

REVIEW ESSAY

Legal imagination and the thinking of the impossible

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In recent decades, imagination has become a popular referent in the contemporary international legal discourse.¹ In fact, international lawyers now commonly invoke imagination to refer to the discursive, argumentative, interpretive, performative possibilities that are offered (or refused) to them by their tradition, their training, their discipline, their vocabularies, their forms, their symbolic universe, their history, their regime of truth, their belief system, the structure of their argumentation, etc.

It must be acknowledged that the rising popularity of imagination in the international legal discourse can prove surprising for at least two reasons. First, if reduced to an empirical phenomenon, imagination could be deemed as old as the international legal discourse.² Second, and maybe more fundamentally, the action of imagining could be construed as an inextricable part of discoursing, arguing, interpreting and performing international law.³ In that sense, it could be said that imagination has always been at work in the international legal discourse and is very banal in phenomenological terms.⁴ Yet, it is noteworthy that, when it is invoked in the contemporary international legal discourse, imagination is usually not reduced to a phenomenal banality. In fact, when international lawyers mention imagination, they are often referring to the pursuit of an anti-totalizing and anti-disciplinary ambition, that is to the possibilities of an emancipation from

¹For an early illustration see A. Carty, *The Decay of International Law? The Limits of Legal Imagination in International Affairs* (1986), (republished with a new introduction in 2019). For an overview of the possible uses of imagination in the international legal discourse see G. Simpson, ‘Imagination’, in J. d’Aspremont and S. Singh (eds.), *Concepts for International Law: Contributions to Disciplinary Thought* (2019), 413.

²On the idea that Grotius offered an early act of imagination in the field see M. Koskeniemi, ‘Imagining the Rule of Law: Rereading the Grotian “Tradition”’, (2019) 30 *European Journal of International Law*, 17–52, at 22. See also G. Simpson, ‘Imagination’, in d’Aspremont and Singh, *ibid.*, 413, at 414. Compare with Peter Haggemacher, for whom it is later imagination that elevated Grotius as the author of one of the first modern systematizations of international law. See P. Haggemacher, *Grotius et la Doctrine de la Guerre Juste* (1983).

³On the idea that imagination is a mode of worldmaking and a mode of engagement with the world see S. L. Winter, *A Clearing in the Forest: Law, Life and Mind* (2001), at 67.

⁴G. Simpson writes that ‘to do international law is to make an imaginative leap’. See G. Simpson, ‘Imagination’, in d’Aspremont and Singh, *supra* note 1, 413, at 417.

their tradition, their training, their discipline, their vocabularies, their forms, their symbolic universe, their history, their regime of truth, their belief system, the structure of their argumentation, etc.⁵ Said differently, in the contemporary international legal discourse, imagination often refers to an act of denaturalizing what comes naturally for international lawyers.⁶

It is against this backdrop that I have read Koskenniemi's new volume. In the author's own words, *To the Uttermost Parts of the Earth* constitutes a history of legal imagination understood as a 'history of the ways in which ambitious men, mostly in Europe, used the legal vocabularies available to them in order to react to important events in the surrounding world'.⁷ As a history of legal imagination, *To the Uttermost Parts of the Earth* continues – and decisively contributes to – the abovementioned tradition of engagement with imagination in the international legal literature. That Koskenniemi perpetuates such engagement with imagination is no coincidence, for, as I will discuss in the next section, Koskenniemi himself has long been instrumental in elevating imagination into one of the points of entry into the scrutiny of the ways of thinking of international lawyers.⁸ It is this essay's ambition to shed light on the specific understanding of imagination that informs *To the Uttermost Parts of the Earth*, to situate it against the background of Koskenniemi's earlier work, and to elucidate the particular theoretical moves around which it is articulated.

Before examining how imagination is construed in *To the Uttermost Parts of the Earth*, its contents must be briefly sketched out. *To the Uttermost Parts of the Earth* contains 12 chapters that are spread over four parts – an organization that is not without reminiscences of Wilhelm Grewe's 1984 *Epochen der Völkerrechtsgeschichte*.⁹ Part 1 engages with the justifications of authority in human society in, respectively, thirteenth century France and sixteenth century Spain. This first part ends by specifically turning the attention to the writings of the two Protestant lawyers, Alberico Gentili and Hugo Grotius as they tried to detach legal speech from the hands of the theologians while opposing the expansion of a countervailing idiom of advice to rulers addressed as *raison d'état*. For Koskenniemi, the takes of these educated men on the obedience to authority warrants attention, for, as the author argues, such a question 'would long remain a key theme for defending law as against other idioms for justifying authority'.¹⁰ Part 2 examines the justifications of legal authority in France and the French colonial world up to the Haitian Revolution in 1793–1804, demonstrating that there was a world of difference between what was imagined by the intellectuals and how the administration of an absolutist ruler viewed the roles of the law and lawyers. Part 3 focuses on the British Empire and traces the rivalry between the idioms of the common law and the royal prerogative during British commercial and colonial expansion. It sheds light on the extent to which Britain's free trade empire was based on the combination of ideas about protection and the rule of law that were less argued in terms of the law of nations than as rules of a kind of civilizational propriety the contents of which were imagined by British politicians and colonial officers themselves. Part 4 grapples with the natural law discourse as it was practiced and subject to reinventions between the sixteenth and early nineteenth centuries in Germany, showing how the question of aligning the sovereign equality of individual princes with the overall structure of an empire became the principal problem of what German lawyers at the turn of the nineteenth century began to address as the modern law of nations. Together, these four parts and 12 chapters come to form an impressive 1,107 page-long volume.

