomes of international law’s universal, liberating promise?<sup>281</sup>

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<sup>279</sup> Ibid., p. 509.

<sup>280</sup> Ibid., p. 513.

<sup>281</sup> Ibid., p. 513.

This seems to be Koskenniemi's greatest fear, that if we give up on thinking about international law as a force for furthering universal ideals then we generally also give up on values like liberty, equality and the idea of a global humanity.

Koskenniemi's formalism remains a regulative principle, but is a regulative principle caught up in the aporetic dynamics of international law. What Koskenniemi suggests by making international law the balancing act between realism and idealism is that both realism and idealism are highly politicized. Thus the only way out of this Kantian problem, the only way to chart a more peaceful future is to locate the way forward somewhere else, somewhere outside the aporetic logic of international law

The necessity to keep law independent from law is also mirrored in Koskenniemi's concern with the danger in allowing actors other than international lawyers to be involved in processes of international law. He fears the influence of technocrats in international organizations, managers of international projects, politicians and other academics:

‘[I]nterdisciplinarity’ often comes with a dubious politics. I am particularly thinking of the kind of ‘managerialism’ that suggests that international problems – problems of ‘globalization’ – should be resolved by developing increasingly complicated technical vocabularies for institutional policy-making. One encounters this often in the suggestion to replace international law’s archaic *mores* by a political science-inspired language of ‘governance’, ‘regulation’, or ‘legitimacy’. The managerial approach is

critical of the formal aspects of the legal craft that it often sees as an obstacle for effective action. Its preference lies with informal ‘regimes’ and its focus is on (the fact of) ‘compliance’ rather than (normative) analysis of what there is to comply with.<sup>282</sup>

International law should be the reserve of international lawyers and their focus should lie on what law there is out there to comply with, a classical restatement of the type of formalism that dominates the field of international law. Bureaucratic politics within the structures of international law becomes the greatest threat of the future of the civilizing process. Koskenniemi’s insistence on a professional history of international law is a reflection of historicist assumptions and driven by a need to create a future for the “gentle civilizers” of our days

By progressive denaming, by successive revelations of the complex reality that underlies familiar names, inherited with the institutional baggage they specify, the Liberal historicist succors a tragic-realist vision of the world, and, by dissolving the impulse to absolute commitment, ironically labors for a minimal but hopeful freedom for his heirs.<sup>283</sup>

Since international law itself does not embody the civilizing ethos that gave birth to it in the first place, Koskenniemi creates space for his hope in the increased self-reflection and maturation of international lawyers. This coming-of-age story

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<sup>282</sup> Koskenniemi, Martti. (2009). The politics of international law—20 years later. *European Journal of International Law*, 20(1):15.

<sup>283</sup> White, Hayden. (1975). *Metahistory: The historical imagination in nineteenth-century Europe*. Baltimore: JHU Press, p. 229.

of international lawyers is reflected in the Epilogue to *From Apology to Utopia*, a piece that received much attention at the time of re-print.<sup>284</sup>

The Epilogue begins with a story about a barrister, a “professional gentleman” who at the later stages of his life feels that he has failed to achieve one of his life-goals, that of “furthering the welfare of his people.” The sense of failure is brought about by a realization that modernity with all its promise of emancipation can also be a force of destruction. To understand how progress can “divide its fruit very unevenly”, the barrister turns to philosophy and social science with the hope “to find intellectual reassurance and perhaps a more efficient platform from which to continue his civilizing activities.” His philanthropic work was not only a failure in terms of its civilizing mission, the barrister also ended-up retiring “a poor man.” His sons reacted to his misfortunes in two ways; the “good son” set out to prove his father right, to confirm that everything would be “as it had been” and “the rebel son” reacts by rejecting his father’s ideals.<sup>285</sup>

The two sons were both successful despite their methodological differences because of “their ability to give powerful expression to something that many felt intuitively”, and their success is solely dependent on “the strength of their commitment.” Both love and power, as represented by the two sons respectively, matter as part of processes of international law, and we should be comforted that there still are a few professional international lawyers out there who act as the

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<sup>284</sup> See the previously mentioned reviews, p. 160.

<sup>285</sup> Koskeniemi, Martti. (2005) *The Gentle Civilizer of Nations : The Rise and Fall of International Law*, Op. cit., p. 510 - 517.

“juridical conscience of the civilized world” despite knowing that power politics plays a crucial role in issues framed in terms of international law.

The story can easily be read as a story about the discipline of international law’s loss of naïve idealism and the disciplinary turns that followed. However, just as the case with Kennedy, it easily reads as Koskenniemi’s romantic tale of coming-of-age. Schiller’s *The Robbers* is a paradigmatic example of the genre and is, just as Koskenniemi’s version, built around the disillusioned father Maximillian and his two sons: Frank and Karl. Maximillian is the benevolent father who at the later stage of his life feels that he failed to raise either of his sons properly. Frank, exuberant and much loved by his father, sets out as an idealist who turns to crime to achieve his ideals. Charles, the younger and cunning son, employs ice-cold rationalism to achieve his own ambitions. As the story unravels it becomes clear that the dividing line between the two, idealism and realism, is not easy to identify.

Many commentators take Maximillian to personify the modern nation state, a dream of a rational and egalitarian society that the French revolution showed the world was very difficult to achieve. The story of the two sons tells us that a perceived dichotomy between idealism and realism is false. One son becomes the other in order to achieve his goals and vice versa illustrating a dialectical relationship in which the characters are forever fluid and changing. It is a structure with no way out, no given sense of historical development but rather a structure that can only produce change within itself. As the next chapter will show, with the help of Dipesh Chakrabarty, this internal dialectic relationship is where we can

start to search for an understanding of international law that mirrors the complexity of modern life.

*The Robbers* is a play about the interplay between innocence and heroism seen through the oppositions between realism and idealism but it is also a story of the role of (failed) education.<sup>286</sup> In Schiller's story, read as a criticism of the French revolution, Europe is the father figure and history is a history of coming into being of mature modern Europe. The father has failed in educating his sons and the effects are the body of the story, the bewilderment at the chaos that is the result of reason being "overrun by the irrepressible forces of unreason against which reason had insufficient defences".<sup>287</sup> Despite having placed himself in the armchair, Koskenniemi makes a crucial difference between him and the image of the father.

Koskenniemi frames his scholarship in a similar way as Schiller's play unfolds but casts himself (and international lawyers) as a mother figure working in opposition to power politics. In order to underscore the importance of the maternal instincts and commitment of international law, Koskenniemi sets his profession up against one of the iconic the realist father figure of modern power politics, George Kennan.

The epigraph to *the Gentle Civilizers* reads

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<sup>286</sup> Schiller, Friedrich. (2004). *The Robbers and Wallenstein*. Digireads. com Publishing.

<sup>287</sup> Schorske, Carl E. (1981) *Fin-De-Siècle Vienna: Politics and Culture*. Cambridge: Cambridge University Press.

I cannot resist the thought that if we were able to ... refrain from constant attempts at moral appraisal – if, in other words, instead of making ourselves slaves of the concepts of international law and morality, we would confine these concepts to the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest in which they find their true value – if we were able to do these things ... then, I think, posterity might look back upon our efforts with fewer and less questions.<sup>288</sup>

The conclusion of the Robbers is that power can corrupt as much as it can be a vehicle for good. Judging from Koskenniemi's work, he seems comfortable to rest on the same romanticist foundation that many of the gentle civilizers before him. He becomes one of the many tragic, European heroes of international law who has unveiled that international law can be a vehicle for both liberation and subjugation. Contemporary politics suggests that we have not understood that to successfully steer the waters between Scylla and Charybdis we need the guiding, motherly and educational consciousness of the civilizing international lawyers.<sup>289</sup>

In reaffirming his faith in a professional ethics of international lawyers, Koskenniemi suggests a vision of international law where only the sufficient commitment to law can guarantee that international law remains a force for good. That international law remains a force for good is also a condition of possibility for politics to operate in an accountable fashion. Thus, the mature conscience of

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<sup>288</sup> Koskenniemi, Martti. (2005) *The Gentle Civilizer of Nations : The Rise and Fall of International Law*, Op. cit., p. V.

<sup>289</sup> The image is Koskenniemi's, Ibid., p. 504.

international lawyers is the only guarantee of that the future of modern man is anything but nasty, brutish and short.

International lawyers should not focus on methodological questioning of that what we take to be knowledge or facts, but rather on continuously articulating a notion of the virtue of international law. Koskenniemi's sense of nostalgia, and the need for commitment arises from the fact that theoretical debates have made it too easy to question the gently civilizing power of international lawyers in the name of "particularity", "post-colonial" theories or even in the name of competing "universalisms".

The possibilities of understanding the intrinsic heterogeneity of modern life as reflected in international law that I try to open up here do not appease his anxiety because of technocratic hope in the professional ethos of international lawyers. Koskenniemi acknowledges the importance of the question and begins the *Gentle Civilizer* by acknowledging a need for international law to mirror the heterogeneous experience of the modern world when he comments on the demographics of the characters in his book

If all protagonists in this book are white men, for instance, that reflects my concern to retell the narrative of the mainstream as a story about its cosmopolitan sensibilities and political projects: indeed to articulate precisely in what the limits of its horizon consisted. This should not, however, be read so as to exclude the possibility – indeed, the likelihood – that in the margins, for instances as objects of the administrative

regimes developed by or with the assistance of international lawyers, there have been women and non-Europeans whose stories would desperately require telling so as to provide a more complete image of the profession's political heritage.<sup>290</sup>

It is almost by inflection, a sleight of hand that he both opens up and immediately shuts it down for the possibility of heterogeneous experiences of international law. To suggest that there is a 'likelihood' for multiple experiences of international law *that* also helped to *shape* international law is problematic because it is highly exclusionary not only in terms of characters like Martti Koskenniemi but more importantly because it neglects the importance of the experiences of the victims, losers and marginalized peoples in shaping international law.

For example, if we focus on the Nuremberg trial alone when we look at how international law developed post-war then we would suggest that the atrocities that came before it did not play a crucial role in developing international law. To Koskenniemi it is only as actors subsumed within a system built by international lawyers that someone not a lawyer could find a space to exercise some type of active agency.

Moreover, just as important as both victims and marginal champions might be according to Koskenniemi, they are not as important as the story of the gently civilizers that he chose to write down. No one can be denied to tell the story he wishes to tell but in telling one particular story you need to be open to criticism in

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<sup>290</sup> Ibid., p. 9.

terms of what the *function* of tell such story is. Koskenniemi's project is a highly Eurocentric, modern project and, within the framework of a discipline trying to come to terms with the effects of its Eurocentrism and modernism, gesturing to the *possibility* that someone else but white European men might have an impact is just not critical, productive or simply good enough.

The effect of telling and reaffirming this particular of modernity and the purpose of doing so remains muted throughout Koskenniemi's account. To him the reason for embarking on the project was to

provide a historical contrast to the state of the discipline today by highlighting the ways in which international lawyers in the past forty years have failed to use the imaginative opportunities that were available to them, and open horizons<sup>291</sup> beyond academic and political instrumentalization, in favor of worn-out internationalist causes that form the mainstay of today's commitment to international law. [...] The limits of our imagination are a product of a history that *might have gone another way*. There is nothing permanently fixed in those limits. They are produced by a particular configuration of commitments and projects by individual, well-situated lawyers.<sup>292</sup>

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<sup>291</sup> Every finite presentation has its limitations. We define the concept of "situation" by saying that it represents a standpoint that limits the possibility of vision. Hence an essential part of the concept of situation is the concept of "Horizon." The horizon is the range of vision that includes everything that can be seen from a particular vantage point.... A person who has no horizon is a man who does not see far enough and hence overvalues what is nearest to him. Contrariwise, to have an horizon means not to be limited to what is nearest, but to be able to see beyond it.... The working out of the hermeneutical situation means the achievement of the right horizon of enquiry for the questions evoked by the encounter with tradition. Gadamer, Hans-George. (1988) *Truth and Method*, Trans., Ed. Garrett Barden and John Cumming. New York: Crossroad Publishing Co. p. 269.

<sup>292</sup> Koskenniemi, Martti. (2005) *The Gentle Civilizer of Nations : The Rise and Fall of International Law*, Op. cit., p. 5.

Koskenniemi's technocratic focus is what sets his "horizon" and he does not seem particularly concerned that other actors, like the Sami, also are in charge in "producing" a particular configuration of commitments and projects. Despite representing a story that according to Koskenniemi's own words "desperately needs to be told" there are no space for alternative experiences of international law if we were to follow his lead.

## 5. Limits dissolved - All that is Solid Melts into Air

When, as we saw in chapter one, the Swedish state tried to draft legislation recognizing the Sami as an indigenous people, the responses to the draft highlighted a number of points, some more surprising than others. Different Swedish state agencies argued opposite positions and the several responses from the Sami community revealed rifts in what often is considered a homogenous group. On the whole, the process revealed that international law as a political process could look different from what we imagine and it can take place in venues we normally do not consider.

Another very interesting point that emerged in the context of how indigenous people can access and make use of international law was the differing views on the character of the “authentic” indigenous people and their relationship to development, a relationship often conceived of as driven by the necessity of the indigenous people to protect their “authentic” culture from impositions and influence from the predominant society. In the case of the Sami we saw another dynamic play out; while the Swedish landowners and some state agencies want to impose an idea of original, historically “frozen” Sami culture on the Sami community, the Sami on the other hand are arguing for a right to develop on their own terms, that their culture is not stagnant but rather very much alive and continuously evolving.

In the context of the Sami living in Sweden, this point is most often played out in relation to hunting and reindeer breeding. The question is whether or not the Sami

can make use of new technology and *at the same time* base their hunting and breeding rights on an idea of practices that go back to time immemorial. The Sami hunters often bring forth claims that argue for a right to develop in relation to the development of the world around them while their opponents press for the notion that the moment they part ways with “traditional Sami ways” then the Sami lose any immemorial rights.

The textbook categories of different types of actors, processes and venues where international law is supposed to take place do not really seem to be able to fit a reality where definitions are anything but neat and processes anything but easily defined. What we have seen in the previous chapters is how the discipline of international law approaches processes of international law in terms of an idea of the modern world as ordered according to introductory textbooks on international law and politics. The spatial structuring of world politics is more often than not (as chapter two and three have argued) coupled with a teleological understanding of the development of the modern world, which reproduces hierarchical power relations also in time. The discrepancy between understanding the world in terms of these solid structures and processes and the dynamic, buzzing, fluid and often contradictory nature of human life around the world becomes increasingly difficult for both practitioners and theoreticians to understand and sustain.

As we saw in the case of Koskenniemi, the perplexity as to the fluidity of modern life often creates a sense anxiety among those dealing with international law. Contrary to a disabling sense of anxiety, and as we saw in chapter one, the Sami community with their multiple-pronged strategy to criticize the Swedish state

seems quite happy to embrace a complex and dynamic sense of modernity where given categories and definitions do not have to be considered as set in stone.

Rather, if we look around us we can sense and see a modern world that is dynamic, messy and alive; that breaks through the crust of fixed structures; that responds to changes; that reminds us of the past and also alters our futures. It is thus to explore a dynamic sense of the modern world that becomes the focus of the following chapter. What if Marx was right in suggesting that, in the modern world, 'all that is solid melts into air'. What are the implications for international law?

The previous chapter focused on Martti Koskenniemi and found one of the most interesting attempts to engage the question of the politicization of international law and the effects of what he identified as a foundational “theory of liberal politics”. His analysis was produced at a time when the discipline primarily discussed whether or not a system of norms impinged on national sovereignty and how international norms could be considered a social system.<sup>293</sup> In this context Koskenniemi drew the attention of the discipline to having to consider both the

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<sup>293</sup> An influential and paradigmatic example of this type of discussion is Martha Finnemore, now University Professor at the Elliott School of International Affairs at George Washington University. Her 1996 book *National Interest in International Law* in which she argued for the idea that national interest are social constructed within an existing international society outlines the major philosophical ground for “constructivism”. Her review *Norms, Culture, and World Politics: Insights from Sociology's Institutionalism* published in the journal *International Organization* of the same year gives an excellent general introduction of the scholarly debate see Finnemore, Martha. (1996) Norms, Culture, and World Politics: Insights from Sociology's Institutionalism, *International Organization*, 50:325-347.

particular structure of international norms and the processes that take place within and without those structures.

