

The Potential of International Law: Fragmentation and Ethics

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Abstract

Fragmentation discourse provides a rare opportunity for international lawyers to review what has gone and what is to come: it is, in short, a chance to learn lessons of the past. The subjects and the looking glass, so to speak, are the International Law Commission's Report on the Fragmentation of International Law and its author, Martti Koskenniemi. It is the conclusion of this paper that the legal world's approaches to fragmentation, reflected in the ILC Report, represent a deficiency in ethical responsibility. The author not only considers the Report to be naturally inhibited by the institutional environment in which it was constructed, but furthermore finds that the Report's rule-centric approach to a polarized discourse results only in the propagation of ethical deficiencies that define the classical approaches to fragmentation: constitutionalism and legal pluralism. The Report's formalistic approach is one that attempts to find a middle ground between the stated polarities and, in doing so, it not only advances the myths of a system and of coherence in international law, but enables the preferences that define proliferating tribunals. The very same preferences continue to disable the ethical and political emancipation of the legal professional. The author believes the future of international law can no longer remain chained to rule-centrism against political preferences, but rather lies in the study of the legal professional. International law is a project that requires the rediscovery of our consciously enlightened professionals. This not only requires the development of a professional pluralism but the understanding that professional existentialism is not a reward, but rather the transpiring mindset of noble objectives.

Key words

deformalization; ethics; ILC Report on Fragmentation; Koskenniemi; legal theory

I. INTRODUCTION

The fate of international law is re-establishing hope for the human species.¹

This is Koskenniemi's utopian ideal for international law. It is also the central tenet of this paper. More importantly, it should be the animus that drives the modern international legal professional. Contemporary international law is torn between opposing dichotomies, competing languages, and uncovered subjectivities. The discipline has forgotten its historical strife for the impossible universal, animated by a purposeful ethics centred on the tenets of law, legal theory, and political responsibility.

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1 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 MLR 30.

The purpose of this paper is to remind us of such an ethos through the lens of fragmentation; to demonstrate that our choices have ethical consequences and real implications. It shall not consider the motivations or implications of the dichotomous theories that have dominated fragmentation discourse: constitutionalism and legal pluralism.² Each is a vocabulary that enables the imposition of a preferential perspective, in both the identification of fragmentation and its consequences. Both proffer differing solutions premised on their perspectives. Rather than operating as empirical definitions, each brings with it a political project to exist as the sole condition of possibility. To situate this paper's analysis within either of these theoretical perspectives would be to disable its ultimate ethical exercise. Rather, it seeks to identify and examine the theoretical outlook adopted by the International Law Commission (ILC) in its Report on the Fragmentation of International Law.³ The latter's import lies not only in its positivistic framework, but more so in its theoretical outlook to international law's past and its future. This paper shall examine not only this theoretical outlook, but also the Report's internal contradictions, which arise from its own aims and the personal works of its Chairman, Martti Koskenniemi.

Accordingly, this paper shall be structured as follows. First, it shall outline and identify certain core concepts that are integral to the foregoing analysis (section 2). Second, this paper shall then examine the theoretical underpinnings of the ILC Report (section 3). This shall reveal that the Report possesses a remarkable self-awareness of its weaknesses, as well tensions caused by the chasm between its goals and methodology. This shall be demonstrated through its approach to deformalization as well its attempt to construct a middle path between constitutionalism and legal pluralism, in its approach to fragmentation. Whilst the Report's theoretical underpinnings do not fight, but rather re-enforce, deformalization, it makes a noble but wholly unexpected attempt to notify us of the attending ethics. Finally, it is here that the paper then engages with the personal works of Koskenniemi. Considering law as an ethical act and the virtues of professional pluralism advocates inclusion and negates bias (section 4). This final argument is a call for international lawyers to practise with a considered, Foucaulian freedom.

2. DEFINITIONS AND SITUATING THE ANALYSIS

This paper is fuelled by an agonistic anger at the current state of affairs.⁴ Fragmentation and deformalization are central to defining this state of affairs. This section shall quickly identify the definitions of both these concepts, and their inter relationship in the eyes of the author. First, fragmentation is to be defined as normative disaggregation or conflict resulting from the continuous functional specialization

2 See A. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', (2009) 22 *LJIL* 1.

3 M. Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission, Finalised by M. Koskenniemi, A/CN.4/L.682 (hereinafter ILC Report or Report).

4 Anger can at various times give rise to irrational revolt, to the antagonism that is inherent in law. Agonistic anger attempts retain the constructiveness in resolving that which causes the anger, much as intended by Mouffe. See C. Mouffe, 'Deliberative Democracy or Agonistic Pluralism?', (1999) 66 *Social Research* 745, at 755.

of general international law. It is the normative effect of the emergence of special regimes. Deformalization, on the other hand, has been defined by Koskenniemi as ‘the process whereby the law retreats to provide only procedures or directives for public or private experts to administer international problems by functionally effective solutions and “balancing the interests”’.⁵ This author would take a wider and more historically nuanced definition of deformalization. This, in turn, shall inform a generalized relationship between the two concepts: deformalization can be identified as both a *cause* of fragmentation and a concept that *sustains* the fear of fragmentation.

Niklas Luhmann’s ‘speculative hypothesis’ stated that radical fragmentation would ensue as the result of a shift from the normative to the cognitive.⁶ The belief that boundaries between legal, economic, and political considerations have become porous is one that is sustainable not only between the meta-narratives of the named considerations, but also within law itself. The proliferation of international institutions came not only with the rise of the liberal political agenda, but also with the interconnectedness of specialist aims and normative realizations. Deformalization represented the deferral of law to the politics of the relevant expert. It enabled the specialization of the proliferating institutions. It resulted in the shift from institutions to regimes. Therefore, deformalization was one possible *causatory element* of fragmentation, inasmuch as it enabled the specialization and development of regimes in international law. It did so from shifting our thinking from the normative to specialized and identifiable cognitive areas.

More worryingly for the current state of affairs is that deformalization can be identified as a domineering discourse that *sustains* the fear of fragmentation. The shift from the normative to the cognitive, and the consequential porosity of economic, legal, and other considerations, is one that has taken place within law itself. With the fall of classical legal formalism and the realization that rules are both over- and under-inclusive came the concentration of power with the law applier. In conjunction with this came a change in the manner in which norms in international law were constructed. International legal rules require the deferral of law to the politics of the expert, necessitating his presence for the decoding and application of many rules.⁷ Deformalization is therefore the process by which legal rules are constructed and applied to continuously necessitate the relevant expert. Deformalization has reduced legal judgement to the product of a regime’s internal rationality. A regime’s internal rationality is defined by its particularist tendencies, its specialist function – in short, its ‘structural bias’. Koskenniemi has represented ‘structural bias’ as an empirical

5 M. Koskenniemi, ‘Constitutionalism as a Mindset: Reflection on Kantian Themes about International Law and Globalisation’, Tel Aviv Conference, 28–30 December 2005, at 4.

6 N. Luhmann, ‘Die Weltgesellschaft’, in N. Luhmann (ed.), *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft* (1971), 51, at 63. For a construction and extension of the Luhmann perspective, see A. Fischer-Lescano and G. Teubner, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (trans. M. Everson), (2004) 25 Mich. JIL 999, at 999–1002.