The book that these four parts and 12 chapters come to constitute warrants a preliminary observation. This is an observation on Koskenniemi's new book *as a book*. A book often comes across as a neat, linear, totalizing, and systematic container for a set of pre-existing ideas, historical

⁵See, e.g., R. Kapur, *Gender, Alterity, and Human Rights: Freedom in a Fishbowl* (2018), at 1; J. d'Aspremont, 'Critical histories of international law and the repression of disciplinary imagination', (2019) 7 *London Review of International Law* 89–115; G. Simpson, 'Imagination', in d'Aspremont and Singh, *ibid.*, 413, at 414.

⁶On the idea of naturalistic necessity see J. Butler, *Gender Trouble* (2007), 45.

⁷M. Koskenniemi, *To the Uttermost Parts of the Earth Legal Imagination and International Power 1300–1870* (2021), at 1.

⁸See *infra* Section 2.

⁹The first English translation was published in 2000. See W. G. Grewe, *The Epochs of International Law* (2000).

¹⁰Koskenniemi, *supra* note 7, at 10.

findings, stories, arguments, etc. The 1,107 pages of *To the Uttermost Parts of the Earth* and its 12 chapters can certainly be perceived this way. Yet, in my view, there is no book that functions just as the container of pre-existing ideas, historical findings, stories, arguments, etc., and from which it can be distinguished.¹¹ Indeed, for I believe there is no content that pre-exists its inscription, a book cannot be distinguished from its content. In other words, a book, as inscription, always supplants its ever-deferred and always-absent content.¹² *To the Uttermost Parts of the Earth* is no exception to that. The reason I am making this point – which I noticeably borrow from French poststructuralist literary theory – is to highlight why I believe that Koskenniemi’s *To the Uttermost Parts of the Earth* offers us less a set of pre-existing ideas, historical findings, stories, arguments, etc. that ought to be interpreted by exegetic readers and more a *space*¹³ where something is happening and will be happening in the decades to come.¹⁴ What happens and will happen in the space provided to us by Koskenniemi’s *To the Uttermost Parts of the Earth* is and will be the result of his readers exercising imagination. In fact, imagination is one of the ways in which one fills the space provided by the inscriptions with which one engages in order to make something happen. Interestingly, *To the Uttermost Parts of the Earth*, as a book on the history of legal imagination, offers a space today about how lawyers, theologians, merchants, poets, philosophers, medical doctors, and economists have themselves filled the space available to them through their imagination between 1300 and 1500. In that sense, *To the Uttermost Parts of the Earth* is a happening about centuries of happenings or, said differently, it is a space about uses of space then and now. This entails that the readers of *To the Uttermost Parts of the Earth* are not only following the footsteps of all the protagonists whose stories and interventions are told by Koskenniemi in his new book. They are also caught in the same indefinite space.

1. Imagination in the oeuvre of Martti Koskenniemi

This section elaborates on the possible continuity between *To the Uttermost Parts of the Earth* and his author’s past scholarship. In fact, and as was said above, *To the Uttermost Parts of the Earth* is certainly not the first venture of Koskenniemi in the study of imagination. Imagination has always constituted one of Koskenniemi’s points of entry into the ways of thinking and of discoursing by international lawyers. For instance, on a number of occasions, Koskenniemi has engaged with the work of some leading figures of the discipline as works of imagination.¹⁵ Imagination has also been a common referent in Koskenniemi’s work, which the latter has justified by the need to supplement his previous analytical work on the forms of the international legal arguments as well as their uses within international institutions by an examination of ‘the ways in which types of legal speech have become authoritative, have operated to support or critique powerful institutions and

¹¹See J. Derrida, *Positions* (1972), at 11; J. Derrida, *De la Grammatologie* (1967), at 30–1; J. Derrida, *Papier Machine* (2001), at 27. On the idea that Derrida’s Grammatology is about the end of the book see P. Goodrich, ‘Europe in America: Grammatology, Legal Studies, and the Politics of Transmission’, (2001) 101 *Columbia Law Review* 2033–84, at 2042. On the linearity of international law books see the remarks of R. Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (2019), at 15.

¹²I have developed this further in J. d’Aspremont, *After Meaning: The Sovereignty of Forms in International Law* (2021).

¹³It is interesting to note that Koskenniemi has used the idea of space in his concluding chapter where he writes the following: ‘The chapters above have looked backwards to the intellectual spaces from which, during half a millennium, ambitious men tried to imagine a law between nations’ (at 953). On the idea of the text as space see R. Barthes, *L’aventure sémiologique* (1985), at 13. See also R. Barthes, *Le bruissement de la langue: Essais critiques IV* (1984), at 56.

¹⁴On the idea of text as an event see P. Legrand, ‘The same and the different’, in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (2003), 240–411, at 244. See also P. Legrand, ‘“Il n’y a pas de hors-texte”: Intimations of Jacques Derrida as Comparatist-at-Law’, in P. Goodrich et al. (eds.), *Derrida and Legal Philosophy* (2008), 125, at 143.

