

Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project

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A. Introduction: Fourth Time Lucky?

Few books have attained the influence and impact of Martti Koskenniemi's *From Apology to Utopia* (FATU); fewer still could have made anything like such an impact with a publication run and consequent distribution as small as FATU's. Thus, as has undoubtedly been said before, and will undoubtedly be repeated subsequently, Cambridge University Press must be congratulated on their decision to publish a new edition, with a far larger print run, and wider distribution.

This new edition takes the form of a reissue, with only an Epilogue added. The epilogue is designed to re-situate the text and to demonstrate its relevance to today's international law, despite the seismic shifts in the international order since its original publication. Another, perhaps more important, aim is clarificatory. For if few books have been as influential as FATU, it is, perhaps paradoxically, also true, as Koskenniemi has noted, that few have been so comprehensively misunderstood, misportrayed, even defamed.¹

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¹ MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 563 (2006) .

Ending his well-known review of the first edition of FATU, Iain Scobbie professed the hope that “Koskenniemi will enrich us in the future with further theoretical thoughts”. This hope has not been disappointed; Professor Koskenniemi has proven a prolific writer, and a consistently provocative intellect. However, it has also been suggested that this provocative nature is the *only* consistent element in his *oeuvre*. Although superficially plausible, and arguably exacerbated by his more recent “formalist” writings, this is not a charge that I find compelling. Rather than a *conflict*, I would postulate an intimate connection between Koskenniemi’s critical and constructive (or ethical) projects. From this perspective, the critical project both identifies the conceptual space, and secures the political space, within which the ethical project takes place; and thus the ethical project drives the critical. The central aim of this paper is to elucidate Koskenniemi’s writings and arguments in an attempt to demonstrate their *consistency*; but also to question their limits, their radicality, and their utility.

This is neither the first, second, nor even the third time that I have engaged with the provocative body of work produced by Martti Koskenniemi. Rather, this is my *fourth* attempt to respond to his critique of international law. My first three attempts² took the form of refutations, but as with many others’ attempts to refute Koskenniemi, they started from uncertain foundations, proceeding from an unclear – in fact inaccurate – understanding of his critical project. I was not alone in misunderstanding, not even in my particular form of misunderstanding.³

However, these misunderstandings in turn raise, and to some extent demonstrate, one of the book’s central concerns: the subjectivity of interpretation. No interpretation is objective or neutral, because each presupposes the text to be a response to a particular set of concerns – whether these are recognised by author and interpreter or not. It is only when the concerns of author and interpreter coincide that what is written will also be what is read. In all other cases – as my previous engagements with Koskenniemi illustrate – interpreters must recuperate the text as part of their own project.

² See, for example, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW [EJIL] 627 (2001) and *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL*, 16 EJIL 213 (2005). The third attempt was *The End of Customary International Law?* Jun, 30, 2006 (Unpublished Ph.D dissertation, University of Glasgow) especially chapter 5.

³ For consideration of such misunderstandings, see KOSKENNIEMI *supra*, note 1 at 590 footnote 78.

This brings us close to William Blake's observation that "Truth can never be told so as to be understood, and not be believ'd."⁴ A text, and most especially a normative-political thesis like this one, must arouse sympathy and even empathy in order to be fully understood. To understand, in other words, becomes synonymous with agreement. Consequently, any disagreement, the given foundation of critique, is simultaneously symptomatic of misunderstanding. Indeed, as I read, and re-read, the body of Koskenniemi's work, I find myself increasingly in agreement with him.

Nonetheless, the point of a review essay is to provide a critical assessment of the strengths and limitations of the work reviewed. This requires maintaining a critical distance from the work under review; and *that* entails a degree of separation, of interpretation and location, and thus of misunderstanding. It is with awareness of this 'gap' that the proceeding review is presented.

This paper, then, is part-confessional, part revisionary. It takes the form of a clarificatory exposition of Koskenniemi's central theses, before turning to a revised and refocussed critique. I begin by sketching the by now well-known dilemma against which Koskenniemi's work is situated, and to which it offers a response. Next, I shall demonstrate the nature and inexorability of indeterminacy within this framework. This provides the data for an analysis of the *continuity* between his critical and constructive projects. However, Koskenniemi's thesis also has both a descriptive and a normative ambition, and the central criticism offered in the present paper is that these *conflict*, that his normative aims are precluded by his (unnecessary) commitment to accurately describing the social practice of law "as it is."

B. The Unpleasant Situation of International Law, or, Between a Rock and a Hard Place

If the justification, or *purpose*, of the Epilogue was to re-situate the text, then the question of the situation, the *setting*, of the Epilogue becomes a vital one. Koskenniemi's analysis of PIL is located between two competing normative commitments: the desire for peace; and the rejection of universally inclusive justice. Contemporary international law is neither neutral amongst competing substantive political commitments; nor does it embody a universal truth. Yet, we do not often recognise this, and even if we do, we tend to deny, or at least disregard, it. This

⁴ Blake W. "The Proverbs of Hell," in *The Marriage of Heaven and Hell*, Jacob Bronowski (ed.) Blake Poems and Letters 98 (1958).

denial, and the denial of denial, if not combated, reduces international law to “*Kitsch*”.⁵

Kitsch is the use of intellectual structures (like law, humanity, consensus, universality, etc.) to convince *ourselves* that what we want is what everyone wants.⁶ We should all be treated and evaluated equally, but in terms of *our* standards. *Kitsch* signifies the necessary partiality of universal judgement. It is false universalisation,⁷ the assumption that what ‘we’ want is also what everyone else should want. Because international law appears to embody ‘our’ values, it must also embody everybody’s values; it must embody universal values.

Koskenniemi’s claim is that there are *no* such universal values, because there is no universal position. Arguments from universal values are simply “hegemonic”. International law can embody only particular values, whose particular adherents have succeeded in their particular hegemonic struggles. Eschatological escape is also precluded – even in the future there can be no (rediscovered) harmony.⁸ There is *no* Fukayamian “End of History”,⁹ and so we cannot be stumbling toward such an end. Commenting on Allot’s “messianic” writing, Koskenniemi notes that “nothing short of this kind of language *can create the impression* that ‘perennial truths’ are being conveyed”.¹⁰ The important point being, of course, that the impression thus created is a false one, Allot’s truths, undoubtedly profound as they may be, are no more perennial or universal than any others.

Thus, although law entrenches order, and attempts to secure peace, that peace can never be just; all substantive universalism is imperialism.¹¹ Nonetheless, law’s claim to universality, and the (necessarily unjust) order which it produces, remains

⁵ Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 *EJIL* 113, 122 (2005).

⁶ See MICHEL FOUCAULT, *Truth and Power*, in *POWER: ESSENTIAL WORKS OF FOUCAULT, 1954-1984*, VOL. 3, 111 (2001); and TERRY EAGLETON, *IDEOLOGY* (1991).

⁷ See also MARTTI KOSKENNIEMI, *THE GENTLE CIVILISER OF NATIONS* 499-500 (2004).

⁸ See Martti Koskenniemi, ‘*The Lady Doth Protest Too Much*’ Kosovo, and the Turn to Ethics in International Law, 65 *MODERN LAW REVIEW* 159, 165, 170 (2002); Martti Koskenniemi, *What is International Law For?*, in *INTERNATIONAL LAW* 57, 59 (Malcolm Evans, ed., 2d 2006), especially footnote 4.

⁹ On this Hegelian idea, see FRANCIS FUKAYAMA, *THE END OF HISTORY AND THE LAST MAN* (1993). For a critique, see Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 *EJIL* 449 (1997).

¹⁰ Martti Koskenniemi, *International Law as Therapy: Reading The Health of Nations* 16 *EJIL* 329, 332 (2005), emphasis added.

¹¹ Koskenniemi, *supra* note 5, at 122.

preferable to conflict: “law-making and consensus-building are so hugely important ... [because] [t]hey enable political victory *without having to fight to the death*.”¹²

However, the injustice of the law – the “irreducible adversity” constructing the “middle ground”, the necessary partiality of “law-making and consensus-building” – is both vast and endlessly repeated. As Koskeniemi notes, “consensus-seeking ... does not have the same meaning to the one who can live without consensus as it has to the one who must purchase it by giving up everything else”.¹³ Consensus cannot embody the desires of all participants (equally). This remains true no matter how ‘open’ the drafting process by which new laws are ‘agreed’ (created). Power differentials always remain, and the outcome is always biased,¹⁴ and, indeed, indeterminate.¹⁵ Consequently, there can be no proceduralist escape. Law must embody values, and those values (*ex hypothesi*) conflict incommensurably.

This gives rise to the philosophical injustice of law, which may be repressed and denied, but which cannot, given the absence of the true universal, be avoided.¹⁶ This injustice – “the suffering that is produced by social normality”¹⁷ – is *not* merely a question of abstract ethics or philosophy, but also a concrete reality. As Koskeniemi (repeatedly) notes, under the gaze of PIL, “Thirty thousand children die daily from causes that we have the resources to prevent.”¹⁸ Despite the bleak perspective of such slaughter, order remains normatively preferable to disorder. Even an unjust law precludes violence and disorder, limited confrontation can be internalised but: “*it is better to agree than to fight*.”¹⁹ The origin of this normative commitment is unclear, as are any conditions or limitations upon it.

¹² KOSKENIEMI, *supra* note 1, at 597, emphasis added.

¹³ *Id.*, 598.

¹⁴ Sonia Harris-Short, *Listening To “The Other”? The United Nations Convention on the Rights of the Child*, 2 MELBOURNE JOURNAL OF INTERNATIONAL LAW 304 (2001) .

¹⁵ See *infra* notes 35-72 and accompanying text.

¹⁶ See Koskeniemi, *What Is International Law For?*, *supra* note 8, at 78; Akbar Rasulov, *International Law and the Poststructuralist Challenge*, 19 Leiden Journal of International Law [LJIL] 799, 812-813 (2006).

¹⁷ Koskeniemi, *‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 173.

¹⁸ Koskeniemi, *supra* note 5, at 122; see also Koskeniemi, *‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 173; Koskeniemi, *What Is International Law For?*, *supra* note 8, at 63; KOSKENIEMI, *supra* note 1, at 606-9.

¹⁹ KOSKENIEMI, *supra* note 1, at 598.

Thus Koskenniemi's problematic – the reality which FATU describes and analyses, and to which it provides a response – is situated in a world without universality or neutrality; on a terrain of inexorable adversity, struggle, and conflict. It is situated: “In an era deeply suspicious both of universalist ideologies and the bureaucratic management of social conflict”.²⁰ But also in a world which *a priori* privileges peace over war, order over disorder and compromise over conflict. A world located between Habermas²¹ (discursive inclusion/universal ideology) and Schmitt²² (managed conflict).

The impossibility of the universal, or just, position is a feature of reality. It is not a reason, however, to abandon law.²³ Although unable to embody the interests of all, “international law provides the [only] shared surface on which political adversaries recognize each other as such”.²⁴ Thus, for Koskenniemi, law constitutes the (last?) site which “can sustain (radical) democracy and political progress”.²⁵ Despite recognising the “[a]ntagonism ... embedded in the *raison d'être* of the law itself”,²⁶ Koskenniemi rejects Schmitt's embrace of “the civilising power of antagonism”.²⁷ Instead, he appears (terminology notwithstanding) to agree with Mouffe that the most progressive solution is to “convert an “antagonism” into an “agonism””;²⁸ to “channel interpretative conflict into peaceful avenues.”²⁹

²⁰ KOSKENNIEMI, *supra* note 7, at 504

²¹ There is a particular clear implied rejection of Habermas in Koskenniemi, ‘*The Lady Doth Protest Too Much*’ Kosovo, and the Turn to Ethics in International Law, *supra* note 8, at 170: “However much political theorists might seek ‘ideal speech situations’ to account for institutional legitimacy, what is ‘ideal’ will remain open for controversy”.

