

Sisyphus was an international lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the place of law in international politics

By Jochen von Bernstorff*

A. Introduction

From Apology to Utopia is a disturbing reading experience. I first came across Martti Koskenniemi's book of 1989 during research for my thesis on Hans Kelsen. In his monograph "Das Problem der Souveränität", published immediately after the First World War, Kelsen attempted to destroy the central doctrinal pillars of the nineteenth century German international law discourse by exposing the ideological nature of its central doctrines, such as the concept of the sovereign will of the state, autolimitation and consent.¹ 70 years later, the analytical programme of *From Apology to Utopia* deconstructed international law by exposing the inherent "political" nature of international legal discourse, interpreted as an argumentative practice. Exposing the unstable discursive boundaries between politics and international law is the central objective of this monograph.² Martti Koskenniemi portrays international legal doctrine as an inherently contradictory and repetitive argumentative routine that is incapable of producing meaningful "legal" results. International lawyers somewhat tragically feel compelled to engage in this Sisyphean routine in order to maintain their professional identity.

* Former researcher at the Max-Planck-Institute for European Legal History in Frankfurt am Main and at the European University Institute in Florence. E-mail: jochenvonbernstorff@web.de. I wish to thank Philipp Dann, Jo Murkens and Eibe Riedel for their comments and criticism on earlier drafts of the paper. The views expressed in the paper solely represent my personal opinion.

¹ HANS KELSEN, *DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS* (2ND ED. 1928); on the Vienna School: MICHAEL STOLLEIS, *GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND*, vol. 3: STAATS- UND VERWALTUNGSRECHTSWISSENSCHAFT IN REPUBLIK UND DIKTATUR, 1914-1945 163-171 (1999).

² MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT*, REISSUE WITH A NEW EPILOGUE (2005).

For me, both monographs constitute historic academic caesurae, revealing deeply provocative critiques of international legal scholarship of their time. Their respective analytical tools, however, are entirely different. Yet, the approach is similar in that both authors use current philosophical approaches and political intuition to develop a critical analytical matrix that exposes the political nature of international legal discourse. Taken seriously, both monographs demand a fundamental departure from previous practices and self-perceptions and thereby pursue a highly political project. From a history-of-science-perspective, monographs that constitute a radical break with the self-perception of a discipline are often not those that develop a new constructive approach to their subject. Instead, they tend to produce an innovative methodological perspective on the argumentative practices of the discipline as a whole. Kelsen's *"Problem der Souveränität"* marks the final stage of the nineteenth-century-debates, primarily German, about the construction of an objective (binding) international legal order based on the subjective "will" of sovereign states.³ Kelsen completely dismisses the recurrent philosophical attempts of the *fin de siècle* -discipline to combine the (positivist) concept of a sovereign "will" of states with the (naturalist) assumption of an objective legal order independent from the changing political preferences of individual sovereigns.⁴ *From Apology to Utopia*, in comparison, marks the supposedly final stage of an international academic discipline and practice that had taken refuge in pragmatism⁵ as a reaction to the discredited "utopian" approaches to international law of the interwar period.

The analytical tools applied by both authors do not form the basis of a new theory of international law, and they are not intended to give concrete guidance to practitioners or academics on how to speak the language of international law. Instead, they leave no stone of the argumentative resources of the contemporary discipline unturned; in the case of Kelsen from an external perspective, and in the case of Koskenniemi by providing a devastating "insiders view"⁶ to international legal discourse illuminated by philosophical and linguistic insights. Where Kelsen applied the late nineteenth century neo-Kantian distinction between "Is" and

³ See Jellinek's attempt to integrate these conflicting elements in his theory of international law: Jochen von Bernstorff, *Georg Jellinek, Völkerrecht als modernes öffentliches Recht im fin de siècle*, in GEORG JELLINEK. BEITRÄGE ZU LEBEN UND WERK 183 (Stanley L. Paulson & Martin Schulte eds., 2000).

⁴ HANS KELSEN, *supra* note 1, 182, 224-241 and 320, on Kelsen's critique: JOCHEN VON BERNSTORFF, *DER GLAUBE AN DAS UNIVERSALE RECHT, ZUR VÖLKERRECHTSTHEORIE HANS KELSSENS UND SEINER SCHÜLER* [*Believing in Universal Law, The Public International Law Theory of Hans Kelsen and his Disciples*] 54-61 (2001).

⁵ KOSKENNIEMI, *supra* note 2, 575.

⁶ *Id.*, 13.

“Ought”,⁷ *From Apology to Utopia* uses linguistics and deconstruction as contemporary intellectual currents to gain a new perspective on legal discourse that uncovers underlying ideological premises and assumptions. It seems that both analytical matrixes had exhausted their potential in the field of international legal theory once they had been applied by their authors in an encompassing fashion. Their external philosophical anchor prevented a harmonious reintegration into a modified discipline or legal routine.⁸ Both approaches leave a disturbing doctrinal void that goes a long way towards explaining the harsh reactions of some of their commentators.⁹

This paper intends to illustrate *From Apology to Utopia*'s critical thesis by comparing it with the Kelsenean critical programme. Starting from the first edition of the monograph, I will also try to highlight subsequent developments in Koskenniemi's thought. The main thesis is that - in spite of diverging theoretical approaches - both authors share an extraordinary sensibility for ideological underpinnings of international legal discourse. They are obsessed with the lawyer's role and identity in a highly politicised environment. Reflecting on Koskenniemi's more recent publications, the paper contends that he adopts a Kelsenean strategy to thwart the threat of realism and morality. I also try to show that both authors share a somewhat superstitious faith in the inherent value of international legal validity.

