Koskenniemi: A Critical Introduction

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I think international law has a wonderful political and intellectual potential (this is why I am interested in its history) but that it has in the 20th century become – *malgre soi* – a small bureaucratic discipline at law schools. My project is to try to revive a sense of its original mission, its importance. I suspect I am creating a myth (for it probably never was much better) – but myth-creation is an important aspect of political activity and activism.

(Martti Koskenniemi, commenting at a Conference at the Law Faculty of the Sorbonne, February 2004.)

I

MARTTI KOSKENNIEMI IS now well-known throughout the world, not only as a result of his position as the President of the International Law Commission's study group on the fragmentation of international law, but also on the basis of his doctrinal work. Both *From Apology to Utopia*[1] and *The Gentle Civilizer*[2] are truly remarkable intellectual achievements, each exceptionally powerful in its own way, as they have profoundly revolutionised the ways in which we can understand both international legal discourse (*From Apology to Utopia*) and its history (*The Gentle Civilizer*). In doing so, they move from a structuralist approach to one based upon historical narration and contextualisation; a progression driven not by chance, but on the contrary by the desire to clarify the object of our discipline and its effects on the international plane. Koskenniemi has never intended to produce a 'theory of international law'; indeed, he would object to the

[1] M Koskenniemi, *From Apology to Utopia; the Structure of International Legal Argument* (1989) (Re-issue with a new Epilogue, Cambridge University Press, 2005) 683. I will refer here to the recently published second edition, which contains an extremely important new epilogue in which the author himself puts his work into perspective and discusses the criticisms that have been made. The first edition, now out of print, was published in 1989 by the Finnish Lawyers' Publishing Company.

[2] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960.* Hersch Lauterpacht Memorial Lectures (Cambridge, Cambridge University Press, 2002) 569.

very term itself, as his goal has never been to be perceived as a legal theoretician or philosopher, but rather and above all as an international lawyer addressing other international lawyers. In doing so, he has sought to illustrate the ways in which international legal discourse is articulated, the ways in which it operates, and to illuminate and improve our practice of international law in full awareness of both its limits and its promise.

Indeed, when we read Koskenniemi we, in my view, become the privileged witnesses of an extremely powerful and lucid account of the linguistic and contextual reality of international legal discourse. It is, moreover, an account that is always in motion, undermining itself insofar as it cannot be exempt from the ambiguities and other difficulties that Koskenniemi is constantly seeking to overcome (as is, for example, attested to by the new epilogue to the reissue of *From Apology to Utopia*).[3] Often, we academics, after having staked out our initial arguments, are so inclined to repeat ourselves that we continue, simply restating in another form that which we said at the outset. Yet, if Koskenniemi's thought has remained deeply conditioned by his first book (and by the first of the texts in the present volume), or perhaps more accurately, by the paradigm upon which it was based, we cannot but admire the manner in which he has progressed without ever appearing constrained by any of the frontiers that often limit academic thought. Koskenniemi is an author without frontiers – personal or intellectual – and this, I think, is one of the reasons for his incredible productivity, and for the versatility and innovation of his thought. When we read many of his innumerable works, and the texts collected in this volume, we see that Koskenniemi – who speaks at least four languages – genuinely seems based at the intersection between the three great traditions that formed the three pillars of *The Gentle Civilizer*: the Anglo-Saxon, the German and the French. This intersecting of traditions and familiarity with the work of foreign authors is evident in *From Apology to Utopia*, not merely in the vast range of literature cited, but also in the very reasoning of the book itself. Although this work unquestionably reflects the influence of the Critical Legal Studies (CLS) movement in the United States, it draws, in doing so, directly on the source of French structuralism, borrowing its analytical method from the work of Levi-Strauss; it is thus less influenced by the 'Derridean' strands of CLS so popular in the United States.

That the author is familiar with these three major cultures should not come as a surprise, and can be explained in part by his education in Finland, and in part by his own personal trajectory. At the time, legal education in Finland largely followed the German tradition: Kelsen was, of course, studied; as were Laband, Gerber, Jellinek, Weber and the Frankfurt School. Curiously, however, very little in the way of Anglo-Saxon thought and, of course, even less of French international legal thinking was taught there. It was thus at University that Koskenniemi became immersed in the German jurists, and in the culture of Scandinavian realism dominated by Olivecrona and Ross. The influence of the hard realism of the

[3] Koskenniemi, *From Apology to Utopia* (2005) 562–617.

Scandinavians is also perceptible in Koskenniemi's work (he devoted an article to the subject), but he was equally able to make a very firm break with that heritage.[4] He developed a more profound knowledge of the Anglo-Saxon and French legal cultures a little later, during the year he spent at Oxford from 1982–83, and as a result of his work at the Finnish Ministry for Foreign Affairs, which led to him spending some time in France and considerably more in the world of UN multilateral diplomacy. During his travels, he discovered in particular the thought of the American critical legal scholars – and above all that of Roberto Unger, and Duncan and David Kennedy – whose direct influence can be seen so strongly in his work.

Through his education, his reading and his travels, Koskenniemi has thus become thoroughly transdisciplinary; and we can see in him an embodiment of the advantages that studying law in a manner free from disciplinary barriers can bring. Koskenniemi's thought is without such barriers, without any intellectual taboos; the different texts collected in this volume show a multi-talented author prepared to venture across all of the different landscapes of the law and its adjacent fields, into which he increasingly interweaves history, literature and the human sciences.

On one reading, a number of his works such as, for example, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law' or 'International Law and Hegemony: A Reconfiguration' demonstrate that Koskenniemi has transcended the Anglo-Saxon/Continental cultural divide, and thus also that between realism and formalism: precisely the kinds of classic dichotomies from which he has sought to escape. From this particular perspective, Koskenniemi's work strikes me as unclassifiable; his piece entitled 'Perceptions of Justice: Walls and Bridges between Europe and the United States' (not included in the present volume) illustrates well his knowledge of, attachment to, and critical perspective on these two worlds, European and American, that he knows so well.[5] Thinking of Koskenniemi, I am reminded of what someone once said of Paul Ricoeur: 'he strikes out along ridges'. All of Koskenniemi's thought is located on such 'ridges': exposed to the open air and to multiple horizons, vibrant, strong, fertile, never restricted within its own confines or inward-looking, but on the contrary in constant interrelation with other worlds, other cultures, and other authors.

It would, however, be a mistake to think that by using this interdisciplinarity, these cultural intersections, Koskenniemi would lose himself on these borrowed paths among an increasing range of perspectives and theories. On the contrary, his work rests upon certain fundamental presuppositions through which he has forged his own concepts and practices, following a rigorous method of reasoning that is entirely particular to him. I will return below to certain key themes within these foundations; at this early stage, however, it suffices to note that one of the most notable elements is without doubt the inseparability of theory and practice in his work, as is shown by the numerous concrete examples to which he refers

[4] M Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism' (2003) *European Journal of International Law* 14, 653–59.

[5] M Koskenniemi, 'Perceptions of Justice: Walls and Bridges between Europe and the United States' (2004) *Heidelberg Journal of International Law* 64, 305–14.

throughout the texts collected in this volume. He always seeks to come back to practice – not in order to illustrate some deductive, theoretical argument, but rather to draw out inductively the lessons that can be learned from the practice itself, as he explains in his piece entitled 'Style as Method Letter to the Editors of the Symposium'.[6] This inextricable association between theory and practice, intrinsic to his thought, corresponds to the broader goal that Koskenniemi has chosen to pursue: not, as noted above, the production of a general theory of law, but rather the clarification of practice and discourse of international lawyers – or perhaps more accurately, the discourses and the practices that appear to him simply as different styles that we can adopt depending on circumstance, but by which we are also inevitably constrained.

This association between theory and practice has been further reflected in his working life: a scholar, and now Professor with the University of Helsinki, who has always at the same time been a practitioner. Employed as a legal counsellor in the Department of Foreign Affairs in his home country, he was, as a result of the small size of the legal department, quickly given important responsibilities. In particular, he participated in a number of United Nations Environment Programme (UNEP) working groups, and was for a number of years a member of the Finnish delegation to the Sixth Committee of the UN General Assembly. From 1989–90, including the start of the first Gulf War in Iraq, Finland was a member of the Security Council; and Koskenniemi took away from these years an insider's experience that later informed his article on 'The Place of Law in Collective Security'.[7] He was also a counsellor on legal affairs in his Foreign Ministry, working in a number of different areas, such as relations with the USSR at the time of the dissolution of the Soviet empire,[8] and a Co-Agent of Finland in the Case Concerning Passage Through the Great Belt before the International Court of Justice (he has continued this activity – also pleading for Finland in the recent Kosovo advisory opinion (2009). This constant activity in the service of his country made a lasting impression upon him, and thus something he often reflects upon in his doctrinal writings. This intimate knowledge of, and desire to remain connected to, practice accounts for the fact that Koskenniemi has never approached the study of international law in an external manner, but has always sought to conduct an internal exploration of international legal discourse, be it in terms of its structure, its operation in theory and practice, or its historical development. Here we find another of the strengths of his work. 'Normative' theories of law, international or otherwise, take as their object principles rather than rules or institutions. However, in Koskenniemi's view, the true principles of international law cannot be discovered through some sort of a priori ideological self-justification, but rather within the internal conceptualisation of international legal practice – in the way in which

[6] See chapter 12 in this volume.

[7] Chapter 3 in this volume.

