

INTERNATIONAL LEGAL THEORY

Symposium on Martti Koskenniemi's *From Apology to Utopia*

Martti Koskenniemi, the Mainstream, and Self-Reflectivity

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Abstract

This article argues that contemporary international lawyers all sing the same critical refrain but few have really confronted and integrated the critical attitude deployed in *From Apology to Utopia*. After the denial and perplexity of the first encounters with Martti Koskenniemi's work, international lawyers came to feel that they have domesticated the perplexity provoked by it. They now all enthuse about the new self-reflectivity that their victorious struggle with *From Apology to Utopia* supposedly allowed them to acquire. In sum, the contemporary self-proclaimed self-reflective international lawyers, after reading *From Apology to Utopia*, have returned to business as usual, continuing to let the discipline's vocabulary decide on their behalf.

Keywords

aesthetics; critical legal studies; deconstructivism; methods; self-reflectivity; structuralism

I. INTRODUCTION

After more than two decades of anxiety, international lawyers feel they can revel again in comfort. In today's scholarship, there seems to be a much greater feeling of confidence among international lawyers towards the critical attitude that was popularised by Martti Koskenniemi. Compared to the jitteriness and defensive mindset earlier provoked by the wide dissemination at the end of the 1980s and in the 1990s of the thoughts developed in *From Apology to Utopia*, today's common take on such critical attitude is one of ease and self-confidence. International lawyers – even those trained according to the most orthodox dogmas – are no longer afraid of (or perplexed about) the writings of Martti Koskenniemi. What is more, they have overcome their original complexes and now show greater ease in manipulating (and engaging with) the thoughts of the famous Finnish thinker. In that sense, it seems that the apprehension and defensive attitude observed in the early stage of the

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dissemination of *From Apology to Utopia* was substituted in recent years by a feeling of domestication and assertiveness towards the critical attitude. Last but not least, international lawyers believe they have learnt what needed to be learnt from *From Apology to Utopia*, i.e., self-reflectivity. Yet, comfort and confidence often come at the expense of inquisitiveness. As this article argues, while it seems undeniable that international legal scholarship recently became more perceptive as it learned from its earlier apprehension of *From Apology to Utopia*, the greater comfort that is felt today has interrupted the reflection and inquisitiveness that accompanied earlier encounters with the work of Martti Koskenniemi. More specifically, the point made here is that international lawyers nowadays tend to all sing the same critical refrain but few have really confronted and integrated the critical attitude deployed in *From Apology to Utopia*. After the denial and perplexity of the first encounters, these newly self-proclaimed self-reflecting international lawyers seem to have returned to their sleepers and their comfort zones.

After a few preliminary caveats (Section 2), this brief article spells out some of the moves and attitudes commonly associated with the critical attitude at work in *From Apology to Utopia* (Section 3). In the third section, this article speculates on the legacy of *From Apology to Utopia* within the mainstream and, on that occasion, tries to offer an image of the perceived legacy of *From Apology to Utopia* and thus not what its author actually intended. In the following section (Section 4), this article ventures into a depiction of the various stages of reception of *From Apology to Utopia* among those members of the mainstream with a view to showing how international lawyers went from an original denial to a feeling that they have learnt what needed to be learnt. In this fourth section, the article thus seeks to tell the *story* about how the perceived legacy of *From Apology to Utopia* sketched out in Section 3 out reached its legatees. This article ends with a few concluding reflections on the deceitfulness inherent to the feeling of comfort felt by those self-proclaimed self-reflecting international lawyers as well the consequences thereof for the project carried by *From Apology to Utopia* (Section 5).

2. PRELIMINARY REMARKS AND THE IDEA OF MAINSTREAM

Reconstructing the image of the legacy of *From Apology to Utopia* and the formation thereof is certainly a perilous enterprise that calls for a few preliminary caveats. First, there is an inevitable anachronism in any attempt to reconstruct the way in which the legacy of a scholarly work has reached its legatees. The reconstruction of the treatment which was reserved to *From Apology to Utopia* when it first appeared in 1989 as much as its discussion in the two decades that followed is inevitably prejudiced by the pre-understanding and experience of the present author.¹ However, this should not be deemed an insurmountable obstacle. As the author of *From Apology to Utopia* has himself contended, such inevitable distortions are themselves a source

¹ See O. Korhonen, *International Law Situated. An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000), 9–10.

of richness for legal argumentation and thinking rather than an invalidating flaw.² Some more deformation inextricably accompanies the cognitive and descriptive preconceptions of the author of these lines.³ Inevitably, the empirical materials which are relied on here – and which primarily consists of peers' discourses – are prejudiced by the cognitive and conceptual frameworks as well as the personal experience that the present author inevitably relies on. It is not possible to unveil such biases.⁴ Nor can it be determined whether the discussion below is meant to be inward-looking (adopting an internal point of view) or outward-looking adopting (external point of view), for the author's own position in relation to this idea of mainstream fluctuates between the two, which constitutes a additional distorting factor.⁵

These distorting parameters explain the care with which peers' discourses are used in this article. This justifies the resort to limited empirical materials. There is another reason why the materials the story told here relies on are limited. This is the second preliminary caveat that must be formulated. This article does not attempt to trace back certain types of encounters or experiences to certain people. In that sense, the following observations do not constitute a cartographic exercise. Any cartographic exercise would appear judgmental of how people have positioned themselves towards *From Apology to Utopia*. Such mapping would also be fallacious, for international lawyers' own position towards *From Apology to Utopia* has evolved and changed over time – as is discussed in Section 4.⁶ For these reasons, the image of the legacy of *From Apology to Utopia* presented in Section 3 and the story about how this legacy reached its legatees told in Section 4 are consciously built on a limited amount of empirical materials.