B. The denial of a “pure” legal sphere

In contrast to early twentieth century legal modernists like Hans Kelsen, Martti Koskenniemi's analytical approach tears down the boundaries between legal theory, doctrine and diplomatic practice. Where Kelsen tried to define a *Rechtswissenschaft* (legal science or jurisprudence) as opposed to *Rechtspolitik* (legal practice), *From Apology to Utopia*, by drawing on the insights of modern linguistics, refers to international law as a unified discourse.¹⁰ Legal advisers, scholars and

⁷ On Kelsen and Neokantianism: HORST DREIER, RECHTSLEHRE, STAATSSOZIOLOGIE, UND DEMOKRATIETHEORIE BEI HANS KELSEN 56 (1986); on the development of the concept of methodological dualism: Stanley Paulson, *Kelsen's Earliest Legal Theory: Critical Constructivism*, in NORMATIVITY AND NORMS. CRITICAL PERSPECTIVES ON KELSENIAN THEMES 23, 29-30 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1998).

⁸ On Koskenniemi's intentions in retrospect: KOSKENNIEMI, *supra* note 2, 564.

⁹ For an early critique of FROM APOLOGY TO UTOPIA: Ian Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 61 BRITISH YEARBOOK OF INTERNATIONAL LAW 339 (1990); for an overview of critical reactions to Kelsen's theory of international law by German interwar-scholars: VON BERNSTORFF, *supra* note 4, 64-68 and 95-104.

¹⁰ KOSKENNIEMI, *supra* note 2, 4.

judges use the language of international law and, thus, constitute international law.¹¹ *From Apology to Utopia* is an attempt to expose the “inherent politics” of international law. Martti Koskenniemi contends that it is impossible for international lawyers to maintain a specifically “legal” identity separated from that of a social scientist or politician.¹² He argues that there is no room for a neutral legal sphere outside politics and that lawyers should integrate this basic insight in their professional identity.

Kelsen’s pure theory pursued exactly the opposite project: In his view, “legal science” is supposed to occupy a space clearly delineated from other sciences, such as sociology and theology and first and foremost from the realm of politics. At the brink of the First World War, the young scholar is faced with an increasingly radicalised political culture in Austria and Germany. Nationalist and openly anti-Semitic political forces as well as socialist movements attempt to destabilize the multinational Austrian monarchy (and later the Weimar Republic) and question the influential role of the bourgeois elite.¹³ This liberal élite of predominantly Jewish origin believed in law as a means to rationalize political conflict and to constrain the forces of European nationalism. Against this political background, Kelsen tries to construct an apolitical realm for the “science” of public law. He distinguishes between the academic, who is confined to work in this “pure” legal sphere, and the practitioner whose role is to assist others in realising “political” or non-legal goals. The role of legal science is to provide practitioners and politicians with a value-free analysis of legal norms and instruments.

For Kelsen, there should be (and can be) a clear division of labour between politicians (including legal practitioners) and jurisprudence: The former produce the law, which the latter will assess scientifically in a non-ideological fashion in order to enable the political sphere to base new legislative projects or advocacy-work on the “objective” insights provided by jurisprudence.¹⁴ The political is not

¹¹ “This is a contentious distinction (the one between practitioners and academics, JvB) - after all, academics too practise the law and it is only the context in which they do so that makes them special”, KOSKENNIEMI, *supra* note 2, 617.

¹² KOSKENNIEMI, *supra* note 2, 1.

¹³ On Austrian fin de siècle - liberalism represented predominantly by emancipated and highly assimilated Austrian Jews: CARL E. SCHORSKE, WIEN, GEIST UND GESELLSCHAFT IM FIN DE SIECLE (1982) 111-114; STEVEN BELLER, VIENNA AND THE JEWS 122-137 (1989).; on Jewish emancipation and German public law in the nineteenth century: MICHAEL STOLLEIS, “Junges Deutschland”, *jüdische Emanzipation und liberale Staatsrechtslehre in Deutschland*, SITZUNGSBERICHTE DER WISSENSCHAFTLICHEN GESELLSCHAFT AN DER JOHANN WOLFGANG GOETHE-UNIVERSITÄT (1994).

¹⁴ On the role of the international lawyer: HANS KELSEN, THE LAW OF THE UNITED NATIONS. A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS XIII (Second Impression, 1951). *See also* Bardo Fassbender,

absent in the pure theory - it is the creator of the law and the place for stabilising and reforming its institutions. But legal science must be depoliticised in order to maintain the operability of law as a "social technique". Hence, "purification" of the scientific legal sphere serves a social role by identifying underlying ideological barriers in the legal discourse that might block processes of political reform.

In his brilliant sketch on Kelsen in "The Gentle Civilizer", Koskenniemi portrays Kelsen's quest for objectivity as an "obsessive search for a scientific method".¹⁵ *From Apology to Utopia* dismisses the 19th century- distinction between *Rechtspolitik* (legal practice) and *Rechtswissenschaft* (legal science or jurisprudence) methodologically from the outset. In *From Apology to Utopia* every international lawyer is a legal adviser and a theorist at the same time, albeit often unconsciously.

C. The indeterminacy-thesis

According to *From Apology to Utopia*, "politics" is omnipresent in the language of international law, both contextually and structurally. The structural dimension is exposed through the indeterminacy-thesis:

"The idea that law can provide objective resolutions to actual disputes is premised on the assumption that legal concepts have a meaning which is present in them in some intrinsic way, that at least their core meanings can be verified in an objective fashion. But modern linguistics has taught us that concepts do not have such natural meanings. In one way or another, meanings are determined by the conceptual scheme in which the concept appears."¹⁶

From Apology to Utopia demonstrates that all central areas of doctrine rely on reversible argumentative strategies that can be reduced to two basic mutually exclusive conceptual schemes determining the outcome of a particular legal argument. Doctrinal arguments can either be linked to a "descending" interpretation from a community-perspective (utopianism) or to an "ascending"

Hans Kelsen und die Vereinten Nationen, in: VÖLKERRECHT ALS WERTORDNUNG/ COMMON VALUES IN INTERNATIONAL LAW. FESTSCHRIFT FÜR/ ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 763 (Dupuy/Fassbender/ Shaw/Sommermann eds., 2006).