¹⁵On the work of Grotius as a work of imagination see Koskenniemi, *supra* note 2, 17–52, at 19; on the work of Lauterpacht as a work of imagination see M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 412; on the work of Rolin as a work of imagination see Koskenniemi, *ibid.*, at 16.

have eventually lost to competing vocabularies'.¹⁶ In that regard, the reader is likely to experience some kind of continuity between Koskenniemi's new volume on the history of legal imagination since 1300 and his previous work.

Yet, it is submitted here that Koskenniemi's engagement with imagination in *To the Uttermost Parts of the Earth* departs from that of his previous work in some other regards. In his earlier work, Koskenniemi never posited a monolithic and fixed notion of imagination, let alone elaborated on the extent to which imagination constitutes a thinking of the impossible for the sake of resistance. Instead, Koskenniemi has been using imagination earlier to refer to a multitude of ideas, concepts, postures, moves, and phenomena like non-routine type of thinking,¹⁷ 'reasoned folly',¹⁸ shared historical associates,¹⁹ the available repertoire of possibilities,²⁰ legal thought in general,²¹ the object of the constraints of the legal discourse,²² creativity,²³ a material product of history,²⁴ a type of non-rationalist and non-scientific work,²⁵ a type of normativity,²⁶ a type of morality,²⁷ etc. Compared to such previous engagements with imagination, *To the Uttermost Parts of the Earth* now comes to adopt a much more sophisticated and precise understanding of imagination.

It is the very way in which Koskenniemi understands imagination as well as his specific engagement therewith that will draw the attention for the rest of the essay. It will be particularly demonstrated that Koskenniemi's understanding of imagination in *To the Uttermost Parts of the Earth* is binary. In that regard, it will be argued that Koskenniemi's understanding of imagination comes with two dimensions, each of them corresponding to very distinct theoretical moves, the first one being a *content-deferring* character and the second one being more of *content-postulating* nature. In elucidating Koskenniemi's binary understanding of imagination, the following sections will show that *To the Uttermost Parts of the Earth* finds itself caught between binary theoretical moves in a way that ensures that, like the rest of the work of Koskenniemi, it cannot be labelled, pinned, and boxed in as belonging to any precise philosophical tradition. It will also be shown here that the binary understanding of imagination that informs *To the Uttermost Parts of the Earth* manifests an engagement by its author with the thinking of the impossible.²⁸

2. Deferring content: The imagining rather than the imagined

The first dimension of Koskenniemi's understanding of imagination associates the latter with *thinking* rather than *thought*. Indeed, Koskenniemi defines imagination as the way in which ambitious European men *used* the vocabularies available to them in order to react to important events in the surrounding world.²⁹ Drawing on an analogy with the act of *bricolage* – a notion he borrows

¹⁶Koskenniemi (2019), *ibid.*, 17–52, at 19.

¹⁷M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 557.

¹⁸*Ibid.*, at 560.

¹⁹M. Koskenniemi, 'A History of International Law Histories', in B. Fassbender and A. Peters, *The Oxford Handbook of International Law* (2012), at 945.

²⁰See M. Koskenniemi (2001), *supra* note 15, at 228; M. Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', (2011) 26 *International Relations* 3, at 23.

²¹See M. Koskenniemi (2001), *ibid.*, at 253, 339, 399, 514; M. Koskenniemi, book review of J. L. Cohen, (2013) 11 *ICON*, 818, at 818; M. Koskenniemi, 'What Should International Lawyers Learn From Karl Marx', (2004) 17 *LJIL* 229, at 242.

²²See M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', (2007) *Theoretical Inquiries in Law* 8.1, at 33.

²³See M. Koskenniemi (2001), *supra* note 15, at 403.

²⁴*Ibid.*, at 5.

²⁵*Ibid.*, at 23.

²⁶Koskenniemi, *supra* note 22, at 11; Koskenniemi, *supra* note 17, at 560

²⁷M. Koskenniemi, 'The Pull of the Mainstream', (1990) 88 *Michigan Law Review* 1946, at 1953. For some remarks by M. Koskenniemi on the Kantian engagement with imagination see Koskenniemi (2007), *supra* note 26, at 32–3.

²⁸See *infra* Section 4.

²⁹Koskenniemi, *supra* note 7, at 1.

from French structuralist thought –³⁰ he associates the act of imagination with the *use* by the protagonist of familiar vocabularies lying around them with a view to constructing responses to problems they saw and in order to justify, stabilize, or critique the uses of power.³¹ In *To the Uttermost Parts of the Earth*, imagination is thus always an instrumental type of action, for it is exercised and initiated to produce an authoritative statement and to persuade.³² In the words of Koskenniemi, imagination is ‘about finding a powerful justification for acting or taking decision in some particular way’.³³

The foregoing entails that, in *To the Uttermost Parts of the Earth*, Koskenniemi leaves aside an understanding of imagination that reduces the latter to a thought to which some fixed content, origins, and authors are assigned. Instead, in *To the Uttermost Parts of the Earth*, Koskenniemi embraces an understanding of imagination as action.³⁴ To put it simply, the thread of *To the Uttermost Parts of the Earth*, is the *imagining rather than the imagined*.

