Articles

A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture

By Paavo Kotiaho[*]

> The reality of ideological phenomena is the objective reality of social signs. The laws of this reality are the laws of semiotic communication and are directly determined by the total aggregate of social and economic laws. Ideological reality is the immediate superstructure above the economic basis. Individual consciousness is not the architect of their ideological superstructure, but only a tenant lodging in the social edifice of ideological signs.[1]

I.

Received wisdom tells us that the left-wing international law project dates back to the late 1980s, encompassing a tremendously varied group of participants. As such, rather than trying to shoe-horn this motley-crew of more or less theoretically minded people to fit the label of 'an approach' or a 'school of thought' we would be better off taking cue from Akbar Rasulov and recognize that what we are dealing with is best understood as either a 'project' or a 'discursive practice,'[2] delineated by Duncan Kennedy as:

> [A] continuous goal-oriented practical activity based on an analysis of some kind (with a textual and oral

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[1] VALENTIN NIKOLAEVICH VOLOSHINOV, MARXISM AND THE PHILOSOPHY OF LANGUAGE (1973), available at: http://www.marxists.org/archive/voloshinov/1929/marxism-language.htm (last accessed: 24 April 2012).

[2] Akbar Rasulov, *New Stream: A Critical Genealogy,* unpublished draft paper presented at The 'New Stream' Twenty Years On: A Critical Genealogy workshop held at the University of Glasgow (19 February 2010), available at: http://ssrn.com/abstract=1675446 (last accessed 24 April 2012).

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> tradition), but the goals and the analysis are not necessarily internally coherent or consistent over time. It is a collective effort, but all the players can change over time, and people at any given moment can be part of it without subscribing to or even being interested in anything like all its precepts and practical activities …. It isn't a project unless people see it as such, but the way they see it doesn't exhaust what outsiders can say about it.[3]

Further, despite this discursive practice being a collective effort defined by the participants' common understanding of belonging, with projects as varied as feminist critique, law and semiotics, third world approaches to international law, new law and development, and global governance studies – the participants in these various projects nevertheless have a shared understanding of which works constitute the foundations or starting points of the movement, or at least which works are most commonly cited and read. It is in this shared understanding that the relevance of looking at the scholarship of Martti Koskenniemi finds its roots. Put differently, it is submitted – adopting the argument by Voloshinov above – that when examining the objective reality by which the left wing international legal project has produced and reproduced knowledge about itself, we find that the scholarship of Martti Koskenniemi occupies a central role.

A similar argument - albeit focusing on specific form of communicative agency - was put forward some five decades after Voloshinov by the French thinker Michel Foucault in his lecture titled *What is an Author?* In this lecture mapping the function of an author, Foucault explains that while it is impossible to acknowledge any author's right to the ownership of meaning, it is nevertheless necessary for certain names to serve as points of reference particularly when dealing with 'inventors of discourse ' or 'initiators of discursive practices.' With regards to these names, Foucault argues "the distinctive contribution of these authors is that they produced not only their own work, but the possibility and the rules of formation of other texts."[4]

As such, it is inevitable that participants which identify themselves within these discursive practices constantly perform a 'return to' these foundational texts. This occurs, not only in order to find some fundamental inadequacies or gaps within these texts, but also in order to seek to transform and restructure the field.

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[3] DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION 6 (1997).

[4] Michel Foucault, *What Is An Author?*, *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS BY MICHEL FOUCAULT 113, 131 (Donald F. Bouchard ed., 1977).

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Furthermore, it is vital to recognize that this return is always in reference to the foundational text itself. For what this 'return to' establishes is the re-reading of these foundational texts in view of the legacy of future strategies that are both marked by future resemblances and future differences to these texts, for

> [The initiators of discursive practices] cleared a space for the introduction of elements other than their own, which, nevertheless, remain within the field of discourse they initiated. In saying that Freud founded psychoanalysis, we do not simply mean that the concept of libido or the technique of dream analysis reappear in the writings of Karl Abrahams or Melanie Klein, but that he made possible a certain number of differences with respect to his books, concepts, and hypotheses, which all arise out of psychoanalytic discourse.[5]