¹⁵ MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER, THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960, (2001) 249; on the GENTLE CIVILIZER, see e.g. Hauke Brunkhorst, *Verfallsgeschichten*, 2 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 295 (2002); Armin von Bogdandy, *Pragmatismus, Imperialismus und internationales Recht*, Martti Koskenniemis Konzeption der Geschichte, *Krise und Zukunft der Wissenschaft vom Völkerrecht*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 205-211 (2003).

¹⁶ On the quest for objectivity: KOSKENNIEMI, *supra* note 2, 16.

interpretation from an autonomy-perspective (apologism). This interpretative choice cannot be controlled by legal science or by the legal concepts themselves. Interpretation boils down to hidden political choices between central conceptual schemes leading to opposing yet equally valid outcomes.¹⁷

From a system-orientated point of view, Kelsen had also acknowledged that international legal jurisprudence involves a central political choice. He depicted the central political choice of interpreting international law as one between the “primacy of national law” or the “primacy of international law”. Depending on this initial basic choice, academics are supposed to construct the monistic legal system either from a - in the words of Koskenniemi - “descending”- perspective (primacy of international law) or from an “ascending” perspective (primacy of national law). Doctrinal arguments advanced by legal science should, according to Kelsen, stick to the overtly chosen perspective in a coherent fashion and should avoid constant alternation between arguments drawn from either perspective.¹⁸ The possibility of a “pure” scientific legal sphere in Kelsen’s view presupposes that the individual academic takes an open political decision, which perspective he or she will subsequently adhere to in his or her legal arguments.¹⁹ Sovereignty from the perspective of the primacy of international law, for instance, is defined as a changing set of legal competences allocated to states by the higher (sovereign) international legal order. By way of contrast, the opposite perspective of the primacy of national law defines international law as a subordinated legal sphere to which competences are delegated by the sovereign (higher-standing) national legal orders through concrete acts by their national organs. Both perspectives for Kelsen are scientifically equally valid and produce diverging outcomes applied to the same legal problem.²⁰

From Apology to Utopia convincingly illustrates that the “politics” of the antinomy between the community and the autonomy perspective cannot in practice be reduced to one initial and open political decision of self-conscious academics. The reason is that the constant oscillation between the two perspectives has become an internal feature of practically all doctrinal arguments. With *From Apology to Utopia* we could even go so far as to say that this way of argumentation is *the* distinctive

¹⁷ KOSKENNIEMI, *supra* note 2, 58. Koskenniemi hereby draws on David Kennedy’s famous article David Kennedy, *Theses about International Law Discourse*, 23 GERMAN YEARBOOK OF INTERNATIONAL LAW 353 (1980).

¹⁸ KELSEN, *supra* note 1, 320; on this aspect of the pure theory: von Bernstorff, *supra* note 4, 91-94.

¹⁹ KELSEN, REINE RECHTSLEHRE, 142 (1934).

²⁰ KELSEN, *supra* note 1, 155, 317.

feature of international law, given “that each legal concept can and must be argued from an ascending as well as descending perspective”.²¹ This indeterminacy-critique focuses on the political open-endedness of a seemingly neutral legal discourse. In retrospect, Koskeniemi describes the main function of the indeterminacy-critique as follows:

“It points to the apparent paradox that even a “literal” application is always a choice that is undetermined by literality itself. There is no space in international law that would be free from decisionism, no aspect of the legal craft that would not involve a “choice” – that would not be in a sense, a *politics of international law*.”²²

The indeterminacy-critique leads him to the contested conclusion that international law cannot fulfil its function as a “problem-solver”.²³ By closely linking the definition of the social function of law to problem-solving situations, which – according to his definition – always involve the determination of the meaning of a norm, *From Apology to Utopia* draws a drastic sociological conclusion as to the inherent value of the existing international legal discourse.²⁴ While acknowledging that international law may also be regarded as a means for communicating shared values and for creating expectations about future behaviour, *From Apology to Utopia* insists that “all these functions are parasitic upon the capacity of the law to determinate outcomes to normative problems”.²⁵ By rendering such determinate outcomes impossible the “interpretation-dilemma” ultimately obstructs the social function of international law. This somewhat harsh conclusion regarding the societal value of international legal discourse is highly provocative and goes – in its sociological conclusions – clearly beyond other general critiques of the indeterminacy-problem.²⁶

By contrast, for Kelsen the concrete application of the law belongs to the sphere of *Rechtspolitik* situated outside the scientific legal sphere, automatically involving an act of inherently subjective (political) interpretation of the law. It even constitutes

²¹ KOSKENIEMI, *supra* note 2, 503.

²² KOSKENIEMI, *supra* note 2, 596.

²³ KOSKENIEMI, *supra* note 2, 24.

²⁴ On this point: Ian Scobbie, *supra* note 9, 348-350.

²⁵ KOSKENIEMI, *supra* note 2, 26.; see with an overview of different theoretical approaches to the function of international law: ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT, ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHTS 252-268 (1991).

²⁶ See below on Niklas Luhmann and Jacques Derrida.

an act of norm-creation. As long as “pure” legal science refrained from such “political” activities there was no problem with individual “legislation” by judges or civil servants nor with politically guided arguments of legal advisers. In other words – for Kelsen “indeterminacy” is an inevitable fact of the sociological process of the application of the law that might even be conducive to its social function by allowing authorised norm-applying entities to adjust legal rules to changing political and moral preferences in a given community.²⁷

Similarly, both for Luhmann and Derrida legal “decisions” – as acts of application of the law in individual cases – have no determinable legal foundation. Both consider the absence of foundation of the legal “decision” as one of the central paradoxes of law.²⁸ Luhmann, from a sociological perspective, however, had no problem with depicting the “foundationless” decisions rendered by courts as a beneficial societal practice, which could even be regarded the “centre” of every system of law. Binding court decisions, regardless of their paradoxical nature, have the potential to produce positive societal effects in terms of legal security, stabilisation of expectations and pacification. At the same time, however, Duncan Kennedy and others have demonstrated for national courts that the background assumptions and prejudices of judges can cement societal structures of exploitation and violence in their rulings.²⁹

In relation to international law, *From Apology to Utopia* sketches the grammar of this paradoxical foundation, which Derrida and Luhmann call the experience of the “undecidable”.³⁰ Koskenniemi demonstrates that every legal argument advanced by states or other actors – most often in the absence of a compulsory court decision – inevitably relies on a structure that can easily be manipulated in order to produce the preferred outcome. For a legal system that, in the words of Leo Gross, primarily relies on “auto-interpretation”, the consequences of this insight might indeed be more dramatic than for a legal system that disposes of an encompassing system of compulsory jurisdiction. In the absence of binding judicial settlements, legal arguments advanced by states or other actors can easily be countered by an equally

²⁷ KELSEN, *supra* note 19, 97.

