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Leiden Journal of International Law / Volume 29 / Issue 03 / September 2016, pp 699 - 726  
DOI: 10.1017/S0922156516000273, Published online: 28 July 2016

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### How to cite this article:

SAHIB SINGH (2016). Koskenniemi's Images of the International Lawyer. *Leiden Journal of International Law*, 29, pp 699-726 doi:10.1017/S0922156516000273

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# Koskenniemi's Images of the International Lawyer

SAHIB SINGH\*

## Abstract

In this article I excavate and critique two dominant images of the international lawyer that emerge from the oeuvre of Martti Koskenniemi. In doing so, I hope to briefly shake the faith critical international legal thought so often invests in the potential of the subject. The first image is of the critical subject that emerges from *From Apology to Utopia*. She also happens to be a projection of the critic, governed by both elitism and unhappiness, for whom freedom is always both a constant and overarching possibility, and yet always embodied in a fleeting moment. By way of critique, I question whether this critic(al subject) may not unwittingly embed the very aspects of liberal legal and political thought that she seeks to challenge. The second image is of the professional lawyer, left on the shores of pragmatism. She emerges from my reading of Koskenniemi's *The Gentle Civilizer*, the 2005 *Epilogue* and his Kantian texts. She is constructed as Koskenniemi's critique is domesticated, taking a last, and perhaps futile, refuge in an ethics that is needed to buttress an identity which can aid international law's moral regeneration. Koskenniemi's writings urge today's international lawyers to put their sense of identity into question; this article asks which identities (and their possibilities) he embeds as he does so.

## Key words

critic; identity; international lawyer; Martti Koskenniemi; subject

## I. INTRODUCTION

Experiencing Martti Koskenniemi's texts is akin to what I imagine Gregor Samsa felt at the beginning of Franz Kafka's *The Metamorphosis*. Samsa, a travelling salesman, awoke one morning thinking he was human, only to discover his body was now that of an insect.<sup>1</sup> This is a moment about knowing you are not what you understand yourself to be. The displacement and discomfort that accompany this experience is precisely what has allowed Koskenniemi to reinvigorate the discipline. It has been

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<sup>1</sup> F. Kafka, *The Metamorphosis* (1972).

for the most part a tortuous journey through apathy, marginalization, engagement, misunderstanding, trenchant resistance, polemics, and perhaps finally, acceptance through subsumption. Possibly in spite of this journey or because of it, Koskenniemi's texts have firmly arrived into the canon of international legal thought.

At the heart of this lies *From Apology to Utopia*. A text that changed what it is possible to say within the discipline and how it is possible to say it. No small feat. Critical thought has, in part, founded its success upon its relentless willingness to intertwine epistemological concerns with ethical ones. Readers are reminded that international law is made, and re-made, through the commitments and choices of its participants. It is *we* who are responsible for the choices we make amidst the anxieties and uncertainties of living in a conflictual world.<sup>2</sup> But like all forms of knowledge and politics, critical thought also inscribes certain images, characteristics and attitudes of this 'we'.<sup>3</sup> In short, it presumes, shapes and imposes certain images of the international lawyer. And in Koskenniemi's texts, ranging from *From Apology to Utopia*, *The Gentle Civilizer*,<sup>4</sup> to his writings on Kant, we see numerous images of the international lawyer. Some hidden, some put front and centre and others sutured through his texts.

In this article I excavate, problematize and critique these images of the international lawyer. A particular series of questions guide this article. What images of the subject are required by, but not always made explicit within, the text?<sup>5</sup> What characteristics and attitudes, or subjectivities, are rhetorically assumed, created and perpetuated by his texts? And are the subjects that emerge capable of realizing the politics of critical thought? These questions help me to explore several identities that have become integral to the discipline's imagination in recent decades.

The first is the critical subject, and as we shall see, this is also a projection of the critic. Hence the designation critic(al subject). She emerges from my reading of *From Apology to Utopia* in Section 2 and is a subject who is governed by both elitism and unhappiness, for whom freedom is both a constant and overarching possibility, and yet is always embodied in a fleeting moment. This dominant image emerges after I excavate the assumed and presupposed subject behind the intellectual vehicles that drive Koskenniemi's text.<sup>6</sup> I then question whether this critic(al subject) may not unwittingly embed the very aspects of liberal legal thought that it seeks to challenge.

In Section 3, we see different images of the professional. The dominant image is one of a lawyer left on the shores of pragmatism who takes refuge in an ethics that may shore up an identity necessary for international law's moral regeneration. This image emerges from my reading of *The Gentle Civilizer*, the epilogue to the republished *From Apology to Utopia*, and those texts that relate to Koskenniemi's turn

2 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument. Reissue with New Epilogue* (2005), 542–8, 614–17.

3 S. Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (2008), 103.

4 M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

5 U. Eco, *The Role of the Reader: Explorations in the Semiotics of Texts* (1979), 10–11.

6 P. Allott, *Eunomia: New Order for a New World* (2001), 24–6 (paras. 2.26–2.30) (referring to the 'genetic material' of an idea).

to Kant. Each text is treated as distinct, with its own theoretical and metaphysical presuppositions, but also as part of a collective endeavour and the same problematic.

To speak of a 'subject' is not to speak of a natural individual, but rather one that is created and sustained by a discourse upon which she is dependent. It preserves her whilst initiating and sustaining her desires and agency.<sup>7</sup> A form of power constitutes her and her capacities. The discourses and practices of critique is such a form of power. But like most discourses and practices, different and at times conflicting images of the international lawyer may emerge. It is by better grasping the *dominant* images within critical thought, as well as the possibilities created by contrasting and conflicting images, that we may be able to re-envision our own role with it. It is for this reason that it is useful to look to Koskeniemi's texts, some of which have become influential – even part of what is unconsciously presupposed or assumed, rather than what is questioned – in certain corners of the discipline.<sup>8</sup>

There is also a second reason for this article. In contemporary legal thought there is a tendency to always consider the subject as part of the solution. It is a tendency shared by traditional liberal and critical theories alike. In the rhetorical form that tends to structure most texts, as well as the psychology of normative legal thought – the 'problem→solution' split – the subject nearly always *ends up* occupying the latter position. Problems are normally seen to lie outside the subject, often in specific practice structures or processes, and on occasion within certain modes of thought. There is no motivation to explore the possibility of problems lying within specific images of the subject, or ourselves as trained international lawyers.<sup>9</sup> Where critical scholarship has breached this threshold, and considers the way we think of ourselves, our subjectivity, it still ultimately ends up investing the potential of its emancipatory politics within specific images of the subject. These patterns of thought deserve attention. Of course any specific form of politics requires a subject and often presumes her into existence. My hope, here, is to shake – and perhaps reinvigorate – the faith that is often invested in the potential of the subject within critical international legal thought.

## 2. THE CRITIC(AL SUBJECT)<sup>10</sup>

It is a rare breed of book that causes consternation in the ranks whilst also inspiring a generation. James Crawford, then holder of the Whewell Chair, introduced the work of Koskeniemi at the annual meeting of the American Society of International Law by saying the latter had shown 'with overwhelming erudition the

7 J. Butler, *The Psychic Life of Power: Theories in Subjection* (1997), 2; M. Foucault, 'The Order of Discourse', in R. Young (ed.), *Untying the Text: a Post-Structuralist Reader* (1981), 51.

8 D. Kennedy, 'The Last Treatise: Project and Person (Reflections on Martti Koskeniemi's *From Apology to Utopia*)', (2006) 7 *German Law Journal* 982, at 991.

9 P. Schlag, 'The Problem of the Subject', (1991) 69 *Texas Law Review* 1627, at 1702 (noting this problem within the American critical legal studies tradition).

