Review of Apology to Utopia: The Structure of International Legal Argument, by Martti Koskenniemi

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VOLUME 31, NUMBER 1, WINTER 1990

Book Reviews

APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. By Martti Koskenniemi. Helsinki: Finnish Lawyers' Publishing Company, 1989, Pp. xxvi, 550. 275 Fmk (paper).

Reviewed by David Kennedy*

Mr. Koskenniemi has written a remarkable and challenging book. His project is ambitious, his thesis provocative. He attempts an integrated reappraisal of public international law by drawing upon recent developments in social theory, political science and legal scholarship. Demonstrating an intimate knowledge of the literatures of international legal history and doctrine, as well as a facility with current political and social theory, Koskenniemi maps the structural coherence of public international legal history, theory, and doctrinal argument.

Koskenniemi's book challenges almost every dimension of the contemporary discipline of public international law. He mounts a philosophical challenge, identifying a systematic objectivist bias within international law that renders both pragmatic and value-laden approaches to the field unsatisfyingly formal. To this he adds a professional criticism, challenging the meaningfulness of the doctrinal, historical, and political arguments which are the bread and butter of most international legal practice.

Under his scrutiny, the materials of the discipline fare no better. Koskenniemi challenges the enlightenment story of intellectual and institutional progress which has long been the central motif of the historiography of public international law. Where traditional histories stress the partial, incoherent, foreshadowing quality of the preclassical period of public international law (before 1648), Koskenniemi resurrects a comprehensive unity. He then criticizes the standard account of the classical period (1700–1900) for stressing the triumph of positivism. He reinterprets the post-World War I era as an erratic period which reestablished the traditional "professional" system rather than as a break to a more pragmatic modernism. Koskenniemi elaborates a comprehensive and systematic criticism of modern public international legal doctrine and argument. He reconsiders the basic building blocks of the field concerning sovereignty, statehood, custom, and the sources

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of law, as well as the more innovative doctrinal projects for a new law of the sea or a "new international economic order." Throughout he finds incoherence, contradiction, and an exaggerated objectivity.

For all these critical turns, Koskenniemi's project sits squarely in the international law tradition. His criticism is rooted in the materials of the discipline itself—its cases, its histories, its arguments, and its professional contexts. Rather than applying criticisms developed by other fields or writing from a viewpoint outside international law, he produces a criticism that is internal and, ultimately, situated in the best traditions of the discipline. One might say that he simply extends lines of analysis already common to the field until they collide with one another. Like most scholars of public international law, he criticizes the extremes of naturalism and positivism as professional methodologies, philosophical positions, and doctrinal explanations. Unlike others, however, Koskenniemi elaborates the same criticisms against those who respond to the difficulties of positivism and naturalism by adopting what seem more modern, moderate, centrist or realist positions.

Koskenniemi's project should be understood from the vantage point of the philosophical traditions he adopts. His work rests comfortably upon the insights of contemporary critical theory and linguistic philosophy. But he also poses a challenge to legal work in these traditions. If Koskenniemi is able to criticize public international law, without leaving its materials or traditions, by relying upon the methodologies of critical social theory, he refrains from drawing conclusions about the social function of international law as a "legitimation" of the international political order. Contemporary linguistic philosophers would also be at home with his approach: he foregrounds the details of argument, rhetoric, and persuasion, and focuses on difficulties of logic and style. And yet he goes beyond the study of language to think rhetorically about the professional culture of international law.

Taken together, these two approaches yield an original and provocative thesis—that international law should be seen first and foremost as a rhetorical *movement* "from emphasizing concreteness to emphasizing normativity and *vice versa*."[1] In Koskenniemi's view, international lawyers are constantly rushing to demonstrate that *other* international lawyers are either too utopian or too apologetic. In their practical arguments and in their scholarship, international lawyers work by insisting that their interlocutors are subjective. This flight to the objective, Koskenniemi believes, is more central to the discipline than the contents of any particular theoretical or doctrinal argument.

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1. M. KOSKENNIEMI, APOLOGY TO UTOPIA 46.

Methodologically, this thesis is provocative precisely because it sets to one side issues of doctrinal or theoretical content. Koskenniemi does not assess the sociological or logical persuasiveness or practicality of any particular argument. He seems uninterested in whether positivists or naturalists are more persuasive; he declines to mediate their dispute. Nor does he take a stand on controverted doctrinal issues. We never find out, for example, whether, on balance, he supports the claims made for "soft" law. At times his agnosticism annoys. Although balance is normally considered essential to scholarly objectivity, Koskenniemi seems to have taken things too far. His refusal to take a stand tempts us to doubt his sincerity, perhaps even his objectivity. Either he is hiding his preferences or his analysis is so sweepingly critical as to be of little use to either the scholar or practitioner.