7 For a range of examples of such legal rules that cannot be properly applied by the attendant legal expert, see Koskenniemi, *supra* note 1, at 9–15.

corrective to his indeterminacy thesis.⁸ But it is more than this; it is the final nail in the coffin of the law applier. Deformalization is the process, enabled by ‘structural bias’, by which the law applier becomes the bureaucrat. Therefore, in its *sustaining* mode, deformalization enables the solipsistic tendencies of particularist institutions and reduces the law applier to a bureaucrat, or Koskenniemi’s ‘managerialist’,⁹ whose function is driven by political and technical expertise.

It is this reduction in the modern international legal professional that lies at the heart of the author’s angst with contemporary international law. To be an expert and to sustain political particularisms are virtues in the marketplace of contemporary international law. Fragmentation discourse and our approach to it are very much rooted in such a reduction of the individual. Equally, however, our response to this discourse and to deformalization can embolden a path that does not betray the modern professional to the prison bars of a particularist vocabulary or a solipsistic perspective.

3. THE ILC REPORT ON FRAGMENTATION

These conclusions are more important for what kind of *perspective* they bring into the debates, than what they suggest as practical recommendations.¹⁰

Koskenniemi viewed the Report’s virtue as lying in its theoretical outlook, notwithstanding the attendant institutional curtailment that one expects from a formalistic body such as the ILC. It was his introduction as Chairman of the Study Group that significantly changed the perspective through which the Commission viewed fragmentation. It shifted from a unity-centred perspective to that of a plurality of perspectives: ‘[i]n an important sense, “fragmentation” and “coherence” are not aspects of the world but lie in the eye of the beholder.’¹¹ This shift can be seen when contrasted with previous ILC studies on the matter,¹² in the substance of the 2006 Report, and, more superficially, in the latter’s change of name. The Report’s perspectival pluralism is premised on the observation that ‘international lawyers have been divided in their assessment of the phenomenon’ and that the ILC ‘has understood the subject to have both positive and negative sides’.¹³ The Report goes on to state that ‘[o]n the one hand, fragmentation does create the danger of conflicting and incompatible rules, principles, rule systems and institutional practices. On the other hand, it reflects the rapid expansion of international legal activity into various new fields and the diversification of its objects and techniques’.¹⁴ The Commission’s

8 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument: Reissue with a New Epilogue* (2005), 606.

9 M. Koskenniemi, ‘Formalism, Fragmentation, Freedom’, speech given on Kantian Themes in Today’s International Law in Frankfurt, 25 November 2005, at 17; M. Koskenniemi, ‘International Law: Between Fragmentation and Constitutionalism’, speech, Canberra, 27 November 2006, paras. 3–7, 16, and 26–28. More recently, see M. Koskenniemi, ‘The Politics of International Law: 20 Years Later’, (2009) 20 EJIL 7.

10 Koskenniemi, *supra* note 5, at 7 (emphasis added).

11 ILC Report, *supra* note 3, para. 20.

12 See G. Hafner, ‘Risks Ensuing from Fragmentation of International Law’, Official Records of the General Assembly, Fifty-Fifth Session, Supplement No. 10 (A/55/10), Chap. IX.A.I, Annex, at 321.

13 ILC Report, *supra* note 3, para. 14.

14 *Ibid.*

approach was initially rooted in viewing fragmentation through its effects on the unity of international law, but the Report demonstrates the value of legal pluralism, as well as the latter's limits.¹⁵ This unwillingness to adopt a singular perspective, quite correctly in the eyes of this author, is rooted in avoiding a Faustian pact. The cost of adopting a specific perspective is the application of specific value-laden preferences. The extent to which the Report manages to avoid this Faustian pact shall be illustrated below.

However, a few remarks need to be made concerning the institutional context in which the Report was constructed. The Report was the product of a number of different studies conducted by different Commissioners. But Koskenniemi did finalize the Report, using his own language, whilst needing to compromise on it with other Commissioners. Yet, more importantly during his time at the ILC, Koskenniemi observed '[c]an a meaningful contribution to the global legal order be made by a group of lawyers representing nothing more but a narrow technical expertise?'¹⁶ The ILC therefore suffers from two inherent problems: first, the ILC functions as presupposing and reinforcing the systemic nature of international law, and more particularly its unity, and, second, as Bederman states, it is 'destructive (because codification fails to describe the experience of the international community)'.¹⁷ Given each of these points, the following analysis is limited. The Report could never reasonably consider an ethical project. This paper does not require it do so, for an ethical project derives from the normative and theoretical choices made. Despite its limitations, this paper shall move to consider the choices made by the Report.

3.1. The ILC Report's treatment of deformalization

To what extent does the Report prevent the reduction of international law to a mere instrument for the imposition of particularist preferences and to the consequential bureaucratization of the legal professional? The Report's initial and underlying approach to deformalization and fragmentation is circumscriptive at best. In an approach reminiscent of its Chairman's personal works, the Report begins its construction of legal fragmentation with the disaggregation of the social, openly mounted as the sociological perspective, noting that '[o]ne of the features of later international modernity . . . [is] . . . "functional differentiation"'.¹⁸ However, rather than nullifying the discussion by advocating the radical sociological perspectives of Fisher-Lescano and Teubner, it merely goes on to note the 'well-known paradox of globalisation' that has enabled 'the emergence of specialised and relatively autonomous spheres of social action and structure'.¹⁹ Predictably, this sociological observation is moored within the legal through the following observation:

The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice.

¹⁵ Ibid.

¹⁶ M. Koskenniemi, 'International Legislation Today: Limits and Possibilities', (2005) 23 *Wis. ILJ* 61, at 64.

¹⁷ D. Bederman, *The Spirit of International Law* (2002), 67.

¹⁸ Ibid., para. 7.

¹⁹ Ibid.

What once appeared to be governed by ‘general international law’ *has become a field of operation of such specialist systems* as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘law of the sea’, ‘European law’ and even such exotic and highly specialised knowledges as ‘investment law’ or ‘international refugee law’ etc. – *each possessing their own principles and institutions.*²⁰

Deformalization is intimated behind the socially concrete concept of specialized regimes that forms the crux of fragmentation. Indeed, it operates as nothing more than a background point enabling the chief concern of the Report ‘to focus on [its] substantive question – the splitting up of the law into highly specialized “boxes” that claim relative autonomy from each other and from the general law’.²¹

Latent concerns with deformalization surface more readily as the Report attempts to define its ambits. Underlying policy and perceptual concerns readily manifest themselves in the definitions that one adopts to define the debate – in this case, the notion of ‘conflict’ for the purposes of the Report. The Report notes that if a conflict is only perceived between rules of the ‘same subject-matter’, then this would presume a ‘pre-existing classification scheme of differing subjects’. Since no such classification exists, it would require ‘pigeon-holding [*sic*] legal instruments as having to with “trade”, instead of “environment”’.²² The Report then proceeds to state that ‘[i]f there are no definite rules on such classification, and any classification relates to the interest from which the instrument is described, then it might be possibly to avoid the appearance of conflict *by what seems like a wholly arbitrary choice between what interests are relevant and what are not*’.²³ The Report avoids classification for fear that it may only exacerbate specialization by expert systems, and noted that without classification, there was a danger that conflict determination may be pre-determined by preferential interests. The Report attempts to avoid both reductions into deformalization, drawing upon Vierdag’s definition,²⁴ so that ‘[t]he criterion of “same subject-matter” seemed already fulfilled if two different rules or set of rules are invoked in regard to the same matter’.²⁵ In the opinion of this author, the Report commendably manages to restate such an open notion of conflict, so as to bring into play any applicable rule. However, with such an open redress to deformalization and the threat of fragmentation, it may falter before the same critique of formalism: over-inclusiveness. This may merely enable and then exacerbate the presence of the expert. The Report’s redress to substantively empty formalism is reminiscent of Koskenniemi’s ‘culture of formalism’, which he uses to counter the vices of deformalization.

