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0521546966 - From Apology to Utopia: The Structure of International Legal
Argument

Martti Koskenniemi

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FROM APOLOGY TO UTOPIA

This book presents a critical view of international law as an argumentative practice that aims to ‘depoliticise’ international relations. Drawing from a wide range of materials, Koskenniemi demonstrates how this effort fails as international law becomes vulnerable to the contrasting criticisms of being either an irrelevant moralist Utopia or a manipulable façade for State interests. He examines the conflicts and paradoxes inherent in the main strands of international law – sources, sovereignty, ‘custom’ and ‘world order’ – and shows how legal discourse about such subjects can be described in terms of a small number of argumentative rules.

From Apology to Utopia was originally published in English in Finland in 1989, and though it quickly became a classic, it has been out of print for some years. Cambridge University Press is proud to reissue this seminal text, together with a substantial, freshly written Epilogue in which the author both responds to critics of the original work, and reflects on the effect and significance of his ‘deconstructive’ approach today.

MARTTI KOSKENNIEMI is Professor of International Law at the University of Helsinki and Global Professor of Law at New York University. He is also a member of the International Law Commission. His other publications include *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*.

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The Structure of International Legal Argument

Reissue with a new Epilogue

MARTTI KOSKENNIEMI



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All games have morals; and the game of Snakes and Ladders captures, as no other activity can hope to do, the eternal truth that for every ladder you climb, a snake is waiting just around the corner; and for every snake, a ladder will compensate. But it's more than that; no mere carrot-and-stick affair; because implicit in the game is the unchanging twoness of things, the duality of up against down, good against evil; the solid rationality of ladders balances the occult sinuosities of the serpent; in the opposition of staircase and cobra we can see, metaphorically, all conceivable oppositions, Alpha against Omega, father against mother; here is the war of Mary and Musa, and the polarities of knees and nose ... but I found ... that the game lacked one crucial dimension, that of ambiguity – because, as events are about to show, it is also possible to slither down a ladder and climb to triumph on the venom of a snake.

Salman Rushdie, *Midnight's Children* (Picador, London, 1981), p. 141

For T & L & A

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PREFACE TO THE REISSUE

This book was first published at a moment of enthusiasm about the spread of international cooperation and the rule of law in the world. Its central thesis – namely that international law reproduces the paradoxes and ambivalences of a liberal theory of politics – may have seemed awkward at a time when liberalism was just about to gain a knock-out victory over its alternatives. Little is left today of that enthusiasm. International institutions, multilateral diplomacy and indeed international law are widely seen to have failed to cope with the most pressing international problems. Instead, “liberalism” is now often associated with the expansion of a private, market-driven “globalization” or the spread of a rhetoric of “freedom” that instrumentalizes law for the advancement of particular values or interests. Examined from the outside, international law appears sidelined by the informal structures of private governance while, from the inside, its functional differentiation (“fragmentation”) has raised the question of whether any unifying centre remains in public international law that would still seem worthy of professional or ideological commitment.

And yet, the supple fabric of liberalism accounts for the persistent attraction of liberal themes. The virtues of sovereignty remain as palpable as its vices. The ideal of a consensually based legal order between equal and self-determining collectivities has retained its political appeal despite the theoretical, doctrinal and practical problems with the ideas of consent, self-determination and inter-state equality. It now seems to me that the concepts and structures of international law, elaborated in this book, are not something that political actors may choose to apply or ignore at will. They are the *condition of possibility* for the existence of something like a sphere of the “international” as one for asserting and contesting political power, making and challenging claims of right and legitimacy that may be analysed as claims about legal justice. If international law did not exist, political actors would need to invent it.

To be sure, the political effects and meaning of international law remain ambivalent. While the way international law is spoken, and

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thus applied, reflects the profoundly inequitable constellation of power today, it also offers avenues of resistance and experimentation. It may be used to support and to challenge hegemony. Though it often empowers the “wrong” people and justifies the “bad” decision, this is by no means necessarily the case. In any case, suggestions to “do away” with international law seem to me both naive and ideological. They are naive because every aspect of the international world is always already “legalized”, that is, amenable for description and analysis by reference to legal concepts and categories. As Hans Kelsen and Hersch Lauterpacht once argued, there is no “outside-of-law”. If, as this book argues, every law is a “politics”, it is likewise true that every politics can become known, and effective, only as “law”, including above all a law that liberates some actors to decide in accordance with their preferences. The question is never whether or not to go by law but by *which law* or *whose law*. Which is why the assumption that there might be a sphere of “pure” non-law (of politics, economics, strategy, etc.) is ideological: with every political decision-maker, there comes a legal advisor, an expert in the language whose grammar is sketched in the following pages and whose assignment it is to enable the retreat of the decision-maker from the existential *Angst* of the decision to the comforting structures of the law. The challenge for us, legal experts, is to provide the right advice.