Additionally, a terminological remark is warranted in relation to the use of the term 'mainstream'. Absent from international legal discourses some decades ago, the term has now become rather common, especially in a certain type of critical – and usually theoretical – literature where it is meant to describe either a dominant group of professionals that adhere to an orthodox reading of the law or a dominant type of argumentation that is shaped by the reliance on orthodox methods and concepts. According to this linguistic practice, what is mainstream is thus supposed to reflect the adherence to a dominant argumentative orthodoxy. Obviously, the term carries a negative connotation and is never used to commend a certain type of argumentation. On the contrary, what (and who) is dubbed mainstream is said to be uncritical, unreflective and to have a tendency to mechanically reproduce vocabularies held as stable and determinate. The mainstream is an all-encompassing descriptive notion

² On the virtues of anachronism, see M. Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', (2013) 27 *Temple Journal of International and Comparative Law* 215, at 230–1.

³ There are no pre-conceptual or even pre-theoretical data that exist outside any conceptual and descriptive framework. See A. McIntyre, *Whose Justice? Which Rationality?* (1988), 333.

⁴ S. Fish, *Is there a text in this class?* (1980), 360; see also McIntyre, *supra* note 3, at 363–7.

⁵ Compare with the notion of 'moderate external point of view' developed by F. Ost and M. van de Kerchove, *Legal System between Order and Disorder* (1994), 9.

⁶ See my earlier account of *From Apology to Utopia* from which I have radically departed ever since. See J. d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's *From Apology to Utopia* revisited', (2006) 19 *Revue québécoise de droit international* 353.

that can refer to a variety of argumentative postures that are commonly derided, like formalism, fake universalism, objectivism, state-centrism, immanent rationality, mechanical interpretation, etc. In *From Apology to Utopia*, Martti Koskenniemi uses the term 'mainstream' 32 times. Even if the term was already widely used in North-American international legal scholarship prior to *From Apology to Utopia*, the latter certainly contributed to further popularizing its use in international literature.

It does not seem controversial to contend that the notion of 'mainstream' is problematic. It is inevitably oversimplifying as it projects an image of a monolithic and uniform group of scholars (or ideas) that are allegedly dominant. It comes with the presupposition that there is something like one dominant argumentative posture. In that sense, this notion functions as a flattening descriptive tool that irons out the nuances of legal discourses and caricatures those scholars or ideas which it describes. The notion also carries the risk of creating strawmen. Despite its limitations, the notion of 'mainstream' remains a useful descriptive and argumentative tool and this is why it is resorted to in the following sections. There is no doubt that the term 'mainstream' is a convenient and economizing notion. It spares its user of a lengthy reminder of what the dominant legal argumentation may possibly be. More fundamentally the term usefully projects the image of orthodox thinking in opposition of which its user can position oneself. In that sense, it helps create the adversarial argumentative platform that is necessary for scholarship to be held responsive and innovative.⁷ It also provides the critical attitude with the necessary raw materials without which it could not exist. In that sense, the notion is not only a useful descriptive and economizing tool. It also has an existential function for the critical attitude. Irrespective of its descriptive downsides and upsides, it is important to stress that the use of this notion in the following sections should not obfuscate the fact that the mainstream today still constitutes the very mainstream that *From Apology to Utopia* took issue with in 1989 and 2005. If the image and the story below can be upheld, it may be that we can no longer speak of the 'mainstream' in international legal literature, especially if the mainstream has come to think of itself – as it is argued below – as self-reflective. The concluding remarks offered at the end of this contribution will briefly revert to this question.

3. IMAGE OF A LEGACY: A PERCEIVED SELF-REFLECTIVITY

As was highlighted above, this section seeks to offer an image (or certain images) of what the legacy of *From Apology to Utopia* may possibly be for those international lawyers which could belong to the 'mainstream'. Thus, it is not meant to offer an account on the moves actually done or intended by the author of *From Apology to Utopia*.⁸

⁷ J. d'Aspremont, 'Wording in International Law', (2012) 25 *Leiden Journal of International Law* 575.

⁸ For an overview of the lessons of *From Apology to Utopia*, see A. Rasulov, 'From Apology to Utopia and the Inner Life of International Law', (2016) 29 *LJIL* 641–66.

There are some moves (and attitudes) that are now commonly dubbed 'critical' and which have been – at least in international lawyers' consciousness – 'popularised' by *From Apology to Utopia*. They must be briefly mentioned here. Again, this is of course not to say that *From Apology to Utopia* did actually promote those moves and attitudes that are associated with it. It is noteworthy in this respect that there is a fair deal of both imprecision as to how *From Apology to Utopia* has been described and received. For instance, despite fundamental differences, critical legal studies, deconstruction and structuralism are often used interchangeably in mainstream international legal literature to refer to the work of Martti Koskenniemi. In particular, *From Apology to Utopia* is often seen as a manifestation of 'postmodernism' or 'critical legal studies' in international legal thinking. It is also referred to as a rejection of reasoned narrative, the instability of knowledge, the move away from universal grand theories, the deconstruction of 'metanarratives', the empowerment of the rule-applier, the politics of language or general textual indeterminacy. It is also said to epitomize a self-reflective attitude that is more debunking than reforming. It is likewise commonly associated with deconstruction and structuralism. Some more radical depictions have associated *From Apology to Utopia* with nihilism⁹ or escapism.¹⁰