10 This section is largely based on my chapter in W. Werner et al. (eds.), *The Law of International Lawyers. Reading Martti Koskeniemi* (forthcoming, 2016).

impossibility of our discipline'.<sup>11</sup> But hadn't Koskenniemi sought to expose the discipline's conditions of possibility in *From Apology to Utopia*, rather than render it to the mercy of nihilism? Hadn't he sought to shake the complacent intellectual foundations of the discipline, seeking to preserve it whilst transforming the way its participants thought of it? Interpretations vary. Perhaps part of the problem was the text's form.<sup>12</sup>

Its intellectual vehicles are important (Section 2.1). Whilst they no doubt contribute to the misunderstanding and domestication of critique,<sup>13</sup> the text's theories and methods betray its dominant subject. The image of the subject the text presupposes is to be found by better understanding these theories and methods. In short, the critical subject is the subject the text requires in order to perform as it does. And as we shall see this is also a *projection* of the critic; a reproduction of the author's self-image. It is a subject that is deeply rooted in a Sartrean metaphysic – governed by elitism, unhappiness and specific ideas of freedom (Section 2.2). Perhaps more importantly, this subject may not be capable of realizing the political project of critique in the 1980s. I argue that this subject is torn between certain antinomies and that in many key respects reflects the subject at the heart of liberal political thought. Not only may *From Apology to Utopia* be structured by opposing philosophies of freedom, hence bringing into question its emancipatory politics, but it may very well enable the very form of liberal politics that it wishes to challenge (Section 2.3).

### 2.1. Critical Knowledge: Method and Theories

Critical international legal thought has no allegiance to a given method or theory, for this may betray a form of reification.<sup>14</sup> Indeed Koskenniemi has argued that the merit of any method or theory (or 'style' as he would prefer) lies in the strategic use it is put to.<sup>15</sup> For this reason we see considerable eclecticism in his use of theories and methods, as well as shifts in theoretical posturings across his oeuvre. This diversity has allowed him to enrich what has traditionally been a theory-averse discipline. But there is almost certainly a common commitment to anti-formalism and what is known as the broad church of 'critical knowledge'.<sup>16</sup> This form of knowledge seeks to bring about structural change in a given social system by bringing an awareness of one's concrete social reality. This in turn enables forms of transformative action. The point is to try and change the world. And the kernel of emancipatory politics that lies at the heart of this form of knowledge is intimately tied to how the subject may come to see her own freedom.

11 J. Crawford, Introductory Remarks to Martti Koskenniemi's, 'The Wonderful Artificiality of States', in (1994) 88 *Proceedings of the American Society of International Law* 22, at 22.

12 See the comments of Robert Jennings in A. Cassese, *Five Masters of International Law* (2011), 145–6.

13 S. Singh, 'International Legal Positivism and New Approaches to International Law', in J. d'Aspremont and J. Kammerhofer (eds.), *International Legal Positivism in a Post-Modern World* (2014), 291–313 (exploring various techniques of disempowerment under the guise of discussion).

14 D. Kennedy, 'Spring Break', (1985) 63 *Texas Law Review* 1377; M. Koskenniemi, 'Letter to the Editors of the Symposium', (1999) 93 *American Journal of International Law* 351.

15 Koskenniemi, *supra* note 14, at 356.

16 M. Horkheimer, 'Traditional and Critical Theory' in *Critical Theory: Selected Essays* (2002), 188–243.

*From Apology to Utopia* is committed to a number of methods and theoretical predispositions in pursuit of its emancipatory politics. The majority of the text is the demonstration of a formal structuralist method (Step 1). Koskenniemi attempts to show that professional international legal discourse is constructed around binary opposites that reflect the tensions found in liberalism. Whilst these opposites are mutually exclusive, they can also only gain their meaning by relying on each other.<sup>17</sup> They are irredeemably interdependent.<sup>18</sup> International legal argument interminably oscillates between these poles and this structural indeterminacy means that a given legal question cannot be answered by reference to *only* international law. If a given argument is to prevail it has to be infused with, or motored by, political, moral, social (etc.) contexts.

This structuralism is deployed as a form of critical knowledge, whose task is 'to undo the naturalness of conventional ways of thinking about the law.'<sup>19</sup> Step 1 is employed to unmask and undo the 'false consciousness' of then existing international legal thought (Step 2).<sup>20</sup> Clearly influenced by the critical theory of the Frankfurt School, Koskenniemi attempts to subvert the 'truth' claims of liberal political and international legal thought. Liberalism's attachment to law's objectivity and its primacy over politics is cast aside as a form of false consciousness – as a naturalized, given way of thinking. The indeterminacy thesis demonstrated by the text's application of structuralism seeks to unravel international law's claim to objectivity and undoes its false consciousness, so that this claim will now 'appear as contingent and contestable, [so that] the actual will manifest itself in a new light'.<sup>21</sup>

Both Koskenniemi's structuralism and his ideology critique are a form of polemics. This adversarial approach is softened by what is an 'indissociable'<sup>22</sup> aspect of his text: the ideals of community and intersubjectivity (Step 3). The indeterminacy thesis leads us to the conclusion that any international legal argument must find its justification in a contestable political choice. In this way the conflictual and paradoxical nature of liberal politics finds its way into international legal argument. However, critical practice 'attempts to reach those conflictual views, bring them out into the open and suggest practical arrangements for dealing with conflict without denying its reality'.<sup>23</sup> This normative practice urges us to 'slowly proceed towards (instead of promising to realize at once) decreasing domination and increasing a sense of an authentic community between disagreeing social agents'.<sup>24</sup> I will explore whether this normative practice is feasible given the negative moment of

17 It is not a deconstructionist method as some authors assumed (before critiquing the book on this basis) (see, e.g., I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism', (1990) 61 *British Yearbook of International Law* 339). Koskenniemi has often referred to adding a 'deconstructive' technique to his structuralism (not to mention that these referrals always use inverted commas), but was all too aware that many would not classify it as such (Koskenniemi, *From Apology to Utopia*, *supra* note 2, at 10 and fn. 8). See also Singh, *supra* note 13, 296–9.

18 Koskenniemi, *supra* note 14, at 355.

19 Koskenniemi, *supra* note 2, at 541.

20 *Ibid.*, at 537–41.

21 *Ibid.*, at 540.

22 *Ibid.*, at 541–8.

23 *Ibid.*, at 544–5.

24 *Ibid.*, at 547.

Koskenniemi's critique, and if so, whether it leads us to a deepening of liberal ideals through an arrested critique.

Finally, Koskenniemi argues for a critical identity for the international lawyer. She must be capable of acting in a conflictual world. Here, international lawyers are socialized agents, performing specific roles within specific routines, shaped by specific contexts (Step 4). But these both constrain and enable the international lawyer. She is a situated agent for whom it must be 'possible to live in the present without losing the sense of the beyond'.<sup>25</sup> Critical normative practice requires this particular subject. And whilst he only briefly elaborates this subject, it seems necessary for him to 'outline for the lawyer an existence in routine which constantly aims at transforming the context which shape it and an intellectual directedness towards context-transformation without losing touch of its embeddedness in routine'.<sup>26</sup>

As we follow these methodological and theoretical steps through the text, it becomes apparent that *From Apology to Utopia* is defined by a specific paradox. Its entire critical project depends on the potential of the subject and yet it furnishes us with no analytical knowledge of her. As we move from structuralism to ideology critique, to intersubjectivity and to socialization, the subject rises to a certain prominence within the narrative. We become aware that Koskenniemi's emancipatory politics cannot do without her. She is capable of transcending her own situation by recognizing herself as a reified individual, thereby changing how she may act in the world, and of constantly realizing her freedom; of bringing a sense of community and authentic commitment to the lives of actors who are constantly in conflict and disagreement; and of acting within but being able to constantly transform one's context in a given social role. The hitherto invisible subject is *doing all the work*. And yet we know nothing about her. Nonetheless, Koskenniemi's text seduces us to simply invest in her potential.

## 2.2. The Critic(al Subject)

Let me begin by shedding light on the images of the international lawyer. There are two 'subject-types' at play within *From Apology to Utopia*. On the one hand there is the socialized international lawyer who is tasked to carry out a critical normative practice (see Step 4 above). Then there is the subject who can realize and overcome the thought-structures that have so far defined her existence. This image of the subject is presupposed and required by Koskenniemi's critique. She is also the *result* of the critique that is performed throughout his text. And finally, she is a *projection* of the critic – a replication of the author's self-image. Images of this subject are repressed, comprising the text's unconscious: a driving force that refuses articulation. But perhaps most importantly, she is also recursively played out in other parts of critical international legal thought. She emerges from Koskenniemi's structuralism and ideology critique. In these steps we experience the reproduction

<sup>25</sup> Ibid., at 548.