However, the Report’s attitude towards deformalization is not entirely enlightened. It is unfortunate that despite the concerns outlined in section 2 above, the Report is unable to guard against the concept’s inherent dangers. Whilst acknowledging that ‘[e]ach rule-complex or “regime” comes with its own principles,

20 Ibid., para. 8 (emphasis added).

21 Ibid., para. 13.

22 Ibid., para. 22.

23 Ibid. (emphasis added).

24 Ibid.

25 Ibid., para. 23.

its own form of expertise and its own “ethos”, not necessarily identical to the ethos of neighbouring specialisation’, it does so with concern only for ‘problems of coherence in international law’ and fear that ‘the unity of law suffers’.²⁶ The ILC only concerns itself with deformalization insofar as the development challenges the coherence and unity of traditional general law. This traditionalist approach disables the ILC from realizing the true dangers of deformalization: the importation of solipsistic values into international law – values that reductively categorize the professional as a bureaucrat for specializations. It is here that this author differs with the Report. It is clear that the Koskenniemi and the Report itself recognize deformalization’s capacity to endanger a professional’s human freedom and, apart from token posturings, ignore the magnitude of this fault.

3.2. The ILC Report’s treatment of international law as a system

Despite this, the Report makes other clear choices: its adoption of international law as a system and the resultant rationality of legal reasoning. Between its narrow conception of legal reasoning, necessitated by its internal tension between contextuality and systemic predictability, and its inability to move beyond a classical legal formalism, is its underlying conception of an evolutionary ethos. This ethos draws upon Koskenniemi’s own works and seeks substantive emptiness in the face of a regressive return to rule-orientation. However, in order to understand the influence of the author upon the Report, a small insight into Koskenniemi’s works *circa* 2005/06 reveals an interesting commentary on legal reasoning and rule application in an era of deformalization:

Every rule needs, for its application, an *auctoritatis interpositio* that determines what the rule should mean for a particular case, and whether, all things considered, it is right to apply it or perhaps have recourse to the exception . . . [T]he *auctoritatis interpositio* whose judgment in the application of the law in a particular case . . . [is] . . . the act of competent creation of an individual norm, which is, as Kelsen would say, a political act . . . [Therefore] *the rule of law must address the way the law-applier (administrator, public official, lawyer) approaches the task of deciding in the narrow space between fixed textual understandings on the one side and predetermined functional objectives on the other without endorsing the proposition that the decisions emerge from a ‘legal nothing’. I think about this in terms of the spirit or better, the mindset, of the legal profession.*²⁷

Three points of import can be derived from this statement, each essential to the proceeding analysis of the Report. First, rules are insufficient in a deformalized world; ‘rules do not spell out the conditions of their own application.’²⁸ Second, it is the aim of the rule of law, and, for our purposes, legal reasoning, to decide the application of a rule without delving into the pits of Schmittian decisionism. Third, and importantly, an international rule’s fate lies in the *mindset* of the legal professional.

²⁶ Ibid., para. 15.

²⁷ Koskenniemi, *supra* note 5, at 1–3; see Koskenniemi, ‘Formalism, Fragmentation, Freedom’, *supra* note 9, at 14–25; Koskenniemi, ‘International Law’, *supra* note 9, para. 26 (emphasis in original).

²⁸ This notion of Kant has been used to fuel many of Koskenniemi’s forays into stating Kant in critical legal terms.

The Report, whilst familiar with the impossibility of formal unity, attempts to treat international law's dichotomies as 'conditions of possibility'²⁹ and accordingly steer a middle path between the particularisms. However, despite its good intentions, it constructs a centripetal but indefinable system of international law. Such a path suffers from two endemic faults that betray its intentions: (i) the Report's consistent deferral to coherence is ultimately rooted in a unity-centric perspective, and (ii) the Report's accordingly narrow conception of legal reasoning falls far short of Koskenniemi's analysis above. Each shall be considered in turn.

3.2.1. *International law as a 'system'*

The Report's opening comments strike the tenor of swinging between the dichotomous approaches of constitutionalism and legal pluralism, whilst it attempts to find the hope accompanying an unoccupied space. It first acknowledges the influence of deformalization on fragmentation: '[n]ew types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements.'³⁰ Yet the Report diverts again and again to the perspective that 'the unity of law suffers' and it 'creates problems of coherence in international law'.³¹ The Report makes clear at the outset, despite its obvious high regard for legal pluralism,³² that its approach shall be systemic, rooted in upholding order and 'the objectives of legal certainty and equality of legal subjects'.³³ Yet, even as it approaches this conception of international law, it acknowledges that 'it is pointless to insist on formal unity. A law that would fail to articulate the experienced differences between fact-situations or between the interests or values that appear relevant in particular problem-areas would seem altogether unacceptable, utopian and authoritarian simultaneously'.³⁴ However, whilst it recognizes the obvious weakness of formal unity, it comes dangerously close to presupposing this weakness. The Report turns to 'the wealth of techniques in the traditional law for dealing with tension or conflicts between legal rules and principles. What is common to these techniques is that they seek to establish meaningful relationships between such rules and principles'.³⁵ It is this turn to the uniform application of what are seemingly secondary rules that could trigger the accusation that the Report panders to the notions of formal unity, for such unity is preconditioned by the uniform application of such secondary rules.³⁶ Yet the creation of a relationship between rules constitutes part of its centripetal, yet indefinable, system and not a turn to formal unity, since 'no homogenous, hierarchical meta-system is realistically available to do away with such problems [of

29 D. Kennedy, 'The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's *From Apology to Utopia*)', (2006) 7 *German Law Journal* 982, at 985.

30 ILC Report, *supra* note 3, para. 15.

31 *Ibid.*

32 *Ibid.*, paras. 7–8; see also para. 491.

33 *Ibid.*, para. 12.

34 *Ibid.*, para. 16.

35 *Ibid.*, para. 18 (emphasis added).

36 See P.M. Dupuy, who defines formal unity as 'essentiellement liée à l'utilisation des mêmes règles secondaires, de reconnaissance, de production et de jugement', in P.M. Dupuy, 'L'unité de l'ordre juridique international: Cours général de droit international public', (2002) 297 *RCADI* 15, at 39.

fragmentation]'.³⁷ The Report avoids architectural constitutionalism by asking the legal professional to construct 'the rules, methods and techniques for dealing with such collisions [between norms and regimes]'.³⁸ It aims to pave a middle path between the Scylla of coherence and the Charybdis of pluralism by remaining grounded in a 'formal' or ethically derived constitutionalism.