As has been discussed by scholars remarkably knowledgeable of Martti Koskenniemi's work, among all the denominations of *From Apology to Utopia*, it is its qualification as a structuralist enterprise that seems the most warranted,¹¹ the deconstructive or postmodern pointer having been judged improper.¹² For the sake of the argument made here, it is however of no avail to discuss all those properties commonly associated with the complex – and sometimes misunderstood¹³ – critical attitude that is deployed in *From Apology to Utopia*. It seems more relevant to highlight that, irrespective of all the virtues and vices which international lawyers – sometimes contradictorily – ascribe to *From Apology to Utopia*, there exists a shared perception that *From Apology to Utopia* has brought about an unprecedented self-reflectivity in

⁹ Even Martti Koskenniemi deemed it necessary to rebut such association. See the new epilogue in the re-issue of *From Apology to Utopia* (2005).

¹⁰ See the Interview of Robert Jennings by A. Cassese, *Five Masters of International Law* (2011), 146 (arguing that high-flown ideas may be a kind of escapism from the urgent problem in the field).

¹¹ S. Singh, 'International legal positivism and new approaches to international law', in J. Kammerhofer and J. d'Aspremont (eds.), *International Legal Positivism in a Postmodern World*, (2014), 291–316; J. Desautels-Stein, 'International legal structuralism: A primer' (2016) 8 *International Theory* (forthcoming); See also S. Singh, *The Politics of Martti Koskenniemi's Theory (Or, The International Legal Subject & an Impossible Freedom)* (on file with the author). Jouannet comes with a similar but more nuanced account. See E. Jouannet, 'A Critical Introduction', in M. Koskenniemi, *The Politics of International Law* (2011), 2 and 7–12. Koskenniemi's works are said to be works of structuralism because they take roots in Saussurean structural linguistics and assume that words have no inner meaning but that originating on – and being left fluctuating in – its relationship with other words. For some general remark on structuralism and its impact on legal thought, see J. Desautels-Stein, 'Structuralist Legal Histories', (2015) 78 *Law and Contemporary Problems* 37.

¹² See A. Rasulov, 'From Apology to Utopia and the Inner Life of International Law', (2016) 29 *LJIL* 641–66. On the idea of a termination of deconstruction see P. Schlag, "Le hors de texte, c'est moi": the politics of form and the domestication of deconstruction', (1990) 11 *Cardozo Law Review* 1631; P. Schlag, 'The problem of the subject', (1991) 69 *Texas Law Review* 1627; P. Schlag, 'A brief survey of deconstruction', (2005) 27 *Cardozo Law Review* 741; and P. Dews, *Logics of Disintegration. Post-structuralist Thought and the Claims of Critical Theory* (1987), 33–44 and 200–19.

¹³ J. Beckett, 'Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project', (2006) 7 *German Law Journal* 1045, at 1046.

international legal thinking.¹⁴ Indeed, many international lawyers, as will be further explained in Section 4 below, think of themselves as having grown self-reflective in legal argumentation, a skill which many of them trace back to their encounter with the writings of Martti Koskenniemi and especially *From Apology to Utopia*. Again, for the sake of the observations made here, whether *From Apology to Utopia* actually and consciously promotes self-reflectivity is not the question at stake. It is more interesting to inquire into the perceived reasons that led international lawyers to elevate *From Apology to Utopia* to an authoritative companion on self-reflectivity in international legal studies.

The work of Martti Koskenniemi can be construed as stimulating self-reflectivity in various ways, sometimes even indirectly. The type of self-reflectivity that can most conspicuously be nourished by *From Apology to Utopia* in the eyes of mainstream international lawyers probably pertains to the way international lawyers have come to situate the foundational doctrines of international law which had been, generation after generation, taught at all main law schools and which had been continuously described and refined in major textbooks. *From Apology to Utopia* – as well as the later works of Martti Koskenniemi – have more specifically heartened international lawyers in disclosing the agenda and functional premises of the doctrines they rely on and to functionally situate the legal claims of others.¹⁵ In that sense, although *From Apology to Utopia* never sought to be a pioneer in this respect,¹⁶ it came to generalize self-reflectivity in the form of functional situationalism. As a result of this type of self-reflectivity, international lawyers have been invigorated to constantly inquire about the agendas and social arrangements pursued by those foundational doctrines and legal argumentation.¹⁷ This has even become a rather common object of inquiry.

It ought to be mentioned that the functional situationalism associated with *From Apology to Utopia* – which contrasts with (but ushers in¹⁸) the socio-historical situationalism found in *The Gentle Civilizer of Nations*¹⁹ – has often served as a useful reminder to international lawyers of the exercises of powers and hierarchies at work

¹⁴ von Bernstorff writes, 'In a truly modernist spirit *From Apology to Utopia* has provided the discipline with a sharpened self-reflective consciousness'. See J. 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 *German Law Journal* 1015, at 1034. This is also a finding made by Bederman although the latter falls short of ascribing it to *From Apology to Utopia* which he cites. See D. Bederman, 'Appraising a Century of Scholarship in the American Journal of International Law', (2006) 100 *American Journal of International Law* 20, 21.

¹⁵ Situationalism was very central in legal realism. On the link between critical legal studies and legal realism, see N. Duxbury, *Patterns of American Jurisprudence* (1997), 6.