This focus on the imagining rather than the imagined allows Koskenniemi to make a theoretical move whereby one does not postulate any pre-existing content but focuses on the work of the structure. This is a move that allows one to avoid the traditional pitfall of what is commonly called logocentricism,³⁵ that is the presumption that the structure carries a pre-existing content and has a set origin or author. To phrase it in semiotic terms,³⁶ imagination, for Koskenniemi, does not correspond to any pre-existing signified (i.e., meaning, content, authorship, etc.) that can simply be loaded onto and carried by a set of legal signifiers (i.e., words, texts, ritual utterances, images, etc.) but is always the work of the signifiers themselves. In that sense, *To the Uttermost Parts of the Earth* provides a history of imagination as action where the content of what is imagined is actually always deferred from one signifier to the other.

3. Postulating content: Imagination as legal imagination

Although the focus of Koskenniemi on the imagining rather than the imagined allows him to never postulate a fixed content of what is being imagined, his content-deferring move is accompanied by a reduction of imagination to *legal* imagination. Indeed, for the author of *To the Uttermost Parts of the Earth*, imagination refers to the use by some carefully selected protagonists of familiar *legal* vocabularies lying around them.³⁷ The action of imagining with which Koskenniemi is concerned thus belongs to the realm of ‘the legal’. It is submitted here that the reduction of imagination to legal imagination in *To the Uttermost Parts of the Earth* entails the postulation of a fixed and pre-existing idea of legality, thereby re-introducing logocentricism by the back door. Said differently, the deferral of content that accompanies the focus on the imagining rather than the imagined is simultaneously displaced by a postulation to a pre-existing content about what belongs to ‘the legal’.

³⁰Koskenniemi, *supra* note 7, at 2. In some earlier work, Koskenniemi defined the act of bricolage as ‘trying to construct a persuasive argument from the bits and pieces of authoritative language lying about in the appropriate professional context’ and as ‘grasping other texts and utopias so as to try as best we can to persuade audiences of the authority of what we have to say, provided that there is anything we are able to say’. See Koskenniemi, *supra* note 2, 17–52, at 24, 28. Compare with the idea of bricolage by P. Legrand, ‘Foreign Law: Understanding Understanding’, (2011) 6 *Journal of Comparative Law* 67–177, at 82, 154.

³¹Koskenniemi, *supra* note 7, at 2.

³²*Ibid.*, at 2, 8.

³³*Ibid.*, at 9.

³⁴*Ibid.*, at 4, 8.

³⁵On the idea of logocentricism see J. Derrida, *De la Grammatologie* (1967), at 13, 21–3; J. Derrida, *L’écriture et la différence* (1967), at 23. Such pattern has also been referred to as the expression of a *metaphysics of presence* as signs are always calling on a pre-existing meaning which they make permanently present. See J. Derrida (1967), *ibid.*, at 103; J. Derrida, *Marges de la Philosophie* (1972), at 187–8.

³⁶F. de Saussure, *Course in General Linguistics*, (edited by C. Bally and A. Sechehaye) (1986).

³⁷Koskenniemi, *supra* note 7, at 1 and 2.

It is important to stress that the reduction of imagination to legal imagination in *To the Uttermost Parts of the Earth* is not a purely semantic move meant to please the likely readership of his new book. Indeed, Koskenniemi carefully defines what it is that makes the imagination he examines belong to the realm of 'the legal'. The belonging of the exercises of imagination that fall within the scope of his inquiry is defined as follows. Koskenniemi starts by making it very clear that it is not the professional capacity in which the protagonists of his book engage in the exercise of imagination that makes the exercise of imagination legal imagination. Indeed, he repeatedly emphasizes that theologians, merchants, poets, philosophers, medical doctors and economists exercise *legal* imagination for the sake of his study.³⁸ Likewise, he is very explicit that it is not the context in which the exercise of imagination takes place that makes him regard such exercise as legal.³⁹ For him, all those contexts of speech that are referred to in the book are never such that they could be regarded as a legal⁴⁰ and this is why he always refers to the 'international context' rather than the legal context.⁴¹

Thus, not by virtue of the capacity of the protagonist or the context in which imagination is exercised, the exercises of imagination examined by Koskenniemi are deemed legal by virtue of the vocabulary around which they are articulated. In other words, by Koskenniemi's account of legal imagination, the use of a legal vocabulary by the protagonists involved is what makes an exercise of imagination belong to 'the legal'. Indeed, all the protagonists of his book, Koskenniemi claims, are united in their resort to legal vocabulary.⁴² Although he recognizes that many other vocabularies – religious, scientific, political, etc. – come to complement legal vocabularies in the stories he tells,⁴³ he repeats that all exercises of imagination examined in *To the Uttermost Parts of the Earth* book build on a legal vocabulary. In his view, it is thus the shared employment of (old or familiar) *legal* vocabularies that makes all those exercises of imagination 'legal'.⁴⁴

Koskenniemi's understanding of what makes an exercise of imagination 'legal' is key in my reading of *To the Uttermost Parts of the Earth*. I argue here that claiming that what unites all the protagonists of his book, be them lawyers, theologians, merchants, poets, philosophers, medical doctors and economists, is their shared resort to a legal vocabulary entails a postulation of some kind of fixed content about 'the legal'. In fact, the narration of 500 years of exercises of imagination provided by *To the Uttermost Parts of the Earth* is informed by a postulation of a transcendental legal phenomenon in which parts of the vocabularies feeding into the exercises of imagination under examination can always be referred back to. Such postulation of a transcendental legal phenomenon also includes a postulation of a distinction between 'the legal' and the 'non-legal'.