If one takes these two preliminary arguments seriously, recognizing Martti Koskenniemi's role as an initiator of the discursive practices of the left-wing international legal project, who consequently not only gives rise to the possibility of future projects, but also sets the 'rules of formation of future texts,' then the question must be: what are these coordinates set out by Koskenniemi for the formation of future texts in the left-wing international legal project, and what are their political implications? In other words, we need to ask whether the celebration by Koskenniemi's epigoni of his scholarship's didactically emancipatory value holds any merit, or is simply the morbidly symptomatic wishful thinking of the so called 'critic' who in practice is striving to append the still nascent left-wing international legal project onto the liberal status quo?[6]

But how does one go about finding answers to these questions? Following Voloshinov this essay proceeds by studying the evolution of the scholarship of Martti Koskenniemi – from the early *indeterminacy thesis* to his later call for a *culture of formalism* — all the time bearing in mind that the aim is to discover the total aggregate of social and economic laws, which govern its conditions of existence. Put differently, what the author is alluding to is the fact that the contradiction between the appearance and essence of Koskenniemi's work

[5] *Id.* at 132.

[6] *See* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 276 (Quintin Hore & Geoffrey N. Lloyd eds. & trs., 1987): "The crisis consist precisely in the fact that the old is dying and the new cannot be born; in the interregnum a great variety of morbid symptoms appear." My gratitude to Rob Knox for bringing this to my attention.

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> [I]s inseparable from the total structure of the social body in which it is found, inseparable from its formal *conditions* of existence, and even from the *instances* it governs; it is radically *affected by them*, determining, but also determined in one and the same movement, and determined by the various *levels* and *instances* of the social formation it animates. [7]

As such, I will first discuss Koskenniemi's descriptive critical project by examining his work on the *indeterminacy thesis* of international legal argument (Part II) and its normative ethical corollary embodied in his call for a *culture of formalism* as a meaningful international legal practice (Part III). Then the essay will argue that while at first it may seem that this coupling does provide the left-wing international legal scholar with an account of an emancipatory or critical practice of international law, the essence of the argument contradicts this appearance (Part IV). This essay will ultimately conclude that an appropriate alternative approach for the contemporary left-wing international legal project is one that rejects an idealization of international law, as well as the argument that international law ought to be abandoned as a site of intellectual and political investment (Part V).

II.

A good starting point for this study comes from Koskenniemi's own elucidation of the two kinds of unease he had with regards to the international legal profession, which led him to write his first book *From Apology to Utopia*:

> First, existing reflection on the field had failed to capture the experience I had gained from it through practice within Finland's Ministry of Foreign Affairs, especially in various United Nations contexts. In particular, I felt that none of the standard academic treatments really captured or transmitted the simultaneous sense of rigorous formalism and substantive or political open-endedness of argument about international law that seemed so striking to me. Second, there seemed to me no good reason why the "field" of international law or the ambition of the international lawyer (matters which are of course not unconnected) should be limited intellectually or

[7] *See* LOUIS ALTHUSSER, FOR MARX 101 (Ben Brewster trans., 1969).

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> politically the way they were …. I wanted to resuscitate the sense, or even the unavoidability, of …. commitment for a meaningful international legal practice.[8]

What we see here is that an intimate connection exists between Koskenniemi's descriptive critical project relating to assessing how legal argument is produced, and his normative ethical project, *i.e.* the call for the renewed commitment for a *meaningful* international legal practice. As such, in order to understand this relationship and development let us first turn to the descriptive element of this enterprise.

In essence, what the descriptive *indeterminacy thesis* expounded by Koskenniemi states, is that the constitutive founding tenets of the liberal theory of politics underlying our current international legal status quo, present international legal argument with a paradoxical structure. The theoretical point being that in an international sphere constituted solely of sovereign and equal actors, liberalism cannot on the one hand deny the existence of the objectivity of value and simultaneously claim to resolve conflict through the application of the 'objective legality' of law. In other words, "if liberalism preserves its radical skepticism about values, then it cannot ground a coherent problem-solving practice—if it makes reference to the objective nature of some values it will undermine liberty."[9]

First of all it is important to realize that the focus of Koskenniemi's descriptive *indeterminacy thesis* is the actual incidence of international legal argument.[10] As such the indeterminacy critique itself is itself firmly rooted in the liberal theory of politics underlying the international legal discourse. By accepting the radical insights of 'liberalism' and taking them to their logical conclusions, the indeterminacy thesis shows that the grammar of international legal argumentation necessitates that arguments keep on ending up in incompatible positions that can equally well be justified by the constitutive assumptions of the system.[11] This pattern has been described by Professor Koskenniemi as the oscillation of legal arguments between an *apology* for the behavior of those equal and sovereign State actors and a *utopia* of invoking the ideal of an international order governed by the objective legality of law as a way to resolve conflict between these very same actors (i.e. an oscillation between normativity and concreteness).[12]

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[8] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 562 (2005).

