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**MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (REISSUE WITH NEW EPILOGUE)* (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2005)\***

**Uniting Pragmatism and Theory in International Legal Scholarship:  
Koskenniemi's *From Apology to Utopia* revisited**

By Jean d'Aspremont\*\*

Becoming a “classic” book in international law literature is commonly a protracted process. This assertion has however been faulted by the groundbreaking Martti Koskenniemi's *From Apology to Utopia*. This volume was first published in 1989 and immediately turned very successful, a rare feat for a work initially presented as a doctoral thesis. The book that rapidly went out of print is today reissued together with a new epilogue whereby the author responds to critiques drawn by the original work and sheds some light on the contemporary relevance of a theory devised more than fifteen years ago.

Koskenniemi's book is well-known and has already been the subject of a flurry of comments in literature. A new analysis of the thrust of his thesis would thus be superfluous as well as redundant. It seems more relevant here to take a step back with the view of gauging fifteen years after its publication the significance of this volume's contribution to international legal scholarship as a whole. In so doing, I intend to offer some observations on Koskenniemi's ambitious attempt to unite “crude pragmatism”<sup>1</sup> and “theory” in international legal scholarship.

## **I. The Politicization of International Law**

Though it is not the aim of this review essay to sketch the content of Koskenniemi's seminal work, his theory must be, for the sake of clarity, briefly recalled. In *From Apology to Utopia*, the author, an avowed disciple of David Kennedy and the critical legal studies movement,<sup>2</sup> argues that international law arguments are beset by a fundamental contradiction and have accordingly no solid epistemological foundations. By Koskenniemi's account, international lawyers always seem to oscillate between the need to verify law's content by reference to the

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<sup>1</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with new Epilogue)* (Cambridge: Cambridge University Press, 2005) at 4.

<sup>2</sup> *Ibid.* at 65.

concrete behaviour, will and interest of States (concreteness) and the need of impartial ascertainment and application of law regardless of the behaviour, will or interest of States (normativity).<sup>3</sup> This is so because neither concreteness nor normativity can sustain a positive programme on its own.<sup>4</sup> Indeed, law is unable to fulfill any functions unless it enjoys some degree of autonomy from State behaviour, will or interest. But if law is utterly independent from State behaviour will or interest, it boils down to a mere natural morality.<sup>5</sup> This oscillation between concreteness (what the author casts as an “Apology”) and normativity (that is the “Utopia”) arguably quells the objectivity of international legal argument. In that sense, international law is inescapably indeterminate and its objectivity is a mirage.<sup>6</sup>

Rather than trying to circumvent this indeterminacy, Koskenniemi posits that international lawyers must accept that there is no privileged rationality in international legal argument. In turn, there is an “inevitable movement to politics” in legal argument.<sup>7</sup> Lawyers must thus admit that arguing within the realm of law involves a “moral-political choice.”<sup>8</sup> This conclusion rests on the idea that lawyers are social agents<sup>9</sup> capable of arguing on the basis of a theory of natural justice.<sup>10</sup>

Koskenniemi’s volume has been almost unanimously hailed as a demonstration of the author’s mastery of both international law and major social sciences. His thesis is cogent and, in many regards, watertight. Most of the criticisms that could be raised against it would fall into one of the sins shrewdly singled out by Koskenniemi. It is thus not the intention of this essay to dwell upon any particular aspects of the above thesis. It seems more insightful to turn back to the general doctrinal project contained in Koskenniemi seminal book that also pervades his following writing.<sup>11</sup>

## II. A General Doctrinal Project

How can Koskenniemi’s general doctrinal project be understood? My opinion is that *From Apology to Utopia* and Koskenniemi’s ensuing works can be construed as a manifesto for the rehabilitation of the theory of international law. Indeed, his work overtly takes a firm stand against the “retreat to doctrine” ensuing

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<sup>3</sup> *Ibid.* at 58 and 219.

<sup>4</sup> *Ibid.* at 219.

<sup>5</sup> *Ibid.* at 18-20.

<sup>6</sup> *Ibid.* at 590-591.

<sup>7</sup> *Ibid.* at 536.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 69.

<sup>10</sup> *Ibid.* at 507.