Whilst, for my part, I believe that the postulation of a transcendental legal phenomenon as well as the distinction between the 'legal' and the 'non-legal' are themselves caught in the imagination of the imagination it feeds and thus has a meaning that is always deferred and thus absent,⁴⁵ this short essay is not the place to dwell on whether such postulations are appropriate or not. The point made here is that Koskenniemi thus makes two theoretical moves when building his understanding of imagination for the sake of *To the Uttermost Parts of the Earth*: one that is content deferring by virtue of his focus on the imagining rather than the imagined and one that is content-postulating by virtue of his postulation of a transcendental legal phenomenon to which some

³⁸*Ibid.*, at 7.

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹*Ibid.*, at 1.

⁴²Koskenniemi, *supra* note 7, at 5.

⁴³*Ibid.*, at 3 and 8.

⁴⁴*Ibid.*, at 2.

⁴⁵Comp. With the claim of P. Legrand that the different discourses that are traditionally be said to be outside the law are not existing outside of it but are *of it*. See P. Legrand, 'Foreign Law: Understanding Understanding', (2011) 6 *Journal of Comparative Law* 67–177, at 80–1.

of the vocabularies feeding into the exercises of imagination under examination can always be referred.

4. Between the imagining and the legal imagined: The thinking of the impossible

The previous sections have shown that the understanding of imagination around which *To the Uttermost Parts of the Earth* is articulated is caught in a content-deferring move (the imagining) and a content-postulating move (the legal imagined). That the author of *To the Uttermost Parts of the Earth* is aware of the two-dimensionality of his understanding of imagination, and especially of his shift between content-deferring and content-postulating moves, is beyond doubt – it suffices, in that respect, to highlight the repeated use of quotation marks when referring to ‘law’ throughout the volume.⁴⁶

It is submitted in this section that Koskenniemi’s superposition of a content-postulating move to a content-deferring one is the manifestations of his ambivalent relation with structuralism and poststructuralism – at least as these terms are understood in the French structuralist tradition.⁴⁷ Indeed, whilst the content-postulation move that comes with Koskenniemi’s reduction of imagination to the legal imagination corresponds to a traditional and logocentric move of structuralism, the content-deferring move that follows his focus on the imagining rather than the imagined is closer to a post-structuralist posture.⁴⁸ Koskenniemi’s ambivalent relation with structuralism and poststructuralism is certainly not surprising, let alone unheard of. In fact, Koskenniemi has always been navigating back and forth between what I understand as structuralism and poststructuralism⁴⁹ – a posture which he is obviously not alone in and for which he finds himself in good company.⁵⁰ In that sense it could be said that the structuralism of Koskenniemi itself has always been the object of some *bricolage*⁵¹ – to borrow a term from French structuralism which he is fond of.⁵²

It must be acknowledged here that such debates of labelling and genealogy may sound slightly futile, especially since the author of *To the Uttermost Parts of the Earth* never sought to build his work on a united epistemology let alone to turn it into a complete legal system of structural analysis.⁵³ Yet, and more importantly, it is argued here that the oscillation of Koskenniemi’s

⁴⁶See Koskenniemi, *supra* note 7, at 102, 106, 138, 139, 210, 275, 286, 307, 309, 312, 626, 658, 664, 680, 687, 821 (the use of quotation marks is particularly noticeable in the chapters on the Salamanca scholars and on Grotius). Overall, I counted 18 uses of quotation marks when the author refers to law.

⁴⁷Compare with what J. Desautels-Stein has called the Harvard school of legal structuralism: see J. Desautels-Stein, ‘International Legal Structuralism: A Primer’, (2016) 8 *International Theory* 201.

⁴⁸On the distinction between structuralism and poststructuralism see J. Culler, *On Deconstruction. Theory and Criticism after Structuralism* (2008), 22–30. For a traditional expression of structuralism see de Saussure, *supra* note 36. On this aspect of the work of Saussure see the remarks of J. Derrida, *L’écriture et la différence* (1967), at 427.

⁴⁹For his part, A. Rasulov has argued that M. Koskenniemi engagement with structuralism is much more on the side of traditional French(-speaking) structuralism and that it is more a structuralism *à la Saussure*. See A. Rasulov, ‘From Apology to Utopia and the Inner Life of International Law’, (2016) 29 *Leiden Journal of International Law* 641–66; S. Singh, ‘International legal positivism and new approaches to international law’, in J. Kammerhofer and J. d’Aspremont (eds.), *International Legal Positivism in a Postmodern World* (2014), at 291–316.

⁵⁰It is noteworthy that the same ambivalent relationship with structuralism can be witnessed in the work of R. Barthes, *Le bruissement de la langue: Essais critiques IV* (1984), 15–18. See also R. Barthes, *L’aventure sémiologique* (1985), 9–14.

⁵¹It is noteworthy that, on another occasion, Koskenniemi has described his work in *From Apology To Utopia* as a specific type of structural analysis that arose in the twentieth century aimed at making explicit the rules of production of ‘there-ness’ in a way that releases us of such rules’ power so as to take action and help us destabilize the sense that the immediate aspects of international law were true, fixed and action-determining. See M. Koskenniemi, ‘What is Critical Research in International Law? Celebrating Structuralism’, (2016) 29 *Leiden Journal of International Law* 727, at 728–9.