¹⁶ For an early elaboration of situationality, see K. Jaspers, *The Future of Mankind* (1958) (transl) and *Man in the Modern Age* (1932) (transl).

¹⁷ See J. Dunoff, 'From interdisciplinarity to counterdisciplinarity: is there madness in Martti's method?' (2013) 27 *Temple Journal of International and Comparative Law* 309.

¹⁸ Koskenniemi himself has unsurprisingly contended that there is an intellectual continuity between his 1989 *From Apology to Utopia*, *Gentle Civilizer of Nations* and his 2005 *From Apology to Utopia* with an Epilogue. See M. Koskenniemi, *From Apology to Utopia*, (2005), 562–3 and 617; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), 1–2. The two can be said to have paved the way to Koskenniemi's Kantian turn. On the continuity between the two, see Jouannet, *supra* note 11, 17. On the later Kantian turn of Koskenniemi, see S. Singh, *The Politics of Martti Koskenniemi's Theory* (Or, *The International Legal Subject & an Impossible Freedom*) (on file with the author).

¹⁹ See generally Koskenniemi (2001), *supra* note 18. See the remarks on this aspect of Koskenniemi's project by Dunoff, *supra* note 17.

behind the deployment of legal categories and interpretive practices in international law. By shedding light on (and, in other places,²⁰ expressing concern about) some of the very structures that obfuscate the exercises of power by international legal thinkers, the functional situationalism found in *From Apology to Utopia* has helped generalize and popularize among international lawyers some of the lessons learnt from French sociologists, and especially awareness that legal argumentation is a highly structured activity.²¹

Interestingly, the perceived invitation to self-reflectivity associated with *From Apology to Utopia* also has borne upon methodological debates.²² Such impact on methodological debates is obviously not without paradox as the critical attitude found in *From Apology to Utopia* was never meant to promote anything like a certain methodology and has always conveyed scepticism of any project that attempts to articulate a set of methods.²³ As is well-known, the author of *From Apology to Utopia* had the opportunity to recall that there is not such a thing as a meta-standpoint 'that allows that method or politics to be discussed from the outside of particular methodological or political controversies'.²⁴ However paradoxical this may be, the self-reflective methodological heritage of *From Apology to Utopia* seems difficult to deny as a matter of social fact.²⁵ International lawyers claim today to be more self-reflective about their methodological choices – an inclination which they often credit to *From Apology to Utopia*.²⁶ *From Apology to Utopia* has helped convince a great number of international lawyers of the need to develop greater methodological self-awareness, irrespective of whether such self-awareness can ever

²⁰ Koskenniemi has taken direct issue with those structures, like managerialism, in that they obscure the way power works. This is something which Koskenniemi focused on at a subsequent stage. See M. Koskenniemi, 'The Politics of International Law: 20 Years Later', (2009) 20 *European Journal of International Law* 7. This is why his culture of formalism seeks to reinstate international law as the only available surface over which managerial governance may be challenged. Koskenniemi (2001), *supra* note 18, 500–8.

²¹ This is one of the central ideas defended by Bourdieu in his studies of the legal field. See, e.g., P. Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', (1987) 38 *Hastings Law Journal* 805. On the step made between Bourdieu and Foucault and the distinct benefits of the insights provided by each of them for the study of international law, see the remarks of N. Rajkovic, 'Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule', (2014) 27 *Leiden Journal of International Law* 331, at 341, citing V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault', (1998) 18 *Oxford Journal of Legal Studies* 75, at 78; See also F. Ewald, 'Norms, Discipline and the Law', (1990) 30 *Representations* 138, at 139–41; L. Hammer, *A Foucauldian Approach to International Law. Descriptive Thoughts for Normative Issues* (2007).

²² Bederman, *supra* note 14, 48 ('In my view, the most surprising intellectual turn of the AJIL's past decade has been the self-conscious renewal of interest in the methods and techniques of international legal scholarship itself.'). This seems to be translated into the feeling of a need to be methodological multilingual. R. van Gestel, H. Micklitz and M. Poiras Maduro, *Methodology in the New Legal World*, at 14 (EUI Working Papers No. 2012/13, 2012), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2069872.

²³ M. Koskenniemi, 'Letter to the editors of the symposium', (1999) 93 *American Journal of International Law* 351, at 352–3. See also O. Korhonen, 'New International Law: Silence, Defence or Deliverance?', (1996) 7 *European Journal of International Law* 1, at 17. See also Desautels-Stein, *supra* note 11. Such a contention has been made by Derrida in relation to deconstruction in general. See J. Derrida, 'The Almost Nothing of the Unpresentable', in E. Weber (ed.), *Points... Interviews* (1995), 78 at 83 ('Deconstruction as such is reducible to neither a method nor an analysis'). For the opposite position and an example of the making of deconstruction as a technique, a method or analytical instrument, see J. Balkin, 'Deconstructive Practice and Legal Theory', (1987) 96 *Yale Law Journal* 743 (at 786: 'deconstruction by its very nature is an analytical tool').

²⁴ Koskenniemi, *supra* note 23, 352; A. Orford, 'On international legal method', (2013) 1 *London Review of International Law* 166, at 167.

²⁵ See also J. Haskell, 'From Apology to Utopia's Conditions of Possibility', (2016) 29 *LJIL* 667–76.