Koskenniemi's points concerning the processes and purposes of international law in order to illustrate how what plays out in his scholarship is an anxious search for a final resolution to the impossible dilemmas of modernity and the constant negotiation of between progress and destruction, liberation and subjugation, inclusion and exclusion. In searching for a final resolution Koskenniemi is presented with a number of ultimate choices that he often reduces to strict dichotomies. The anxiety arises from the impossibility of choosing between any two options. Is development progress or subjugation? Is the extension of human rights liberation or oppression? Is the spread of market economy good or bad? The anxiety arises from the fact that we have a structural, solid way of thinking about modernity that tells us that historical development is linear and that to be modern is to achieve certain status: to be emancipated, liberated, developed, democratized and so on.

### **Challenging Limits – effects of claims to modernity**

The main point of this chapter is that if we replace this idea of modernity as something solid with a much more fluid understanding of the modern world then we can also see how international law is one of many tools that we can use in order to engage political problems of modernity and its effects of so doing on peoples, groups and actors traditionally thought of as falling outside of international law. Before turning to alternative visions of the modern world with

the help of Marshal Berman and Dipesh Chakarbarty we will briefly look at how one common criticism of international law as an imperial structure and force also replays a very similar vision of modernity.

As we have seen in the realization that his methodology leads him to foundational paradoxes of international law, Koskenniemi admits that paradoxes cannot be rationally overcome but can only be either effaced or conflated into mere oppositions, in his case, the most telling one being the opposition between law and politics. In trying to salvage the process of ‘gently civilizing’ the world, the overcoming of chaotic and irrational politics, Koskenniemi puts his faith in law and international lawyers. This is where the last chapter ended, with a grand historical narrative positing the “horizon of universality” in direct opposition to a feeling of chaos of the modern world.<sup>294</sup>

The argument made previously is that Koskenniemi’s understanding of the structures and processes of international law and his resulting anxiety is an indication of the mode of thinking of academics throughout the discipline. Koskenniemi thus provides an illustration of the core dynamics of the discipline on the whole. Despite Koskenniemi’s attempts to criticize the politics of liberalism that he sees underpinning the discipline, he underwrites a very similar narrative of modernity as something solid, as a status to be achieved (the modernized world) and as a historically linear idea of development.

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<sup>294</sup> In many ways this feels very much as if we are back to where we started with Donnelly and Kennedy in Chapter 2.

The anxiety Koskenniemi feels arises from the fact that somehow his image of international law does not overlap with the actual practice of international law. International law is anything but a solid structure and even if the perceived purpose of international law is to provide order in an otherwise chaotic world, then international law has fallen short of its own standards. World political events also seem to suggest that the development of international law is everything but the teleological progression of the realizations of man's enlightened freedom. Thus, the project of civilizing has failed, the world has become chaotic and the only thing to do is to stake out a particular role for international lawyers as continuously heroic gentle civilizers.<sup>295</sup>

Before we look into how a deeper understanding of modernity as a alive and fluid state, rather than the achievement of a particular status (that of being civilized) there is one alternative answer to Koskenniemi's vision, namely, that Koskenniemi's conception of international law is primarily imperial, it has historically been a tool to establish European control of world politics and will remain exactly that for the foreseeable future. The reason why we briefly will look at this alternative vision at this point is to illustrate how even the gravest critics of "mainstream" international legal scholarship replays a very similar understanding of the modern world.

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<sup>295</sup> Here it is easy to draw direct parallels to what was earlier referred to the disciplinary-wide sense of epistemic uncertainty in the face of among other things the "retreat of the state", see pages 106-112.

There is undoubtedly merit to this analysis and it warrants our attention since one of the purposes of this text is to explore the possibilities of re-imagining international law as a tool for critique against all sorts of political practices that do not recourse to language and ideas that pit cultural difference against universalist ideals of independence and freedom.

### **International Law as Imperial Power – Antony Anghie**

Antony Anghie is best known to the discipline of international law as having articulated one of the most nuanced and insightful criticism of the western-centrism of the discipline. The purpose of his book *Imperialism, Sovereignty and the Making of International Law* is in his own words to show how “colonial confrontation is central to an understanding of the character and nature of international law, [and] that the extent of this centrality cannot be appreciated by a framework which adopts as the commencing point of its inquiry the problem of how order is created among sovereign states.”<sup>296</sup> In making this point, Anghie picks up on critiques very similar to those previously raised here in terms of the historicist assumptions that underpin the discipline of international law and how these operate to continuously allow re-affirmation of this particular understanding of modernity.

Anghie locates the continued balancing act between universality and particularities in what he calls a “dynamic of difference” and a “language of

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<sup>296</sup> Anghie, Anthony (2005) *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press) p. 36.

development”,<sup>297</sup> and the effect of so doing is that “it was in the universal function of “development” of national society as a whole that the post-colonial state would find its distinctive content.”<sup>298</sup> The nation state, or the “becoming” of an independent nation state was the organizing principle and imperialism was always the defining characteristic of international law because it set the structures within which newly independent states would operate.

In other words, Anghie seems to suggest that recognition was never recognition of independence alone but rather recognition of the independent state becoming subsumed under a system of international law that to the same extent as previous colonial systems was moved by imperialist ambitions (even though the ambitions are framed in terms of market ambitions rather than in terms of colonial imperialism). In so doing he does make the very important point that there is no natural distinctive moment when international law moved on to become “non-imperial” or post-colonial.

This idea of the continuity of the structures and processes of international law is reflected in Anghie’s comment on the emergence of a global human rights regime:

[h]uman rights is the one area of international law that is explicitly committed to the protection and furtherance of human dignity. Globalization, with the inequalities that it

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<sup>297</sup> Ibid., p. 204.

<sup>298</sup> Ibid., p. 205.

promotes, challenges if not threatens the integrity of human rights law, precisely because it uses human rights law as a means of furthering itself.<sup>299</sup>

He continues by looking at International Financial Institutions (IFI's) and how they, by linking human rights to the concept of good governance, have “in recent times used their enormous power to transform Third World societies to satisfy the interest of the rich, industrialized countries.”<sup>300</sup> To Anghie, human rights, in this context, becomes the furthest extension of an imperial structure, easily employed by those in power. Anghie is not the only one who raises this critique against human rights in this way. Perry Anderson has written on that which he calls the hypocrisy of Europe.<sup>301</sup> The question however, is **whether that is all** that human rights are? Is that their only function? If the answer is yes, then what happens to those peoples, persons and actors that can primarily rely only on human rights in order to articulate critiques against current power relations and societal structures?

Concluding his book with an analysis of the “war on terror”, Anghie points out how “international law is now being subjected to various pressures that might ultimately result in the emergence of an international system that permits, if not endorses and adopts, quite explicitly imperial practices.”<sup>302</sup> In contrast with Koskeniemi, it is not that international law is being overtaken by irrational politics but rather that imperial politics have always been at the heart of the

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<sup>299</sup> Ibid., p. 256.

<sup>300</sup> Ibid., p. 263.

<sup>301</sup> Anderson, Perry. (2007) "Depicting Europe." *London Review of Books* 29(18): 13-21.

<sup>302</sup> Anghie, Anthony. (2005) *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press, Cambridge. p. 274.

system (a system that now seems to face the threat of becoming even more of a vehicle of imperial ambitions). Anghie continues: “the colonial origins of the discipline are re-enacted whenever the discipline attempts to renew itself, reform itself. At one level, then, the old doctrines created to further colonialism are difficult to reform; at another level, new international law doctrines somehow reproduce the structure of the ‘civilizing mission’ [...]”<sup>303</sup>

The heroes of Koskenniemi’s account have become foot soldiers in an imperial structure operating by continuously re-victimizing those who have historically been marginalized through processes of international law. Anghie finds the only possibility for change in the influence that “general principles of law” have, as one of the source of international law outlined in article 38(1) of the Statute of ICJ.<sup>304</sup> “General principles of law” denote the possibility to fill gaps by drawing upon municipal law, a possibility that is by some viewed as an opening for international legal pluralism.<sup>305</sup> Unfortunately, up to this point the idea of mirroring some type of legal pluralism in international law has achieved little success in both theory and practice.<sup>306</sup> From a more theoretical perspective, what Anghie hopes to achieve is “to clarify one aspect of the history of the discipline in the hope of illuminating its operations sufficiently to enable us to assess its results

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<sup>303</sup> Ibid., p. 313.

<sup>304</sup> Ibid., p. 237.

<sup>305</sup> For a well-argued exploration of what happens when ideas of legal pluralism is applied to international law (as a juxtaposition of international the ambitions of international lawyers to view the development as one of ‘fragmentation) see Berman, Paul. (2007). Global legal pluralism. *Southern California Review*, 80:1155-1238.

<sup>306</sup> Very little proof of the influence of local or national legal systems can be found in actual case law and many international lawyers are dismissive concerning the possibility of national legal practice being translated into norms that can be used within official legal procedures and venues where international law is practiced.

against our sense of justice; and in so doing, empower us to make, rather than simply replicate, history.”<sup>307</sup>

However, the goal of understanding how we can become producers of history rather than its products, to become producers of international law rather than merely its products, seems difficult to achieve if we follow Anghie’s logic. There is no doubt that Anghie agrees that the cost of his conclusion is exactly that those peoples, persons and groups historically marginalized and victimized will remain marginalized and victimized.

The key to understanding how Anghie ends up reinforcing a notion of international law that he started by criticizing, lies in realizing that he replays a very similar idea of modernity that we have located at the heart of mainstream scholarship, with the important difference that he sees the effects of the spreading of modernity from Europe across the globe not as a process of liberation but in terms of a process of submission and domination.

Modernity remains a state of solidity, market forces run by the rich and privileged reinforce a social structures that continuously exclude those who historically been excluded by the same processes. If we want to re-conceptualize international law we have to acknowledge that what international law “is” is not pre-determined; it does not follow in any simple way from Kantian principles but nor does it follow simply from power politics. Instead international law is a way of doing politics, a

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<sup>307</sup> Anghie, Anthony (2005), *op. cit.* p. 320.

way that engages us for good or for bad, and that demands our attention as political scientists. The question that remains is whether this mode can be conceived of as fluid and dynamic and not forced and ineffectual as Anghie argues.

In trying to question Anghie's conclusion, that international law is first and foremost an imperial force (even if framed in terms of human rights) we need to continue by focusing on themes not only central to the liberal theories addressed previously, but also central to critiques like Anghie's: the concept of development and the idea of modernity as modernization, the coupling of industrialization and the spread of liberalism (both political and economic). Anghie convincingly argues that these are key concepts that need to be considered in order to fully appreciate the processes and purpose of international law.

Previously, it became obvious that since Koskenniemi only envisaged progress, or development, as being an infinite approximation to a given ideal, his greatest challenge, as an international lawyer, became that of explaining the discrepancy between his ideals and the actual world that he works with and within.

Koskenniemi does what also Kennedy does: in the face of perplexing contradictions and a world that that seems more chaotic than before, the only way forward is to retain faith in your ideal values. However, in order to question the limits of understanding international law like this we need to take a step back from the ideal categories so easily employed within the discipline and re-assess whether "development" in this context can mean only a civilizing process in terms

of the spread of particular enlightenment ideals, then perhaps we can begin to re-conceptualize our understanding of international law.

### **Fluid modernity**

The following section serves two particular purposes, firstly, to discuss alternatives to the idea of modernity as fluid and ephemeral in order to re-conceptualize international law as a dynamic modern political practice. The analysis is heavily indebted to the writing of Marshall Berman and in particular his book *All that is Solid Melts Into Air*. The second point, building on the first, argues that idea of the enlightenment and teleological development of modernity in relation international political development can be fruitfully engaged with the help of post-colonial theory. In so doing we can also engage the question of what seems to be a discipline-wide Euro-centrism. This part draws inspiration from Dipesh Chakrabarty and especially his book *Provincializing Europe*. Brought together the two thinkers can help us understand how international law could be viewed as one of many modern political tools that we can make use of in order to engage political problems of modernity.

#### ***Marshall Berman's All That is Solid Melts Into Air***

We left Koskenniemi (and many of the other international lawyers) in his armchair, feeling nostalgic over a civilizing process that could have gone otherwise. The civilizing project of the spread of international human rights norms has gone wrong and still has not reached its goal, which is a more peaceful and stable world built on equality and autonomy. However, Koskenniemi ends by

saying that we have to have faith in the progress of history, eventually human development will reach its goal. It is his underpinning teleology and the solidity that it gives to modernity, that in the end makes it impossible for Koskenniemi to fulfill his own critical project. This is why we find him in an armchair overcome with melancholy at the end of his book; current world politics does not conform to his hopes for mankind and it is only our faith in ultimately doing good that keep us going.

Marshall Berman's *All That is Solid Melts Into Air* (the title a reference to Marx's the Communist Manifesto) gives us a possibility to overcome this sense of melancholy and to move our focus away from a teleological understanding of historical development and instead embrace a much more messy and dynamic idea of modern life. In order to understand Berman's "modernism" as a way of living in the modern world it is important to clarify that to Berman "modernity" stand for the technological, financial, political, social and cultural changes that are directly linked to the industrial revolution and the shared experience thereof.<sup>308</sup> As Berman explains

there is a mode of vital experience – experience of space and time, of self and others, of life's possibilities and perils – that is shared by women and men all over the world today. I will call this body of experience "modernity".<sup>309</sup>

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<sup>308</sup> Of course this is only one aspect of modern life as will be showed later – we will call it History 1.

<sup>309</sup> Berman, Marshal. (1987) *All That Is Solid Melts Into Air: The Experience of Modernity*. London: Verso, , p. 15.

“Modernization” are all of the processes through which modernity is being realized and “modernism”, as Berman defines it, are all of the attempts to make us feel at home in a world where modernization has turned the traditional world on its head.<sup>310</sup> The point here is to try to shift from thinking about modernity primarily as a historical epoch with a given trajectory (and thus also a given past and future) to focus on what tools are employed by individuals, peoples and society to grapple with the modern political and social problems constitutes a move from object to subject, from understanding man as not only the product of history but also as a producer of history.

According to Berman we should focus on how people *experience* their historical context in order to see the effect of this shift from object to subject. Berman begins his book by defining what he means by “modernism”:

modernism as any attempt by modern men and women to become subjects as well as objects of modernization, to get a grip on the modern world and make themselves at home in it. This is a broader and more inclusive idea of modernism than those generally found in scholarly books. It implies an open and expansive way of understanding culture; very different from the curatorial approach that breaks up human activity into

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<sup>310</sup> In accounts dependent on an idea of modernity as the unfolding of enlightenment ideals globally, “modernity” was taken to stand for modernization (i.e. technological, industrial and financial developments) and at the same also with the development of liberal politics. Because of the teleological historicism (often based on the irrefutable logic of capitalist development) foundational to these type of arguments, the possibility of responding or changing the modern trajectory on behalf of peoples, persons or actors not at the center of power is generally viewed as non-existing. The major concern thus becomes how to adapt or when to adapt to a modern way of life in order to do as little as possible violence to that which is left behind.

fragments and locks fragments into separate cases, labeled by time, place, language, genre and academic discipline. [...] It [this broad and open way] creates conditions for dialogue among the past, the present and the future. It cuts across physical and social space, and reveals solidarities between great artists and ordinary people, between residents of what we clumsily call the Old, the New and the Third Worlds.<sup>311</sup>

In achieving this goal the book spans from Goethe's Faust through Marx and Baudelaire to St. Peterburg in the 1860s, and Brazilia and Robert Moses' New York in the 1960s. Despite the fullness of the book and for the purpose here, the focus will lie on the first chapter that consists of Berman's analysis of Goethe's *Faust* entitled "*the Tragedy of Development*". The point is to try to understand and explain not only Koskenniemi's sense of loss but also how the modern tension between liberation and subjugation and development and destruction is a core dynamic of the international law.