<sup>26</sup> Ibid., at 549.



of the subject found in Jean-Paul Sartre's existentialist philosophy.<sup>27</sup> In Sartre, as in Koskenniemi's text, we see an individual who can always transcend her situation *in reality*, rather than only as some ontological condition. The critical international lawyer may find absolute freedom in the sphere of critical rational consciousness rather than in a freedom conditioned by material reality. Let me explain.

Koskenniemi, like Sartre, begins by developing an unbridgeable separation between the world and the individual. That is between object and subject, or between doctrine and lawyer. *From Apology to Utopia* dedicates most of its pages to a structuralist method that focuses on the 'object' side of the analysis (doctrine, cases, arguments). Unsurprisingly, its scientific method suspends nearly all references to the subject, whose activity may constitute such objects, or whom in turn such objects may constitute.<sup>28</sup> The purpose of this is not to render the subject irrelevant, but to expose the varied and contradictory positions that an international lawyer can take within the diversity of international legal discourse.<sup>29</sup> The analytical structure of the book *reinforces a splitting between subject and object* (whilst also making a normative argument that denies the possibility of this; see Step 4 above). This 'splitting' is then recursively solidified in Koskenniemi's images of the critic(al subject).

In *From Apology to Utopia* this subject is able to stand *above* and *separate* from, albeit momentarily, her object. She is defined by an attitude of reflection upon her own situation, as well as upon herself. She is able to reflect on her own and her field's reified situation (because critique has done its work). She is able to see herself, and her fellow travellers, as managing technicians in a thingified system of rules. And she is able to transcend this understanding of herself, moving towards her own possibilities. She is able to discern all this because she can detach herself from the (international legal) world she finds herself in. Critique promises her the capacity to capture and see her 'real' situation, through the momentary distance that critique gives her from her false understanding of the world. She is able to see all this because there is a brief 'moment' and 'space' that is immune from context, from structure, from her technical role, from her beliefs etc.

Now notice how this image of the subject is almost identical to the critic. Except the critic's operation is performed before this subject comes into view. The critic is able to stand *above* and *separate* from his object of analysis.<sup>30</sup> With his interrogative attitude, he is able to discern that international law works according to a determinable structure of argument, at a given historical moment. He is able to discern the patterns of structure without having to be constituted by this structure. He is able to reflect upon his own and his field's reified situation as a mere collection of managing technicians working in a thingified system of rules. He is able to transcend this understanding, moving towards its possibilities. He is able to discern all of this because

27 In this section I rely heavily upon, but go beyond, Pierre Schlag's argument regarding American critical legal thought; see generally Schlag, *supra* note 9, at 1679–1705.

28 A. Supiot, *Homo Juridicus: On the Anthropological Function of the Law* (Saskia Brown (tr.), 2007), 6: 'A truly scientific method aims to efface the subject in favour of the object and cannot therefore explain what founds the subject'.

29 See M. Foucault, *The Archaeology of Knowledge*, (A. Sheridan Smith, (tr.), 1972), 200. For the influence of Foucault on Koskenniemi see Koskenniemi, *supra* note 2, at 7 and fn. 2, 73 and fn. 6.

30 I use the masculine, because the critic's image in this text is a projection of its author, Martti Koskenniemi.



he is able to detach himself from the world he finds himself in and *able to conduct his diagnosis in a space that is not occupied by the very objects he wishes to analyze*. So, these very objects do not constitute him and he is able to master them. The critical theorist, here, is an individual that can know in ways that a reified individual cannot; he is capable of highlighting as contingent that which may have been falsely thought of as universally necessary. It is the knowledge acquired and given by his interrogative attitude and distance from his objects that allows him to escape the conditions of his existence. In Koskenniemi's own words:

The critical argument's critical potential lies in showing that it is possible to escape from the frustratingly weak character of legal discourse by extending the range of permissible argumentative styles beyond the points in which it is usually held that legal argument must stop in order to remain "legal".<sup>31</sup>

[I seek to] provide the possibility for reformed routine; a routine which allows *the lawyer to escape from the limitations of the role* and help create a better society while enabling him to live a conscious and meaningful life as a lawyer in the midst of the actuality of social and political conflict.<sup>32</sup>

We have felt that extending upon imagination we must renounce the security which our legal roles offered us. Yet, remaining within roles seemed to require unreflective assimilation or engaging in phantasy. We were not relieved from the painful task of living and choosing in the midst of political conflict. Instead of impartial umpires or spectators, we were cast as players in the game, members in somebody's team. It is not that we need to play the game better, or more self-consciously. We need to re-imagine the game, reconstruct its rules, redistribute the prizes.<sup>33</sup>

Where the non-critical or reified lawyer is imprisoned within constraints or structures, the critical theorist in Koskenniemi's text is able to promise freedom, through choice and transformation, from these very constraints. The politics of this form of critical theory is one of setting the reified subject free. Within this narrative there is always something that can be done despite, and beyond, the structured character of one's situation.<sup>34</sup> And what we see, given this image of the critical subject and its projection of the critic, is the Sartrean subject.

Sartre's *Being and Nothingness* is an account of what it means for a human to be in the world. At the book's centre lies a distinction between things in the world (being-in-itself, or roughly, the object) and the human being (being-for-itself, consciousness, cogito, or roughly, the subject). These are distinct parts of the world that comprise concrete human reality only in a synthetic relationship with each other.<sup>35</sup> Whilst an object is a non-conscious thing that always coincides with itself, the *subject is a consciousness that is conscious of itself and always reaches beyond what it is, all the while*

31 Koskenniemi, *supra* note 2, at 542.

32 *Ibid.*, at 553 (emphasis added).

33 *Ibid.*, at 561.

34 For an exploration of the connection between structuralism/ideology critique and emancipatory politics in American critical legal studies see, J. Boyle, 'The Politics of Reason: Critical Legal Theory and Local Social Thought', (1986) 133 *University of Pennsylvania Law Review* 685, at 743–5; P. Gabel and D. Kennedy, 'Roll over Beethoven', (1984) 36 *Stanford Law Review* 1, at 53–4.

35 J-P. Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology* (H. Barnes (tr.), M. Warnock (intr.), 2003), 27.

*continually creating itself*.<sup>36</sup> Sartre's task is 'to penetrate into the profound meaning of the relation "man-world"'.<sup>37</sup> This, at first blush, seems to be an ontological question concerned with the nature and relations of being. On the other hand, Koskenniemi's work offers a *historical* grounding for his critical international lawyer. Sartre remains relevant precisely because his analysis is not merely ontological; it *becomes historical* to the extent that he argues that it seeks to exist in concrete reality and is an attitude of living *in* the world. As a consequence, his historical stance presupposes and imports the conclusions of his ontological analysis.<sup>38</sup>

In Sartre's writings the individual possesses the specifically human 'attitude of interrogation'.<sup>39</sup> To be able to reflect upon and question oneself and one's situation is at the core of being human. A question of course does not guarantee an answer. It may also furnish an answer in the negative. Or it may even limit an affirmative answer ('It is thus and not otherwise').<sup>40</sup> For Sartre, the constant possibility of these negations constitutes the heart of what it is to be a human, a subject, or a consciousness. It is this possibility of negation that conditions every process of questioning, and this process in turn is the very condition of a reflective consciousness.<sup>41</sup> Negations define the subject, leading to certain forms of anxiety, frustration and anguish. At the heart of the critical subject's being is a kernel of nothingness, for it is this that affords him such a role. But it is in seeking detachment from the world, *transcending its objects*, that this subject finds the possibility of freedom:

*Anguish then is the reflective apprehension of freedom by itself. In this sense it is mediation, for although it is immediate consciousness of itself, it arises from the negation of the appeals of the world where I had been engaged – in order to apprehend myself as consciousness which possesses a preontological comprehension of its essence and a pre-judicative sense of its possibilities. Anguish is opposed to the mind of the serious man who apprehends values in terms of the world and who resides in the reassuring, materialistic substantiation of values. In the serious mood I define myself in terms of the object by pushing aside a priori as impossible all enterprises in which I am not engaged at the moment; the meaning which my freedom has given to the world, I apprehend as coming from the world and constituting my obligations. In anguish I apprehend myself at once as totally free and as not being able to derive the meaning of the world except as coming from myself.*<sup>42</sup>

In this passage we see why Sartre's metaphysic may lie at the heart of Koskenniemi's image of the critic(al subject). The relationship between the individual and the world operates through splitting them and establishing a hierarchy. In Sartre, the subject can master the world without the world constituting it (in its reflective place) in

36 On the object: 'Being-in-itself (*être-en-soi*): Non-conscious Being. It is the Being of the phenomenon and overflows the knowledge which we have of it. It is a plenitude, and strictly speaking we can say of it only that it is.' *Ibid.*, at 650 and see also, 18–21. On the subject: 'But it would be necessary to complete the definition and formulate it more like this: *consciousness is a being such that in its being, its being is in question in so far as this being implies a being other than itself*.' at 18 (original emphasis).