<sup>11</sup> This is underpinned by his drawing upon the critical analysis developed in *From Apology to Utopia* in ensuing writings. As Koskenniemi acknowledges in the Epilogue, he has continued to read international cases through the lens of the dichotomy between normativity and concreteness upon which *From Apology to Utopia* is built (Koskenniemi, *supra* note 1 at 617). Even the *Gentle Civilizer of Nations* can be seen as an application of the structural bias identified by Koskenniemi in his doctoral thesis (*Ibid.* at 607-608, 617).

the thriving assumption that theory is fraught with subjectivism.<sup>12</sup> Koskenniemi avows that his work opposes the marginalization of international legal theory, usually confined to the introductory sections of standard treatises. Against such a backdrop, the attempt to “politicize”<sup>13</sup> the international legal argument contained in *From Apology to Utopia* can be read as a plea to entrust international legal theory with a more significant role in international scholarship and do away with utter technical (and positivist) approaches of international law. In other words, his ultimate project might well be a call for the emergence of a generation of lawyers opening themselves to social theory.<sup>14</sup>

If Koskenniemi’s doctrinal project is so, there will hardly be any legal scholar not welcoming it. Few will dispute that international law remains a social product that can hardly be totally severed from its social context. International law is more than a mere aggregate of crude rules and international lawyers should not naively confine their role to that of “librarians” of the rules forged by States. With the benefit of hindsight, one could say that this program is has come as a refreshing outburst. It could even be sustained that Koskenniemi’s project has already had positive effects on international legal scholarship in that it has contributed to the revival of the interest for international legal theory among international legal scholars.

But if Koskenniemi’s politicization project is understood as described above, it can also cause some bewilderment. His plea for the politicization of international law understood as the rehabilitation of lawyers as social agents may carry some hazardous consequences. In my opinion, the peril lurking behind the politicization of international law may be that of an all-out craze for theory and policy at the expense of the technical skills that make fine lawyers. To put it differently, the potential risk lingering behind Koskenniemi’s critical studies is that international law ceases to be understood from the vantage point of a system and starts to be construed as a hazy discipline short of any coherent logic.

To avoid being misunderstood, I must highlight that I do *not* contend that Koskenniemi, whose practice and writings have demonstrated that he is himself a savvy lawyer in the technical sense of the term, plays down the importance of having skilful lawyers with a technical understanding of the intercourse of rules. I however think that the politicization of international law sustained by *From Apology to Utopia* paves the way for a legal scholarship overly riveted to other social sciences with the view of gleaning some hints of a theory of justice.<sup>15</sup> Indeed, Koskenniemi’s program leaves little room - (if any) for lawyers endowed with a technical expertise in the operation of international law as a system.

To my understanding, international lawyers are first those minds who have not only a large knowledge of the rules themselves, but also an understanding of how

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<sup>12</sup> Koskenniemi, *supra* note 1 at 2-3.

<sup>13</sup> *Ibid.* at 12-13, 512.

<sup>14</sup> See also Nicholas Onuf, “Book Review of *From Apology to Utopia: The Structure of International Legal Argument* by Martti Koskenniemi”, (1990) 84 Am. J. of Int’l L. 771.

<sup>15</sup> For similar concerns, see David J. Bederman, “What’s Wrong with International Law Scholarship? I Hate International Law Scholarship (Sort of)” (2000) 1 Chi. J. Int’l L. 75.

these rules interplay. My feeling is that we need lawyers that understand international law as a system that, despite its gaps and indeterminacy, can work as an independent and locked scheme of rules relying on an autonomous logic. To take an example, lawyers must be able to pinpoint the frictions caused in one part of the system by, say, the emergence of a new rule at the other edge of that system and roughly anticipate the way the system will cope with that friction and alleviate inconsistency. This somewhat “Hartian” conception of the role of lawyer drives me to fear that this “species” of lawyers might be endangered by Koskenniemi’s plea for politicizing international law, or at least by the way the latter might be interpreted.

Looking at international law as a system does not mean that I do not acknowledge that the system has its own limits. I accordingly agree with Koskenniemi’s point according to which the resolution of international legal problems does not amount to the application of ready-made legal principles – though I believe that the resolution of international issues is not the application of ready-made solutions borrowed from other social sciences either. I also agree with Koskenniemi that the very foundations of the compulsory character of the rules have remained contentious and that the system cannot provide any satisfactory explanation without undermining its logic.<sup>16</sup> Koskenniemi is thus right when he underscores that consensualism is theoretically flawed as it ultimately relies on some form of a non-consensual norm. I nonetheless believe that the contradictions impinging on justifications of the compulsory character of the rules do not undermine all international legal arguments and do not extend beyond the questions revolving around the ultimate foundation of the obligatory character of norms in a broad sense. I believe that the scope of Koskenniemi’s argument is more limited than what he is ready to concede. The contraction between the concrete and the normative patterns in international legal argument is not the “seemingly awesome problem” that he professes to depict.<sup>17</sup> In that sense, Koskenniemi overstates the significance of the contradiction between the Apology and the Utopia, the concreteness and the normativity.

