Dr. Öğr. Üyesi Zeynep ERHAN BULUT
Çankırı Karatekin Üniversitesi, Hukuk Fakültesi
Cankiri Karatekin University, Faculty of Law
Çankırı, TÜRKİYE
zeyneperhan@karatekin.edu.tr
https://orcid.org/0000-0002-5766-126X

INTERNATIONAL LAW AND POLITICS: AN ANALYSIS OF MARTTI KOSKENNIEMI'S ARTICLE

Uluslararasi Hukuk ve Politika: Martti Koskenniemi'nin Makalesi Üzerine Bir İnceleme

Makale Bilgisi | Article Information
Makale Türü / Article Type:
Makale İncelemesi / Article Review
Geliş Tarihi / Date Received: 13 Aralık 2024 / 13 December 2024
Kabul Tarihi / Date Accepted: 27 Aralık 2024 / 27 December 2024
Yayın Tarihi / Date Published: 27 Ocak 2025 / 27 January 2025
Yayın Sezonu / Pub Date Season: Ocak / January
Cilt/Volume: 3
Sayı/Issue: 1

Atıf | Citation
Erhan Bulut, Zeynep, "International Law And Politics: An Analysis Of Martti Koskenniemi's Artıcle". *Karatekin Hukuk Dergisi* 3, sy. 1 (Ocak 2025): 45-53.

Değerlendirme | Peer-Review
İki Dış Hakem / Çift Taraflı Körleme
Double anonymized - Two External

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Yayıncı | Published by
Çankırı Karatekin Üniversitesi Hukuk Fakültesi
Çankırı Karatekin University Faculty of Law

Finansman | Grant Support
Bu araştırmayı desteklemek için dış fon kullanılmamıştır.
The author(s) acknowledge that they received no external funding in support of this research.

Abstract

This paper critically reviews The Politics of International Law by Martti Koskenniemi, a seminal work that examines the liberal concept of the Rule of Law through a critical lens. Koskenniemi highlights the inherent tensions between normativity and concreteness in international law, as well as the interplay between rule-based and policy-based approaches. While his analysis offers significant insights into the political nature of international law and its dependence on state sovereignty, his arguments are marked by ambiguity and a lack of definitive conclusions. This paper summarises Koskenniemi's key arguments, including his critique of liberalism, the indeterminacy of international legal argumentation, and the role of international lawyers in navigating the relationship between law and politics. The discussion evaluates these ideas from multiple perspectives, incorporating views from critical legal theory and legal realism. Although Koskenniemi raises important questions about sovereignty, sources of law, and the objectivity of international legal norms, his work is critiqued for its circular reasoning and lack of clarity. This review concludes that Koskenniemi's contribution lies in his nuanced critique of the liberal foundations of international law, even as his failure to resolve key dilemmas leaves room for further scholarly debate. The aim of this paper is to review The Politics of International Law by outlining a straightforward framework, without engaging in a deep academic discussion.

Keywords: Martti Koskenniemi, Politics of international law, Rule of law, Liberalism, Normativity, Concreteness.

Özet

Bu makale, Martti Koskenniemi'nin "The Politics of International Law" başlıklı eserini eleştirel bir şekilde incelemektedir. Koskenniemi, hukuk devletine dair liberal kavramı eleştirel bir bakış açısıyla değerlendirirken, uluslararası hukukun normatiflik ve somutluk arasındaki gerilimlerine ve kural temelli ile politika temelli yaklaşımlar arasındaki ilişkilere dikkat çekmektedir. Analizi, uluslararası hukukun politik doğasını ve devlet egemenliğine olan bağımlılığını vurgularken, belirsizlikler ve kesin sonuçlardan yoksun bir argümantasyonla dikkat çekmektedir. Bu makale, Koskenniemi'nin temel argümanlarını özetlemekte; liberalizm eleştirisi, uluslararası hukukun belirsizliği ve uluslararası hukukçuların hukuk ile siyaset arasındaki ilişkiyi yönlendirme rolü gibi konuları ele almaktadır. Tartışma, bu fikirleri eleştirel hukuk teorisi ve hukuki realizm perspektiflerinden değerlendirirken, Koskenniemi'nin egemenlik, hukukun kaynakları ve uluslararası hukuki normların nesnelliği üzerine düşüncelerini incelemektedir. Koskenniemi'nin, uluslararası hukukun liberal temellerine yönelik derinlemesine eleştirisi önemli bir katkı sağlasa da temel ikilemleri çözmedeki başarısızlığı daha fazla akademik tartışmaya alan bırakmaktadır. Bu değerlendirme, Koskenniemi'nin katkısının, uluslararası hukukun liberal temellerine yönelik incelikli eleştirisinde yattığı, ancak temel sorulara net yanıtlar verememesi nedeniyle tartışmaya açık bir eser sunduğu sonucuna varmaktadır. Bu makalenin amacı, derin bir akademik tartışmaya girmeksizin, Koskenniemi'nin "The Politics of International Law" başlıklı eserini basit bir çerçeve ile gözden geçirmektir.