²⁶ See Bederman, *supra* note 14, 21.

be achieved. In so doing, *From Apology to Utopia* has certainly contributed to a – limited – loss of popularity which problem-solving and complexity-reducing scholarship had enjoyed until then.²⁷

It would be simplistic to restrict the reception of *From Apology to Utopia* in international legal scholarship to a (perceived) improvement of self-reflectivity in international legal thought. In the view of the present author, beyond self-reflectivity, *From Apology to Utopia* has also impacted academic writing and the style through which scholarly arguments are shaped and designed. For instance, the elegance of Martti Koskenniemi's writing has certainly been conducive to the improvement in the aesthetics of scholarly arguments. International legal scholars today have a much greater inclination to work on the aesthetics of their texts as they seek to infuse them with the most impeccable locutions or idioms. They spend more time today than they did yesterday to find the most accurate and elegant textual construction. Although this proclivity may at times drift into artificial textual body-building as well as pompousness,²⁸ such a practice should certainly not be bemoaned. Aesthetics contribute to the persuasiveness of legal arguments. It is accordingly welcome that international lawyers, after reading *From Apology to Utopia* and other works of Martti Koskenniemi, have come to realize that they ought to work as much on the substance of their arguments as their textual expressions.

Yet, besides its contribution to the improved aesthetics of scholarly texts, *From Apology to Utopia* has been held – most probably in contradiction to the real intention and style of its author²⁹ – as a model or source of inspiration for less lofty practices in academic writing. Indeed, emboldened by the uncontested simultaneous elegance and force of the thoughts found in *From Apology to Utopia*, a certain numbers of authors have – sometimes unconsciously – developed a type of academic writing which is highly reliant on the use of semantic instability³⁰ and the resort to textual intimidating tactics.³¹ It will not come as a surprise that the resort to semantic instability and the use of textual intimidating tactics resonate well in certain specific

²⁷ For some resistance and the necessity of legal scholarship to reduce complexity, see A. Peters, 'Realizing Utopia as a Scholarly Endeavor', (2013) 24 *European Journal of International Law* 533. For some remarks on the specific historic conjuncture of the publication of *From Apology to Utopia*, see J. Haskell, 'From Apology to Utopia's Conditions of Possibility', (2016) 29 *IJIL* 667–76.

²⁸ d'Aspremont, *supra* note 7.

²⁹ See *contra* P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', (2005) 16 *European Journal of International Law* 131, at 131, 137.

³⁰ Semantic instability refers to the practice according to which word semantics is purposely kept open to allow semantic oscillation. It can take various forms including the borrowing of words and idioms from social or hard sciences, for they will usually not be entirely fathomable by other members of the community of international legal scholars, thereby allowing a wide space for semantic fluctuation. Semantic instability allows the destabilization of fellow scholars. Indeed, it confuses the reader who can never clearly delineate or grasp an ever-changing and unstable argument. It bars any argumentative backfire while allowing the author to dodge most counter-arguments by taking refuge under a semantic shelter. Such semantic instability is often facilitated by the resort to economical textual constructions which evoke – rather than explicitly state – a large state of affairs and come with a large semantic load. For some critical observations on this academic practice, see d'Aspremont, *supra* note 7.

³¹ Semantic intimidation refers to the use of words – especially those you borrow from other fields and which may be unknown to peers – as some sort of heavy artillery that one makes appear on adversaries' radar to intimidate the latter. Such a practice is grounded in the belief that argumentative adversaries will accordingly be deterred from directly engaging with one's argument, which can, in turn, create some

circles of the community of international legal scholars while faring poorly among the great majority of international legal scholars.³² The reasons why *From Apology to Utopia* can be seen as having paved the way for such academic practices remain unclear, especially since they have not been envisaged by its author. It remains that such academic writing styles are often attributed to *From Apology to Utopia* by its detractors.³³ This article is certainly not the place to dwell any further on the possible impact of *From Apology to Utopia*, not only on the legal thinking itself but also on the writing style of an entire profession. It is more relevant now to conclude this section by highlighting that the transformations witnessed in international legal thinking and which can be attributed to *From Apology to Utopia* arose very incrementally and in a piecemeal way. They certainly did not come to be felt in one day. Before turning more self-reflective – at least in their own perceptions – and changing their academic writing style, international lawyers went through several states of mind which are described in [Section 4](#).

4. STORY OF A LEGACY: A PERCEIVED DOMESTICATION OF PERPLEXITY

It is argued here that the acclamation of *From Apology to Utopia* as the vanguard of a new era of self-reflectivity in international legal thought – however detached from the author's intention this may be – is the result of a protracted and piecemeal encounter between those that have been castigated as the 'mainstream' and the critical attitude they found in *From Apology to Utopia*. It took some time for international lawyers – especially those trained according to the orthodox dogmas – to get a sense of the inescapability of the argument in *From Apology to Utopia* as well as to grasp the extent of its potential impact. Albeit at very different paces and with many intergenerational variations,³⁴ most international lawyers who ended up taking *From Apology to Utopia* seriously went through more or less similar mindsets in their encounter with the text. Notwithstanding some inevitable oversimplifications, the following paragraphs sketch out some of the important stages of the reception of *From Apology to Utopia* by the mainstream.

4.1. The time of denial and disdain

At the time *From Apology to Utopia* started to be disseminated widely, it was met with *ignorance and denial*, if not with *disdain*, among all those who were confronted with it for the first time. Such disregard and derision were particularly acute among the oldest guard of international lawyers. In his entertaining collection of interviews, Antonio Cassese managed to capture the extent to which some of the – then

comforting distance. It can also express itself through conceptual 'obscurantism' or semantic instability. For some critical observations on this academic practice, see *ibid*.