Berman introduces Faust to the reader "as one of modernity's cultural heroes". Concluded in 1831 it is a story of the successful but yet melancholic and disillusioned Faust who at the moment when he is about to end his own life in despair is approached by Mephistopheles and strikes a deal with him. His melancholy is caused by the fact that Faust feels that his personal success is built

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<sup>311</sup> Ibid., p. 5-6. Berman continues: "certainly this is not the only way to interpret modern culture, or culture in general. But it makes sense if we want culture to be a source of nourishment for ongoing life, rather than a cult of the dead."

only on “triumphs of inwardness” and it leaves him despairing for a connection with the world.<sup>312</sup>

What Mephistopheles offers Faust is the opportunity to overcome the disabling despair that has caught Faust in its grip, being torn between the secluded life of the intellectual and the desire to have real positive effect on the society around him. Mephistopheles’ part of the bargain is to give Faust the power to balance the paradoxes of modern life, the paradoxes that just moments earlier tore Faust apart. Mephistopheles describes his cosmic role as the “spirit who negates all” and Berman comments on this by pointing out how “paradoxically, just as God’s creative will and action are cosmically destructive, so the demonic lust for destruction turns out to be creative.”<sup>313</sup> The bargain thus rests on Faust’s desire to harness Mephistopheles’ destructive forces in order to create something good.

In striking a deal with the devil the paradoxical dialectics of modern life is unveiled to the reader. In the words of Berman:

Faust yearned to tap the sources of all creativity; now he finds himself face to face with the power of destruction instead. The paradoxes go even deeper: he will not be able to create anything unless he is prepared to let everything go, to accept the fact that all that has been created up until now – and, indeed, all that he may create in the future – must be destroyed to pave way for more creation. This is the dialectic that modern man must

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<sup>312</sup> Ibid., p. 41.

<sup>313</sup> Ibid., p. 47.

embrace in order to move and live; and it is that dialectic that will soon envelop and move the modern economy, state and society as whole.<sup>314</sup>

Berman draws attention too the all-familiar character of modernization that we today often enough forget about, that development (towards greater riches, faster cars or personal liberation) always comes at a cost that we, mankind, are responsible for. No longer can man blame the gods or the spirits, the world has become human-made and therefore we are responsible for the destruction that comes in the wake of construction - with the realization that the world is now human-made comes the burden of *both* freedoms *and* responsibilities.

What drives Faust, as the modern developer, to strike a deal with the devil is his desire to be a part of the world, to change the world for the better – to destroy old social orders so new ones can be constructed. The desire to get rid of old social orders is the desire for bringing into being a community of mankind in which we are all equal and in which we share desires and feelings, suffering and happiness. What distinguishes the modern bourgeoisie is exactly the desire for self-betterment and that that self-betterment is reflected in the development of society at large. In the words of Gramsci, the modern bourgeoisie “poses itself as an organism in continuous movement, capable of absorbing the entire society, assimilating it to its own cultural and moral level.”<sup>315</sup> When Faust feels the despair caused by the isolation of his self-development, it is the desire to see and feel the

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<sup>314</sup> Ibid., p. 48.

<sup>315</sup> Gramsci, Antonio. (2009). Hegemony, intellectuals and the state. *Cultural theory and popular culture: a reader*, p. 260.

reflection of those emotions and development in society at large, he wants “for himself [...] a dynamic process that will include every mode of human experience, joy and misery alike, and that will assimilate them all into his self’s unending growth; even the self’s destruction will be an integral part of its development.”<sup>316</sup>

Faust’s drive to develop in terms of personal and social betterment thus personifies those processes that cause Berman to describe modernity as the condition in which all that is “solid melts into air”, where even that which is built and achieved today can be torn down tomorrow all in the name of further self-development and further betterment of all.

We will see later how Faust is driven to fervor by this desire to improve the life of the society around him, to the extent that the seemingly purposeless nature of the movement of the sea annoys him and that he must be able to harness the force of the sea for the purpose of man. If we return to Faust after his deal with Mephistopheles, the desire to live has returned to Faust, Mephistopheles gives him all that he needs to realize his modern yearnings and this is the moment of his metamorphosis into a modern developer.<sup>317</sup> The violence that his modern desires to develop have to inflict on traditional ways of living is illustrated by his doomed love for Gretchen and the sad end she faces. Faust loves Gretchen, however she symbolizes everything from the past that needs to be sacrificed in the process of

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<sup>316</sup> Berman, Marshall (1987). *Op. cit.*, p. 40.

<sup>317</sup> *Ibid.*, p. 50.

modernization. Faust is so fulfilled by the power of being a creator driven by the desire to change the world for the better that he explains away the role he played in Gretchen's tragedy by reflecting that "human growth has its human cost."<sup>318</sup> The remark is a lucid realization that Gretchen despite wanting to be a part of Faust's new world was just too weak to take the step into the modern world but at the same time was too aspirational to be able to return to her village once she left. Tradition is as unforgiving as development in Goethe's account. Gretchen shows a profoundly felt affinity on behalf of Faust to the human spirit of being a part of the modern world despite not managing to negotiate it.

As the modern developer Faust has completed what Berman sees as the modern metamorphosis, at this point Faust connects "his personal drives with the economic, political and social forces that drive the world; he learns to build and destroy. He expands the horizon of his being from private to public life."<sup>319</sup> He conquers the old world, tears down old building and replaces them with new constructions. He conquers nature and constructs "a radically new social environment that will empty the world out or break it down." Faust knows that the successful completion of the project will cause immense hardship on the people and he accepts that price. He has become "the dark and deeply ambiguous figure" called "the developer".<sup>320</sup> When he has managed to obliterate every single trace of the old world he has succeeded and as he overlooks his creation he utters the ominous words "*Verweile doch, du bist so schoen!*"

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<sup>318</sup> Ibid., p. 57.

<sup>319</sup> Ibid., p. 61.

<sup>320</sup> Ibid., p. 63.

However, the modern world is the world in which all that is solid melts into air. It is a world in which fluidity is the necessary condition for the betterment of all, where solidity might stand for that which has been achieved but at the same time also stands for achievements that can be further developed. The moment the developer stops moving, stops creating, the moment he succeeds in his mission he has eliminated the very reason for his being in the world in the first place and the devil returns to collect his soul.<sup>321</sup>

What Berman draws our attention to is that Goethe's Faust, in his activity as "the developer" who is driven by the desire to change the world for the better, is an archetypal modern hero. But the developer, as Goethe conceives of him, is tragic as well as heroic and Berman continues:

In order to understand the developer's tragedy, we must judge his vision of the world not only by what it sees – by the immense new horizons it opens up for mankind – but also by what it does not see: what human realities it refuses to look at, what potentialities it cannot bear to face. Faust envisions and strives to create a world where personal growth and social progress can be had without significant human cost. Ironically, his tragedy will stem precisely from his desire to eliminate tragedy from life. [...] It appears that the very process of development, even as it transforms a wasteland into a thriving physical and social space, recreates the wasteland inside the developer himself. This is how the tragedy of development works.<sup>322</sup>

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<sup>321</sup> Ibid., p. 70.

<sup>322</sup> Ibid., p 66.

Koskenniemi will never be able to overcome the limits of the process of establishing a system of international law and human rights because he cannot accept that that is a project with no end. He will not accept that international law, or human rights are not a status to be achieved all for once but rather a dynamic process full of the promise of both destruction and construction. It is a process within which each success brings about the empowered subject using newly found agency to criticize the very system that brought about that metamorphosis.

The modern world appears to us somewhat differently at this point, instead of a given process of “progress” towards a teleological goal (most often than not man’s mature liberty in an equal society), modernity has emerged as a state of promise and pain, construction and destruction and one, just as Goethe knew, that cannot become an achieved status. The modern world is one of continuous creation and destruction, a world in which all that is built and achieved today can be torn down and recreated tomorrow – there is nothing that is solid about the modern world. Instead the modern world is fluid and dynamic and full of life!

Recall Berman’s description of modernity as “a mode of vital experience – experience of space and time, of self and others, of life’s possibilities and perils – that is shared by women and men all over the world today.”<sup>323</sup> Unless we face the moment of destruction (in the name of construction) and violence (in the name of liberation) we will never be able to either discuss or oppose the cost with which development is carried out – the process with which we conceive of our future

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<sup>323</sup> Ibid., p. 15.

would be completely depoliticized in as much as we will never fully discuss the cost of its realization. If human rights is a given ideal, absolute and never changing, then alternative ways of life will always have to be destroyed in the name of progress. Within this scheme of international law it becomes impossible to see how human rights can be employed by a people like the Sami to argue *for* the right to development, for the right to change, for the right of not having to remain *only* a trace of history but rather an active participant in a modern society.<sup>324</sup>

Following from Berman's point is that nothing is ideally given about modernity and the way we relate to the modern world: in other words, man plays an integral role in building and sustaining modern life. As Berman notes in his concluding remarks on the Faustian bargain: "as members of modern society, we are responsible for the direction in which we develop, for our goals and achievements, for their human costs."<sup>325</sup> This is Goethe's story, a story of trying to replace a world governed by uncontrolled and unaccountable forces (may that be God or an absolute monarch) by one governed by humans, a shift that also bring to humanity that unimaginable responsibility of being responsible for the world within which we live. Modernity is the source of man's liberation and at the same time source of limitless responsibility.

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<sup>324</sup> An often articulated answer to the Sami's demand for the right to usage and passage over land based on immemorial right is that because the Sami now use snowmobiles while reindeer herding and plastic lassoes then they have changed beyond recognition from the indigenous people they claim to be – they have, in other words, become modern. As modern men they are equal, and only equal, to all other modern, Swedish men.

<sup>325</sup> Ibid., p. 85.

Berman seems to be saying that from now on we are never only objects of modernity but also subjects of modernity. Michel Foucault described the effect of thinking about man as both object and subject of historical processes as:

Power is exercised through networks, and individuals do not simply circulate in those networks; they are in a position to both submit to and exercise this power. They are never the inert or consenting targets of power; they are always its relays. In other words, power passes through individuals. It is not applied to them.<sup>326</sup>

As Berman pointed out man has to take responsibility for his role in creating the modern world, take responsibility for the human cost of development and we are not only subject to these historical processes, but they pass through us, we can channel their force and make use of it. Remember the very beginning of Berman's book, the first quote, describing modernism is all of our attempts to make ourselves at home in the modern world,<sup>327</sup> the body of tactics, all of the tools that we make use of in order to balance the paradoxical forces of the modern world. If we believe that this is also true for international law then we must be objects *and* subjects, products *and* producers of history. What we have seen playing out within the discipline of international law is the anxious search for a final resolution of impossible dilemmas of modernity and the same anxiety that we see played out in other academic disciplines and in other aspects of modern life.

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<sup>326</sup> Foucault, Michel, Mauro Bertani, Alessandro Fontana, Francois Ewald, and David Macey. (2003) *Society Must Be Defended: Lectures at the Collège De France, 1975-76*. New York: Picador, p. 29.

<sup>327</sup> Berman, Marshall. (1987) *Op. cit.*, p. 5.

If we accept the image of a fluid, modern world we can start to see what is at stake in understanding international law as a modern political process of both promise and pain. Within the discipline of international law the idealized universal ultimately reoccurs as a given, or alternatively the infinite approximation of a given. In Koskenniemi it is the ideal of freedom that is given and in which we should put our faith, in Anghie's case the universal is a concept integral to Western imperialism. Both display a logic of a universal ideal with which particularities have to be balanced. Even if there is a sensitivity to the fact that this universal is not absolute, something we can see in the influence Derrida's *l'avenir* has had on some thinkers in the field of international law,<sup>328</sup> it remains idealized and void of human experience and life. Rather we must think about any universals displayed in or through international law as being constantly re-defined by particular practices.

### ***Dipesh Chakrabarty and Provincializing Europe***

Dipesh Chakrabarty, describes the ambition of *Provincializing Europe* in terms of a desire to articulate "how we might find a form of social thought that embraces analytical reason in the pursuit of social justice but does not allow it to erase the question of hetero-temporality from the history of the modern subject."<sup>329</sup> Modern history to Chakrabarty does not *only* become the story of the imposition of European values on the rest of the world *but also* a story of how the values that

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<sup>328</sup> See for example Douzinas, Costas. (2000) *The end of human rights: Critical legal thought at the turn of the century*. London: Hart Publishing.

<sup>329</sup> Chakrabarty, Dipesh. (2000) *Provincializing Europe: Postcolonial Thought and Historical Difference*. Princeton, N.J.: Princeton University Press, p. 239.

modernization embodied gave birth to a number of counter processes founded in a capacity of voicing social critique outside the logic of liberalism.

Chakrabarty describes his project as

[t]he project of provincializing “Europe”, the Europe that modern imperialism and (third-world) nationalism have, by their collaborative venture and violence, made universal. Philosophically, this project must ground itself in a radical critique and transcendence of liberalism (that is, of bureaucratic constructions of citizenship, the modern state, and the bourgeois privacy that classical political philosophy has produced).<sup>330</sup>

Chakrabarty emphasizes how the project of provincializing Europe cannot be a project of cultural relativism because that would suggest that all the social, political, cultural and scientific aspects of historical development that defined modernity in the European and extra-European context is necessarily only “European”. His point is not to dismiss the spread of enlightenment ideals but rather to look at how “‘reason’, which was not self-evident to everyone, has been made to look obvious far beyond the ground where it originated. If a language, as has been said, is but a dialect backed up by an army, the same could be said about narratives of “modernity” almost universally today, which point to a certain “Europe” as the primary habitus of the modern.”<sup>331</sup>

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<sup>330</sup> Ibid., p. 42.

<sup>331</sup> Ibid., p. 43.

In this context Chakrabarty describes the work in *Provincializing Europe* as the attempt to realize “the idea [...] to write into history of modernity the ambivalence, contradictions, the use of force, and the tragedies and ironies that attend it.”<sup>332</sup> The Europe that is “being provincialized” is not an actual historical, political or territorial entity but “an imaginary figure that remains deeply embedded in *clichéd and shorthand forms* in some everyday habits of thought that invariably subtend attempts in the social sciences to address questions of political modernity in South Asia.”<sup>333</sup>

What Chakrabarty identifies as the issues at stake – the un-engaged employment of a particular understanding of history and modernity within disciplines dealing with or describing modernity – directly mirrors the issues and themes identified here as problems persistent critical limits to the discipline of international law. According to Chakrabarty the process of “provincializing” consists of acknowledging that “European thought is for once both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations.” The European experience of modernity is simply one experience of modernity and it by no means exhausts the experience of *all* modernities. Instead of focusing on applying what we have learned from the particular, European experience of modernity we should focus on “the task of

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<sup>332</sup> Ibid..

<sup>333</sup> Ibid., p. 4.

exploring how this thought – which is now everybody’s heritage and which affect us all – may be renewed from and for the margins.”<sup>334</sup>

Chakrabarty does not argue with the fact that many of the processes that we identify with modernity (industrialization and the social and political changes that often follow) took place first in Europe. What he is arguing with is the role that the idea (hyper-real Europe) of modern Europe has played in constructing historical narratives that continuously places European at the forefront of the rest of the world, placing between the two a given historical trajectory of development. The process of provincializing Europe must begin with acknowledging two points Chakrabarty argues: that the perception of Europe as the origin of modernity was integral to European imperialism (giving rise to the feeling of having to civilize “the rest” of the world) and secondly, that this image of “modern Europe” affects not only European self-perception but has as much effect on how narratives of “modern Europe” have been employed by third-world nationalisms.<sup>335</sup>

Most accounts of international law is based on an understanding of the progress of history as a teleological process of the spread of enlightenment values from Europe to the rest of the world. Thus, any prediction for the future of international law is shaped by a belief in the teleological development of that historical process. Chakrabarty instead is presenting an idea of modernity and historical development

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<sup>334</sup> Ibid., p. 16.

<sup>335</sup> Ibid..

that focuses on the discontinuities, ruptures, and shifts of history. In his own words he is challenging “the idea of development and the assumption that a certain amount of time elapses in the very process of development.”<sup>336</sup> It is by following his lead in trying to counter “maneuvers reminiscent of the old “dialectical” card trick”<sup>337</sup> with a way of thinking of global history in a manner even if “hyper-real Europe” dominates the narrative which we can come to understand how international law and its reference to universality can be a vehicle for diversity of human experience rather than an imperial, monolithic and pre-given force as was the case for Anghie. To understand the relation between global history and the multitude of particular histories or historical differences Chakrabarty turns to Marx, with special emphasis on how Hegel’s idea of the becoming in time of a human totalizing unity plays a crucial role in Marx’s critique of global capital.

Following Marx, Chakrabarty posits that there is a “universal and necessary history [that] we associate with capital,” which he calls History 1.<sup>338</sup> History 1 also has a past, a pre-History 1 viewed as the precondition for History 1. As has been highlighted previously, History 1 is often conflated with European modern history and due to this conflation it has been possible for “modern” Europeans to address the rest of the world as pre-modern. Put differently, History 1 has been made to present global capital as exactly the history of the unfolding in time of a totalizing global unity or destiny.