Anahtar Kelimeler: Martti Koskenniemi, Uluslararası hukukun politikası, Hukukun üstünlüğü, Liberalizm, normatiflik, Somutluk.

INTRODUCTION

This paper reviews The Politics of International Law by Martti Koskenniemi, a seminal work that critically examines the liberal idea of the rule of law in international relations. Koskenniemi's analysis offers a profound exploration of the interplay between law and politics, shedding light on the tensions between normativity and concreteness, as well as rule-based and policy-based approaches. Drawing heavily on contemporary critical legal theory, Koskenniemi critiques the assumptions underpinning the liberal framework of international law, particularly its claims of neutrality, objectivity, and universality.

While the article provides valuable insights into the foundational dilemmas of international law, it also presents challenges for readers due to the recurring circularity of its arguments. Koskenniemi navigates through complex legal doctrines and political realities but often stops short of proposing definitive solutions, leaving many of his critiques open-ended. As Kennedy observes, Koskenniemi's argument "moves from unsolvable debate to unsolvable debate," creating a sense of opacity that may frustrate readers seeking clear conclusions or actionable frameworks.

This paper will summarize Koskenniemi's key arguments, exploring his critique of the liberal tradition in international law and his insights into the indeterminate nature of legal argumentation. It will also engage with the broader implications of his ideas, examining how they challenge conventional understandings of sovereignty, the sources of law, and the role of international lawyers. By situating his arguments within the broader discourse of critical legal theory and international relations, this paper aims to review The Politics of International Law by presenting a straightforward framework without delving into an in-depth academic discussion.

I. SUMMARY OF THE ARTICLE

Koskenniemi argues that, in the international arena, there is a liberal tendency to escape politics[1]. However, he points out that this is difficult because certain social problems must be resolved through political means. In the second part of his article, he discusses the content of the rule of law, focusing on two key aspects: normativity and concreteness. The normativity of law aims to create distance from state interests, while concreteness requires the law to be grounded in something substantial. In this context, he argues that concreteness appears apologist because it aligns closely with state practice, whereas normativity is utopian since it seeks to distance the law from state practice and interests.

Thirdly, he attempts to explain the substantive structure of law from both the perspective of concreteness and normativity. From the concreteness approach, the substance of law is derived from state sovereignty. By contrast, the normativity approach contends that this substance is based on sources that reject state interests and will. Furthermore, there are two main criticisms of international law: one claims it is too political because it depends on the political power of states, while the other argues it is political because it is based on utopian ideals[2].

Koskenniemi then discusses the rule-based approach and the policy-based approach. The rule-based approach is rooted in the normativity of law, whereas the policy-based approach asserts that international law is only applicable if it considers the social context of international policy. However, Koskenniemi claims that: "The rule and the policy approaches are two contrasting ways of trying to establish the relevance of international law in the face of what appear as well-founded criticisms. The former does this by stressing the law's normativity, but fails to be convincing

1 Martti Koskenniemi, "Politics of International Law", European Journal of International Law 1, no. 1 (1990): 4–32, 4.
2 Koskenniemi, Politics of International Law, 4–32.

because it lacks concreteness. The latter builds upon the concreteness of international law, but loses the normativity, the binding force of its law."[3] In his paper, Koskenniemi focuses on highlighting the rule-based approach and the policy-based approach in international law. While he shows that they are based on different principles, he also argues that they are interdependent, as there is an indissoluble bond between them.

Koskenniemi essentially aims to explain what the rule of law is based on. However, he approaches the subject indirectly and fails to articulate his position clearly. Koskenniemi also criticises himself in his later article, The Politics of International Law - 20 Years Later, where he acknowledges, "the article (The Politics of International Law) was not very clear about what its target was, apart from the lack of professional imagination"[4]. As he acknowledges, his argument was subject to varying interpretations. He further acknowledges the ambiguity in his work, particularly regarding the undefined meaning of politics within his context. Accordingly, the subsequent section of this paper will critically analyse Koskenniemi's article.