³² For Beckett, 'the crooked paths [Koskenniemi's] writing sometimes takes are necessary or at least beneficial, and should not be straightened out to aid the reader who travels them'. See Beckett, *supra* note 13, 1088.

³³ See the Interview of R. Jennings by A. Cassese in Cassese, *supra* note 10, 146; See also the criticisms of P.-M. Dupuy on Koskenniemi's style of writing, in Dupuy, *supra* note 29, 131 and 137. Some of the criticisms are mentioned by Jouanet, *supra* note 11, 22.

³⁴ See Introduction *supra*.

perceived – pundits of international law scorned (and consequently turned a blind eye to) *From Apology to Utopia*. Indeed, to the question asked by Antonio Cassese about whether he had had a chance of reading theoretical books like *From Apology to Utopia*, former ICJ president Robert Jennings answered that he had had look at it but then stated:

Koskenniemi I have looked at because I like him very much, he's a nice man, very able, really top-class mind, a very good technician – yes. When he gets into the more sort of jurisprudential and abstract field, I get the same reaction that I think you do from Philipp [Allott]. It may be laziness of mind on my part, but I don't really follow it easily, and I don't easily understand quite what he's saying. It's partly a matter of language, certainly also with Kennedy. It leaves me cold. Ideas can be very powerful, but I sometimes wonder whether high-flown ideas are not a kind of escapism from the urgent problems in the field.³⁵

To the exact same question, Louis Henkin, also subjected to Cassese's interview, answered:

I read [books by Koskenniemi] without being persuaded. I read them without real interest. No. When I say 'without interest', I am pleased that people think in those terms, because most of us don't have time to sit back and look out on the world, but I have no particular interest in that, and I don't think any of [these scholars like Koskenniemi] has 'spoken' to me. That is, I have not got up from a book and said 'Gee, that's right'.³⁶

Asked whether he learnt anything from *From Apology to Utopia*, the same Henkin went on to say: 'No. I get more from books on the international political order'.³⁷

Although the representativeness of such accounts should certainly not be exaggerated, they constitute good indicators of the spirit of the time within some circles. This abovementioned derision often came with an underlying fear which the former was meant to compensate. In that sense, the first encounter with *From Apology to Utopia* also provoked wariness with what international lawyers saw as the lethal rise of radical scepticism, indeterminacy, or simply what they call the 'political'.³⁸

4.2. The time of discomfort and inescapability

Soon the abovementioned wariness transformed itself in discomfort and the denial was succeeded by a feeling of inescapability.³⁹ Many of those international lawyers abandoned their original denial strategy and came to confront the discomfort. This was the time of perplexity. Perplexity differed from denial in that the source of perplexity was then taken seriously. It is important to note, however, that, in the context of the reception of *From Apology to Utopia*, this perplexity came with a feeling of inescapability. It is because the argument made in *From Apology to Utopia* seemed to touch on an inextricable – yet uncomfortable – property of legal argumentation that it created so much perplexity within the mainstream. The second stage was

³⁵ See the Interview of R. Jennings by A. Cassese in Cassese, *supra* note 10, 145–6.

³⁶ See the Interview of L. Henkin by A. Cassese in Cassese, *supra* note 10, 220.

³⁷ *Ibid.*

³⁸ See *supra* notes 9 and 10.

³⁹ Beckett speaks of 'unpleasantness'. See Beckett, *supra* note 13, 1047.

thus that of a repelled feeling of the inevitable necessity of engagement which is – in contrast to the denial – consciously pushed back. This was so until confrontation came to be felt as inevitable.

It is in this sense that Jochen von Bernstorff spoke about *From Apology to Utopia* as a 'disturbing reading experience'.⁴⁰ That feeling can also be illustrated by the reaction of Oscar Schachter who, as a subject to the similar abovementioned interview, contended:

Koskenniemi's book, *From Apology to Utopia*, has apparently had a wide influence judging from the many references to it in current journals . . . I did not find it upsetting. As a practitioner (legal adviser), my work almost always required me to support my conclusions by referring to both lines of support – namely consent . . . and desirable ends. True, these arguments may be seen as resting on premises of social reality. Their persuasive force or validity depends on the context in which they are applied. I am certain that Koskenniemi in his practical role as legal adviser to his Foreign Ministry had no intellectual hang-ups in arguing on grounds of both precedent and consent, on the one hand, and on desirable social ends, on the other.⁴¹

4.3. Engagement and struggle

The abovementioned perplexity and feeling of inextricability was succeeded by a greater inclination to engage with *From Apology to Utopia*.⁴² For many international lawyers, the feeling of inescapability quickly transformed itself into the overwhelming necessity to engage, and, possibly, rebut the uncomfortable account made in *From Apology to Utopia*. This was the time of engagement when international lawyers found themselves so unnerved and irritated by the constantly pushed back inescapability of *From Apology to Utopia* that confronting the work of Martti Koskenniemi proved irresistible. It is interesting to mention, for instance, the first engagements with *From Apology to Utopia* by Jason Beckett which – before this author famously and radically changed course⁴³ – all amounted to rebuttals or refutations.⁴⁴ One can also refer here to the reaction of Rosalyn Higgins who, despite her avowed aberrance of traditional orthodoxy and her embrace of process-oriented approaches to law, showed that she took the argument of its author very seriously. Although she acknowledged the contradictions of legal argumentation highlighted in *From Apology to Utopia*,⁴⁵ she came to dismiss the book as being superficially attractive in trying to reconcile or synthesize rules and processes.⁴⁶ As she took *From Apology to Utopia* seriously, she

⁴⁰ von Bernstorff, *supra* note 14, 1015.

