

ARTICLES : SPECIAL ISSUE

The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's *From Apology to Utopia*)

By David Kennedy*

Martti Koskenniemi's *From Apology to Utopia* is the most significant late 20th century English language monograph in the field of international law, and it is terrific to see it re-issued.¹ The book offers a comprehensive reinterpretation of the doctrinal materials and intellectual history of the discipline. It became an instant classic in the analysis of law's rhetorical structures, and it could well turn out to have been the last great original treatise in the international law field. It both synthesized the materials and demonstrated the impossibility of their being synthesized in a stable and intellectually coherent fashion. The treat in this re-issued edition is Martti's new epilogue. In it, he reflects on what he was seeking to achieve in ways that will open the text to new readings while remaining, I think, true to the spirit of the initial project.

I felt very close to Martti's original project. My own *International Legal Structures*² pursued similar themes and Martti has been very kind in his acknowledgement of its influence. I was also trying to map the rhetorical patterns and argumentative structures in the field's doctrinal corpus. *From Apology to Utopia* was also Martti's

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¹ I make this assessment with apologies to many friends and colleagues. I was tempted to fudge -- "one of the most significant" -- but decided to stick to my guns. Comparable efforts to integrate, criticize and reimagine the field are hard to identify. There are numerous major works of synthesis and integration -- Brierly, Cassese, Lauterpacht, Rosenne, Schwarzenberg, Sorensen, Verdross or de Visscher come to mind, and must have been models for *From Apology to Utopia*. In the postwar era, there were several efforts to reimagine the discipline and offer it a new intellectual foundation -- Clark/Sohn, Falk, Franck, Friedmann, Henkin, Jessup may have been the most noteworthy. There were also other works of criticism -- Carty, Chimni, or my own *INTERNATIONAL LEGAL STRUCTURES* (1986). But for root and branch re-thinking on this scale, I think we would need to go back to Kelsen or McDougal in mid-century.

² DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

dissertation and one of the most pleasurable intellectual conversations I have ever had took place in Turku on April 1, 1989 when I served as “opponent” to his promotion at the Turku Faculty of Law. It was thrilling to have a go at the details of his doctrinal history and hear his response. Did Vattel really mean that? Do the periods really break this way, or is there more continuity here, more discontinuity there? We argued about what he called “objectivism” and “indeterminacy” and about their significance. When *From Apology to Utopia* came out, I published a review³ that seems, in retrospect, to have failed to capture the book’s singular importance for me as a fellow-traveler in the project of rethinking the international law tradition. Simply put, it was thrilling to find a kindred spirit, so much more knowledgeable about the history and doctrines and cases of the field than I, developing an analytic framework parallel to my own.

That he should be *European* was more remarkable still. Like many American internationalists, I longed to be well regarded by Europeans. But in several years of knocking about the old world, I had found very little resonance for my own ideas about international law, which came across, as I was repeatedly told, as yet another exotic variant of American skepticism-realism-pragmatism-policy-science-exceptionalism. Critical legal studies might be another American “school of thought” one would need to learn something about --- the Cold War was still on, and America was still the occupying hegemon --- but it was not something important for scholars serious about the international legal order, or lawyers serious about the practice of international law. Yet here was an international lawyer and a European intellectual, moving in the same direction. I think we each found the existence of the other exciting and reassuring, and it would be some time before we could begin to sort out for ourselves what made Martti’s book European and mine American, and whether these differences mattered.

Martti and I met in the summer of 1985, at a diplomatic cocktail party in Geneva. I was working for the UNHCR. He was 32, I was 31. He seemed like a fairly serious guy, who wanted to talk about international legal history over drinks, and I think we recognized in one another a parallel intellectual ambition. We shared the feeling that the intellectual tradition sustaining the field of international law had come to an end - the field was, in some sense, over. I had been trying to get promoted at Harvard by writing critically about international law. It had been tough slogging, and I was in Geneva in part to get away and explore a career in practice. Here was Martti, a practicing international lawyer, who seemed to yearn for the academy. In some odd way, we both seemed committed, against the odds, to investing our

³ David Kennedy, 31 HARVARD INTERNATIONAL LAW JOURNAL 385 (1990) (reviewing MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT*, (1989)).

intellectual careers in international law as a field, making intellectual sense of what I would have called the “consciousness of the establishment” we saw on display all around us at the cocktail party. Martti’s research technique focused more on libraries than cocktails, but we were both engaged in a multi-year scholarly project on a really crazy scale --- to rewrite the entire history and all the doctrines of international law in a new way, in a single unified intellectual framework.