The incompatibility between concreteness (Apology) and normativity (Utopia) can prove to be a compelling problem but only if one systematically sees all international legal disputes from the standpoint of theory. Although other social science and international legal theory are enriching and illuminating sources in many regards,<sup>18</sup> I believe that peripheral theoretical sources should not be the starting point of the legal reasoning. The indeterminacy of international law –which I come to terms with – must first be resolved via an understanding of it as a system. I agree with Koskenniemi that each lawyer’s understanding of the system can bespeak some kind of theory of justice. But that does not mean that lawyers must argue on the basis of a theory of justice. Political standpoints might well underlie legal arguments but they should however not be an intrinsic part of them.

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<sup>16</sup> Koskenniemi, *supra* note 1 at 311.

<sup>17</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 15.

<sup>18</sup> *Ibid.* at 555.

Koskenniemi's insightful reflections have an even more limited scope if we look at them from an empirical standpoint. I am aware that referring to empirical arguments makes me guilty of the sins singled out by Koskenniemi's in his demonstration (namely the Apology). But, whether or not this looks "apologist" in the eye of the author of *From Apology to Utopia*, I cannot help but see that international law provides States with a set of rules which they comply with and that are, to some extent, enforced by certain international bodies. I submit that these theoretical contradictions identified by Koskenniemi do not foil the entirety of international legal contentions.<sup>19</sup> International law can operate in fact as a coherent system regardless of these theoretical weaknesses. For instance, and contrary to what Koskenniemi argues,<sup>20</sup> international litigants almost exclusively resort to consensualist arguments and their arguments are not stifled by the theoretical impossibility to justify the compulsory character of the rules. In the light of Koskenniemi's account of the *Nicaragua* or the *Land and Maritime Boundary between Cameroon and Nigeria* cases, I find that the author even tends to stretch some of the case-law of the International Court of Justice to ensure that it fits into his theory.<sup>21</sup> In that sense, Koskenniemi overstates the practical significance of the contradiction lying at the core of international legal argument. This exaggeration can thus be hazardous if it entices lawyers to shy away from technical legal argumentation on the footing of dramatized assumptions.

### III. International Law as a Grammar

Before furthering my argument, I must point out that Koskenniemi's demonstration is subtle in that the author manages to hover over the abovementioned fray between "technicians" and "theoreticians". He does not call for a normative understanding of international law and acknowledges that the recourse to other social sciences is a very selective and biased intellectual exercise. The leaning of his work towards a retreat to theory however stems from the idea according to which the international lawyer must re-establish an identity for himself as a social actor and "rather than be normative in the whole (and be vulnerable to the objections of apologism-utopianism) [...] should be normative in the small."<sup>22</sup> The international lawyer, Koskenniemi argues, "can attempt, to the best of his capability, to isolate the issues which are significant in conflict, assess them with an impartial mind and offer a solution which seems best to fulfill the demands of the critical program. In doing so, he "can fulfill his authentic commitment, his integrity as a lawyer."<sup>23</sup>

There is an obvious difficulty of simultaneously entrusting the international lawyer with a social role and avoiding the pitfall of normativity. To iron out that hitch, Koskenniemi astutely resorts, in the Epilogue of the new issue, to the metaphor

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<sup>19</sup> See David J. Bederman, "Book Review of *From Apology to Utopia: The Structure of International Legal Argument* by Martti Koskenniemi", (1990) 23 N.Y.U. J. Int'l L. & Pol. 229.

<sup>20</sup> Koskenniemi, *supra* note 1 at 332.

<sup>21</sup> *Ibid.* at 405, 579.

<sup>22</sup> *Ibid.* at 555.