[9] *Id.* at 89.

[10] Outi Korhonen, *New International Law: Silence, Defence or Deliverance*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW (EJIL) 1, 10 (1996).

[11] *Id.* at 10; Nigel Purvis*, Critical Legal Studies in Public International Law,* 32 HARV. INT'L L. J. 81, 119-120 (1991).

[12] Koskenniemi, *supra* note 8 at 17; *see also* Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 1, 3-8 (1990).

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The conclusion that is drawn from here is that by using competent international legal argument one may articulate and defend any course of action while at the same time that argument as well as its critique will be recognized as equally professionally valid.[13] And this ultimately is due to the fundamental incoherence of the liberal theory of politics, which as argued, cannot be the grounds for a coherent problem-solving practice, but necessarily invokes an indeterminate and oscillating practice. Thus the descriptive aspect of this thesis shows that, as explained by Koskenniemi: "Participants and observers will continue to disagree on the particular interpretations of the facts and the law, but the disagreements will remain internal to the profession and invoke the same argumentative moves the Court itself made. They are matters of "feel" and choice; they are the politics of international law."[14]

Taking stock of the *indeterminacy thesis* and its conclusions up to this point, we see that what we are left with in essence is a 'weak' conclusion in the normative sense, of stating simply that no legal decision is ever *compelled* by the legal argumentative structure, and further, that the legal decision-maker could always decide otherwise.

Furthermore, by merely pointing to the inevitability of choice in international legal argument and the fact that every such decision involves an extra-legal interest, the *indeterminacy thesis* does not answer the question "*but what is wrong with that?* In particular nothing in [the *indeterminacy thesis*] suggests that there should be a turn towards 'more' political jurisprudence. It is not only that 'political jurisprudence' …. may serve many different types of interests and, though it today often is linked with the Left, this has not always been the case."[15]

Therefore, in order to respond to the unease regarding the international legal profession outlined in the start of this section, Koskenniemi argues that the *indeterminacy thesis* needs to supplemented by a shift of focus, which takes into account what he terms the *structural bias* of legal institutions. This is brought to the fore by an empirical argument, which tries to answer the apparent paradox, which is that "irrespective of indeterminacy, the system still de facto prefers some outcomes or distributive choices to other outcomes or choices."[16]

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[13] Koskenniemi, *supra* note 8, at 571.

[14] *Id.* at 589.

[15] *Id.* at 601; for an excellent example materializing this point *see* China Miéville, *International Law, Haiti and Imperialism*, 19 FINNISH YEARBOOK OF INTERNATIONAL LAW (FYIL) 62, 68 (2010).

[16] Koskenniemi, *supra* note 8, at 606.

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However, the immediate question that Koskenniemi then seems to ask instead is how can international lawyers implement these empirical realizations of structural bias while at the same time remaining professionally competent—i.e. not seeming to be flirting with either the depths of apology or the highs of utopia? The answer to this question is what the author understands as Koskenniemi's call for a *culture of formalism*.

III.

> Recently, I have argued in favour of a "culture of formalism" as a progressive choice. This assumes that although international law remains substantively open-ended, the choice to refer to "law" in the administration of international matters—instead of, for example, "morality" or "rational choice"—is not politically innocent. Whatever historical baggage, including bad faith, such culture entails, its ideals include those of accountability, equality, reciprocity and transparency and it comes to us with an embedded vocabulary of (formal) rights.[17]

Koskenniemi sets out his preference for a *culture of formalism*, by arguing that its value lies

> [I]n trying to account for the possibility of democratic politics in an era deeply suspicious of both universalist ideologies and the bureaucratic management of social conflict by bargaining between interests groups. Between the Scylla of Empire and the Charybdis of fragmentation, the culture of formalism resists reduction into substantive policy, whether imperial or particular. It represents the possibility of the universal but it does this by remaining "empty", a negative instead of a positive datum, and thus avoids the danger of imperialism. Instead it tries to induce every particularity to bring about the universality hidden in it.[18]

Two points need to be emphasized here in order to comprehend the full thrust of this statement and concept. Firstly, this *culture of formalism* is conditioned by the impossibility

[17] *Id.* at 616.