²² Koskenniemi's rejection of Schmitt is discussed in the text accompanying notes 199-210 *infra*.

²³ KOSKENNIEMI, *supra* note 1, at 606-7. A similar point is acknowledged in Koskenniemi, *supra* note 5, at 115.

²⁴ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 77.

²⁵ KOSKENNIEMI, *supra* note 7, at 502, 508.

²⁶ KOSKENNIEMI, *supra* note 1, at 599.

²⁷ WILLIAM RASCH, SOVEREIGNTY AND ITS DISCONTENTS (2004); see also Jason Beckett, *Conflicting Orders: How Peace is Waged* LJIL (forthcoming 2007).

²⁸ Chantal Mouffe, *Deliberative Democracy or Agonistic Pluralism?* 66 *Social Research* 745, 755 (1999); see also Beckett, *supra* note 27 for a critique of this approach.

²⁹ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 62

However, it must also be emphasised that Koskenniemi is a *legal* theorist; and FATU – alongside the rest of his *oeuvre* – is a work of *legal* theory. Thus the project of progressive politics is one which he seeks to pursue through a *specifically legal* form. My aim is to elucidate this specifically legal approach, which Koskenniemi believes *does* sustain a meaningful distinction between law and politics, even within the “politics of law.”

C. Internalising Indeterminacy and Displacing Conflict: Law as Language

International law, according to Koskenniemi, is capable of accommodating all positions and arguments. In this sense, law is like a language, a “generative grammar”, delimiting only *how* arguments should be made, not *which* arguments may be made. Indeed he goes further, international law is not *like* a language, it *is* a language:

*[W]hatever else international law might be, at least it is how international lawyers argue, ... and this can be articulated in a limited number of rules that constitute the “grammar” – the system of production of good legal arguments.*³⁰

This turn to “grammar” forms the principle intellectual re-situation of Koskenniemi’s thesis. It functions to internalise and legitimate indeterminacy, because the language can be deployed in different ways, so as to accommodate different positions. “Although international law is highly structured as a language, it is quite fluid and open-ended as to what can be said in it.”³¹ Between them, all ways of speaking the language can express all possible positions.³² Opposing positions are articulated by employing the same grammar in different ways.

Koskenniemi terms these approaches to speaking a language “cultures” or “traditions”. If law is to serve the function of displacing conflict from the field of war to that of interpretation, then it must be as inclusive as possible. As a result, no tradition, preference, or culture, is more ‘authentic’, more ‘legal’ than any other: “there is no access to legal rules or the legal meaning of international behaviour that is independent from the way competent lawyers see those things”.³³ The mark of the international lawyer is linguistic competence, and such competence is

³⁰ KOSKENNIEMI, *supra* note 1, at 568.

³¹ *Id.* at 567. Footnote omitted.

³² *Id.*

³³ *Id.* at 568.

learned from the study of the arguments of international lawyers. Students, theorists, and practitioners “develop an ability to distinguish between competent arguments and points ... that ... somehow fail as *legal* arguments.”³⁴ This distinction is empirical: legal arguments are those accepted and made by competent lawyers – of whatever school, culture, or tradition – and non-legal arguments are those rejected by all. Defined in this way, legal arguments constitute a wide and varied menu from which international lawyers can select norms, arguments, and argumentative techniques; this is one of the roots of radical indeterminacy in international law.

D. The Definition and Causes of Indeterminacy

Koskenniemi’s thesis has both descriptive and normative impulses. At the descriptive level he claims simply that radical indeterminacy is a feature of international law. This may be denied, ignored, accepted, or refuted; but before any of these moves can be made, the descriptive claim – and the support and evidence offered for this – must be fully analysed. This incorporates an analysis of responses to that claim: of their plausibility, efficacy, and limitations. Only after this descriptive analysis has been undertaken can attention turn to the normative questions of how and whether to ‘combat’ indeterminacy.

I. *What is Radical Indeterminacy?*

Put simply, radical indeterminacy is the claim that law – in this case public international law – is equally capable of supporting any claim: that law can produce diametrically opposed answers to *any* question of legality. This claim *can* be semantic in nature. However, for Koskenniemi, the *more important* critique:

*[I]s much stronger (and in a philosophical sense, more “fundamental”) and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises.*³⁵

This strong claim of indeterminacy itself functions on two levels; first it magnifies and entrenches the simpler claim of semantic indeterminacy, and, second, it complements it. The overall impact of the two levels of indeterminacy critique is that:

³⁴ *Id.* at 566.

³⁵ *Id.* at 590.

[I]t is possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards.³⁶

II. The Semantic Critiques

The first semantic claim of indeterminacy is based upon simple linguistic ambiguity – the tendency to rely on ambiguous terms to disguise disagreement in international negotiations.³⁷ The most obvious response to the semantic critique is hermeneutic: although the words themselves may appear ambiguous, they are stabilised *within* the legal system by reference to past decisions and embedded values. Although linguistic ambiguity “may leave room for disagreement ... it is not subjective and arbitrary.”³⁸ This response is deeply undermined by the second, stronger, semantic critique, which emphasises the *conceptual* ambiguity caused by commitment to contradictory premises and conflicting values.

This is best illustrated as a response to Koskenniemi’s own critics. Thus where Scobbie suggests that “interpretation may ... have recourse to values already embodied within the system to determine which interpretation best makes sense systemically”,³⁹ he assumes an unrealistically coherent legal system containing a consistent, or at least hierarchically ordered, sequence of values. It is not “Koskenniemi [who] appears to presuppose that legal systems should be based on a unified and consistent legal theory”,⁴⁰ Koskenniemi makes no such presupposition. It is made, rather, by the Hartian interpreter Scobbie implicitly valorises. Despite acknowledging value inconsistency, Scobbie relies upon a coherent “segmental expression of policy which underlies discrete areas of the legal system.”⁴¹

³⁶ *Id.* at 591.

³⁷ Koskenniemi, *supra* note 5, at 119; see also KOSKENNIEMI, *supra* note 7, at 495.

³⁸ Iain Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism*, 61 BRITISH YEARBOOK OF INTERNATIONAL LAW [BYBIL] 339, 349 (1990).

³⁹ *Id.* at 350.

⁴⁰ *Id.*

⁴¹ *Id.*

Koskenniemi's point is that no such coherence exists. Law (or any given legal system) is saturated in value conflict at all levels and in all "segments". Even the 'black letter' anti-theoretical environment of world trade does not escape, as "both free trade and social regulatory objectives are written into the WTO treaties."⁴² There is no self-evident core of reason unifying and systematising (even segments of) legal systems. Interpretative discretion is not limited by previous judicial decisions. It is instead magnified *by* the multiplicity of previous judgments, because these decisions are *not* internally coherent. This is perfectly illustrated by Koskenniemi's analysis of the jurisprudence of the ICJ,⁴³ and the ICTY.⁴⁴

The inevitability of indeterminacy within any empirical analysis of law can be demonstrated by comparing Unger's call for a process of "mapping and critique" of the legal order with MacCormick's claim that legal theory is (or should be) engaged in a process of "rational reconstruction". "[A] requirement for the accomplishment of [mapping] is that we resist the impulse to rationalise or idealise the institutions and the laws we actually have".⁴⁵ This would appear to be the logical conclusion, or perhaps the *reductio ad absurdum*, of the Hartian project of descriptive legal theory. However, as MacCormick concedes, such a process would illustrate confusion and contradiction, not coherence or rational order:

*Legal doctrine produced in this way degenerates into mere casuistry ... there has to be some discrimination between the parts that belong in the coherent whole and the mistakes or anomalies that ... ought to be discarded.*⁴⁶

Consequently, the work of rational reconstruction:

*Calls for the exercise of creative intelligence and disciplined imagination to master the large and always changing bodies of material involved, to grasp them all together [presumably with the 'necessary' excisions already having taken place], and to reconstruct them altogether [except the excised pieces] into systematized and coherent wholes.*⁴⁷

⁴² KOSKENNIEMI, *supra* note 1, at 607. However, it is also worth noting the presence (and apparent stabilising force) of "structural bias"; Koskenniemi continues the quotation above, "the former are always taken as the starting-point while the latter have to struggle for limited realisation". On structural bias, see *infra*.

⁴³ *Id.* at 585-8.

⁴⁴ *Id.* at 584-5.

⁴⁵ ROBERTO MANGABEIRA UNGER WHAT SHOULD LEGAL ANALYSIS BECOME? 130-1 (1996).

⁴⁶ Neil MacCormick, *Reconstruction After Deconstruction: A Response to CLS*, 10 OXFORD JOURNAL OF LEGAL STUDIES [OJLS] 539, 556 (1990).

⁴⁷ *Id.* at 557.

As a result, “[t]he juristic task has always been to establish intelligibility, not merely to discover it”.⁴⁸ In other words, MacCormick, *contra* Unger, recommends that we indulge “the impulse to rationalise or idealise the institutions and the laws we actually have”. However, Hartian theorists are then confronted with the limit point of their own theorising. When the system is viewed empirically, there is simply *no* coherence to observe: “Legal practitioners, says Dworkin, habitually disagree about which rights and duties are legally valid and about why they are: there are no shared criteria to be found here.”⁴⁹ Absent coherent informing values, neither the legal system, nor any “discrete area” within it, supports a consistent set of criteria for the interpretation of legal norms. Order, or “coherence”, must be *imposed* according to the desires of the theorist concerned; through their “creative intelligence and disciplined *imagination*”.⁵⁰ MacCormick has, in effect, *conceded* the impossibility of the Hartian descriptive project. This reduces ‘legal analysis’, according to Koskeniemi, to “an objectionable attempt to score a political victory outside politics.”⁵¹ As a result, the rationalising process is indeed “mere casuistry”, and *ex post facto* casuistry at that; but that fact is disguised and denied, and that *denial* constitutes the “continuing intelligibility and operability of law”⁵² (*Kitsch*).

In short, under the (Hartian) positivist approach, ‘legal arguments’ are constructed by applying a free choice of legal argumentative techniques to an equally free choice of ‘extant legal norms’ to produce the *appearance* of a logically entailed ‘chain’ of decisions pointing to the intersubjective ‘correctness’ of a given interpretation in the instant case. It is important to realise that this is not, necessarily, an act of bad faith by legal interpreters. Quite often, they are simply ignorant of what they are doing. *Kitsch* is thus analogous to MacIntyre’s refinement of the emotivist claim, whereby emotivism is transposed from a theory of meaning into a theory of *use*, and where:

Meaning and use would be at odds in such a way that meaning would tend to conceal use. ... Moreover the agent himself ... might well, precisely because he was self-conscious about the meaning of the words that he used, be assured that he was appealing to independent

⁴⁸ *Id.* at 557-8.

⁴⁹ Ofer Raban, *Dworkin’s ‘Best Light’ Requirement and the Proper Methodology of Legal Theory*, 23 OJLS 243, 244 (2003).

⁵⁰ This is *precisely* the charge Dyzenhaus levels against contemporary legal positivism. David Dyzenhaus, *Positivism’s Stagnant research Proposal*, 20 OJLS 703, 711-2 (2000).