[8] Amongst other writings on this experience, see M Koskenniemi et PM Eisemann, *La succession d'Etats : la codification à l'épreuve des faits* (Académie de droit international de La Haye, La Haye, Nijhoff, 2000) 1012 et M Koskenniemi et M Lehto, 'La succession d'Etats dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande' (1992) AFDI 905–47.

international lawyers conceive of that which they actually do. Thus, in his piece entitled 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', he notes that 'International law is what international lawyers do and how they think.'[9]

Moreover, in his essay on 'The Place of Law in Collective Security', Koskenniemi again insists upon the necessity of this internal perspective, denouncing external critiques such as those offered by the more radical Anglo-Saxon realists. For him, the external point of view is completely irrelevant for the decision-makers themselves. It has no comprehension of their situatedness as participants instead of observers in the process – their need to find some language to justify their action in view of concerns that they find relevant for their professional context.[10] Deferring to a strictly internal viewpoint does not, however, signify uncritically accepting and systematising the self-definition of international lawyers and legal institutions in order to render it intelligible. Yet neither is it a case of breaking entirely with this discourse and adopting a purely external perspective, attempting to comprehend it from the outside and totally ignoring the pre-understanding that international lawyers and other relevant actors have of their object and of their discipline: to do so would be to remain entirely unaware of that which imparts all particularity, all specificity to law. Nothing could be further from Koskenniemi's approach. Instead, he occupies a space between these two positions, adopting what François Ost and Michel van de Kerchove have called, following Hart, a 'moderate external point of view' – that is, a perspective that '[takes] account of the point of view internal to law without adopting it', and without seeking to furnish it with its ultimate justification.[11]

His multicultural perspective and his 'moderate external' mode of reasoning aside, is it possible to discern a consistent thread running throughout Koskenniemi's work, notwithstanding the fact that he himself vigorously resists the idea of developing a systematic theory? A priori, the search for such a thread seems ill-fated: having emphasised the richness and the constant movement and innovation of his thought, it might easily be concluded that its originality is to be found not at one but at multiple points. At its core, his work is simultaneously located on a number of different levels, which it can on occasion be somewhat difficult to disentangle: it presents itself as at once an analysis of the discursive practices of international lawyers; as a theory of society and of politics; as a critique of liberalism and of modernity; as a re-interpretation of the history of international law; and even as an analysis of memory and truth. One purpose of the present volume is precisely to bring together the various aspects of this protean oeuvre in order to better grasp both its eclecticism and the full extent of its complexity. Reading the different texts collected here, however, it is possible to gradually discern the connecting thread

[9] See chapter 11 in this volume.

[10] See chapter three in this volume.

[11] See M van de Kerchove and F Ost, *Legal System between Order and* Disorder (Oxford, Clarendon Press 1994) 9. Here, as elsewhere, where I used an official translation of a French text for a direct quote, I will cite the English official translation used.

that enables this body of work to retain its structure and coherence across these many and varied fields of investigation. Indeed, it is perhaps even easier to discern this thread in this volume than it is in reading the two major intellectual monuments to which I referred at the outset, *From Apology to Utopia* and *The Gentle Civilizer*: as, leaving aside the obvious differences in form and genre, the general trajectory remains the same whether we are inclined towards his major books or whether we focus instead on his shorter, more accessible studies. The thesis presented in *From Apology to Utopia* is succeeded by that of *The Gentle Civilizer* in order to progress towards a specific horizon; just as the author has selected the articles included in this volume in order to progress towards a particular epilogue. The key decisions of the author are again evident in this volume, and we can see Koskenniemi's work develop in a manner that runs counter to the major trends in contemporary thought: neither positivist nor strictly realist, but structuralist, deconstructivist and anti-liberal.

So much so, indeed, that we might be tempted to suggest that the connecting thread in Koskenniemi's work might be that of rupture itself. His versatile and fertile intellectual trajectory could be presented as constructed around a succession of ruptures: a rupture with dogmatics and with the classic, logical manner of approaching international legal discourse by subjecting it to a deconstructive critique; a rupture with the classical, canonical history of international law, which has been called into question by his particular re-reading of the international legal project; and finally, a rupture with liberalism – the preferred option of the majority within the international legal world – against which he has set himself in favour of a progressive, leftist stance. It would not, it seems to me, be false to present Koskenniemi's trajectory in this manner: he is a committed international lawyer who has developed precisely through his opposition to a number of the traditional – conservative and academic – ways of understanding international law. Nevertheless, it is not this thread that I will focus on here in interpreting his work. Although rupture has certainly been one of the driving forces behind his thought, to me it seems overly reductive to make of the themes of opposition and fracture the connecting threads of his work. To do so would be to suggest that he only defines himself in opposition to dominant existing theories, whereas what he has sought to do has rather been to deconstruct the opposition between these theories and to understand their underlying foundations, in order to shed light both on the 'machinery' of international law and on 'its wonderful potential'. As Christian Descamps has noted, 'deconstruction is not destruction';[12] rather, it is to bring to the surface meanings that the play of language and the structures of thought have hidden or forbidden. We can thus choose another way of interpreting the thought of Koskenniemi: in my view, he has sought less to 'oppose' than to 'make sense', while remaining profoundly critical and thus 'committed'.

[12] C Descamps, *Quarante ans de philosophie française* (Paris, Bordas, 2003) 150 [*déconstruire n'est pas détruire*].

To make sense is, according to Ricoeur, a basic aspiration of all human beings; and Koskenniemi makes sense for the world of international law in a series of particularly brilliant steps, in many different ways (including, of course, the application of critical and deconstructive approaches) and constantly confronting the difficulties – practical and theoretical – to which international law gives rise. He 'makes sense' in this regard through his dual insight – that international law is at once a language and a site of politics – and then again through his use of this insight as a basis for commitment. In his major books, as in all of the texts collected in the present volume, Koskenniemi seeks to show that international law is above all a language characterised by a precise grammatical structure. This is the original and foundational point of departure for his entire approach, a condensed version of which is offered in the first article of this volume ('Between Apology and Utopia: The Politics of International Law') and constitutes the basic element of his work without which, in my view, we cannot understand anything that has come since. Law, however, is not only a language for Koskenniemi; international law is also politics. His revelation of the argumentative structure of international legal discourse should not, according to the author himself, create the impression that we are somehow trapped by this underlying structure; rather, it should lead us to the realisation that our very knowledge of the existence of such a structure can free us from ourselves, and prime us for our necessary – yet now lucid and fully understood – return to the politics of international law. Hence the title of the present volume.

II

Koskenniemi's work marks a genuine turning point in our understanding of international law. He is among those rare international lawyers who have managed to truly integrate the linguistic turn into their thought (and thus the work of Saussure, Wittgenstein, Peirce and Austin), also taking into consideration Perelman's theory of legal argumentation, the critical approaches of Foucault in France and the CLS movement in the United States, and the anthropological work of Lévi-Strauss. Drawing on these different sources, on his own impressive erudition and his in-depth professional experience, Koskenniemi succeeds in developing, from the first article in this volume onwards, a thesis that is at once profound, original and provocative: that the discourse of international lawyers corresponds to an argumentative structure from which there is no escape – regardless of the particular vision of international law to which we subscribe. In his view, this discourse oscillates – interminably, necessarily – between two poles of argumentation: the abstract utopianism of the idealists and the power apologism of the realists. It is inescapable because, as he illustrates with numerous examples, the more normative an argument is, the less it can be justified by reference to what actually exists in the world, and thus the more vulnerable it becomes to the charge of utopianism.

Conversely, the more an argument seeks to root itself in concrete reality in order to evade the charge of utopianism, the closer it comes to simply reflecting power and rendering it indistinguishable from the interests of the actors, and thus becoming susceptible to the charge of apologism. Put otherwise, international legal discourse is somehow trapped in between these two opposing yet intersecting poles of argumentation. The constraints inherent in the art of argumentation, in the play of language itself, in effect force each side to defend its viewpoint by borrowing, recurrently and unremittingly, the argumentative premises of the other.[13]

> Following mainstream structuralism, I described international law as a language that was constructed of binary oppositions that represented possible – but contradictory – responses to any international legal problem. I then reduced international legal argument – what it was possible to produce as professionally respectable discourse in the field – to a limited number of 'deep structural' binary oppositions and transformational rules. To this matrix I added a 'deconstructive' technique that enabled me to demonstrate that the apparently dominant term in each binary opposition in fact depended on the secondary term for its meaning or force. For example, the principles of self determination and of *uti possidetis* are at once mutually exclusive and mutually dependent: self-government is only possible within a fixed territory; and the authority of existing power can only be justified by reference to some idea of self-government.[14]

It is this that results in the fundamental indeterminacy of legal argumentation – an indeterminacy that cannot be resolved by reference to law alone. Only a political choice (a politics of law or of rights) can determine a solution. This does not mean that this is necessarily negative or 'bad', or totally arbitrary; and there is an awareness of this in the profession itself, an awareness expressed in the mundane way every doctrine always turns from determinative rules to the search for an 'equitable' solution. For Koskenniemi, this is an everyday demonstration of the profession's silent knowledge that its premises are always political in nature. Koskenniemi's demonstration of this point was both audacious and striking, enabling him to carry out his deconstruction of our major theoretical controversies and of all the dichotomies (positivism/natural law, consent/justice, autonomy/community, etc) that have long haunted our disciplinary repertoire, as all of these dichotomies are at once logically opposed and inevitably interlinked, and no solution thereto can have any decidable legal foundation. This deconstruction is itself based upon a structural – as opposed to a causal or logical – explanation of international legal discourse, within which we find the analytical frameworks that are fundamental to Koskenniemi's thought: the theme of identity-opposition within international legal discourse; the indeterminacy of norms and their formal predictability; the reversibility of arguments and the instability of the positions they support; and finally the inevitable and necessary reliance of each position upon its apparent opposite.[15]

[13] This argument is developed in the first of the texts collected in this volume, 'Between Apology and Utopia: The Politics of International Law', which is itself a condensed reworking of his major work cited above, Koskenniemi *From Apology to Utopia* (2005).

[14] See chapter 12 in this volume.

[15] See chapter one in this volume.