[18] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 504 (2002).

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of ever discovering a true universal ("it represents the possibility of the universal but it does this by remaining *empty*"). Secondly, a *culture of formalism* also denies the possibility of a single right answer, for as stated by Koskenniemi: "the door to a formalism that would determine the substance of political outcomes is no longer open. There is no neutral terrain."[19]

This type of a *culture of formalism* is specified and delimited further by Koskenniemi in his expositions on Kantian themes of international law, where he argues that the type of a *culture of formalism* he seeks to advocate is a Kantian formalism "sans peur et sans reproche,"[20] in which

> [L]aw is enlightenment as responsibility, but not as any particular meaning of a text or practice, nor as a systematic effort to apply some external objective, purpose, or value. Instead, it would have law as a mindset with which the law-applier approaches the task of judgment within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a "legal nothing" (decisionism). I think about this in terms of the spirit of the legal profession, and the aim of legal training.'[21]

In essence the merit of this kind of law is not that it contains the contours of the ideal social relationship suitable for each context and period—these will always be left to the normative *auctoritas interposition*. In other words from this point of view, jurists rather than positive rules become the law's nucleus.[22] As such the preliminary conclusion that could be drawn is that the call for a *culture of formalism* can be seen as a virtuous call; it

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[19] Martti Koskenniemi, *The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 165 (2002); Jason Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, 7 GERM. L. J. 1045, 1068 (2006), available at: http://www.germanlawjournal.com/pdfs/Vol07No12/PDF_Vol_07_No_12_1045-1088_SI_Beckett.pdf (last accessed: 24 April 2012).

[20] Martti Koskenniemi, *Formalism, Fragmentation, Freedom: Kantian Themes in Today's International Law*, 4 NO FOUNDATIONS 19 (2007).

[21] Martti Koskenniemi, *International Law: Constitutionalism, Managerialism and the Ethos of Legal Education*, 1 EUR. J. LEGAL STUD. 1, (2007).

[22] Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 THEOR. INQ. IN L. 9, 11 (2007).

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would allow the international lawyer to take into account empirical arguments of 'structural bias' in her everyday practice, while at the same time remaining professionally competent—i.e. not seem to be flirting with either the depths of apology or the highs of utopia. Indeed, from this point of view a *culture of formalism* can be seen as progressive and virtuous when understood as an 'ethics of choice,'[23] recognizing the inherent situatedness of legal practice,[24] and emphasizing the contextuality of justice.

And it is here that the co-optation the title of this essay refers to begins to unravel itself.

IV.

For it is submitted that what this call for a *culture of formalism* fails to take into account is the counter-argument that this empty "negative instead of positive datum …. [which supposedly, PK] thus avoids the danger of imperialism''[25][….] is never a 'mere' form; it involves a dynamics of its own, leaves its traces in the materiality of social life and is only then fully valid."[26]

Put differently, "the ultimate question is not which particular content hegemonizes" [27] this empty concept of a *culture of formalism* and thus, in the struggle for hegemony, excludes other particular contents. Rather, "the ultimate question is: which specific content has to be excluded so that the very empty form of" [28] this concept of the *cultural of formalism* "emerges as the 'battlefield' for hegemony?" [29]

And to drive home the implicit co-optive nature of this call *culture of formalism* we ought to ask *qua* Michel Foucault, the following question:

> What types of knowledge do you want to disqualify in the very instant of your demand [that adopting a

[23] Alexander Boldizar & Outi Korhonen, *Ethics, Morals and International Law*, 10 EJIL 279, 310 (1999).

[24] Koskenniemi, *supra* note 8 at 616; *see also* OUTI KORHONEN, INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAWYER'S STANCE TOWARDS CULTURE, HISTORY, AND COMMUNITY (2000).

[25] Koskenniemi, *supra* note 18, at 504.

[26] Slavoj Žižek, *Against an Ideology of Human Rights*, *in* DISPLACEMENT, ASYLUM, AND MIGRATION: THE OXFORD AMNESTY LECTURES 2004 56, 57 (2006).