⁵²On all the possibilities offered by a structural(ist) analysis of law, see D. Kennedy, ‘Critical Theory, Structuralism and Contemporary Legal Scholarship’, (1985–1986) 21 *New England Law Review* 209. On the unexploited potential of structuralism in international legal thought see the remarks by N. Tzouvala, *Capitalism as Civilisation. A History of International Law* (2020), at 5–7.

⁵³Koskenniemi, *supra* note 51, at 727–35.

understanding of imagination between a content-postulating move and a content-deferring one, and thus between a structuralist posture and poststructuralist one, raises a much more fundamental question of what his new book is about and what the main takeaway thereof possibly is. In this regard, I want to suggest that *To the Uttermost Parts of the Earth* is, as has just been described, caught between a content-postulating move and a content-deferring one because it is a work that engages with the thinking of the impossible. Being a work on the thinking of the impossible, *To the Uttermost Parts of the Earth* cannot but be caught between the structure it seeks to escape and the 'outside' thereof. In other words, as I want to explain here, the oscillations between a content-postulating move and a content-deferring move that are witnessed in the understanding of imagination informing *To the Uttermost Parts of the Earth* are the expressions of an engagement with the thinking of the impossible.

The following elucidates why I take *To the Uttermost Parts of the Earth* to be a work on the thinking of the impossible, which explains why the understanding of imagination around which it is articulated is caught between a content-postulating move and a content-deferring one, and thus between a structuralist posture and poststructuralist one. Even if, in *To the Uttermost Parts of the Earth*, Koskenniemi is prompt to recognize – drawing on Gaston Bachelard's notion of epistemological obstacles – that vocabularies constitute 'the historical baggage that limits what is possible to imagine in a persuasive fashion today',⁵⁴ Koskenniemi repeatedly indicates that exercises of imagination by the lawyers, theologians, merchants, poets, philosophers, medical doctors, and economists that populate his history of legal imagination are works *around* the vocabularies that 'block' thinking and 'simplify' reality.⁵⁵ For him, imagination is a tool that allows one to shift between discourses, distorts vocabularies, and possibly uses the language against itself.⁵⁶ This is also how I read what the author of *To the Uttermost Parts of the Earth* is trying to tell the readers in the last chapter of the book. Indeed, in that final part, the author, after rejecting point blank the old modernist assumption that language mechanically carries content and thought, immediately takes distance from the opposite view according to which language enjoys full primacy over content and thought. Koskenniemi specifically writes that '[o]ne of the ways in which I find the thesis about the primacy of language to thought and action to be too strong is that it exaggerates the passivity of imagination'.⁵⁷ In my own reading of that concluding chapter, Koskenniemi is telling the reader that the structure governs *but not entirely*.⁵⁸ This dent in the sovereignty of the structure is, for Koskenniemi, made possible by the work of imagination. To put it simply – and maybe somewhat simplistically – imagination, for Koskenniemi, is the way out of the structure. That imagination, according to my reading of Koskenniemi's understanding of imagination, is the way out of the structure is the very reason why I read *To the Uttermost Parts of the Earth* as a work on the thinking of the impossible. For I believe that there is no way out of the structure⁵⁹ and that the 'outside' of the structure remains within the structure, the striving for an 'outside' of the structure that comes with the exercise of imagination is bound to belong to the impossible.⁶⁰ In

⁵⁴Koskenniemi, *supra* note 7, at 4–6.

⁵⁵*Ibid.*, at 3.

⁵⁶*Ibid.*, at 953 ('What I have in this book and elsewhere addressed as imagination is a critical capacity, one that enables shifting between professional languages, and between professional and private languages. It implies the ability to step outside the position of authority to examine it critically, and perhaps to redirect its use . . . Instead, I have wanted to account not only for how the idiom of *ius gentium* and its many cognates have been employed as part of different professional vocabularies in the context of intellectual and political struggle but also to transform what can be achieved by it by shifting between vocabularies, finding new uses for old idioms, creating hybrids or using the languages against themselves.').

⁵⁷Koskenniemi, *supra* note 7, at 952–3.

⁵⁸Compare with J. d'Aspremont, *supra* note 12.

⁵⁹J. Derrida, *Positions* (1972), at 21, 35, 56. See also Derrida (1967), *supra* note 35, at 46. Compare with the idea of one's confinement to one's vocabularies as being the 'tragedy' of writing: see R. Barthes, *Le Degré zéro de l'écriture* (1972), 66. On impossibility being a condition of the realization of the discourse see H. Bergson, *Le possible et le réel* (2011), at 14.

⁶⁰Mention must, however, be made about the conceptualization of thinking outside current thinking. See, e.g., Henri Bergson's suggestion to deconceptualize thinking and to articulate the latter around intuition, movement, and duration in

other words, trying relentlessly to go out of the structure – which is what exercises of imagination undertake according to Koskenniemi’s understanding – is a type of thinking of the impossible.