²⁸ NIKLAS LUHMANN, *DAS RECHT DER GESELLSCHAFT* 317 (1993); JACQUES DERRIDA, *GESETZESKRAFT* 49 (1991).

²⁹ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); on the role of the judge between commitment to rules and “cynicism”: Martti Koskenniemi, *Between Commitment and Cynicism: Outline for a Theory of International Law as Practice*, in *COLLECTION OF ESSAYS BY LEGAL ADVISERS OF STATES, LEGAL ADVISERS OF INTERNATIONAL ORGANISATIONS AND PRACTITIONERS IN THE FIELD OF INTERNATIONAL LAW* 495, 512 (1999).

³⁰ LUHMANN, *supra* note 28, 317; DERRIDA, *supra* note 28, 49.

valid opposing argumentation. Without authoritative decisions, the problem of “indeterminacy” becomes more acute. That is the reason why Lauterpacht and Kelsen, who both readily acknowledged the political nature of the individual application of law, vigorously postulated the introduction of a system of compulsory adjudication in international law.³¹

I would argue that Koskenniemi’s radical sociological conclusion which claims that, because of the indeterminacy-problem, international law is necessarily prevented from fulfilling its function, does not follow cogently from *From Apology to Utopia’s* analytical programme. Only if the definition of the “function” of a specific language is closely linked to determinacy will the indeterminacy-finding lead to the negation of the previously defined function. The harshness of the conclusion is thus hidden in its premises. The conclusion seems to aim at a destabilization of the identity of international lawyers, who indeed might regard themselves as “problem-solvers” by being able to provide determinate outcomes to normative problems of international life. Koskenniemi in later writings develops a more sophisticated theory of the function of law, in which the problem-solving function is much less accentuated.³²

D. The politics of repoliticisation – an ethic of responsibility for international lawyers

Where Kelsen situated the indeterminacy-problem outside the scope of legal “science”, thereby reducing the realm of his theory considerably, Koskenniemi locates it at the centre of a unified discourse of international law. There is no politically innocent realm for legal scholarship. The critique also expresses a sense of intellectual frustration about a discourse that relies on seemingly neutral and formal concepts, pretending - in a somewhat tragical fashion - to be able to produce solutions, which remain distinguishable from subjective politics.

However, as is always the case in Koskenniemi’s writings, the analytical programme is also inspired by normative concerns. *From Apology to Utopia* is an attempt to repoliticise the professional identity of international lawyers. The fragmentary critical programme exposed in the last chapter, however, is not a call

³¹ See On Lauterpacht: Martti Koskenniemi, *Lauterpacht, The Victorian Tradition in International Law*, 2 *European Journal of International Law* 215 (1997); on Kelsen’s campaign for a system of compulsory jurisdiction: VON BERNSTORFF, *supra* note 4, 169.

³² See below.

for a more political jurisprudence³³, but an attempt to destabilize the identity of international lawyers as practitioners of a seemingly neutral and inherently benevolent professional routine. Instead, Koskenniemi postulates an ethos of “authentic commitment” in a conflictual and inevitably politicised environment: “The integrity demanded of him (the international lawyer, JvB) may be seen, not as a devotion to “rigorous” legal – technical analysis, but as commitment to reaching the most just solution in the particular disputes which he is faced with”.³⁴

Based on Roberto Unger’s distinction between “routines” and “formative contexts”, Koskenniemi constructs the ideal of contextual justice or “normativity in the small”. He tries to re-establish the international lawyer’s identity as a “social actor”, who accepts that uncertainty and subjective choices are an ineradicable part of his practice.³⁵ In Albert Camus’ unorthodox reading of the ancient myth, Sisyphus is portrayed on the one hand as suffering under the pointless and interminable routine of having to roll a huge rock up a steep hill (just to see it roll down again), but on the other hand as a happy man, having fully acknowledged the absurdity of the routine in a self-reflective fashion. It is the full acceptance of the paradoxical nature of the imposed routine that has the power to create a new self-perception, which emancipates Sisyphus intellectually from outside-domination. *From Apology to Utopia* exposes the limits of the unreflective quest by international lawyers for “objectivity” and, in turn, introduces a new level of consciousness in the daily routine of international lawyers.

But do we, as international lawyers, really need such a - highly disturbing - critical consciousness? *From Apology to Utopia*’s devastating critique would be entirely superfluous or counterproductive if the sketched paradoxical routine (international law) was an essentially benevolent societal practice that, regardless of the indeterminacy-problem, produced positive societal outcomes. The understanding of international law as a progressive force was coined by the writings of international legal scholars from the second half of the nineteenth century. Kelsen and Lauterpacht both postulated the expansion of international law as a regulatory force that constrained the dark forces of violent and irrational politics. After the First World War, compulsory international adjudication was supposed to ensure the rule of law in international relations. International law was the fabric out of which new institutions would be built, institutions that would ensure peace,

³³ KOSKENNIEMI, *supra* note 2, 601.

³⁴ KOSKENNIEMI, *supra* note 2, 555.