⁵¹ Koskeniemi, *‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 173.

⁵² MacCormick, *supra* note 46, at 578.

*impersonal criteria, when all that he was in fact doing was expressing his feelings to others in a manipulative way.*⁵³

III. Deconstructing Stable Interpretations: The Delusion of Hermeneutics

The ambiguity of legal language, and the omnipresence of conflicting values within all “segments” of the legal system, combine to leave interpreters with an almost unlimited discretion to choose the norm that will ‘control’ or ‘determine’ their decision. However, this discretion goes unrecognised, even as it is exercised:

*Useful work may be done by a close analysis of the application of particular doctrines. A typical demonstration of structural bias would ... show that ... in any institutional context, there is always ... a particular constellation of forces that relies on some shared understanding of how the rules and institutions should be applied.*⁵⁴

It is only through this undisclosed, even unrecognised, imposition of values that the law takes on an *appearance* of stability. However, this stability must always remain provisional and contingent because it is not secured by the texts of the law, but by the biases of particular institutions. That is, because “nothing in the standards themselves mandates such distinction”,⁵⁵ “the law will always possess resources for re-opening the debate, undoing the settlement, attacking the (“unjust”) hegemony of the mainstream.”⁵⁶ Structural bias, once exposed, is easily undermined.

The sheer proliferation of data entailed by an empirical approach to the theory or practice of law precludes the possibility of coherence. This necessitates an (undisclosed) imposition of values by the ‘interpreter’ or ‘identifier’ of the law.⁵⁷ The discovery of “coherence”, or the “values already embedded in the legal system”, the identification of a coherent “segmental expression” of policy, is thus revealed as:

[T]he end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or “neutral” position. There is no “centre”, no pragmatic meeting-point existing independently of arguments that seek to make a position

⁵³ ALASDAIR MACINTYRE, *AFTER VIRTUE* 14 (1984).

⁵⁴ KOSKENNIEMI, *supra* note 1, at 608. Footnotes omitted.

⁵⁵ *Id.*

⁵⁶ *Id.* at 598.

⁵⁷ A similar pathology afflicts the “descriptive thesis” of Koskenniemi’s project, *infra*.

seem “central” or “pragmatic” while casting the contesting positions as “marginal” or “extreme”.⁵⁸

Put differently, the critical bite of Koskenniemi’s adoption of deconstruction is *not* that “ambiguity is always available by pursuing an unpursued nuance.”⁵⁹ Rather, it is the fact that this inevitable ambiguity is always already, subconsciously, *suppressed*. As Koskenniemi puts it:

*Hermeneutics, too, is a universalisation project, a set of hegemonic moves that make particular arguments or preferences seem something other than particular because they seem, for example “coherent” with the “principles” of the legal system.*⁶⁰

This, as Scobbie almost concedes,⁶¹ is true of municipal legal systems where “judges” are clearly institutionally defined, and legal decisions and argumentative techniques institutionally vetted by authoritative declarations of success or failure. It is infinitely exacerbated in the de-institutionalised international legal order; where even this limited “jurispathic function”⁶² is absent.

III. *The Non-Semantic Critique*

Koskenniemi does not presuppose that law possesses the coherence necessary to understand it as a practice. In other words, Koskenniemi (in his *descriptive* mode) adopts a *variant* of Unger’s idea of “mapping” the legal order (of PIL). There is, however, one crucial difference: the absence of centralised institutions. Thus, where Unger advocated mapping the decisions of centralised legal institutions (courts), Koskenniemi must focus on legal arguments. However, being bereft of institutional vetting – by which ‘good’ legal arguments could be separated from ‘bad’ ones – Koskenniemi must accord the label ‘legal argument’ to arguments emanating from ‘lawyers’. This greatly magnifies the extent of indeterminacy.

⁵⁸ KOSKENNIEMI, *supra* note 1, at 597.

⁵⁹ Scobbie, *supra* note 38, at 347.

⁶⁰ KOSKENNIEMI, *supra* note 1, at 597-8. Footnotes omitted.

⁶¹ Scobbie, *supra* note 38, at 349.

⁶² See Robert Cover, *Nomos and Narrative* 97 HARVARD LAW REVIEW 4 (1983).

Where the semantic critiques, and the hermeneutic approach, presuppose agreement on which 'norms' are to be interpreted,⁶³ Koskenniemi's approach makes no such assumption, and consequently accommodates an *ontological* indeterminacy alongside interpretative indeterminacy. The non-semantic aspect of the indeterminacy thesis is a recognition (and description) of the empirical reality that different approaches to international law – which, for Koskenniemi, are all equally “competent” – embody contrasting approaches to the *identification* of legal norms.⁶⁴

Different approaches embody different theoretical assumptions and thus perceive differing data as constitutive of international legal rules.⁶⁵ Moreover, and more importantly, not all approaches perceive international law as being about rules at all. Those which do not – i.e. those commonly labelled “process based” or “pragmatic” approaches – Koskenniemi calls “dynamic” or “instrumentalist”. Their common feature is to downplay the significance of legal rules, which are reduced merely to inadequate vessels (or *instruments*)⁶⁶ for the transmission of values. From this perspective, the values embodied in rules are pre-eminent over the mere vessels. Those values, although both contradictory and prone to change, prevail in the event of a clash between value and expression (rule).⁶⁷ Thus the rule format can be abandoned where necessary. Recognising the validity (or rather the empirical existence) of such approaches:

*[O]nly shows the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realise, that impeccable arguments may be made to support preferences that are not normally heard; that if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around.*⁶⁸

Both formal and informal techniques exist, both are used by “international lawyers”, and thus, for Koskenniemi, both constitute “impeccable legal

⁶³ Only the *meaning* of the norm can be subject to dispute, the identity, or identification, of the norm must assumed (or agreed) before interpretation can commence. See, for example, RONALD DWORKIN, *LAW'S EMPIRE* 65-6 (1988).

⁶⁴ I have attempted to respond to the question of ontological indeterminacy in Jason Beckett, *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL*, 16 *EJIL* 213-238 (2005).

⁶⁵ *Id.*

⁶⁶ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 191-9 (1997).

⁶⁷ KOSKENNIEMI, *supra* note 1, at 591.

⁶⁸ *Id.*

arguments". This creates a very wide category of raw data, as there is no distinction between 'winning' and 'losing', 'successful' and 'unsuccessful' arguments. There are only arguments which are adopted, and those which were not. However, as Koskenniemi has noted, adoption of legal arguments owes more to the desirability of their conclusions than to their intrinsic merits.⁶⁹

In short, when push comes to shove, instrumentalism gives the interpreter an entirely free hand. "To refer to objectives is to tell the law applier: 'please choose'."⁷⁰ Instrumentalism embodies the radical indeterminacy of international law, but, *so* does formalism. The possible, or perhaps perpetual and inexorable, oscillation between the two magnifies this indeterminacy (by maintaining ontological indeterminacy alongside the interpretative) – *and* shows it to be simply another manifestation of the apology/utopia dialectic. Thus, 'legal arguments' is revealed as a category in which contradiction is endemic; and thus the radical indeterminacy of international law is definitively demonstrated.

E. Critique as Commendation

Perhaps the most common mistake made by FATU's readers is to *assume* that the demonstration of radical indeterminacy was a critique, that Koskenniemi had brought indeterminacy to light, that we might eradicate it, and 'save' the international legal project. Thus, Scobbie can identify "[t]he pure objectivism which Koskenniemi appears to desire [which] open[s] his thesis up to the charge of incurable utopianism".⁷¹ This is a misreading common to critics of the CLS or NAIL movements. Elsewhere, I have presented Koskenniemi's project as precisely such a utopian "secret love of the law", "a desire for a return to idealism".⁷² However – and this is this vital point, which illustrates the deconstructive challenge – that was simply *not* Koskenniemi's project, but only how his words fitted into *my* project, at a particular time. *That* is the impact of deconstruction; it is also why FATU is *not* "simply rather a long performative inconsistency."⁷³

⁶⁹ *Id.* at 569.

⁷⁰ *Id.*

⁷¹ Scobbie, *supra* note 38, at 350

⁷² Beckett, *supra* note 64, at 221.

⁷³ Scobbie, *supra* note 38, at 346.

Koskenniemi's text is subject to the "simple *tu quoque riposte*"; it *has* proven – if not exactly "meaningless or hopelessly indeterminate"⁷⁴ – completely subject to the whims, or political/philosophical commitments, of the reader or interpreter. It *has* been read, primarily, as a response to the readers' own projects or theoretical commitments; and evaluated in that light. It was 'us' (the, or at least some of the, readers) – and not Koskenniemi – who wanted to eradicate, or at least strictly limit, indeterminacy. For Koskenniemi, indeterminacy "does not emerge out of the carelessness or bad faith of legal actors".⁷⁵ Thus, where Bederman saw it as "a dread disease",⁷⁶ Koskenniemi perceives the radical indeterminacy of international law as a *good thing*; as "an absolutely central aspect of international law's acceptability."⁷⁷

I. *Law As Ethics, Accepting Indeterminacy, Suppressing Conflict*

The rule of law – which Koskenniemi in his own way appears to adopt – presupposes the social centrality of law, but: what is the purpose of socially central law? At first glance, the answer is obvious: its purpose is to regulate human behaviour. However, it cannot achieve this by reference to rules. Socially central (definitionally authoritative) law is *necessarily indeterminate*, because this is the price for its acceptability. Consequently, the purpose of law must be understood at a higher level of abstraction: "[t]he purpose of international law is always also international law itself."⁷⁸

It is important to realise that what Koskenniemi is advocating is *not* a system of 'ethical laws' akin to that pursued by Dworkinians or any other natural lawyers. Rather he is suggesting that we understand law as such as a form of ethics, more precisely, as an ethical technique which decentres our own ethics, both disputing their 'objective correctness' (and thus denying their hegemony in the evaluation of the actions of others), but also simultaneously rendering them sovereign over our *own* actions. This allows *both* space for alternative ethical systems, *and* self-evaluation in terms of our own ethical commitments – *our* actions ought to be compatible with our own ethics (as we would apply these to others).

⁷⁴ *Id.*

⁷⁵ KOSKENNIEMI, *supra* note 1, at 591.

⁷⁶ David J. Bederman, *Book review of From Apology to Utopia*, 23 NEW YORK JOURNAL OF INTERNATIONAL LAW AND POLITICS 228 (1990). See also KOSKENNIEMI, *supra* note 1, at 603.

⁷⁷ KOSKENNIEMI, *supra* note 1, at 591.

⁷⁸ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 77.

II. *Law as an Epistemic Grid: Formal Equality and Critique*

Law, for Koskenniemi, is more than a way of evaluating conduct. Or rather, law is something different from a technique of evaluation by reference to rules or standards; it is a way of perceiving the world, a way of making sense of reality:⁷⁹

*Formal law ... expresses the universalist principle of inclusion at the outset, making possible the regulative ideal of a pluralistic international world. ... Without that idea, much of the criticisms we all make of the international political world would no longer make sense.*⁸⁰

Law is an embodiment of our desire for an organised world, and thus law provides both our understanding of order (of the *meaning* of order), and our lens for perceiving such order. From the abstract perspective of legality, order is understood as the peaceful resolution of disputes by reference to external rules or standards. Justice is then understood as (and limited to) the pursuit of formal equality.⁸¹ We can then understand law as the manifestation of justice because the ideal of law has, itself, provided our abstract understanding of justice. Consequently, if we abuse, or abandon, or limit law, we undermine that very idea of justice by which we make (evaluative) sense of international relations.