<sup>23</sup> *Ibid.*

of the language. He says that international law is to be thought of as a language, or more precisely, as the grammar of this language.<sup>24</sup> International should not be seen, Koskenniemi argues, as an enormous amount of words (*i.e.* the rules). International law is rather about the use of these rules in the context of legal work.<sup>25</sup> In that sense, international law is a grammar construed by Koskenniemi “as the system of production of good legal arguments”<sup>26</sup> or “an account of what is possible to say in that language.”<sup>27</sup>

I cannot but agree with Koskenniemi that international law must be construed as a grammar. I however disagree with his conception of a grammar. International law as a grammar is not about producing good legal arguments. Nor is it aimed at laying down *what* can be said. I believe that international law is a grammar in the sense that it is a system that regulates *how* things are said, not *what* can be said. In other words, it is not about producing good legal arguments but about the way argument must be produced to be legal and valid. In more simple terms, it means seeing international law as a system. Gaining mastery of this grammar – as most students in international law would probably confirm – is a laborious, strenuous, and even daunting task. Koskenniemi’s thesis poses the risk of prodding lawyers, particularly the young ones, into the pipe dream of importing selected ready-made solutions from other social sciences as a makeshift means to skirt grammatical difficulties.

#### IV. Pluralism and Legitimacy

Some might say that the risk of scaling down the technical proficiency of lawyers is the price to pay to ensure the pluralism of international legal scholarship which, I agree, is a noble purpose. There is little doubt that pluralism is also one of the objectives of Koskenniemi’s general doctrinal project. Indeed, building on the idea that the indeterminacy of international law is not mindless relativism, Koskenniemi argues, in the Epilogue, that indeterminacy is the bedrock of a healthy pluralism.<sup>28</sup> In that sense, the indeterminacy of international law is not “a scandal or (even less) a structural deficiency” but “an absolutely central aspect of international law’s acceptability.”<sup>29</sup> This aspect of Koskenniemi’s program, which contains obvious “Habermassian” overtones, accordingly paves the way for discussion among lawyers. It also dovetails with the author’s continuous crusade against hegemony which pervades the bulk of his doctrinal work.<sup>30</sup>

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<sup>24</sup> *Ibid.* at 565-566.

<sup>25</sup> *Ibid.* at 567.

<sup>26</sup> *Ibid.* at 571.

<sup>27</sup> *Ibid.* at 583.

<sup>28</sup> *Ibid.* at 559, 596.

<sup>29</sup> *Ibid.* at 591.

<sup>30</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001); Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16 *Eur. J. Int’l L.* 124.

Pluralism undoubtedly offers some legitimacy to international legal argument in that it ensures openness and sustains the “conversation” that is so cherished by the author.<sup>31</sup> My feeling is however that the legitimacy of international legal argument can also be seriously hampered by the pluralism advocated by Koskenniemi. I argue that, if international legal argument is to have some legitimacy, this also stems from the predictability, the security and the stability provided by the logic to be found in the system. There is thus risk that excessive recourse to other social sciences dampens the predictability, the security and the stability provided by international law. If lawyers were social agents that advocated a given theory of justice, there would hardly be anything predictable in international legal argument. Justice and the debate about what it means is bound to remain controversial. Pluralism, in that sense, does away with any reliable grammar and makes international law a malleable discipline that does not offer any security. Moreover, the recourse to other social sciences can be a biased and selective process as one can borrow some arguments and deliberately ignore others. In some extreme situations, this pluralism of the legal argument can even be used as a shallow embellishment of legal arguments with the view of dragging the argumentation away from the system whose logic could yield the opposite result. For these reasons, the pluralism advocated by Koskenniemi, though being in itself very welcome thanks to the hindsight that it brings, could, in some hypotheses, frustrate the legitimacy of international legal argument.

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None of the hazards that I have mentioned can be directly ascribed to Koskenniemi’s salient volume. They are rather incidental to the project underwritten by this book. This is why, despite the reservations that I have formulated against the politicization of international law pursued by *From Apology to Utopia* or the understanding of lawyers as social agents, I remain convinced that any international lawyer will be amenable to Koskenniemi’s thoughts on the structure of the legal argument. As illustrated by the personal views expressed in this essay, Koskenniemi’s stellar volume calls into question any lawyer’s most entrenched convictions. It invites him to challenge what he could have taken for granted. Although it cannot be seen as a book which revamps international law as a whole,<sup>32</sup> *From Apology to Utopia* is an obligatory gateway to the understanding of the theoretical foundations of international law and has, for that reason, entered the “classics” hall of fame.

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<sup>31</sup> Koskenniemi, *supra* note 1 at 545.

<sup>32</sup> Some have expressed the idea that it was more a book about law as a whole. See Lea Brilmayer, “Book Review of *From Apology to Utopia: The Structure of International Legal Argument* by Martti Koskenniemi”, (1991) 85 *American Political Science Review* 687.