Such enlightened and ethically driven constitutionalism is an approach that seeks the median line between traditional European positivists and contemporary liberalists.³⁹ The Report, having embraced that unity 'is to some extent a fiction – a valuable fiction, and one to be cherished, but a fiction',⁴⁰ and privileging systemic coherence and the language of predictability over-rigid hierarchy, clearly seeks to assuage certain liberal scholars. However, the appearance of trawling the line between the two disciplines is just that – an appearance. The Report's formal and ethically derived constitutionalism is rather an attempt to reflect Koskenniemi's sociological construct of the 'constitutionalist mindset at work'⁴¹ that enables an overly formalistic approach, which, in turn, offends the situationality sentiments of liberal institutionalist scholars. It is a reflection of a tempered European approach. Koskenniemi stated in 2005 that it was necessary to reflect the fact that 'there appears to exist a practice of "constitutionalising" international relations by constantly deciding hierarchies between rules and rule-systems'.⁴² Much of contemporary international legal commentary centres on unity as the standard against which international adjudication is measured. Indeed, *fragmentation discourse is posited on the precondition that unity actually exists within the international legal sphere. Without an object to fragment, the fear of fragmentation is merely an empty conceptual abstract.* The Report adopts an identical approach to that of scholastic commentary, resulting in a presumption of a system whose coherence is presumed and yet apparently threatened. This presumption of coherence, which places the Report at a critical disadvantage,⁴³ is posited within the 'formal' and ethically derived constitutionalism. This approach is two-part; first, considering a plausible formal constitutionalism that denotes the turn to a centripetal legal system and, second, considering a specific ethical project that is premised in the sociological observation above, but also in the normative project of resisting injustice, with the legal professional adopting the 'constitutional mindset'. Only the first shall now be considered, whereas the second, its ethical project, shall be examined in section 4.

37 ILC Report, *supra* note 3, para. 493.

38 *Ibid.*

39 See, e.g., A.-M. Slaughter, 'Toward a Theory of Effective Supranational Adjudication', (1997) 107 Yale LJ 273; and J. Charney, 'Is International Law Threatened by Multiple International Tribunals?', (1999) 271 RCADI 101.

40 H. Thirlway, 'The Proliferation of International Judicial Organs: Institutional and Substantive Questions: The International Court of Justice and Other International Courts', in N. Blokker and H. Schermers (eds.), *Proliferation of International Organizations* (2001), 255, at 266.

41 Koskenniemi, *supra* note 5, at 10.

42 *Ibid.*, at 9; see also at 7.

43 Miller notes that 'until the work is done [to thoroughly research the overall coherence of the system, and the extent to which it is really threatened by fragmentation], the complacent and the critic alike will be at a disadvantage': N. Miller, 'An International Jurisprudence? The Operation of "Precedent" across International Tribunals', (2003) 15 LJIL 483, at 526.

A 'formal' constitutionalism has alternatively been termed as constitutionalism's 'political sensibility';⁴⁴ as its 'subsidiary mode as the critique of rule; as a vocabulary of rights, accountability and transparency';⁴⁵ or as a 'plausible constitutionalism'.⁴⁶ Its essence lies in considering that no special regime is to be considered separate from general international law, but rather 'international law is a legal system'.⁴⁷ It stands in contrast to what may be termed formal unity: the hierarchical concept of the system of international law. The Report defined 'system' negatively, stating '[b]y this [system], no more need be meant than that the various decisions, rules and principles of which the law consists do not appear randomly related to each other'.⁴⁸ Yet this systemic conception is one that acknowledges the impossibility of formal unity, and yet seeks to explain international law's capacity for reasonable systemic coherence and order. It is this systemic conception of international law that prefaces the Report's unnecessarily formalistic approach to legal reasoning. Yet, for current purposes, the Report's apparent adoption of an international legal system based on 'plausible constitutionalism' speaks to two observations. First, it is common to both the liberal and the traditional European disciplines, despite each varying in their perception of the system. Second, a system of international law only states that its composite institutions make decisions; therefore, it seeks to create stable relations of convergence upon the 'site' of the system. If such convergence was to be established, divergence enunciates specific consequences for the system. However, despite these observations, one is forced to ask: what is the purpose of establishing the system, or establishing relationships, and if they matter, surely such relationships need to be constructed with care so as not to establish an unstable system? As Skouteris notes, 'one should not wonder what is wrong with the methodological tool kit but, rather, what is the added benefit by calling something a system?'.⁴⁹ It is one thing to say, as the ILC has, that international law is a system; it is quite another to say that the system is not developed beyond its primal state and that it is our purpose to define it and its internal relationships. Given that the Report charges the international legal professional with the latter,⁵⁰ what is to prevent the latter from falling into the traps of managerialism? There are therefore a number of problems with the Commission's digression to a plausible constitutionalism, to a general system that is able to deductively inform legal decision-making. First is Skouteris's critique: what value lies in such a determination? Second is Foucault's critique of such terms: adorning the labels of system and coherence provides more questions than answers, since 'structure, coherence, systemacity . . . may not, in the last resort, be what they seem at first sight'.⁵¹ Third, naming something a 'system' shall

44 M. Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought', speech, Harvard University, 5 March 2005, at 17.

45 Ibid.

46 Koskenniemi, 'International Law', *supra* note 9, para. 18; Koskenniemi, *supra* note 1, at 16.

47 ILC Conclusions, (1).

48 ILC Report, *supra* note 3, para. 33.

49 T. Skouteris, *Progress in International Law* (2010), at 179.

50 ILC Report, *supra* note 3, para. 493.

51 M. Foucault, *The Archaeology of Knowledge* (trans. A. M. S. Smith) (1990), at 117. The full quotation states: 'To recognize that they are not the tranquil locus on the basis of which other questions (concerning their structure,

only ever be a regressive act. It shall always operate as an apparently empirical and objective determination, but one that is aimed at contextualizing and empowering its component parts. However, placing the international legal professional within this 'system' is far from empowering; it is merely a deferral to existing mindsets and biases. The notion of 'system' always requires definition by reference to its own terms. The pretensions of the Report's plausible constitutionalism, its centripetal system, clearly aims at emboldening the legal professional and one's belief in the societal persuasive power of law. But 'systemic' conceptions are accompanied by a particular language and grammar. It is here that we see the largest rift between Koskenniemi's personal works and his operation as Chairman. Koskenniemi, in his personal works, has effectively used the turn to language and grammar to effect the modern professional's ethical freedom. However, the Report equates the emancipatory language and grammar of international law with that attendant on a 'systemic' approach. It removes the professional's ethical freedom and undermines the truly persuasive power of international law.

3.2.2. *The Report's approach to legal reasoning*

Having critiqued the Report's identification of international law as a system, the paper moves to consider the Report's approach to legal reasoning. The Commission states that '[t]his report is about legal reasoning'.⁵² However, before embarking on an exploratory examination, one should be reminded of the words of Koskenniemi stated at the beginning of this section. First, the pivotal arena for legal reasoning centres on the *auctoritatis interpositio* and not on rules, and, second, the purpose of legal reasoning is to find the unoccupied space between fixed textual meaning and functional objectives without falling into decisionism. The Report's formalism is one that is unable to embrace either of these two points, but may nevertheless emerge as important for its value in that which it opposes.

The Report's treatment of legal reasoning, as stated in its footnotes, owes a debt to Hart, Dworkin, and McCormack.⁵³ However, whilst the Report attempts to accurately reflect and construct the 'pragmatic process'⁵⁴ of legal reasoning, it is unable to do so for want of contextual appreciation. This particular observation is rooted in four particular observations regarding the Report's construction. First, the Report's heritage in classical legal formalism leads to the observation that legal reasoning 'builds systemic relationships between rules and principles';⁵⁵ indeed, it is 'one of the tasks of legal reasoning to establish it [systemic relationships between

*coherence, systemicity, transformation) may be posed but they themselves pose a whole cluster of questions (what are they? How can they be defined or limited? What laws do they obey? Which specific phenomena do they give rise to in their field of discourse?). We must recognize that they may not, in the last resort, be what they seem at first sight. In short, they require a theory, and that this theory cannot be constructed unless the field of the facts of discourse on the basis of which those facts are built up appears in its non-synthetic unity. Once this is done, an entire field is set free' (emphasis added). Many thanks to Thomas Skouteris for highlighting the import of this statement; Skouteris, *supra* note 49, at 195.*

52 ILRC Report, *supra* note 3, para. 20.

53 *Ibid.*, fns. 29, 32, 33, and 35.