As my students know all too well, this book has been long out of print. I am therefore deeply grateful to Professor James Crawford and to Cambridge University Press for suggesting that it be reissued with only minor corrections of typographical errors and that I should write a substantial epilogue to reflect upon critiques and developments in the intervening years. The debts I have incurred during the years are too many to mention here. The original acknowledgements cover the most important ground: David, Tiina and my family continue to be the key participants in this venture. Colleagues and students in Helsinki, New York University, Geneva, Paris and other places have taught me many new things. I thank them all. The conversation continues.

Helsinki, 6 May 2005

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The most important intellectual support has come from professor David Kennedy, Harvard Law School. His unorthodox work – which is frequently referred to in the course of the book – contains what can only be regarded as the most significant contribution to international legal scholarship by a contemporary lawyer. I am grateful for his numerous comments on my earlier work and for his unfailing encouragement. Whatever merit this book may have is due to my having been able to acquaint myself with him and his work.

Several people have provided technical help. The personnel of the Library of Parliament in Helsinki gave invaluable professional assistance during my three-year stay with them. Tiina Astola read the successive drafts and her comments on form and substance are reflected throughout. My two research assistants, Tuula Svinhufvud and Jaana Törrönen-Nwoko checked the notes and collected the bibliography efficiently and with care. Director of Publication, Anna-Liisa Laurila was instrumental in having publication arranged with Lakimiesliiton Kustannus. Kari Takamaa from the Library of the Law Faculty in Helsinki gave me

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Helsinki, 18 September 1988

ABBREVIATIONS

AFDI	Annuaire français de droit international
AJIL	American Journal of International Law
Am.U.J.Int'l L. & Pol'y	American University Journal of International Law and Policy
Arch. de philo. du droit	Archives de philosophie du droit
Arch.VR	Archiv des Völkerrechts
ARSP	Archiv für Rechts- und Sozialphilosophie
Buffalo L.R.	Buffalo Law Review
BYIL	British Year Book of International Law
Calif. L.R.	California Law Review
Can.YIL	Canadian Yearbook of International Law
Cardozo L.R.	Cardozo Law Review
CLP	Current Legal Problems
Columbia J. of Transnat'l Law	Columbia Journal of Transnational Law
CSCE	Conference on Security and Co-operation in Europe
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
FYBIL	Finnish Yearbook of International Law
GYIL	German Yearbook of International Law
Harv.ILJ	Harvard International Law Journal
Harvard L.R.	Harvard Law Review
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IIL	Institute of International Law
IJIL	Indian Journal of International Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials

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ILR	International Law Reports
Int'l Org.	International Organization
Iran-US CT	Iran-United States Claims Tribunal
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland
JIR	Jahrbuch für Internationales Recht
KOIG	Kansainoikeus – Ius Gentium
LJIL	Leiden Journal of International Law
LM	Lakimies
Neth.YBIL	Netherlands Yearbook of International Law
NTIR	Nordisk Tidsskrift for International Ret
NtvIR	Nederlands Tijdschrift voor Internationaal Recht
OAS	Organization of American States
Oxford JLS	Oxford Journal of Legal Studies
ÖZöRV	Österreichische Zeitschrift für öffentliches Recht und Völkerrecht
PCIJ	Permanent Court of International Justice
RBDI	Revue belge de droit international public
RCADI	Recueil des Cours de l'Academie de Droit International
RDI	Revue de droit international
Reports	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
Res.	Resolution
Rev.Int.Stud.	Review of International Studies
RGDIP	Revue générale de droit international public
RITD	Revue internationale de théorie du droit
Procès-verbaux PCIJ	Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee, 16 June – 21 July with Annexes
SC	Security Council
Schw.JB	Schweizerisches Jahrbuch für internationales Recht
Stanford L.R.	Stanford Law Review
UNCLOS	United Nations Conference (Convention) on the Law of the Sea

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UNGA	United Nations General Assembly
UNRIAA	United Nations Reports of International Arbitral Awards
Yale L.J.	Yale Law Journal
YILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht