“FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT”: A CRITICAL VIEW OF INTERNATIONAL LAW

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Martti Koskenniemi is a renowned international legal scholar. He was the member of the International Law Commission in 2002–2006 who presented his highly acclaimed report “Fragmentation in International Law”. Prior to it he served as a judge in the administrative tribunal of the Asian Development Bank and the director of the International Law Division in the Finnish Diplomatic Service.

Nowadays M. Koskenniemi works as a professor of international law in the University of Helsinki. He is the Director of a research institute that functions under the aegis of the University of Helsinki — the Erik Castreén Institute of International Law and Human Rights.

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The book "*From Apology to Utopia. The Structure of International Legal Argument*" was first published back in 1989 in Finland. It offered a critical view of international law: some claim it lacks objectivity as an idealistic moralist utopia, others view it as an apology to the rationalist preoccupation of states with national interests rooted in *Realpolitik*. The book provoked an intensive academic discussion. One of the leading Soviet/Russian legal scholars Igor I. Lukashuk in the introduction "Theory and Practice of Interstate Relations" to his famous work "Modern Law of International Treaties" in two volumes paid attention to a new critical school of thought in the doctrine of international law pointing to its prominent representatives such as D. Kennedy, F. Kratochwill, N. Onuf, M. Koskenniemi.[2] Lukashuk quoted M. Koskenniemi's phrase about international law being "unable to coherently justify or criticize instances of State practice" and his suggestion of going beyond objectivism, studying international law on more solid, even though a lower basis of international relations, bringing international law theory closer to real politics.[3]

In 2006 the "German Law Journal" devoted a special issue in which leading Western scholars shared their opinions about M. Koskenniemi's book "*From Apology to Utopia*"[4]. David Kennedy, for example, characterized it as "the most significant late 20th century English language monograph in the field of international law."[5]

"From Apology to Utopia" was reissued in 2005 by Cambridge University Press. Now it has a new epilogue where the author comments

[2] David Kennedy, *International Legal Structures* (New York, 1987); Friedrich Kratochwill, *Rules, Norms and Decisions* (New York, 1989); Nicholas Onuf, *World of Our Making* (New York, 1989); Martti Koskenniemi, *From Apology to Utopia* (Helsinki, 1989). Cited in Lukashuk I. I. Sovremennoye pravo mezhdunarodnyh dogovorov. V 2 t. Tom 1. Zaklyuchenie mezhdunarodnyh dogovorov. M.: Wolters Kluwer, 2004. S. 54–55 (Igor Lukashuk, *Modern Law of International Treaties*. In 2 vol. Vol. 1. Concluding International Treaties (Wolters Kluwer, 2004), 54–55).

[3] Martti Koskenniemi, *supra n 2,* 2, 48. Cited in Lukashuk I. I., *supra n 2,* 55.

[4] URL: http://www.germanlawjournal.com/volume-07-no-12 (accessed May 24, 2017).

[5] David Kennedy, *The Last Treatise: Project and Person* (2006) 7 (12) German Law Journal 982. URL: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8cb52cf80a132568cadc2/1454951250243/GLJ_Vol_07_No_12_Kennedy.pdf (accessed May 24, 2017).

on the critique generated by the 1989 book. In 2016 Vladislav L. Tolstyh, Head of the International Law Department of the Novosibirsk State University, published an extensive review of the 2005 edition book in the "Russian Law Journal" in which he called it "not simply bright and original", but also "the most profound modern work in international law."[6]

"From Apology to Utopia" comprises eight chapters. Chapter 1 is entitled "Objectivity in international law: conventional dilemmas". The identity of international law is defined by the requirements of normativity and concreteness. Normativity presupposes its difference from the conduct of states. Concreteness delineates international law from natural morality. "A law, which would lack distance from State behavior, will or interest, would amount to a non-normative apology, a mere sociological description ('*concreteness*'). A law, which would base itself on principles ... unrelated to State behavior, will or interest would seem utopian, incapable of demonstrating its own content in any reliable way ('*normativity*')."[7] As M. Koskenniemi formulated in his "Response" to the discussion that was fueled in the special issue of the "German Law Journal" (2006), "All of international legal practice is an endless oscillation between opposite poles in which no solution is more plausible than any other solution."[8]

The structure of international legal argument is predetermined by either a descending or an ascending pattern of justification. The former is "premised on the assumption that a normative code overrides individual State behavior" (a community perspective, or *utopianism*), the latter — "on the assumption that State behavior, will and interest are determining

[6] Tolstyh V. L. Obzor knigi M. Koskenniemi "Ot apologii k utopii. Struktura mezhdunarodnog-pravovogo argumenta". Russian Law Journal. 2016. № 5. S. 61–70; № 6. S. 52–62 (Vladislav L. Tolstyh, Review of M. Koskenniemi's book "From Apology to Utopia. The Structure of International Legal Argument" (2016) 5 Russian Law Journal 61–70, 6 Russian Law Journal 52–62).

[7] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument*. (Cambridge University Press, 2005), 17.

[8] Martti Koskenniemi, A Response (2006) 7 (12) German Law Journal 1104. URL: http://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8cbdecf80a132568cb322/1454951390787/GLJ_Vol_07_No_12_Koskenniemi.pdf (accessed May 24, 2017).

of the law" (an autonomy perspective, or *apologism*). Following this logic, "either the normative code is superior to the State or the State is superior to the code"[9] — *tertium non datur*. Back in 1928, Hans Kelsen in a similar fashion stated that a monistic hierarchy of legal norms could be based either on the initial choice of "primacy of international law" or "primacy of national law" (in M. Koskenniemi's terminology, based respectively on the descending or ascending argumentative model). The first choice presupposes that it is the higher international legal order that vests states with legal competences, the second one, on the contrary, views international law as "a subordinated legal sphere to which competences are delegated by the sovereign (higher-standing) national legal orders through concrete acts by their national organs" — to Kelsen, both approaches were academically valid, but resulted in different conclusions when applied to the same legal problem.[10]

In Chapter 2 M. Koskenniemi describes the effect of the liberal doctrine of politics on international law. It was aimed at countering the anarchic consequences of the loss of faith. The author traces the doctrinal history from the early scholarship (Vitoria, Suarez, Grotius) through the works of the classicists such as Wolff, de Vattel and legal scholars of the 19th century (Wheaton, Phillimore, Klüber, Martens and others) up to modern professional mainstream. The early liberal theory presumed that a State determined its rights and duties all by itself. In such a case law was incapable of resolving conflicts. At this point Christian Wolff suggested a strategy of reconciliation. "It is not apologetic as it maintains its connection with natural law maxims. <...> And yet, it is not utopian, either, as it incorporates the real character of the international society within itself."[11] Classicism symbolized the first attempt to reconcile argumentative models, to strike a balance between

[9] M. Koskenniemi, *supra n 7,* 59.

[10] H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts (2nd ed. 1928) 155, 317. Cited in Jochen von Bernstorff, Sisyphus was an international lawyer. On Martti Koskenniemi's "From Apology to Utopia" and the place of law in international politics. (2006) 7 (12) German Law Journal 1020. URL: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b8cb8bcf80a132568cafe6/1454951307710/GLJ_Vol_07_No_12_von+Bernstorff.pdf (accessed May 25, 2017).

[11] M. Koskenniemi, *supra n 7,* 109.

them. Modern doctrine in this sense is a continuation of the classical approach.

Chapter 3 is devoted to the structure of modern doctrines. M. Koskenniemi claims that modern doctrinal interpretations are founded simultaneously on both descending and ascending arguments, and it creates "relative indeterminacy", in his words. In modern doctrine there exist four possible approaches to resolving this tension. These are a *rule-approach* exemplified by G. Schwarzenberger (international law consists of norms, all the rest is politics), *skepticism* presented by the figure of G. Morgenthau (there exists no international law), a *policy-approach* that can be illustrated by the works of M. McDougal (it is necessary to promote the values of human dignity), and *idealism* that can be best represented by A. Alvarez (law reflects society).

The title of Chapter 4 is quite laconic — "Sovereignty". Here the author devotes his attention to the continuing dispute about the extent and relevance of sovereignty juxtaposing a *legal* and *a pure fact* approaches. None of them proves to be absolutely effective in the analysis making it possible to speak of "the rise and fall" of both. M. Koskenniemi notes, "Modern discourse about sovereignty shifts constantly between a pure fact and a legal approach."[12] He provides two examples that seem most convincing in this respect: a case of statehood and recognition and a case of territorial disputes.

Chapter 5 points out to most problematic zones in the international legal sources theory such as treaty interpretation, unilateral declarations, acquiescence and estoppel. It is the antinomy *consent* v. *justice* that underlies all of these issues — what should prevail?

Chapter 6 characterizes the identity of custom as general law through the prism of the ascending and descending approaches. As a result both materialism and psychologism in their pure forms are rejected by the author.

Chapter 7 bears the title "Variations of world order: the structure of international legal argument". The author is trying to answer the question about the sense of the legal project (the antinomy *independence* v. *community*): is international law moving to serve the interests of an individual or embrace the interests of a bigger whole? The "community"

[12] M. Koskenniemi, *supra n 7,* 270.

project can be traced to the Grotian tradition (law is deemed to reflect the pre-legal normative project), it can also be predicated on the idea of interdependence of states in the political, economic, cultural, ecological spheres) or universality of human nature, culture, socio-economic structures. The descending model (common values prevail over individual state's policies) is common for each of the three traditions mentioned above. However, all of them are vulnerable. First, common values are subjective in character. Second, it may be hard to single out common interests that differ from the interests of states. Third, all of them lack an understanding of human nature. In V. Tolstyh's opinion, the argumentation that refers to natural justice or common interests looks like "well-masked imperialism" and supports totalitarianism.[13] Quite on the contrary, the "independence" project promotes egoism underlining the absence of common goals and stressing the liberty of states in their choice of actions. According to it, international organizations are not bodies of a fictitious community, they just manifest agreements to cooperate. However, this project fails to explain why states have to conclude agreements and implement them. Why did *bellum omnia contra omnes* stop?

In Chapter 8 "Beyond objectivism" the author considers the doctrinal school of objectivism unfounded and calls upon international lawyers to revise the structure of legal argument. Here he is trying to resolve a fundamental dilemma of *ideas* v. *facts*.

In the epilogue written in 2005 M. Koskenniemi concludes, "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."[14]

[13] Tolstyh V. L. Obzor knigi M. Koskenniemi "Ot apologii k utopii. Struktura mezhdunarodnog-pravovogo argumenta". Russian Law Journal. 2016. № 6. S. 54 (Vladislav L. Tolstyh, Review of M. Koskenniemi's book "From Apology to Utopia. The Structure of International Legal Argument" (2016) 6 Russian Law Journal 54).

[14] M. Koskenniemi, *supra n 7,* 565.

In the 2005 epilogue M. Koskenniemi gives a retrospective overview of the concepts he introduced in 1989 and outlines the tenets of the descriptive and normative projects. The former is called "the grammar of international law" while the latter represents a movement from grammar to critique.

Carrying out the analysis of the main elements of grammar, Professor Koskenniemi comes back to the notion of sovereignty.[15] One of the binary distinctions or "structural biases", in the author's formulation, discussed throughout the book is the dichotomy of *sovereignty v. sources*.

"The story about international law's basis in statehood is a 'hard', historically inclined narrative that assures the reader of the law's suave realism, its being not just a compilation of the author's cosmopolitan prejudices"[16]. This is the ascending argumentative model in action, and all Russian authors whose articles are presented in the rubric "The concept of sovereignty: traditional, liberal and critical approaches" seem inclined to follow this line of reasoning (A. Solntsev and A. Gulasarian more visibly, D. Boklan and A. Korshunova — to a lesser extent). They criticize *utopianism* describing international law in the actual political context.

"Thinking of international law being generated by 'sources' opens the door for a 'softer', cosmopolitan vision focusing on the present 'system' constituted by treaty texts (such as *the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms*, emphasis added — L. Z.), UN resolutions, peremptory norms or general principles."[17] This is the descending model of argumentation based on the conviction that international law should be primarily guided by the interests of international community rather than by national interests, and this approach is evidently more convincing for the colleagues from Germany (E. Klein) and the Netherlands (J. Gerards). Like most scholars who criticize *apologism,* they emphasize in their deliberations the need for an international legal order, the importance of human rights and the "Responsibility to Protect" concept and they suggest the degree of normativity should be increased in international law.

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[15] M. Koskenniemi, *supra n 7,* 576–582.

[16] M. Koskenniemi, *supra n 7, 574.*

[17] M. Koskenniemi, *supra n 7, 575.*

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