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<sup>336</sup> Ibid., p. 23.

<sup>337</sup> Ibid., p. 38.

<sup>338</sup> Ibid., p. 63.

History 2s are by the same logic viewed as *antecedents* of capital, in that capital “encounters them as antecedents” but, - and here follows the critical distinction that needs to be highlighted – “not as antecedents established by itself, not as forms of its own life-process.”<sup>339</sup> As History 1 presents a linear progression towards a given goal History 2s are not the past of History 1 (as pre-modern is to modern), neither are they pasts that are completely separate from History 1 (as cultural relativists would argue) but rather, “they inhere in capital and yet interrupt and punctuate the run of capital’s own logic.”<sup>340</sup> It is a process of being and constant becoming at the same time, and if “considered together [History 1 and History 2s] destroy the usual topological distinction of the outside and the inside that marks debates about whether or not the whole world can be properly said to have fallen under the sway of capital.”<sup>341</sup>

It is imperative to emphasize that History 2s are not, as we are often led to consider, the dialectical Other of History 1: if we did that we would return to the problem of the domination of History 2s by History 1 (as History 2s inevitably would be subsumed within History 1). Rather, “History 2 is better thought of as a category charged with the function of constantly interrupting the totalizing thrusts of History 1.”<sup>342</sup> In illustrating this point Chakrabarty turns to the Indian constitution. At the moment of its drafting the European, modern understanding of

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<sup>339</sup> Ibid.

<sup>340</sup> Ibid., p. 64.

<sup>341</sup> Ibid., p. 65-66.

<sup>342</sup> Ibid., p. 66.

a liberal, legitimate constitution contained a limitation to suffrage, only those mature enough, educated enough could be considered to be entrusted with playing a role in the political process. In response to this the Indian constitution was of the first constitutions that rested on universal suffrage. Talking about the European, imperial project in general and the experience of India in particular, Chakrabarty explains this as the possibility for the subalterns to make use of modern political concepts as liberty, equality and brotherhood in response to European denial of claims to independence as:

the “not yet” [to demands for independence, freedom and equality] to which the colonized nationalists opposed his or her “now.” The achievement of political modernity in the third world could only take place through a contradictory relationship to European social and political thought.<sup>343</sup>

The effect of the Indian constitution can be seen far extending the geographical boundaries of India and today the idea of, for example, that only educated Europeans or Afghani would be allowed to vote does seem absurd. History 2 thus interfered and changed the course of History 1.

It is by thinking about history in these terms that we can also understand how historical difference, or multiplicity can be understood in relation to what often appears as a totalizing historical process. It is with reference to Marx’s idea of a “politics of human belonging and diversity” that Chakrabarty describes the space

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<sup>343</sup> Ibid., p. 9.

that opens up as “a ground on which to situate our thoughts about multiple ways of being human and their relationship to the global logic of capital.”<sup>344</sup> By returning to the aim of Chakrabarty’s project we can see the implications of his analysis of historical process and its mechanics, which in his description serves “to produce a reading in which the very category of ‘capital’ becomes a site where both the universal history of capital and the politics of human belonging are allowed to interrupt each other’s narrative.”<sup>345</sup> The universal is always only a placeholder that has been “usurped by a historical particular seeking to present itself as the universal.”<sup>346</sup>

This is where we arrive at the most pertinent point of Chakrabarty’s analysis - that particularities, or different historical experiences, are not deviations, exceptions or limit conditions (i.e. the dialectical Other) of a perceived or proclaimed universal, but in as much as they are particularities they continuously affect that which is considered to be universal. It is not the infinite approximation of a given ideal that we find in Kantian inspired theories of liberal politics, it is not *only* given by political power and it is not only dictated by material interests, but rather Chakrabarty draws our attention to the ongoing modification of History 1 by History 2s.<sup>347</sup> Through particular practices or experiences the universal is modified and thus it becomes an ever-changing process.

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<sup>344</sup> Ibid., p. 67.

<sup>345</sup> Ibid., p. 70.

<sup>346</sup> Ibid., p. 70.

<sup>347</sup> Ibid., p. 251.

To provincialize Europe in relation to our understanding of historical process and change is to always “hold in a state of permanent tension a dialogue between contradictory points of view” and not to fall for the temptation to view the two as oppositions between which we must make a choice.<sup>348</sup> We must, according to Chakrabarty “create conjoined and disjunctive genealogies for European categories of political modernity as we contemplate the necessarily fragmentary histories of human belonging that never constitute one or a whole.”<sup>349</sup>

Chakrabarty’s point seems to be that in order to overcome thinking about history as a totalizing teleological process (“a future that is singular” and already given by our present)<sup>350</sup> we must recognize the heterogeneity not only of the past and the present but also of the future. The presence of multiple futures that already is gives rise to the “constant and open-ended modifications of the future that “will be” by the futures that “are”.”<sup>351</sup> Chakrabarty draws our attention to how academics within the social sciences dealing with one or many aspects of the unfolding of liberal principles easily fall into the trap of thinking about practices which do not fall within our own definition of “modern practices” as “anachronistic if not reactionary”.<sup>352</sup> In so doing there is a return to a uniform and totalizing logic of historical development and social justice. A complete rejection of shared experiences is not the answer to conflicting practices, rather we have to understand how our commitment to social justice, which has a discontinuous

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<sup>348</sup> Ibid., p. 245.

<sup>349</sup> Ibid., p. 255.

<sup>350</sup> Ibid., p. 249.

<sup>351</sup> Ibid., p. 251.

<sup>352</sup> Ibid., p. 253.

genealogy traceable to the enlightenment is constantly modified by the plurality of ways of being human in the modern world: i.e., there is no either/or question in relation to the constant “negotiation of universality and particularity” because there is no contradiction to begin with.

Before we go on to continue to explore this process of constant and plural modification and its effect on our understanding of international law, it is important to address that much critique has been levied against Berman and also Chakrabarty, primarily phrased in terms of how modernity as a historical condition has passed and we have entered a post-modern world. A very interesting articulation is Perry Anderson’s response to Berman’s book *Modernity and Revolution*.<sup>353</sup> Anderson argues the world and thus the historical conditions that drive Berman’s historical process do not exist anymore, rather, the last traces were gone by the end of World War II:

The ambiguity of aristocracy, the absurdity of academicism, the gaiety of the first cars or movies, the palpability of a socialist alternative, were all now gone. In their place, there now reigned a routinized, bureaucratized economy of universal commodity production, in which mass consumption and mass culture had become virtually interchangeable terms.<sup>354</sup>

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<sup>353</sup> An argument that he developed much further in his 1998 book *The Origins of Postmodernity*, New York: Verso.

<sup>354</sup> Anderson, Perry. (1992) *A Zone of Engagement*. New York: Verso, p. 107.

Or as Anderson puts in his *The Origins of Post-modernity* “Postmodernism is what occurs when, without any victory, that adversary is gone.”<sup>355</sup>

The engine of Berman’s historical process, the growing middle class with a desire to develop and modernize society had become complacent and unengaged.

Another problem has also appeared, if development is driven by the modern individual’s desire to unlimited self-development how is any sense of community (especially global) possible?<sup>356</sup> Talking about the demise of the original sensibility that Anderson locates as modern, he also brings to the fore that the historical conditions for this sensibility do exist elsewhere if not in Europe, “for in the Third World generally, a kind of shadow configuration of what once prevailed in the First World does exist today.”<sup>357</sup> Here we can see the benefit of reading Berman together with Chakrabarty because in many ways Chakrabarty constitutes a response to Anderson’s critique of Berman in as much as he brings to the fore the multiplicity of modern experiences and how modernity outside of Europe was not a “shadow” of European experience but an integral part of its historical development. The type of creative force, the desire for development and realization of social justice described by Berman was a sensibility and strategy successfully employed in instrumental ways also outside of Europe.

## **Fluid Modernity and International Law**

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<sup>355</sup> Anderson, Perry (1998) *The Origins of Postmodernity*, New York: Verso, p. 86.

<sup>356</sup> Anderson, Perry (1992) Op. cit., p. 109.

<sup>357</sup> Ibid., p. 109.

To people commenting on international law Chakrabarty's conclusion can offer a way to engage the problematic liberal underpinnings of the discipline. We can start to re-imagine international law not as an infinite approximation of an ethereal ideal – of good, of being human or of global humanity – but rather as a set of modern political practices. These political practices share a great affinity with the political processes described historically by Chakrabarty.

In previous chapters we identified, within the discipline, a pervasive understanding of modernity and a certain historicism that produced by that understanding. In the previous section of this chapter we engaged that understanding with the help of Marshal Berman and his account of modernity as a process of contradictory forces, of construction and destruction, of submission and liberation where “all that is solid melts into air.” Read together they provide an opportunity to re-frame our understanding of processes on international law in order to also grasp its potential not as a given ideal but as a political practice and as a tool for critique of state practice, employing the idea of social justice without recourse to a language that pits cultural difference against universalist ideals.

To claim that there are a multitude of experiences of international law is nothing new; this is the basis of a variety of critiques voiced against its perceived universalist ambitions.<sup>358</sup> It is also the basis for much more engaging and

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<sup>358</sup> See Anne Orford's *International Law and Its Others* for what can be conceived of as an attempt to open up the discipline to a wide range of alternative experiences of international law. Orford, Anne. (2006) *International Law and Its Others*. Cambridge: Cambridge University Press.

sophisticated work looking at how we see norm-production in relation to international law.<sup>359</sup> However, what remains at the basis of all of these accounts is the dialectical relation between the core and periphery, the norm and the exception and the universal and the particular.

This is exactly the entrenched logic that Chakrabarty's insights can help us to engage because he tells us that we need to look at all the occasions when we can see a universality that permeates and is permeated by numerous particularisms. Our understanding of the function of international law must be one that takes into account how ideas of social justice are produced, reproduced and communicated in a multitude of fashions. We have to take on the challenge to avoid reductionist accounts, in this context avoid falling back into a liberal legal formalism and instead make an argument for meaningful experience that is *both* dependent on and independent of the structures that frame our actions.

The following chapter will illustrate that the idea of universality closely connected to particularities and the idea of international law can be easily worked into what is considered to be a foundational moment within the discipline of international law namely the debate between Hans Kelsen and Carl Schmidt. The argument is that in so doing argue that the logic described here already rests at the heart of that which we take modern international law to be. But theory is not our only concern here and the relevance of re-conceptualizing our understanding of international

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<sup>359</sup> Rajagopal, Balakrishnan. ( 2003) International law from below: Development, social movements and third world resistance. Cambridge: Cambridge University Press.

law will be illustrated by not only a return to the Sami but it will also draw on a wide range of examples from all parts of the world and segments of society.

## 6. Fluid Modernity and International Law – Hans Kelsen v. Carl Schmitt

The exploration of Marshall Berman and Dipesh Chakrabarty ended with a call to avoid reductionist accounts of international law. This insight opens up our understanding of international law to also include the fact that human experience continuously alters the structures within which we operate – that we can be both producers and products of international law. Before continuing to draw upon current events to further illustrate this point this section will focus on how this suggestion is not new to the discipline, rather it rests at the very heart of that which can be called the contemporary discipline of international law, namely, in the disagreement between Hans Kelsen and Carl Schmitt.<sup>360</sup>

Repeating a very similar critique as was presented against the discipline's treatment of Koskenniemi's scholarship the point here is that rather than reading Kelsen and Schmitt as conflicting accounts they are actually the two parts of a full description of form and force of international law. Read together it appears that they provide accounts similar to that which we bring with us from the previous chapter will emerge. This is essential to scholars of international law if we accept not only Koskenniemi's story as to what international law was and is, but if we accept that his account unveils a fundamental problem that needs to be engaged.

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<sup>360</sup> Koskenniemi in his *Apology/Utopia* refers their conflicting views as “the structure of the problem.”, Koskenniemi, Martti. (2002) *Op. cit.*, p. 236 – 238.

This is not to say that this is the only account of what international law was and is, there are many meaningful engagements with international law that has chosen to re-frame international law in completely different ways. As I have argued earlier on, this text attempts to shift our understanding of international law with the starting point in international law as it framed the Sami experience, a frame that by its reliance on a certain understanding of modernity, the modern state and sovereignty makes the return to Hans Kelsen and Carl Schmitt a meaningful one.

On the one hand, we have Kelsen, whose pure theory of law “attempt[ed] to answer the question of what and how law *is*, not how it ought to be. [The theory of pure law] is a science of law (jurisprudence), not legal politics.”<sup>361</sup> On the other hand we have Carl Schmitt who dismissed Kelsen and claimed that the validity of a system of norms had to do with actual political power and that a legal system was merely a *form* of sovereign power.<sup>362</sup> They did engage in an actual exchange of ideas concerning their differences in an exchange concerning the notorious article 48 of the Weimar constitution where Schmitt’s exceptionalism seemed to have triumphed over Kelsen’s constitutionalism. However, the “debate” between the two referred to within the discipline of international law primarily concerns the two authors’ view of the legal justification of international law and the relation between international and national legal systems.

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<sup>361</sup> Kelsen, Hans (1967) *Pure Theory of Law*. Berkeley and Los Angeles: University of California Press., p.361.

<sup>362</sup> Schmitt, Carl. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: Chicago University Press, p. 11.

A brief outline of both positions<sup>363</sup> will provide a general idea of Kelsen's and Schmitt's respective arguments concerning the basis for sovereignty, the validity of law and how the relationship between a national and international legal system could be conceptualized and justified. This gives us the opportunity to explore what can be gained by reading them as part and parcel of one unified description of international law, and how read as such they illustrate the intrinsically modern tensions inherent to conceptions of the international and to the processes of international law.

### **Kelsen – Peace Through Law**

To Kelsen, the search for a legitimate foundation of national sovereignty was a question of the validity of its system of norms. The purpose of creating a “pure theory of law” was to create a science of law, one that did not involve questions of politics, morals or religion. Important as these issues are to Kelsen they are not issues pertaining to a pure theory of law. Kelsen argued that law was a “social technique” used “to create order within society” and as a technique it was not related to a concept of justice. The question of whether or not a legal order is just or not was, according Kelsen, a “political and not [legal] scientific” question.<sup>364</sup> In order to purge law of politics, Kelsen defined the state as only existing as, and

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<sup>363</sup> The amount that can be said (and has been said about both) is astounding. For further introductory descriptions of both position I would suggest the excellent piece by Hidemi. Suganami (2007) Understanding sovereignty through Kelsen/Schmitt. *Review of International Studies* 33:511-530.

<sup>364</sup> Kelsen, Hans (1999) *General Theory of Law and State*. London:Lawbook Exchange Ltd., p. 5. Justice in this case is linked to happiness, but not everyone can be happy all the time. How we decide to negotiate where to draw the line in terms of people that can be happy is, according to Kelsen, a political decision and not a legal one.

through, its domestic legal order. However, the validity of a legal system could not be explained by extraneous factors nor could it be explained only by recourse to the fact of its existence.<sup>365</sup> Rather the validity of any legal system could only be established through the logical completeness of the system.

The logic of Kelsen's pure science of law is dependent on a split between fact and norm, a separation between what "is" and what "ought" to be, and as a science, legal theory can only be concerned with the "ought." The law, a social technique regulates what we should do, i.e. the "ought." Whether there are any ontological grounds for this "ought" is not the concern of a pure theory of law. Kelsen argued that whether or not human behaviour did or did not follow the precepts of the law does not change the validity of the law. In order to illustrate, take the example of murder - if I murder someone (and murders do happen quite frequently), it does not mean that a law prohibiting murder has lost its validity since if you get caught it remains the valid basis for charges being brought against you. Neither does the fact that we have a law against murder say anything about the moral underpinnings of the law in the first place. To put it differently, the fact that I commit a murder is not an exception to the rule, because my act is separated from the validity of the norm. As Stanley L. Paulson puts it, the effect of a "distinction between 'is' and 'ought' implies altogether separate tracks for establishing, respectively, the truth of empirical claims and, *inter alia*, the validity of legal

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<sup>365</sup> Kelsen, Hans (1967) Op. cit., p. 12. In making this point Kelsen is often talked about as the first critical positivist.

norms.”<sup>366</sup> Thus, to Kelsen the question of validity of a system of norms was not a question of whether or not the “is” overlaps with the “ought”, it was a question of the system’s internal coherence and logical completeness.