54 *Ibid.*, para. 27.

55 *Ibid.*, para. 35.

various rules)].⁵⁶ The Report states that this process of ‘systemization’ ‘penetrates all legal reasoning’.⁵⁷ Second, these comments preface the view espoused by Dworkin, whereby the Report’s systemization ‘may also be rationalized in terms of a *political obligation on law-appliers to make their decisions cohere* with the preferences and expectations of the community whose law they administer’.⁵⁸ Third, the Report posits formality, not merely through deductivism, but rather through policy, principles, and purpose, by asserting that ‘legal reasoning should be understood as a purposive activity’⁵⁹ enabling ‘the operation of a whole that is directed towards some human objective’.⁶⁰ Fourth, and finally, the Report endorses an artificial distinction between application and justification,⁶¹ which is premised on promoting the self-confessed ‘formal and abstract virtue’⁶² of coherence.

The above-mentioned characteristics are certainly formalistic to the extent that they advocate (i) a turn to rules over factual and institutional situationality,⁶³ and (ii) a systemization of international law that disguises the biases of the interpreters (much akin to sociological critiques on mainstream thought and in particular to instances of the abuse of deduction and its relationship to gaplessness in legal orders). The Report must be examined and analysed as to why it embraces formalism in the manner it does. The primary answer to this question is that the value of formalism (dependent on definition) lies in that which it opposes. Historically, formalism in legal theory has been used within specific factual and political environments. Koskenniemi has noted that ‘in a thorough policy-orientated environment, formalism may sometimes be pursued as a counter-hegemonic strategy’.⁶⁴ Kant’s liberal conception of law as rules and institutions was often conceived against the naturalism of Pufendorf and Grotius.⁶⁵ Hart offered his highly normative, rationalized account of law under the guise of a neutral descriptive theory, pitted against the naturalism of Fuller, both of whom accused each other of formalism. Yet, each was situated in confronting the conception of law that emerged within the Nazi regime.⁶⁶ Kelsen rejected the alternative sociological models proposed by those between Geny and Cardozo as disguising a politically progressive natural law. Therefore, from Kant to Hart/Fuller, and Kelsen, formalism in its various guises and forms has been the squabbling twin of naturalism. This opposition is what has driven Koskenniemi to label it a ‘counter-hegemonic strategy’. Yet what does this formalism oppose in today’s society? What is the naturalism that is to be considered hegemonic? It is here that we return to deformalization. This is a process that manifests and sustains

56 Ibid., para. 33.

57 Ibid., para. 35.

58 Ibid. (emphasis added).

59 Ibid., para. 34.

60 Ibid.

61 See generally on the distinction J. Habermas, *Justification and Application* (trans. C. P. Cronin) (1993).

62 ILC Report, *supra* note 3, para. 491.

63 M. Del Mar, ‘System Values and Understanding Legal Language’, (2008) 21 *IJL* 29, at 39–57.

64 Koskenniemi, *supra* note 8, at 602.

65 Koskenniemi, *supra* note 1, at 28; Koskenniemi, ‘International Law’, *supra* note 9, para. 24.

66 N. Lacey, ‘H. L. A. Hart’s Rule of Law: The Limits of Philosophy in Historical Perspective’, (2007) 36 *Quaderni Fiorentini* 1203, at 1205–6 and 1208.

managerialism, the ‘new imperial naturalism’.⁶⁷ The Report’s formalism is therefore possibly virtuous, but this is entirely dependent on the type or rhetoric of formalism being used. It is here that we come to the import of Koskenniemi’s personal works and his ethical project.

4. AN ETHICAL PROJECT: BEYOND CLASSICAL FORMALISM

[E]ven where formalism appears progressive, it may turn regressive.⁶⁸

As outlined above, the Report valorizes the liberal law model of Hart, Dworkin, and MacCormick. This model assumes a coherent legal system containing a consistent sequence of values – a resort that enables legal reasoning and rule application to be systemically beneficial.⁶⁹ Indeed, it is the fallacy of classical formalism that presupposes determinacy and a unifying, systemic core of reason within law. Rather, a resort to this model of law necessitates the imposition of order and coherence, because, empirically, there is no such coherence in international law; there is no conception of a system, no matter how loosely defined it is in the Report. Koskenniemi makes the point that resort to classical formalism is without merit, for ‘a formalism *sans peur et sans reproche* is no longer open. The critique of rules and principles cannot be undone’⁷⁰ – because this formalism confronts two problems. First, such classical legal formalism constantly strives to circumvent semantic indeterminacy; it is unable to embrace it as an empirical reality. Second, it is unable to account for the ontological indeterminacy of international law. This ontological indeterminacy is the statement that entirely opposing and differing arguments can compose ‘impeccable legal arguments’. This is Koskenniemi’s stronger indeterminacy critique.⁷¹ However, more importantly for Koskenniemi, classical liberal formalism has always been unable to appreciate the value of this stronger indeterminacy critique, for it is recognition of competing legal argumentation as equally competent that extends international law’s acceptability. Both these elements of Koskenniemi’s indeterminacy critique shall be examined later in this paper.

Central to understanding the formalism that finds intermittent referencing in the ILC Report is rejecting its possible classification as classical legal formalism. The formalism invoked is given value by that which it opposes and in this regard must constitute part of international law’s ontological indeterminacy. Duncan Kennedy states the value of formalism in this endemic and ontological battle to win favour

67 M. Koskenniemi, ‘Between Empire and Legal Formalism’, Speech at Recife, Brazil, 18 May 2003, at 9.

68 J. A. Beckett, ‘Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project’, (2006) 7 GLJ 1045, at 1072.

69 Accordingly, note the observations of Scobbie: ‘interpretation may . . . have recourse to values already embodied with the system to determine which interpretation best makes sense systemically’: I. Scobbie, ‘Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism’, (1990) 61 BYIL 339, at 349.

70 M. Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (2001), 104.

71 See Beckett, *supra* note 68, at 1059, for this label.

in legal discourse:

Formal law is part of the drama of governance, the trivial or murderous drama of breaking eggs to make omelettes. The critical use of the term formalism, against the abuse of deduction and the fantasy of gaplessness in legal discourse, is part of the twentieth-century battle between those who have wanted to depoliticize the drama as much as possible, through reason, and those who have seen it as inevitably a dangerous improvization.⁷²

Formalism has certainly moved past the critiques of deductionism and the fantasy of gaplessness. However, formalism is still continuously turned to when one seeks to rescue law as law. Indeed, this may be what Koskenniemi endeavours in his critical and ethical projects. However, it is with these words in mind that this paper turns to consider whether formalism is able to confront managerialism. It does so on the understanding that classical legal formalism, as outlined above, is unable to do so: it must be a formalism that is able to move forward after embracing the dual aspects of Koskenniemi's indeterminacy critique.