Clearly, such an approach to law is not common in Europe, despite the fact that the specificity of legal language, the indeterminacy of norms and the related problem of interpretation have become staples of international legal thought. Neither, however, is it so common to be 'banal' in other settings. The strength of this understanding of international law as a language lies in its ability to integrate that which is commonly referred to today as the 'linguistic turn', whilst also drawing on the contribution of the American CLS movement and the work of the French structuralists. The profound originality of Koskenniemi's work lies in his illumination of the underlying 'structure' of the discourse of international lawyers, whether they be academics or practitioners, and of the indeterminacy that results, ad infinitum, from that structure.

It is useful, in order to better understand both the origin and the impact of Koskenniemi's work, to recount briefly the characteristics of linguistics and structuralism and the contribution that they made to his thought. What is meant, first of all, by the term 'linguistic turn'? It is not simply an approach that understands law as a particular language (an old idea, established at least since Savigny), but rather one that seeks to explore in a more decisive fashion the relation between language and thought,[16] and the 'power of words';[17] to insist of the impact of language upon thought and upon social practices such as law. Since Saussure, contemporary linguistic theory has demonstrated that individuals are constrained by their languages and discourses, which form arbitrary and autonomous systems from which there is no escape. Language is not, however, merely a system of signs; it is also a social activity. This social dimension was emphasised above all in the work of Wittgenstein, who described the 'pragmatic' dimension of language (*Philosophical Investigations*, 1936–49).[18] Drawing on this pragmatic, social dimension of language, Wittgenstein introduced the notion of 'language-games' in order to illustrate the irreducibility of every discursive practice: each type of discourse refers back to a (social, historical, collective) practice that has its own rules and its own specific grammar. These language-games are social facts constructed upon implicit conventions. The pragmatic dimension of language also helps us to understand, thanks to the works of authors such as JL Austin, that our legal-linguistic utterances are not simply descriptive propositions, but also actions. Austin's famous book, *How To Do Things With Words*,[19] showed that when we formulate a legal argument, we are performing an act, an action; and that these acts, these actions, produce certain effects. The 'linguistic turn' also reminds us, in particular through the play of argumentation, that language is dialogue, and that dialogue is unique to humans. Language for humans is not, as it is for animals, a simple tool of communication; rather, it is that which gives individuals the capacity to think and to represent. To speak is to formulate ideas, and to accept that these are exposed to criticism. Thus, it is also to foresee objections and to test the

[16] D Nicolet, *Lire Wittgenstein. Etude pour une reconstruction fictive* (Paris, Aubier, 1989) 21.
[17] *La pratique de la philosophie* (Paris, Hatier, 2000) 120.
[18] L Wittgenstein, *Philosophical Investigations* (New York, Macmillan, 1953).
[19] JL Austin, *How To Do Things With Words*, 2nd edn (Oxford, Oxford University Press, 1976).

strength of our arguments. Of course, Plato had already stressed above all else the importance of dialogue; however, the contemporary linguistic turn constituted a powerful reintroduction of this dialogic and discursive dimension, which is constitutive of the human being.

With Saussure, writing at the beginning of the twentieth century (*Course in General Linguistics*,[20] 1907–11), the linguistic turn was simultaneously structuralist. Language was thus conceived as a system of signs in which each is defined not in isolation but in relation to the others: the meaning of each is determined by its position in the system as a whole.[21] Put otherwise, the whole – the structure – prevails over each individual element. The structuralist element of the discourse would later be contested, but it nevertheless altered to a degree our understanding of the language of law. While, previously, mastery of this language had conveniently represented the implicit possibility of rational discussion on the law, today it has come to signify equally that which eludes such a discussion. It signifies that which is inherent to the language of law in its social usage – which cannot be altered at will by individuals, politicians or international lawyers – but also that which ensnares them in the play of argument and counter-argument. It is, in any event, amusing to note here the intellectual detour taken by Koskenniemi in integrating structuralism into the language of international law, as he first came to structuralist analysis through the anthropological work of Lévi-Strauss and not that of the linguists.[22] In many ways, this provides a further reason for the link between the structure of language and the analysis of a particular social group – in this case, international lawyers – in Koskenniemi's work, even if the analysis of that group in a given context ultimately led him to move in a certain sense beyond a structuralist analysis.

All of this forms a particularly rich theoretical background to Koskenniemi's work on the discourse of international lawyers: it presents us above all with international law as both discourse and as social fact, as a particular language-game whose grammar he uncovers for us (in particular in the first text in the present volume). It is important, however, to understand precisely what the result of Koskenniemi's discourse-based critique is: it has an extremely powerful unmasking effect, which has not always been appreciated due to the fact that his critique is situated at the level of the structure of the discourse itself, and not that of the indeterminacy of norms or the ambivalence of words.[23] Indeed, Koskenniemi has often been accused of exaggerating the indeterminate nature of rules or legal

[20] F de Saussure, *Cours de linguistique générale*, edited by C Bally and A Sechehaye (Lausanne and Paris, Payot, 1916); translated by W Baskin, *Course in General Linguistics* (Glasgow, Fontana/Collins, 1977).

[21] ibid 431 [*conçue comme un système de signes se définissant les uns par rapport aux autres et non pas isolément : le sens d'un élément est déterminant par sa position dans l'ensemble du système*].

[22] Levi-Strauss himself borrowed his method of structuralist analysis from linguistics, granting primacy to the system over its various different elements and revealing in this manner the permanence of a certain type of arrangement of human relations.

[23] See Koskenniemi *From Apology to Utopia* (2005) 590, where Koskenniemi sets out all of the distinctions that follow.

terminology, even though his analysis is not primarily concerned with that issue, but rather is situated at an even more fundamental level. Put simply, legal norms might be absolutely 'clear', but they would nonetheless remain – always and inevitably – imprisoned within the structure created by the play of legal argumentation; a structure that renders them interdependent, and within which each is defined not in isolation but in relation to the others. Koskenniemi often takes the example of the play of restrictive and expansive interpretations of rules (which in turn decide which cases are and are not included within the rule in question), or that of the rule and the exception, as in both of these configurations each position necessarily refers to its opposite. When we are confronted by dramatic cases (such as the prohibition on the use of nuclear weapons) that pose the problem of the 'unthinkable exception' par excellence, and that thus seem to imply an absolute prohibition defined in its own terms and not in relation to other rules, our only option is to move beyond the play of legal language altogether – as demonstrated well by Koskenniemi in his analysis of the 'silence' of the International Court of Justice in the Nuclear Weapons advisory opinion ('Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons').[24] It is thus above all important not to mistake structuralist deconstruction of legal argumentation for, or to confuse it with, the classical question of the indeterminacy of norms or the problem of interpretation; Koskenniemi's work, even if it analyses the configuration of norms through the play of issues such as exception and inclusion, is simply not situated at that level. Rather, it is the relations between norms (and doctrines and principles) that are fundamental, and that together constitute the 'structure' of international legal discourse, not the individual elements thereof (norms, doctrines, principles) taken in isolation. There is thus stability to this 'highly formal and predictable' structure of relations, which forms across the great fluidity of possible arguments and positions.

Having shown this, however, Koskenniemi goes even further still as, in uncovering the structure of international legal discourse, he is able to deduce the general indeterminacy of the play of argumentation in law (which is different from the question of the indeterminacy of norms) – that is, the impossibility of resolving controversies on the basis of law alone, due to the way in which relations between the different norms, principles and doctrines are structured. It is important, in this regard, to read the new epilogue to *From Apology to Utopia*, in which Koskenniemi discusses in detailed and illuminating fashion what he calls 'the nature of indeterminacy'.[25] If this general indeterminacy is not the same as the issue of the indeterminacy of norms then it stems from the structure of the language; and yet it does not necessarily imply the indeterminacy of actual experience, or the unpredictability of solutions to particular controversies. Controversies are resolved every day; judicial decisions are handed down, following methodologies and modes of justification that are predictable to all those who have mastered the

[24] See chapter eight in this volume.
[25] Koskenniemi *From Apology to Utopia* (2005).

language of international law and who are familiar with the institutional practices and the players involved. Put simply, the solutions adopted and decisions taken no longer find their ultimate justification in the formal language of law; rather, they belong to the actual world of politics – which is that of determination and commitment, just as it is that of manipulation and exploitation.

This possibility of concluding legal debate and finding a solution by means of a political choice moves us from a pure linguistic structuralism to a theory of political action and of freedom, the seeds of which were already present in *From Apology to Utopia* but which were developed in more detail in his subsequent works.

III

The fact that international law is a specific social discursive practice, imbued with its own structure, leads Koskenniemi to draw a number of conclusions that are in fact quite far removed from radical structuralism, and demonstrate rather his affiliation with both the US CLS movement and with the Frankfurt School.[26] There is thus a second fundamental thesis developed in *From Apology to Utopia* (and in the first of the texts collected in the present volume), which is intimately related to, but ultimately moves beyond, the structuralist thesis, as it is situated at a different level than that of structural analysis: the critical exposure of the effects of political liberalism on international law. According to Koskenniemi, 'international law reproduces the paradoxes and ambivalences of a liberal theory of politics'.[27]

Liberal thought, which was born almost at the same time as international law itself, has constantly sought to defend the idea of the primacy of law over politics, in order to neutralise 'the passions' and to allow for conciliation between the different subjective values held by the members of international society. It has taken different forms, from natural law to positivism, objectivism to subjectivism, formalism to realism; it has left its mark on the different conceptions of sources and rules that we have inherited today; yet it has always sought to maintain the ideal of the primacy of law over politics.[28] The desire to do so has, however, a considerable perverse effect: it has masked the inevitable social and political conflicts that are the very heart of the international sphere, necessary to its evolution.

> In this article, however, I shall extend the criticism of the liberal idea of the Rechtstaat, a commonplace in late modern western society, into its international counterpart. I shall

[26] The Frankfurt School brought together, from 1923 onwards, at the Institute for Social Research in Frankfurt, a whole group of major German thinkers who tasked themselves with renewing Marxist analyses of society and denouncing all contemporary forms of totalitarian domination, including Max Horkheimer, Walter Benjamin, Theodor Adorno and Herbert Marcuse. Jürgen Habermas is the best known representative of the 'second generation' of this School, and has given it a less Marxist turn.

[27] Koskenniemi *From Apology to Utopia* (2005) xiii.

[28] See chapter one of this volume.

> attempt to show that our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, for reasons internal to the ideal itself, rely on essentially contested - political - principles to justify outcomes to international disputes.[29]

In this way, the link between Koskenniemi's two theses – that is, between his account of the language of international law as imbued with a highly determinate argumentative structure and his political critique of liberalism – is immediately clear: in bringing the argumentative structure of international legal discourse to the fore, he was able to show that the idea of the primacy of law over politics is pure illusion. In effect, no legal theory, norm or principle is ever capable of furnishing the means of its own justification: the argumentative structure of the discourse renders each and every position fundamentally undecidable. The ultimate determination of the 'best' argument is never grounded upon purely legal criteria alone, but is rather inevitably made on the basis of an underlying political choice – to the extent that the political neutrality sought by liberal internationalism since the inception of modern international law is a mere delusion, profoundly harmful in as much as it encourages the supremacy of experts and bureaucrats to the detriment of genuine political decision-making. Koskenniemi's goal has thus been to demonstrate the importance of politics within international law, and to rehabilitate the former at the expense of the so-called 'neutrality of law' and the liberal idea of the primacy of law. He has also been concerned to expose the hegemonic political project at work behind the strategies of universalisation of international law. An echo of this point, which is distinct from the simple rehabilitation of the political moment in law, can also be found in the work of Lévi-Strauss who, in the aftermath of the two World Wars and the Vichy regime, had extremely good reasons for doubting international law, and for his belief that the much-vaunted universalism of law and of values represented an excellent means of masking ethnocentrism and Western colonialism (*Tristes Tropiques*, 1955).[30]

This double focus (on language and politics) which constitutes, in fact, a single, two-sided thesis has been the subject of innumerable commentaries, such is the richness, strength and originality of the manner in which it brings together the critique of political liberalism and the structuration of international legal discourse.[31] It is also, however, a deeply provocative approach, as that which Koskenniemi refers to as 'liberalism' in international law covers the positions of the vast majority of international lawyers. As noted above, political liberalism in Koskenniemi's work corresponds in effect to a very broad idea of the primacy of law over politics, and over the subjective values of states. In fact, Koskenniemi at this point picks up arguments advanced by authors such as Roberto Unger and

[29] ibid.

[30] C Lévi-Strauss, *Tristes tropiques* (New York, Penguin, 1992 [1955]).

[31] See, eg the essays in 'Special Issue: Marking Re-Publication of From Apology to Utopia' (2006) 7 *German Law Journal* 977–1108.

Timothy O'Hagan,[32] developed in the context of domestic civil societies dominated by political liberalism, and makes them his own, transposing them to international society, and integrating them into the contemporary movement within both domestic and international society towards 'contextual justice' (the balancing of interests, appeals to notions of equity, etc) in which outcomes are not predetermined by rules. On this point, Koskenniemi's position has been subjected to inevitable criticism – even from within the international legal realist current in the United States – as he does not claim that international law, in the final instance, boils down to the political interests of states; rather, he refutes the idea that a solution founded upon law alone can exist. There is thus a radical element to his critique, which will be rejected or accepted depending upon each individual's own particular perceptions of the international legal project and of international law.

In any event, it would be a mistake to think that this claim implies a devalorisation of law that brings Koskenniemi's position closer to that of the Anglo-Saxon realist international relations specialists, some of the more radical deconstructionists or certain orthodox continental Marxist thinkers. There is, of course, a realist underpinning to his conception, the origins of which can be attributed to the influence of the CLS movement, and perhaps Scandinavian realism, too; however, his critique of liberalism, and the rehabilitation of the political that he advocates with regard to the ultimate choice that must be made in adopting any given position, are not made at the expense of international law, but rather in order to give back to each – to law and to politics – its particular role and purpose.

> A better metaphor than pigeon-holing for the law/politics relationship might refer to the contemplation of a landscape. In the morning, we see the colours of the trees and the reflection of the leaves on the water; in the evening, we notice the outline of the cliffs against the grey sky, and the shadow of the forest stretches far into the sea. The landscape is the same, the messages it conveys are different. The images are equally self-contained and full. We can reproduce both separately, but we cannot mix them. Likewise, law and politics seemed coherent and separate, yet related to one single reality.[33]

In doing so, Koskenniemi has also sought to illustrate at what points law and politics are consubstantial, intrinsically linked to each other like the two opposing faces of Janus, and how ignorance of this link can explain the trends towards bureaucratisation and technocratisation that he decries, along with the political liberalism that produces them. This is particularly evident when we read his two articles on human rights. The first of these ('The Effect of Rights on Political Culture')[34] seeks to criticise, in a manner typical of CLS scholarship (but also close to that of the Frankfurt School), the technocratic banalisation of human rights discourse and the perverse effects of this, while the second ('Human Rights,

[32] RM Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York, Londres, Free Press, Collier Macmillan, 1976) 309; T O'Hagan, *The End of Law?* (Oxford, Blackwell, 1984) 183.

[33] See chapter three in this volume.

[34] See chapter five in this volume.

Politics and Love')[35] sets out in a much more optimistic fashion the ways in which rights and politics can, in the metaphor of the impossibility of love, be brought together. His critical, deconstructive approach enables him to expose the subjective presuppositions and the extent of the political powers exercised by the legal authorities, in particular judges, that lie beyond the apparent impartiality and neutrality of rights discourse; yet his own position leads him to equally emphasise the necessary and positive character of that discourse.

The denunciation of political liberalism within international law also reflects one possible principle driving the evolution of Koskenniemi's thought since *From Apology to Utopia*, a more complex development than can be accounted for by structuralism alone. The discourse is not self-contained, it is not only structure; international law cannot be analysed as a language alone. It is also a set of utterances that produce social effects; it is an instrument that can be manipulated; and it is a practice that can be the bearer of much promise. It is not only a language; it is also a discourse. It is a politics every bit as much as it is a language; and this political dimension opens up new perspectives that become, for Koskenniemi, new fields of investigation. Law is politics just as law is culture; law is alive. It is not the metaphor of the game, so commonly used today, that is appropriate to describe the manner in which Koskenniemi conceives of international law; rather, it is without doubt – as his works make clear – the old metaphor of the 'tongue' that is best suited to this task; a tongue by now moulded by many centuries of culture, religion and history; a common tongue, constructed progressively, that has enriched other domains even as it has sombrely colonised them. Law belongs to the realm of the tongue, of lived experience, of history. To compare it to a game or to a system of rules, or even to a set of networks would without doubt appear reductionist to Koskenniemi, as it would be to ignore that in law which goes beyond the rules and the systems, beyond the networks, beyond the instruments used.

As the author himself explains in his new epilogue to the re-edition of *From Apology to Utopia*, the grammar that he revealed through his analysis of the linguistic structure of international legal discourse remains a given for him; it is that which he now refers to as 'the condition of possibility of international law', without which international law would cease to be itself and become something fundamentally different. However, we might also think that, since the publication of *From Apology to Utopia*, Koskenniemi has moved from a sort of 'optimistic structuralism' (corresponding symbolically to the more optimistic nature of international relations during the 1990s, when he wrote that book) towards a sharper awareness of the limitations of this type of analysis in allowing him to develop a more pronounced contextualism, at once historical and social. He has refused to allow himself to become locked within an ahistorical perspective of the sort that his structural analysis of international legal discourse could readily lead to, and to reduce the meaning of international law to the mere practice of combining different arguments. It is this that led him to show, in a more precise and altogether remarkable manner,

[35] See chapter six in this volume.

the limits of our discourse on death in, for example, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons'[36], with regard to the Opinion of the International Court of Justice on the use of nuclear weapons. These limits are discussed again in different contexts: for example, when the discourse on death becomes judicial and aspires to historical truth, as it did in the Milosevic case (see 'Between Impunity and Show-Trials')[37]; when it becomes banalised in the context of human rights (see 'The Effect of Rights on Political Culture')[38]; or when it ignores the dramatically unequal realities of international society (see 'International Law and Hegemony: A Reconfiguration').[39] These considerations have also led Koskenniemi to study in an in-depth (and internal) fashion the different discursive practices and behaviour of different types of international lawyer, as the play of argumentation only derives its sense from the perspectives of the actors immersed within their practices and cultures ('Between Commitment and Cynicism: Outline for a Theory of International Law as Practice'). The behaviour of the international lawyer, whether the lawyer is a legal advisor, a human rights advocate, a judge or an academic, is conditioned both by the lawyer's social and cultural environment and by the discursive structure of the activity that the lawyer conducts.

It is also for this reason that Koskenniemi has sought to define the various methodological approaches to international law as different 'styles' that are valid according to the specific contexts within which they are adopted. None (formalism, realism, feminism, third-worldism, etc) is 'correct', because all methodological approaches to international law are dependent upon a particular context:

> It was a merit of this theory, however, that it demonstrated that to achieve these strategic goals, the contexts of legal practice offered many different styles of argument. It was sometimes useful to argue as a strict positivist, fixing the law on a treaty interpretation. At other times it was better to conduct an instrumentalist analysis of the consequences of alternative ways of action – while at yet other times moral pathos seemed appropriate. Each of these styles – or 'methods' in the language of this symposium – was open-ended in itself, amenable to the defense of whatever position one needed to defend. None of them, however, gave the comfort of allowing the lawyer to set aside her 'politics', her subjective fears and passions. On the contrary, to what use they were put depended in some crucial way precisely on those fears and passions.[40]

Put simply, this means that we move beyond the analysis of international legal language as a structural system in order resituate that language within a precise historical, cultural or social context that also imbues it with meaning; with the consequence that the active will of the international lawyer ultimately prevails over the linguistic structure. Just as *From Apology to Utopia* was followed by *The Gentle Civilizer*, the texts presented in this volume follow this same guiding thread.