Kelsen resolved the question of validity of the legal system by setting up a hierarchical system dependent on what he called the “Grundnorm” (or basic norm). According to Kelsen, all norms derive validity from a more basic or general norm, which in turn derives validity from a more general or even lower norm. At the base of this system of logical derivation there must exist a foundational norm, one that underwrites validity of the whole system, a norm that Kelsen himself acknowledged never existed and had to be believed in. The Grundnorm is a logical postulate, an assumption that needed to be there in order for the whole logical system that followed to work.<sup>367</sup> What the idea of hierarchical structure of a legal system and the idea of the Grundnorm postulate is that a subject of law could never be under a legal obligation to carry out conflicting acts: all legal acts within a perfectly logical system must conform.

What at this point might be dismissed as mere logic, or empty formalism completely detached from human experience had immense effects on Kelsen’s

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<sup>366</sup> Paulson, Stanley L. (1992) "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies*, p. 324.

<sup>367</sup> “The cognitive goal of the Basic Norm is to ground the validity of the norms forming a positive moral or legal order, that is, to interpret the subjective meaning of the norm-positing acts as their objective meaning (i.e. as valid norms) and to interpret the relevant acts as norm-positing acts. This goal can be attained only by means of a fiction.” From *General Theory of Law and States*, quoted in Paulson, Stanley L. (1992) *Kelsen's Legal Theory: The Final Round*. *Oxford Journal of Legal Studies*, p. 269.

views on the validity of international law.<sup>368</sup> While at the beginning of his career Kelsen's main preoccupation was constitutional law and national legal theory, he put much greater emphasis on International Law after his move to the US in 1935.<sup>369</sup> In his *Principles of International Law* he set out to explore whether and why international law could be considered to be part of one complete legal system (the other part of the system being national legal systems). In order to apply the same logic through which he determined the validity of legal norms on a national level, Kelsen rephrased the often-asked question (especially after World War II) of "is international law 'law proper'?" and instead asked the question "does international law determine a certain conduct of states as the condition of certain enforcement mechanisms?"<sup>370</sup> Kelsen's answer was yes, because there exists the logical possibility of delicts and international law also set out a system of sanctions, i.e. there are rules that can be broken and such acts have effects for the perpetrator.<sup>371</sup> To Kelsen, a body of international law can only be derived from customary international law and positive international law.<sup>372</sup> After concluding that international law is indeed law, the question that followed and the questions

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<sup>368</sup> This was also critique raised by some of his students. Sander went on to write on the legal theory of experience, a criticism that Kelsen engaged by reference to Freud and the Oedipus complex, see Jabloner, Clemens. (1998) "Kelsen and his circle: The Viennese years." *European Journal of International Law*, p. 382.

<sup>369</sup> He did touch upon the topic prior to that, especially in the *Peace Through Law* in 1920 where the foundations of his later argument were already present. We are not going to go into all subtle changes in his argument here, for a detailed read of Kelsen's different periods see Paulson, Stanley L. (1998) "Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization," *Oxford Journal of Legal Studies* 18:153-160.

<sup>370</sup> Kelsen, Hans. (1967) Op. cit., p. 18.

<sup>371</sup> Ibid., p. 19.

<sup>372</sup> See Kelsen, Hans and S L Paulson. (1997) *Introduction to the Problems of Legal Theory*. London: Clarendon Press, §49.

at heart of Kelsen's monistic theory of law was: what is the relationship between international and national law?<sup>373</sup>

One of the core questions in international law has for a long time been how to account for why it is that international norms and institutions are considered capable of making legal decisions and imposing sanctions on sovereign states at all. In International Relations the question is often rephrased in terms of sovereignty, i.e. if a state confers sovereignty to a higher authority, does it remain sovereign by the virtue of being capable of conferring power in the first place or has it given up sovereignty by virtue having conferred power?

A similar problem plagued Kelsen. If all international law is positive international law, which can only be created by the consent of states, should the national or international system of norms be considered higher in the legal hierarchy? Deriving from his pure theory of law, the hierarchical question needed to be resolved because the primacy of some legal norms over others had to be determined:

One should never tire of emphasizing that the logical unity of the system is the fundamental axiom of any normative knowledge. In the sphere of normative consideration, a real objective conflict of norms is unthinkable [...] The domestic norms must conform with the International ones, and in the event of conflict it will be

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<sup>373</sup> For a good overview of the legal theoretical argument see Rigaux, Françoise (1998) Hans Kelsen on International Law. *European Journal of International Law* 9: 325-343.

the latter that must prevail. At least in principle, they can accordingly be assumed as *Ius cogens* and applied by national courts with no need for conversion into domestic law.<sup>374</sup>

Kelsen acknowledged that in order to bring national and international legal systems together in the single monist system of law he envisioned, a decision had to be made concerning their position within a coherent legal hierarchy, but, he continued that that decision fell outside of the scope of law and in essence it was a political decision. Kelsen made a decision to argue that the primacy of international norms, a decision that is in line with his constitutionalism, his affinity to social democratic circles in Vienna and his later writing on how peace could be established on a global level. It is also a decision that reflects his belief that once all national legal systems have been incorporated in one international legal system it would provide “the organization of mankind, and accordingly all of a piece with the supreme ethical idea”.<sup>375</sup> Hence Kelsen could provide a critique of dualist conceptions of the relationship between international and national law. However, the point here is that at Kelsen could only do so by reintroducing the one thing he wanted to expell from his legal science, namely, *politics*. We will get back to the effects of this re-introduction momentarily, but let us first turn to Schmitt’s solution to the same problem.

### **Schmitt – national not international**

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<sup>374</sup> Kelsen, Hans (1967) Op. cit., §50(f).

<sup>375</sup> This development is based on developments of positive international law

Schmitt did not give much credence to Kelsen's view and already in 1928 he dismissed Kelsen's foundational distinction between "is" and "ought" as mere positivism and nothing else. He continued by saying that "Kelsen solved the problem of the concept of sovereignty by negating it."<sup>376</sup> In response to Kelsen's idea that the state is equal to its legal system Schmitt answered that law was just another *form* of sovereign power and that "juridical formulas of the omnipotence of the state are, in fact, only superficial secularizations of theological formulas of the omnipotence of God."<sup>377</sup> Instead, based on his idea of the political as the capacity of making a distinction between friend and enemy he took the opposite view of law and legal structures and presented an argument concerning the validity of any legal system based not in that which "ought to be" but in that which "is":

Law can signify here the existing positive laws and lawgiving methods which should continue to be valid. In this case the rule of law means nothing else than the legitimization of a specific *status quo*, the preservation of which interests particularly those whose political power or economic advantage would stabilize itself into law.<sup>378</sup>

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<sup>376</sup> Schmitt, Carl. (2005) *Political Theology: Four Chapters on the Concept of Sovereignty*. Chicago: Chicago University Press, p. 21. Paulson, Stanley L. (1992) *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, Oxford Journal of Legal Studies, note 5.

<sup>377</sup> Schmitt, Carl. (2008). *The concept of the political: Expanded edition*. Chicago:University of Chicago Press, p. 42.

<sup>378</sup> *Ibid.*, p. 66.

Within this system of legal validity based on the ordering of actual facts, justice to Schmitt did not depend on an ideal notion of right or good; rather, it depended on the coherence of legal decisions. If a number of judges made the same decision on the same case, the judgment would be considered just in as much as it created order. In the opposite scenario, if the same judges gave contradictory judgment to cases with similar merits, this could only create disorder.<sup>379</sup> Often, Schmitt's definition of justice is read as merely another example of his "decisionism," but it can also be understood as a necessary coherence of the values held and shared by society at large in order for a functional notion of justice. If we all share an understanding of what is right and wrong, then judges (as our representatives) should make decisions along the same line. Giacomo Marramao describes the legal theory that we find in *Nomos of the Earth in the International Law of Jus Publicum Europaeum* ("*Nomos of the Earth*") aptly as "meta-legal tending towards the anthropological."<sup>380</sup>

We can see proof of this in his *Nomos of the Earth*, in which the validity of a legal system is derived from the occupation of land and the order over land realized through the presence of the State.<sup>381</sup> According to Schmitt, the *nomos* (the order) of the world up until WWII had consisted of the division of land between European powers and the extension of that power over the high seas. In the words of Schmitt, "[s]o it follows that the Law of inter-state relations and associations

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<sup>379</sup> Schmitt, Carl (2005) Op. cit., p. 13.

<sup>380</sup> Marramao, Giacomo. (1999). "Exile of the Nomos: For a Critical Profile of Carl Schmitt" *Cardozo Law Review* 21:1585.

<sup>381</sup> Perry Anderson makes a very similar point in his *The Absolutist State* but with a focus on political economy.

does not develop from abstract-normativist, rule-oriented thinking, but rather from a concrete Order of a particular kind, which has evolved its particular character from certain states and peoples [...].<sup>382</sup> Any idea of ahistorical or ideal law was antithetical to Schmitt since “history is not the realization of rules or regularities or scientific, biological, or other types of norms. Its essential and specific content is *the event* that arrives only once and does not repeat itself.”<sup>383</sup> Law and the question of its validity could only be resolved through a focus on the event (on facts), not by a focus on norms.

Schmitt himself acknowledged that his prediction for a new *nomos*<sup>384</sup> of the earth would have to take into consideration new and even global aspects of the political. What role did Schmitt envision for international law to play in this context? First of all, any idea of a universal ethics based on the notion of humanity would mean the end of politics since humanity according to Schmitt cannot have an enemy. Based on his description of politics as “friend enemy grouping” a loss of the possibility of animosity also meant the loss of politics.<sup>385</sup> To Schmitt the attempt to outlaw war by the Kellogg- Briand pact and the UN Charter denied each

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<sup>382</sup> Carty, Anthony. (2001). Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945. *Leiden Journal of International Law*, p. 32.

<sup>383</sup> Schmitt, Carl in *The Unite du Monde*, p. 248 [emphasis in text]. Quoted in Koskenniemi, Martti (2002) Op. cit., p. 502.

<sup>384</sup> The use of *nomos* to define certain spatio/temporal delineations is dictated by the necessity of making predictions – In the words of Fredric Jameson “The concept of the *nomos* as a periodizing and structural category (whose family likenesses, besides one to the Marxian “mode of production,” might also include one to Foucault’s historical epistemes) then inevitably brings with it the problem of the break, not particularly solved by the notion of a “transition.” Jameson’s parallel between Schmitt’s *nomos* and Foucaults episteme will momentarily be picked up on. Jameson, Fredric. (2005). Notes on the *Nomos*. *South Atlantic Quarterly*, p. 202.

<sup>385</sup> Schmitt, Carl (2008) Op. cit., pp. 38 and 54. However, this does not mean a state of constant warfar to Schmitt, see *Ibid.*, p. 49.

nation-state its political independence.<sup>386</sup> Furthermore, any idea of a universal ethics as the basis for a future world order would only mean that the concept would be co-opted as a hegemonic language by the strongest nation state or actor. The possibility of co-opting universal ethics in the interest of one hegemonic power could allow for the possibility of starting wars in the name of humanity. However, to Schmitt humanity has no human enemy and:

To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.<sup>387</sup>

Rather, wars fought in the name of humanity were often wars fought for particular interests, and he continued, a war in the name of humanity was “an especially useful ideological instrument of imperialist expansion.”<sup>388</sup> Thus, in Schmitt we find a complete rejection of liberal humanism and of the possibility of shared universals and a pertinent critique of the simultaneous development of modern notions of sovereignty, imperialism, and world order<sup>389</sup>

However, just as Kelsen had to include the one thing he wanted to expunge from his theory of law, Schmitt necessarily relied on a transcendental basis of politics

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<sup>386</sup> Derived from the definition of the political, see Schmitt, Carl (2008) Op. cit., p. 51.

<sup>387</sup> Ibid., p. 54.

<sup>388</sup> Ibid., p. 54

<sup>389</sup> Ibid., p.29.

to create a valid system of law based in the nation state, namely, the exception. To Schmitt, the exception, even the possibility of the exception, played the same role as the miracle in Christian theology. Furthermore, he grounds his idea of international law in one fundamental principle, that of self-determination in as much that it becomes the ordering principle upon which any actual order can be built.<sup>390</sup> As such the right to self-determination is pre-existing, ahistorical and the logical basis for the State rather than thinking about sovereignty and the State as derived from a legal system or equated with a legal system.

To Schmitt, international political order is all about finding the right space for the right people because a national legal system is the only form through which political control can be realized. This is Schmitt's main criticism of Kelsen and his emphasis on the superiority of international legal norms, even though just as Kelsen, his whole system is derived from an a-priori *grundnorm* (that of self-determination). It seems at this point, that neither of the authors above can create a coherent theory of law without recourse to the one aspect of the validation of legal norms and national sovereignty that they wish to exclude.

### **What is at stake in the Kelsen vs. Schmitt debate?**

What does it then mean to say that Kelsen and Schmitt's differing opinions together constitute the structure of the foundational problem that international law as a discipline is trying to resolve? To Koskenniemi they present two

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<sup>390</sup> Carty, Anthony. (2001) Op. cit., p. 34.

diametrically opposed accounts of “how the relations between statehood and law should be understood” and he himself suggests that the best answer is that “international sovereignty doctrine oscillates constantly between arguments such as Schmitt’s and Kelsen’s.”<sup>391</sup> The point here, and the overall present argument is that the question of the validity of international law is not, first of all, an either/or question, nor is it an oscillation, but rather that Schmitt and Kelsen should be read together and as such they provide a much fuller account of the validity of national and international law in as much as the two accounts read together provide an image of modern international law as fluid and constantly changing.

In order to appreciate this point the following section will focus on what is at the heart of the supposed fundamental conflict between the two, namely, questions concerning the difference between fact and norm, the validity of legal systems, the possibility of exceptional circumstances and the foundation of international order and two quite overlapping accounts of the possible resolution of these tensions.

Schmitt counters Kelsen’s focus on “is” over “ought” by giving primacy to “facts”. Politics and justice become concerned with questions of how to order facts, of making sure that the always-threatening chaos of competing powers will not take over nor that some nebulous idea of a liberal universal ethic will co-opt and underwrite a hegemonic order. Complete ordering of facts as the purpose of sovereignty was the point that Schmitt tried to make, as we saw in his definition of justice. This is not that far removed from Kelsen’s necessity of the logical

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<sup>391</sup> Koskeniemi, Martti. (2002) O. cit., p 227.

completeness of his pure theory of law. We are talking about two different aspects of the same phenomenon in as much as both authors emphasize the necessity to achieve social regulation or order, albeit on different political grounds.

To Kelsen there is no possibility of exceptions to the norm; since exceptions take place in the world of facts they do not upset the order of norms. To Schmitt “rule proves nothing [...] In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”<sup>392</sup> This is perhaps one of the best illustrations of Schmitt’s understanding of the dynamics of the modern world, a world in which any sense of order is interrupted by modern life.

Lethargy is the threat posited by an order that is not challenged, an order that we have just seen more often than not underwrites hierarchical power relations. The exception is when modern life and its power struggles manage to cut through stagnant structures. The exception is when sovereignty is made visible through law by the fact that the moment “reveals most clearly the essence of the state’s authority. The decision parts here from the legal norm, and (to formulate it paradoxically) authority proves that to produce law it need not to be based on law.” In other words, sovereignty “is the highest, legally independent, underived power”.<sup>393</sup>

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<sup>392</sup> Schmitt, Carl (2008) Op. cit., p. 15.

<sup>393</sup> Ibid., p. 13.

It is easy to forget in a discipline where during the last ten years Schmitt's exceptionalism has uncritically been employed to explain everything from the US federal state and pirates to airports and Guantanamo Bay that Schmitt's emphasis is on how, at the moment of crisis, someone has to be able to make essential decisions.<sup>394</sup> He did not say that political sovereignty only exists in that moment, merely that it is in the moment of intense threat against the survival of the state that sovereignty reveals itself fully. Recall his description of the legal system as a *form* of sovereignty that has the function of creating order, the same role played by he-who-decides-the-exception at a moment of crisis.

Even though social order is the overriding concern for both authors and they conceived of the process of achieving it differently they both agreed that the difference in the process of achieving order is a choice of the location of sovereignty. Kelsen located the over-arching principle in the sphere of positive international law, a body of law that contained a prohibition on the use of force and the termination of war as the continuation of politics and as the title of one of his later books; also peace through law. However, the point here is not as much the location sovereignty but that both Kelsen and Schmitt are describing a dynamic system of both solidification and change.

Kelsen admitted, as pointed out earlier, that the logic of his scientific theory of law sustained also the opposite conclusion, that national sovereignty overrode international norms and that the decision as to which option to choose could only

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<sup>394</sup> Ibid., p. 38.

be a political decision.<sup>395</sup> David Dyzenhaus in his *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* describes the politics underlying Kelsen's legal science:

Kelsen wanted to emphasize above all that law is a product or creation of earth-bound human beings who have the power to determine the content of the positive law. He relentlessly opposed any metaphysical, mythic or theological understanding of law which seeks to elevate law or the state into something above and beyond modes of social organization that have been put in place or posited by human beings. [Kelsen's legal science] was nested within a wider political philosophy about the justification and proper functioning of liberal democracy.<sup>396</sup>

Schmitt, having started out with the assertion that law is just an emanation of politics, located the ordering principle of politics in national sovereignty and he feared that 'liberalism' and 'state neutrality' more often than not were particular (often economic) interests disguised as a shared notion of communal good.<sup>397</sup>

Instead he argued that the *possibility* of war was essential for politics to exist in

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<sup>395</sup> See the preceding discussion on Hans Kelsen's *Pure Theory of Law* pp. 241-245.

<sup>396</sup> Dyzenhaus, David. (1997). *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. Oxford: Clarendon Press, p.104.

<sup>397</sup> Even if this was the case most of the time it was not always the case: "Schmitt is read as arguing against universalism per se, as if universal claims automatically equated with barbarism while claims based on particularist national interests were somehow more civilized. This is a superficial reading of Schmitt's work, focusing on his contingent conclusions, neglecting the ontological grounding of the relation between sovereign power and law, which does not itself distinguish between universal and particular claims in this idealist way". From Chandler, David. (2008). The revival of Carl Schmitt in international relations: the last refuge of critical theorists?. *Millennium-Journal of International Studies*, p. 40.

the first place.<sup>398</sup> His definition of politics is not driven by a desire for war but rather by a felt necessity to counter a spreading economic rationalism and legalization which he thought only operated to obfuscate particular political agendas.

To both thinkers, the decision concerning the legitimacy of an international legal system (and to both it is indeed a decision) ended up being a political decision, which also implies that they viewed the problem of legitimate sovereign authority and law as ultimately a *political* problem. Arguably, they are giving accounts of different aspects of a problem that they view in a similar manner: the necessity to create a legitimate order in the name of social regulation, the necessity to validate system of norms and a necessity to do both through a system that allows for the dynamics of modern life. In other words, one of the foundational moments of contemporary discipline of international law is not concerned with competing logics, or diametrically opposed modern experiences; it is thus concerned with the possibility of a different modern politics.

## **The Dynamics of International Law**

We started with the claim that what is conceived of as the central problem in international law is badly framed by both international legal scholars and political scientists and how the academic interpreters continuously reproduce simplistic

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<sup>398</sup> This did not at all mean that war was ever present, merely the possibility of war is ever present. Schmitt, Carl (2002) Op. cit., p.34.

answers to some of the impossible dilemmas of modernity. Idealized categories or structural readings of modern political processes are reduced to simply a status. Either we have international law or we don't, either sovereignty rests in on a national level or it rests on the international level. If we consider Kelsen and Schmitt as *together* describing the dynamic, inherent tensions and normativity of international law as a *political process* we can overcome this problem of oversimplification. Taken together as co-constitutive aspects of an experience of modernity as described by Berman in terms of our solid past, the fluid present and the altogether better futures, international law thus becomes *both* as situational *and* ideal.

If we read the two accounts as two aspects of the role played by law in society then law becomes both constituted by social, cultural and political processes, and at the same time derives its legitimacy not only from these particular processes, but also from a transcendental claim that both restricts and enables those very same social, cultural and political processes. International law is a political process that consists of both norms and exceptions in a symbiosis where (as Chakrabarty tells us), the exceptions are not inconsequential or parallel to the norm but rather an integral part of the continuous dynamic development of the modern world. Thus, international law, in trying to deal with problems of universality and particularity, communality and difference or domination and submission is an intrinsically *modern* process and as such it is a process of both promise and despair, of construction and destruction and one that can never be

fully realized.<sup>399</sup> It can never be fully realized because the fluid present always alters future, or in the Chakrabarty's words "the futures to be". Where we place ourselves in relation to this process is as both Kelsen and Schmitt pointed out – a political choice.

There is even more to be gained by reading Kelsen and Schmitt as describing different aspects of a modern world that is anything but solid or ordered since they both attempted to articulate strategies to deal with the immense threat of disorder and chaos they perceived to be looming in the 1920s. We can understand their ideas as a essentially *modernist* strategy to cope with the paradoxical forces of modernity, a modernity that at the time of *Peace Through Law and Political Theology* was characterized by "the amalgamation of prayer and desperation, dream and chaos, wish and desolation."<sup>400</sup> Social and political fluidity threatened perceived ideas of order and as Faust showed us, only by embracing the chaotic dynamics of the modern world can we harness its powers and possibilities. Kelsen and Schmitt tried to explain the relationship between emancipation, the future role of nation states and some sense of a global humanity all in the context of the first total and global war.

In order to understand what a modernist strategy is and the effects of calling both Kelsen and Schmitt modernists might entail, let's return to Berman for a second.

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<sup>399</sup> Just as Faust could never succeed in his modernizing endeavor without annihilating the very reason for his own existence, see preceding discussion on pp. 213-225.

<sup>400</sup> Eksteins, Modris (2000) *Rites of Spring: The Great War and the Birth of the Modern Age*. Boston:Mariner Books, p. 294. Eksteins refers among other things to *All that is quite on the Western Front* and in so doing he is describing WWI as a expression of modernist sentiment, even as a piece of art.

As mentioned in the previous chapter, modernity to Berman is that state when all that we take to be solid in society (traditions, social relations, economic patterns, histories) melt into air *and* that that which follows (as solid as it might appear in terms of new traditions, social relations, financial institutions etc.) is always at risk of being torn down before it even has time to solidify. Change and the possibility of change becomes core dynamics of the modern world. For example, the subjects empowered by social and political changes are quick to use their new powers to critique the new social and political structures within which they find themselves. The most pertinent character trait of the modern man is the fact that he is empowered to produce changes to the surrounding world.

But the power to produce change does not guarantee the direction of those changes, the modern world is fluid and non-teleological. Modern man stood out from his precursors to someone like Berman because of his “readiness to turn on itself, to question and negate all that [has] been said. [...] to grasp a world where everything is pregnant with its contrary.”<sup>401</sup> There is no guarantee of what the futures are holding, modern man is himself responsible for the outcome of his actions. *Modernism* is modern man’s attempts (or strategies) to feel at home in this tremendously contradictory world, to deal with the conflicting feelings that come with his newly empowered self. What characterizes *late modernists* (twentieth century) to Berman is that they have “lurched far more toward rigid polarities and flat totalizations”.<sup>402</sup>

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<sup>401</sup> Berman, Marshall. (1987) Op. cit., p. 23.

<sup>402</sup> Ibid., p. 24.

The fact that the discipline of international law has continued to read Kelsen and Schmitt as *only* polemical without trying to understand what is at stake in so doing, the discipline has been caught with ultimately always having to answer existential questions in terms of either/or: particular *or* universal, law *or* politics, realism *or* idealism, Europe *or* the third world and so on. However, if we read them together as modernist attempts to deal with intrinsically modern problems in the context of international law we can move beyond these unhelpful and idealized questions, start investigating the limitations of a flattened perspective and rather start looking for openings.

If we look for openings by approaching international law as a modernist strategy we have to assume that modernity happens to its subjects, that we have a little to no choice as whether or not we are modern. This is not a normative statement concerning the value of tradition or other ways of living, it is a statement based on certain technological, social, financial, cultural and political processes that have been ongoing since early 18<sup>th</sup> century in different ways in different places at different times. However, as we painfully know, in order to construct new social structures and relationships other structures and relationships need to be torn down. This is an insight not reflected within the contemporary discipline of international law dealing with the many ways in which a just international legal order can be established. The fact that the discipline frames its main problem as that of creating a just international order indicates that contemporary international law is considered at least in some part unjust and that we have to figure ways of

fixing or improving the international legal system in way that does not reproduce those same injustices.

Locating a foundational conception of modernity at the heart of the discipline of international law and after having argued that we have to view international law as a modern political process incorporating a formal understanding of law and its practice what we need to look for to re-frame the field is those practices, those moments that do not fit within the general liberal scheme of things – we need to look for and ascertain the value of anti-historicist moves framed in terms of international law and in particular human rights. Furthermore, the previous point is also informed by the realization that if international law is only considered a means of ordering social relations then we do not acknowledge its disruptive and productive force, a force that can be located in the tensions intrinsic to the disagreements between Kelsen and Schmitt.

This is the moment to recall Dipesh Chakrabarty who located continuous anti-historicist moves in the social relations that he called History 2s. Chakarabrty investigates how it is that we take hyper-real Europe to be the authentic site for modernity. History 1 is that which, if we look back, appears to as the teleological development of a European defined modernity.<sup>403</sup> History 2s are the histories that are “not as antecedents established by itself, not as forms of [modernity’s] own life-process” and they are the experiences that guarantees that history remains a

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<sup>403</sup> Chakrabarty says capital, for this particular formulation I am indebted to Siddhartha Della Santina.

non-teleological, open-ended and non-linear process.<sup>404</sup> History 2s are not prior to modernity and nor do they follow an already given logic as to their development, instead “they inhere in [History 1] and yet interrupt and punctuate the run of [History 1s] own logic.”<sup>405</sup> In bringing Kelsen and Schmitt together the point was to show how international law as a modern political practice consists of practices that can both be identified with a particular History 1 *and* at the same time consists of all those practices that are both a part of and interrupt the totalizing of idealized understandings of international law. Before we move on to a number of examples of actual practices it is important to note the effect of the process that Chakrabarty aptly called the process of “provincializing Europe”.<sup>406</sup>

Provincializing Europe is not the process of “a simplistic rejection of modernity, liberal values, universals, science, reason, grand narratives, totalizing explanations and so on” rather it is the project of writing “into history of modernity the ambivalences, contradictions, the use of force, and the tragedies and ironies that attend it”.

In writing history as consisting of contradictory forces also allow for the always-changing histories, the history of attempts by people trying to grapple with the modern world. In this process, people around the world have in different ways

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<sup>404</sup> Chakrabarty, Dipesh. (2000) Op. cit., p. 63.

<sup>405</sup> Ibid., p .64.

<sup>406</sup> Chakrabarty doesn't cite examples of provincializing Europe. As I think I mentioned, the better title would be *Universalizing India*.

made recourse to international law and human rights in order to gain a foothold vis-à-vis imperial powers and oppressive national governments.

## **International law's History 2s**

Europe has been provincialized partly because the geographical distinctions dependent on an idea of a hyper-real Europe have lost credibility. Instead it is quite obvious that Europe is full of history 2s, they are not only lived in “the rest of the world”. The idea of Europe as one, big, homogenous centre for world development must be replaced with an idea of many, dynamic and ever-changing centres, however, often enough the most visible attempts to take control and drive the development of modern life seems to slip by unnoticed. In the process of seeking recognition, we saw how the traditional Sami ways of life and the particularities of Sami society were pushed to the forefront: questions concerning a right to “usage and passage over land” vis-à-vis a legal system based on a notion private property, the question of acknowledging oral cultures in a system based on legal deeds, notarized acts and written law etc..

As became obvious from the committee hearings, the idea of a static, pre-modern Sami way of life was articulated by state institutions and land-owners, whilst the Sami turned to human rights argued to claim their freedom to development.<sup>407</sup>

When we looked at the process of recognition more closely to it occurs that the Sami, the supposed backward and historically stagnant people, argued much more

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<sup>407</sup> See p. 89.

forcefully than their opponents for their right as modern empowered subjects. The Sami obviously feel confident enough in their own capacity to challenge Swedish state sovereignty in a multitude of venues and ways except just in front of the national courts. Rather, they have employed the idea of modern man and his rights in order to stake out a space for the Sami community to live according to their own desires. In the sense of the multitude of modern experiences and the driving force of historical processes it would be difficult in this context to argue that it is the Swedish state or the Swedish landowners that are the force behind the realization of universal human rights.

However, the Sami are not the alternative experience of modernity in Europe. European history is a history of combined alternative experiences within which some stand out because they overlap with our preconception of what a “pre-modern” way of life should look like: the Sami, the Roma, the rural parts of Eastern Europe etc.: pre-modern pockets that according to many need to be modernized, traditional ways of life that need to be both guarded and at the same time developed to keep up with a modern world. However, we need to resist thinking about History 2s as “exotic” or “indigenous” ways of life, that the Roma and the Sami more often than not are more “modern” than Swedish state or the French judiciary.

We have to cease to think about a homogenous “Europe” and rather embrace the fact that Europe consists of great bundle of paradoxical History 2s. If we think this proposition through then we can understand what a hurdle the “hyper-real Europe” as the proper origin for modernity has been and still is in terms of

attempts by modern men and women everywhere to turn themselves from products to producers of history.

In this respect, one of the most interesting cases (*Lautsi v Italy*) was argued in front of the ECHR in the summer of 2010.<sup>408</sup> The claimant, Mrs Lautsi, mother of two and living in northern Italy complained that the display of crucifixes in her childrens' school violated her and her children's right to religious freedom and also a freedom *from* religion as enshrined in the European Convention on Human Rights. Legally the case is concerned with article 2 of protocol 1 concerning the right to education read in conjunction with article 9 concerning the freedom of thought, conscience and religion. Her argument was that the display of crucifixes in Italian schools goes "contrary to parents' right to educate their children in line with their conviction and to children's right to freedom of religion".<sup>409</sup>

After exhausting all local remedies Mrs Lautsi submitted her complaint to the European Court. The government's counter-argument was based on the fact that the crucifix was a cultural symbol of the Italian state and its history and could be appreciated as such by both Catholics and non-Catholics. It is interesting to see, however, that in order to make the claim that the crucifix represents the Italian

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<sup>408</sup> *Lautsi v. Italy*, 30814/06 Judgment 3.11.2009 .Press-release concerning the decisions available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?sessionId=36339028&skin=hudoc-en&action=html&table=F69A27FD8FB86142BF01C1166DEA398649&key=77725&highlight=>; Full proceedings available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=857724&portal=hbk&source=externalbydocnumber&tabl>. Last visited on 20/08/12.

<sup>409</sup> The quote is the actual sub title of the case – *ibid*, summary.

nation state, the government made the argument that Italian democracy is based on the Catholic faith.

In conclusion, the democratic values of today were rooted in a more distant past, the age of the evangelic message. The message of the cross was therefore a humanist message which could be read independently of its religious dimension and was composed of a set of principles and values forming the foundations of our democracies.

As the cross conveyed that message, it was perfectly compatible with secularism and accessible to non-Christians and non-believers, who could accept it in so far as it evoked the distant origin of the principles and values concerned. In conclusion, as the symbol of the cross could be perceived as devoid of religious significance, its display in a public place did not in itself constitute an infringement of the rights and freedoms guaranteed by the Convention.<sup>410</sup>

The counsel for the Italian state furthermore stated that the “the only common ground in Europe regarding relationship between state and Church is the distinction and autonomy in temporal and spiritual matters” and that the issue of religion was a national issue to be resolved within the nation state. In this context it must be mentioned that the obligation to display the cross in all Italian schools was part of the Lateran Treaties which established a division of powers between the Vatican and the Italian state. Thus, part of the price paid by the Italian state for

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<sup>410</sup> Lautsi v Italy, Op.cit., para 35.

limiting the powers of the Catholic Church to ecclesiastic issues and gaining political sovereignty was the clause that made it obligatory to display a crucifix in every classroom in Italy.

The Court found for the plaintiff and concluded that:

[t]he State was required to observe confessional neutrality in the context of public education, where attending classes was compulsory, irrespective of religion, and where the aim ought to be to foster critical thinking in pupils. The Court was unable to grasp how the display, in classrooms in State schools, of a symbol that it was reasonable to associate with Catholicism (the majority religion in Italy) could serve the educational pluralism that was essential to the preservation of a “democratic society”[...].<sup>411</sup>

Thus, whereas the Italian government argued that the crucifix carried values also underpinning the Italian state and that the influence of Catholicism was a historical and cultural fact and not a matter of faith the Court found that the crucifix primarily was a Catholic symbol and thus incompatible with the idea of a mandatory, secular state education. They also dismissed the government’s argument that the mere presence of a crucifix would not be an imposition on a child’s right to the freedom of thought, conscience and religion. Having said that, the court also acknowledged that they did not have the power to order the removal of all crucifixes but awarded Mrs Lautsi 5000 Euro in damages.