In consideration of formalism's traditional fallacies, and its protagonistic appearance in the 'drama of governance', one may be somewhat surprised to find it to be the centre of Koskenniemi's constructive call for action within international law. However, Koskenniemi's call for a 'culture of formalism'⁷³ is made on two premises. First, it is premised on incorporating and accommodating international law's ontological indeterminacies rather than seeking to establish the determinacy that classical formalism may be faulted for. Second, it considers that irrespective of the identification of fault, 'irrespective of indeterminacy, the system still de facto prefers some outcomes or distributive choices to other outcomes or choices'.⁷⁴ Each of these defines the foundations of Koskenniemi's normative project and is rooted equally in his irrefutable passion for law and, fittingly, his agonistic anger towards international law. Like many of Koskenniemi's concepts, the definition of formalism invoked by his 'culture of formalism' is atypical:

Situationality, as Outi Korhonen has put it, is a key aspect of legal practice. The virtues and vices of international law cannot be discussed in the abstract Recently, I have argued in favour of a 'culture of formalism' as a progressive choice. This assumes that *although international law remains substantively open-ended*, the choice to refer to 'law' in administration or international matters – instead of, for example, 'morality' or 'rational choice' – is not politically innocent. *Whatever historical baggage, including bad faith such culture entails, its ideals include those of accountability, equality, reciprocity and transparency, and it comes to us with an embedded vocabulary of (formal) rights.*⁷⁵

[N]othing has undermined *formalism as a culture of resistance to power, a social practice of accountability, openness, and equality* whose status cannot be reduced to the political positions of any one the parties whose claims are treated within it.⁷⁶

72 D. Kennedy, 'Legal Formalism', in N. J. Smelser and P. B. Baltes (eds.), *13 Encyclopedia of the Social & Behavioral Sciences* (2001), 8634, at 8637.

73 Koskenniemi, *supra* note 67, at 616; Koskenniemi, *supra* note 70, at 494–509.

74 Koskenniemi, *supra* note 8, at 606.

75 *Ibid.*, at 616 (emphasis added).

76 Koskenniemi, *supra* note 70, at 500 (emphasis added).

The culture advocated by Koskenniemi bears several marked characteristics. First, it embraces the situational use of formalism as a culture of defiant opposition – as outlined in section 3 above. Second, it is conditioned by the impossibility of discovering a true universal and so differentiates itself from Kant’s universalist ethos. Third, it idealizes the unattainable universality by remaining substantively empty, seeking the critical embrace of Kant’s cosmopolitan project. Fourth, and finally, this emptiness enables the generalization of multiple particularisms. It seeks both to embrace the ontological indeterminacy of international legal norms, their ability to bear any desired meaning, and to state that only those interpretations that are capable of normalizability or repetition are valid. The culture of formalism’s value lies in each one of these characteristics, most notable of which is the observation that ‘[a]s a flat, substanceless surface of the legal form, law expresses the universalist principle of inclusion at the outset and makes possible the regulative ideal of a pluralistic international world’.⁷⁷ In its simplest form, Koskenniemi’s culture is one in which no particular is able to impose itself as a universal, and thus it forces one to simply ‘sit down and talk’.⁷⁸

The identifiable characteristics of Koskenniemi’s ‘culture of formalism’ also appear to have foundations within the Report. The Report notes that it is the ‘task of [legal] reasoning to make the unfamiliar familiar’,⁷⁹ through integration, inclusion, and accommodation. The Report then goes on to note that the model it has constructed for confronting conflicts is one of ‘substantive emptiness’⁸⁰ before finally considering that the task of international law is one that necessitates mere dialogue:

The report has, in a way, bought its acceptability by its substantive emptiness. Yet this ‘formalism’ is not without its own agenda. The very effort to canvass a coherent legal–professional technique on a fragmented world expresses the conviction that conflicts between specialized regimes may be overcome by law, *even as the law may not go much further than require a willingness to listen others, take their points of view into account and to find a reasoned resolution at the end. Yet this may simply express the very point for which international law has always existed.*⁸¹

However, these intermittent references to the elements that characterize Koskenniemi’s normative project are only illusory. Rather than embracing the characteristics of the ‘culture of formalism’, the Report’s path forward is to state that ‘increasing attention will have to be given to the collision of norms and regimes and *the rules, methods and techniques for dealing with such collisions*’.⁸² This is the constructive end point of the Report. Such an approach, as shall now be shown, retains the lawyer as Koskenniemi’s managerialist, within his current circumstance. More disappointingly, it undermines the value attributable to it through its having loosely embraced the model of plausible constitutionalism (see subsection 3.1 above). In doing so, it also undermines the ethical project that lies behind a plausible

77 Koskenniemi, *supra* note 67, at 18.

78 *Ibid.*

79 ILC Report, *supra* note 3, para. 20.

80 *Ibid.*, para. 487.

81 *Ibid.* (emphasis added).

82 *Ibid.*, para. 493 (emphasis added).

constitutionalism. It is first necessary to consider this ethical project, before examining the extent to which the Report was ever able to fulfil it. It is unsurprising to conclude that Koskenniemi was reduced to the mere technical managerialist he opposes, in his role as Commissioner.

As stated in section 3 above, Koskenniemi proposes that the ILC Report should reflect a ‘plausible constitutionalism’. This term comprises both positivist and ethical elements – positivist in its statement and description of international law as a system, and ethical since it includes a project of resistance to the current state of affairs in international law. Sub-subsection 3.2.1 above highlighted the virtues and considerable vices of the former positivist element, and this section now considers the purpose behind the ethical project. The ethical project begins with Koskenniemi’s statement that ‘[t]he Report will illustrate the constitutionalist mindset at work’.⁸³ This constitutionalist mindset is said to be accompanied by a specific vocabulary that would inform the political struggles between hegemonic particularistic institutions. The purpose of this vocabulary is ‘to contest the structural biases of expert systems and acts of imperial violence’.⁸⁴ The Report acknowledges not that it shall be able to combat structural bias, but that every institution is reduced to this. Accordingly, the Report acknowledges its limits:

Each [institution] has its experts and its ethos, its priorities and preferences, its structural bias. Such regimes are institutionally ‘programmed’ to prioritise particular concerns over others. The concern over fragmentation has been about the continued viability of traditional international law – including the techniques of legal reasoning that it imports – in the conditions of specialization. Do Latin maxims (*lex specialis*, *lex posterior*, *lex superior*) still have relevance in the resolution of conflicts produced in a situation of economic and technological complexity? Although this Report answers this question in the positive, it also highlights the limits of its response.⁸⁵

The defiance and resistance so integral to Koskenniemi’s ‘plausible constitutionalism’ are not only without presence in the Report, but the lack thereof is implicitly conceded as its integral weakness. Koskenniemi’s ‘plausible constitutionalism’ may be rooted in antagonistic defiance, but it is to be defined by its embrace of agonistic anger. The central thesis of the plausible constitutionalism – and its central link to the culture of formalism – is its wish to vet arguments by their normalizability, detracting from argumentative polarities, and enabling repetition. It states that an argument’s validity is gained through its ability to be applied to oneself and everyone in one’s situation over and over again. As recently stated, ‘[t]his vets arguments by their normalisability, *not* their apparent contextual coherence’.⁸⁶ It is both the anger at the current state of affairs and the willingness to constructively use one’s anger that lie at the heart of a ‘plausible constitutionalism’ ethical underpinning. Unfortunately, the Report is only able to give notional glances to the concept of ‘plausible constitutionalism’; it certainly is unable to muster the anger required to challenge international law’s structural biases.

83 Koskenniemi, *supra* note 5, at 10.

84 *Ibid.*, at 23–4.