Law provides the interpretative grid through which order can be understood, perceived, and pursued (where it is perceived as absent). It is through this grid, alone, that we come to understand international social interaction as more than chaos and the rule of force. It is only from this precondition that we can critique the current order for failure to live up to these ideals. It is only from here that the aspiration for improvement or progress becomes intelligible.

Quoting Vaughn Lowe with approval, Koskenniemi notes that: "after all, the system works for most of the time".⁸² However, this approval appears ironic; the system does not *actually* work most of the time, but simply appears to. It is the appearance, delusional as it may be, which is vital, maintaining the perception of an orderly – if not entirely just – world: "the weakness of this is that there is no

⁷⁹ Alasdair MacIntyre, *Epistemological Crises, Dramatic Narrative and the Philosophy of Science*, 60 *THE MONIST* 453, 453-4, and 462-3 (1977).

⁸⁰ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 69-70.

⁸¹ This internalises – and temporarily suspends – disputes over which features are relevant to the construction of like cases, and over which standards these cases are to be subjected to.

⁸² KOSKENNIEMI, *supra* note 1, at 596-7.

agreement on what the correct – “unbiased”, “external” – procedure is: each contestant invokes institutions ... the other regards as biased.”⁸³ In other words, there exists a second-order agreement that states should be treated equally, and that this means their conduct should be evaluated against the same rule or set of rules. However, this co-exists with a first-order disagreement over which specific set of rules (which particular standard) conduct should be evaluated against. Koskenniemi endorses the indeterminacy of law in order to secure the second-order agreement – and the world-view it embodies – over the first-order disagreement.

III. *Law as Organising Principle: The Epistemic Authority of Order*

For Koskenniemi, critique – as a matter of structure and logic – presupposes the universal, at least as a condition of possibility. This creates the apparent paradox that although the (articulation of the) universal has been *denied as a possibility*, it *remains as a condition of possibility*:

*‘Whoever says humanity wants to cheat’ is a useful reminder that a universal law, too, has no voice of its own ... But it builds on a distinction between honesty and cheating that presupposes the existence of the universal standard ... [F]rom the fact that there is no authentically universal position, it does not follow that all positions are the same. Indeed, were this the case, we would have no reason to take the realist critique seriously, no basis to distinguish between honesty and cheating.*⁸⁴

This does not undermine the realist critique, but merely contextualises it. Law retains a habit of misrepresenting reality. At the very least, law conditions the way in which reality is understood, helping to determine what is perceived as important, what as problematic, and what may be ignored as unimportant, or outside the law’s sphere of expertise or authority.⁸⁵

International law is used to focus attention and construct international events in particular ways. For example, (human) rights discourse is used to locate responsibility for the suffering of the Palestinian people with that people and their government. The lack of ‘democratisation’, alongside allegations of governmental ‘unreasonableness’ and corruption, are thus presented as lying at the root of the

⁸³ Martti Koskenniemi, *International Law as Political Theology: How to Read Nomos der Erde?* 11 CONSTELLATIONS 492, 506 (2004).

⁸⁴ Koskenniemi, *supra* note 5, at 118-119.

⁸⁵ KOSKENNIEMI, *supra* note 1, at 606.

problem. Likewise, the blame for the pathologies of, and suffering caused by, the international economic order is laid at the door of Third World political elites.⁸⁶

In both cases, rights discourse is used to deflect attention from the reality of Western implication in this suffering, by presenting the problem in a manner which disguises that implication. However, in both cases it is also true that the needs and demands of these marginalised populations can be expressed through – and given significant additional support by – universal rights discourse. Thus human rights function, through their indeterminacy and their restricted but alterable focus, as *both* cause and solution to the problem; as both critique and justification. Human rights discourse facilitates the perpetuation of the problem, but also, simultaneously, identifies the problem as a problem, a problem of international law.

Consequently, human rights give marginalised populations a universal language in which to present their particular demands as something more than subjectively felt grievances. They provide a technique of articulation to which the rest of the world is bound, in principle, to listen. It is in this way that international law functions to internalise and suppress conflict. As the law has provided a universal discourse, then recourse to violence can be neither beneficial nor legitimate. Thus, law functions as the *definition* – and guardian – of order.

It is this *a priori* privileging of dialogue, of peaceful settlement, which allows law to condition our understanding of order. By precluding the legitimacy of recourse to violence, the law entrenches an understanding of order as the ‘neutral’ resolution of disputes by reference to impartial rules (and, ideally, adjudicators). Despite its empirical impossibility, this model structures our understanding of a civilised order under law; and thus law constructs its own conditions of acceptability:

Schizophrenia tears wide open the fragile fabric of diplomatic consensus and exposes the aporia of a normative structure deferring simultaneously to the impossibility of ethical politics in a divided and agnostic world and the impossibility not to assess political action in the light of some ethical standpoint.⁸⁷ The positive law of the Charter ... receives its acceptability by such schizophrenia.⁸⁸

⁸⁶ Harris-Short, *supra* note 14, at 346.

⁸⁷ Koskenniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law, *supra* note 8, at 162.

⁸⁸ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 66.

Ultimately, we can criticise actions only on the basis that they could not be emulated by others in analogous situations.⁸⁹ If every situation were truly unique, every action truly singular, then every judgement would be truly subjective, an aesthetic evaluation of preference, with neither context nor meaning.⁹⁰ Although there is no access to the universal,⁹¹ law ought to embody the principle of universalisability – a sort of Kantian “categorical imperative” test – in order to best serve a function. Law is a technique of evaluation – or at least justification – and thus presupposes critique. Consequently, law *also* presupposes – and indeed embodies – the universal, the possibility of the universal, the universalisable. However, because the universal is not ‘real’ (“authentic” or ‘objective’) – or, at least, cannot be accessed directly – there are different ways in which it may be manifested. These correspond to the different ways in which law may be ‘spoken’: the alternative (particular) “traditions”, “preferences”, or “cultures” the law might manifest.

F. Cultures as Strategies?

I. Following Kelman: Koskenniemi As Legal Insurgent?

Indeterminacy cannot be denied or overcome, and it should not be hidden. However, it does not, as such, reduce law to a mere façade.⁹² Once it becomes clear that the emphasis on radical indeterminacy is not a critique, or that FATU has *evolved* from immanent critique into something else,⁹³ the most important question comes into relief: just what *is* Koskenniemi seeking? One obvious answer would be to seek parallels with those – e.g. Mark Kelman in municipal legal theorising, David Kennedy in PIL – who advocate revelling in indeterminacy. From this perspective, one ought, cynically, to manipulate indeterminacy simply to pursue one’s own political agenda.

Consequently, at the descriptive level, there is a danger of Koskenniemi’s analysis, precisely by accepting and legitimating contradictory “cultures”, degenerating into

⁸⁹ See Beckett, *supra* note 27; and Mercy, *Particularity, the Map from the Void*, in *Archiv für Rechts und Sozialphilosophie* (forthcoming 2007).

⁹⁰ Koskenniemi, ‘*The Lady Doth Protest Too Much*’ Kosovo, and the Turn to Ethics in International Law, *supra* note 8, at 173.

⁹¹ See Martti Koskenniemi *The Politics of International Law* 1 EJIL 4 (1990).

⁹² KOSKENNIEMI, *supra* note 1, at 564.

⁹³ This was my second misreading, *supra* note 64. On the limitations of immanent critique, see *Id.* at 600.

a self-fulfilling prophecy. However, Koskenniemi does remain committed to a “meaningful distinction between lawful constraint and the application of naked power”;⁹⁴ i.e. between law and politics:

*Reducing international law to its objectives or likely consequences would have given no sense whatsoever of what it was to produce a legal opinion, or of the significance of the legal service for people who continued to think of it as not only a distinct, but also an apparently valuable, service.*⁹⁵

In retaining a belief in the specificity, and the value, of PIL, Koskenniemi clearly distinguishes himself from the (possibly illusionary) ‘nihilistic’ wing of CLS/NAIL. However, in simultaneously rejecting a hermeneutics of “coherence” as hegemony, and thus an illicit strategy, he retains a distinctly critical approach. As such, he does embrace the rhetorical form of law, but his is not the unfettered rhetoric of a Stanley Fish, nor the “insurgency” of Kelman, nor even Kennedy’s ‘playful’ freedom.

While romantically, or sentimentally, attractive, legal insurgency (or any other form of unbridled rhetoric as legal analysis) is a limited and dangerous strategy. It is worth remembering that insurgents are rarely the stronger party to any conflict, and that legal insurgency is as likely to validate an opponent’s arguments as to refute them. This is especially important in the de-institutionalised environment of international law. Although the strategic use of indeterminacy allows any position to be critiqued, it also allows any position to be justified. Consequently, it allows the powerful to act, with legal justification, despite being subject to legal critique for those same actions. Critique can gain force only by consistently adopting the same argumentative methodology; by displaying consistency as the sign of the objectivity of legal analysis. This requires the consistent adoption of *one* (singular) culture of legal practice.

II. *Choosing Between Cultures*

The problem is that, having recognised (or rather stipulated) the equal competence of all cultures of international law, Koskenniemi leaves himself bereft of resources by which to make, or even justify, the choice between cultures. Instead, he acknowledges “the continuity of a profession no longer seeking a transcendental foundation from philosophical or sociological theories.”⁹⁶ Ontological

⁹⁴ KOSKENNIEMI, *supra* note 7, at 502.

⁹⁵ KOSKENNIEMI, *supra* note 1, at 564.

⁹⁶ *Id.* at 575.

indeterminacy is the inevitable consequence of this internalisation of value conflicts. To facilitate the choice of a single, correct culture, these value conflicts must be resolved.

However, that cannot be accomplished by a technique of synthesis, nor by reference to the 'correct' resolution of the conflicts. Value conflicts can be resolved only by making *choices* between the competing values; by privileging one set of values (one purpose for international law) above all others. Moreover, and this is precisely the weakness of Koskenniemi's thesis, these choices must be made by reference to the purity of a philosophical perspective. Indeed, Koskenniemi himself has acknowledged, "that by avoiding philosophical justification ... pragmatism rests on a faith that remains a mystery to itself as it conflicts with its avowed rationalism."⁹⁷ Despite all of this, despite having precluded himself from making such a choice, Koskenniemi must, *and does*, make it.

III. Koskenniemi's Choice

Koskenniemi disclaims any interest in the pursuit of philosophical purity.⁹⁸ Moreover, he states that pursuit of a single method is "academic hubris";⁹⁹ feigns a total disinterest in the question "what is international law for?";¹⁰⁰ and acknowledges that all legal cultures constitute equally competent ways of speaking the common language (international law). Nonetheless, he also acknowledges that:

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.¹⁰¹

This cannot amount to anything other than the claim that formalism is the 'best' culture of international law; but that claim is, itself, ambiguous. Is formalism

⁹⁷ Koskenniemi, *supra* note 83, at 505.

⁹⁸ KOSKENNIEMI, *supra* note 1, at 600.

⁹⁹ KOSKENNIEMI, *supra* note 7, at 504.

¹⁰⁰ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 57

¹⁰¹ KOSKENNIEMI, *supra* note 1, at 616.

simply the most aesthetically pleasing way to speak – the Queen’s English – or is it rather the (only) correct way to speak? Before these questions can be engaged – either by, or on behalf of, Koskenniemi – the issue of what it means to speak in this way, of what Koskenniemi means by the term formalism, must be resolved.