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<sup>411</sup> Lautsi v. Italy – Op. cit., [Section II].

The reaction of the then centre-right wing government in power was outrage. According to the critics the ECHR was making judgments about the particularity of Italian culture and in the words of Silvio Berlusconi's education minister, Maria Stella Gelmini: "No one, not even some ideologically motivated European court, will succeed in rubbing out our identity."<sup>412</sup> However, the reaction to the decision was not limited to Italy. Around Europe the question arose with regards to the role played by the Catholic Church in their communities. Cardinal Keith O'Brien displayed concerns repeated by Catholic institutions throughout Europe by drawing attention to the potential effect of the ruling:

The precious religious heritage of many people and nations across Europe as well as the values of authentic tolerance and freedom of belief that are propounded in democratic societies are under threat. [...] I hope that the European Court of Human Rights will uphold the values of freedom and tolerance, which are integral to our Christian heritage.<sup>413</sup>

On March 2, 2010 the European Court agreed to hear an appeal filed by the Italian state, an appeal that gained the support from nine additional signatory states:

Armenia, Bulgaria, Cyprus, Greece, Malta, San Marino, Romania and Russia.<sup>414</sup>

The Court's finding was overturned, the arguments remaining the same but the outcome the opposite.

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<sup>412</sup> Hooper, John. Nov. 3, 2009. Human Rights Ruling Against Crucifixes Angers Italy. The Guardian. Available at <http://www.guardian.co.uk/world/2009/nov/03/italy-classroom-crucifixes-human-rights>.

<sup>413</sup> Quoted in Is the Italian Crucifix Ruling Scotland's Cross to Bear? June 23, 2010. The Scotsman. Available at <http://news.scotsman.com/comment/Is-Italian-crucifix-ruling-Scotland39s.6378496.jp>

<sup>414</sup> Hooper, John. Op. cit.

The focus here is not to get involved in a discussion concerning the relationship between temporal and ecclesiastical power and the role of religion in Europe, nor to comment on the particular role of the Catholic Church in Italy, however, a few comments are worth making. History 2s are all our histories that do not follow the historicist logic of History 1 and they are taking place all around, not merely through societies with obviously different or “traditional” lifestyles nor only in some mythical Third world that is trying its best to catch up with the mythical First world. In the Lautsi court case, not only does the Italian government argue that the secular Italian state can be represented by a Catholic crucifix but that human rights within the European context is considered an ideological imposition.

As pointed out the story about human rights as a political practice is not one of diametrically opposed alternatives, but rather a process full of paradoxes that are negotiated. When President Sarkozy announced during the summer of 2010 that France would go ahead and level a number of Roma settlements and expel their inhabitants he was not only criticized by human rights and civil liberty groups but also by the pope who in a sermon on the 22<sup>nd</sup> of August reminded France of the necessity to recognize people of diverse origins and their intrinsic human dignity. After a little political bickering the French interior minister was also called to a meeting with the Cardinal of Paris in order to explain the French policy.

At the same time as the Catholic Church opposed the European Court’s ruling they criticized the French government for not respecting the diversity of humanity and human rights. It is the paradoxical nature of human rights that gives it its

particular character as a modern political practice. It is not only the Catholic church that opposes human rights the same day that it criticizes other actors for not respecting human rights. Even just a brief glance at recent news presents us with numerous examples. The government of the United States has been criticizing the Iranian government for shutting down the use of Blackberries and restricting internet access at the same time as they, with reference to ‘national security’, try to restrict Wikileaks’ capacity to release ‘top secret’ documents. Or take the Swedish government being outraged by the conditions in sweatshops in South-East Asia at the same time as they support a Visa-waiver for berry pickers that come every year to Sweden and work under slave-like conditions in order to procure much desired blueberries. The list is endless, a fact that should make us start to reflect on the supposed exceptional character of the events in relation to a proclaimed character of Europe as the world’s primary defender of human rights. It is important to acknowledge the paradoxical nature of human rights and the often-idiosyncratic manner in which they are ‘granted’, ‘defended’, ‘retracted’ and ‘violated’.

Human rights have the capacity to provide the ground for critique for a number practices of states and non-state actors. The varied references above of History 2s, or when human rights have been posited as both modern and anti-modern, should make us realize that it is a varied tool used for many different purposes. As we have seen they can be employed to defend individual rights *and* oppress other individual rights; they can be used for arguing for arcane state practices *and* at the same time used to criticize the very same practices and so on. For example, we began with an account of the process of recognition of the Sami, concluding that

by all conventional readings human rights do not work for them in terms of furthering their case.

As we saw in terms of the divisions within the Sami community, the same rights used to criticize the Swedish state and landowners, empowered parts of the Sami community to present a critique in the name of human rights against the Sami community's internal representational politics. In this context, trying to make a point as to why we should view human rights a political tool becomes apparent in many ways. On the European level we saw an example of this in relation to the drafting of the constitution. For a long time the reference to a common Christian legacy was still kept in the draft, only to be exchanged for a reference to human rights as the common ground and language of European states.<sup>415</sup>

The point here is that human rights are much more than just the legal right of the individual. It has become the tool to create a space for political discussion. Saying this however, does not in any way diminish the way that human rights still remains a tool for questioning state practice in court; the point is merely that its influence and power goes far beyond the oak panels of the courtroom.

How do all these practices square with a notion of the universal – how can human rights be a tool of emancipation and critique and at the same time also a tool for

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<sup>415</sup> Koblanck, Maria. (2003) *What is in a Human Rights Clause? Its Development, its application and an insight into the construct of European identity*. Master thesis, University of Padua/KU Leuven – EIUC. Available at <http://www.humanrights.se/upload/files/1/Utbildning%20och%20forskning/U-MariaKoblanck-THESIS.pdf>.

critique of state practices in ways not always envisaged by of international law? Just as Chakrabarty told us, a reoccurring image of norm creation in international law is that the norms were first articulated in the Western world and that the Western world and the EU in particular is still the driving force of its continued development. It is an image that again re-affirms a hierarchical and spatial delineation as to who can be producers of international law, and by extension also underwrites a hegemonic discourse. However, despite the many repetitions of this particular narrative, there are many examples that indicate that human rights and international law are processes also driven by other discourses and practices.

One example, and there are plenty, is the Cartagena declaration made in 1984. Despite not being a treaty it is widely acknowledged in South America and has been translated into some national law.<sup>416</sup> What is important is that not only did the Cartagena Declaration widen the definition of refugees to include also “[...] persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”, but what is also expressed through the declaration is a

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<sup>416</sup> The Declaration was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984. It is available at <<http://www.refworld.org/docid/3ae6b36ec.html>>, 2013, Aug. 13. On the basis of incorporation see <[http://www.hrea.org/index.php?doc\\_id=418](http://www.hrea.org/index.php?doc_id=418)> 2012, April 4.

definition of refugee status based not on a narrow definition of state oppression but rather based on a notion of solidarity.<sup>417</sup>

What is notable in this context is that the declaration has been cited widely outside of South America and is considered to be at the forefront of refugee law in as much that it recognizes a much wider set of rights on behalf of the individual refugee. That Europe does not follow the same standards nor presses for the continued development within the field is made as painfully clear on a daily basis. As recently as in the spring of 2012, France was ready to limit the fundamental principle of free movement within the EU in order to stop refugees fleeing the civil war in Libya to enter France from Italy. The idea of the geographic origin of international law (as an extension of modernity) is easily provincialized if we just look at what is going on around the world today. We also must ask ourselves what is at stake by repeating and re-affirming well-known mythologies about the potential form and function of human rights.

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<sup>417</sup> For an analysis of the effect of basing protection of refugees on a basis of solidarity see Guglielmelli White, Ana. 2012. UN Committee for Refugees and Immigrants. Research Paper no. 239, <<http://www.unhcr.org/4fd5d9c79.pdf>> 2012, July 6.

## 7. International Law as Life

I began this study with the claim that most of the contemporary academic discipline of international law has been constituted on the basis of a sense of the modern world being in crisis, a crisis to which many scholars are encouraged to find solutions. The sense of crisis is brought about by the realization that despite our best efforts of modern world remains chaotic and ever changing. In effect, in trying to understand the constant tension between chaos and order in the world in which we live, debates about international law seem to express both an historical condition and a philosophy of history that greatly limits its scope of analysis. In this respect, I have also suggested, international law may be understood as part of a more pervasive tendency to interpret the possibilities before us in terms of broad claims about a crisis of the old and some kind of transformation towards something newer and better.

However, I have argued that this way of understanding what is at stake in contemporary debates about international law is deeply flawed. The specific sense of crisis enabling so much contemporary discussion of international law may indeed be open to historical analysis, but it is not usefully understood in terms of a moment of historical crisis and potential transformation, or at least not only in terms of such a reading of contemporary historical tendencies.

Whatever crisis there may be, it is not passing. Nor did it start in 1945, or 1948, or 1989. Rather, a sense of crisis is an effect of the ephemeral nature of modern life. However, the sense of crisis has come to be understood as a matter of historical transformation and is already embedded within the discipline and practices of international law; in other words, a sense of crisis is already built into the forms of international law that have been said to be in crisis.

It may be that the forms of international law that have long been constituted through a paradoxical structuring of relations between universality and particularity, and so on, are inadequate to contemporary conditions, but, I have sought to suggest, attempts to confront this inadequacy in ways that simply reproduce claims about crisis that are built into the prevailing assumptions of international law must run into difficulties very quickly. The reason for this is that any attempt to *perpetually* order the *fluidity* of *modern life* is doomed to *fail*, leaving as we have seen only a sense of anxiety and failure.

One of the main points I have tried to emphasize throughout this analysis is that there are in principle no easy solutions to the dynamic forces that shape modern life. Much of the impetus behind my analysis is guided by my judgment that the temptations offered by traditions, like International Law, that thrive on a logic of either/or must be resisted and that, therefore, the effects of the paradoxical structuring of international law must be engaged more carefully.

I have suggested here that in order to engage and provide fruitful answers to how we can move from understanding people as products to producers of international

law we need to start by thinking about international law as a modern political process rather than as a legal or political status. It is only by embracing a more dynamic understanding of modernity that we can re-conceptualize our understanding in a more imaginative and therefore productive way.

I have argued that approaching international law based on an idea of modernity as a teleological development towards the realization of man's freedom is inherently flawed because it reduces peoples and people to merely products of international law. We all become caught in the structures of international law with little to no active agency. As I have pointed out previously, despite attempts to criticize what are perceived of as the limits of international law, the ultimate outcome still remains the reinforcement of the same structures and the same limits that the authors take to be the hegemonic discourse.

In relation to the insight that most accounts of international law end up reinforcing a very state-centric, Western-centric and structural understanding international law, this text should indeed be read as another attempt to try to re-imagine the way we understand international law. This is why human rights has been the focus of the text.

The starting point of the present analysis was exactly that human rights as an international legal claim forces us to deal with the type of foundational paradoxes outlined above, because none of the idealized categories otherwise employed can be disregarded when so doing. Often we are told that the modern structures of human rights are the greatest success of international law, in terms of not only

providing the moral counterpoint to power politics but also by constituting a, or “the”, sign that all of humanity does share something essential in the first place.

As such, any claim framed in terms of human rights will explicitly have to deal with the fact that sovereign authority is both problematic and exists in multiple spaces, and that attempts to isolate any claim in terms of one level or another are impossible since a claim always involves all levels: the individual, the nation, the state, the international and the universal and the multiple relations that exist between them.

Focusing on claims framed in terms of human rights thus forces us to address how international law still presupposes the splitting up of the global realm of sovereignty. Claims made in terms of human rights also bring to the fore what on a national level are perceived as the condition of possibility of legitimate politics and legitimate laws, namely, the separation of powers, a principle both difficult to establish and sustain outside of the nation state.

Human rights thus present a challenge to international law that is inherent to its own logic, an immanent critique of the structures and processes of international law. It presents a challenge since it is impossible to frame any issue of politics in terms of human rights without having to face the paradoxical nature of international law. The example of the attempt by the Sami to frame their critique of Swedish state practice revealed how it is impossible to sustain any perceived levels of political process.

Is the recognition of the Sami a Swedish matter of concern; an individual concern for those involved; a regional concern in terms of the establishment of a European sphere of politics, or is it primarily a concern that falls squarely within the realm of the international? The point here has been that if you look closer at the issues framed in terms of human rights it becomes apparent that it is impossible to isolate claims about international law in terms of either hierarchical 'levels' of politics or actors.

The example of the Sami served the purpose not only of highlighting deeply problematic aspects of Swedish state practice but also the purpose of pointing out how research on the Sami has a tendency of framing the process of recognition as primarily one of national concern. The case study showed how it is impossible to frame issues of international law as belonging to an idealized category of "international" law and that in order to understand what is at stake when people(s) historically falling outside of the existing system of international law employ human rights we need to re-think what we take international law to be. The idea presented here is that we gain a much more nuanced understanding of problems and possible outcomes of processes of international law if we do not think about international law as primarily a legal process with some political elements and also as a political practices with some legal elements.

The complexity of the issues at stake was explained by approaching the contemporary human rights discourse as a 'capsule' containing a set of debates, each playing a role in structuring the discipline. chapter two on contemporary academic interpretation of international law served the purpose of opening up the

‘capsule’ in order to illustrate how the centrality of the nation state, concomitant idealized levels of analysis

(individual/local/regional/national/international/global/universal) with regards to political and legal practices, and an understanding of both law and politics based on constitutional arrangements within liberal democracies constantly re-affirmed and re-established the limits of our understanding of international law.

More importantly, however, is that as academic interpretations they do not provide us with a tool to make sense of the situation of the Sami with which this text started, namely, they do not provide us with the tools to understand how human rights can provide the Sami with a credible and constructive tool to engage the world around them. If we hold on to a belief in a teleological end of international law (in terms of man’s freedom; or in terms of perpetual peace; or order in the face political chaos), the only conclusion we can draw is that international law must remain primarily an imperial imposition and also a hegemonic academic discourse.

In tracing the outlines of this common narrative within the discipline of International Law in the scholarship of David Kennedy and Jack Donnelly we unpacked a set of assumptions about the modern individual, his relationship to society and an the idea of progress of history at the core of contemporary academic interpretations of international law. Albeit in different ways, Donnelly and Kennedy try to balance and overcome the paradoxical relationship between multiple particularities and universality, and their attempts are examples of what

the discipline perceives of as the major challenges to contemporary international law.

This challenge still remains, and just a cursory glance at contemporary scholarship suggests that the discipline still struggles with being able to give a credible answer to the criticism raised against international law on the basis of claims to cultural relativism (or relativisms of other sorts), *without* giving up the idea of a shared and universal notion of human dignity and worth. The desire to hold on to the promise of a cosmopolitan and perpetual peace (in the absence of better options), is probably the best explanation for why the discipline keeps on re-affirming the same story about the purpose of the pacifying force of international law. As we saw, this is dependent on historicist assumptions linked to perceiving modernity as originating in the enlightenment and then unfolding in a teleological fashion. Thus it leaves authors unable to present a credible solution to the problem of the intrinsic imperialism of international law, and the negotiation between particularities and universality.

However, the point in reading first Donnelly and Kennedy individually and subsequently to show how some of their assumptions were reflected in the discipline of international law in general was not only to illustrate methodological differences between these scholars but more importantly to show how their shared assumptions about the modernity, history and man as a modern subject created through and by both politics and law are echoed throughout the discipline as such. The final point showed how these shared assumptions make it impossible for the

authors to solve the problems that they set out to solve, i.e. to provide a credible counterargument to relativism without re-articulating an imperial logic.

Martti Koskeniemi realized that these are the limits of the discipline that need to be engaged, and has done so by tracing the effects of what he calls “the politicization of international law” based on a “liberal theory of politics”.