Koskenniemi would suggest, I think, that were we to establish such a position, we would simply open ourselves up to charges of subjective preferences, utopian speculations or apologetic intentions. To place himself outside the chain of accusation, Koskenniemi stops short of prescription and restricts his interest to the rhetoric of international law. Still, his project is not entirely dispassionate. Like other post-modern scholars, he seems determined to narrate his discipline to its end—to write the last modern book on public international law. He wants, in some way, to be the last objective writer.

This approach, however, raises difficult methodological questions. It is easy to suggest—and perhaps doing so demonstrates Koskenniemi's point—that the desire for a purely objective, simply balanced, and rigorously agnostic science of international law either expresses a substantive vision or amounts to an apologetic acceptance of all possible viewpoints.

For Koskenniemi, the effort to remain objective and refuse the closure of position runs counter to the modern system of international law. The story line of his book moves from unresolvable debate to unresolvable debate. Koskenniemi repeatedly reminds us that he is depicting the "weakness" of the law in order to demonstrate that "international law is singularly useless."[2] Only in the final chapter, "Beyond Objectivism," does he produce his own utopia, which he describes as "re-establishing the identity of international law by re-establishing that of the international lawyer as a social agent."[3]

This criticism suggests a rather conventional image of the functional or useful. International law would be useful precisely to the extent that it could generate substantive doctrines and theoretical positions. In Koskenniemi's economy, the key to use-value is meaning—deter-

2. *Id.* at 48.
3. *Id.* at 490.

minable, interpretable, subjective meaning: "[I]f the law lacked determinate content, it would be singularly useless in communicating any ideas, expectations or procedures."[4] All other functions of international law are "parasitic" upon "its ability to provide determinate outcomes to normative problems."

Koskenniemi thus places himself in the same dilemma for which he criticizes the discipline as a whole: seeking the objective in legal science, he seems to value law only as it generates the subjective. In this context it is unsurprising that his methodology recapitulates the move from objectivism to subjectivism for which he criticizes the discipline. If other authors combine objective critical rigor with subjective conclusions, whether utopian or apologetic, Koskenniemi goes one step further. He attempts a fully objective analysis, placing the weight of his subjective belief in the methodological resuscitation of the "international lawyer." In this sense, Koskenniemi has perhaps produced the last modern treatment of the field. His determined demonstration of the field's indeterminate argumentative structure forces us away from a functionalism of meaning and toward a pragmatism of gaps, ambivalences and nonsense. Still, his insistence on indeterminacy and objectivism poses new questions.

Although Koskenniemi is persuasive in his identification of the particular ambivalences and logical difficulties in the doctrinal and theoretical materials of international law, I wonder about his more general claim that the "problems of theory and practice share a similar structure and are related to the contradictory character of more fundamental aspects of legal consciousness."[5] What does it mean to "share" a structure or to be "related" to some deeper contradiction? Sometimes Koskenniemi argues that indeterminacy is a matter of form which can be proved in advance, as if his critical technology could reliably shatter all claims of doctrinal fixity. At other times, he seems to suggest some situs or ultimate cause for the indeterminacy of all argument—a flawed die from which all the discipline's currency is struck. Either way, the claim seems too substantive, too utopian to comport either with his contextually objective analytical framework or with his valorization of the freedom of the international lawyer as a professional.

As for objectivism, his claims about the hidden and recurring formalism of international legal argument are persuasive, but I wonder about generalizing his move to formalism. Koskenniemi criticizes the "world order" for its "fatal" claims to accommodate both community and autonomy. To accommodate both, he argues, each must be ren-

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4. *Id.* at 11.
5. *Id.* at 9.

dered "purely formal."[6] International law fails because it relentlessly seeks to repress or exclude the informal, subjective or imaginative. Yet Koskenniemi also claims that the structure of argument in the field is a projection of its professional culture, and that the work of the discipline is to manage the relationship between assertions of community and autonomy. It seems equally plausible, however, to characterize the field as relentlessly subjective, struggling against the formalization of ideology and political interest. As Koskenniemi himself demonstrates, much of legal rhetoric foregrounds fear, loneliness, anxiety, hope, and desire.

Koskenniemi's historical argument is sweeping. He integrates the development of international legal theory after 1700 with developments in liberal political theory. The result is an important contribution to the literature on sovereignty. Koskenniemi uses changing images of sovereignty to trace the impact of developments in political theory on international law, which led to a vision of sovereignty as a bundle of rights designed to mediate between the requirements of doctrine and the arguments of international legal theory. Koskenniemi's synthesis of the eighteenth- and nineteenth-century materials makes a persuasive case for the unity of the classical period. This late nineteenth-century concept informs Koskenniemi's critical exploration of doctrinal modernism.

