

REVIEW ESSAY

LANGUAGE GAMES OF INTERNATIONAL LAW: KOSKENNIEMI AS THE DISCIPLINE'S WITTGENSTEIN

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CONTENTS

I	Introduction	1
II	The Non-Philosophy and the Non-Theory of the Politics of International Law	3
III	The High Priest and the Perpetual Confession of Liberal International Law.....	8
IV	A Mirror into the Soul of the International Lawyer.....	9
V	The Anguish of the Soul of the International Lawyer in the Face of Nuclear Dilemmas	12
VI	History of International Lawyers' Vocabularies as Philosophy of International Law	16

I INTRODUCTION

This volume provides another, almost accidental, opportunity to reflect on the work of Martti Koskenniemi after the review which the author wrote in the *Michigan Journal of International Law* in 1990.¹ That review argued that the shadow of natural law was a ghost haunting the critical approach to international law which Koskenniemi represents. It received no critical response from Koskenniemi. It received a brief mention in the Epilogue to the second edition of *From Apology to Utopia*.² Emmanuelle Jouannet, in her critical introduction, informs the reader that Koskenniemi has never intended to produce a 'theory of international law'³ and 'indeed he would object to the very term itself, as his goal has never been to be perceived as a legal theoretician or philosopher but rather as

¹ Anthony Carty, "'Liberalism's Dangerous Supplements': Medieval Ghosts of International Law' (1991) 13 *Michigan Journal of International Law* 161, especially at 168–9.

² In the Epilogue to the reissue of *From Apology to Utopia*, Koskenniemi notes that I suggest he tends more towards an apologist than a utopian perspective: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, revised ed, 2006) 603, citing *ibid* 171. I think that the insight that connects him to Wittgenstein also reinforces this argument. See especially the discussion of his chapter on the legality of nuclear weapons, below Part V.

³ E Jouannet, 'Koskenniemi: A Critical Introduction' in Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011) 1, 1.

an international lawyer addressing other international lawyers'.⁴ His aim is not

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.⁵

Notwithstanding the above disclaimer, Jouannet says shortly afterwards that, among the large number of philosophers who have influenced Koskenniemi, the one who may be closest to him is Wittgenstein.⁶ In addition, Jouannet, herself an academically-trained philosopher, makes a rather philosophical point which is important for any reflection on Koskenniemi's work. There is discussion among contemporary philosophers about the possibility of intersubjectivity being attained. However, the position of Koskenniemi remains that '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'.⁷

It is equally possible to describe such a position — whether or not it understands itself as philosophical — as simply obstinacy or intransigence, to use Wittgensteinian 'ordinary language'. It marks what 'ordinary people' might characterise as 'emotional immaturity', endless squabbling about whatever. At the same time, Jouannet notes that in the context of legal discourse, Koskenniemi is insisting that 'the solution to legal questions stems from a political decision and not from a reasoned choice'.⁸ She goes on to quote Koskenniemi himself as saying that

[t]he 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.⁹

This authoritarian, irrationalist discourse by its very nature cannot be contested because, at every stage, Koskenniemi deals in what is to him self-evidently an attempt to gain hegemonic control. Obviously whoever disagrees with him is simply trying to 'silence' him, to impose his own 'partial' view on Koskenniemi, who, presumably, has also a partial view, which the evidence of this book suggests he has quite successfully imposed on others. So, in his own preface, Koskenniemi says that his work is a survey of international law's operation as a vocabulary for politics but not a study of international law and

⁴ Ibid 1–2.

⁵ Ibid 4.

⁶ Ibid 22.

⁷ Ibid 24.

⁸ Ibid 25.

⁹ Jouannet, above 3, 25, quoting Martti Koskenniemi, 'What is International Law For?' in *The Politics of International Law* (Hart Publishing, 2011) 241, 259–60 (emphasis in original). See also Ernesto Laclau, 'Deconstruction, Pragmatism, Hegemony' in Chantal Mouffe (ed), *Deconstruction and Pragmatism* (Routledge, 1996) 47, 58.

politics as separable entities.¹⁰ International law is instead an expression of politics. Yet he immediately warns that he offers no definition of the political — ‘no jurisprudential thesis about the *real nature*’ of the political.¹¹ Instead his analysis points to ‘the experience of a certain fluidity and contestability that most people — lawyers and non-lawyers — have when they enter the world of international law’.¹² There are always a variety of choices open to participants and ‘[t]he question “who will win, who will lose” is never far from the surface of such choices’.¹³ In this ‘regulated madness’ presumably the most stubborn will prevail, a theme to which Koskenniemi returns repeatedly.

The volume then begins with a reproduction of the 1990 article ‘The Politics of International Law’,¹⁴ a summary of the book *From Apology to Utopia*. Koskenniemi tells us that this chapter and the following, ‘The Politics of International Law — 20 Years Later’,¹⁵ originally published in the same *European Journal of International Law*, set out the argument about the operation of the politics of international law and serve as an introduction to the rest of the book being reviewed. So here these chapters will receive the most attention. The others follow the same arguments and close attention will only be offered to three other chapters: that concerning the identity of the profession (Chapter 11),¹⁶ that concerning the litigation over the legality of nuclear weapons (Chapter 8)¹⁷ and that concerning natural lawyers as miserable comforters (Chapter 13).¹⁸ These chapters allow one to illustrate, in depth, Koskenniemi’s understanding of the operation of various types of international lawyers and those others also interested in using law in contemporary international society.

II THE NON-PHILOSOPHY AND THE NON-THEORY OF THE POLITICS OF INTERNATIONAL LAW

The first non-philosophical, non-theoretical principle which Koskenniemi preaches is the self-evidence of Hobbesian irrationalist nominalism. Koskenniemi quotes Hobbes, that what one person calls wisdom another calls fear, what one calls cruelty, another calls justice ‘[a]nd therefrom such names

¹⁰ Martti Koskenniemi, ‘Preface’ in *The Politics of International Law* (Hart Publishing, 2011) v, v.

¹¹ *Ibid* (emphasis in original).

¹² *Ibid*.

¹³ *Ibid* vi.

¹⁴ Martti Koskenniemi, ‘Between Apology and Utopia: The Politics of International Law’ in *The Politics of International Law* (Hart Publishing, 2011) 35. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, revised ed, 2006).

¹⁵ Martti Koskenniemi, ‘The Politics of International Law — 20 Years Later’ in *The Politics of International Law* (Hart Publishing, 2011) 63. See also Martti Koskenniemi, ‘The Politics of International Law — 20 Years Later’ (2009) 20 *European Journal of International Law* 7.

¹⁶ Martti Koskenniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’ in *The Politics of International Law* (Hart Publishing, 2011) 271.

¹⁷ Martti Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent: International Lawyers and Nuclear Weapons’ in *The Politics of International Law* (Hart Publishing, 2011) 198.

¹⁸ Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law’ in *The Politics of International Law* (Hart Publishing, 2011) 307.

can never be ground for any ratiocination'.¹⁹ After this quotation Koskenniemi makes an important inclusion/exclusion move — very important for his fundamental adherence to Wittgenstein in order to defend the identity of international lawyers — when he says that all liberals agree with Hobbes in 'their criticism of relying upon natural principles to justify political authority'.²⁰ It is important to realise the fate of those who are not liberals, or who might believe in the possibility of rational argument. These people are tyrants who do not belong to the profession of international lawyers, however confused that profession may be about its identity. So Koskenniemi continues:

Appealing to principles which would pre-exist human society and be discoverable only through faith or *recta ratio* was to appeal to abstract and unverifiable maxims which only camouflaged the subjective preferences of the speaker. It was premised on utopian ideals which were constantly used as apologies for tyranny.²¹

Needless to say, this excommunicatory rhetoric is unreferenced, allowing an unrestricted employment of it at opportune moments. Koskenniemi is imprisoning the profession in a number of his chosen philosophers. Others will follow, in much the same vein, particularly Hume, for whom 'reason is the slave of the passions'.²² Presumably Koskenniemi's disqualification of himself as a political philosopher and theorist, and Jouannet's acceptance of this, means that he thinks he is identifying simply the accepted philosophical parameters within which the profession of international lawyers in fact and in practice works. If any particular person wanting to call him- or herself an international lawyer does not wish to be a Hobbesean then an appropriate torrent of Hobbesean abuse can be used to silence him or her. Whether Hobbes is the definitive political philosopher need only concern philosophers and theorists, not international lawyers.

What Koskenniemi is trying to show is that there is no way out of Hobbesean-style politics through the process-oriented rule of law. The international lawyer, as a liberal, wishes to flee politics, which now does receive a definition 'as a matter of furthering subjective desires, passions, prejudices and leading into an international anarchy'.²³ The rhetoric of the rule of law is the liberal impulse to escape politics.²⁴ The apology–utopia dichotomy that Koskenniemi uses to deconstruct this is based upon his Hobbesean, nominalist epistemology of ethics. The rule of international law attempts to distance itself from theories of natural justice by achieving concreteness while it attempts to safeguard the normativity of law by distancing itself from actual practice. The former is an apology, while the latter is utopian. This abstractly stated procrustean dichotomy, translated into ordinary language, means that to find standards to follow we must look to what people are actually doing rather than invent our own arbitrary, subjective preferences. But if we do not find an external standard — which is, in any case,

¹⁹ Koskenniemi, 'Between Apology and Utopia', above n 14, 36. See generally Thomas Hobbes, *Leviathan* (Penguin, first published 1651, 1982 ed) 109–10.

²⁰ Koskenniemi, 'Between Apology and Utopia', above n 14, 36.

²¹ *Ibid.*

²² See generally David Hume, *A Treatise of Human Nature* (Everyman, first published 1739, 2003 ed).

²³ Koskenniemi, 'Between Apology and Utopia', above n 14, 36.

²⁴ *Ibid.* 37.

impossible (because Hobbes says so) — then we are merely copying what states actually do, which can have no normative significance.

The rigour of these propositions rests in their having no referent. They are analytically a tautology. Their abstractness has to do with the fact that Koskenniemi has no referent for what he means by ‘state’ or ‘practice of states’. This is clear from his ‘deconstruction’ of the two elements of customary law: the material and the psychological. Koskenniemi says the difficulty is that neither can be identified without the other. Evidence shows there is no independent criterion to determine *opinio juris* apart from material practice,²⁵ while any way to claim to determine such an element opposable to a non-consenting state would be ‘knowing better’.²⁶ Anyway, state beliefs are not identifiable apart from what is actually effective material practice, which in turn is effective only if the states wish it. A circular process of behaviour as evidence of intention and intention as evidence of behaviour results. To avoid utopia, one looks to the material element, while to avoid apology one looks to the psychological element.

Koskenniemi thereby claims that the very mechanisms of custom cause it to self-destruct. Yet, he has done nothing more than describe the use of the language of custom by the International Court of Justice (‘ICJ’), in the context of his own procrustean dichotomy.²⁷ For instance, consensualism cannot work, because it means telling a state that says it does not consent that ‘we know better’, defying the democratic idea by claiming that ‘we know best’ what everyone really wants.²⁸ Alternatively, to introduce any standard of ‘reasonableness’ or ‘reasonable expectations’ into state conduct defies the principle of modernity — of subjectivity of value — that justice cannot be discussed in a non-arbitrary way.

In fact the issue of customary law is precisely the one which calls for philosophical reflection. What is the ‘nature’ (bad word, non-modern) of human action? How do we infer intention from behaviour? How can we construct a ‘meaningful’ narrative of sequences of human conduct? True to his promise to avoid philosophical reflection, Koskenniemi confines himself throughout to reflection on the language of international lawyers and, especially, the ICJ. And this is probably what forecloses him from any direct reflection upon what a state or nation, or whatever, might be. Following his procrustean dichotomy he tells us that historical reality can be reduced to the discursive practices of international lawyers. For instance, one view of legal personality is that sovereignty imposes itself upon law,²⁹ which constitutes the ‘pure fact view’. Another approach is that sovereignty is part of law’s substance — the legal view — contrasting with Jellinek³⁰ and Verdross,³¹ late 19th and early 20th century Austrian international law writers. There follows the apology–utopia pedantry. The former fact view,

²⁵ Ibid 56–7.

²⁶ Ibid 57.

²⁷ Which I accept is a possible interpretation of much of the jurisprudence of the International Court of Justice: see Carty, “‘Liberalism’s Dangerous Supplements’”, above n 1, 163–5.

²⁸ Koskenniemi, ‘Between Apology and Utopia’, above n 14, 52 et seq.

²⁹ Ibid 45–6.

³⁰ See generally Georg Jellinek, *Die Rechtliche Natur der Staatenverträge: Ein Beitrag zur Juristischen Construction des Völkerrechts* (Alfred Hölder, 1880).

³¹ See generally Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer, 1926).

by placing reliance on pure fact of power, is apologist, while reliance on a criterion independent of effectiveness is abstract and question-begging. The pure fact view assumes the law follows from what the facts say, while the legal view assumes the sense of facts is determined by rules.

Beyond Wittgenstein-style language games there is no reality, no referent. All is simply a play of words, with each following a whimsical Hobbeseanism. For instance, within recognition doctrine³² there is little point in insisting, as Hersch Lauterpacht did, that there is a duty to recognise, when it is in practice refused.³³ Yet refusal of recognition introduces for existing states an apparent political right to decide questions of status of statehood or self-determination, which conflict with the equal right of others to claim the status. Koskenniemi openly points out the foundation of the problem, although he will come later to state an anti-foundationalist credo when discussing nuclear weapons: 'The real problem is that it is impossible, within liberal premises, to overrule any participant interpretation in a legitimate fashion'.³⁴

The course which appears to be closed to Koskenniemi is that followed by Morgenthau in relation to Kelsen, which I have described at length in my article on the continuing influence of Kelsen.³⁵ Morgenthau challenges what Koskenniemi calls Kelsen's legal view of statehood, demanding empirical proof of the impact of international society in actually creating or constructing individual states.³⁶ For instance, one might say that in some measure the Concert System created Belgium between 1830 and 1839 by guaranteeing its neutrality, preventing its absorption into France. Being satisfied that Kelsen could not meet this demand, Morgenthau went on to construct an empirical theory about the extremely limited possibilities of normativity — or the 'legal view' of statehood³⁷ — which led Morgenthau not to take an apologist view of international law, but to abandon the subject altogether. Similarly, Raymond Aron launched a parallel critique of Briery and Lauterpacht, alongside Kelsen.³⁸

These debates will, in Koskenniemi's view, merely bring us into the language games of international relations scholars. Koskenniemi speaks with scepticism of those who would presume to study the relationship of international law to international politics.³⁹ Both are merely technical languages. In Chapter 13, devoted, in part, to international relations as the new natural law, Koskenniemi considers how Goldsmith and Posner argue⁴⁰ — within a rational choice, or law and economic approach to international law — that the best international law

³² Koskenniemi, 'Between Apology and Utopia', above n 14, 48.

³³ Ibid. See also Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1948).

³⁴ Ibid.

³⁵ Anthony Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law' (1998) 9 *European Journal of International Law* 344, 349.

³⁶ Ibid 349–50. See generally Hans Morgenthau, *La Réalité des Normes: En Particulier des Normes du Droit International — Fondements d'une Théorie des Normes* (Alcan, 1934).

³⁷ Carty, above n 35, 349–50.

³⁸ See ibid 350–2. See also Raymond Aron, *Paix et Guerre Entre les Nations* (Calmann-Levy, 1962).

³⁹ Koskenniemi, 'Preface', above n 10, v.

⁴⁰ Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005) 15.

writing is in the international relations subfield of political science.⁴¹ Koskenniemi's concern is about vocabularies. The impact of what Goldsmith and Posner are saying is that international law vocabulary, that is of 'consent', 'validity' or 'dispute settlement' etc, will be replaced with social science vocabularies of 'explaining' behaviour and attaining 'compliance'. Koskenniemi is dismissive of interdisciplinarity as a power struggle: 'Also, because achieving compliance is all that counts, the interdisciplinary call is not really about cooperation but conquest'.⁴² So, any external critique of the language game of international law is 'seen off' as an attempt to impose an alternative and, therefore, alien language game.

It is possible to pursue Morgenthau's concerns in another manner. International relations theory has developed a complex series of theories about exogenous and endogenous factors in the construction of states. The former would attribute more power in state creation to international society while the latter would regard state creation as self-generating.⁴³ Since then the standard work has become Wendt's *Social Theory of International Politics*.⁴⁴ Free of the so-called factual and legal views of the state, one might try to understand collective entities and their impact on international society, and vice versa, through the various historical and cultural perspectives, devising for oneself other possible options than Hobbeseanism. The latter's perspective has been, in my view, effectively criticised by Tuck and Ricoeur.⁴⁵ One who remains in the jail of the Leviathan does so as a matter of choice: as Koskenniemi would say, a political choice, the nature of which he treats as one of identity, 'who we, as international lawyers, are' — and 'we' are, it seems, Hobbesean liberals for eternity.

The break which Koskenniemi will not make, despite his critique of mainstream international law discourse, is simply to abandon the legal discourse of the ICJ, which he has parodied so often. Yet this requires a fundamental philosophical move, which the Wittgensteinian anti-philosopher Koskenniemi will not make. It means abandoning the language games whose futility he enjoys to expose and adopting a phenomenological posture vis-a-vis a reality for which new languages have to be found. The reason that Koskenniemi will not take this course is the passion he feels for the tortuous world of modernity, with its liberal inability and unwillingness to eliminate the cacophony of voices, of which his own is one that is very prominent and well heard. Indeed, the primary interest of his work to a virtual outsider like the reviewer is probably diagnostic. It affords both a window and a mirror through which the profession as a whole can see itself reflected and enjoy a mutual fascination with Koskenniemi, who, far from

⁴¹ Koskenniemi, 'Miserable Comforters', above n 18, 324.

⁴² Ibid.

⁴³ See generally Martin Hollis and Steve Smith, *Explaining and Understanding International Relations* (Oxford University Press, 1990).

⁴⁴ Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 1999).

⁴⁵ See Anthony Carty, *Philosophy of International Law* (Edinburgh University Press, 2007) 123–8, 221–7. See also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999); Paul Ricoeur, *Parcours de la Reconnaissance: Trois Études* (Gallimard, 2005).

being a critic of international law, has become its High Priest. Most of his book is both a confessional and a High Priest's call to communal confession.

III THE HIGH PRIEST AND THE PERPETUAL CONFESSION OF LIBERAL INTERNATIONAL LAW

Following MacIntyre, from *After Virtue*,⁴⁶ Koskenniemi identifies how modern international law defers immediate substantive resolution of issues in favour of further procedural interpretation.⁴⁷ Indeed the absence of a common good, interpreted by sages, means law has to focus on process, whether rule-oriented, or base values-led.⁴⁸ Both have to create a social process, albeit one which is circular, given our paradigms and interests of knowledge determine what and how we can know, 'a common theme in much modern epistemology'.⁴⁹ So tribunals such as that of the Law of the Sea have mostly no determinate standards by which to decide. This expresses the rule of law promise of communal life without giving up individual autonomy.⁵⁰ The rule of law endorses neither particular community ideals nor particular social policies. Generally it will have no answer to questions such as environmental pollution and economic development, nor foreign investment and so on.

Any theory of justice premised on a concept of the good life will be contrary to the rule of law because 'we know' that since the Enlightenment 'everybody has had good reason to reject it'.⁵¹ The Enlightenment signified a loss of faith in a natural order among peoples.⁵² To contain political subjugation, international lawyers put their faith in logic and legal technique, while the way back to Vitoria and Suárez's unquestioning faith is no longer open.⁵³ We can never again assume that political questions could be simply discussed rationally so that in the end everyone could agree.

Indeed now that they are banished from the illusory pre-Enlightenment Garden of Eden, there is only a gnashing of teeth among quarrelsome liberal international lawyers. In his *European Journal of International Law* article 20 years later, Koskenniemi points to the fragmentation of the power of sovereign states into many regimes of international law⁵⁴ — such as human rights, environmental law, trade law etc — where now struggles of opposing groups of experts and preferences provide 'cutting-edge themes within which

⁴⁶ See generally Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (University of Notre Dame Press, 3rd ed, 2007).

⁴⁷ Koskenniemi, 'Between Apology and Utopia', above n 14, 58. See also Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *European Journal of International Law* 1, 16–17.

⁴⁸ Koskenniemi, 'Between Apology and Utopia', above n 14, 44.

⁴⁹ *Ibid* 44 n 29.

⁵⁰ *Ibid* 59.

⁵¹ *Ibid* 61.

⁵² See *ibid* 61–2.

⁵³ This simplistic, patronising description of Vitoria and Suárez once again evidence an anti- rather than non-philosophical suppression of the Catholic pre-Reformation history of Europe that I first suspected of Koskenniemi's work in my "Liberalism's Dangerous Supplements": see above n 1 and accompanying text.

⁵⁴ Koskenniemi, 'The Politics of International Law — 20 Years Later', above n 15, 66–8. See also Martti Koskenniemi, 'The Politics of International Law — 20 Years Later' (2009) 20 *European Journal of International Law* 7.

ambitious lawyers increasingly like to intervene for political effect'.⁵⁵ The divisions of international organisations — the Food and Agriculture Organization, the World Trade Organization, the World Health Organization the International Maritime Organization — all offer competing vocabularies, none truer than the others; although some get pushed into the darkness. Clashing idioms and competing descriptions push some interests forward and leave others in the shadows, all struggling in the neutral language of expertise, wickedly obscuring the contingent nature of choice and reifying as necessary what is partial. There are special styles of being committed to refugees, humanitarian matters, human security and the environment. These all appear to be progressive stances but the High Priest reveals '[i]t is still about conquering the decision-making position within one's institution, and then laying out the agenda of reform'.⁵⁶ While 'we' are no longer shaped by a particular unitary national spirit, we have our disciplinary and professional profiles as 'we' push into 'others' vocabularies'.⁵⁷ Of course, the world's causalities are too complex and what each 'professional' offers is crude over-simplification.⁵⁸ Indeed, the root of the power of the expert manager is precisely to play down the apparent role of passion and randomness and to occupy the dominant positions in institutions without too much critical reflection which might reduce his authority. The High Priest ends on a note of total pessimism. To believe that law is a progressive avenue of choice is as bad as imperialism, for law offers no panacea for such matters as the 'War on Terror' or the possible trampling on human rights.⁵⁹ The gnashing of teeth continues for eternity.

IV A MIRROR INTO THE SOUL OF THE INTERNATIONAL LAWYER

Chapter 11 of the book, about the pull of the practice of international law between commitment and cynicism, was originally commissioned by the United Nations from legal advisers of states, international organisations and practitioners in the field. It is the occasion for a vital speculation as to how to read Koskenniemi to the most effect. His lacerations of the profession appear to be something in which it delights. At the same time, these insights provide a window, perhaps the only window available at present, into the psychological state of the profession. The reviewer would also argue that Koskenniemi's 'revelations' do allow one to make connections with similar radical criticisms of other professions in modernity, whether late or 'post'.⁶⁰

This chapter is selected for review because it appears logical to ask how the profession reacts to the profound crisis which the futility of liberal international law must present for most of the profession — presumably not the legal advisers of some 'illiberal' states; but then again, presumably, Koskenniemi does not write for them. It is a common theme of Western professionalism that it is

⁵⁵ Koskenniemi, 'The Politics of International Law — 20 Years Later', above n 15, 66.

⁵⁶ Ibid 69.

⁵⁷ Ibid 70.

⁵⁸ Ibid 72.

⁵⁹ Ibid 73–4.

⁶⁰ Consider the portrait of Ulrich in Robert Musil, *The Man without Qualities* (Sophie Wilkins trans, Alfred A Knopf, 1995) vol 1, 13–16 [trans of: *Der Mann ohne Eigenschaften* (first published 1952)].

plagued with narcissism, that is to say, a very self-reflective preoccupation with how one is 'doing the job' and, even more so, seen to be doing the job.⁶¹ Christopher Lasch has led the way in critical reflection on narcissism in the United States.⁶² In France, Jacques Arènes adds a dimension beyond psychological confusion and decadence in *Croire au temps du Dieu fragile: Psychanalyse du deuil de Dieu*.⁶³ It is also the emptiness — the spiritual and intellectual frustration of a profession in the face of the aimlessness, futility or meaninglessness of what they are doing — which throws each person very much back on him- or herself, forced to reflect on how to continue functioning as a working social being. The emptiness of the professional activity feeds its way into the soul of the professional person and could eventually destroy him or her. It is this process which Koskenniemi describes, quite logically, given his prior critique of the nature of professional international law activity. He deliberately chooses the word 'commitment'⁶⁴ to indicate he has to deal with a rather desperate affair. This word represents a wholesale — ultimately unreflective or sentimental — throwing of oneself into one's work.⁶⁵ Since a negative aspect of modernity is personal alienation and social nihilism, commitment has to be a private passion as well as a formal public duty, providing a stable personal identity, thereby restoring, ideally, an 'oceanic' feeling of an indissoluble bond with the external world. This is especially difficult because modernity bars the way to reliance upon faith or truth.⁶⁶ Commitment in conditions of agnostic modernity means engagement without any rationally demonstrable foundation.

Arènes says the stress leading to narcissism comes from the immensity of the task of self-grounding in a foundationless environment.⁶⁷ As Koskenniemi points out, the evaluative indeterminacy of international law's basic concepts, such as self-determination or sovereign equality, means that one has to infuse these words with interpretative acts stemming from one's own life view. Augustine or Vitoria could, in Koskenniemi's perspective, simply defer to theological authority. For instance, Koskenniemi makes his point in true Wittgensteinian fashion. Augustine was not, in his view, committed to believing in God. Commitment as a concept belongs to an agnostic world. The picture becomes even more confused as the cosmopolitan ideals of the nation-state's legal adviser are surpassed by the complexities of the apparent globalisation following the end of the Cold War. Transnational regimes and economic liberalisation all replace international law with ever more fluid transnational patterns of exchange.

Hence at the heart of commitment is ambivalence, where the effect of an activity is seen rapidly to produce its opposite. For instance, the authors of

⁶¹ Indeed Koskenniemi himself sets, according to Jouanet, his goal to be perceived not as a theorist of international law but as an international lawyer addressing other international lawyers: Jouanet, above n 3, 2.

⁶² Christopher Lasch, *The Culture of Narcissism* (Norton, 1978).

⁶³ Jacques Arènes, *Croire au temps du Dieu fragile: Psychanalyse du deuil de Dieu* (Cerf, 2012).

⁶⁴ Koskenniemi, 'Between Commitment and Cynicism', above n 16, 273 et seq.

⁶⁵ Ibid 273.

⁶⁶ See ibid 274.

⁶⁷ See Arènes, above n 63, chs 3–4 (considering tendencies to narcissism brought on by the trauma of loss of belief and, especially, confronting nihilism and indifference in society by withdrawing into oneself).