³⁵ KOSKENNIEMI, *supra* note 2, 548.

prosperity and the reign of democracy. As Joseph L. Kunz – Hans Kelsen’s principal international law disciple in Vienna – put it in retrospect:

“At the end of World War I, fought under the leadership of Woodrow Wilson “to end the war”, boundless optimism prevailed. There was everywhere, in victors, neutrals and vanquished, not only the will to achieve a better world through international law, but also the firm conviction that it could be done. Hence, the ambitious experiment of the League of Nations. Away with power politics! No more secret diplomacy, no more entangling alliances, no longer the forever discredited balance of power, no more war! Democracy and the rule of international law will change the world.”³⁶

Despite recurrent waves of “realist” disillusionment since the 1930s, the liberal belief in the rule of international law remained a shared professional bias of international lawyers through the 20th century. *From Apology to Utopia* intends to fundamentally shatter this common understanding. Uncertainty replaces the assumption that the world is automatically better off with international law than without it. International law’s unreflected quest for objectivity can become ideological.³⁷ The postulated new, self-reflective identity of international lawyers is, therefore, first and foremost a political project. The “politics” of *From Apology to Utopia* is the quest for a transformation of international institutions that are incapable of bringing about social change and, thus, stabilise or even promote hegemonic structures of exploitation and violence. Koskenniemi stops short of formulating a concrete new substantive utopia, and in so doing avoids the accusation that he is “a naturalist in disguise”.³⁸

The intended “identity-crisis” is meant to have an emancipatory effect both for international lawyers and for other political agents. *From Apology to Utopia* postulates an ethic of responsibility in the Weberian sense of the term to international lawyers: given that international law is inherently political and always involves subjective choices, international lawyers should take greater responsibility for the effects of their individual usage of this language, which is always complicit in existing political structures and institutions. International law’s

³⁶ Joseph L. Kunz, *The Swing of the Pendulum, From Overestimation to Underestimation of International Law*, in: THE CHANGING LAW OF NATIONS. ESSAYS ON INT. LAW 125, 126-127 (Id. ed., 1968) [article first published in 1950].

³⁷ On the problem of “objectification” and law as ideology, see KOSKENNIEMI, *supra* note 2, 537-542; on interwar international legal scholarship: VON BERNSTORFF, *supra* note 4, 5.

³⁸ On the move to political discourse of critical int. lawyers: Nigel Purvis, *Critical Legal Studies in Public Int. Law*, 32 HARVARD INTERNATIONAL LAW JOURNAL 81, 116-117 (1991).

identity as a societal practice distinct from politics is dissolved and transformed into a situational ethic of responsibility for international lawyers. This can, in my view, only be a weak identity. After philosophical suicide,³⁹ the discipline is left with no more than rough guidance for an ethic of individual responsibility for the political choices one inevitably has to make.⁴⁰

What emerges from the above discussion is that - in spite of *From Apology to Utopia's* last chapter - nihilism and subjectivism continue to loom large over *From Apology to Utopia*.⁴¹ Deconstruction exposes the intrinsic limits of international law in a merciless fashion and can play into the hands of the realist critique of international law. It seems almost impossible to imagine Sisyphus' task, even in its self-reflective version, as part of a broader, meaningful societal practice. Why not then embrace the instrumental languages of causality, interests, power or international moralism instead? Did we not always sense that in the international arena legal argument ultimately turns out to be weaker than considerations of power, morality and economy? Lawyers without a specific legal identity cannot keep up a distinct legal discourse defending the concept and potential value of international legal validity. The distinctiveness of legal discourse, however, is a precondition for the existence of law as a self-referential communicative system, which as such is able to foster societal pacification and to bring about political transformation.

Radical deconstruction is, therefore, a risky exercise. It may create a new space for political contestation and emancipatory practices through an emerging new language, but it might as well be the beginning of the end of the professionally shared faith in international law's ability to constitute a distinct normative practice. This risk is increased by the fact that international law - in comparison with domestic law - is a relatively weak legal system due to the almost complete absence of compulsory jurisdiction as a communicative centre, around which the discourse can evolve and maintain its inherent dynamic.⁴²

³⁹ I borrow this term from ALBERT CAMUS, *LE MYTHE DE SISYPHE* (1942), chapt. 1.

⁴⁰ On a theory of "situationality" of legal practice: Outi Korhonen, *New International Law: Silence, Defence or Deliverance?*, 7 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 1 (1996).

⁴¹ See on the problem of nihilism and deconstruction in international law: Nigel Purvis, *supra* note 39, Outi Korhonen, *supra* note 41

⁴² On the role of courts in the legal system: NIKLAS LUHMANN, *supra* note 28, 258.

E. The independence of Law from Sociology and Morality

Some years after *From Apology to Utopia's* first publication it seemed as if there was a dramatic turn in Koskenniemi's writings.⁴³ Due to the dominance of the discipline of international relations that attempts to dissolve international legal validity in "prisoner-dilemmas", "causal templates", "networks" and new international moralism, Koskenniemi adopts a Kelsenian strategy: he provides a profound critique of those two rivalling approaches to interpret the international world, which tend to question the relevance of law as a distinguishable normative practice - sociology and morality.

Kelsen's pure theory worked on the philosophical premise that legal validity can neither be derived from empirical phenomena such as causality, power and interests nor from moral rules. The concept of legal normativity is completely independent from these categories based on a theory of the "Rechtssatz" as the basic structure of the specific legal form.⁴⁴ Kelsen took recourse to the neo-Kantian distinction between "is" and "ought" in order to justify his critique of sociological constructions used in legal argumentation. Empirical descriptions belonged to the realm of the "is" and therefore philosophically belonged to another category without any link to the normative world of the legal "ought". Morality also constituted an ought-order ("*Sollensordnung*"), but one that had to be separated from the specific legal ought. With this philosophical postulate Kelsen had gained a critical perspective on attempts of contemporary scholars to integrate these perspectives in their concept of law. The philosophical separation of law from sociology and morality is based on Kelsen's somewhat irrational faith in the potential value of the existence of a distinct legal medium first and foremost for the maintenance of world peace.