37 *Ibid.*, at 28.

38 H. Marcuse, 'Sartre's Existentialism', in *Studies in Critical Philosophy* (J. de Bres (tr.), 1972), 157, 171–7.

39 Sartre, *supra* note 35, at 28.

40 *Ibid.*, at 29.

41 *Ibid.*, at 29 and see also 53–5.

42 *Ibid.*, at 63 (emphasis added).

turn.<sup>43</sup> The subject can gain a specific distance from his object of analysis. A reflective consciousness (or knowing consciousness)<sup>44</sup> may suffer frustration and anguish, but it is this that secures him space away from the world and its objects. And just as the critic can transcend international law's reified objects and its structure, Sartre's subject is able to master and transcend the world.<sup>45</sup>

Sartre also accepts that an individual always finds himself in a given circumstances, not of his own making. Similarly, Koskenniemi asserts an image of the international lawyer as a social agent who occupies given social roles, through which he helps produce the structure of international legal language. But Sartre's subject, just as Koskenniemi's critical international lawyer, is able to also (momentarily) transcend the given 'situation' that so degrades her possibilities and potential. This transcendence is achieved because the *individual subject alone is able to determine the limits of her situation*. It is she that determines the meaning of any given adversity by choosing to see the situation in light of the goal she chooses.<sup>46</sup> In short: *the real limits of a given situation depend on how we exercise our absolute and free choice to see the situation and its limits*.<sup>47</sup> A pre-given situation is hence made the subjects own. He masters its meaning – its limits and its relevance to her own condition – all through her act of choice.

This is the imposing logic that sustains the emancipatory politics of critical legal thought. For Koskenniemi, '[conscious agents] must participate in social routine and yet, *do this from a distance*. To be a conscious actor requires relatedness to the social world in a way which it is possible to live in the present without losing a sense of the beyond.'<sup>48</sup> The social role does not constitute the individual lawyer, but is rather appropriated by him. The critical subject is able to make the situation his own and realize his freedom in choosing to transform it. Importantly, notice that this logic *requires* a subject that can take a specific distance from a given world – an irreconcilable and always maintained subject / object split. It requires a consciousness that can transcend the world because it is reflective and not entirely shaped by the world's belief and social structures.<sup>49</sup> It requires the elements of an *empty* subject whose

43 'The first procedure of a philosophy ought to expel things from consciousness and to reestablish its true connection with the world, to know that consciousness is a positional consciousness *of the world*', *ibid.*, at 7 (original emphasis).

44 Sartre considers this *the only* mode by which to become conscious of an object: 'The self-consciousness we ought to consider not as a new consciousness, but as *the only mode of existence which is possible for a consciousness of something*.' *Ibid.*, at 10 (original emphasis).

45 T. Adorno, 'Subject and Object' in A. Arato and E. Gebhart, *The Essential Frankfurt Reader* (1985), 497, 498–9.

46 'In particular the coefficient of adversity in things can not be an argument against our freedom, for it is *by us* – i.e., by the preliminary positing of an end – that this coefficient of adversity arises. ... Thus although brute things (what Heidegger calls "brute existents") can from the start limit our freedom of action, it is our freedom itself which must first constitute the framework, the technique, and the ends in relation to which they will manifest themselves as limits.' Sartre, *supra* note 35, at 503–4 (original emphasis).

47 'The technical and philosophical concept of freedom, the only one which we are considering here, means only the autonomy of choice. ... Thus we shall not say that a prisoner is always free to go out of prison, which would be absurd, nor that he is always free to long for release, which would be an irrelevant truism, but that he is always free to try to escape (or get himself liberated); that is, that whatever his condition may be, he can project his escape and learn the value of his project by undertaking some action.' *Ibid.*, at 505.

48 Koskenniemi, *supra* note 2, at 548 (emphasis added).

49 'In occupying and fulfilling roles which are open to us *we reproduce* those imaginative and institutional constraints through which any particular society establishes its identity. ... Simultaneously, roles are a

choices can never be constructed by the world. Sartre, for example, considers that the constraints society placed on the Jewish population during the 1930s and 40s only existed in a concrete historical sense, and have meaning, to the extent that a Jew *chooses to see them* as constraints. A Jewish person can transcend the anti-Semitic signs ('No Jews allowed here') and the anti-Semitic structures, if he chooses to view these as purely external objects that do not constitute him, his freedom to choose, or his beliefs and consciousness.<sup>50</sup>

It seems reasonable to argue that this existential notion of freedom, if it asked to live in concrete reality, borders on absurdity.<sup>51</sup> Sartre's philosophy, and to the extent it undergirds Koskenniemi's text, delivers the subject into a tyrannical idealism. The critic premised on a Sartrean metaphysic bears a constant and unrelenting responsibility for the world and for himself.<sup>52</sup> Everything rests on his *absolutely free* choices; the burden of the world is his to master.

But even as the critic has exposed the objectifying structures within international legal thought, and the critical subject realizes her 'true' situation, their *freedom is only momentary*. Or, in the words of Koskenniemi, there is 'little support for the belief that revolution or happiness could survive the first moments of enthusiastic bliss. The morning after is cold, and certain to come'.<sup>53</sup> This is both a historical lesson and one that emerges from Sartre's analysis. His subject can never fully coincide with the world (for then it would be an object) and it can never coincide with its actual situation. Just as the critic creates a new world, and the critical subject is remade in the critic's image, they cannot coincide with the world their critique, or realizations, have produced. The critic(al subject) must, at every new historical juncture, renounce the knowledge and subject that critique has produced. And because there is no human existence without the 'situation', or no 'non-human situation', the responsibility to realize my freedom occurs in making the situation mine – to constantly make a choice on the same and new ground 'again and again without a break'.<sup>54</sup> Critique for this subject, like existence, knows no bounds of time except mortal death. The image of the critic(al subject) that emerges from Koskenniemi's *From Apology to Utopia* is an individual who lives an essentially unhappy and constantly burdened existence, who can always (and is so burdened to) realize his absolutely free choice, all the whilst knowing that any freedom achieved can only ever be fleeting. And must be fought for over and over, each time anew, till one is no longer capable.

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constant threat to consciousness to identity. There is this dilemma: to participate in routine, one needs to do this through a role. But the more one immerses oneself in one's role, the less one is actually participating as a conscious agent at all. ... For the international lawyer, *social existence means participation in legal routine and yet doing this so as not to be wholly submerged in it*' Ibid., at 549–50 (emphasis added). You will notice that the subject remains in control of the constraints, but is never constituted by them; constraints are rather *produced by* and upon the individual.

50 Sartre, *supra* note 35, at 545–8.

51 See generally Marcuse, *supra* note 38.

52 Sartre, *supra* note 35, at 574–7.

53 M. Koskenniemi, 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice', in *The Politics of International Law* (2011) 271, 293.

54 Sartre, *supra* note 35, at 574–5.

### 2.3. Tensions and Limits

I have tried to make explicit the implicit. I have argued that we see the Sartrean subject at the heart of *From Apology to Utopia*. The subject, her attitudes and characteristics, her worldview may now be better understood. She ought, at the least, to be graspable. This is a subject that splits herself from and transcends the world (her object), possesses a reflective and constantly transcendent image of rational consciousness, and who believes that concrete freedom lies in absolute choice. In this final substantive section the question becomes whether this subject is capable of realizing the politics of the critical international legal thought.

In the subsections that follow, I will show how the critic(al subject) is structured by certain antinomies and sustained by certain myths. The first contradiction that constitutes this subject is the search for a politics of community, whilst simultaneously trying to dominate a part of the polity (Section 2.3.1). The second is between competing and opposite understandings of freedom (Section 2.3.2). Third and finally, I argue that the image of the subject that we see in *From Apology to Utopia* may, ironically, perpetuate and reproduce the very ideology of liberalism that it seeks to challenge (Section 2.3.3).

#### 2.3.1. Between Community and Domination

The first tension arises as *From Apology to Utopia*'s critique moves from its negative to its positive moment; or, from undoing false consciousness through structuralism, towards intersubjectivity (Section 2.1). Koskenniemi's is a critique with the ideal of community. I argue that the performed ideology critique sits in irresolvable tension with the idealized move towards community, for the simple reason that Koskenniemi's ideology critique effects, at a subjective level, a commitment to annihilate its opponent.

To understand the nature of this 'annihilation', it must first be understood that the critic (and then the critical subject that the critic's critique engenders) abhors the situation where an individual is alienated from his freedom. Rather, to 'have identity as conscious agents they must fight constantly against alienation and assimilation'.<sup>55</sup> Koskenniemi sees the field of international law populated by those lawyers whose 'identity [lies] in his skill as a managing technician of [an] invisible international "system"'.<sup>56</sup> The form of critique that we see in *From Apology to Utopia* functions upon and for such individuals. It is critique built on a war of consciousness.<sup>57</sup> The task is to do away with a consciousness that does not realize itself and its potential as consciousness. It is to do away with the individual who views herself as a 'thing' that is subordinated to the standardized techniques of a given social system (i.e., as a managing technician in a system of laws). This individual cannot realize the potential of herself as a consciousness, precisely because she considers herself to fully coincide with her situation. This type of individual can only ever be an object

55 Koskenniemi, *supra* note 2, at 548.

56 *Ibid.*, at 554.

57 See generally P. Sloterdijk, *Critique of Cynical Reason* (M. Eldred (tr.), 1988) (on critique as a form of a war on consciousness).

in a Sartrean metaphysic, for she does not realize that she is always more than the possibilities of her given situation. She possesses a form of consciousness that alienates her from her freedom, her choices and her responsibilities.

Critique seeks to ‘annihilate’ this form of subjectivity or consciousness. It wishes to demonstrate its falsity, and replace it with its own ‘truth’.<sup>58</sup> Ideology critique, in the particular sense we see in *From Apology to Utopia*, must begin with the undoing of a specific form of consciousness. It does this through an act of domination: the (claimed) exercise of a superior form of reason. The critic and the critical subject does what she does with all objects; she harnesses a specific distance from them and then masters them.<sup>59</sup> And this act of domination precedes the act of annihilation: the consciousness that does not realize itself cannot be an acceptable part of the polity where ideology critique has done its work.

We may now perhaps see how a kernel of irony lies at the heart of Koskenniemi’s critique. The will to lessen domination is premised upon an act of domination. In the positive moment of his text, even if inter-subjective conflict remains in the world, we ‘can slowly proceed towards . . . decreasing domination and increasing the sense of authentic community between disagreeing social agents’.<sup>60</sup> The ideal of community presupposes an understanding of the political. It is not premised on the erasure of conflict, or the move to consensus. It does not deny dissensus, but rather provides a hermeneutic footing for disagreement. But this notion of community *does not* presuppose exclusion, or the undoing of a part of the polity. Critique, in its idealized image, has enabled this open, conversant and conflictual community. Yet in this very act of constitution lies a founding act of annihilation. One part of the community is afflicted with falsity of thought and *must* be replaced by a ‘truer’ form of thought. False consciousness must be undone in this war of consciousness. The subjectivity of a specific individual must be undone and replaced with another subjectivity that will bring her in closer relation to the group in which the critic resides. And so at the heart of an idealized community where dominance is constantly lessened, is an act of domination *par excellence*.

Matters do not end here. This act of domination may be constantly re-inscribed into the fabric of the international legal community. Can the critic we have seen emerge surrender this initial act of dominance? The Sartrean metaphysic almost ensures that the war of consciousness is relentless; a Sartrean subject can never let her consciousness coincide with itself without lapsing into an object that needs to be mastered. And just as a certain falsity is replaced by a ‘truth’, this ‘truth’ is

58 I bracket any questions of the viability of this form of critique, but false consciousness critique has had a number of detractors. See M. Heidegger, *What is Called Thinking* (F. Wieck and S. Gray (tr.), 1968), 34; Sloterdijk, *supra* note 57, at 3–137; M. Foucault, ‘Two Lectures’, in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (1980), 78. Koskenniemi has briefly intimated as the possible ‘naivety’ of his critical method, but whether this is his position, or of his critics is unclear. See M. Koskenniemi, ‘The Politics of International Law – 20 Years Later’, (2009) 20 EJIL 7, at 8.

59 This is also a natural consequence of Sartre’s metaphysic and rationalism. Specifically it is the consequence of the definitions of the object and subject, the subject-object hierarchy and, in particular, the rule of the Master-Slave dialectic in the relationship between self and Other – which is a thoroughgoing of Sartre’s philosophy. On the relationship between ego and Other, see Sartre, *supra* note 35, at 383–452.

60 Koskenniemi, *supra* note 2, at 547.



shown to be its own form of falsity. The anxious responsibility attached to always having to transcend a given way of being is the recurring narrative at the heart of both the Sartrean metaphysic and the nature of false consciousness critique.<sup>61</sup> And so, the critic, and the critical subject that follows him, will nearly always be torn between the antinomy that lies at the heart of the negative and positive moments of his critique. The image we see in *From Apology to Utopia* is that of a critic who aspires to less domination as his ideal, all the while constantly perpetuating a form of domination himself.

### 2.3.2. *Emancipatory Politics between Freedoms*

The critic(al subject)'s identity and Koskenniemi's text is structured by a second antinomy. Two incompatible notions of freedom are produced by the text: (a) freedom *from* a situation, and (b) freedom *through* a situation. On the one hand, the Sartrean subject delivers us into the first understanding by positing a subject who can constantly appropriate and transcend her situation. This is the text's *presupposed* subject. But on the other hand, Koskenniemi's structuralism delivers us into the second. A position reinforced by the text's *normative* subject (i.e., the idealized socialized subject we see at the end of *From Apology to Utopia*). But let me elaborate on this antinomy.

The empty subject that we saw emerge from Sartre is one who believes that freedom is always possible. This is the freedom of choice and it is absolute. The subject's ontological freedom conditions and obtains her practical freedom.<sup>62</sup> The critic, building on this Sartrean metaphysic, requires a space for reflection that is not occupied by the objects of his analysis (beliefs, structures, discourses etc.). And the critical subject is endowed with this same 'space'. By freezing the subject-object dichotomy, critique can maintain an image of this 'space' or momentary distance from externalities. Not only is this necessary for the critic's and critical subject's performance, but it is foundational to her promises. The fantasy she sells his reader depends upon the latter being able to finally occupy this same space or distance from the world (once his false consciousness is undone). But both the performance and the promise deliver us into identical ideas of freedom. Critique in *From Apology to Utopia*'s casts freedom as the absence of constraint, as freedom *from* a situation.

And yet, Koskenniemi's structuralism and his normative, socialized, subject advocates for a different understanding of freedom. 'True, the lawyer is constrained. But inasmuch as he experiences the conflicting pull of the criticisms of apology and utopia, he is not fully so.'<sup>63</sup> Koskenniemi's structuralism enables the lawyer

61 For a recollection on the relentless pattern of the Sartrean metaphysic, see above [Section 2.2](#).

62 There is an argument that we see two ideas of freedom in Sartre: ontological freedom and what he calls 'freedom of obtaining'. The first conditions the second, and the second presupposes the functioning of the first. At the heart of my analysis is the understanding that Sartre collapses his ontological inquiry into the realm of the real, i.e., the concrete, historical context. Some authors may reasonably disagree with this. Marcuse and Merleau-Ponty supported my reading, but Simone de Beauvoir famously defended Sartre against these readings. See Sartre, *supra* note 35, at 483–4 (on 'freedom of obtaining'); Marcuse, *supra* note 38; J. Stewart (ed.), *The Debate Between Sartre and Merleau-Ponty* (1998); S. de Beauvoir, 'Merleau-Ponty and Pseudo-Sartreanism', (1989) 21 *International Studies in Philosophy* 3.