“‘We Are Teachers of International Law’” are convinced of the reversibility of most international law stances.⁶⁸ Koskenniemi mentions, for instance, that statehood can be the threat to human rights, but without statehood the stability necessary for them will be missing. Frontiers of states rest on *uti possidetis*, but self-determination is also fundamental. International law’s standards are as ambivalent as its protagonists have to be. Koskenniemi exposes how self-preoccupation appears to have become very widespread among international lawyers. Commitment always involves doubt,⁶⁹ leading to sentimental exhaustion and a voice without emotion, drawn to camouflage a self that secretly believes otherwise. The ambivalence merely expresses insecurity about the distance which really exists but could easily vanish, between oneself and those whom one opposes, for example, the teachers of international law in contrast to George W Bush and Saddam Hussein in 2003.⁷⁰

Reversibility of arguments or stances is a centrally recurring phenomenon in Musil’s *The Man without Qualities*. For instance, ideals of pacifism and humanity, by driving the human spirit too high, produce the reverse effect, plunging it into violence. Musil describes how each system of thought becomes its contrary, conservatives becoming eccentrics and the normal becoming criminals, a carnival of reversals. Nonetheless, the tendency is more one way: the collapse of a reason unable to contain chaos.⁷¹

Ambivalence then comes to appear as the fundamental of anti-foundationalism. Since nothing can be conclusively resolved through reason, that must also apply to the protagonist him- or herself, never overwhelmed by his own arguments, while having to appear disinterested, impartial, but in any case unable to discern all of the causal relations of the context in which he operates. So, commitment perhaps imperceptibly becomes cynicism, above all where another appears overwhelmed by arguments, tactics of persuasion and supposed technical expertise which are less than convincing to the proponent him- or herself. Commitment then becomes cynicism as soon as it prevails. Koskenniemi has already described every legal argument as a battle where there are conquerors and where others are sent into darkness.

Koskenniemi then briefly describes different levels of practice. The most important is the international judge. Here the connections of his overall vision are clearest. The judge must know that his task — the impartial application of law — is impossible.⁷² Judging therefore has to involve a schizophrenic consciousness, a kind of bad faith, which knows the barriers between subjective politics and objective law are not there. Yet the judges cannot admit this without dissolving their roles, admitting their application of the liberal rule of law is subject to political manipulation. It appears to the reviewer that commitment can only be the loser to cynicism in this context. Koskenniemi quotes the arch-exponent of modern cynicism, Peter Sloterdijk, that an enlightened false

⁶⁸ Matthew Craven et al, “‘We Are Teachers of International Law’” (2004) 17 *Leiden Journal of International Law* 363.

⁶⁹ See Koskenniemi, ‘Between Commitment and Cynicism’, above n 16, 283.

⁷⁰ Craven et al, above n 68, 369.

⁷¹ Highlighted by Stéphane Gödicke, *Désordres et transgressions chez Robert Musil* (Presses Sorbonne Nouvelle, 2006) especially at 92–6.

⁷² Koskenniemi, ‘Between Commitment and Cynicism’, above n 16, 284–7.

consciousness is a matter of being '[w]ell-off and miserable at the same time, this consciousness no longer feels affected by any critique of ideology; its falseness is already reflexively buffered'.⁷³

The narcissism is quite explicit in Koskenniemi's descriptions of legal advisers and academics, as well as non-governmental organisation activist users of international law. Here his theme leads well into the next section of the book to be reviewed, the treatment of the ICJ advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* ('*Nuclear Weapons*').⁷⁴ It is inevitable that he or she who is trying to convince another of what does not convince him- or herself will be very preoccupied about how he is seen by others. A good external image is essential to conceal internal doubt or even anguish. The case study is the third element in the system which Koskenniemi constructs in his papers. However, in the present chapter he amuses himself with how legal advisers bracket their limited engagement compared to academics by admiring what 'free spirits' can do, while still maintaining a spiritual superiority to the politician who has to be held off from the 'quick pleasure', and to the academic, who can be written off for his facile indulgence in self-aggrandisement.⁷⁵ The latter, in turn, imagines him- or herself as free of the servile submission of government legal advisers. Finally, the activist, so important for the *Nuclear Weapons* case,⁷⁶ is torn because appearing to accept whatever the judges decide may create an impression of careerism in the eyes of his or her more fanatical colleagues. The latter, in turn, by rejecting whatever they do not agree with in the ICJ's judgment, appear themselves an absurd mixture of arrogance and manipulative cynicism. In modernity everything — including legal argument — is a matter of appearances. That is why political correctness is the eldest child of the Enlightenment.

V THE ANGUISH OF THE SOUL OF THE INTERNATIONAL LAWYER IN THE FACE OF NUCLEAR DILEMMAS

Chapter 8 is chosen for extended analysis because arguments from indeterminacy — undermining the liberal rule of law — are at the heart of the critical school's attack upon international law. While there may be a philosophical foundation for its 'theory', most of its analysis is taken up by juxtaposing the arguments used before the ICJ. That is, Koskenniemi is, above all, true to his word that he is analysing international lawyers' practice. However, he brings to this analysis philosophical assumptions which he prefers to present rhetorically rather than to ground in any discursive fashion. Never has doubt been so convincingly portrayed in international law. At this point, the dichotomy of commitment and cynicism spills over into a narcissistic self-regard of the international lawyer, preoccupied with how to avoid whatever path of political incorrectness might tarnish his or her image of him- or herself to him- or herself.

⁷³ Ibid 286, quoting Peter Sloterdijk, *Critique of Cynical Reason* (University of Minnesota Press, 1988) 5.

⁷⁴ (*Advisory Opinion*) [1996] ICJ Rep 226.

⁷⁵ Koskenniemi, 'Between Commitment and Cynicism', above n 16, 277–9.

⁷⁶ Ibid 291.

Nuclear weapons, says Koskenniemi, pose the distinction between reason and passion.⁷⁷ The very identity of international law is to set itself on the side of reason, which is practically synonymous with order, while passion belongs to chaos. Rhetorically, Koskenniemi writes again that in their ‘quest for universally applicable law’ international lawyers have always (no footnotes) sought support from the universality of reason:

Whether naturalists, formalists or realists, however, lawyers have derived their professional identity from their ability to manage a legal method enabling them to produce valid normative statements about the social world that bear no necessary connection to their personal beliefs.⁷⁸

In other words, the chapter/article is not about nuclear weapons, but about international lawyers, how they see themselves and how they are seen by others. For Koskenniemi, the essential point about the 1996 *Nuclear Weapons* case is that not merely does the law fail to get to grips with political and moral dilemmas, it ‘above all, fails to articulate a defensible conception of what it is to engage in international law as a professional commitment’.⁷⁹ Of course, these remarks are by way of introduction to a critique of the ICJ’s superficial treatment of the issue of the existence of nuclear weapons and its failure to bring together the opposing arguments on the issues. However, everything is always brought back to the self-image of the international lawyer. Koskenniemi protests that the ICJ ‘is unable to reach the core of the request — the massive killing of the innocent — and that to think otherwise would presume an image of international law and of ourselves as international lawyers we have good reason to reject’.⁸⁰ Koskenniemi, far from being the arch-critic of the profession, has become its High Priest. The argument, he continues, is not about the tension between ‘law’ and ‘politics’ and our ability to manage it ‘but about what we can be certain about and, consequently, who we are’.⁸¹

Koskenniemi continues this rhetorical harangue with a return to the importance of passion. He continues his preoccupation with ‘our identity’ as international lawyers, purportedly horrified by ‘massacres of innocents’, and makes his presumably ‘non-philosophical’ pronouncement that passion subordinates reason because David Hume says so, just as Hobbes has already told us various other things. Passion, Koskenniemi tells the profession, ‘to which reason is, as Hume always insisted, but a humble slave’ is nonetheless the realm in which ‘the issues of what we can know (faith), and who we are (identity) are settled and linked with how we understand and argue about the killing of the innocent’.⁸²

In other words, the real excitement of the ICJ *Nuclear Weapons* advisory opinion, Koskenniemi tells us, is that it raises existential questions of identity, community and responsibility prior to the conventional ways of legal reason and cannot beneficially be treated through the latter. To think otherwise,

⁷⁷ Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent’, above n 17, 198.