Without endorsing Kelsen's quest for an objective science of law, Koskenniemi aims to deconstruct sociology and morality as "languages" that (equally) fail to have an objective argumentative basis. They both operate with hidden normative premises when using terms like "power", "interest" and "security". Their cognitive bases are equally unstable and involve political choices. Furthermore, Koskenniemi criticises these approaches as strategies to deformalise international legal validity.

His critique of sociological approaches is primarily focused on the doctrine of realism and is designed to deconstruct central terms of its "language". Koskenniemi destabilizes the political scientist's quest for "objectivity" by

⁴³ See for a differentiated reading of this change of tone: Outi Korhonen, *supra* note 41, 21.

⁴⁴ KELSEN, *supra* note 19, 19.

demonstrating that terms like “power”, “national interests” and “security” remain empty phrases, unless they are first given a meaning.⁴⁵ This injection of meaning adds a normative dimension that cannot be based on empirical findings structured by the laws of causality: “Power is a matter of perspective. It receives meaning as threat or support depending on how we relate to it. It is applied as a means to an end different from itself. A study of ends, however, introduces normative elements into the explanatory matrix that cannot be grasped by the sort of empiricism that Realists espouse”.⁴⁶

With his dialectical sensibility for the ideological baggage of new academic concepts, such as ‘governance’, ‘networks’ or the compliance-concept, Koskenniemi exposes hidden normative premises.⁴⁷ It seems as if he wants to highlight that a new identity for international lawyers cannot be formed on the basis of a move to sociology, rational choice-theory or empiricism. These methodological approaches equally operate with concepts that are not able to constitute an objective foundation of their discipline. He strongly criticises their instrumental and deformalising approach to law. The critique is based on a fascinating historic study that reconstructs the intellectual links between Weimar-Era-jurisprudence (the intellectual Schmitt-Kelsen antagonism) and American-dominated post-war international relations discipline founded by Hans Morgenthau, himself an emigrated Weimar lawyer.⁴⁸

Koskenniemi equally insists on law’s independence from morality. In times of moral agnosticism, the reference to moral duty in international politics can only be interpreted as a private and subjective judgement. It is a matter of private conscience. As such references to moral duties to justify decisions in the public realm become questionable: “In the public realm, however, decisions need to be

⁴⁵ Martti Koskenniemi, *The Place of Law in Collective Security*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 455, 468 (1996).

⁴⁶ *Id.*, 467.

⁴⁷ KOSKENNIEMI, *supra* note 15, 480; see on “governance-networks” and international law: Jochen von Bernstorff, *Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony*, 9 EUROPEAN LAW JOURNAL 511 (2003).

⁴⁸ KOSKENNIEMI, *supra* note 15, 413; on the current debate on the divergence between US and EU-perceptions of international law: Martti Koskenniemi, *Perceptions of Justice: Walls and Bridges between Europe and the United States*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 305 (2004); with an overview of the main issues addressed in this debate: Rüdiger Wolfrum, *American-European Dialogue: Different Perceptions of International Law - Introduction*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 255 (2004); and UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003).

taken. To refer in these cases to moral duty is to back down from the political to the private".⁴⁹

Invoking "humanity" in a political struggle, for Carl Schmitt has the function to cast the enemy who acts against my moral convictions as someone who is outside of humanity.⁵⁰ Building on this insight, Koskenniemi demonstrates for the Kosovo intervention that there is a tendency to refer to Serbs killed in the NATO-bombings as individuals "with whom there is no political community and so no political agnosticism".⁵¹ He illustrates the hegemonic potential of post-naturalist morality in public discourse given that the reference to morality situates the argument outside the field of open political contestation. Moral convictions cannot be politically challenged, since they enter the public realm as an admittedly subjective feeling. As a consequence, they change the nature of political discourse, turning it into an existential struggle about religious or moral identities and beliefs. It is a common ideological strategy of strong actors to invoke universal morality so as to justify their specific political agenda.

In reaction to the identified strategies of the deformalisation of international law, Koskenniemi in "The Gentle Civilizer" praises law's inherent formality and propagates a "culture of formalism". Formalism is portrayed 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 of the parties whose claims are treated within it".⁵² It is characterised as a "practice that builds on formal arguments that are available to all under conditions of equality". Koskenniemi hereby translates Kelsen's insight into the value of law's intrinsic aspiration to formal equality by its reference to general norms⁵³ into a normative vision of a communicative culture based on legal argumentation.

According to Koskenniemi, the formal reference to legal standards demands that decision makers distance themselves from their own preferences and justify their position in a way that can be generalized beyond the individual case. Invoking formal law in public discourse is conducive to the realisation of the ideals of

⁴⁹ Martti Koskenniemi, *Legal Universalism – Between Morality and Power in a World of States*, in *LAW, JUSTICE AND POWER – BETWEEN REASON AND WILL* 46, 54, 60 (Sinkwan Cheng ed., 2004).

⁵⁰ CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN* 55 (1932, reissue 1979).

⁵¹ KOSKENNIEMI, *supra* note 50, 46.

⁵² KOSKENNIEMI, *supra* note 15, 500.

⁵³ Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organisation*, 53 *YALE LAW JOURNAL* 207 (1944).

accountability, equality, reciprocity and transparency.⁵⁴ Koskenniemi's unique contribution is the illustration of how concrete discursive situations change when legal arguments are brought into political debates, some of which he experienced himself as legal adviser. From these analyses of argumentative practices emerges an ambivalent and highly sophisticated picture of the separateness and interdependency of political and legal argumentation in a given historical context.⁵⁵

The call for a "culture of formalism" adds a new dimension to the contextual "ethic of responsibility" outlined in *From Apology to Utopia*. International lawyers can no longer believe in the "objectivity" of their craft. Hence they have to take full political responsibility for their work. But beside their own political assessments of individual cases, they should have faith in the abstract potential of formal legal argumentation to limit the exercise of power and to empower and protect those who are weak.⁵⁶ As a counter-hegemonic strategy Koskenniemi carefully rebuilds the international lawyer's deconstructed legal identity. It seems as if Sisyphus could eventually be liberated from the spell of his meaningless routine.