It should be made clear that thinking about the impossible is no minor thing, let alone a fantasy.⁶¹ It could be argued that, as a form of thinking, the thinking about the impossible is the greatest form of resistance at the disposal of international lawyers against their tradition, their training, their discipline, their vocabularies, their forms, their symbolic universe, their history, their regime of truth, their belief system, the structure of their argumentation, etc.⁶² In that sense, imagining, as is construed by Koskenniemi in *To the Uttermost Parts of the Earth*, is resisting. It follows that Koskenniemi’s history of legal imagination is a history of resistance by a series of European protagonists between 1300 and 1800.⁶³ Whether the multitude of acts of resistance by the ambitious European lawyers, theologians, courtiers, professors, advisers, political writers, etc. that populate Koskenniemi’s book have resisted the ‘just’ or ‘the unjust’ is yet another question that is left to the readers⁶⁴ – although *To the Uttermost Parts of the Earth* allows them to think that more often than not resistance has gone hand-in-hand with injustice. What matters, however, is that speaking of a better world, as Koskenniemi recalls on several occasions in his book, requires that we are able to speak of the injustices of the past as they have been produced by exercises of imagination, including by the work of resistance.

5. Post scriptum: The question of Eurocentricism repeated

Most of what I wanted to say in this short essay pertained to Koskenniemi’s engagement with the structure, and ultimately, the thinking of the impossible for which, as I have tried to demonstrate, *To the Uttermost Parts of the Earth* offers a formidable space. Yet, I cannot help making a final remark on what has been a recurring debate about Koskenniemi’s work on history. This is not entirely a digression for the following allows me to conclude with an elucidation of the very title which Koskenniemi has given to the book that has been discussed here.

It is noteworthy that, in contrast with the silence under which the questions of contextualism and the universalism are passed, *To the Uttermost Parts of the Earth* addresses twice the question of the localization of all the protagonists in European or colonial locations, that is the question of the Eurocentric characters of the markers around which the history of legal imagination offered by Koskenniemi is articulated. Indeed, Koskenniemi addresses this aspect of his work – which he himself describes as ‘embarrassing’⁶⁵ – first in the introduction⁶⁶ and,

a what that is unbridled by concepts (cf. H. Bergson, *La pensée et le mouvant* (2014), 219–44). It is interesting to note in this respect that Adorno recognized the value of Bergson’s attempt to invent non-conceptual cognition but claims that Bergson fails by lack of rigour. For his part, Adorno has called for non-identity thinking, that is a thinking about the nonexistent. Cf T. W. Adorno (edited by R. Tiedmann and Translated by R. Livingstone), *Lectures on Negative Dialectics* (2008), 1, 6, 185–91. Steiner, instead, pinned his hopes of the altering effect of experience on the very categories through which it has been created. Cf. G. Steiner, *Errata. An Examined Life* (1997), 23.

⁶¹On the idea that there is no opposition between reality and imagination see S. L. Winter, *A Clearing in the Forest. Law, Life and Mind* (2001), at 67. See also H. White, *The Content of the Form: Narrative Discourse and Historical Representation* (1987), at 57, 126–7. See also P. Veyne, *Les Grecs ont-ils cru à leurs mythes? Essai sur l’imagination constituante* (1983), at 26, 33, 99.

⁶²Compare with J. Derrida (1967), *supra* note 35, at 46. Compare with T. Eagleton, *The Function of Criticism* (2005), at 89 (‘The genuinely theoretical question is always in this sense violently estranging, a perhaps impossible attempt to raise to self-reflexivity the very enabling conditions of a range of routinized practices’). On the idea that justice is the experience of the impossible see J. Derrida, ‘Force de Loi: Le “Fondement Mystique de l’Autorité”’, (1990) 11 *Cardozo Law Review* 920–1046, at 946.

⁶³Compare the idea of theory’s self-resistance by P. de Man. See P. de Man. *The Resistance to Theory* (1986), at 20.

⁶⁴P. de Man, *ibid.*, at 19–20 (speaking of how theory flourishes when it is resisted and wondering whether this is a triumph or a fall).

⁶⁵Koskenniemi, *supra* note 7, at 12.

⁶⁶*Ibid.*, at 12–14.

then once more, at the end of the volume.⁶⁷ In doing so, Koskenniemi seeks to pre-empt the charge that his history of legal imagination is a story exclusively populated by white European males, taking place only in imperial and colonial locations, and according to a very European timeline.

This is a question which Koskenniemi has already addressed in the past, also in relation to his own work.⁶⁸ In fact, Koskenniemi has had the opportunity to highlight that international lawyers cannot deny their debt to their predecessors in terms of histories.⁶⁹ He also pointed out that a total rejection of the categories and vocabularies of preceding histories would be as reductive⁷⁰ and that, as a result of such a rejection, international lawyers would deprive themselves of a tool to communicate 'by invoking widely shared historical associates'.⁷¹ According to him, the European pedigree of the vocabularies targeted by critical histories as well as the terms, vocabularies, and categories of such critical histories cannot be unmade.⁷² This is why, in his earlier work, he came to expressed some resignation as to the impossibility of avoiding some degree of Eurocentricism in critical histories,⁷³ even acknowledging that a critique of Eurocentricism appears to arise from European preoccupations and political beliefs.⁷⁴