⁷⁸ Ibid.

⁷⁹ Ibid 199.

⁸⁰ Ibid 201.

⁸¹ Ibid.

⁸² Ibid.

Koskenniemi says he shall argue, is to assume a passive and tragic view about the human condition and the particular condition of the international lawyer.⁸³

The heart of the argument is the necessity to avoid appearing too blatantly embarrassed by contradicting too strongly people one knows will not listen. Koskenniemi begins by saying it is hard to believe that a statesman, having weighed the values at stake in a decision to use nuclear weapons, would be swayed because of a deviating legal argument. The latter is anyway merely a rationalisation of political decisions, since reason cannot produce credit counter to politics but is compelled to succumb to it,⁸⁴ presumably because David Hume says so. If the ICJ had declared that the use or threat of nuclear weapons was illegal, it would have set itself on course against vast political, military structures, a conflict between law and the longstanding policies of the most powerful states. Again, Koskenniemi says it is pragmatically unthinkable that a statesman would, in a case of extreme national danger, put at risk the lives of his own innocent citizens before those of another country. Therefore, an ICJ opinion for an absolute prohibition would have condemned the law to irrelevance in advance, particularly since defenders of the doctrine of deterrence can just as well put their arguments in legal terms. Here Koskenniemi calls into play the fundamental principle that people, anyway, always disagree about everything and, as Laclau tells us, go about taking decisions madly.⁸⁵ The different legal interpretations could not be resolved within law, but remained a battle of prestige and influence which the ICJ would have had to fight with the nuclear powers. Its chance of prevailing in such a struggle must be rather slim.⁸⁶ Conversely, if the ICJ had declared for the use of certain, 'clean' nuclear strikes, '[e]nvisaging any possibility for the lawful killing of the innocent ... would have collided head-on with powerful moral and political sentiments, humanitarian principles deeply entrenched in modernity's political discourse'.⁸⁷ In any conflict between the Court's view of law and generally shared humanitarian sentiments, the Court would not have emerged as a victor. 'Again, it would have condemned itself — and the legal system it manages — into irrelevance'.⁸⁸ Both solutions were excluded by the ICJ 'for good pragmatic reasons',⁸⁹ and this is less 'embarrassing' than the disappointment of its effective '*non liquet*'.⁹⁰

There is a fairly clear 'philosophical' message running through Koskenniemi's argument, which is to follow Wittgenstein's theory of language communities. Contrasting the ICJ's position in the advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*⁹¹ with the *Nuclear Weapons* case, there was an international law community consensus about genocide as a crime in the former case, whereas there is no similar consensus about the merits, legal or otherwise, of the threat or

⁸³ Ibid 201.

⁸⁴ Ibid 201–2.

⁸⁵ See Laclau, above n 9 and accompanying text.

⁸⁶ Koskenniemi, 'Faith, Identity, and the Killing of the Innocent', above n 17, 202.

⁸⁷ Ibid 202–3.

⁸⁸ Ibid 203.

⁸⁹ Ibid.

⁹⁰ Ibid 202–3.

⁹¹ [1951] ICJ Rep 15, 21.

use of nuclear weapons. At the level of axioms, such as ‘genocide is a crime’, one simply declares what one is: ‘who I am’, hence the issue of identity, the centrality of the ‘self’.⁹² Justification refers away from itself, to what is accepted as faith: ‘the social practices in which what we do is constitutive of who we are’.⁹³ For the ICJ to set itself outside its community — which it does where there is no consensus — simply means the argument cannot go on. Wittgenstein would say that each language game, viz community, rests on what it regards as self-evident. To ask for proof is to play another language game.

One might accept Koskenniemi’s argument as a theory of rule application. He argues that legal rules do not work because they appear through language, requiring interpretation techniques.⁹⁴ He then offers a survey of the way language about deterrence and use of nuclear weapons is employed and shows that it is full of contradictions as a matter of the social practices of politicians and lawyers. The same is true of the language of self-defence, proportionality, equity etc.⁹⁵ Inevitably, Koskenniemi will be the first to see disagreement, given his expectation that the nature of human beings is to disagree endlessly. So there is probably a complacency and a right-wing bias in his statement concerning self-defence, that it tends to be applicable in all conceivable circumstances, and it will be ‘buttressed by the reasonable argument that it must be up to the State itself to assess when its “self” might be threatened’.⁹⁶ Hobbes would agree, but is Hobbes the Wittgensteinian core of the international law language game? Presumably, if Koskenniemi were to answer this question it would be with respect to what he sees as the social practices of international law game players. In the meantime, Koskenniemi is careless about his metaphors. Writing about the concept of proportionality as a softening of any absolute rule in humanitarian law, he remarks that such a qualification of a standard ‘leaves everything ultimately up to the person with the button’.⁹⁷

If one is to take issue with Koskenniemi’s sometimes biased and pro-state authority description of social practices of politicians and lawyers, it must be by challenging the place of the non-philosopher Wittgenstein in his system. It is very tricky to try to challenge a non-dialogic writer who claims he does not have any rational argument that remains to be refuted. Towards the end of this chapter Koskenniemi’s rhetoric reaches histrionic heights with the introduction of the Holocaust — in my view usually a prelude to inappropriate pathos — accompanied by references to postmodernist theorists of ethics in the post-Auschwitz camp. Koskenniemi tells his readers, concerning ‘the killing of the innocent’,⁹⁸ that a prohibition ‘cannot be “derived” from a moral theory without becoming subject to apparently well-founded objections, derived from 3,000 years of argument in moral philosophy’.⁹⁹ This bombast is a prelude to another brief reiteration of the Wittgensteinian and English ordinary language

⁹² Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent’, above n 17, 214.

⁹³ *Ibid.*

⁹⁴ *Ibid* 203.

⁹⁵ *Ibid* 204, 207.

⁹⁶ *Ibid* 208.

⁹⁷ *Ibid* 210.

⁹⁸ A rhetorical device that remains throughout the chapter without any referent — it is a stick that each side in whatever ‘battle’ may refer to.

⁹⁹ Koskenniemi, ‘Faith, Identity, and the Killing of the Innocent’, above n 17, 212.

school of philosophy, but soon it moves onto the grander rhetoric of non-philosophising after Auschwitz.