Some aspects of this account are puzzling. At times, Koskenniemi stresses the unity of the preclassical period, seeing work before 1700 as the prototype for what he calls "descending" arguments that move from order to norm. Treating liberalism as a fall from unity is a classic maneuver in critical history; it reverses liberalism's own claims to have wrested unity from fragmentation. Yet Koskenniemi is probably equally critical of that view. Indeed, we learn that the distinction between "ascending" and "descending" approaches to international law did not arise until after 1700. Here, he treats the preclassical account of sovereignty as "simply a description" devoid of "normative content."[7] At other points, however, he criticizes "descriptivism," particularly that of the classical positivists, as unavoidably normative.

Where Koskenniemi perceives a unified classical period, he focuses on the unity of positivist and naturalist scholarship. Indeed, the key to the book's historical claims is Koskenniemi's assertion that the ascending and descending arguments of the classical period derive from a single theoretical universe. The contradictions embedded in that universe have, he feels, continued to structure modern doctrine. But Koskenniemi establishes this unity by criticizing precisely the

6. *Id.* at 431.
7. *Id.* at 192.

distinctions he used to mark the difference between the classical and the preclassical. He sees the extremes of ascending and descending as historically incompatible when they mark the 1700 transition to classicism, but they are unified and mutually compelling when they serve to split classicism into positivism and naturalism. They become incompatibly contradictory once again in their roles within the structure of contemporary doctrine. In short, Koskenniemi is as resistant to classical claims of differentiation as he will be to modern claims of doctrinal synthesis.

Although I have a great deal of sympathy for his historical narrative, Koskenniemi's treatment seems a bit too objective or logical. It may be that description existed in a world without descending normativity prior to 1700, or that ascending and descending modes were inseparable thereafter until the modern period when they could no longer be combined. But such general claims would be better substantiated if they were situated in the historical development of the debate itself. In particular, it should be pointed out that naturalism changed quite dramatically from 1750 to 1900, orienting itself ever more directly to the positivist challenge and playing on a terrain ever more defined by nationalism.

Koskenniemi's doctrinal argument is quite intricate. His basic claim is that a forced choice between ascending and descending arguments defeats any modern effort to achieve a stable resolution of doctrinal issues or a satisfactory closure to theoretical argument. On the one hand, he argues that "the unity of modernism lies in its opposition to earlier theories"[8]—in its rejection of positivism and naturalism and its search for a middle ground. On the other, he demonstrates the continued necessity of the choice between norm and fact-driven arguments, between those which are rooted in sovereign autonomy and those expressive of an international public order, a choice he claims can never be satisfactorily made.

Koskenniemi's sweeping criticism of modern work, whether driven by rule formalism or skepticism, by policy science realism or aspirational idealism, is an original and provocative analysis. It is at its best in his discussion of custom, which Koskenniemi wrests from debates about the source and authority of international law, and transforms into the terrain for an investigation of psychologism and materialism in modern social theory. His subtle argument here develops a truly first-rate analysis of the discipline's modernist voice.

Based on an unwillingness to believe that modern theory and doctrine work precisely by exploiting cognitive dissonance and ambivalence, Koskenniemi's insistence on the necessity of choice is particu-

8. *Id.* at 188.

larly provocative. Nevertheless, some doctrines do not fit the modern contradictory structure he develops. If we think about doctrines which concern the origin of international law, such as those regarding the territorial nature of statehood, we find some resistance to specificity which may prevent the contradictions described by Koskenniemi from developing. For example, although territory is required for statehood, it is widely acknowledged that boundaries need not be settled and that no final position need be taken on boundaries in order to confer statehood. Similarly, there are various super-doctrines, whose content—at least aspirationally—stand outside the law and beyond the realm of contradictory argument. Although the traditional candidates for *ius cogens* may fall prey to the dilemma Koskenniemi identifies, they may also provide a smokescreen for doctrines which the system really takes seriously, such as the exclusion of terror or preserving the means of communication and the institutions of negotiation. In addition, the allocation of jurisdictional instance—particularly when done in explicit denial of international legal norms as in the *Lotus* case—might sidestep the demand for the substantive justification which leads modern doctrine into the difficulties outlined by Koskenniemi. I should add that Koskenniemi's image of modernism might have left more room for the hesitant, the indecisive, and the incoherent had he not set aside materials relating to war, human rights, and international institutions when examining the doctrinal voice of modernism.

These are minor points, however. Ultimately, Koskenniemi's reappraisal of the field of public international law presents an extremely broad and challenging thesis. He integrates doctrinal, historical, and theoretical materials into a single image of the discipline, an image which is extremely suggestive for scholars and practitioners. He reorients us from particular doctrinal controversies to the overall structure of persuasion and clears the ground for a less "objective" while more professional and passionate approach to public international law. Without doubt, this is the single most original book-length contribution to the field in the past decade.