63 Koskenniemi, *supra* note 2, at 549.



to see the play of language he can enact so as to be professionally competent. It is anti-humanist to the extent that it reminds us that social structures exist and often proceed without any regard for the individual *and* always through her. But it also seeks to rescue a form of humanism as it leads the lawyer away from the stark rationalism that required the Sartrean subject to think of freedom as the absence of constraint. The logic enabled by Koskenniemi's normative text is that constraints, whether linguistic structures, social roles, beliefs or other conditioning circumstances, *provide the enabling conditions of possibility*.<sup>64</sup> Freedom becomes dependent on constraint. And constraint becomes the very means by which we can enter into a given world and can realize our concrete possibilities.<sup>65</sup> Maurice Merleau-Ponty put it so: that 'I am a psychological and historical structure does not limit my access to the world, but on the contrary is my means of entering into communication with it'.<sup>66</sup> Freedom is achieved *through* one's situation.

The result is a text structured by, and oscillating between, certain antinomies. Not only do we have competing and incompatible understandings of freedom but we also have incompatible understandings of the subject. On the one hand there is the image of the individual who is always able to transcend his situation, and on the other hand, one who seeks to transform his given situation by working within and opening up its concrete possibilities. The first presupposes a bare or empty consciousness that can always master his situation and the second understands the subject as always constituted, who acts in the world through this constitution. One is presupposed by the text, the other demanded by it. Each *produced* in its own way.

These antinomies are not idle intellectual musings. Rather, they go to the very core of critical international legal thought for no other project is so driven by the politics of emancipation. The stakes are considerable. How do the critic and critical subject speak? From a disembodied, unsituated position within a momentarily separated space, or from an embodied, historical situated and produced spaces? Not only does this antinomy go to the heart of the individual's sense of self and his capacity in the world, but it also goes to the heart of how we may seek to address the problems of this world. And we find it recursively being played out in critical international legal thought.<sup>67</sup> To say little of what is ultimately at stake: whether we may unwittingly exacerbate the hostile conditions which constitute us, or whether we are capable of understanding them in a new light and possibly bringing small amounts of welcome relief.

64 See note 31 and accompanying text for a better understanding of how this may play out. Koskenniemi's structuralism does not seek to efface the subject.

65 This, in part, is why it has been so easy for people like Stanley Fish to deconstruct the very form of critique we see in Koskenniemi's *From Apology to Utopia* (although he applied it to American critical legal studies). See S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989), 457–67. But Maurice Merleau-Ponty believed that this type of philosophy, and Fish's critique, both fell into what he called the 'rationalist's dilemma: either the free act is possible, or it is not – either the event originates in me or is imposed on me from the outside.' M. Merleau-Ponty, *Signs* (R. McCleary (tr.), 1964), 227.

66 M. Merleau-Ponty, *Phenomenology of Perception* (C. Smith (tr.), 1962), 455.

67 See for example that which is implied colonial and postcolonial projects within Third World Approaches to International Law and in S. Marks, 'False Contingency', (2009) 62 *Current Legal Problems* 1.

### 2.3.3. *The 'Stunningly Liberal Subject'*<sup>68</sup>

The philosopher Jacques Rancière once stated that 'revolutionaries invented a "people" before inventing its future'.<sup>69</sup> This is to say that not only does all politics require a subject but also the framing of the future happens in the moment of political intervention. The critic(al subject) is not merely the condition of possibility of Koskenniemi's text. Rather, her image frames the potential of his intervention, for the realization of his politics. It is not enough, however, that this subject is capable of realizing the politics of Koskenniemi's critical thought. More importantly, we must be seduced and manipulated into believing that this subject has this capacity. Readers, consumers, students and co-conspirators of Koskenniemi's text must come to believe that the conception of the self they see in his work is an accurate account of the nature of their being.<sup>70</sup> But what if the critical subject is not capable of realizing the politics of critical thought and we as readers realize that we have been seduced by particular myths?

If you accept the argument made in [Section 2.2](#) above, the absolute free and empty subject is presupposed by Koskenniemi's critique. Sartre is the dirty little secret at the heart of *From Apology to Utopia*. This critical subject, no matter her conditions or situation, she is able to determine, appropriate and master it. She is always responsible for her own freedom, and indeed, freedom can only appear as a result of exercised responsibility. This freedom from constraint comes into sight as she empties herself, as she separates from and transcends her object. The problem of course is that we already live within such a cultural narrative of ourselves. It is strikingly familiar precisely because it is the narrative of political liberalism. And the image of the critical subject is, as Pierre Schlag notes in another context, that of the 'stunningly liberal subject'.<sup>71</sup> Liberalism has established, sustained and rejuvenated itself by constantly furnishing us with an image of the individual who is always self-determining and always capable of making any choice she wishes to. Not only is freedom equated with choice, but this choice is an ever-present possibility and always absolute. The liberal subject is seduced (and often ironically, shamed) into believing that she is the alpha and omega in her relations with the world.

So at the precise historical juncture that Koskenniemi's text seeks to challenge the main tenets of liberalism,<sup>72</sup> his text offers a subject who sees herself and her emancipation on the same foundations as that of the liberal subject. The Sartrean kernel at the core of *From Apology to Utopia* is no longer innocent or dormant. One is left to question the extent to which Koskenniemi's critique is capable of realizing its politics of liberating the individual. But perhaps more damningly, Koskenniemi's critique and its view of the subject may *perpetuate the very ideology of its, of our, time*. The point is not merely that the critical subject is promised freedom through the

68 Schlag, *supra* note 9, at 1697.

69 J. Rancière, 'The Thinking of Dissensus: Politics and Aesthetics', in P. Bowman and R. Stamp (eds.), *Reading Rancière* (2011), 1, 13.

70 F. Michelman, 'The Subject of Liberalism', (1994) 46 *Stanford Law Review* 1807, at 1831 (making the point in regards the liberal subject).

71 Schlag, *supra* note 9, at 1697.

72 See generally Koskenniemi, *supra* note 2, at 71–157.

operation of critical thought. It is that the *grounds* of this freedom are precisely the same as those embedded within the liberal subject. With this realization comes another: freedom, and its constant promise, is a mode and method through which we are managed. Sartre was all too aware of this. In 1946 he remarked:

The revolutionary ... distrusts freedom. And rightly so. There has never been a lack of prophets to proclaim to him that he was free, and each time in order to cheat him.<sup>73</sup>

Koskenniemi, many years after he wrote *From Apology to Utopia*, would state much the same: 'freedom is also a way to govern human beings'.<sup>74</sup> The irony should be quite apparent; the critical thought that sought to empower, liberate and enable the individual may then very well have delivered her into the very tyranny she sought to escape. And in doing so, helped sustain the very political ideology that she and her politics sought to challenge.

But the stories, images and problems of the international lawyer and her identity are only just beginning.

### 3. THE PRAGMATIC PROFESSIONAL

There was always something missing from Koskenniemi's formal structuralism. We were never privy to how international law changed or transformed; it did not do so of its own volition. From this perspective it was natural that the individual international legal professional would move to the forefront of Koskenniemi's subsequent writings. And so, *The Gentle Civilizer* is a natural supplement to *From Apology to Utopia*.

In the pages that follow, I look at the various angles from which Koskenniemi approaches his now more visible subject. I approach identity through a form of border politics. The image we see of the international lawyer is as much constituted by the substance of Koskenniemi's text as by that which it opposes and that which constantly laps onto its boundaries. First, the historical imagination that undergirds *The Gentle Civilizer* is understood against the contemporary predominance of disenchantment (Section 3.2). I then look at how Koskenniemi's 'culture of formalism' sets itself against managerialism, which allows for a view that the image of the international lawyer is intimately linked to a specific practice and the freedom this may enable (Section 3.3). Finally, I outline how certain tensions emerge in this image of the pragmatic professional before gently inquiring whether the refuge of ethics is sufficient (Section 3.4).