We were both reading and borrowing from all the then fashionable currents of European social theory. Those who made it into Martti’s bibliography included: Aarnio, Adorno, Barthes, Chomsky, Derrida, Foucault, Gadamer, Habermas, Kuhn, Levi-Strauss, Marx, Piaget, Weber, and dozens of other formidable intellectuals. I think we thought we were the first – certainly in many years – to look at international law through the lens of this broad intellectual tradition. We may have been among the first to import post-modern and post-Marxist social theory, but we were hardly the first to look to the great traditions of European social thought --- leading international law scholars in every generation had done the same. Nevertheless, the vivid sense that we were bringing hot coals to dry tinder remains sharp in my memory. We both thought scholars associated with Critical Legal Studies in the United States had worked out how to make the tradition of critical and left social theory useful for legal analysis and we intended to “apply” Roberto Unger’s critique of “liberalism” to international law and imitate Duncan Kennedy’s analysis of private law doctrine and history in our own chosen field.

Looking back, I know we wildly overestimated how much of what would be needed to rethink international law from top to bottom had already been accomplished and could simply be imported wholesale from these traditions. But if we had not thought so, we might not have undertaken such a project. There were, after all, thousands of books and articles and cases about international law written over several centuries – the idea that we could crack it all open in one book was a bit whacky. Still, there is something amusing, even now, to skim *From Apology to Utopia*’s lengthy bibliography and finding scattered among Virally, Fitzmaurice, Scelle and the rest of the international legal canon the names Jack Balkin, Paul Brest, Hugh Collins, Clare Dalton, Peter Goodrich, Robert Gordon, Thomas Heller, Alan Hunt, Mark Kelman, Duncan Kennedy, Frank Michelman, Gary Peller, Joseph Singer, Mark Tushnet, and Roberto Unger. The number of international law works of critical mien remained negligible. In Martti’s bibliography we find only Philip Allott, David Bederman, James Boyle, B.S.Chimni, and myself.

Apology to Utopia sought to establish a new intellectual voice or viewpoint from which to analyze international legal materials. Martti’s new epilogue recapitulates his central thrust. International law is a professional practice of arguing. If other theories of international law stepped outside that practice, rearranging the

arguments into satisfying theoretical edifices, Martti wanted to study the arguments as they were lived. The arguments of the profession are a kind of language, their meanings a function of the way they are used in relationship to one another. Martti treated the main theoretical axes of contention within the field --- naturalism/positivism, objectivism/subjectivism, formalism/realism --- not as problems to be resolved, but as “conditions of possibility” for arguing about a whole range of matters, from the meaning of international legal history to the resolution of technical doctrinal disputes.

Prior to the publication of *From Apology to Utopia*, to become a famous international law theorist, one needed to develop an idiosyncratic – and influential – resolution to a series of classic questions: how does international law bind the sovereign, is sovereignty law or fact, and so forth. We had learned in law school that the simple explanations – naturalism or positivism, for example – had long since been proven inadequate to the task. Only a more robust, complex, baroque theory would be able to succeed – neo-this or post-functional-that. But perhaps, our teachers seemed to suggest, one should forego theory altogether, and cultivate the mature and balanced voice of the experienced jurist/scholar. Such a person took questions one at a time and resolved them in an eclectic spirit of sound judgment, without theory – like an acrobat without a net. Martti was proposing to do something else altogether – to explain in a single blow why all those nuanced judgments, and all those prior theories, were inadequate to the task of resolving the central questions posed by the field. And yet the practice of international law nevertheless continued.

To this point, Martti and I were travelling the same road: there is a central intellectual dilemma that cannot be resolved, a wide range of doctrinal and historical issues turn out to pose analogous, and equally irresolvable, dilemmas; people practice international law by deploying doctrinal, theoretical and historical arguments that purport to resolve these dilemmas but somehow only reproduce them. We described the difficulty in different ways, used different materials to illustrate it, focused on different kinds of doctrinal argument, but our basic arguments were quite similar.

One difference that still interests me is this. In elaborating a recurring antinomy in doctrinal argument, I tended to present each opposition between two doctrines or doctrinal interpretations as a static chiasma, able to be transformed into another dyad, but otherwise in balanced equipoise. Martti, by contrast, tended to present the same choices as having stakes and direction --- often a strong disciplinary default forced to confront an unsettling alternative. This gives his text far more drama and movement. He might well have thought I was missing something in acting as if the choices were all so static and balanced, just as I thought he was often

underestimating the rhetorical potential of the argument which remained the underdog in the discipline at a particular moment.