The new mention of this – old – objection in both the introduction and the concluding chapter of *To the Uttermost Parts of the Earth* is interesting because the author of the latter comes to add yet another justification to his earlier claim of the inextricability of Eurocentrism, probably the most convincing of all those already provided by the author. Indeed, echoing this time Foucault's idea of the genealogy of the present,⁷⁵ Koskenniemi argues that we can only speak of a better world as long as we have, in the present, some sense of the injustices of the past. His argument is worth citing for the way it is phrased:

The world today is an extraordinarily unjust place where massive tragedies are produced on a daily basis by the products of an imagination that we recognise as “modern”. If there is reason to be critical about prejudice in the past, this is to learn about prejudice in the present.⁷⁶

At the end of the book, when he returns to this question once more, Koskenniemi adds the following:

Why not just forget about them? One response is that doing so would deprive our own collective imagining of resources enabling us to have a well-informed, instead of prejudiced, view of the kinds of thinking and doing that have created today's world. Depending on what we think of this world, it may then invite us to do our own imagining better.⁷⁷

⁶⁷*Ibid.*, at 956–7.

⁶⁸See also the interview of M. Koskenniemi by L. Obregon reproduced in L. Obregon, 'Martti Koskenniemi's Critique of Eurocentricism in International Law', in A. Galan, M. de Hoon and W. Werner (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017), 360, 374–84, esp. 378.

⁶⁹M. Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', (2013) 27 *Temple International and Comparative Law Journal* 215, 216.

⁷⁰*Ibid.*, at 224.

⁷¹Koskenniemi, *supra* note 19.

⁷²M. Koskenniemi, 'The Case for Comparative International Law', (2009) 20 *Finnish Yearbook of International Law* 1, at 4. See also M. Koskenniemi's remarks on the occasion of the interview conducted by Liliana Obregon and reproduced in Obregon, *supra* note 68, 360, esp. 377–84.

⁷³M. Koskenniemi (2009), *ibid.*, 1, 5.

⁷⁴Koskenniemi, *supra* note 69, at 222.

⁷⁵On M. Koskenniemi's references to the history of the present, *supra* note 7, at 12. Compare with M. Foucault, *Surveiller et Punir* (1975), at 30–2. On Foucault's history of the present see the remarks of D. Garland, 'What is a "history of the present"?' On Foucault's genealogies and their critical preconditions', (2014) 16 *Punishment and Society* 365.

⁷⁶Koskenniemi, *supra* note 7, at 13.

⁷⁷*Ibid.*, at 956–7.

I believe that, of all the past justifications of the confinement of critical histories to Eurocentric vocabularies, markers, protagonists, and periodization ever heard in the literature, the one offered in *To the Uttermost Parts of the Earth* is probably the most compelling. This justification is also most spectacular for Koskenniemi's emphasis on the need to learn, in the present, of this injustice of the past is what informs the very title of his 1,107-page-long book! In fact, in the view of Koskenniemi, the exercises of imagination by all the white protagonists that populate the chapters of his book started in European imperial and colonial locations before being extended 'to the uttermost parts of the earth'. Colonizing thinking beyond home and across all of the globe that is known to the protagonists concerned is, for Koskenniemi, what legal imagination does and seeks to be doing.⁷⁸

Whilst I find Koskenniemi's justification of the Eurocentric character of his history convincing, I note that Koskenniemi's argument stands in sharp contrast with my own engagement with imagination. In fact, in my own work I have always made the forgetfulness about European white males and imperial locations as well as Europe-centred causalities and timelines a condition of the renewal of our imagination.⁷⁹ Yet, thanks to the reading of *To the Uttermost Parts of the Earth*, I have come to appreciate that the difference between Koskenniemi and myself in this regard is one that pertains to our respective understandings of imagination itself and thus not to a divergence on the very question of the configuration which critical histories should take. And this brings me back to the distinction between the imagining and the imagined that was discussed above. In *To the Uttermost Parts of the Earth*, Koskenniemi engages with imagination as action and focuses on the *imagining* rather than the *imagined*. My claim on Eurocentricism, in contrast, engaged with the impossibility of the *imagined* and the repressive character of the terms, categories, vocabularies, markers, events, texts, figures, periodisation, causalities, etc. of our (self-declared) critical histories.⁸⁰ If anything, this short digression on the question of Eurocentricism confirms that the careful focus of Koskenniemi on the imagining rather than the imagined in *To the Uttermost Parts of the Earth* is not only going to bear important lessons for international lawyers' engagements with imagination but also for the latter's critical histories.

⁷⁸Koskenniemi, *supra* note 7, at 9. The reference to 'the uttermost parts of the earth' is actually borrowed by Koskenniemi from a sermon of the Poet John Donne to the Virginia Company in November 1622 where he urged its members to continue the work of St Paul and his companions whom Christ had admonished to preach the gospel 'unto the uttermost part of the earth'. Part of Donne's sermon serves as an epigraph to the volume (p. v). References to that sermon are also made at 700.

⁷⁹See d'Aspremont, *supra* note 5, at 89–115. See also J. d'Aspremont, *The Critical Attitude and the History of International Law* (2019); J. d'Aspremont 'Turntablism in the History of International Law', (2020) 22 *Journal of the History of International Law* 472–96.

⁸⁰On the inadequacy of the idea of repression to capture what is the productive aspect of power see the remarks of M. Foucault in, 'Noam Chomsky and Michel Foucault', *The Chomsky-Foucault Debate on Human Nature* (2006), at 152–3.