#### 3.1. The Gentle Civilizer: Non-Theory

Koskenniemi's first monograph displayed a theoretical and methodological clarity that his second eschewed. Such was the formality of his method in *From Apology to Utopia* that it constrained what could be reasonably or thoroughly argued. However

73 J-P. Sartre, 'Matérialisme et Révolution' (1946), 1 *Les Temps Modernes* 9, at 14.

74 M. Koskenniemi, 'International Law Between Fragmentation and Constitutionalism' Speech, 18 May 2003 (Recife, Brazil), 15 (para. 31).

in *The Gentle Civilizer*, ‘the constraints of any rigorous “method” have been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession that plays with the readers empathy’.<sup>75</sup> Koskenniemi joined many others in the New Approaches to International Law tradition in his move away from the stringent application of theory and method. Perhaps in these quarters such notions were considered as mere ‘disciplinary fixtures and academic reifications’.<sup>76</sup> In any case, there can be little doubt that he is sceptical of theory’s potential alone.<sup>77</sup> Or, perhaps we could ascribe his lack of transparency regarding theory and method to be an essential part of his theoretical posture. *The Gentle Civilizer* was a sustained effort to move beyond ‘critical reason’<sup>78</sup> and its rationalizing tendencies, towards the sensuous. This ought to be regarded as a key theoretical move (more on this in Section 3.2) for the sensuous often finds itself in retreat or cast aside when confronted with the coldness of method’s reason.

In any case, the lack of overt method does not mean that Koskenniemi’s text is not propelled and structured by specific theoretical commitments. It merely means that it is not reducible to them and that they have to be teased out. *The Gentle Civilizer* is driven by hard-to-grasp terms, such as ‘narrative’, ‘sensibility’ and ‘imagination’.<sup>79</sup> They arrive in Koskenniemi’s text with complex and contentious histories and emerge from his pages with a (purposeful) lack of clarity. For example, is his appreciation of ‘history as narrative’<sup>80</sup> influenced by his wish to encourage empathy?<sup>81</sup> Beyond the extent to which this particular move may encourage a heterodox approach to critique, some terms (such as ‘narrative’) are of little interest to me. Others, such as ‘sensibility’ and ‘imagination’ or even ‘culture of formalism’, are far more central to Koskenniemi’s text and his emancipatory politics. Over the next few pages, I hope their meaning and use may become clearer.

### 3.2. The Historical Imagination in Times of Disenchantment

If there is a driving force, or politics, behind Koskenniemi’s second monograph and a number of his subsequent writings, it is an *embodied critique* of the rationalizing and technocratic tendencies in modern international law. In riposte, he seeks emancipatory refuge in the potential of a historical conditioned ‘imagination’ and what he came to term a ‘culture of formalism’.

75 Koskenniemi, *supra* note 4, at 10.

76 O. Korhonen, ‘Innovative International Law Approaches and the European Condition’, in J. Beneyto and D. Kennedy, *New Approaches to International Law: The European and American Experiences* (2012), 193, 206.

77 Koskenniemi, *supra* note 4, at 504; Koskenniemi, *supra* note 14.

78 Koskenniemi, *supra* note 58, at 16.

79 Frustration at the lack of methodological clarity has been noted elsewhere, see G. Galindo, ‘Martti Koskenniemi and the Historiographical Turn in International Law’, (2005) 16 *European Journal of International Law* 539, at 546.

80 Koskenniemi, *supra* note 4, at 8.

81 See R. Rorty, *Contingency, Irony and Solidarity* (1989), xvi; see also R. Bernstein, *The Pragmatic Turn* (2010), 207–13. For Koskenniemi’s appreciation of narrative as opening a discourse in much the same way as heterodox traditions, see M. Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’, (2011) 19 *Rechtsgeschichte* 152, at 179.

Max Weber famously stated that the ‘fate of our times is characterized by rationalization and intellectualization, and above all, by the disenchantment of the world. Precisely the ultimate and most sublime values have retreated from public life . . .’<sup>82</sup> It is within this tradition of thought – against the conditions of disenchantment – that Koskenniemi’s *The Gentle Civilizer* emerges. His writing seeks to confront what he terms ‘managerialism’.<sup>83</sup> This is the process by which politics and political struggle is shortcut and sidelined by technical expertise. A phenomenon exacerbated by the fragmentation of our world and international law. In our disenchanted world, empirical and technical knowledges are preferred even as they ‘obscure the way power works and make particular intellectual or social hierarchies appear as natural aspects of our lives’.<sup>84</sup> Managerialism introduces the image of the international lawyer as a ‘fully instrumentalised cog’<sup>85</sup> whose ‘fantasy . . . is that of holding the prince’s ear’,<sup>86</sup> of becoming ‘counsel for the functional power holder’.<sup>87</sup>

Koskenniemi’s response is a turn to history and an embodied critique. As it emerges in *The Gentle Civilizer*, critique is no longer a matter of proper distance or reflexive reason. Long gone are references to ‘critical reason’, the ‘critical consciousness’ or even reflexivity. In its place arrives an intimate and embodied exercise. A careful, detailed and perhaps nostalgic recollection of a past that is able to impart important lessons about the endeavour of practicing international law. Peter Sloterdijk outlined this form of critique:

It is not on the basis of elevated, distanced critique that achieves grand overviews but a stance of extreme closeness – micrology. If things have become too close for comfort for us, a critique must arise that expresses this discomfort. It is not a matter of proper distance but of proper proximity. . . . Because the sovereignty of minds (*Köpfe*) is always false, the new critique prepares to slip from mind into the whole body.<sup>88</sup>

This is the driving thrust of Koskenniemi’s second monograph. It proposes to see international law as a ‘terrain of fear and ambition, fantasy and desire, conflict and utopia, and a host of other aspects of the phenomenological lives of its practitioners’.<sup>89</sup> Koskenniemi sought to place the work of ‘men of 1873’ ‘within social and political contexts’ such as ‘the professional and political projects they tried to advance through their practice, on the struggles for power and position in which they were engaged, and on their defeats and victories’, as well as the minutiae of their life.<sup>90</sup> It is the very intimacy of this critique that allows Koskenniemi to bring

82 M. Weber, ‘Science as a Vocation’, in H. Gerth and C. Mills (eds.), *From Max Weber: Essays in Sociology* (1946), 129, at 155.

83 For a general discussion see S. Singh, ‘The Potential of International Law: Fragmentation and Ethics’, (2011) 24 *LJIL* 23; and A. Lang and S. Marks, ‘People with Projects: Writing the Lives of International Lawyers’, (2013) 27 *Temple International & Comparative Law Journal* 437.

84 Koskenniemi, *supra* note 58, at 16.

85 M. Koskenniemi, ‘The Fate of Public International Law: Between Technique and Politics’, (2007) 70 *Modern Law Review* 1, at 26.

86 Koskenniemi, *supra* note 58, at 15.

87 M. Koskenniemi, ‘Miserable Comforters: International Relations as a New Natural Law’, (2009) 15 *European Journal of International Relations* 395, at 411.

88 Sloterdijk, *supra* note 57, at xxxiii.

89 Koskenniemi, *supra* note 4, at 7.

90 *Ibid.*, at 2 and 5–6.

the international lawyer face to face, in part, with those historical practices, attitudes, habits and ‘emotional dispositions’<sup>91</sup> that have become part of the discipline’s background. This goes to the heart of Koskenniemi’s notion of ‘sensibility’.<sup>92</sup> The individual international lawyer is shaped and constituted by this ‘background’ and more importantly it is his means of entering into the world of international law *as a shared enterprise*. It is the means through which he may act and, in turn, constitute his shared world.