85 ILC Report, *supra* note 3, para. 488.

86 Beckett, *supra* note 68, at 1069 (emphasis added).

The Report's inability and unwillingness to confront the core corrupting developments in international law, namely deformalization and managerialism, are to some degree unsurprising. But the Report's attitude to 'plausible constitutionalism' may be a saving grace. Koskenniemi's 'plausible constitutionalism' is the necessary prelude and corollary to his 'culture of formalism'. The latter is to be regarded as the condition *sine qua non* for progress in the discipline⁸⁷ when considered as an 'ethics of choice',⁸⁸ which emphasizes the contextuality of justice, and centres the legal professional in the search for the emancipatory potential of international law. Although the project is reminiscent of Horkheimer's critical theory that sought 'to liberate human beings from the circumstances that enslave them',⁸⁹ it is one that maintains a specific situationality – one that is not a grand general theory, but rather one that is constructed to resist the specific phenomenon of managerialism and the consequential effect it has on the legal professional. This ethical project should not be understood as detached from Koskenniemi's descriptive critical indeterminacy project, but rather as an extension thereof, for, as Beckett notes, the 'critical project both identifies the conceptual space, and secures the political space, within which the ethical project takes place'.⁹⁰ It is with this in mind that one should approach the origins and historical roots of Koskenniemi's project.

Koskenniemi's recent writings have expanded his call for a 'culture of formalism' by reference to Immanuel Kant. Koskenniemi supplements his 'culture of formalism' and 'constitutionalist mindset' with Kant's notions of freedom and progress. Koskenniemi does not turn to Kant as the paragon of liberal philosophy, but does so with a critical perspective. Nevertheless, this turn may enable the critique that Koskenniemi presents a normative project within which he forgets the lineage of that which he espouses. In the opinion of the present author, such observations would be premised in a severe misreading of Koskenniemi's works. The author posits that these works and their findings are centred on a critical and ethical reading of Kant's legal and political philosophies. First, Koskenniemi demonstrates Kant's indeterminate reading of rules.⁹¹ Second, Koskenniemi exposes Kant's ethical project as a 'legalism of the legal mindset'.⁹² This paper was inspired by a critical Kantianism to which it now resorts: 'to expand towards universality, one must penetrate deeper into subjectivity'⁹³ – the purpose of Koskenniemi's project was to expose a critical and ethical reading of Kant, to define the essence of law as lying in *personal virtue*.⁹⁴ Koskenniemi exposes Kant not as the enabler of liberal law's decentring of the individual (e.g. in rule application), but rather as one who sought emancipation through law, and saw the agent for this process to be none other than the legal professional

87 O. Korhonen and T. Skouteris, 'Under Rhodes Eye: The "Old" and the "New" International Law at Looking Distance', (1998) 11 LJIL 429, at 431.

88 A. Boldizar and O. Korhonen, 'Ethics, Morals and International Law', (1999) 10 EJIL 279, at 310.

89 See generally M. Horkheimer, *Critical Theory* (1982).

90 Beckett, *supra* note 68, at 1046.

91 See Koskenniemi, *supra* note 1, at 25–30; Koskenniemi, 'International Law', *supra* note 9, paras. 24–30; Koskenniemi, *supra* note 5, at 1; Koskenniemi, 'Formalism, Fragmentation, Freedom', *supra* note 9, at 2–4.

92 Koskenniemi, 'International Law', *supra* note 9, para. 24.

93 Koskenniemi, *supra* note 1.

94 Koskenniemi, *supra* note 5, at 22.

himself. The agent identified by Koskenniemi is Kant's 'moral politician'⁹⁵ (without the federalist overtones), akin to modern international law's perfect gentleman and Adam Smith's active 'impartial spectator'.⁹⁶ This 'moral politician' is one who is able to apply the high standards of Koskenniemi's 'culture of formalism': to apply rules inasmuch as they are repeatable to like situations. Koskenniemi adorns Kant's 'moral politician' as the path to existential freedom for the law applier – simply because it is the substantively empty formalist whose fidelity is to the law and not to its hypothesized purposes. Koskenniemi uses Kant to centre the legal professional and to adorn this same professional with the mindset required of him. The 'moral politician' is to embrace a *political sensibility* enabling him to decentre his own position so as to understand law as the 'sum of conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom'.⁹⁷ In short, the valuable purpose of this project is 'persuading people to bracket their own sensibilities, and learn openness towards others'.⁹⁸ In this respect, international law requires the perfect gentleman. Whilst Kant vigorously pursued a universal freedom, Koskenniemi's project is one that embraces the futility of this universalism. It is an ethical project that forges a politics of inclusion as a technique to reject solipsism. Koskenniemi's project is one that acknowledges that law is a human creation, and accordingly fallible. Yet, without a politically enlightened decision-maker who is willing to distance himself from his specialized and technical language, there is no possibility to discover 'intermittent successes', only consistent 'moral failure'.⁹⁹ It is such failure that Koskenniemi's ethical and normative projects attempt to combat.

The paper has now explored both Koskenniemi's ethical and normative projects, as well as the Report. The value of such a side-by-side consideration is twofold. First, an understanding of the author's personal works enables one to better understand the self-professed misgivings, and correctly so, of the Report. Second, the paper's critique of the Report's legal formalistic roots is heightened given its Chairman's ethical project. Whilst Koskenniemi's projects may be critiqued, his redirection of understanding the value of international law as a 'mindset', an ethics, is certainly for the better.

Fragmentation from a unity-centric perspective is a fear. It is not merely an empirical observation. Even if viewed as merely an observation, it is derived from international law's institutions and the legal rules that govern its actors. The application and interpretation of rules and the functioning of institutions depend on

95 Koskenniemi's use of the moral politician is to be contrasted with this use of the political moralist: 'If the political moralist looks beyond the law in order to reach happiness, others are reduced to instruments of his own desire. The more he insists he will thereby also provide for the happiness of others, the less he is able to think of those others as free. Against these, Kant puts the "moral politician." This is the formalist whose fidelity is to the law, not to its hypothesized purposes, the law understood as the "sum of the conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom": Koskenniemi, 'International Law', *supra* note 9, paras. 27–28; Koskenniemi, 'Formalism, Fragmentation, Freedom', *supra* note 9, at 17.

96 Beckett, *supra* note 68, at 1070.

97 I. Kant, *Metaphysics of Morals* (ed. M. J. Gregor ed.) (1996), at 24.

98 Koskenniemi, *supra* note 70, at 502.

99 Koskenniemi, 'Formalism, Fragmentation, Freedom', *supra* note 9, at 24–5.

the international legal professional. It is this professional that is integral to international law. Deformalization is the result of a politicized and technical individual. Hope for international law can be the result of the ‘moral politician’. Classical legal formalism is premised on notions of determinacy: it aims to limit the role of the individual professional. However, in contrast, it is an ethical culture of inclusiveness and self-displacement that enables the embrace of indeterminacy, humanism, and normalizability in rule application. Fragmentation is pervaded by two polarizing discourses, each of which brings with it a predefined mindset, the bipolar normative goals of unity and pluralism. The modern legal professional, according to Koskenniemi, is one who is able to critically examine himself and displace himself from the perspectival strictures of his technical practice.¹⁰⁰

However, it is here that we arrive at one of two critiques of Koskenniemi’s ethical project. Does the ‘culture of formalism’ achieve the requisite desubjugation of the individual by remaining loyal to the original subjugating framework of the liberal theory of politics? The second critique is that Koskenniemi is unable to achieve the lofty goals he sets for his ethical project, for it produces only self-consciousness and not the subversion of discursive practices.¹⁰¹ A friend worded a critique as follows, and it seems apt for the reader to consider it amongst the above two points:

For rather than choosing revolution Koskenniemi has opted for surrealism – rather than seeking the emancipation of the international legal agent he has in fact argued for his emasculation by sending him behind and in fact re-enforcing the bars of the prison house of international legal language.¹⁰²

This author cannot help but be persuaded a little by this argument. However, Koskenniemi’s project ought to be lauded for centring the legal agent within international legal discourse. But it does so by embracing an atypical ‘culture of formalism’ that operates as part of Kennedy’s endemic ‘drama of governance’. Its value lies in that it aims at countering managerialism and deformalization, but the extent to which Koskenniemi’s project does this is debatable. In any event, it is certain that the ILC Report certainly does not do so.