Martti was also more interested than I at that time in the motives of the professionals who use the disciplinary language. Why do international lawyers keep falling for formal --- or anti-formal --- arguments that in some sense we now know are unpersuasive? For Martti, the answer lay in the beguiling twin desire to apologize for what is *and* to promise the utopia of what might yet be. They *want* form, and forget its limits, just as they *want* reform and forget its routinization. I have always found Martti's narrative extremely helpful as a heuristic --- contradictory desires for ratification and reform linked somehow to the unstable history of relations between legal and political modes of interpreting and building international order. In *International Legal Structures* I speculated far less about the motives of the professionals speaking the language of international law, and invested the argumentative materials themselves with needs and wishes in a kind of discursive anthropomorphism. For both of us, the idea of an unstable or contradictory root helped explain how alternatives within legal consciousness - formal and anti-formal, procedural and substantive, positivist and naturalist - fail to settle down over time. The discipline has an itch it keeps needing to scratch.

In the epilogue, Martti formulates the central problem that got him going - the itch he needed to scratch --- this way:

"My descriptive concern was to try to articulate the rigorous formalism of international law while simultaneously accounting for its political open-endedness --- the sense that competent argument in the field needed to follow strictly defined formal patterns that, nevertheless, allowed (indeed enabled) the taking of any conceivable position in regard to a dispute of a problem. Existing academic works seemed to me too focused on either the formal or the substantive without suggesting a plausible account of the relations between the two."⁴

Often in the book, the words "form" and "legal" and "objective" blend into one another, and are juxtaposed to "substance," "politics" and "subjective." For Martti, to be legal, international lawyers default toward the formal, stigmatizing their opponents as subjective or political, claiming the high ground of objectivity and banishing their opponents to the political. But they also want the subjective, and they keep opening things back up. At the same time, formality disappoints - rules are over or under-inclusive, for example - and the indeterminacy of doctrine

⁴ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA, THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, REISSUE WITH A NEW EPILOGUE, 565 (2005).

repeatedly forces a subjective political judgment. This repeated return to political discretion is not a good thing. It makes law “singularly useless as a means for justifying or criticizing international behavior.”⁵

“The weakness of international legal argument appears as its incapability to provide a coherent, convincing justification for solving a normative problem. The choice of solution is dependent on an ultimately arbitrary choice....”⁶

Looking back at it, I wonder whether this way of framing the problem resulted from the international lawyers Martti had encountered, who may well have felt their status as *legal* rather than political actors required fealty to form, and was threatened by their repeated need to open things up. The international lawyers with whom I was familiar did not share this default to form, or the sense that departures from form threatened to exile you from the domain of law altogether. Some did – but they seemed old-fashioned. I thought of Leo Gross or Al Rubin, neo-positivists who treated sovereignty and consent as the prime directives. Many international lawyers I knew defaulted the other way – to an anti-formal law of loose standards and soft judgments. But they also seemed old-fashioned, associated with the international law of “cooperation” and interdependence and the “international community” of the nineteen sixties --- I thought of Wolfgang Friedmann or Bob Meagher. Martti’s later historical work very helpfully analyzes the roots of these two traditions in the German and French legal traditions of the late nineteenth and early twentieth centuries.

Most of the international lawyers I knew were careful not to have an identifiable default. So long as they kept moving, making and unmaking law as a tool of statecraft, they would not get stuck with the difficulties of form or substance, objective or subjective. But what they were doing would not be “politics” either – they weren’t “realists” or political scientists – they were international lawyers. That may explain my tendency to see rhetorical alternatives in equipoise, rather than agonized moments of departure from a formal default. The international lawyers from whom I learned the field were children of the American legal realists. Some had, certainly, been influenced by the “policy” school associated with McDougal at Yale – but others saw themselves as opponents of the Yale school and heirs to the “legal process” thinking prominent at Harvard in the same years. Many were someplace in between Yale and Harvard (in Manhattan, actually, at NYU or Columbia) and drew upon both policy and process schools to develop their own

⁵ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT, 48 (1989).

