Talking to Ourselves

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Abstract

The discourse of international law is a remarkable achievement, but it poses the danger that international lawyers will be absorbed in their own conversation and fail to persuade outsiders. International human rights bodies may be especially vulnerable to that risk, despite their need for cooperation from local actors.

Professor Koskenniemi's article is sophisticated and irrefutable. One can only supplement it.

As regards the United States, Koskenniemi is right to be concerned, but not about a dearth of international law professors. Economic globalization makes inevitable the growth of international law practice, international law teaching, and the sales of international law publications (especially if written in English). Fewer of the professors may be purely international lawyers, and more will be dual specialists in international-law and, giving them an interdisciplinary or domestic legal perspective from which they can make locally informed, and perhaps not merely locally self-interested, commentary on international practice.

I once had a colleague who was fond of saying that the phrase 'International Law' was an oxymoron, and then adding the punchline: 'like "Constitutional Law." ' I understood the implication to be that there was a conception of law that both these fields could at most aspire to, and could never claim. The witticism might deserve the rejoinder, 'or like "Private Law" ', but here it would be more useful to entertain the hypothesis that different fields of law face their own characteristic obstacles to achieving rule of law ideals, in addition to the general jurisprudential ones. Professor Koskenniemi has long been pointing us to the hazards for international law.

The impediments that international lawyers must take into account are numerous: cultural difference, linguistic barriers, religious and ideological diversity, incompatible legal traditions; all would complicate negotiation even if states did not differ so greatly in power, material resources, and stages of development. Bridging those divides to reach agreement and maintain cooperation offers a major challenge. The discourse of

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EJIL (2005), Vol. 16 No. 1, 139–142 doi: 10.1093/ejil/chi108

international law, or *droit international*, or *jus gentium*, that facilitates the necessary communication is itself an impressive achievement.

Accomplishments risk complacency, however, and Koskenniemi's adaptation of the concept of kitsch eloquently expresses some of the dangers. The danger that I would like to emphasize here concerns the absorption of international lawyers in their own discourse, deaf to its effect – or lack of effect – on the external audience.

International human rights law illustrates the problem with particular intensity, because international human rights bodies are so dependent on persuasion of outsiders. Like many other international tribunals, these bodies usually lack coercive powers to enforce their own decisions and resolutions, and must cajole national courts and political institutions to comply. But international bodies that specialize in human rights afford states fewer direct benefits than other institutions for resolving international disputes, and states have less incentive to strengthen their authority or augment their resources. They also aim more broadly for influence on states that are not directly involved in proceedings before them.

Ideally, human rights argumentation is a process by which particulars combine to produce something that can function as universal. Human rights lawyers engage in continuing arbitrage between consent and values. From consent to a text, which obviates the need for common theoretical justification, they derive more specific obligations by interpretation. The derivations sometimes proceed positivistically as analyses of text and *travaux*. But they often substitute what the text *ought to* mean, entering the arena of normative dispute that consent had circumnavigated.

It may be an Anglo-American prejudice – although some other European traditions might share it – to think that judicial or quasi-judicial decisions should give reasons, and that the broader or more novel the principles they announce, the fuller the reasoning should be. Human rights bodies have difficulty following that precept, perhaps because their members find it easier to converge on results than on reasons, and would rather do more good than explain it better.

The availability of 'kitsch' offers a risky solution to that problem. International formulae may embolden human rights bodies to leap over gaps in arguments, and persuade tribunal members that they can accept an 'incompletely theorized' (in this case, untheorized) agreement.[1] The danger is that only insiders will be persuaded, and that the body's conclusions will appear as unauthorized fiat, or geopolitical will.

That danger will not always materialize. Studies of transnational judicial dialogue have suggested that for some national courts, an external tribunal can serve as a prestigious source of usable rules, separable from the reasons originally accompanying them.[2] Other national courts may give a human rights body's equivocation a locally convincing meaning that would not receive global endorsement. That response, however, may postpone rather than eliminate conflict.