But can such a defence of international legal validity be reconciled with *From Apology to Utopia's* central message that international law as a language is inherently political? If international legal practice is political through and through - how can a call for a distinct culture of formalism be sustained? For Koskenniemi the thesis of political open-endedness of legal arguments does not conflict with this vision of legal argumentation as a potentially positive societal practice. He even refers in the 2006- epilogue to the indeterminacy of law as a precondition of law's ability to justify and criticise existing practices.⁵⁷ It is the initially criticised openness of international legal discourse that now becomes a virtue since it allows for the articulation of any violation or a lack suffered by an individual in universal terms. The indeterminacy-thesis becomes a key-element in his concept of legal universalism. International law's inherent tendency to justify political claims by reference to generalisable standards shared within an imagined community is described as law's "aspiration of universality"⁵⁸: "As international law has the

⁵⁴ KOSKENNIEMI, *supra* note 2, 616.

⁵⁵ KOSKENNIEMI, *supra* note 46, 455.

⁵⁶ KOSKENNIEMI, *supra* note 15, 502.

⁵⁷ KOSKENNIEMI, *supra* note 2, 614; Louis Henkin sees the reason for the survival of international law in its open structure: HOW NATIONS BEHAVE - LAW AND FOREIGN POLICY 109 (1979); on the merits of a relatively open international legal order with further references: ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT, ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHTS 270 (1991).

⁵⁸ KOSKENNIEMI, *supra* note 50, 60.

aspiration of universality, it compels those that make claims under it to make those claims in a universal way".⁵⁹

Legal universalism is not a substantive universalism transporting a concrete vision of the good life, not another theology. Instead, it is the inherent universalism of Kelsen's (empty) legal form. More than ten years after *From Apology to Utopia* was first published, the indeterminacy-thesis and the subsequent call for a "culture of formalism" merge in Koskenniemi's concept of legal universalism. International law is seen as an irreplaceable public medium for political controversy in an antagonistic world. It is conducive to an open political discourse that can transcend particular preferences by imagining a community sharing general standards. It now becomes clear that the normative concern behind his critique of the social scientist's reference to empirical "facts" or morality (as well as the international lawyer's quest for legal objectivity) is their tendency to erect ideological limitations for political discourse.

The normative basis of this critique is a utopia of an open and conflictual international conversation that is not limited by hidden normative premises or hegemonic domination.⁶⁰ Any reference to a prepolitical truth or justice is dismissed as ideologically constraining a discursive political process. Legal argumentation becomes an irreplaceable medium for the construction and transformation of institutions and communities. The outline of this vision of an authentic conversation allowing for intersubjective agreement could already be found in *From Apology to Utopia's* last chapter.⁶¹ In a book review published in 2003 in *German Law Journal*, Koskenniemi alludes to international law's political project as follows: "As Derrida has often argued, justice does not end but only begins with law. The fact that the universal is always also particular, the legal also more than just "legal", does not open the way to the Schmittean nightmare: it is the precondition for there to be something like a realm of politics in which issues of right, good and just can be meaningfully debated and approached. There is no closure."⁶²

⁵⁹ *Id.*, 61.

⁶⁰ KOSKENNIEMI, *supra* note 2, 545.

⁶¹ As Nigel Purvis has emphasized, the postulation of a "move to open political discourse" contains a normative principle on public discourse and decision-making, Nigel Purvis, *supra* note 39, 116-117; on the utopian character of Koskenniemi's emancipatory concept of law: Ulrich Fastenrath, *Book Review - From Apology to Utopia*, 31 ARCHIV DES VÖLKERRECHTS 182, 184 (1993).

⁶² Martti Koskenniemi, *Book Review - GIOVANNA BORRADORI (ED.), PHILOSOPHY IN A TIME OF TERROR. DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* (CHICAGO AND LONDON, UNIVERSITY OF CHICAGO PRESS 2003), 4 GERMAN LAW JOURNAL 1084 (2003), available at <http://www.germanlawjournal.com/article.php?id=319>.

F. The critical project reaffirmed

Can all of this be interpreted as an unexpected endorsement of the liberal interwar-project of the extension of the rule of law in international relations through constitutionalizing international law leading to a gradual creation of a Kantian world federation? This cosmopolitan project was promoted by Hans Kelsen's theory of the primacy of international law, his sovereignty-critique and, most prominently, by Hersch Lauterpacht with his early insistence on the introduction of international compulsory adjudication and the recognition of international human rights as a new foundation of post-war international law. Even though Koskeniemi tries to revive the formal spirit of the intellectual founding fathers of the discipline, he does not subscribe to the ideal of an evolutionary legalization of the international realm, an ideal that can still be considered a Leitmotif of many scholarly writings. Habermas, for instance, translates the Kantian project in order to adapt it to conditions of modern complexity. Increased *Verrechtlichung* (legalization) is a central theme in his call for a reform of existing international institutions that can foster human rights, peace and develop distributive policies on a regional and global level.⁶³

While trying to redeem international law's transforming promise, Koskeniemi is reluctant to concur with the political strategy outlined above. One reason is that for him, the political ingredients of the cosmopolitan project, including human rights, are at best ambivalent.⁶⁴ The most important reason seems to be a differing political assessment of present international law's complicity in structures of injustice: "The law is not – or is not only – the fragile European humanitarianism that is timidly opposing American Empire. It is also that empire, its wars and its violence (...). It is

⁶³ JÜRGEN HABERMAS, DER GESPALTENE WESTEN 153-178 (2004).