⁶ *Id.*

eclectic defense of a fluid international normative profession. I am thinking of people like Oscar Schachter, Tom Franck, Warren Christopher, Bill Rogers or Abram Chayes. For these people, as I put it in *International Legal Structures*, "the interminability of legal argument is the subtle secret of its success."⁷

As a result, I would have reworded the last sentence in the earlier quote from Martti's epilogue. He says the field seemed "too focused on either the formal or the substantive without suggesting a plausible account of the relations between them."⁸ There is much truth to that - but for me, the itch that needed to be scratched was the repeated suggestion by international lawyers that there *could be* "a plausible account of the relations between the two" rather than or alongside a focus on "either the formal or the substantive." This was the international legal tradition I thought had run its course. These men knew quite well that tight rules can generate open-ended administrative or judicial discretion, just as broad standards can become routinized and predictable. They did not associate *form* or objectivity with law --- law was a complex *mélange* of form and substance, rules and standards, doctrine and policy. As a result, I wanted to understand how these lawyers continued to feel the intermediate positions they developed were satisfying given that they *also knew* in another part of their brain, that these positions were open to criticism and might well be collapsed back into an unhelpfully formal or anti-formal extreme. It seemed obvious to me that international law was *useful* - all these people were using it for all kinds of things. And yet the very people most adept at using it were also most adept at unravelling the arguments made by their colleagues for using it *this way* rather than *that way*. Somehow they knew, and they didn't know, and somehow the ongoing practice of the profession seemed to depend on keeping that knowledge available and hidden.

With these people in mind, it was easy to see that an absolutely airtight theoretical argument demonstrating that their arguments were incoherent or contradictory or indeterminate would not lay a glove on their professional practice. Nor would it disturb them to find that liberal philosophy was split at the root. They suspected as much --- and were already disinvesting from both philosophy and whatever they called "liberalism." Moreover, in my experience, *sometimes* you could think up an argument that would make them feel compelled to abandon a position they had just defended - but quite often you could not. And even if you did go home and work out how logically it could have been the other way around, when you came back, they would just shrug - they were already on to a new problem. There was

⁷ DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).

⁸ *Supra*, note 4 at 565.

something shamefully jejune about having thought it was all somehow supposed to make sense.

Rereading *From Apology to Utopia* and *International Legal Structures* together now, I find traces of this difference in starting point, but both books contain both approaches. (There are other differences – he really does know a lot more about the doctrines and the history!) Martti seems angrier that it all doesn't fit together, while the author of my text seems to be getting some pleasure out of demonstrating how incoherent it all is without acting surprised or let down. But I wrote my share of sentences claiming that it had all tumbled down and could not be put back together again. As it evolved, my own approach to what we both call “deconstruction” owes a lot to Duncan Kennedy's notion that deconstruction is an *experience* that can happen to you when an argument you thought persuasive is undermined by another argument you also feel compelled to recognize stems from the same premise. Martti sometimes uses the word “deconstruction” as if there existed a logical machine that could reliably produce this effect once it had been shown to work in the domain of philosophy. I would rather say the potential to produce this effect lies latent everywhere. But we both do say both things at different points in the two books, just as we both speak of legal arguments as being inherently unpersuasive once they have been shown to be contradictory.

For reasons I still do not fully understand, Martti's recoil from the eclectic incoherence of postwar American legal thought is different from my own, as if he, like many European international lawyers, doesn't see our professional practices as properly *legal* in some sense. As if the empire were, somehow, ultimately a fraud. As if what we call law was “really” just political science cross dressed in norms. Perhaps this difference in emphasis has something to do with the difference between the European and American legal professions into which we were both educated. Martti was taught in the shadow of Scandinavian legal realism, just as I had relatively formalist teachers – among them Leo Gross and Al Rubin, in the international law field. Nevertheless, in my education, such people were intriguing misfits, and even they had us confront the realist tradition. I remember Rubin starting his class with Hohfeld's jural correlatives and Gross scrawling “*homo homini lupus est*” across the blackboard and stepping back with a mischievous grin. I would need to know more about the legal culture in which Martti began his career to figure this out. For some reason, I have never quite shared Martti's yearning for a “culture of formalism” which could redeem the promises of the liberal cosmopolitan vision he associates with the best in the European international law tradition.