IV. *Koskenniemi’s Formalism*

As with “instrumentalism”, Koskenniemi has a specific, unorthodox or even idiosyncratic understanding of formalism. He rejects *both* the classic Kelsenian/Kantian definition, *and* Unger’s understanding of formalism as argumentation with the presupposition of closure.¹⁰² *In lieu* of these, Koskenniemi proposes a new understanding, rooted in Laclau’s concept of the “empty universal”. Rejecting the classical approach, he notes: “we often think of formalism in terms of Kantian ideas about a (universal) reason – and in doing so fall into the trap of generalising a European particularism.”¹⁰³ This remains true even of the variant advocated by Hans Kelsen: “The way back to a Kelsenian formalism, a formalism *sans peur et sans reproche* is no longer open. The critique of rules and principles cannot be undone.”¹⁰⁴

However, “there is room for a culture of formalism even after the critique of rules has done its work.”¹⁰⁵ Contrary to first impressions, Koskenniemi’s embrace of formalism does not contradict, but rather complements, his critical and deconstructive claims.¹⁰⁶ It is a formalism designed to cope with radical indeterminacy; not to overcome it. “Although [formalist] notions and vocabularies

¹⁰² ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1 (1986).

¹⁰³ KOSKENNIEMI, *supra* note 7, at 500.

¹⁰⁴ *Id.* at 495-6 and on Friedman in particular, *Id.* at 498. The impossibility of reaching a determinate understanding of the demands of contemporary Public International Law by reference to classic Kelsenian methods is highlighted and persuasively demonstrated by the most consistent neo-Kelsenian currently writing on the subject of Public International Law, Jörg Kammerhofer, *The Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 *EJIL* 523 (2004).

¹⁰⁵ Koskenniemi, *supra* note 7, at 500, 503. Again, Kammerhofer’s writings may be relevant here, as they suggest that Kelsen was fully aware of the necessary indeterminacy of normative orders; that, in fact, Kelsen has been consistently, and radically, misunderstood by a legal academy which precisely fails to recognise his radicality. See, especially, his *Uncertainty in International Law*. What does it look like, what causes it? (Aug 31 2006) (unpublished Ph.D, University of Vienna 2006) (Available at the University of Vienna Library and the Austrian National Library in Vienna).

¹⁰⁶ In a similar vein, when understood in light of its *own* project, the eighth chapter of FATU does not contradict the first seven; see KOSKENNIEMI, *supra* note 1, at 602-4.

are again indeterminate ... they are biased both against moral vocabularies of imperial privilege and economic techniques underwriting privatized de facto relationships."¹⁰⁷ This neo-formalism rejects the claims of its classical predecessor.¹⁰⁸ In doing so, it:

Represents the possibility of the universal (as Kant well knew) but it does this by remaining "empty," a negative instead of a positive datum, and thus avoids the danger of imperialism.¹⁰⁹ ... [because] unlike in imperialism, it is not opened by a positive principle but a negative one: what is it that we lack? The ability to articulate this lack, and to do this in universal terms, is what the culture of formalism provides.¹¹⁰

Two things must be emphasised: firstly, Koskenniemi's formalism recognises the impossibility of the universal,¹¹¹ not only the non-realisation of the universal in contemporary PIL, but the impossibility of *ever* discovering a true universal¹¹² (as all appeals to a substantive, "positive" universal are imperialistic); second, it is *not* a formalism of the single right answer: "[t]he door to a formalism that would determine the substance of political outcomes is no longer open. There is no neutral terrain."¹¹³ The absence of the universal precludes transcendental claims, and the claim of radical indeterminacy entails that any given 'legal rule' can bear any meaning, or at least those meanings which it cannot bear can be brought to bear against it by "impeccable legal arguments". Rules, in short, are meaningless; interpretation is everything. This, to repeat, is not, simply, a claim of semantic indeterminacy.¹¹⁴

Formalism then becomes precisely a claim of form. Although any given legal norm can bear any desired meaning, the only formally valid interpretations are those capable of universalisation, of repetition. That is, a claim is valid only if the interpreter would accept that the same claim – at the appropriate level of

¹⁰⁷ KOSKENNIEMI, *supra* note 1, at 616.

¹⁰⁸ KOSKENNIEMI, *supra* note 7, at 503.

¹⁰⁹ *Id.* at 504.

¹¹⁰ *Id.* at 506, emphasis added.

¹¹¹ Koskenniemi, *supra* note 5.

¹¹² Koskenniemi, *What Is International Law For?*, *supra* note 8, at 78; Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law* *supra* note 8, at 165.

¹¹³ Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 174.

¹¹⁴ *Supra* note 35, and accompanying text, *supra*.

abstraction – could be made by (and granted to) any actor in an analogous situation. In particular, an interpretation is valid only if the interpreter would accept its validity as against themselves.¹¹⁵

Moreover, the claim must be presented in *formal* (i.e. “empty” or “negative”) terms; not as a claim that others are also entitled to act on ‘our’ values, but that if values (or ‘cherished’ values) may be pursued by ‘us’ then others may equally pursue their cherished values. Thus is *form* privileged over substance; thus are interpretations differentiated amongst, and valid interpretations (momentarily) restricted or delimited.

V. *Formalism as Normality, not Universality*

Koskenniemi embraces a tightly controlled rhetorical form. This is not restricted by the words of the text,¹¹⁶ nor by the “authentic meaning of raw state preferences”; but by *form*, by a commitment to the necessity of universalisability or repetition. Arguments do not meet this formalist test of “validity” simply because they can be made to appear textually inevitable. Instead, arguments gain formal validity by the possibility of (indefinite) repetition. Formalism becomes a demand analogous to the Kantian “categorical imperative”, but without the (hubristic) claim of objective correctness.¹¹⁷

Put more simply, law is *not* the application of rules, but rather the abstract commitment to the *rule form*. This vets arguments by their normalisability, *not* their apparent textual consonance. Formalism presumes international law to be an attempt to maintain normality, to contain or eradicate the exception. Formalism is precisely the denial that international law is best understood as a “discipline of crisis”:¹¹⁸

¹¹⁵ KOSKENNIEMI, *supra* note 7, at 501.

¹¹⁶ Actually, this claim may be a little too strong. If instrumentalism is excluded as a competent approach to international law then the words of a text would have some constraining force on interpretation; see notes 196-201 and accompanying text, *infra*.

¹¹⁷ KOSKENNIEMI, *supra* note 7, at 500. Perhaps it is closer still to Nietzsche’s “endless return”, or at least Deleuze’s interpretation thereof, see RONALD BOGUE, *DELEUZE AND GUATTARI* 31 (1989).

¹¹⁸ KOSKENNIEMI, *supra* note 1, at 606, footnote 122 (citing Charlesworth).

*For the politicians, every situation was new, exceptional, crisis. ... The point of the law was to detach the particular from its particularity by linking it with narratives in which it received a generalizable meaning, and the politician could see what to do with it.*¹¹⁹

Formalism is the attempt to normalise situations, claims, grievances, and responses. Thus where MacCormick insists that a good reason for deciding a single case must also be a good reason for deciding other cases of that type,¹²⁰ Koskenniemi emphasises the corollary: only generically applicable arguments or interpretations should be accepted as lawful claims. Only claims of this nature are formally valid; only these should count as (formalist) legal interpretations.

VI. *Contemporary Radicalism, or Pre-Modern Return? Formalism and Adam Smith*

Koskenniemi's formalism is relatively simple, a privileging of form over content, abstract equality over disagreement about evaluative standards. In short, the indeterminacy critique is taken as given, that any 'law' can sustain any meaning. However, formalism does place an interpretative safeguard: only those interpretations are valid which we would have held against ourselves.

Furthermore, formalism – to remain empty, or 'negative' – must take place at a high level of abstraction. Indeed formalism becomes precisely the technique of abstraction from particularity. Despite rejecting its Kantian (and, of course, Rawlsian) ancestry as fraudulent, deceptive, hegemony, Koskenniemi's approach is not without historical precedent; it is reminiscent of Adam Smith's concept of the "impartial spectator".¹²¹ Indeed the motivation behind the two approaches seems identical: a concern with the human tendency to solipsism,¹²² and a technique of abstraction (or displacement) to ameliorate this.¹²³

It is hard to justify the attention and resources allocated to the 'fight against terrorism' in the aftermath of the attacks on ... September 2001 in which nearly 3,000 people lost their lives, while simultaneously six million children under five years old die annually of

¹¹⁹ Koskenniemi, *supra* note 5, at 120.

¹²⁰ NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 97 (1978).

¹²¹ *THEORY OF MORAL SENTIMENTS*, Bk. III, ch. i., para. ii, at p. 110 (1976 Raphael and Macfie eds.).

¹²² *Id.*, Bk. III, ch. I, para. v, at p. 112 "there is not in the world such a smoother of wrinkles as is every man's imagination, with regard to the blemishes of his own character"; *see also* Bk. III, ch. iii, at p. 134-56.

¹²³ *Id.*, Bk. III, ch. i, para. ii, at p. 105.

*malnutrition by causes that could be prevented by existing economic and technical resources.*¹²⁴

Obviously, 'objectively' the 3,000 deaths cannot be worse than the 6,000,000. However, *subjectively* they can appear so.¹²⁵ They (unlike the greater number caused by extreme poverty) are the deaths of people like us, deaths that we could experience, deaths that the law should not allow. Those other, poverty induced, deaths, by contrast, are a product of "misfortune" and not of "injustice";¹²⁶ as such, we have a positive duty (of benevolence) to try to eradicate or minimise them, an obligation to help;¹²⁷ not an enforceable legal duty:

*[T]he terrorism that shall be branded as the enemy of humanity will not be the intellectual property system that allows hundreds of thousands of Africans to march into early death by sexually transmitted disease.*¹²⁸

It is precisely that evaluative distinction – that *narcissism* – which Koskenniemi perceives in "instrumentalism". There is a structural bias in the *focus* of legal rules, not in their content (which is indeterminate). This necessitates greater sensitivity in the use of legal rules, and also a sense of *political* responsibility in international lawyers, that "political commitment ... which animated its best representatives."¹²⁹ That is why Koskenniemi rejects instrumentalism in favour of a formal discourse which – even though it cannot be neutral, nor based on universals – at least "decenter's one's own position"; "persuading people to bracket their own sensibilities, and learn openness for others, is not worthless".¹³⁰

Empathy then, becomes humanity. However, the danger which motivates the rejection of Kantian formalism, that between narcissism and empathy lies solipsism

¹²⁴ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 63. Emphasis added. [there is no emphasis here!]

¹²⁵ Smith, *supra* note 122, Bk. III, ch. iii, para. iv, at p. 136.

¹²⁶ The phrases and the contrast between them are analysed by JUDITH SHKLAR, *THE FACES OF INJUSTICE* (1990).

¹²⁷ On the inaccuracy of this understanding, see THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 11-20 (2002).

¹²⁸ Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 172.

¹²⁹ KOSKENNIEMI, *supra* note 1, at 562.

¹³⁰ KOSKENNIEMI, *supra* note 7, at 502.

or *Kitsch*, remains: that tendency to treat everyone equally, and alike, but only in terms of our values, of our standards. This is why the desire for universality must become a desire for normality, for the recognition of the suffering caused by normality, and the normal law's obligation to minimise this suffering. International lawyers should no longer serve the function of Kantian bearers of moral exculpation:

*Having learned its lesson, formalism might then re-enter the world assured that whatever struggles it will have to weigh, the inner anxiety of the Prince is less a problem to resolve than an objective to achieve.*¹³¹

Despite its possible historical analogues, it is this that is the radicality of Koskenniemi's formalism.