[36] See chapter eight in this volume.
[37] See chapter seven in this volume.
[38] See chapter five in this volume.
[39] See chapter nine in this volume.
[40] See chapter 12 in this volume at 299.

Meaning is no longer sought simply through an exposition of the grammar of international legal language, but rather through an understanding of this language as a discourse addressed by some individuals to others in specific and unique circumstances. Put otherwise, the meaning of an utterance is not produced by the structure of the relations between signs alone, the meaning of any given dialogue is not the product of the play of developed argumentation alone; rather, these result from the intention – or if not indeed a conscious 'will', then at least an externally conditioned 'intent' of the speaker – with reference to the historical, economic and social reality within which the speaker is situated. It is important to understand, however, that Koskenniemi is not here calling into question the argumentative structure that he unmasked previously; he is, on the contrary, continuing to pursue, in different ways, the same project set out in *From Apology to Utopia* – a project that developed and matured in the course of his subsequent texts. Since *From Apology to Utopia*, Koskenniemi has time and again drawn attention to irreconcilable disagreements (as, for example, in 'The Lady Doth Protest Too Much' and in 'Perceptions of Justice')[41]; his goal, however, has not been to reduce the tension between these opposing poles, but rather to show that this very tension is constitutive of the discourse and practice of international lawyers. In doing so, he seeks to show that although we present our theories and our arguments as being indissolubly tied to one single perspective, they in fact draw their strength from confrontation with opposing theories and arguments – to which they are thus inextricably linked. Yet from the moment that this has been successfully shown, the polemics to which they give rise become of little interest, as both poles of argumentation are at once true and false. This is not, for all that, mere empty rhetoric, as it remains decisive within and constitutive of international law. However, because these theories and arguments, these rules and principles, remain indeterminate, devoid of any ultimate, rational foundation in law, it is necessary to move onto the terrain not only of politics, but also of history, society and culture. It is these terrains that can impart some consistency to different arguments, and enable us to make a choice between them.

It is in this manner, therefore, that we can understand the general evolution of Koskenniemi's thought between *From Apology to Utopia* and *The Gentle Civilizer*: after having uncovered the argumentative structure of international legal discourse in the former, he then proceeds, in the latter, to situate that discourse in its historical context. And while, in *From Apology to Utopia*, he had in a certain manner demonstrated the exhaustion of the discourse (its 'end' in the philosophical sense of the term), in *The Gentle Civilizer* he detailed the exhaustion and the failure of the international legal project – understood as a liberal, humanist project born in the nineteenth century with the first great professionals of the discipline – itself. The act of re-situating international law within its liberal and history has enabled Koskenniemi to shed light on the hopes and the errors to which it has given rise up until the present day; a point in time at which, in his view, a

[41] See chapter four.

pragmatic and technocratic culture – detrimental to any project of advancing emancipation through law – has come to dominate. Despite this, however, Koskenniemi lapses neither into cynicism nor into disenchanted detachment with regard to his discipline and its object. This is the last general characteristic that I want to underline here: that his is a 'committed' approach to international law.

IV

Koskenniemi's critical analyses have not led him to the cynicism practiced by certain Anglo-Saxon realists; neither, however, have they led him to the neutrality of the more continental formalist jurists, nor to militant activism. He does, on occasion, adopt a sceptical perspective; but only as a barrier against dogmatism, not as a definitive suspension of judgment. For me, the sense that ultimately emerges from Koskenniemi's work is that of a positive, if profoundly critical, commitment; a commitment towards a new 'politics of international law'. The author himself has written a brilliant study, contained in the present volume, on commitment and cynicism in international law as two intrinsically linked professional attitudes within the international legal field ('Between Commitment and Cynicism: Outline for a Theory of International Law as Practice'):[42]

> In this chapter I want to argue, however, that no middle position is available; that to practice international law is to work within both strands of tradition: a sentimental attachment to the field's constitutive rhetoric and traditions, an attachment that I like to call 'commitment', and a pervasive and professionally engrained doubt about the profession's marginality, or even the identity of one's profession, the suspicion of its being 'just politics' after all, a doubt that I will call 'cynicism'.[43]

In this piece, he analyses the social activity of international lawyers, drawing on the notion of 'field' developed and used by the French sociologist Pierre Bourdieu in order to characterise the practices specific to different sectors of activity that result from the social division of labour. Individuals (agents) within these sectors consider as self-evident the interests and issues specific to their own 'field', despite the fact that they might be of no interest whatsoever to those in another. These very individuals are at once interdependent and in competition with each other within their own field in defining the legitimate contours of that field. Drawing on this idea, Koskenniemi was able to describe the two attitudes of commitment and cynicism as the two basic dispositions of all those working in the field of international law. In any event, his own theoretical presuppositions lead him here to a more general form of commitment, as an author who makes choices, who takes up direct positions on the most fundamental issues of our time, and who rejects the

[42] See chapter 11 in this volume.
[43] ibid 272.

illusion of positivist neutrality. It is a commitment against the 'non-committal legal rationality'[44] that, in his view, characterises contemporary international law.

How best to precisely define this commitment? A non-conformist both as an intellectual and as an international lawyer, Koskenniemi above all rejected the hermeneutics that he had been taught while at the same time setting himself against the tide of positivist and liberal thought dominant in international law – often provoking, perhaps predictably, some lively reactions against his position. Yet he has on each occasion put forward his case, calling for a renewal of the political within international law and denouncing the false axiological neutrality of legal discourse espoused by liberalism and positivism; calling for the rejection of the ventures into technocratic governance to which, in his view, strict positivism and strict realism both lead; and challenging the banalisation of particular discourses on law, either the all-too-comfortable closure offered by legal formalism or the hegemonic manipulation to which the pragmatism of the powerful leads.

There can be no doubt that, for Koskenniemi, this aspect is absolutely fundamental; both the necessity and the nature of this commitment can be readily observed running throughout his entire oeuvre. The theoretical elements of his thought rest upon a set of strong, pre-existing convictions that function as a sort of motive, underpinning and directing both his practical action and his theoretical work. Two elements thus remain constant in his work: the fact that the international sphere is profoundly unjust in its distribution of wealth and power; and the fact that international law alone cannot remedy this, as it is itself part of the problem. We too often think of international law as a means of prohibiting certain forms of behaviour, forgetting that, as a result of its discursive structure, it can also, and perhaps above all allow, authorise and legitimise any type of behaviour: each state, each tyrant, each economic actor in a position of power can find in international law the legitimation of their public policies or private interests. Each of them can turn to the opinions of legal advisors, enabling them, through the play of rules and of argumentation, to provide their positions with an aura of legal respectability. Hence the necessity to move beyond the framework offered by the legal discourse of the law, to move beyond the strictly 'legal' sphere, in order to take the struggle to the realm of politics, which alone renders us capable of founding a commitment, of taking a decision, and of fighting against injustice.

As all of the texts collected in the present volume attest, the vitality of Koskenniemi's thought has been harnessed in service of this type of commitment; a commitment that nevertheless remains essentially critical in nature, based upon a very precise analysis of our discursive practices (Koskenniemi is an author who seems to prefer describing international legal practice to reimagining or reinventing the whole field). Nor does he display the moralism of certain militants, who so often confuse morals with politics. To advocate for politics is not necessarily to

[44] To paraphrase H Albert, *La sociologie critique en question* (Paris, PUF, 1987) [*rationalité juridique sans engagement*].

advocate for 'the good'. Where this distinction is elided, it is perhaps too easy to arrive at a clear conscience or feelings of righteous indignation; whereas acceptance of the political is also to accept its violence, its flaws and thus also a certain amorality. Moreover, as Raymond Aron emphasised, in limiting ourselves to moral discourse we can avoid compromising ourselves with the political – but only at the cost of remaining ineffectual in the world. Koskenniemi constantly decries the faults of the international sphere, the profound rift between a powerful periphery and a centre that grows ever more impoverished. An expert on Marxism and sympathetic to the Frankfurt School,[45] he conceives of law as always profoundly anchored within an international social practice, the terrible inequality of which he never ceases to denounce, even if he subscribes neither to the Marxist logic of dialectical materialism nor to the project of the Frankfurt School, which would without doubt appear to him to be too rationalistic. Yet there is also something nostalgic about this commitment, a nostalgia that draws strength from his intimate knowledge of the history of international law, and of that period in the nineteenth century during which a small group of liberal, humanist internationalists embraced the ideals of an internationalist faith, without at that time understanding the negative consequences that this faith could lead to, or the fact that it already contained the seeds of its own destruction. *The Gentle Civilizer* is a brilliant and penetrating description of the slow decay of a dream, on the basis of which the author offers us a reflection on law, politics and history within the field of international law; a reflection that implicitly informed the texts that followed the publication of this second major work.

What, however, is the path proposed by Koskenniemi today? In order to discern this, it is necessary to return to the different conclusions that punctuate his various studies, and in which we find something that recalls the 'tragic optimism' of Sartre. Koskenniemi does not believe in either the capacity of reason to provide us with ultimate foundations, or in the Kantian ideal of peace through law – meaning that our lived experience is necessarily that of anxiety, uncertainty and incompletion:

> History provides little support for the belief that revolution or happiness could survive the first moments of enthusiastic bliss. The morning after is cold, and certain to come. And as we pick up the pieces of yesterday's commitment, we might perhaps fight tomorrow's cynicism by taking ourselves lightly, for a change.[46]

At the same time, the existential background to Koskenniemi's work lends a certain optimism to his latest writings, born from the conviction that individual freedom can be an act of creation, of rupture with the conditions in which we find ourselves; that freedom itself consists in the acts for which we are all – as international lawyers, men, women, victims and perpetrators – absolutely responsible.