Koskenniemi says that

[i]f the prohibition against the killing of the innocent is not accepted as such — and it cannot be accepted as such within a legal reason that looks for proof — then it is always subjected to the balancing act of law's purposive-rational bureaucratic ethos ...¹⁰⁰

He then breaks into a quotation from Bauman's *Modernity and the Holocaust*: 'divesting the use and deployment of violence from moral calculus, and ... emancipating the desiderata of rationality from interference of ethical norms or moral inhibitions'.¹⁰¹ This device combines two rhetorical steps to reach the conclusion that the principle of proportionality and the principle of mass extermination are much the same. So Koskenniemi continues that, whatever the reasons for the 'non-liquet' in the ICJ's judgment, its silence leaves us to follow what he calls 'the moral impulse, the irrational, non-foundational appeal against the killing of the innocent'.¹⁰² He adds, enigmatically, in a footnote that these musings draw inspiration from Emmanuel Levinas,¹⁰³ whose thinking is seminal, though admittedly difficult — but again, mercifully, explained by Bauman in another work on postmodern morality.¹⁰⁴ This allows Koskenniemi to come back to the 'self' of the international lawyer.¹⁰⁵ Speaking on behalf of all of us international lawyers, he explains that 'we' recognise the killing of the innocent is wrong not because of legal technique — which, like any other type of technique, is a bit cold if not actually bad — nor because of unconditional loyalty to formal authority — which could lead anyway to another Holocaust¹⁰⁶ (quoting the ever-lucid Bauman again)¹⁰⁷ — nor to any chains of reasoning — 'but because of who we are. Without so defining ourselves, how could we possibly be trusted to do the right thing in the unique and precarious situations in which that passion is triggered?'¹⁰⁸

VI HISTORY OF INTERNATIONAL LAWYERS' VOCABULARIES AS PHILOSOPHY OF INTERNATIONAL LAW

Perhaps surprisingly, given his convincing, if overplayed, portrayal of the existential confusion of the profession, Koskenniemi also considers that their identity is a function of the inexorable march of history away from the pre-modern, through the modern, to the postmodern. All international lawyers are imprisoned in this inexorable march, at the price of dropping out of the international law language game. In this volume Koskenniemi treats Pufendorf

¹⁰⁰ Ibid 211.

¹⁰¹ Ibid, quoting Zygmunt Bauman, *Modernity and the Holocaust* (Cornell University Press, 1989) 28.

¹⁰² Koskenniemi, 'Faith, Identity, and the Killing of the Innocent', above n 17, 211.

¹⁰³ Ibid 211 n 35.

¹⁰⁴ See generally Zygmunt Bauman, *Postmodern Ethics* (Blackwell, 1993).

¹⁰⁵ See Koskenniemi, 'Faith, Identity, and the Killing of the Innocent', above n 17, 218.

¹⁰⁶ Ibid 217.

¹⁰⁷ Ibid, quoting Bauman, *Modernity and the Holocaust*, above n 101, 17.

¹⁰⁸ Koskenniemi, 'Faith, Identity, and the Killing of the Innocent', above n 17, 218.

as the first provider of the vocabulary of the modern in international law.¹⁰⁹ He rejects Aristotelian notions of the search for the public good; or Grotian notions of innate human sociability.¹¹⁰ Having read his Hobbes, Pufendorf knew humans were innately selfish and concerned with self-preservation.¹¹¹ Law was a matter of social management of a plurality of concepts of the good. Pufendorf leads on to Adam Smith and theory as to how pursuit of individual interest could serve social harmony.¹¹² Koskenniemi points out the place Diderot gave Pufendorf in the *Grande Encyclopédie*.¹¹³ Government, including international government presumably, would be a matter of a science of managing self-interest and persuading it to work on the basis of some kind of coexistence.

Of course it is the case that the essays in this volume represent a tiny proportion of Koskenniemi's work, although one is entitled to regard them as representative. It is still worth stressing that a major weight of his work at present is historical. He is tracing the development of the history of what he would presumably describe as international lawyers' vocabularies. In 'The Advantage of Treaties: International Law in the Enlightenment',¹¹⁴ Koskenniemi traces the transition from Pufendorf's natural law theory to Adam Smith's theory of the *Wealth of Nations*.¹¹⁵ He remarks, commenting on David Hume's views about treaties, that '[i]t is only with arguments about the "advantages of treaties" that a stable and realistic sphere of the international seems to emerge. This is not a sphere of law, however, but of economics'.¹¹⁶ Koskenniemi explains the context of the new natural law approach which sought to make 'self-interest appear consistent with life in society'.¹¹⁷ He quotes the famous remark from Adam Smith that our dinner comes not from the kindness of the butcher and brewer or the baker, but from their own interest. So, says Smith, we should address not their humanity but their self-love.¹¹⁸ The question was still whether an impartial spectator could encourage a secondary sociability in a society of self-centred individuals.¹¹⁹ What appeared to be useful for long-term happiness had to be an argument that reflected the possibilities of long-term interest. As Smith could see, the weakness of international law was that there was no legislature or judicial system to resolve disputes.¹²⁰ However, as the Physiocrats and others such as Frederick II realised increasingly in the 18th

¹⁰⁹ Koskenniemi, 'Miserable Comforters', above n 18, 309–10.

¹¹⁰ Ibid 310.

¹¹¹ Ibid.

¹¹² Ibid 311.

¹¹³ Ibid 313, citing D Diderot and J d'Alembert, *Encyclopédie, ou Dictionnaire raisonné des sciences, des arts et des métiers, par une Société des Gens de lettres* (Permagon Press, first published 1751–72, 1985 ed) vol 1, 1030.

¹¹⁴ Martti Koskenniemi, 'The Advantage of Treaties: International Law in the Enlightenment' (2009) 13 *Edinburgh Law Review* 27.

¹¹⁵ Adam Smith, *The Wealth of Nations* (Alfred A Knopf, first published 1776, 1991 ed).

¹¹⁶ Koskenniemi, 'The Advantage of Treaties', above n 114, 30.

¹¹⁷ Ibid 64.

¹¹⁸ Ibid, quoting Smith, *The Wealth of Nations*, above n 115, 13.

¹¹⁹ Koskenniemi, 'The Advantage of Treaties', above n 114, 64.

¹²⁰ Ibid 65, quoting Adam Smith 'Of the Laws of Nations' in R L Meek, D D Raphael and P G Stein (eds), *Adam Smith: Lectures on Jurisprudence* (Clarendon Press, 1978) 545.

century, 'the proper language for modern *salus populi* would have to be that of political economy'.¹²¹

The study of one's own advantage automatically works to that of the society. Here Smith makes an important move. The political is concerned with irrational, negative passions, while the economic realm turns our passions into beneficial and calculable interests. These 'can be subjected to a universal system of rational exchanges'.¹²² Where people are concerned only to fulfil their needs, with free economic activity given full reign, welfare and happiness will be produced.¹²³ Koskenniemi points to what is said 'by a very large part of professional international lawyers in the past half century, emerg[ing] from viewing the international world in terms not of politics but of economics'.¹²⁴ This is international law as a universal commercial society. As heads of state proliferate at the UN representing 'increasingly insignificant political communities' in the General Assembly, 'the crowd retreats to drinks in the adjoining lounge'.¹²⁵