G. Exclusion Not Choice: Why Endorsing Formalism Is Not Enough

Koskenniemi remains unwilling to move beyond the claim that formalism is the best culture of international law, the most eloquent way to speak the language. He does not advocate the stronger claim that it is the *only* appropriate way to practice, or speak, PIL; he does not attack the *competence* of those who endorse the instrumental culture. There appear to be two reasons for this, one descriptive and the other normative. Descriptively speaking, it is undeniable that there are legal academics and practitioners who understand international law instrumentally (in Koskenniemi's sense), thus an accurate description of the social practice of international law must include this culture.

Secondly, Koskenniemi appears to have a slight normative disquiet which centres on the possibility that formalism produces answers of which he disapproves substantively. In that eventuality, privileging "instrumentalism" over "formalism" allows the undesirable meaning to be avoided, or even ignored.¹³² Consequently, his embrace of formalism is less than wholehearted. Although formalism is the *preferable* way of speaking international law, Koskenniemi is loathe to part with any tool or strategy that could be used to counteract a return to rational imperialism.¹³³ Even where formalism appears progressive, it may turn regressive. Thus, the

¹³¹ Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, *supra* note 8, at 175.

¹³² See, for example, Rex Zedalis, Preliminary Thoughts on Some Unresolved Questions Involving the Law of Anticipatory Self-Defense, 19 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 129 (1987).

¹³³ KOSKENNIEMI, *supra* note 1, at 609.

disquiet centres around the question of how 'we' ought to respond on those occasions when formalism provides answers, or perpetuates situations, which we find unconscionable.¹³⁴

This normative ambivalence toward formalism is misguided. It quite simply is not relevant to Koskenniemi's "formalism", but applies only to a classic formalism – of determinate rules – a formalism of formal equality by reference to particular standards:

*If the law is indeterminate ... then there is no substantive legal system that could be distinguished from unilateral assertions of power. In such a case, the European appeal to "rules" ... would appear as a hegemonic technique through which Europe would only seek to regain some control by inscribing its preferences ... as universal.*¹³⁵

That fear is quite realistic, but it refers to a substantive universalism, a "rational imperialism" which borders on "cynical imperialism".¹³⁶ Consequently, it is clearly recognisable within Koskenniemi's schema as a form of "cheating". Koskenniemi's particular understanding of formalism is immune to the misuse or atrophy that produces his normative disquiet. For rights to be formally universalisable, they must not rely on a difference of capacities. Thus interventions by the World Economic System (World Bank, IMF, etc.) would only be formally valid if all countries, including the developed world, would accept such impositions on their own economies. Similarly, claims to 'precautionary self-defence' do not fit within Koskenniemi's understanding of formalism, as they could not be exercised by all states, but rely on the incapacitating force of *de facto* power differences, "it is never Algeria that will intervene in France, or Finland in Chechnya."¹³⁷ Biases which "work in favour of those who are privileged" are, necessarily, also biases which rely upon inequalities of capacity to restrict exercise thereof. They are not universalisable, and that is why they "form part of the problem".¹³⁸

The specific nature of the test put forward by Koskenniemi must be emphasised, this is analogous to Smith's "impartial spectator". To test the validity of an interpretation we must imagine everyone (who perceives themselves to be) in an analogous situation acting as we propose to. Better still, imagine each and every

¹³⁴ *Id.* at 616.

¹³⁵ Koskenniemi, *supra* note 83, at 506.

¹³⁶ KOSKENNIEMI, *supra* note 7, at 500.

¹³⁷ Koskenniemi, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law, *supra* note 8, at 172.

¹³⁸ KOSKENNIEMI, *supra* note 1, at 609.

one of them watching us as we watch them observing. Would we let them do as we propose (perceived from their perspective)? Would we really expect them to let us do as we propose (perceived from their perspective)?¹³⁹ This is a high standard, with limited opportunity for abuse.

As a result, Koskenniemi has no normative cause not to embrace formalism fully. This leaves only his refusal to eliminate anti-formal approaches descriptively, and brings into relief the conflict between his descriptive and normative theses. His ambition for descriptive accuracy and comprehensiveness undermines his normative project, robbing international law of even its abstract purpose of promoting the idea of inclusion or equality, of providing the condition under which “honesty and cheating” could be “distinguished”.

H. The Failure of Empirical Analysis

Mirrors should reflect more, before throwing back images. –Jean Cocteau

Perhaps the immediately preceding criticism seems unfair. After all, Koskenniemi is simply describing a social practice *as it is*. Yet this is the very heart of the problem: there can be no such thing 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. The social practice of law relies on the understanding of law as a category (e.g. the decisions of central institutions; the pursuit of coherence or justice through hermeneutics; or the speech of competent lawyers) to structure and understand a ‘reality’ of law as a social practice. The cognition of reality is only possible because the data privileged for abstraction from reality is sufficiently similar to this ideal image to be recognisable as a member of that category. Consequently, the category itself must be articulated and explicated, or at the very least assumed. It is the act of creating and imposing a category, and that act alone, which can *constitute* the ‘practice’ as an object capable of being subjected to analysis.¹⁴⁰

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. Moreover, Koskenniemi’s descriptive methodology is – on this issue – patently circular.

¹³⁹ Smith, *supra* note 121, Bk. III, ch. I, para. vi, at p. 106-7.

¹⁴⁰ See Beckett, *supra* note 64.

“Competence” is the capacity to engage the practice, but the practice itself is identified by reference to “competent lawyers” (i.e. practitioners). In short, competence distinguishes lawyers from laymen, but the distinction between the arguments of lawyers and laymen is the definition of competence.

Koskenniemi’s theory is not drawn from observation, but instead imposed onto observation. The theory becomes a self-fulfilling prophecy precisely because it legitimises methodologically incompatible arguments as each being “professionally competent”, as each being valid legal arguments. From this perspective, Koskenniemi can surely offer no sound reason why lawyers should adopt consistent methodological structures – why they should reject an unfettered rhetoric and remain loyal to formalism – even within the same argument. Far from castigating synthetic approaches to international law,¹⁴¹ far even from demanding that theorists, academics, or practitioners refrain from moving between theories to justify their personal or state preferences, Koskenniemi defines their professional competence precisely by their ability to do so.¹⁴²

This seems to me the key issue. As Koskenniemi has noted, his book was perceived by some as “fundamentally a-critical” as “offering weak medicine”; perhaps these critiques missed the purpose of the thesis, which, of course, was never to eliminate indeterminacy, but rather to show our capacity to manipulate it, and to rid us of the ethical baggage accompanying the false necessity of understanding law as a determinate discourse. Due to its (relatively) consistent adoption of formalism, Koskenniemi’s argument does differ from Kelman’s instigation to “legal insurgency”. However, because formalism is adopted contingently, its exact role remains unclear. In particular, the relationship between a culture and a language requires clarification. Alternatively, perhaps this mixed metaphor should be abandoned, and formalism understood as a *dialect* rather than a culture. However, this would also open up the question of whether PIL is *one* language, or several.

My fear is that the earlier critics will prove, fortuitously, correct. I can almost understand Koskenniemi’s unwillingness to commit to formalism wholeheartedly, and his belief that it may be necessary to retain alternative “cultures” for use should formalism ‘fail’. I worry about the costs of such a move. What commends formalism, beyond the substantive outcome it produces, in any given case? By what means does it demonstrate its preferability to hegemonic, value-centric, or

¹⁴¹ *Id.*

¹⁴² KOSKENNIEMI, *supra* note 1, at 602.

'substantively liberal' theories: especially to an audience which accepts the hegemony of its values and its 'tolerance'?¹⁴³

Worse, how can such arguments be sustained while also (simultaneously) reserving the right to change strategy, to employ a different culture, to switch from "Up" to "Down" arguments? Can formalism be correct *only* if it gives results of which Koskenniemi approves? No; this is precisely what formalism stands against, "[t]he cynicism of letting the ideal of universality fall the moment when something about the realization of one's particular preferences is obstructed by it."¹⁴⁴ Moreover, if formalism is *not* portrayed as the 'best' way to do law, then how can indeterminacy be used by 'progressive' or 'emancipatory' causes? Surely the overwhelming resources of 'conservative' 'establishment' forces will be more likely to secure victory. Without a legal constant for support, I fear that Koskenniemi has offered to sell our (disciplinary) soul for the right to protest:

*Although notions such as 'peace', 'justice', or 'human rights' do not fit well with the techniques of legal formalism ... they give voice to ... groups struggling ... and seeking to express their claims in the language of something greater than merely their personal interests.*¹⁴⁵

I. Going Further? Formalism as Critique

Law need not be perceived as a social practice, and indeed to understand it as a social practice entails defining that practice. Defining it purely by reference to the self-understanding of its assumed practitioners fails to produce stability; it is an inadequate technique to distinguish the law. To say 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*¹⁴⁶

¹⁴³ See, for example, Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 EJIL 131 (2005).

¹⁴⁴ KOSKENNIEMI, *supra* note 7, at 509.

¹⁴⁵ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 73.

¹⁴⁶ *Id.* at 566.

is not enough, as this presupposes that we know what “law jobs” are,¹⁴⁷ that law has a natural or defined role or essence. Moreover, it assumes that law is an affair of rules, and *that* lies at the very heart of the dispute between “formalism” and “instrumentalism”. The descriptive approach in fact precludes the possibility that, we can “develop an ability to distinguish between competent arguments and points [which] somehow fail as *legal* arguments”.¹⁴⁸

There is great disagreement over what constitutes legal arguments,¹⁴⁹ and the descriptive approach can only describe that disagreement; or internalise it as radical, non-semantic, indeterminacy. Empirical methodology must be abandoned in order to escape this impasse. A *normative* methodology must be developed and adopted. As a result of this methodological shift, the data to be described as *legal* can be recognised as constituted in the act of description itself. Consequently, that description must be normatively delimited. A decision must be taken as to what is to count as legal data, or valid legal arguments. Only after that has been accomplished can Koskenniemi make good his claim that “international law is highly structured as a language”. To do otherwise would be tantamount to claiming that anyone talking in Finland was *therefore* talking Finnish; but some are not. Some are tourists, students, or academics, communicating in English.¹⁵⁰

Languages must be differentiated from one another. Indeed, Koskenniemi acknowledges the existence of “other professional grammar[s] (of “international relations”, say, or “political theory”)”.¹⁵¹ Moreover, even languages admitting of multiple dialects will perceive some (e.g. the Queen’s English) as more formal, more eloquent, and indeed more correct than others (Scouse, Cockney, or Geordie), with those speaking the former recognised as more competent language users than those using the latter. Finally, those speaking Finnish are competent in another language altogether, and as such (at that moment) incompetent as speakers of English.

¹⁴⁷ Indeed we can go further, it assumes that law is a set of tasks to be accomplished, rather than a means of accomplishing certain tasks; but formalism must surely contain the claim that law is *not* a task, but a *technique*.

¹⁴⁸ KOSKENNIEMI, *supra* note 1, at 566.

¹⁴⁹ Beckett, *supra* note 64.

¹⁵⁰ Perhaps a more telling analogy would be with the claim that immigrant communities in the England *must* be speaking a form of English, because they reside, interact, and communicate in England.

¹⁵¹ KOSKENNIEMI, *supra* note 1, at 605.

It is not enough to say that, “how international lawyers argue ... can be explained in terms of their specific “competence” and that this can be articulated in a limited number of rules that constitute the “grammar””.¹⁵² This system remains too open, too inclusive. International lawyers may be only “a small and marginal group of legal professionals” but they are still insufficiently homogenous; the “grammars” they use are too wide-ranging and inconsistent to be conceived of as a single language. Although “colleagues may well admire the skill of a lawyer arguing for a case they know he or she is bound to lose”,¹⁵³ this is true *only* in an institutional setting; and international law is largely de-institutionalised.¹⁵⁴ Those skills may well be less admired when used to justify imperialist conquest in the de-institutionalised ‘court’ of public, media, or parliamentary opinion.¹⁵⁵ This can be explained by the distinction Koskenniemi draws between law as a technique of discovery and of justification.¹⁵⁶

Put simply, due to its indeterminacy, (international) law does not function to compel certain courses of action, but rather to justify decisions taken for other reasons. We do not discover the lawful way to act, but rather attempt to justify our actions as lawful. Koskenniemi may have been correct “to think about [his] own experience as far from idiosyncratic and to examine the contrast between “formalism” and “realism” as an incident of the *standard experience of any international lawyer*.”¹⁵⁷ In doing so, however, he underplayed the significance of certain idiosyncratic actors: the Great Powers.¹⁵⁸ Despite this, he has observed:

¹⁵² *Id.* at 568.

¹⁵³ *Id.* at footnote 9.

¹⁵⁴ See, for example, *Legality of the Use of Force (FRY v. USA) Preliminary Objections* ICJ Order of 2nd June 1999 para. 30, 1999 ILM p. 1188 at p. 1195: “there is a fundamental distinction between the question of the acceptance by a State of the Court’s jurisdiction and the compatibility of particular acts with international law.”

¹⁵⁵ Put differently, Koskenniemi underestimates the importance of the Kantian observation that claims of legality preclude moral responsibility for the outcomes of (lawful) actions; however, see also *supra* note 131 and accompanying text, *supra*.

¹⁵⁶ KOSKENNIEMI, *supra* note 1, at 570.

¹⁵⁷ *Id.* at 565.

¹⁵⁸ GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004).

*The instrumental perspective is typically that of an active and powerful actor in possession of alternative choices; formalism is often the perspective of the weak actor relying on law for protection.*¹⁵⁹

Perhaps it was through realising that Great Britain was, once again – albeit only temporarily and vicariously – a Great Power, that the Attorney General was able to overcome his earlier misgivings about the legality of invading Iraq without UNSC authorisation, and instead declare:

28. [H]aving regard to ... the arguments of the US Administration which I heard in Washington, I accept that a reasonable case can be made that resolution 1441 is capable in principle of reviving the authorisation in 678 without a further resolution. ... 30. But a "reasonable case" does not mean that if the matter ever came before a court I would be confident that the court would agree with the view.¹⁶⁰

It is precisely the power of those idiosyncratic, powerful, actors who *are* able to "claim a right merely in terms of [their] separate "value-system"¹⁶¹ (even if this must be disguised behind instrumentalism)¹⁶² that law should curtail. However, it is also this power that an empirical methodology will register, acknowledge, emphasise, and even endorse. That is why it is insufficient to ask how a culture of formalism is viewed in a given institution. Strategically, perhaps, in the short term, success may demand that "the choice of technique must reflect a historically informed assessment of the effect of particular institutional alternatives."¹⁶³

However, in the longer term, this serves simply to entrench the reality of anti-formalist reasoning. Formalism must be defended, not as useful, nor even as the best or most eloquent form of international law, but as the *only competent way* in which it may be spoken or practiced. Empirical legal theory's conceptual weakness is fatal:

Before denying ourselves [a] modest indulgence in teleology ... we should consider carefully the cost ... [t]he most significant element [of which is] that we lose wholly any standard for

¹⁵⁹ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 69; Koskenniemi, 'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law, *supra* note 8, at footnote note 46.

¹⁶⁰ http://news.bbc.co.uk/1/hi/uk_politics/vote_2005/frontpage/4491801.stm.

¹⁶¹ KOSKENNIEMI, *supra* note 7, at 505.

¹⁶² *Id.*

¹⁶³ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 63.

*defining legality ... we may bemoan some kinds of retroactive laws, but we cannot even explain what would be wrong with a system of laws that were wholly retroactive.*¹⁶⁴

Description, no matter how accurate, is not enough. As Marx wisely noted:

*The philosophers have only interpreted the world, in various ways; the point, however, is to change it.*¹⁶⁵

II. Formalism as the Definition of Competence

Despite Koskenniemi's reticence to endorse formalism as 'transcendentally' or 'a priori' superior to other forms of discourse,¹⁶⁶ he is willing to acknowledge its exclusionary character: "a culture of formalism cannot tolerate the transformation of the formal into a façade for the material in a way that denies the value of the formal as such".¹⁶⁷ Koskenniemi illustrates this by reference to Friedman.¹⁶⁸ Other international lawyers have made similar assaults on the "professional competence" of those adopting anti-formalist perspectives. Thirlway's critique of D'Amato in particular, and the "Heraclitan school" in general,¹⁶⁹ is in this vein. Allott's strictures on MacDougal spring equally to mind.¹⁷⁰ Uniting these three critiques is the claim that whatever their anti-formal interlocutors are advocating, it is certainly not a (recognisable) practice of law: "Indeed it may have seemed to [Friedman] that what [the anti-formalists] were doing was not part of the [legal] discourse at all."¹⁷¹ Put more bluntly, their adversaries are simply *not* (competent) *lawyers*. Law, to be understood or used at all, must be delimited and defined, it must be separated from non-law; and that separation *must* rest on something more discriminating than the self-image of its "speakers".

¹⁶⁴ LON L. FULLER, *THE MORALITY OF LAW* 147 (1969).

¹⁶⁵ Theses on Feuerbach, thesis XI. *Marx/Engels Selected Works*, Volume One, p. 13 - 15 (Progress Publishers, Moscow, USSR, 1969) available at: <http://www.marxists.org/archive/marx/works/1845/theses/theses.pdf>.

¹⁶⁶ KOSKENNIEMI, *supra* note 1, at 569.

¹⁶⁷ KOSKENNIEMI, *supra* note 7, at 501.

¹⁶⁸ *Id.* at 499.

¹⁶⁹ H. W. A. THIRLWAY, *CUSTOMARY LAW AND CODIFICATION* 52 (1972).

¹⁷⁰ Beckett, *supra* note 64, at 175. Philip Allott, *Language, Method and the Nature of International Law*, 45 *BYBIL* 112 (1971).

¹⁷¹ KOSKENNIEMI, *supra* note 7, at 499.

I. Purposive Methodology and the Essence of Law

Although all cultures are, apparently, equal, at least as regards professional competence, they are by no means the same. Despite accepting the equal competence of all cultures, Koskenniemi does draw an evaluative distinction between them, favouring one (particular variant) of one culture over the other(s). In doing so, he moves, perhaps inadvertently, from an empirical to a *normative* or *purposive* methodology.

This allows us to identify, and overcome, the implicit contradiction between two claims: 1. that international law can only be accessed through the arguments of competent lawyers; and 2. that such arguments can nonetheless be differentiated and taxonomised. The differentiation itself involves a “disaggregation” of the various (competing) forms of articulation;¹⁷² and that, in turn, presupposes that the claims can be referred to extra-linguistic standards, that the claims embody competing ontologies of law, *and* these can be identified and studied. That, surely, involves extra-linguistic access to the ‘raw data’ (the law, or legal theory) that constitutes the legal norms under each claim.

The underlying problem is not about extra-linguistic access; it is about truth. This involves the simpler and less contestable claim that law is not a “brute fact”.¹⁷³ Law has no physical existence; consequently, competing traditions cannot be evaluated by reference to their correspondence with natural truths about law.¹⁷⁴ This would *not* preclude competing traditions from being subject to evaluation.

As noted, Koskenniemi is opposed to claims about the truth, ‘true nature’, or essence, of law, and equally he is opposed to claims about the purposes law should pursue. This is a classic liberal position: there can be no truth in an agnostic world. Consequently, truth claims become hegemonic deceptions. However, the refusal to specify law also conflicts with certain other claims Koskenniemi has put forward, notably: that we can distinguish between “competent legal arguments” and statements that “fail as legal arguments”; that “international law is highly structured as a language”; and, especially that “it does not follow that we cannot choose between better or worse preferences, traditions we have more or less reason to hope to universalize.”¹⁷⁵

¹⁷² See Beckett, *supra* note 64.

¹⁷³ Neil MacCormick, *The Ethics of Legalism*, 2 *RATIO IURIS* 184, 191 (1989). Hans Kelsen makes a very similar point in *PURE THEORY OF LAW* 2 (1934).

¹⁷⁴ Beckett, *supra* note 64, at 214-5.

¹⁷⁵ Koskenniemi, *supra* note 5, at 119.

Koskenniemi denies that his understanding of law's adversarial or linguistic character amounts to "an essentialist claim about its "nature"."¹⁷⁶ But it is unclear why he holds such antipathy to questions concerning the essence of law. Perhaps I have misunderstood again, or perhaps Koskenniemi has asked the wrong question. Rather than focus on the issue of whether law has an *a priori* or ideal form, we can accept that law is a human creation.¹⁷⁷ Although "a "projection" of the human mind",¹⁷⁸ and thus not a pre-philosophical, or brute, fact against which theories can be evaluated,¹⁷⁹ law *still* requires a form.¹⁸⁰ As such we *can* ask, what is the *best* form for law? How could law most valuably serve humanity; and we could well – and it seems to me that Koskenniemi implicitly does – argue that formalism is the best form of law: that it is right, correct, from now on, for all times and places.

Evaluative questions about the form of law can *only* be asked from the perspective of purpose.¹⁸¹ Thus Koskenniemi could not be more wrong when he suggested that: "In the end, very little seems to depend on any general response to the question 'what is international law for?'"¹⁸² However, this is only because he treats this question as a substantive one, whose answer would contain more than the seeds of Hubris. However, toward the end of that very same paper, Koskenniemi attributes three "objectives" to international law.¹⁸³ These can form nothing but an answer to the same question, read formally. The third objective "international law itself", is the important one. International law functions as the site/mechanism of conflict displacement, as our understanding of order, and the desirability of order. That is its true virtue; which necessitates its inclusiveness and indeterminacy.

However, it is equally worth noting that, in Koskenniemi's own terms, only formalism fulfils this abstract function. The "[e]xpression of the universalist principle of inclusion [which] mak[es] possible the regulative ideal of a pluralistic

¹⁷⁶ KOSKENNIEMI, *supra* note 1, at 599.

¹⁷⁷ PHILIP ALLOTT, *EUNOMIA* xxvii (2001); "We make the human world, including human institutions, through the power of the human mind. What we have made by thinking we can make new by new thinking."

¹⁷⁸ MAARTEN BOS, *A METHODOLOGY OF INTERNATIONAL LAW* 7 (1984).

¹⁷⁹ Pace, Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT 1, 36 (Jules L. Coleman, ed., 2001).

¹⁸⁰ Beckett, *supra* note 64.

¹⁸¹ *Id.*

¹⁸² Koskenniemi, *What Is International Law For?*, *supra* note 8, at 58.

¹⁸³ *Id.* at 77.

international world", is a virtue of formal law, and of formal law alone.¹⁸⁴ Instrumentalism precisely aims to defeat this pull towards universality. Although formalism may sometimes atrophy, or slip toward the false universalism of *Kitsch* or "rational imperialism", under instrumentalism, this is the best outcome available, and it is more likely that "Rational Imperialism [will] turn out to be a façade for cynical imperialism."¹⁸⁵

That is the move which destroys the delimitation between law and politics, international law and international relations. It is the move which precludes the separation of legal and non-legal argumentation - the move which expands the definition of competence to the point of meaninglessness, to the point where it ceases to function as a definition. It is the point where Koskeniemi's descriptive and normative ambitions decisively collide, where it is the latter that must be privileged, where instrumentalism is jettisoned from the theory of law.

It is in attempting to make this methodological shift that the illusory nature of 'empirical analysis' comes into relief: an empirical method must define its data and categories no less than a normative method. Consequently, the difference is between more or less self-aware normative methodologies. Koskeniemi ought to pay particular attention to this methodological concern because his constructive project drives his critique; as a result, those methodological commitments which undermine the constructive project deprive the critical project of its purpose. This mandates the methodological 'shift' or realisation; and that alters the identification of law.

Formalism then becomes the correct, the (only) "competent" way to "speak" international law. If, and only if, we (whoever we are) stick loyally to formalism, even when it goes against our immediate desires, can we retain a right to criticise those who do not; not as bad people, but precisely as incompetent lawyers. "In this sense universality (and universal community) is written into the culture of formalism as an idea (or horizon), unattainable but still necessary."¹⁸⁶

¹⁸⁴ *Id.* at 69.

¹⁸⁵ KOSKENIEMI, *supra* note 7, at 500.

¹⁸⁶ *Id.* at 507.

J. The Limits of Deconstruction, Formalism and Interpretation

If formalism is understood as the only competent way to practice PIL, then the instrumental resort to purpose can no longer be used to undermine a legal rule, nor to suspend its application. This has implications for the indeterminacy thesis. In particular, Koskenniemi has recognised situations “where there is no semantic ambivalence whatsoever”.¹⁸⁷

Thus, despite his deconstructive tendencies, Koskenniemi would surely agree with Eco that words – at least once structurally located – *do* have meaning:

*Some contemporary theories of interpretation assert that ... a text is brought into existence only by the chains of the responses it elicits, ... that ... a text is nothing more than a picnic where the authors brings the words and the readers the sense. Even if that were true, the words brought by the author are a rather embarrassing bunch of material evidence that the reader cannot pass over in silence.*¹⁸⁸

This does reduce the impact of indeterminacy – though the semantic critiques alone identify a vast degree of indeterminacy – and highlights the limits of Koskenniemi’s observation that “Kelsen and Schmitt agreed that no decision could be automatically inferred from a pre-existing norm”.¹⁸⁹ Although Kelsen did not view this process as automatic or syllogistic, he did understand it as constrained by the ‘frame’ of permissible interpretation.¹⁹⁰ Indeed, “[t]he very idea of treaty and codification make sense only if one assumes that at some point there emerges ... a standard that is separate from its legislative background.”¹⁹¹ The critique of rules remains, and cannot be undone; but with the elimination of instrumentalism it is, to some degree at least, a limited critique.¹⁹²

¹⁸⁷ KOSKENNIEMI, *supra* note 1, at 590.

¹⁸⁸ Umberto Eco, *Reading My Readers*, 107 MODERN LANGUAGE NOTES 819, 821 (1992).

¹⁸⁹ KOSKENNIEMI, *supra* note 7, at 496.

¹⁹⁰ Kelsen, *supra* note 173, at 350-2.

¹⁹¹ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 69; but *contra* KOSKENNIEMI, *supra* note 1, at 572-3.

¹⁹² Iain Scobbie, *Wicked Heresies or Legitimate Perspectives? Theory and International Law*, in INTERNATIONAL LAW, *supra* note 8, at 83, 89-90.

K. A Little Anxiety: Is Formalism Really Enough? Koskenniemi's Rejection of Purposive Argument Reconsidered

Koskenniemi's understanding of formalism appears to presuppose that law is a tool, *our* tool, which we can deploy. As such, it entrenches the presupposition that our desire for (just) order conceptually precedes our desire for (and knowledge of) law. Consequently, it does not (on the surface) engage the complex interrelationships between law and (the desire for) order. Acceptance of such an *a priori* desire (order) conflicts with both Koskenniemi's liberal agnosticism about values, and his embrace of liberalism as a discourse of disorder, of conflict.¹⁹³

Despite acknowledging, even emphasising, the violence of order (of normality), he attempts to limit this to the current order, almost assuming that another ordering is possible; yet he has disavowed the eschatological escape of a deeper harmony of interests.¹⁹⁴ Moreover, Koskenniemi implicitly adopts arguments from Heidegger, and explicitly from Foucault,¹⁹⁵ which bequeath his thesis an underlying argument that could be termed 'the collapse of time'. Our desires do not predate our social-structural location; they are not intrinsic, but constructed.

Recognition of the contingency of our desire for order questions the sufficiency of Koskenniemi's engagement with Schmitt. Surely it is not enough to reject Schmitt (solely) on the basis that his arguments do not in fact take the form of the concrete-order-thinking that he claims.¹⁹⁶ Nor that they form a corollary of the domestic theory of absolutism.¹⁹⁷ These points are true, and important, but they do not undermine the "structure of conflict"¹⁹⁸ which constitutes Schmitt's intellectual legacy.¹⁹⁹ Presupposing the primacy of peace may entrench both the current

¹⁹³ By understanding order as the peaceful resolution of disputes by reference to an 'impartial' third-party, and focussing on ways to justify this (even though it cannot work), Koskenniemi's arguments legitimate non-neutrality – and preclude legitimate resort to extra-legal violence – through a particular (and circular) understanding of legitimacy (as order).

¹⁹⁴ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 59, especially footnote 4.

¹⁹⁵ KOSKENNIEMI, *supra* note 1, at 571, 614 footnotes 15, 151.

¹⁹⁶ Koskenniemi, *supra* note 83, at 495.

¹⁹⁷ *Id.*

¹⁹⁸ Rasch, *supra* note 27, at 38.

¹⁹⁹ *Id.*

(radical) institutional inequalities and the culture of apathy towards them, the “contract of mutual indifference”, toward which Koskenniemi is so scathing.²⁰⁰

Drawing on Pogge as he does,²⁰¹ Koskenniemi could point out that only small sacrifices are needed on the part of the developed world to eradicate extreme inequality, to ameliorate the current institutional settlement. However, these would be completely insufficient for the true pursuit of “progressive” justice that animates his work. Amelioration would simply entrench current apathies, the current refusal on the part of the developed world to take *responsibility* for the plight of the rest. The current international economic order not only exploits the poor, it also subsidises the rich. To rectify this, the developed world would need to compromise its own standards of living substantially.²⁰² It is difficult to imagine that a simple embrace of empathy could motivate such sacrifice, that we could really move from narcissism to empathy without suffering and violence, that formal argument could operate as the functional equivalent of conflict.

From this perspective, Koskenniemi seems unable to overcome the dichotomy between the liberalism that he embraces, and its self-description, which he rejects. In his own terms, it seems unlikely that formalism can provoke a *sufficient* “inner anxiety of the Prince”.²⁰³

Those pursuing a progressive politics, representing subaltern causes or marginalised peoples are aided and burdened – facilitated and limited – by the law. Those seeking an end to the injustices inflicted upon the Palestinian people, on those experiencing extreme poverty, or on any other wretched of the Earth, may speak – and seek empathy – in the language of universal law. However, they may not resort to violence, not even when their pleas are ignored. Thus even where law does not imbue their arguments with sufficient strength, it *does* function to preclude *their* resort to force, even as it ignores that force used silently, insidiously, and constantly, against them.²⁰⁴ Not only is a subaltern resort to force ‘illegitimate’, it is

²⁰⁰ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 73.

²⁰¹ KOSKENNIEMI, *supra* note 1, 606, 615 footnotes 122, 154.

²⁰² This is so on two levels, first the viciously unfair and exploitative world trade system, on which see *Id.* The second is the concept of “ecological debt”. Put simply, for everyone on the planet to enjoy an average British lifestyle, we would require the resources of 3.1 planet Earths. Consequently, this lifestyle can only be maintained by expropriating resources, and actively denying them to those in the developing world. See, for example <http://news.bbc.co.uk/1/hi/sci/tech/4897252.stm> and: <http://news.bbc.co.uk/1/hi/sci/tech/4696924.stm>

²⁰³ Beckett, *supra* note 27.

²⁰⁴ *Id.*

also *ineffective* because it undermines recourse to law; a recourse which is always already possible, and thus necessary, and sufficient. This reveals a darker side to Koskenniemi's epistemic ethics: law is not our tool; *we* are constructs of international legality.

L. Concluding Thoughts: Indeterminacy, Deconstruction and the 'Changing' Nature of Koskenniemi's Work: Post-modern Anxieties?

When I re-read the Epilogue, for this review, I encountered a 'text' fundamentally different to that I had read for my PhD (my third mistaken engagement with Koskenniemi); different enough to raise a question: was I interrogating the text, or was the text interrogating (and integrating with) me, and *my* project of international law? Whichever project was current in my mind, at that time (or this time), Koskenniemi's text – the entire, persuasive body of Koskenniemi's work – spoke to it.

Perhaps all reading is constituted in such an interactive, dynamic, process: a synthesis of text and reader; with only author missing. But then again, perhaps Koskenniemi's text is a particularly acute example of this;²⁰⁵ his (self-)reflection on our common practice a mirror – an acutely perceptive and revealing mirror – into our own enquiries, our own questions, fears, and our hopes for the International Law Project. This perhaps is the greatest achievement of Koskenniemi's work – analogous to his understanding of the greatest achievement of international law – to provide in an agnostic world a "shared surface"²⁰⁶ on which the debate over our shared and disputed self-understanding can be engaged.

In seeking to understand and 'order' the complex body of work Koskenniemi has produced, I have sought to bring to the surface a sense of coherence, of an underlying theme which unifies his work, though it may also limit it. However, as I noted earlier, Blake's observation that to understand one must empathise, and the deconstructive insight that we read our own projects into the inevitable *aporia* in all texts we encounter, each emphasise the distance between text and interpretation. Thus I must conclude this review with a confession, and an apology. I do not entirely agree with Koskenniemi's thesis or his strategy as I understand them, this critical distance is, after all, a precondition of critical review.

²⁰⁵ Scobbie, *supra* note 198, at 90-1.

²⁰⁶ Koskenniemi, *What Is International Law For?*, *supra* note 8, at 77.

Nonetheless, I am anxious that in attempting to find (or impose) a coherence between his varied recent contributions, I do Koskenniemi a disservice. There are surface differences, and perhaps they do not hide a deeper unity. Perhaps in bringing a compatibility to the relations between them I *also* remove a productive tension or conflict, an occasional confrontation which will introduce a new settlement through co-ordination and thus 'evolve' or stabilise their intellectual system.²⁰⁷ Perhaps, that is, the *desire* for commensurability within the theory was mine, alone. Perhaps the crooked paths his writing sometimes takes are necessary, or at least beneficial, and should not be straightened out to aid the reader who travels them. Having imposed unity, I turn, at the last, back to Blake, and end, perhaps, with a final, pre-modern, anxiety, have I done justice or violence to the work?

*Improvement makes crooked roads straight; but crooked roads, without improvement are roads of Genius.*²⁰⁸

²⁰⁷ *Id.* at 77. His 2006 "Chorley Lecture" covered similar ground; this should be published in the Modern Law Review in 2007.

²⁰⁸ Blake, *supra* note 4, 98.