[45] For Koskenniemi's position on Marx, see 'What Should International Lawyers Learn from Karl Marx?' (2004) *Leiden Journal of International Law* 17, 229–46; and in terms of his work closest to a critical social science perspective, see his article inspired by the work of Herbert Marcuse entitled 'Legitimacy, Rights and Ideology: Notes towards a Critique of the New Moral Internationalism' (2003) *Associations. Journal for Legal and Social Theory* 349–74.

[46] See chapter 11 in this volume at 293.

There is, ultimately, nothing else upon which we can genuinely count; yet, if this freedom is a goal, a commitment, it must be exercised with lucidity and, with regard to international lawyers, with a better understanding of the law for which we are striving, of the discipline within which we evolve, and of the international world within which we are situated. This implies, for Koskenniemi, not only a culture of politics and of responsibility, but also a culture of formalism. Although the latter may seem surprising, the author, in presenting liberty as the solution, evidently does not intend, in the manner of the more extreme forms of realism, to give free rein to the freedom of the strong against the weak; he thus ultimately returns to the formal barriers that the law can set up against this. It would thus be an error to conclude that Koskenniemi rehabilitates politics in order to dissolve the formal specificity of law. Indeed, it is for precisely this dissolution of law in politics that he criticises realist and instrumentalist approaches in his piece entitled 'The Place of Law in Collective Security', which contains a concrete and internal – and extremely convincing – demonstration of the specificity of the sophisticated, formal and normative language of law. Although he might appear very Kelsenian from this perspective, he is in fact even closer to the position of Max Weber in his concern to preserve the specificity of the object of his discipline and to maintain the distinction between legal and natural facts.

> That the United Nations has dealt with the humanitarian crisis in Bosnia in an insufficiently effective manner because the resources, interests, or policies of the great powers have militated against full-scale involvement may or may not be true. But its truth or falsity is not a sufficient response to the question of whether the United Nations has been justified in acting in the way it has, or what might be the right course of action to proceed in the future.[47]

Of course, Koskenniemi is not seeking here to defend a formalism whose goal is neutrality, masking political choices and conflicts; he is not proposing a positivistic formalism, but rather a committed, political and cultural formalism:

> Because formalism is precisely about setting limits to the impulses – "moral" or not – of those in decision-making positions in order to fulfil general, instead of particular interests; and because it recognises the claims made by other members of that community and creates the expectation that they will be taken account of. Of course, the door to a formalism that would determine the substance of political outcomes is no longer open. There is no neutral terrain. But against the particularity of the ethical decision, formalism constitutes a *horizon* of universality, embedded in a *culture* of restraint, a *commitment* to listening to others claims and seeking to take them into account.[48]

The result is that international law becomes an unsurpassable horizon in Koskenniemi's work; not only as a highly formal common language but also as a potential site of emancipatory struggles and of individual recognition.

[47] See chapter three in this volume at 94.

[48] See chapter four in this volume. The culture of formalism receives a fuller discussion in Koskenniemi, *The Gentle Civilizer of Nations* (2002) 494–509.

V.

Clearly, therefore, Koskenniemi is a 'committed' international lawyer, with his own personal method of exploring international law that he brings to bear on all of the fundamental themes of our discipline, very often placing him in the vanguard of debates. As a result, however, he inevitably finds himself more intellectually exposed than others, and his thought gives rise to some important further questions. Despite their exceptional force, Koskenniemi's arguments are not themselves free from difficulties, ambiguities even, of their own. Here, I want to briefly outline a number of these, before concluding with some reflections on the 'conditions of possibility' of his own discourse.

We might note from the outset, as others have done, that Koskenniemi seems on occasion to deliberately caricature opposing theories, presenting their positions in absolutist terms in order to make the task of critiquing them easier. This was the criticism levelled at him by, for example, Philip Alston, in the context of his presentation of human rights as 'trumps', and by Pierre-Marie Dupuy in response to his analysis of the European tradition of international law.[49] Koskenniemi is, of course, perfectly capable of putting across ideas that are foreign to him and formulating his own critical observations; it is, however, true that, on occasion, he does appear to resort deliberately to somewhat reductive polemics or to the use of irony in a manner intended to disconcert. The difficulty here lies less in the resort to polemics itself (which can, in fact, be greatly beneficial insofar as it provokes genuine reflection) than it does in the actual tenor of his discourse. Reliance upon caricature can lead to distorted conclusions, or cause the author to fall into the trap of reductionism.

Yet, a priori, Koskenniemi appears profoundly opposed to all reductionism: he never seeks to minimise positions, rules or institutions, or to reduce their contradictions, but rather to simply take full account of their tensions as a constitutive fact of international law. It is worth recalling also that his aim is above all to help those who specialise in our discipline to better conceptualise and structure their arguments through unmasking the internal structure and the historically-situated nature of their discourse. In this sense, he remains very close to the approach adopted by Wittgenstein, insofar as he understands his theoretical activity as simply a practice of problem-clarification and leaves entirely to one side any extravagant pretensions to resolving foundational problems. To leave problems to one side is not, however, to resolve them; and, if dealt with in this manner, they can subsequently reappear indirectly. Here I want to set out explicitly some of the issues that Koskenniemi omits from consideration; issues that can give rise to much debate. The strength of his claims is remarkable; yet, on occasion, his vision of law, of rationality, and of methodology can appear too narrow, or apt to give rise to a number of somewhat problematic consequences.

[49] P-M Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to the Universal Values: A Response to Martti Koskenniemi' (2005) *EJIL* 16 131–38.

Consider the question of the foundation of international law, which is, in a certain sense, at the root of all of the analyses collected in the present volume. Koskenniemi demonstrates that it is the absence of an ultimate foundation for law in the modern era that explains the indeterminacy of all possible positions and the need, ultimately, to have recourse to subjective and political solutions. He set this out clearly in terms of the 'liberal internationalist' turn, which has led jurists to abandon all idea of an objective foundation of international law; and it is undoubtedly true that international lawyers have for the most part abandoned this line of thought since the 1950s. In doing so, however, he has simply remained comfortably within the internal discourse of international lawyers and left completely to one side the entire contribution of an important element of contemporary legal theory, which presents the question of objective foundations in a different manner, basing it on the idea of intersubjectivity. From the deconstruction of law that he performs, Koskenniemi retains only the idea that legal discourse is a form of power, a very precise social argumentative practice, and a dialogue; but he dismisses any possibility of an intersubjective foundation for human rights or international law. He does not reject the idea that there can be a serious, deliberate and successful use of international law, claiming only that any such use is of necessity political and contingent. His entire approach to the foundation – or lack thereof – of law is summarised in typically exemplary fashion in his discussion of Philip Alston's views in 'The Effect of Rights on Political Culture',[50] in which the only idea of objective foundation that he entertains is in the form of a neo-natural law conception (of the type of which Dworkin sometimes seems to espouse), and the only universalisation that he envisages is that which results from a policy of hegemony (which can, of course, be the case). The possibility of basing it upon contemporary, intersubjective agreement is never considered.[51] This, however, is to ignore the entire recent discussion (led by figures such as Apel, Habermas, Rawls, Renaut, etc) on the possibility of an intersubjective foundation for ethical principles, including those of law, and in particular of human rights. Of course, these new contributions can be contested, in particular as being overly liberal; it is, however, difficult not to discuss them in a reasoned manner, simply claiming instead that these questions inevitably lead us back to problematics that we have now moved beyond. Indeed, the attempt to shed light on the argumentative structure of international legal language (that is, discourse as dialogue and as the play of argumentation) can accord perfectly with the contemporary themes of communicative ethics or neo-Kantian intersubjectivity, which allow for the rational re-foundation of legal claims in a manner that fully integrates the 'linguistic turn'.

We can, moreover, further clarify the issues at stake in this debate by reference to the more general turn in the philosophy of law taken at the same time as the turn to liberal positivism in international law; indeed, the two are, it seems to me, interlinked. The philosophy of law was strongly devalued in favour of a general

[50] See chapter five in this volume.

[51] See P-M Dupuy's discussion of this issue, Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to the Universal Values' (2005).

theory of the Kelsenian sort, viewed by the positivists/normativists as the sole scientific possibility. More generally, however, positivism deprived itself of the possibility of furnishing a complete solution to the question of foundations, referring that question back instead to philosophy. The key point here, however, is that the field of philosophy has remained very much divided on this issue. On the one hand, the post-Heideggerian heritage has cultivated historicism, relativism, the deconstruction of rationality and legal anti-humanism – to the extent that this area of philosophy (of which the deconstruction movement was part) has in fact come to indirectly reinforce legal positivism in its rejection of all critical perspectives based upon ideas of justice, and in its affirmation that no principle can claim to be genuinely universal. On the other hand, a significant section of contemporary philosophy has, in reaction against this post-Heideggerian movement, struck out on the path towards a re-foundation through an examination not of the object of the concept of law, but rather of the concept itself – and thus of its conditions of possibility in its universal dimension, and its disassociation from fact on one hand and morality on the other. These reflections led to an appreciation of the decisive role played by practical rationality and intersubjectivity. This contemporary philosophy of practical rationality, necessarily post-Kantian, has succeeded in integrating the linguistic and hermeneutic turn, allowing for the foundation of a formal universality that enables us to make a choice based upon something more than simply endlessly reversible ideas. We can thus adopt a position that is in this sense no longer 'fluid' or contingent, but that moreover is neither naïve nor metaphysically charged as was previously the case. Such a position can provide us with new foundations for reason and for a certain universality of values after the deconstructive work carried out in the various post-Heideggerian currents, such as those of Foucault, of Wittgenstein, of Derrida, etc.