In other words the postmodern world is concerned with the satisfaction of desire and the conflict of interest in the pursuit of this desire. The *Nuclear Weapons* question is, therefore, an extreme case, and not to be allowed to distort the picture, even though the manner which humans will employ to tackle it will be similar — that is, an interminable squabbling. In Chapter 13 in this volume, 'International Relations as the New Natural Law', Koskenniemi recognises the dominance of what he now calls instrumental reason — presumably began with Pufendorf. Nonetheless, what remains striking for Koskenniemi is the divisive way this international law has developed particularly, after 1989. The hubris of instrumental reason had led to international law vocabularies other than sovereignty, such as regimes of human rights, environment law, and economic law generally, leading to new struggles of vocabularies.¹²⁶ The outcome is, as always, 'that regime will win whose application will, for whatever reason, no longer be challenged. The world of regimes is a world of hegemony, of pure power'.¹²⁷ For instance, the application of the law and economics school of international law¹²⁸ produces the arguments of Goldsmith and Posner, that all international law is merely a coincidence of interest, that '[t]reaties are surfaces over which parties exercise pressure against each other'.¹²⁹

The state of nature now applies not just to states but to autonomous functional systems;¹³⁰ this clash of languages is a pure immanence, an eternal return of the same, where an endless clash of instrumentalist vocabularies of particular regimes replaces the clashes of sovereignties. While it appears puzzling that Pufendorf, Smith and Diderot were supposed to have generally resolved these difficulties in the 18th century — they called for management of the happiness

¹²¹ Koskenniemi, 'The Advantage of Treaties', above n 114, 65.

¹²² *Ibid* 66.

¹²³ *Ibid* 66–7.

¹²⁴ *Ibid* 67.

¹²⁵ *Ibid*.

¹²⁶ Koskenniemi, 'Miserable Comforters', above n 18, 326.

¹²⁷ *Ibid* 320.

¹²⁸ *Ibid* 322–3.

¹²⁹ *Ibid* 323. See also Goldsmith and Posner, above n 40, 84–5.

¹³⁰ *Ibid* 324.

and security of different groups — Koskenniemi ends this chapter with quite a new, but incompletely presented, point of departure: Immanuel Kant.¹³¹ Again, this is rhetorically presented. Kant opposed instrumental reason, with an idea of law as a matter of the judgment of practical reason, which strove to realise human freedom according to a universal principle, applicable to all.

For Koskenniemi, the appeal of this way of thinking appears to be its compatibility, as he interprets it, with his postmodern anti-foundational existentialism. Koskenniemi perceives how at present international law has become, in a world where there is a limited place for pathos and religion, almost the only public vocabulary of a horizon of transcendence, a secular faith — as a place holder for the language of goodness and justice.¹³² Says Koskenniemi, ‘I think this is Kant’s cosmopolitan project rightly understood’,¹³³ a measuring of today’s world against the ideal of universality and freedom, accountability for choosing — a constitutional mindset, measuring everything against the ideal of universality, itself embedded in the very idea of rule of law, instead of expert decision. This is after Koskenniemi saying that appeal to knowledge of the rule of law is just one more pretence at expert decision. In the same rhetorical spirit, Koskenniemi notes how Kant ‘had to sound right’¹³⁴ by writing his proposal for ‘Perpetual Peace’.¹³⁵ Somehow or other this makes international law, at best, neither empirical nor analytical truth, but ‘signals a commitment to work in a setting of competing vocabularies with full knowledge of their indeterminacy and a sense of accountability for the choices one makes’.¹³⁶

Koskenniemi has fitted Kant into his own postmodern vocabulary. So for Koskenniemi, universality is a ‘standard’ felt as a lack at present, but irreducible to a project of institutional reform. Koskenniemi ends by quoting from *The Metaphysics of Morals* that we should act as if our projects, for example for perpetual peace, are real, without asking whether this is true as a matter of theoretical reason. The alternative is to admit that the moral law within us is deceptive, an abhorrent sentiment that we are rid of all reason and belong among the other species of animals.¹³⁷ This is precisely the return of the doubt and anxiety that Koskenniemi considers so effectively in his chapter on the nature of commitment and its relationship with cynicism.¹³⁸

Kant launched a major challenge against the determinism and materialism of the English empiricist, materialist tradition, from Hobbes to Hume and Adam Smith. He is widely, if not universally, regarded as a philosopher. Since the Second World War and the relative demise of the popularity of Hegel, Kant has become the arch-priest of anti-nationalism and anti-war mongering. The contribution of Amanda Perreau-Saussine to Samantha Besson and John

131 Ibid 325–30.

132 Ibid 329.

133 Ibid.

134 See *ibid*.

135 Immanuel Kant, ‘Perpetual Peace: A Philosophical Sketch’ in H S Reiss (ed), *Kant: Political Writings* (H B Nisbet trans, Cambridge University Press, 2nd ed, 1991) 93 [trans of: ‘Zum ewigen Frieden: Ein philosophischer Entwurf’ (first published 1795)].

136 Koskenniemi, ‘Miserable Comforters’, above n 18, 330.

137 Ibid, quoting Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, Cambridge University Press, 1996) 123 [trans of: *Die Metaphysik der Sitten* (first published 1797)].

138 Koskenniemi, ‘Between Commitment and Cynicism’, above n 16, 271–93.

Tasioulas's *The Philosophy of International Law* considered also the implications of his influence for the philosophy of international law.¹³⁹ It appears to me that there is no way to explore Kant's value and significance apart from an understanding of metaphysics of the person and of the world he inhabits. This is Kant's imperative of transcending the passions and bringing them firmly under the rigorous discipline of reason. Acting as if what one wants actually exists, as Kant appears to recommend in the passage Koskenniemi quotes, has been the recipe of madness since time immemorial. If there is no reason to discern the truth, then as Kant thought, we belong lost among the other living species, and, most probably, below them. I think one of the many virtues of Koskenniemi's hugely insightful diagnoses of the mentalities as well as the vocabularies of contemporary international lawyers is that he inadvertently reveals the urgency of a speedy return to reason, united in a partnership with passion — a rhetorical flourish by the reviewer. Perreau-Saussine ends her chapter on Kant as follows:

For Kant, the priority of a metaphysics of morals is both unavoidable and inherently morally transformative. If we were to adopt Mendelssohn's theory that 'humanity constantly vacillates between fixed limits', we could only understand life as a farce — and one of which any reasonable spectator would rapidly tire. A metaphysics of morals is needed to convince us that everyone of us must act 'as if everything depended on him'.¹⁴⁰

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¹³⁹ Amanda Perreau-Saussine, 'Immanuel Kant on International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010) 53, 53–75.

¹⁴⁰ Ibid 75 (citations omitted). See also Immanuel Kant, 'On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice' in Mary J Gregor (ed), *Immanuel Kant: Practical Philosophy* (Mary J Gregor trans, Cambridge University Press, 1996) 273, 305 [trans of: 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis' (first published 1793)]; Immanuel Kant, 'Religion within the Boundaries of Mere Reason' in Allen Wood and George di Giovanni (eds), *Religion and Rational Theology* (George di Giovanni trans, Cambridge University Press, 1996) 39, 135 [trans of: *Die Religion innerhalb der Grenzen der bloßen Vernunft* (first published 1793)].

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