A Response

By Martti Koskenniemi[*]

From the preceding essays, but also from the general discussion around *From Apology,* two themes emerge as a constant source of puzzlement, not least to myself. How does the argument in that book affect – if at all – the way we *do* international law? And what does the claim to be "critical" *really* mean? These are, I suppose, aspects of one larger set of problems that permeate the whole of that work. "Oh yes, it does describe the argumentative patterns pretty well. But it does not really *change* anything, does it?" One might approach this sort of query in different ways. It might be thought of as an expression of the classical theme about the relations of theory and practice in the social sciences. How do academic works influence the social world to which they are addressed? Or one might be more interested in the specific relationship between (academic) doctrines and legal practice – the "outside" and the "inside" of the legal profession.

I tend to think that, overall, the most promising responses to such queries come from some sort of Marxism and that any plausible view ought to recognise the reflexivity of "theory" and "practice" – the way the two co-construct each other. One must also be aware of the stakes that affect, at each level, the choice of alternative (theoretical or practical) orientations – that is to say, the role played by *power* in academic institutions and the contexts of legal practice. Then there is the analytically different set of questions about how all of this is translated into the distribution of costs and benefits between human groups. The latter problem is particularly difficult in international law owing to the great distance between academia, practice and the lives of men and women that are implicated in the issues lawyers seek to deal with. As David Kennedy writes in his contribution, much could be done to clarify all of this. But I cannot even begin to undertake it here. Instead, I shall just very briefly touch upon the question of change in international law as it relates to the kind of structuralist or "deconstructive" enquiry performed in *From Apology* and in other works of that kind.

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https://doi.org/10.1017/S2071832200005320 Published online by Cambridge University Press

One aspect of *From Apology* that few commentators fail to comment upon is its pervasive and relentless, even tiring binarism. The main theory that it propounds is of course built on the dichotomy of "normativity" and "concreteness", together with its homologies or transformations: sources/sovereignty; justice/will; law/fact; natural law/positivism; community/society; rules/processes; diplomacy/ Realpolitik and, of course, utopia/apology. All this seems to depend on a rather grander thesis about reality in some ways constituted as language and as such, of binary distinctions. In the new Epilogue, I have tried to make it clear that these dichotomies cannot be thought of as "problems" to be resolved but that they define the field within which "international law" is played out as a social practice. Without such oppositions, and the way they provide a thematic for international legal "speech", there could be no international law in the first place. It is precisely this dichotomisation that many commentators find (rightly) so striking in this type of enquiry but also (wrongly, I like to think) somehow disappointing or counter-productive in a *soi-disant* "critical" work. If all of international legal practice is an endless oscillation between opposite poles in which no solution is more plausible than any other solution, then it may be the case that (a) there can be no change at all and (b) there can be no critique, only an external description or an (internal) participation in international law.

Among critical lawyers the theory of structural bias – that although no solution is more plausible than any other solution, particular institutions still prefer particular types of outcome to others, explained in the new Epilogue[1] – is supposed to answer these questions. But it still fails to account for what reason a critical theorist – or indeed anyone with a political project – might have to believe that it is possible to participate in "international law" in the above sense so as to transform that bias. Would not the structures have to be completely overhauled in order to bring about a meaningful change? Or in terms that have been frequently addressed to me, why would one be entitled to think that it is possible to be "outside" international law as a critic with a political project and "inside" as a professionally competent "player" in the game? What really *is* the relationship between Chapter 8 and all that precedes it?

When I think about this, I often recall a dance performance I saw towards the late 1980's, when I was writing *From Apology*, by the group of the Belgian choreographer Jan Fabre at the Old Student House in the centre of Helsinki. The performance began at 6 PM and lasted the whole evening, not finishing before close to midnight. The choreography was of extreme simplicity. It consisted of perhaps

[1] FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT. REISSUE WITH A NEW EPILOGUE 600-615 (2005).

10 to 12 dancers proceeding in slow motion from one end of the stage to the other. Some ran, throwing themselves against the wall at each end, others crawled, hopped, or dragged themselves in various contorted poses, for almost six hours against non-descript background music. And in the middle there was one dancer who kept swinging a sabre, just swinging and swinging it, in slow motion. The immediately striking fact about that performance was its sheer length, accompanied by the apparently monotonous and repetitive moves of the dancers as they were slowly moving from one end of the stage to the opposite end, trying to avoid the sabre. I write "apparently" because although the choreography did not change, the performance went though a number of transformations that were impossible to locate at any single moment. But no such single transformation was needed, either. The fact of the sameness of the movements, when repeated over again in the course of the hours invited the audience to go though a series of different experiences of the performance so that although what in the end was in some sense (namely as a choreography) the "same" as in the beginning, was in another sense (namely as experience) completely different.

An explanation of the difference in a choreography that also remained the same would point, among other things, to the physical exhaustion produced by moving about in slow motion for hours. Despite the strength and stamina of the dancers, their movements eventually became slightly unstable, their legs began to shake a little as they turned at each end of the stage, with the sweat on the bodies increasingly visible, as well as the anxiety in the movements and gestures as they passed the sabre-swinging dancer in the middle, growing increasingly unstable as the evening wore on. Simultaneously, the audience's reactions changed. The initial surprise "So this is what it is!" Then boredom: "Oh if they would only stop, or turn around, or start to run really", indifference: "Oh well, let's have a drink and come back later". And anguish "How long can this possibly go on?" To admiration: "Now this is really impressive…but what does it mean?"