⁴¹ See the Interview of O. Schachter by A. Cassese, in Cassese, *supra* note 10, 240.

⁴² See e.g., von Bernstorff, *supra* note 14, 1015.

⁴³ J. Beckett, 'Faith and Resignation: a Journey through International Law', in M. Stone, I. rua Wall and C. Douzinas (eds.), *New critical legal thinking: law and the political*, Abingdon (2012), 145–66; see also J. Beckett, 'The Politics of International Law – Twenty Years Later: A Reply', *EJIL: TALK!*, 19 May 2009, available at www.ejiltalk.org/the-politics-of-international-law-twenty-years-later-a-reply/.

⁴⁴ J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law', (2001) 12 *European Journal of International Law* 627; J. Beckett, 'Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to Nail', (2005) 16 *European Journal of International Law* 213. See also d'Aspremont, *supra* note 6 (from which I have radically departed ever since).

⁴⁵ R. Higgins, *Problems and Process* (1995), 9.

⁴⁶ *Ibid.*, 8.

took pains, in the first chapter of her flagship *Problems and Process*, to oppose Koskenniemi's alleged rejection of any rationally choosing (and thus of Justice) which she ascribed to *From Apology to Utopia* and went on to rehabilitate the policy-oriented School's guiding principles for choice which she felt had been threatened by *From Apology to Utopia*.⁴⁷

4.4. Domestication and catharsis

The time of engagement inevitably paved the way for a new phase in the reception of *From Apology to Utopia*. Indeed, once seemingly rebutted, *From Apology to Utopia* looked (and felt) domesticated. Those international lawyers who could no longer resist confronting *From Apology to Utopia*, engaged with it and rebutted it, and ultimately came to a catharsis. Their engagement and possible rebuttal made them feel they had been purged from their earlier perplexity. Thus, this was a time when international lawyers felt like they had peeled away the intellectual architecture of Martti Koskenniemi and deprived it of its perplexing thrust. It was a time they felt that they had put the malign genie back into its bottle and sealed it.⁴⁸ It was a time they felt peace and reconciliation had returned to international legal thought.⁴⁹ This was also the time *From Apology to Utopia* was cast aside and demoted to just another technique of legal argumentation. In the eyes of these international lawyers, *From Apology to Utopia* was, as Jason Beckett put it, 'recuperated as part of their own project'.⁵⁰ Eventually, this was the time international lawyers stopped reading Martti Koskenniemi, also failing to engage in his subsequent turn to Kantian formalism and ethics.⁵¹

4.5. Empowerment and self-reflectivity

Casting *From Apology to Utopia* aside provoked a perceived empowerment. It brought about the feeling of regaining control. This perceived domestication of *From Apology to Utopia* inevitably brought about renewed confidence. This is exactly where the image of self-reflectivity that was discussed in Section 3 surfaced. As they came to believe they had mastered the genie, they simultaneously felt that they had learnt what *From Apology to Utopia* was meant to teach them. More specifically, and as was argued above, they came to believe that Professor Koskenniemi had taught them to

⁴⁷ Ibid., 9.

⁴⁸ von Bernstorff speaks of *From Apology to Utopia* as a 'risky exercise'. See von Bernstorff, *supra* note 14, 1026.

⁴⁹ For a discussion of whether reconciliation is ever possible see J. Kammerhofer and J. d'Aspremont, *International Legal Positivism in a Post-Modern World* (2014). For some general remarks on such attempt of reconciliation and dialogue in general international legal thoughts, see Schlag (2005), *supra* note 12.

⁵⁰ Beckett, *supra* note 13, 1046.

⁵¹ See the famous plea of Koskenniemi for a culture of formalism. See Koskenniemi (2001), *supra* note 18, 502–9; and M. Koskenniemi, 'What is International Law For?' in M. Evans (ed.), *International Law* (2006), 57, 69–70. For some discussion and interpretation thereof, see E. Jouannet, 'Présentation critique', in M. Koskenniemi, *La Politique du Droit International* (2007), 32–3. See also I. de la Rasilla del Moral, 'Martti Koskenniemi and The Spirit of the Beehive in International Law', (2010) 10 *Global Jurist* 1; von Bernstorff, *supra* note 14, 1015, 1029–31; Beckett, *supra* note 13, at 1045; See also the book review of N. Tsagourias, 'Martti Koskenniemi: The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960', (2003) 16 *Leiden Journal of International Law* 2, at 397, 398–9. On the later Kantian turn of Martti Koskenniemi, see Singh, *supra* note 18.

be self-reflective and critical.⁵² This was when international lawyers came to think of themselves as self-reflective. This was the time international lawyers came to think 'we are all crits'.⁵³

This period of renewed confidence was also the period when reading *From Apology to Utopia* became a necessary ritual in the socialization of international lawyers.⁵⁴ This was when *From Apology to Utopia* was elevated to a necessary learning exercise and was included in the reading list of postgraduate students and researchers. Since then, it is commonly believed in the professional community of international law that to become a twenty-first century international lawyer, one needs to be subjected to perplexity provoked by *From Apology to Utopia* and must domesticate it.

It will not come as surprise that this overcoming of the original perplexity created massive expression of happiness among international lawyers. Some may even feel pride at having allegedly domesticated *From Apology to Utopia*, often showing their peers that they have mastered the genie and put it back in the bottle by extensive referencing to Martti Koskenniemi in their work. Referring to *From Apology to Utopia* in one's work has almost become a cosmetic convention in international legal scholarship ever since.