[1] See Sunstein, 'Incompletely Theorized Agreements', 108 *Harvard Law Review* (1995) 1773.

[2] Slaughter, 'A Typology of Transjudicial Communication,' 29 *University of Richmond Law Review* (1994) 99, at 119.

Nor should the power of persuasive reasoning be overstated. Some countries will spurn inconvenient interpretations, no matter how compelling their derivation, unless they are backed up by material incentives. Nonetheless, persuasiveness may affect the willingness of third parties to create those incentives.

Decisions of the European Court of Human Rights are sometimes thinly reasoned, even when they announce new rules, but they give fuller justifications for their results than the global institutions. While the cultural and ideological diversity of the relevant 'Europe' grew in the 1990s, it still represents a narrow slice of international diversity.[3] The Council of Europe has made acceptance of a specific human rights culture a condition of membership, and those who remain aloof confront prospects of substantial economic disadvantage. Thus, agreement on reasons is both more easily reached and less urgently needed in Strasbourg than in Geneva.

The Human Rights Committee, in contrast, aspires to global validity for its interpretations of the Covenant on Civil and Political Rights. Henry Steiner has diagnosed the uninformative character of the Committee's written 'Views' under the Optional Protocol as follows: 'The Committee fails to expound, and therefore to realise what should be a major purpose of the communications procedure, when its considerations in reaching a decision remain covert, secreted within formal opinions that merely state rather than argue towards conclusions.'[4] Similar criticism could be made of the Committee's General Comments, which often owe their length more to the number of issues they address than to the depth of their analyses.

The Committee's gap-fillers include the undefended attribution of *jus cogens* and the unspecified conclusion of lack of proportionality. The latter is too unemotive a concept to deserve the label of 'kitsch', but can be employed to serve the same function of opacity. Proportionality covers so broad a range of considerations, including the 'weight' of interests and the extent of their impairment and the availability of alternative means in context, that conclusory findings of disproportionality may rest on major normative premises or minor, situation-specific empirical ones.

My own nominee for designation as 'kitsch' is the doctrine that '[a]ll human rights are universal, indivisible and interdependent and interrelated', and must all be treated 'in a fair and equal manner, on the same footing, and with the same emphasis'.[5] This language is quoted from the Vienna Declaration and Programme of Action of 1993, but the supposed principle has been repeated often over the course of the intervening decade, both in UN documents and in the secondary literature. The dogma that all human rights are created equal may be a useful political slogan to cover a laudable agreement to cease the wholesale subordination of economic and social rights to civil and political rights or vice versa. But to claim that the removal of any single brick from the ramifying edifice of human rights treaties would bring down the structure or crush human dignity is plainly false. And treating all human rights with

[3] To an observer at the European Society of International Law meeting, it was striking how much time speakers spent struggling to define the appropriate scope of 'Europe' for their analyses.

[4] Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000), 15, at 39.

[5] Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24 (Part I) (1993), para. 5.

the same emphasis would be a disastrous policy programme, discouraging prioritization of scarce financial and administrative resources. One can extrapolate the effect from the dispiriting experience over the years of the European Court of Human Rights, conscientiously slogging through its vast caseload on unreasonable delay in civil proceedings.[6]

International human rights law needs to persuade outsiders and to leave space for reciprocal critique. Easing conversation among human rights lawyers is not a sufficient objective.

[6] Anticipated procedural reforms pursuant to a Fourteenth Protocol will simplify the adjudication of repetitive violations, while preserving formal equality among rights. See Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, ETS No. 194, Art. 8 (opened for signature 13 May 2004) (authorising three-judge committees to issue judgments on the merits in routine cases under 'well-established case-law'). Whether the power of the Court under Art. 12 of that Protocol to declare an application inadmissible because 'the applicant has not suffered a significant disadvantage' may someday be used in a manner relying on objective distinctions in the 'significance' of different rights remains to be seen.