The relentless binarism in *From Apology* in some way resembles that Fabre choreography. It presents international lawyers like the dancers moving from one wall to the other in slow motion without a moment of respite or a place to stop that would be any more logical than any other place. The reader is positioned not unlike the Fabre audience. Being invited to watch or to read, at close range and in smallest detail, a very simple set of moves and gestures seeks to turn something familiar and predictable into a thing that is both strange and surprising. One is called upon to think about sameness and difference in a new way, about how something might be both identical (as choreography) and non-identical (as movements and experience) with itself. The meaning of the Fabre performance at midnight had almost nothing to do with its meaning at 6.15.

It is in this sense that I do not think that *From Apology* describes a world without change, and international law as the "endless repetition of the same". To invoke "sovereignty" in 1873, 1919, 1965 or 2006 is completely different, it is the performance of an act which apart from its most insignificant aspect – namely its verbal surface – has a completely different meaning to the speaker and to the audience. Historians involved in *Begriffsgeschichte* know very well that political and legal words are expressed in contexts and that their meaning depends on what claims are made by them in respect to other claims. What are they intended to support or to oppose as they are uttered? The same I think is true of the binary distinctions in *From Apology*. As I try to explain in the new Epilogue, those distinctions can be captured in a grammar of the professional use of international legal language. But what points are being made by them, what "acts" are being carried out, can only be determined by reference to the context of argument and persuasion. Which interests or preferences are being supported or attacked by that language at any particular moment? International legal language plays a particular role in (international) society that changes in relation to the kinds of work lawyers are called upon to do, their professional preferences and inclination, their cultural and political positioning at any particular moment.

This is also what not only makes it possible for anyone to be an "insider" and "outsider" at the same time but in a way compels lawyers into both roles. Or to continue the parallel, everyone is a dancer and a member of the audience. As a dancer-practitioner, one is choreographed to perform a limited number of movements in a particular style. However well one learns that style, however skilfully one executes the gestures and however admired one is by one's colleagues, one is never in complete mastery of the performance. One becomes tired; routine may set in to destroy the freshness, or a new nuance attaches to the old movements by intuition and experience. And whatever meaning one seeks to convey by one's dance, one is never a full master of that meaning but always hostage to what the audience "gets" from it. There is no "right" or "wrong" way to execute a certain movement or to defend a particular cause that would be independent from the preferences of those to whom the performance is staged.

Which is also why, in order to be a good dancer one will have to go and see colleagues perform, to learn from them, to be a part of the audience, to imagine oneself as the dance critic, preparing a review for the weekend paper. And one would have to be responsive to other dancers when performing – not only when they swing a sabre, but particularly then. In law, this means reflecting on the meaning of one's movements and gestures while on stage. Which audiences does the performance speak to; whose preferences does it highlight? How does it respond to the moves colleagues make? I do not think being a "good" international lawyers and being a "critic" of international law are in any way mutually exclusive.

In fact, I rather think the contrary. One of the problems with modern international law has been its routinization, the absence of reflection by the profession of its embedded preferences. It is not for nothing that the sub-title of my latest book is "The Rise and Fall of International law 1873-1960". Here "fall" denotes the exit by international law from critical awareness, its failure to take the perspective of the audience for a while – to re-imagine itself as a "project" instead of a technique at the service of other peoples' (aesthetic) preferences.

So how might *From Apology* affect the way we do international law? Not by proposing a novel blueprint or by suggesting that it is all a waste of time. It seeks to have an impact on practice by demonstration: "Look here, this is what a competent performance in international law is". A dancer looks at a video of last night's performance. What effect does that have on the dancer? Surely the point of watching is to learn to be a better dancer. And is that good or bad? Well, that depends on how you think about dancing, including its social and cultural role. The same with international law. *From Apology* is a description of how the choreography of a professional argument unfolds today. Do the arguments really convey the meaning the performers would like them to convey? This is left for the lawyers to assess. But the point of this is to make the lawyer a better lawyer. And is that good or bad? Some would say that this depends on whether the outcomes correspond to this or that preferred set of outcomes or blueprint. A good lawyer in the service of a bad cause is particularly worrying. But then there are those – such as myself – who like to think that international law, like dance, is more than an instrument to fill the theatre, or the cash-box. It embodies historical experiences and ideals about the human future that move us and teach us and which we as professional men and women are called upon to invoke when giving our performances. If so, our success or failure is not a trifle thing.

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From Apology is written by somebody with a career as a performer and a critic. I think it is obvious that the two careers are inextricable and have supported each other. I am delighted that this is also the perspective from which the above essays have examined it. It is, as Christoph Moellers points out, a lawyer's book, written to lawyers, not a philosopher's or a sociologist's manual about interesting international matters. It is also part of a collective venture. I continue to be stunned by David Kennedy's ability to uncover the "dark sides", a sensibility that this profession is so desperately in need of. I am impressed by, and imitate, styles and performances of younger lawyers such as Jason Beckett and Florian Hoffmann who have developed quite complex and intriguing movements in order to rid themselves of the tired antics of the mainstream or, as Mario Prost calls it, the "positivist blues". Jochen von Bernstorff's fresh, political reading of Kelsen is a

prime example of what I think history of international law should become. I am not in the least offended by Anne Orford's association of my project with the colonial experience (though she thought I might be): on the contrary, the voyage is about discovering access to the universal, too, and I note, with delight, that despite our different baggage, Rajagopal Balakhrisnan, feels himself a fellow traveller, with all the political and intellectual risks that such ambition involves.

https://doi.org/10.1017/S2071832200005320 Published online by Cambridge University Press