II. DISCUSSION

Koskenniemi argues that international legal argument is indeterminate and unpersuasive. He seeks to analyze the subject from multiple perspectives, addressing the rule-based and policy-based approaches, the interplay between concreteness and normativity, the distinction between factual and legal views, as well as the doctrines of the sources of international law and state sovereignty. However, these differing perspectives only contribute to the ambiguity of his argument. Koskenniemi touches on both theoretical and doctrinal aspects, and from the beginning of his article, he also incorporates some historical context. Yet, these varied elements do not offer a clear answer; they simply reproduce themselves. As Kennedy observes, "the central armature of his argument remains a hypothesis – it cannot be cited for a tidy conclusion"[5]. Koskenniemi's propensity for digression hinders him from arriving at a definitive conclusion, as each page presents new interpretations. Notably, he refrains from adopting a positive approach to international law and does not engage with positive law. His article lacks legal argumentation, as he avoids looking for answers within legal rules or assessing specific legal arguments.

Koskenniemi argues that, for normativity to exist there must be a distance between law and state practice, interest, or will[6]. Though, it is unclear what the exact limit of this distance should be. Does he mean that all rules must be entirely independent from state interests, or only to a certain degree? Koskenniemi also discusses the sources doctrine, suggesting that international law might be defined through its sources, while once again referencing normativity[7]. He asserts that the sources of international law should be distanced from state practice, yet he overlooks customary rules. As Thirlway points out, customary international law exists as a result of state practice and opinio juris[8]. The first element must be widespread and consistent, while the second is known as an opinion of law or necessity[9]. Briefly stated, while Koskenniemi critiques the sources doctrine and advocates for detaching it from state practice, his neglect of customary rules undermines his argument, as customary international law fundamentally relies on the interplay between consistent state practice and opinio juris.

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[3] Koskenniemi, Politics of International Law, 11.

[4] Martti Koskenniemi, "The Politics of International Law—20 Years Later", European Journal of International Law 20, no. 1 (2009): 7–19, 7.

[5] David Kennedy, "The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's From Apology to Utopia)", German Law Journal 7 (2006): 982–1008, 991.

[6] Koskenniemi, Politics of International Law, 7.

[7] Koskenniemi, Politics of International Law, 4–32.

[8] Hugh Thirlway, "The Sources of International Law." In International Law, edited by Malcolm D. Evans, 2nd ed., (Oxford: Oxford University Press, 2006), 122.

[9] Thirlway, The Sources of International Law, 122.

According to Article 38 of the Statute of the International Court of Justice, customary law is recognized as a source of international law[10]. So, if normativity insists on detachment from state practice, how can we account for customary international law?[11] Under such conditions, it seems impossible to make the sources of international law fully normative. As Georgiev argues, "The rule of law could be conceived, however, as implying only the restraint of arbitrary power - which is a narrower and stricter requirement than the broader concepts of 'distance' or 'closeness' to state practice and 'independence' from politics. Similarly, one could define the requirements for concreteness and normativity also in a narrower sense which would allow for compatibility between them."[12] It can be argued that Georgiev offers greater clarity than Koskenniemi, as Georgiev critiques ambiguous terms such as "distance" and "independence," while Koskenniemi provides only broad explanations and definitions. Koskenniemi should provide further clarification on the concept of "distance". Georgiev focuses on the concept of arbitrary power, which he believes is a more precise term to limit state will or interest[13].

As previously mentioned, Koskenniemi argues that, from the concreteness perspective, the origin of law's substance arises from state sovereignty[14]. He explains the results and character of state sovereignty through both the pure fact and legal views. Koskenniemi asserts that "in each, the pure fact and legal approaches dissolve into each other."[15] He references the Eastern Greenland Case (1933)[16] to support this argument, observing that the Court must consider both facts and law to reach a conclusion. However, this point seems redundant, as it is a widely accepted principle. Blackshield notes that a typical written judgment begins with an outline of the facts of the case, followed by the identification of relevant legal rules and principles[17]. Given that a case cannot be decided without understanding the facts, the law must necessarily be applied to those facts. Consequently, Koskenniemi's discussion of this point appears to be superfluous.

Koskenniemi argues that international law can be independent if both concreteness and normativity are present simultaneously[18]. He claims that, to prove the objectivity of the law, we must achieve both concreteness and normativity. He also asserts that objectivity is necessary for the rule of law. However, Koskenniemi believes that these two requirements for objectivity cancel each other out, making it impossible for the law to be independent of politics. From my perspective, this would imply that the realization of the rule of law is unattainable, given the inherent incompatibility between concreteness and normativity. However, it is contended that normativity and concreteness can, in fact, coexist. As Georgiev suggests, legal norms become concrete when adopted through established procedures, allowing for their validity to be verified and distinguishing them from non-law, such as opinions or values. They remain normative because they can be used to assess state practice, which cannot invalidate them without adhering to the required procedures[19].