⁶⁴ For Koskeniemi, human rights can have a negative effect on political culture. Institutionalised rights can lose their progressive character and marginalize those community-values or interests that resist translation into rights language, Martti Koskeniemi, *The Effect of Rights on a Political Culture*, in THE EU AND HUMAN RIGHTS, 99 (Philip Alston ed., 1999), Koskeniemi agrees with Karl Marx that human rights are a "theology of the bourgeois state whose citizens are obsessed by their weakness, and fearful of "evil" are ever ready to turn whatever powers into the hands of a bureaucratic theocracy", Martti Koskeniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN JOURNAL OF INTERNATIONAL LAW 229, 244 (2004); in line with his own concept of legal universalism Koskeniemi acknowledges, however, that rights can open a political culture to experiences of injustice and "provide a voice through which the pain of torture, for example can be articulated", Martti Koskeniemi, *The Effect of Rights on a Political Culture*, in THE EU AND HUMAN RIGHTS 99 (Philip Alston ed., 1999); on the concept of human rights as a medium to express experiences of injustice and fear: Klaus Günther, *The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture*, in THE EU AND HUMAN RIGHTS, 177 (Philip Alston ed., 1999); on Koskeniemi's "negative" universalism and human rights: Hauke Brunkhorst, *Verfallsgeschichten*, 2 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 295, 311 (2002).

always already there structuring the private and public relations within which material and spiritual resources are distributed in the world".⁶⁵

Seen in this light, the call for legalization is ambivalent and always requires an additional normative assessment as to what law should be created in which historical and institutional context. In line with the critique of liberal legalism, Koskenniemi insists that to strive for the rule of international law is not politically innocent. For him "structural bias" and "hegemonic forces", stabilised by international law's limited set of argumentative choices, block transformative action and institutional reform. The practices of existing international legal institutions are not only indeterminate, they are also biased towards the maintenance of the status quo. This critique is introduced in the new Epilogue to *From Apology to Utopia* as a "strong" indeterminacy-thesis.⁶⁶ It boils down to a subjective and generalising political assessment of existing international law and its institutions: current international legal norms and institutions have most of the time bad political consequences, we therefore need a new language of international law, one that would - albeit equally indeterminate- lead to the right bias and good political consequences. Existing international law is, as David Kennedy has put it, "part of the problem".⁶⁷

The open and somewhat radical political critique of the status quo is also based on the conviction that science and politics, theory and practice cannot be separated.⁶⁸ In the "Gentle Civilizer", Koskenniemi criticises Kelsen precisely for an "emasculatation of his politics" through self imposed theoretical constraints.⁶⁹ Kelsen as a lawyer felt philosophically confined to provide value-free analysis of legal norms and practice. Despite his firm democratic and cosmopolitan convictions, he could not openly base his legal writings on them. Kelsen however, used the critical potential of his theoretical formalism to reveal the true political character of contemporary doctrinal assumptions which were masked by legal argument. In my view this is in itself already a highly political project which is aimed at the

⁶⁵ Martti Koskenniemi, *Book Review* – GIOVANNA BORRADORI (ED.), *PHILOSOPHY IN A TIME OF TERROR. DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* (CHICAGO AND LONDON, UNIVERSITY OF CHICAGO PRESS 2003), 4 *GERMAN LAW JOURNAL* 1084 (2003).

⁶⁶ KOSKENNIEMI, *supra* note 2, 600-615.

⁶⁷ For international human rights law: David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *HARVARD HUMAN RIGHTS JOURNAL* 101 (2002).

⁶⁸ Martti Koskenniemi, *supra* note 65, 229, 241; on the ideological dimension of the separation of science and practice from the perspective of the "Frankfurt School": MAX HORKHEIMER, *CRITICAL THEORY. SELECTED ESSAYS*, 188-243 (Matthew O' Connell et. al., transl., 1972).

⁶⁹ KOSKENNIEMI, *supra* note 15, 247.

destabilisation of those political projects which are not in line with one's personal political goals.⁷⁰

In its indirect approach, this strategy bears strong resemblance to Koskenniemi's own project. He only reluctantly engages in concrete proposals for political reform. The political project is promoted mainly through a critique of texts, which are considered an ideological obstacle for the realization of his own political goals. We find indications for his main political concerns only in short but very intense passages suddenly directing the reader's attention to pressing problems of poverty and social exclusion, life and death produced by international politics. In contrast to Kelsen, however, Koskenniemi refuses to endorse the evolutionary vision of an international law gradually constraining the dark forces of nationalistic policies by increasingly powerful institutions enforcing the rule of law in international life. The twentieth-century-focus on societal pacification through the expansion of international law ("peace through law") is almost absent in Koskenniemi's writings.

In the end, the critical project is strongly reaffirmed - deconstruction is here to stay. It can indeed help to revitalize the transformative aspiration of the founding fathers of the craft. In a truly modernist spirit *From Apology to Utopia* has provided the discipline with a sharpened self-reflective consciousness.⁷¹ This must be seen as an intellectual turning-point in the discipline's history even if it still seems too early to assess its impact. In his subsequent publications Koskenniemi has added a positive vision of international legal validity to this project, and has erected a deliberately fragile - but traversable - bridge between a disoriented discipline and the best representatives of its tradition. In my view, this is a necessary attempt to thwart the threat of nihilism.

International law now has to steer a course between the Scylla of Sisyphean meaninglessness and the Charybdis of cynical decisionism. With its relentless focus on the politics of international law, the critical project will continue to be at risk of ultimately playing into the hands of those who are in power and want to eliminate

⁷⁰ Formalism is being used by Kelsen as a counter-hegemonic (political) strategy. I have made this argument in my: DER GLAUBE AN DAS UNIVERSALE RECHT. ZUR VÖLKERRECHTSLEHRE HANS KELSENS UND SEINER SCHÜLER (2001). On formalism as a political strategy, see the new epilogue, in KOSKENNIEMI, *supra* note 2, 602, 616.

⁷¹ For David Kennedy, Koskenniemi might have produced "the last modern treatment of the field": David Kennedy, *From Apology to Utopia*, 31 HARVARD JOURNAL OF INTERNATIONAL LAW 385, 388 (1990); on this aspect: Nigel Purvis, *supra* note 39, 118. See also David Kennedy, *The last treatise: project and person. (Reflections on Martti Koskenniemi's From Apology to Utopia)*, 7 GERMAN LAW JOURNAL 981 (2006).

any structure that can limit their freedom of action. But then again, what can we achieve in this world without taking risks?