I nevertheless find what Martti wrings from his recoil and his yearning both politically and ethically powerful. The new epilogue makes his politics far more

explicit than it was in the original text. *From Apology to Utopia*, he now writes, “was to provide resources for the use of international law’s professional vocabulary for critical or emancipatory causes.”⁹ I like the phrase “provide resources.” Martti has not produced a program of action for reformers or a deconstruction machine for critics. He has opened up the field’s professional practices for politically contestation. The closing pages are moving -- denouncing the false promise of a cosmopolitan consensus to resolve what remain divisive political choices, calling for investigation of the international legal regime’s “structural bias,” rejecting the field’s fraudulent claims to instantiate liberal principles of equality and pluralism, and insisting that despite the breadth of potential legal arrangements, “*the system still defacto prefers some outcomes or distributive choices to other outcomes or choices.*”¹⁰ I cheer the anger and outrage in these passages. It is not that forms disappoint or arguments fail to persuade, but that people get hurt and no one notices or feels responsible.

In the years since *From Apology to Utopia* was originally published, the professional sensibility Martti and I both found wanting in the nineteen eighties has had its ups and downs. After the end of the Cold War, the promises of a broadly liberal cosmopolitan order again felt shiny and new. In that sense, the book could hardly have appeared at a worse moment – just as the sensibility it autopsied came back to life. Teaching the text in the early nineteen nineties was no picnic --- students were filled with enthusiasm for the networks and non-governmental organizations of a renewed international legal order. Over the last decade, as the dark sides and disappointments of the humanitarian and human rights initiatives of those years have become visible, Martti’s criticisms have found new takers. If his critical reflections on the rhetorical structure of doctrinal and historical argument in the field can be made useful in the struggle to understand more clearly how we are now governed at the global level and why so many are ruled so unjustly by so few in the name of their own sovereignty or a benign cosmopolitanism, we’d really be cooking with gas.

When Martti and I met in Geneva, we thought we just about had that figured out. It is now clear how much remains to be done. We do not yet have a good map of the legal and political regimes that govern our world. What Martti calls the “grammar” of the governing professional languages remains obscure. The links to bias and social injustice are still largely hypotheses. To be sure, a great deal of good critical work in the international field has been done since *From Apology to Utopia*. Both Martti and I have continued to experiment with historical and doctrinal studies of

⁹ *Supra*, note 4 at 589.

¹⁰ *Id.*, at 606-607.

various kinds. Nathaniel Berman began his work blending historical and doctrinal analysis alongside Martti and I in the nineteen eighties and has generated a quite different and powerful critical lens on the field. Martti has had numerous students – Outi Korhonen and Veijo Heiskanen both completed monographs much influenced by *From Apology to Utopia*. Martti cites a wide range of more recent critical work in his new epilogue.

I continue to be struck, however, by the relatively scarcity of work picking up, reworking, extending, or contesting the broad argument of *From Apology to Utopia* -- or, for that matter, of my own *International Legal Structures*. Although often cited, Martti's book is rarely challenged or deeply engaged. *From Apology to Utopia* is a difficult book, full of anguish and complex and counterintuitive analytic riffs. In the years since it was first published, Martti has become a widely recognized leader in the European international law discipline and a member of the International Law Commission. I often have the feeling the book's symbolic meaning has somehow overtaken its analysis. In these pages, Martti wrestles with the devil, looks into the abyss, and struggles with the dark incoherence of the field's intellectual foundations. He lived to tell the tale, and went on to write earnestly and lovingly about the liberal and cosmopolitan forbearers of today's European international lawyers. There is something reassuring in the story, like the Sunday parables of a preacher who struggled with temptation and saw the light in his youth. I hope the book's reissue will offer the opportunity for a re-engagement with its argument.

For those who bring a critical impulse to the field, and hope to take up Martti's challenge to rework the field's tradition and unravel the secrets of its bias and bad faith, it has been tempting to treat the book as a given, a rock to be digested or maneuvered around, rather than a provocation to engage and revise. I have often seen *From Apology to Utopia* cited for some general proposition like "international law moves back and forth from apology to utopia" or "international legal argument is indeterminate and unpersuasive." This is too bad. Every page in the book offers an interpretation --- a contestable, often implausible or counterintuitive interpretation --- of doctrinal and historical materials that could certainly be seen differently. But not just the details. What about "apology" or "utopia?" Just how are these social functions wrought from the grammatical structures and default arguments Martti analyzes? We do not yet know. Martti's first book opened questions, offered provocative suggestions, outlined what it could mean to integrate the field around a recurring problem rather than as progress toward a cosmopolitan solution. The central armature of his argument remains a hypothesis – it cannot be cited for a tidy conclusion. Far more, the book offers a new style, a new voice, and a new sensibility for thinking about the work of scholarship and lawyering in the international legal profession. What will be done with that

method, performed in that style and articulated with that sensibility remains to be seen.