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[10] Christopher A. Ford, "Judicial Discretion in International Jurisprudence: Article 38(1)(C) and General Principles of Law", Duke Journal of Comparative & International Law 5 (1994): 35–77.
[11] Louis Henkin, "International Law as Law in the United States" Michigan Law Review 82 (1983): 1555–74.
[12] Dragoljub Georgiev, "Politics or Rule of Law: Deconstruction and Legitimacy in International Law", European Journal of International Law 4, no. 1 (1993): 1–14, 3.
[13] Georgiev, Politics or Rule of Law: Deconstruction and Legitimacy in International Law, 1–14.
[14] Koskenniemi, Politics of International Law, 4–32.
[15] Koskenniemi, Politics of International Law, 16.
[16] Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5)
[17] Robert French, "Conference on Judicial Reasoning: Art or Science?", Australian Journal of Forensic Sciences 42, no. 1 (2010): 5–9.
[18] Koskenniemi, Politics of International Law, 4–32.
[19] Georgiev, Politics or Rule of Law: Deconstruction and Legitimacy in International Law, 1–14.

D'Aspremont notes that the cycle between concreteness and normativity undermines the objectivity of international legal rules[20]. In this situation, international law becomes indeterminate, and the objectivity of international law remains an elusive goal. Koskenniemi distinguishes between the rule approach (which encompasses sources, normativity, and utopianism) and the policy approach to international law. He explains that the rule approach prioritizes the normativity of law, while the policy approach (which includes sovereignty, concreteness, and apologetics) emphasizes state policy[21]. From my understanding, Koskenniemi posits that international law and international politics are inherently interdependent.

In this context, Georgiev contends that the sources doctrine asserts that state practice alone is insufficient to constitute law; it must be recognized and accepted as law by the relevant legal community[22]. General principles must also be recognized as law. Thus, the concreteness of state practice can base itself on normativity to avoid apologism, and the normativity of general legal principles can base itself on concreteness to avoid utopianism. Consequently, "pure" normativity, meaning total distance from state behaviour, would be utopian, while "pure" concreteness, based on state interest or behaviour, would be apologetic. Therefore, the lack of distance from politics and the lack of objectivity in international law are necessary for the rule of law. As we have previously criticised, Koskenniemi argues that normativity and concreteness simultaneously destroy and create each other. This dynamic prevents the objectivity of international law and, by extension, the rule of law. However, this dilemma remains unaddressed in Koskenniemi's article, where it is presented merely as an open-ended question, lacking definitive resolution or clarity.

Koskenniemi discusses the role of international lawyers, assigning them significant responsibilities. He argues that it is impossible for international lawyers to "maintain a specifically 'legal' identity separated from that of a social scientist or politician". He asserts that there is no space for legal neutrality outside politics, and that lawyers must incorporate this fundamental reality into their professional identities[23]. According to Koskenniemi, international lawyers are both legal advisers and theorists; in other words, they are problem-solvers. However, he fails to define what he means by "international lawyer,"[24] leaving the term ambiguous and susceptible to misinterpretation. Clarification of this term would be beneficial to avoid potential misuse.

Koskenniemi states in his introduction, "I shall extend the criticism of the liberal idea of the Rechstaat"[25]. This creates an expectation in the reader to hear something about liberalism. However, Koskenniemi does not explicitly engage with liberalism, nor does he clarify his stance on the matter. For a comprehensive understanding of his perspective on the liberal approach, this article alone may prove insufficient. A more precise articulation in the introduction might better address this gap. Nonetheless, Koskenniemi does make his position clear in From Apology to Utopia[26]. There, Koskenniemi states that the origins of international law are liberal and that this liberal approach brings with it certain liberal problems[27]. Moreover, he argues that liberal theory

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[20] Jean D'Aspremont, "Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia Revisited", Revue Québécoise de Droit International 19 (2005): 353–60.

[21] Koskenniemi, Politics of International Law, 4–32.

[22] Georgiev, Politics or Rule of Law: Deconstruction and Legitimacy in International Law, 1–14.

[23] Jochen von Bernstorff, "Sisyphus Was an International Lawyer: On Martti Koskenniemi's From Apology to Utopia and the Place of Law in International Politics", German Law Journal 7, no. 12 (2006): 1015–1036, 1018.

[24] For further information look at Patrick Del Duca, "Why We Read the International Lawyer-Answers Parsed from Works of Two International Lawyers", Int'l Law 50 (2017): 87.

[25] Koskenniemi, Politics of International Law, 7.