[27] Slavoj Žižek, *Class Struggle or Postmodernism? Yes, please!*, *in* CONTINGENCY, UNIVERSALITY, HEGEMONY: CONTEMPORARY DIALOGUES ON THE LEFT 90, 110 (Judith Butler, Ernesto Laclau & Slavoj Žižek eds., 2000).

[28] *Id.*

[29] *Id.*

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> 'culture of formalism' is a progressive approach to international legal agency]? Which speaking, discoursing subjects – which subjects of experience and knowledge – do you then want to "diminish" when you say: "I who conduct this discourse am conducting a [progressive international legal] discourse, and I am [an international lawyer]?" Which theoretical-political avant-garde do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it?[30]

It is submitted that the answer to these questions can be found Koskenniemi's argument that: "international law's objective is always also international law itself …. it is international law's formalism that brings political antagonists together as they invoke contrasting understandings of its rules and institutions."[31] And while such a romantic and nigh heroic image does succeed in caressing the international lawyers' self-esteem, it is at the same time one of radical idealism. For as was argued already in the 1920s by Evgeny Pashukanis, "only by taking the viewpoint of legal fetishism is it possible to think that the legal form of a relationship changes or destroys its real and material essence."[32]

In other words, the co-optation I refer to, and identify in Koskenniemi's call for a *culture of formalism*, is that while the *culture of formalism* does describe a type or mode of international legal agency, which takes note of the coin-like duality of legal decision-making and becomes self-conscious of it, it nevertheless fails to respond to the argument that:

> [I]nternational legal argument almost never works like a coin …. it acts more like buttered toast released in free fall: it may flip over several times, but it will almost always land the same side down. (And the question must then become: why?). Any suggestion that 'that is

[30] Michel Foucault, *Two Lectures*, *in* POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 85 (Colin Gorgon ed., 1980). This argument follows Akbar Rasulov, *International Law and the Poststructuralist Challenge*, 19 LEIDEN JOURNAL OF INTERNATIONAL LAW (LJIL) 799, (2006).

[31] Martti Koskenniemi, *What is International Law For?*, *in* INTERNATIONAL LAW 77 (Malcolm Evans ed., 2006).

[32] Evgeny Pashukanis, *International Law*, reproduced *in* CHINA MIÉVILLE, BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW 321, 333 (2005).

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> just what toasts do' would give toasts "way too much credit.[33]

Yet, the above criticisms might still sound unfair. After all, should not Koskenniemi's call for a *culture of formalism* be simply seen as a description of the social practice of the international legal profession 'as it is'[34], and as such a form of immanent critique where one still retains the professional competence of 'speaking law'? However:

> [T]his is the very heart of the problem: there can be no such things as a 'social practice as it is.' A social practice is a social construct; it is not a thing in itself. To 'observe' a social practice one must first identify that practice, and to do so, one must, implicitly or explicitly, *define* that practice. The same is true of law….
>
> Koskenniemi *defines* law when he locates its existence in the practice of lawyers. However, such an escape from theory is not actually available, as it presupposes the 'objective existence' of 'lawyers' as some essentialised reality. But what constitutes a lawyer is a product of agreement, and thus of definition.[35]

The argument that, 'competence' in international law is "a complex argumentative practice in which rules are connected with other rules at different levels of abstraction and communicated from one person or group of persons to another so as to carry out the law jobs in which international lawyers are engaged"[36] is not enough, for it presumes that we know, or that there is uniform agreement, on what those 'law jobs' are,[37] and which kind of discourses they entail.

By romanticizing the practice of endless questioning and denouncing the act of closure as such—a dual movement which finds its logical end in the form of Koskenniemi's call for a *culture of formalism*—it is submitted that Koskenniemi's *culture of formalism* might be

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[33] Akbar Rasulov, *Review: From Apology to Utopia: The Structure of International Legal Argumen*t, 16 LAW & POLITICS BOOK REVIEW 583, 590 (2006)(quoting Duncan Kennedy in *A Semiotics of Critique*, 22 Cardozo Law Review 1147, 1185).

[34] BECKETT, *supra* note 19, at 1074; Koskenniemi, *supra* note 8, at 565.