However, while I generally share the concerns that underpin Koskeniemi’s intellectual project it still becomes evident that Koskeniemi ultimately reinforces very similar limits to our understanding of international law. The reason for this is primarily twofold; Koskeniemi subscribes to the same understanding of modernity as the progressive unfolding of Enlightenment ideals from Europe outwards, and secondly, his project is driven by the anxiety to *overcome* the impossible dilemmas of modernity by *ultimately* making a choice between particular *or* universal; submission *or* domination, law *or* politics. It is through reading Koskeniemi that we come to understand that rather than seeing international law as an isolated academic discipline the same concerns in terms of dealing with a paradoxical modern world played out in other disciplines are also present here.

This insight opens up the possibility for us to understand how the fundamental problems engaged by the discipline are badly articulated. We can continue to search for order, an ordering principle or an ordering philosophy by pitting particularity against universality, submission against domination, chaos against order, but the answer will only be an unsettling effacement of the dynamic inherent in modern life. Donnelly can seek conceptual clarity in the face of

paradoxical practice, Kennedy can pragmatically try to tease out how much pain we cause in trying to do good, and Koskenniemi anxiously looks at a project that did not pan out in the way that he (and all other gentle civilizers) had hoped. The Sami will remain victims, or subjects of integration, and the modern state and international system are unquestionably the primary actors and formal structure.

The realization that even Koskenniemi shares underpinning assumptions with Kennedy and Donnelly leads to perhaps the most important point that this project is advancing - that we can approach issues related to the limits of international law but unless we question the underlying understanding of modernity then we will only reproduce those limits. As we will see ample evidence of in academic interpretations of international law, modernity seems to stand for a teleological process of progress towards the realization of man's freedom, a process of development that on a daily basis forces us to choose between "us" and "them", the "pre-moderns" and the "moderns", the "first world" and "the third world."

The image of the modern world is that of a project of building solid structures that guarantee that the achievements of today will remain in the future. To be modern in this context becomes a status to achieve, a process towards an ever-increasing state of order. If we do not engage our understanding of modernity and modern life we will never be able to imagine how people and peoples can be understood as not only as products but also producers of international law. If we cannot see that people are producers rather than only products of history it will also be impossible for us to understand how some groups of peoples and alternative actors can possess active agency within processes of international law.

The necessity to resist simplistic readings of modern life was the focus of chapter 4 in as much as it pointed out possibilities that arise if we do not merely turn the essentially ephemeral nature of modern life into simple pairs of opposing positions or static aporetics but rather view the modern world as a ever-changing and dynamic constant reconstruction. In this context the key to the present attempt engages with the paradoxical and ephemeral nature of modern life was derived from Marshall Berman and especially his book *All that Is Solid Melts Into Air*.

Berman's book engages the particularity of modern life by turning from discussing modernity per se, to discussing and charting modernism that he defines as "any attempt by modern men and women to become subjects as well as objects of modernization, to get a grip on the modern world and make themselves at home in it."<sup>418</sup> One of the effects of a switch from talking about *modernity* to *modernism* and the concomitant focus on the human experience of modernization is that it opens up to understand the modern experience as that of constant reconstruction and as such it cuts across physical, social and political space.

Reading the anxiety of gentle civilizers like Koskenniemi through Berman's account of "the tragedy of development", the main insight to us is that it is only by giving up on a one-sided understanding of development, civilizing or a human rights revolution that we can fully realize the effect of the fluid nature of modernity. If we constantly try to explain away, re-affirm or generally efface the

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<sup>418</sup> Berman, Marshall (1987) Op. cit., p. 5 – 6.

ever present contradictions present in man's desire to develop, to modernize, to liberate to make the world a better place we will only keep on re-affirming that some people never can and never will be able to fully partake in modern life.

The last chapter addressed the centrality of the insights derived from understanding international law as a political practice by showing how the concerns raised thus far already can be located in the discipline's so called foundational debate, the debate between Hans Kelsen and Carl Schmitt. On the one hand, we have Kelsen, whose pure theory of law "attempt[ed] to answer the question what and how law *is*, not how it ought to be. [The theory of pure law] is a science of law (jurisprudence), not legal politics."<sup>419</sup> On the other hand we have Carl Schmitt who dismissed Kelsen and claimed that the validity of a system of norms had to do with actual political power and that a legal system was merely a *form* of sovereign power.

The "debate" between the two referred to within the discipline of international law primarily concerns the two authors' views of the legal justification of international law and the relation between international and national legal systems. The main argument (similar to that made in relation to Koskenniemi in Chapter 3) is that rather than reading Kelsen and Schmitt as conflicting accounts they are actually the two parts of a full description of form and force of international law.

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<sup>419</sup> Kelsen, Hans. (1967) Op. cit., p. 1.

What we then have to accept in order to fully understand modern life is that there is nothing ideally given about modernity or the way we relate to modern life. Rather, modern men and women continuously partake, reform and alter modern life. This is the point where we can part ways with most scholars who interpret international law and its possible effects, because if we accept that we are both objects *and* subjects, products *and* producers of international law then we are not caught in mere re-productions of simplistic answers to the most pressing problems of modernity (the constant conflict between universality and particularity and difference, domination and submission and so on). We have also escaped ending up in a Derridian space of *l'avenir* and instead firmly re-imagine international law as modern political practice.

By drawing inspiration from Dipesh Chakrabarty and especially his book *Provincializing Europe*, the way suggested in the present text was to embrace Chakrabarty's suggestion that we look for a social science that "embrace[s] analytical reason in the pursuit of social justice but does not allow it to erase the question of hetero-temporality from the history of modern subject".<sup>420</sup> Chakrabarty's insight implores us to focus on the discontinuities, ruptures and disturbances in human experiences and thus also thinking of global history in a manner still allows for international law and its reference to universality to be a vehicle for diversity.

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<sup>420</sup> Chakrabarty, Dipesh. (2000). Op. cit., p. 239.

Chakrabarty argues that we can analyze and understand modern historical experience as a two-pronged process; as the universal and necessary history that we relate to the logic of capital (and the process of industrialization and modernization - History 1) *and* as the lived experience (in relation to this universal and necessary history) that is immanent in History 1 and at the same time interrupts the logic of capital (History 2s). The History 2s thus resist the “totalizing thrusts” of the universal logic of modernization, interrupts and most importantly changes the course of History 1.

This, as my reading of Chakrabarty tried to illustrate, is not only a philosophical or theoretical point. Rather, it is an argument that all those experiences of modernity that take place independent of hyper-real Europe are still very much part of our experience of modernity because it fundamentally changes it. More importantly it is also a critique against modern social and legal science and its totalizing urge to explain the chaotic and dynamic nature of modern life in terms of the infinite approximation of a given ideal.

The examples given by Chakrabarty served the purpose of showing that the sub-altern experience of modernity made use of the tools expressed in and by that modernity to allow for the sub-altern subject to “feel at home” in the modern world. The universal, which in my reading Chakrabarty has been placeholder of human rights, thus only connotes a space/place/value usurped by a particular *wishing* to present itself as a given universal. This also applies to the most fundamental values of liberty, equality and independence that for long have been presented as primarily European values.

As a corollary to understanding particular practices in this way, subaltern histories are not relegated to being ‘exceptions’, ‘deviations’ or ‘limit conditions’ but rather become integral parts of our shared experience of the modern condition. By understanding practices of liberation, independence and equality in this manner we can also get away from a dialectical understanding of modernity by which paradoxes can only be turned into mere oppositions – universal *or* particular, submission *or* domination and so on. We can only understand the potential force of international law by appreciating the intrinsically dynamic nature of paradoxes and by resisting producing ultimate answers. The narrative underpinnings of international law then becomes the “necessarily fragmentary histories of human belonging that never constitute one or a whole” but at the same time all try to grapple with a modernity that happens to us because of processes of modernization. The idea of social justice is born exactly at the moment, when similar claims in terms of rights and duties are articulated through similar experiences, which at the same time are different in their specificities.

This is the moment when thinking about international law as a political practice rather than as an idealized legal category becomes imperative. However, we cannot understand this point unless we realize that History 2s are present everywhere all the time. We are too comfortable to think that the interruptions only take place in the geographically distant “developing world” or generally just “elsewhere”. The example I started with was that of the Sami, a transnationally nomadic indigenous people that, counter to repeated court-cases in the European Court of Human Rights, continue to frame their claims for recognition in terms of

human rights. The current state of European politics urges us to take another example into consideration: the situation of the Roma people living in Europe.

The Roma are by all accounts a transnationally nomadic people, one however with no claims to being indigenous to any modern state and therefore not falling under the particular jurisdiction of any state. Rather, both historically and in the present time, their nomadic nature has been an excuse to for states within which they reside (or are expelled from /integrated into), to defer any responsibilities to them.

In the case of the Sami, the European Court of Human Rights seemed comfortable to defer jurisdiction over the Sami as a people to the Swedish state by the logic that as an indigenous people they fall under the protection of Swedish sovereignty and jurisdiction. In a situation where the Sami wanted to challenge the limits set in terms of the process of recognition, this was not necessarily what they hoped for. In relation to the Roma on the other hand, by virtue of not being able to claim an origin in Europe, their nomadic lifestyle becomes an excuse for nation states to defer their obligation to protect them.

The problems with integrating the Roma into 'modern society' is often phrased in terms of the Roma's refusal to fully accept modern life, to not follow laws, to not educate their children, and to not work in stable occupations and pursue normal careers incompatible with their nomadic lives. The image of a fluid, different, 'pre-modern' lifestyle is the re-occurring image in policy discussions and media. In relation to the recent leveling of Roma settlements and the concomitant expulsion ('returning') of Roma from France, French President Nicholas Sarkozy argued for the legitimacy of his decision by saying that the Roma were a "source

of illegal trafficking, of profoundly shocking living standards, of exploitation of children for begging, of prostitution and crime".<sup>421</sup>

The idea of the equality of citizens and a state's obligation to provide the basis for such equality (legal, politically and materially), becomes the basis for excluding the Roma since even though European legal regulations give EU citizens a right to free movement it does not mean that France needs to acknowledge their obligation towards the Roma residing in France, but can treat them as outsiders. Romania on the other hand, despite the fact that some of the Roma carry Romanian passports, employs a similar logic in continuously re-affirming the *nomadic* life-style of the Roma and claiming that, even though they might in this have recently originated in Romania, the Roma are not authentic Romanians, they are merely—as they always been—passing by. In a recent comment on the French expulsions, Romanian President Traian Basescu said that he was in “friendly conversation” with the French President and that they agreed on the necessity to find a solution to problem of the “nomadic Roma.”<sup>422</sup>

The example of the Roma should once again illustrate that there is nothing ideally given by either human rights or historicist claims as to the progress of the modern world, and so Europe cannot rest on its laurels. If anything we have to take a step back, forget about hyper-real Europe and acknowledge that immense discrepancy

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<sup>421</sup> See Questions and Answers – Roma Expulsions. Oct. 19. 2010. BBC News Europe. Available at <http://www.bbc.co.uk/news/world-europe-11027288>.

<sup>422</sup> Romanian President asked France to stop Roman expulsions. Sep 22, 2010. Expatica.com – AFP. Available at to [http://www.expatica.com/fr/news/french-news/romanian-president-asked-france-to-stop-roma-expulsions\\_98143.html](http://www.expatica.com/fr/news/french-news/romanian-president-asked-france-to-stop-roma-expulsions_98143.html).

of equality is still part of many Europeans' daily lives and that grave abuse of political power is not necessarily the corrupted exception. If we acknowledge that we can only engage these inequalities as a political problem. In many ways, Europe is still struggling with its own modernity and its peoples with making themselves feel at home in the modern world.

According to most commentators on international law and human rights, it is hyper-real Europe that is at the forefront of the development within the field. "Europe" leads summits, adds human rights clauses to trade treaties and urges 'the rest' of the world to follow. Understanding the world in these terms re-affirms the idea that human rights are primarily 'European' or 'Western' and that somehow it is the constant and infinite approximation of an already established, followed, and *lived* ideal. The on-going treatment of the Roma illustrates how it is anything but a continuous move towards an idealized universal of human dignity, and rather shows us that it is a crooked road in which the Western (or European) actors are as conservative and reactionary as any proclaimed "others" of the third (or the rest of the) world.

The fact that 'modernity' might leave us with an idea of a universally shared experience of modernization (History 1) does not mean that alternative experiences (History 2s) are relegated to somewhere else, to the developing world or at least beyond the horizon; everyday life in Europe keeps on bringing our attention to the heterogeneity of life even within the borders of Europe. Our idealized notion of "different" and "culturally incommensurable" "types" of life

sits badly in a world of constant and never ending negotiation between certain given modern structures and processes.

If we remain with the situation of the Roma for a second it is easy to see how all of the categories, boundaries and actors that are often taken for granted are much more difficult to locate in the world. The French government presents an argument that by human rights standards are indeed discriminatory and conservative. The Catholic Church (most of time the most conservative force in relation to especially individual human rights), has become one of the staunchest critics of the French policy of the expulsion of Roma. The Romanian government refuses to acknowledge its obligation towards its own citizens on the basis of the Roma being a nomadic people, and the European Union has seen the possibility of advancing their role as the ultimate guarantor of the rights of the *European* citizen vis-à-vis nation based citizenship. With reference to the reified discipline of international law one wonders what about that is Western, what is the European beacon of light, which idealized human rights are infinitely approximated and so on. If anything, the situation of the Roma shows that idealized notions of human rights and the process of establishing and upholding them based on difficult spatial and temporal assumptions do not help us explain the world that we are living in.

What is then the role of History 2s in this context? As Chakrabarty tells us, History 2s are the logical antecedents to capital, but not antecedents established by

its own life-process.<sup>423</sup> If considered together with History 1, they destroy the conventional topological (dialectical) distinction between the European experience of modernity and the multitude of other experiences. As such the experience of History 2s play the role of constantly interfering with the totalizing logic of History 1. Modern history thus becomes the collection of fragmentary histories of “human belonging” that never constitutes a totalizing whole. We, scholars interested in questions pertaining to processes of international law need to engage more of these ‘fragmentary’ histories.

By looking at the Sami and the Roma we also understand the multiple experiences of modernity in Europe and how these different experiences of modernity are not shadows of some ideal experience of modernity (often taken to stand for European), but rather an integral part of its historical development. The case of the Sami and Roma also (and the French expulsions, the Catholic Church’s fight for and against human rights and so on) point to the fact that it is impossible to locate some type of idealized modern Europe.

It is at this point that the benefits of thinking about international law as a modern political practice rather than conceiving of it as a legal and political fact, a status or merely a collection of legal texts should become clear. To think about international law as a political process makes it accessible to a lot of peoples and actors that otherwise would be marginalized and excluded. The Sami have made use of human rights as tool for critiquing Swedish state policy (and have managed

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<sup>423</sup> See page p. 225 – 235.

to place their concerns in the Swedish political debate), even though they have lost most of their court cases. Criticism against French policy towards the Roma has been framed in terms of the fundamental rights of European citizens at the moment when no other modern state would speak for the rights of the Roma in terms of being a citizen of that or another nation state. There are many examples of how actors and peoples have made use of human rights outside the courtrooms, outside parliament and outside the venues of supranational organizations as a practice of critique against state practice.

Recognizing the heterogeneity of modern experiences has one tremendously important effect in looking at international law as a modern political practice. In all accounts of international law a universal sense of order (moral or ethical) is at some point re-affirmed. In Donnelly's case it was conceptual, in Kennedy's pragmatic, in Koskenniemi's a professional ethos and in Anghie an imperial force. If we follow Chakarabarty's argument then we can recover a dynamic and a living sense of both modernity and international law and by so doing we can escape the trap of retiring to a static, simplistic or dogmatic universalism. Again, this is not a rhetorical point, it is an integral aspect of how international law has developed. Chakarabarty's example of the Indian constitution that in the face of criticism levied against their desire for independence created the most liberal constitution at the time: an experience that fed back into discussions on suffrage in Europe. On the other hand the French government wishes to renege on the universality of their constitutional rights and the reaction to those actions that seem to suggest that the modern state do not hold the privilege to interpret that which we take to be our fundamental rights anymore.

In a dynamic and fluid world we also see a Catholic Church that defies being categorized as either dogmatic or liberal, or a South American framework for refugees based on a notion of solidarity that presents a very different take on what protection we owe refugees by the virtue of all being human. From this perspective human rights and international law stop being a set of idealized rights and become a dynamic and versatile tool for critique in the name of social justice, accessible to many more than those that can make it the police station or the court house; to many more than to only those that modern states decide to protect.

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