In reality, Koskenniemi is fully aware of the different elements of this debate, although he of course only considers them in relation to the premises of his own conception of language and of politics. He is prepared to accept that a certain degree of intersubjectivity can be effectively practiced in the elaboration of norms, but insists that from the moment at which the play of argumentation itself begins, the practice of intersubjectivity inevitably becomes a simple argumentative strategy for claiming objectivity and thus a struggle to ensure the hegemony of one's personal position.

It is also worth noting that the conception offered by Koskenniemi of the different 'methods' within international law ('Letter to the Editor of the Symposium') – which he seeks to recast as culturally situated 'styles' – give rise to the same kinds of difficulties; here also his argument risks appearing somewhat reductive, as it seems to assume that international lawyers still claim to be able to attain genuine scientific objectivity through the application of their methods.[52] To do so, however, is to fail to acknowledge that our understanding of what constitutes the 'truth' of law has evolved considerably since Descartes; that the issue of scientific

[52] See chapter 12 in this volume.

objectivity within the domain of the human sciences such as law has changed, and that jurists are now much more conscious of the limits of their scientific work. Koskenniemi is, on the other hand, entirely convincing – and rightly so – when he shows that although the classic methods are most often presented as neutral forms of knowledge, disinterested in social conflicts, there is always a historically and socially situated interest in the application of each. It is also true that this neutral and disinterested knowledge is presented as a guarantee of access to a certain truth – a truth that is, however, no longer presented as absolute. However, does the revelation of the social and cultural interests concealed behind the apparent neutrality of the positivist necessarily mean that what were previously 'methods' become mere 'styles'? In addition, if methods are indeed only styles, does Koskenniemi not simply offer us a choice between the different styles to be made on the basis of our cultural traditions, just as the organisers of the symposium asked a number of international lawyers to set out their methodologies in order to compare their respective merits? Moreover, does not the critical approach, in revealing the irreducible particularity of each 'style', ultimately have the same results as the liberal approach that seeks to encompass the plurality of 'methods'? Koskenniemi, of course, claims to have deliberately broken with this methodological liberalism by changing style and writing a letter instead of a study on his method. Moreover, he makes no claim to be able to make an impartial comparison of the merits of each. To propose nothing is, however, still to suggest something: it is to claim that there is no underlying justification for choosing one approach over the others – the worst or the best. It is thus to propose here scepticism and relativism and thus equally to guide choices.

This problem doubles in difficulty when we reach the level of the final political decision. As we have seen, the solution to legal questions stems from a political decision and not from a reasoned choice – or, at least, this is the position that Koskenniemi generally adopts:[53]

> The decision always comes about, as a political theorist Ernesto Laclau has put it, as a kind of 'regulated madness', never reducible to any structure outside it. A court's decision or a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria. It is even a *hegemonic* act in the precise sense that though it is partial and subjective, it claims to be universal and objective.[54]

If Koskenniemi at times appears to resemble Hannah Arendt in the manner in which he conceives of politics as freedom and the capacity to innovate, he is very unlike her in his refusal to consider it as the constitution of a plural public space for deliberation and for the emergence of power without domination. He does not argue that all decisions are entirely externally conditioned, but neither does he believe in the possibility of a political praxis capable of generating a common good through the mutual respect – spontaneous or imposed – of those involved in the

[53] In chapter 10 in this volume, Koskenniemi mentions discussion and argumentation; he only does so very briefly, however, and without really dealing with the question of choice.

[54] See chapter nine of this volume, at 259–60.

discussion, as for him conflict is the fundamental reality of the social world and political decision the only available means of defusing it. Yet, if one of his many contributions has been to demonstrate that placing too much confidence in the deliberations of legal actors can on occasion mask problems of hegemonic obstruction or manipulation, he himself is unable to avoid a political decisionism that brings with it a number of problems of its own.

Decisionism is often darkly associated with the Nazi German thinker Carl Schmitt but has become a much more general problem, of central concern to a large number of German thinkers such as Niklas Luhman, Hans Albert and Hermann Lübbe (of whom neither the past nor the authority is contested).[55] Schmitt criticised the political and economic liberalism of his time in calling for a new order founded upon the political; and, in doing so, handed down a set of analyses of the meaning and the existence of the political decision that have become classics on the subject. In his view, liberalism promotes the rule of law in order to destroy political power. The essence of the political lies in the decision that determines and applies the norms and that, in doing so, expresses not objective justice but rather the existential and vital will of a people. Politics is thus a matter of decision, not of discussion; and it is independent of any foundation in rational argument, as it is always inscribed within the tragic context of the struggle for survival against the enemy. The risk here is not, of course, that Koskenniemi is seeking to defend a decisionism in the style of Schmitt. Such a suggestion would do him a profound injustice,[56] as he clearly does not espouse a power-based vitalism or an apology for war; and even less does he display the fundamental, detestable bad faith of the German author. On the contrary, he proposes an ethic of responsibility that brings him closer to the decisionism of figures such as Max Weber.[57] We shouldn't ignore the fact that political decisionism can bring to the fore the type of enigmatic moments in international politics highlighted by Raymond Aron, evoking the image of the President of the United States when confronted with the decision to launch a nuclear weapon.[58] That which can be called the 'decisionism' in Koskenniemi's thought is, in any event, not necessarily of that order. Certainly, he refers on occasions to 'the existential moment of the foreign policy "decision" ';[59] however, his idea of political choice far more often recalls the pragmatic manner in which the judge or even the advisor weigh up the two contradictory arguments before them before coming to a 'decision' that aims

[55] S Mesure, 'Rationalisme et fallibilisme' in A Renaud (dir), *Histoire de la Philosophie politique*, T. 5 (Paris, Calmann-Lévy, 2000) 150.

[56] As P-M Dupuy emphasises, Koskenniemi sometimes criticises Schmitt explicitly. He also, however, has carried out some very in-depth analyses of Schmitt's work: 'International Law as Political Theology: How to Read the Nomos der Erde' (2004) *Constellations: An International Journal for Critical and Democratic Theory* 11, 492–511; and 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations' in Michael Byers (ed), *The Role of Law in International Politics* (Oxford, Oxford University Press, 2000) 17–34, in which he argues that all international relations theory in the US was constructed upon Schmittian foundations. See also Koskenniemi (n 2) 474–94.

[57] See, in this regard, chapter four and chapter three in this volume.

[58] Mesure, 'Rationalisme et fallibilisme',154.

[59] See chapter four in this volume.

to strike a certain balance between the interests involved with regard to the context in question.

> Few international lawyers think of their craft as the application of pre-existing formal rules or great objectives. What rules are applied, and how, which interpretative principles are used and whether to invoke the rule or the exception – including many other techniques – all point to pragmatic weighing of conflicting considerations in particular cases.[60]

He even refers to this process as one of 'contextual prudence'.[61] We are thus some considerable distance here from the Schmittian sovereign who decides upon the exception in the name of the national will, even if Koskenniemi does on occasion seem to endorse this image in other situations.[62] We thus find in Koskenniemi's work the premises of all forms of decisionism: '1) the incompatibility of fundamental viewpoints, 2) the impossibility of resolving these conflicts through genuinely rational argument, and thus 3) the need to make a choice';[63] and the disadvantages that stem from these, such as a complete relativism with regard to the solutions adopted, and a radical conventionalism and contextualism close to that of the later Wittgenstein. As there is no possible rational foundation (that is, founded in reason) capable of determining the political decision, everything can appear reduced to a matter of tastes, interests, cultural preferences, and often hegemonic will, as if nothing – other than resistance movements – could oppose the hegemony of the most powerful: 'If law is also inevitably about the subjective and the emotional, about faith and commitment, then nothing prevents re-imagining international law as commitment to resistance and transgression.'[64]

Yet, if everything is contingent and relative, what is it that legitimates resistance movements rather than the hegemonic powers in their use of international law? What is it that enables us to differentiate effectively between the phenomenon of resistance and that of power? If everything is relative and cultural, what is it that makes a political culture of formalism more desirable than an instrumentalist political culture? On what grounds can this formalist culture be opposed to Anglo-Saxon instrumentalism? Can we really content ourselves with saying, as Koskenniemi does, that we can establish distinctions in the same way as 'we distinguish between kitsch and non-kitsch'.[65] Indeed, beyond its ironic formulation, does such a stance not once again simply render this distinction nothing more than a matter of taste, and thus essentially subjective and contingent?

Koskenniemi's response to these questions is more nuanced than it at first appears, and criticisms of this sort can miss their mark if they argue that he espouses an absolute subjectivism – at least, he himself would firmly reject such

[60] See chapter 10 in this volume at 253.
[61] Mesure 'Rationalisme et fallibilisme'.
[62] See chapter four in this volume.
[63] Mesure 'Rationalisme et fallibilisme' 153.
[64] See chapter four in this volume.
[65] Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) *EJIL* 16, 123.

a suggestion. Koskenniemi does not believe that there exists any genuine subjectivism or objectivism in the positions we adopt, any more than – in his view – there exist any purely subjective or objective values. Indeed, he rejects the idea that we can rely upon a clear distinction between the subjective and the objective as, from his deconstructivist perspective, these represent simply two opposing poles of the same game of argumentation, and are thus relative and interdependent. In this sense, there is no more 'pure' subjectivity than there is 'pure' objectivity in Koskenniemi's thought, as we can perceive these terms, always and inevitably, only through language games and the play of argumentation, thus as already internalised through language and socialisation. There is something circular in this that must always be borne in mind in order to understand Koskenniemi's thought: international legal language is at once a structure that is structured by the implicit social conventions in use within a given group, and a structure that itself structures our behaviour. In a sense, we inhabit this structure; and this is also why, according to Koskenniemi, we 'are in decisionism'; it is imposed upon us, and we are forced into taking a decision if we want to differentiate between 'kitsch' and 'non-kitsch'.