[35] BECKETT, *supra* note 19, at 1074.

[36] KOSKENNIEMI, *supra* note 8, at 566.

[37] BECKETT, *supra* note 19, at 1077.

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forgetting its lineage, and risks falling into the trap that Pierre Schlag calls the 'domestication of deconstruction.' Essentially what Schlag argues is this:

> [I]t is not enough to become self-conscious of the systematic process [by which traditional international legal discourse reproduces and confirms each of us in the privileging of our individual self]. To be sure, self-consciousness might help. It may even be necessary. But self-consciousness here is not enough. What is required is displacement, a subversion of the discursive practices that constitute each of us.[38]

The point is the following: by opting for the call for a *culture of formalism* as the practice of freedom, which is still embedded in the traditional structure of international legal argumentation, Koskenniemi has opted to stay embedded within the same liberal theory of politics, which was the source of his immanent critique, and further, which still "de facto prefers some outcomes or distributive choices to other outcomes or choices." [39] Seen from this perspective the interrogation above takes on a different and somewhat darker character. For by opting to enthrone international lawyers, practicing within the *status quo* of the framework of international legal argument, is Koskenniemi not in fact calling for the perpetuation of the system, which remains the focus of his attack? And even worse, is he not doing this at the expense of any movement seeking to challenge the status quo? Or is Koskenniemi's project an attack at all?

V.

The answer the left-wing international law project today must give to this final question is a strict 'No.' Instead, we must recognize that the abstract, supposedly empty, form of international law is already itself complicit in the perpetuation of the current status quo. For as has been argued by Nicos Poulantzas, the legal process itself:

> [C]onsecrates, and thus helps to establish, the differential fragmentation of agents (individualization) by elaborating the code in which these differentiations are inscribed and on the basis of which they exist without calling into question the political unity of the social formation….

[38] Pierre Schlag, *"Le Hors De Texte, C'Est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1640 (1990).

[39] KOSKENNIEMI, *supra* note 8, at 606.

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> [It helps] the agents 'loosen' and 'free' themselves from their territorial-personal bonds …. fulfilling the key function of every dominant ideology: namely, that of cementing together the social formation under the aegis of the dominant class.[40]

The moment this argument is made, it is important to note that the author is not advocating that the left-wing project ought to completely reject international law as a site for struggle. But when engaging in such struggle we ought not to turn to the ethical prescripts advocated by Koskenniemi above, but rather follow the tactical guidance given by Robert Knox, and recognize that

> The shape of the legal form means that pursuing a legal strategy can break up collective solidarity, and renders progressive forces unable to address the systemic causes of social problems. Indeed, to mount a legal strategy is to risk legitimating the structures of global capitalism …. International law, then, must never be pursued because it 'is law', but only insofar as its content can advance the aims of progressive constituencies. What must be pursued is a 'principled opportunism,' where—in order to undercut the individualizing, legitimating perspective of law—international law is consciously used as a mere tool, to be discarded when not useful.[41]

However, this is only half of the story. To this the author wishes to add that what further needs to be done is to move away from the focus and calls for so called 'realistic,' 'pragmatic' struggles for gradual reforms, essentially denying the possibility of the left-wing project to exist at all. What needs to be done instead is to stop idealizing international law as some sort of messianic entity, but instead undertake its detailed analysis and study by recognizing the fact that

> In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of

[40] Akbar Rasulov, *'The Nameless Rapture of the Struggle': Towards a Marxist Class-Theoretic Approach to International Law,* 18 FYIL 243, 278 (2010) (quoting NICOS POULANTZAS, STATE, POWER, SOCIALISM 86-88 (Trans P. Camillier, 2000).

[41] Rob Knox, *Marxism, International Law and Political Strategy,* 22 LJIL 413,429 (2009).

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> production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.[42]

For too long has this task been avoided and for too long have the politics of eclecticism determined the trajectory of the left-wing project in international law. It is time to rid ourselves of complacency and realize that much work is to be done. The left-wing international legal project is still nascent, in a process of formation, and therefore under these circumstances only the shortsighted will argue that differentiation between shades of opinion is inappropriate or unnecessary. As from behind the corner of theoretical eclecticism, one can already hear the co-optive song of the sirens of global capitalism.

[42] KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY (1977), available at: http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm (last accessed: 24 April 2012).

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