[26] For further discussion look at Hürkan Çelebi, and Ali Murat Özdemir, "Uluslararası Hukukta Eleştirel Yaklaşımlar" Uluslararası İlişkiler Dergisi 7, 25 (2010): 69-90.

[27] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argumen, (Cambridge: Cambridge University Press, 2005), 5.

does not recognize itself as a political theory, claiming instead to be non-political. According to Koskenniemi, liberal theories are fundamentally unable to resolve tensions between community matters and individual freedom[28]. Although he highlights the liberal concept in the introduction, he fails to directly address the topic in the main body of his article.

As previously noted, Koskenniemi raises several important points, including the assertion that international law is inherently political. In his article, he attempts to merge concreteness and normativity, as well as the rule approach and the policy approach, to support his argument. Today, it is hard not to agree with Koskenniemi on this point, as international politics is deeply intertwined with international law. As Duxbury observes, "[i]nternational law would be effective if it did not focus solely on formal authority, but rather on effective control established through value-dependent policies and processes."[29] Koskenniemi addresses the binding force of international law from a different perspective. He notes that binding force is sometimes linked to its ability to reflect the will of states, a concept known as consensualism. On the other hand, "such binding force is linked with the relationship of sources arguments with what is 'just,' 'reasonable,' 'in accordance with good faith,' or some other non-consensual metaphor"[30]. He presents a persuasive critique of full consensualism, arguing that if law is understood to emerge from consent, the theory implies that it does not necessarily require the approval of all states. However, Koskenniemi argues that this notion violates the principle of sovereign equality and raises the question of whether a state could be bound by another state's will. This is an important point, as Hobbes argues that obligations can arise from the will of sovereign states[31]. Therefore, international rules cannot be considered binding without the consent of sovereign states[32]. In this regard, it can be argued that states both create and enforce law, positioning them as both the subjects and objects of international law.

Kelsen also criticized this approach due to the ambiguity of the concept of sovereignty. According to Kelsen, sovereignty is too vague a concept to serve as a solid foundation for the binding force of law[33]. While many scholars discuss the binding force of international rules, few address the issue of sovereign state equality on a global scale, and none fully answer Koskenniemi's key question: Why are these rules binding on states? If a state does not consent to a rule, how can it be bound by it? Furthermore, if these rules favour powerful states, what happens to those that lack political influence? In conclusion, Kelsen's critique highlights the challenges of using sovereignty as a foundation for the binding force of law, while Koskenniemi's central question remains unresolved. The issue of state consent and the unequal impact of international rules on states with varying levels of power further complicates the debate.

CONCLUSION

Martti Koskenniemi's The Politics of International Law offers a highly professional critique of international law's liberal foundations and its entanglement with politics. The article explores key tensions, such as those between normativity and concreteness and between rule-based and policy-based approaches, while re-evaluating fundamental aspects of international law like sovereignty, statehood, and sources of law. Koskenniemi's critique of sovereignty, particularly

[28] Christoph Möllers, "It's About Legal Practice, Stupid", German Law Journal 7, no. 12 (2006): 1011–14.
[29] Oliver Jütersonke, Morgenthau, Law, and Realism, (Cambridge: Cambridge University Press, 2010), 136.
[30] Koskenniemi, Politics of International Law, 21.
[31] Ross Harrison, Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy, (Cambridge: Cambridge University Press, 2003).
[32] Martin Hollis, and Steve Smith, Explaining and Understanding International Relations, (Oxford: Clarendon Press, 1991).
[33] Stanley L. Paulson, and Bonnie L. Paulson, eds. Normativity and Norms: Critical Perspectives on Kelsenian Themes, (Oxford: Oxford University Press, 1998).

regarding the equality of sovereign states, stands out as a significant contribution. However, his deliberate ambiguity and open-ended arguments challenge readers to engage with unresolved questions, including the binding nature of international law for states that do not consent to particular norms.

Koskenniemi dismantles the illusion of neutrality and objectivity in international law, emphasizing its inherent political nature and compelling international lawyers to acknowledge their roles within a politicised field. His critique of consensualism raises important concerns about the legitimacy and efficacy of international legal regimes, highlighting the challenges of balancing state sovereignty with broader normative principles.

However, the article's lack of definitive conclusions or a cohesive framework can be both a strength and a weakness. While it fosters dynamic scholarly discourse and invites diverse interpretations, it risks frustrating those seeking practical solutions or clearer doctrinal guidance. This ambiguity reflects broader struggles within international law to reconcile its aspirational ideals with the realities of global power dynamics. Despite these challenges, Koskenniemi's work remains a cornerstone in the field and will continue to provoke meaningful debate in the evolving global order.

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