4.6. Business as usual and the neutralization of *From Apology to Utopia*

The story of the reception of *From Apology to Utopia* among mainstream international lawyers which has been briefly accounted in the previous paragraphs thus ends with a paradox. Indeed, the moment international lawyers felt they had domesticated *From Apology to Utopia* and began to think of themselves as having gained in self-reflectivity, *From Apology to Utopia* ceased to play its original perplexity-generating role. By making *From Apology to Utopia* a part of the institutional and social landscape, and its reading a compulsory exercise for anyone being socialized as an international lawyer, *From Apology to Utopia* was neutralized. It was made just another technique or method to make legal arguments. Never again would the international lawyer feel the inescapable perplexity of the early days and the irresistible need to engage. Never again would the international lawyers suffer, swear and struggle upon the uncomfortable reading of *From Apology to Utopia*. It is true that, on the surface, it looks like *From Apology to Utopia* has acceded to the pantheon of the classics of international law and its influence cannot be undone. Yet, in substance as much as in practice, *From Apology to Utopia* has been stored in a window case in the museum of

⁵² von Bernstorff, *supra* note 14, 1034 ('In a truly modernist spirit *From Apology to Utopia* has provided the discipline with a sharpened self-reflective consciousness').

⁵³ R. Abel, 'Review of Richard W. Bauman *Ideology and Community in the First Wave of Critical Legal Studies*', (2003) 30(4) *Journal of Law and Society* 601, at 602; O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) 120 *Harvard Law Review* 937, at 940; see also J. d'Aspremont, 'Wording in International Law: A Response', October 2012, available at opiniojuris.org/2012/10/09/ljil-symposium-vol-25-3-wording-in-international-law-a-response/. This echoes the famous claim by Michael Green that we are all legal realists. See M. Steven, 'Legal Realism as Theory of Law', (2005) 46 *William & Mary Law Review* 1915.

⁵⁴ On the notion of socialization, see Korhonen, *supra* note 23, 6.

the history of international legal thoughts. *From Apology to Utopia* being neutralized and archived, the international lawyers went back to business as usual.⁵⁵

5. CONCLUDING REMARKS: WHICH LEGACY?

The image and story provided above are partial and prejudiced. They may be contested for their oversimplification or their failure to do justice to other types of encounters with *From Apology to Utopia*. It goes without saying that not all international lawyers experienced *From Apology to Utopia* in the same way.⁵⁶ The discussion above may also be called into question for its lack of plausibility as legacies of scholarly works – like that of any ideas aired in the public – fluctuate and are the object of constant reconstructions. Obviously, what the mainstream will think of *From Apology to Utopia* in ten years from now – and what our perception of what these international lawyers then think will be – is difficult to anticipate. In the view of the present author, notwithstanding the fact that these prejudices and implausibility are nothing that the author of *From Apology to Utopia* himself may be uncomfortable with, there still is a lesson – or at least a question – to be learnt from the previous paragraphs. Indeed, it is hoped that the image and story of the perceived legacy of *From Apology to Utopia* among the mainstream that has been put forward in this article will help contemporary international lawyers realize, not only that legacies are constructed individually and collectively – which is conspicuous, but also that self-reflectivity can be a deceitful perception. Having felt that they have domesticated the perplexity provoked by *From Apology to Utopia*, many international lawyers have enthused about the new self-reflectivity that their victorious struggle with *From Apology to Utopia* supposedly allowed them to acquire. Yet, in doing so, they have returned to business as usual, continuing to let the discipline's vocabulary decide on their behalf.⁵⁷ This is what brings us back to the notion of 'mainstream' briefly discussed at the start of this article. If the legacy of *From Apology to Utopia* is a greater feeling of self-reflectivity among international lawyers, this begs the question whether it is still possible to see anything as 'mainstream' in the attitude of these self-proclaimed self-reflective international lawyers. In other words, and whatever the superficiality of these international lawyers' newly acquired self-reflectivity, one wonders whether referring to this self-proclaimed self-reflective as mainstream is not a contradiction in terms. It may be that in believing they have become self-reflective, these triumphant international lawyers who now feel they have domesticated *From Apology to Utopia* have ceased to be mainstream. If this is the case, the story of the legacy of *From Apology to Utopia* that has been constructed here might thus ultimately be a story about the vanishing of the 'mainstream', both as a descriptive category and a state of mind. If this is the case, an important

⁵⁵ Such a finding has also been made regarding deconstruction in general legal thought. See Schlag (1990), *supra* note 12, esp. 1636 and 1640–1. See also Schlag (2005), *supra* note 12, 743 ('Overall, it's safe to say that most legal academic who thought at all about deconstruction received it in such a way as to leave their own normative and political commitments intact – indeed, unquestioned').

⁵⁶ See, e.g., the various stages in Jason Beckett's encounter with international law, *supra* notes 43 and 44.

⁵⁷ The expression is from M. Koskenniemi, *The Politics of International Law* (2011), Preface.

concluding remark is warranted. The possible disappearance of the 'mainstream' should not necessarily be construed as a triumph of the project carried by *From Apology to Utopia*. If the work of Martti Koskenniemi has, according to international lawyers' self-perception, finally permeated the latter's attitudes, techniques of argumentation and vocabularies, the question arises whether the death of the mainstream by virtue of international lawyers' self-perceived self-reflectivity is not simultaneously the death of the project carried by *From Apology to Utopia*.