In making this move, however, it can seem that the difficulties have not been resolved, but merely displaced; the problem of human liberty as choice-making subjectivity has not been dealt with at a fundamental level, and nor has the fact that this liberty is not determined by choices rationally founded in law, but rather in accordance with personal preferences, tastes, and even environmental conditioning. Whatever the ways in which it is conditioned by language and by socialisation, the taking of a decision remains a moment at which it is no longer the language of law that governs the choice, but rather what we must call, in one way or another, a 'human subjectivity', which frees itself from all normative obligations and which thus becomes in a certain sense absolute, 'deciding' according to the value system of the actor and the social group in which he or she has developed. There are, in effect, only two alternatives: either we can liberate ourselves sufficiently from the structure of language and make a choice, or we are conditioned and do not thus make a genuine choice. Yet Koskenniemi seems caught between the two: he presents us with the disconcerting idea not only of the necessity of making a choice, but of a choice that remains conditioned. This position is extremely complex and difficult to understand, and contains a curious ambiguity. It is here that an internal difficulty, specific to Koskenniemi's thought, begins to take shape, resulting from his structuralism, which at once reinforces and undermines his decisionism. The key question is whether these are genuinely compatible: decisionism, of any sort, always presupposes a moment of liberty in which a free choice can be made; it presupposes a 'subject'. It presupposes a decision that remains irrational, not in the sense that it is taken blindly or without reflection, but in the sense that, even if well-considered, it remains free – that is, not constrained by reason or language. However, can such a decisionism go hand in hand with a structuralism that always presupposes the conditioning of that liberty by structure and by language, and that seems to lead to precisely the erasure of the 'subject'? This remains an open question; and Koskenniemi maintains the enigmatic quality of this tension, without

resolving it, as he situates his own viewpoint strictly at the level of the actor immersed in practice. It may even be supposed that he would accept this aporia as impassable, and as constitutive of non-dogmatic, fallible thought.

Be that as it may, even if we overlook this obstacle and accept Koskenniemi's 'subjective' political decision, do we not in any event run up against the aporia of an increasing 'subjective' politicisation of the international sphere, which goes hand in hand with a denunciation of the instrumental and pragmatic bureaucratic gigantism of international law? If law comes down to the individual policies of different actors, is there not a risk of an inevitable dilution of law in politics, thus turning international law into the law of the most powerful? Certainly, Koskenniemi constantly refers back to the formal autonomy of law as a particular discourse; yet international law remains an instrument for the contingent realisation of the particular interests that are expressed through it. In order, therefore, to understand the meaning of legal acts and norms, it is necessary to go back, beyond the norms themselves, to the play of historically and socially situated interests that sought expression through the laws in question. In doing so, however, it is difficult to see in what way the formal autonomy of law is preserved; indeed, we might well ask whether we are not witnessing a rather more insidious negation of law itself.

In other words, in insisting too much on the critique of international legal liberalism (an approach whose focus on law without doubt leaves it impoverished politically), the risk is that Koskenniemi is unable to genuinely oppose utilitarianism, instrumentalism or the hardest forms of realism – and thus traps himself within a singular paradox. And yet is liberalism not also human rights which Koskenniemi acknowledges are as 'necessary' as they are 'impossible'?[66] This formulation appears both enigmatic and paradoxical, but it in fact represents a profound expression of his thoughts on, and a powerful critique of, rights discourse. At the same time, it conveys a certain ambivalence on Koskenniemi's part with regard to liberalism:

> . . . while the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values or interests that resist translation into rights-language. In this way, the liberal principle of the 'primacy of the right over the good'[67] results in a colonization of political culture by a technocratic language that leaves no room for the articulation or realization of conceptions of the good.[68]

If we understand Koskenniemi's critique here, we might also point out that this passage illustrates the implicit necessity of conserving a certain form of liberalism, which provides the basis for fundamental rights (they are necessary) even as it condemns its other, bureaucratic and technocratic form (they become impossible

[66] 'Human rights are like love, at once necessary and impossible' in chapter six in this volume.
[67] J Rawls, *A Theory of Justice* (Oxford, Clarendon Press, 1971) 31.
[68] See chapter five in this volume at 133.

to preserve as such). Yet is this really so impossible? Has Koskenniemi implicitly become, like Weber before him, a 'disappointed liberal'?[69] Does his own conception of liberalism not mask certain essential differences between different types of liberalism at the international level? Liberalism was not really born with Hobbes, but rather with Locke, who theorised the idea of the individual subject, endowed with inalienable individual rights that could be opposed to authority. Liberalism thus originally confronted absolutism and the tyranny of power; and this original basis of liberalism can be neither denied nor forgotten, even when transposed into international law. Indeed, the connection between liberalism and certain forms of legal humanism is evident at the international level, with the inscription of human rights within positive law after 1945, and their reactivation during the 1990s.

Hence the equally problematic character of what can appear as a latent anti-humanism in Koskenniemi's writing, resulting from his critique of liberalism and of rights. However, one must proceed with caution here: legal humanism, like political liberalism, is a multifaceted and ambiguous concept. If, then, there is a legal anti-humanism in Koskenniemi's thought, it would be deployed not in order to undermine 'human dignity' but rather to preserve it through illustrating the dehumanising effects of an excess of legalism, technical reason and bureaucracy in dealing with rights and humanitarian issues. After all, is not a certain type of liberalism equally associated with the culture of formalism that Koskenniemi ultimately defends, against those who adopt instrumentalist standpoints (that is, the fact that the legal form can both encompass and give voice to the values and the 'subjective objectives' of all)?

> The form of law constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the community to which they belong no less than their adversaries – thus reaffirming both that inclusion and the principle that the conditions applying to the treatment of any one member of the community must apply to every other member as well. In the end, competent lawyers may disagree about what this means in practice. But the legal idiom itself reaffirms the political pluralism that underlies the Rule of Law, however inefficiently it has been put into effect; or, more accurately still, it is the primacy of the formal rule that makes possible this political pluralism.[70]

Does Koskenniemi not here return to the very liberal idea, which he had already condemned, of the primacy of law over subjective values? Of course, as a result of his deconstruction of the subjective/objective couplet, his view is that there exists no genuinely 'subjective values'; and it is also true that he defines this formal primacy as a cultural style. These caveats do not alter the fact, however, that he defends this principle on many occasions, and that he thus here begins on a journey back to the primacy of law that may seem paradoxical.

It is clear, however, that all of these difficulties or ambiguities, which have a

[69] To use the expression of WJ Mommsen in *Max Weber et la politique allemande, 1890–1920* (Paris, PUF, 1985) 478 [*libéral désespéré*].

[70] See chapter 10 in this volume at 257.

number of implications for Koskenniemi's thought, are ultimately less linked to what has been perceived as radicalism or reductionism in his work than they are to his desire to maintain international law as at once and intrinsically, constitutively, a horizon of meaning and an instrument of hegemonic politics; as potentially both an emancipatory language and an instrument of domination:

> But although international law, too, in this way is a hegemonic politics, 'it is nonetheless a form of politics that has some particular virtues' . . . it is possible to see the expanding practice of making political claims in legal language by an increasing number of international actors in the human rights field, in trade and environment bodies, in regional and universal tribunals and organizations and, not least, in the struggles over the meaning and direction of globalization, as parts of a process of construction of a universal political community.[71]

Moreover, it is this that makes Koskenniemi's approach particularly attractive: as I emphasised above, he refuses to endorse the scepticism of certain legalists, the cynicism of the realists or even the systematic devalorisation of law by critical authors such as Foucault, to whose work he on other occasions appears very close. However, in rejecting the possibility of reducing the oppositions that are generated by this basic double stance, is he not thereby trapped by the tensions that result from them? Is that which he suggests is a constitutive tension of international law not in reality a genuine contradiction of the basic principles thereof? Also, perhaps more profoundly still, upon what can he base the critical dimension of his approach?

Koskenniemi's post-modern (non-rationalist) anxiety perhaps makes him one of the last (of the new?) romantics of international law; a lucid, romantic author who has retraced for us the structure and the history of international law so brilliantly that his work has come to form part of the acquis of international legal thought, but who – like all other romantics before him – believes that we should allow ethical and legal rationality to be carried away by the stream of international legal history. There remains, however, one last path that can be taken, which necessitates an appreciation of the importance of direction itself. Meaning is not exhausted by the significations that can be drawn from structure and historical narrative; it is also about the orientation of our behaviour in practice. It is international law in the sense of an 'ought', as a model for behaviour. Is it possible to provide this path with new foundations after Koskenniemi's work? One of his most important contributions has been the desire to rehabilitate the genuinely political moment located at the very heart of the international legal world. However, could we not conceive of a politics for the international realm which is not that of decisionism and the exception but rather, as Koskenniemi himself on occasion suggests, one that can better accompany the emergence of a contemporary global society that functions normally as a space for discussion as much as it

[71] See chapter nine in this volume at 239.

does a site of conflict? A politics that makes room for the 'reasonable decision',[72] the result of a critical discussion on what should be done?[73] If so, might there not also be a rational justification for a coherent and critical liberalism, characterised by solidarity, which goes beyond the previous liberalism internationalism and its incapacity to limit the excesses of technical legal reasoning?*

[72] This is the expression used by R Aron in his introduction to M Weber, *Le savant et le politique* (Paris, Plon, 1959) 230 [*décision raisonnable*].

[73] See E Jouannet, 'La communauté internationale vue par les juristes' (2005) *AFRI* VI, 21s.

* This introduction was translated from the French language by Euan Macdonald.