To expect the ILC to proceed beyond its narrow technical expertise is naive. However, to expect it to grapple with the political realities of international law is not; to expect a liberating methodology in its choices is not. The Report is riddled with self-induced inconsistencies and fails on two fronts. First, whilst it attempts to bear the fruit of Koskenniemi’s ‘plausible constitutionalism’, it fails to do so in regard to its ethical underpinnings. More importantly, within the context of the ILC, its ‘systemization’ of international law, based on the positivist underpinnings of a ‘plausible constitutionalism’, is entirely unconvincing and certainly unhelpful to

100 ‘Critique would essentially insure the desubjugation of the subject in the context of what we could call, in a word, the politics of truth’: Koskenniemi, *supra* note 5, at 25.

101 As stated by Pierre Schlag, ‘it is not enough to become self-conscious of the systemic process What is required is displacement, a subversion of the discursive practices that constitute each one of us. What is required is deconstruction’, P. Schlag, ‘“Le Hors de Texte, C’Est Moi”: The Politics of Form and the Domestication of Deconstruction’, (1990) 11 *Cardozo L. Rev.* 1631, at 1640.

102 I would like to thank Paavo Kotiaho on this point. The paper on which this consideration is made is on file with the author: P. Kotiaho, ‘The Call for a “Culture of Formalism”: Vice or Virtue? A Genealogy of Koskenniemi’s Critical Project’.

the current state of affairs. Second, its use of formalism fell far short of the promising formalism offered by its Chairman in his personal works. Rather than utilizing the historical value of legal formalism, as the language of opposition, it delved into a formalism that affirmed systemization and coherence. The professional was not empowered, but remains reduced to a technical architect – not one of hierarchy, but one nonetheless. Kant’s moral politician was preferred to the political moralist. The lawyer remains caught within the strictures of his specialized professional language, with its attendant ontological polarities. He remains a tactician and a bureaucrat. Indeed, the contrast between the Chairman’s finalized Report and his personal works only goes to demonstrate the sacrifice of personal value and virtue one undertakes as soon as one speaks the language of technical specialization.

5. CONCLUSION

The author began this paper by seeking immersion in subjectivity, quickly followed by a denunciation of international law’s distribution of ‘spiritual values’¹⁰³ and lack of cosmopolitan ethos. This paper has advocated a turn to centring the legal profession on the mindset of the legal professional. This conclusion is reached after demonstrating that international law, and the discourse of fragmentation, is ruled by polarized preferences. The Report’s attempt to displace the preferences of both unity and plurality through formalism is undermined by its dedication to a systemic conception of international law, and the method of legal reasoning this imports. In its utopian and self-reflective moments, the Report intimates the ethical project of its author, however incoherently. Most notable is the Report’s acknowledgment of the possible impact that deformalization may have on international law. However, because it perceives this from the reductionist perspective of traditional international law, it cannot grasp that it is the phenomenon’s importation of solipsistic and managerial values that most endangers international law and, more importantly, defines the hubristic world of the technical lawyer. Accordingly, this author has considered the ethical project of Koskenniemi as having the virtues of embracing subjectivity, endorsing inclusivity, and resisting solipsism. The purpose of this paper is to utilize Koskenniemi’s ethical project to emphasize the centrality of the legal professional, in contrast to the Report’s rule-centrism. The singular value of the ‘culture of formalism’ is the shift in discourse towards ethics.

The question of *how* the international legal professional may function with existentialist freedom is one that cannot be answered in this paper.¹⁰⁴ It must be the subject of another enquiry. This paper has demonstrated dissatisfaction at the current state of affairs for the international legal professional. The functioning of both deformalization and managerialism has been brought to the fore by contemporary fears of fragmentation. Our responses to fragmentation have been polarized. The Commission, in seeking to strike a unified path in dealing with fragmentation, has

103 See T. Pogge, ‘The Influence of the Global World Order on the Prospects of Genuine Democracy in the Developing Countries’, (2001) 14 *Ratio Juris* 326, at 334–43.

104 See J. P. Sartre, *Existentialism and Humanism* (trans. P. Marlet) (1948).

not liberated the international legal professional from these polarities or from the particularistic nature of his technical world. Its failings are only truly highlighted when placed alongside the personal works of its Chairman. The legal professional's technical box is sustained by the Commission and it is against this willingness to defer to the empirical, rather than change it, that this paper fights. International law as a mode of ethical understanding is one that highlights biases and their normative underpinnings and embraces the openness of personal virtue. In this regard, the author turns to a conclusion once reached by Foucault as he commented on a revolution against corruption in Iran:

[A]bove all we have to change ourselves. Our way of being, our relationships with others, with things, with eternity.¹⁰⁵

What is the meaning for these people, to seek out, at the price of their lives, that thing whose very possibility we Europeans have forgotten at least since the Renaissance and the period of the great crisis of Christianity – a spirituality. I can hear the French laughing at these words, but they are making a mistake.¹⁰⁶

The present author has posited that, much like the Europeans, it is today's international lawyers who have forgotten the political spirituality that has defined its lineage. International law was animated by a cosmopolitan universalism, but international lawyers forgot the spirituality of this venture when universalism was demonstrated as an impossibility. This proposition recognizes that like Foucault's French, international lawyers may laugh at these words; however, it is with the realization that technicality and bias are practices that require a reason, and deferring to Weber's question: 'what is the ascetic price of reason?' This paper has established the price to be international law's current 'universal unbrotherliness',¹⁰⁷ and what is required is a project that elucidates international law as ethics – an ethics in the *réfléchie* practice of freedom. Weber's warning of the prison bars of bureaucratization, the legacy of Foucault, and the works of Koskenniemi require international lawyers to embrace a considered ethical responsibility and disengage themselves from the language of their expertise and the obfuscated drama of governance. At the moment of decision, every legal professional has the capability to embrace an emancipatory freedom. At this moment of decision, of discretion, the legal professional is able to embrace law as Koskenniemi intended for Kant's 'moral politician'. But, more importantly, the professional is also able to revolt against the linguistic barriers of his technicality: to view a plurality of perspectives.

105 M. Foucault, 'Iran: The Spirit of a World without Spirit', in L. Kritzman (ed.), *Michel Foucault: Politics, Philosophy, Culture* (1988), at 214.

106 M. Foucault, 'A quoi rêvent les Iraniens?', in *Dits et écrits*, Vol. 3, at 694.

107 M. Weber, *From Max Weber: Essays in Sociology* (trans. H. H. Gerth and C. Wright Mills) (1946), 357.