Koskenniemi offers this critique so that he may challenge managerialism by capturing our imagination, so we may aspire to a world other than the one we see. Imagination is deployed as a graceful counterpoint to managerialism’s instrumental reason and technicalization. It pushes the ungraspable onto the very form of reason that reduces everything just so that it may be grasped and utilized. Indeed, imagination is the mode through which his historicism and critique seeks to function, or realize itself in the world. In Koskenniemi’s words, ‘the historical narrative liberates the political imagination to move more freely in the world of alternative choices’.<sup>93</sup> In *The Gentle Civilizer* he put it so:

I hope that these essays provide a historical contrast to the state of the discipline today by highlighting the ways in which international lawyers in the past forty years have failed to use the imaginative opportunities that were available to them, and open horizons beyond academic and political instrumentalization, in favor of worn-out internationalist causes that form the mainstay of today’s commitment to international law. . . . Return to “gentle civilizing” as a professional self-definition is certainly no longer plausible. But this is not to say that international lawyers could not learn from their fathers and grandfathers in the profession. Understanding the way they argued in particular situations, often in great crises and sometimes heavily involved as participants or even victims, provides a sense of the possibilities that could exist today. The limits of our imagination are a product of a history that *might have gone another way*. There is nothing permanently fixed in those limits. They are produced by a particular configuration of commitments and projects by individual, well-situated lawyers.<sup>94</sup>

For Koskenniemi, imagination and its possibilities are simultaneously understood as a product of the discipline’s tradition and its collective history, as well as a remedy for our current disenchanting condition. But this is not an overburdened expectation. He does not expect our imagination to master the world for us, or to be the constant space of reprieve that can introduce radically new modes of future possibilities. In this respect, his vision differs substantially from the legacy of American critical legal thought; where imagination is often crafted as a repository of endless transformative possibilities and the shelter for an unrestrained freedom.<sup>95</sup> Within this important

91 Ibid., at 2.

92 Ibid.

93 Koskenniemi, *supra* note 58, at 18.

94 Koskenniemi, *supra* note 4, at 5 (original emphasis).

95 See, for example, Boyle, *supra* note 34, at 742; R. Gordon, ‘New Developments in Legal Theory’, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique* (1990), 413, 422; R. Unger, ‘The Critical Legal Studies Movement’, (1983) 96 *Harvard Law Review* 561, at 584.

passage, imagination and its possibilities are intimately tied to, and constituted by, a communal world and its shared history.

Freedom and responsibility to change our world comes if we are able to appreciate, with care, the marginal historical practices that comprise our disciplinary 'background'. This was Heidegger's legacy.<sup>96</sup> Of course Koskenniemi, like Heidegger, knows that we cannot fully grasp these assumptions and the habits into which we are thrown.<sup>97</sup> Rather, a delicate appreciation of the discipline's heritage and the practices that comprise it, may allow us to find ways to contribute to changing our shared world in its current situation. For Koskenniemi this meant learning from how the 'men of 1873' had exercised their imaginations. It meant making oneself attuned to how these men had sustained an 'enlightened responsibility',<sup>98</sup> 'personal virtue and responsibility',<sup>99</sup> a 'moral consciousness, cultivated by a humanitarian sensibility',<sup>100</sup> a 'morality of attitude—of seriousness . . . of tolerance, and of personal and professional virtue',<sup>101</sup> and a 'moral sensibility'.<sup>102</sup> Koskenniemi's message to the international lawyer may be that we can ground our concrete existence today in the lessons we learn from the past. Not by professing, or aspiring to, the same identity – for it is one that is no longer plausible – but by allowing ourselves to be struck by these historically rooted practices of moral responsibility, so that we may aspire to and imagine other possibilities. For Koskenniemi, it is this that lies at the heart of our capacity to resist our disenchanting conditions.

In Koskenniemi, just as in Heidegger, the first respite from technicalization lies in the potential of an embodied imagination.<sup>103</sup> Implied we see an image of the international lawyer that is the product, and simultaneously the maker, of particular disciplinary practices, assumptions and predispositions. The empty Sartrean subject, rooted in Cartesian philosophy,<sup>104</sup> which we saw at the heart of the critical lawyer in *From Apology to Utopia*, has been removed. This image elevated the absolutely autonomous agent who sought and was capable of achieving freedom from constraints, precisely because these could be grasped and absorbed by a reflective consciousness. In *The Gentle Civilizer*, we begin to see a subject who enters into relations with the world only through the practices and structures that help shape his body and not merely her mind. Her notion of freedom is defined by her (always limited) capacity to engage these structures and transform them only with sensitivity to past practices. This is a subject who, through an embodied idea of imagination, is reconnected with his humanity. As Simon Critchley put it: 'we have

96 'The resoluteness in which Dasein comes back to itself, discloses current factual possibilities of authentic existing, and discloses them *in terms of the heritage* which that resoluteness, as thrown *takes over*.' M. Heidegger, *Being and Time* (J. Macquarrie and E. Robinson (tr.), 1962), 435 (original emphasis).

97 'Dasein cannot get behind thrownness', *ibid.*, at 330.

98 Koskenniemi, *supra* note 4, at 406.

99 *Ibid.*, at 80.

100 *Ibid.*, at 53.

101 M. Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', (1997) 8 *European Journal of International Law* 215, at 261.

102 Koskenniemi, *supra* note 4, at 72.

103 See M. Heidegger, 'The Question Concerning Technology' in *The Question Concerning Technology and other Essays* (1977).

104 See K. Whiteside, *Merleau-Ponty and the Foundation of Existential Politics* (1988), 71.



to expect less from [a transcendental] imagination and accustom ourselves to more minimal transfigurations of reality.<sup>105</sup>

### 3.3. Domesticated Critique and the ‘Culture of Formalism’ as a Practice of Freedom

Koskenniemi then offers a second line of defence against managerialism and the conditions of disenchantment: a ‘culture of formalism’.<sup>106</sup> A move he complements in his subsequent critical readings of Kant. In these texts Koskenniemi seeks to merge the international lawyer’s professional role with a critique that could operate in the role’s context. Peter Sloterdijk gently termed this ‘pseudocritique’ – ‘a period ... in which critical stances are subordinated to professional roles’.<sup>107</sup> Within Koskenniemi’s ‘pseudo-critique’ we have already seen how specific tensions emerge between the competing mentalities, which in turn pull the critical international lawyer in different, and at times conflictual, directions (Section 2.3 above).<sup>108</sup>

In *From Apology to Utopia*, the presupposed image of the international lawyer (the critic(al subject)) was that of a relatively stable subject, despite persistent tensions and the lived anxieties of the world. This stability came from being the ground of one’s own freedom (the Sartrean subject), or from the comfort that comes from disciplinary structures and roles – precisely the conditions that we live in as we seek to transform them. The logic of the argument seemed to function in two moves. Critique enters seeking to destabilize the subject – ensuring that it renounces any rigid claims to a ground or to identity, whilst asking us to embrace the anxieties and conflicts of the world; and professionalism, with its appeals to community, traditions, structures and roles, arrests this move before it can get too far off the ground.

*The Gentle Civilizer* then emerges with a pure focus on those jurists who did not remain ‘in the scholar’s chamber but were to contribute to social progress’.<sup>109</sup> These were men who stressed ‘the pragmatic functions of their professions’,<sup>110</sup> and whose personal virtue was central to their professional identity. ‘If the law lay in the conscience of enlightened jurists, was it not precisely the quality of that conscience-consciousness – virtuous or based – that would be central to law?’<sup>111</sup>

The underlying message of *The Gentle Civilizer* – the emancipatory potential of practice – was in fact enunciated a decade before the monograph was published:

It is what we do – how we act – as practicing lawyers, and not how we theorise about what we do, that establishes – for the moment – that relation [of attention between

105 S. Critchley, *Very little ... almost nothing: Death, philosophy, literature* (2<sup>nd</sup> edn., 2004), 236.

106 Koskenniemi, *supra* note 4, at 494–509.

107 Sloterdijk, *supra* note 57, at xxxvi.

108 This is perhaps unsurprising given that some critical international lawyers have argued that they do not deem it viable to both practice, or offer substantive arguments, and remain loyal to critique. See M. Craven, G. Simpson, et al., ‘We are teachers of International Law’, (2004) 17 *Leiden Journal of International Law* 363.

109 Koskenniemi, *supra* note 4, at 57–8.

110 *Ibid.*, at 516.

111 *Ibid.*, at 76–7 (original emphasis).

constraint and freedom, or between determinism and indeterminism] and determines who we are.<sup>112</sup>

After all the identity of international law lies in its 'its craft-likeness, its being above all a practice'.<sup>113</sup> Koskenniemi emphasized that we must grasp 'the eclectic and pragmatic character of legal *praxis*'.<sup>114</sup> It is against this background – of foregrounding practice, a moral sensibility and a professional pragmatism – that the culture of formalism emerged. In complete contrast to the sensuality of imagination and history, the culture of formalism seeks to tackle managerialism and instrumental reason in the concrete realm of the political; it is 'the only available surface over which managerial governance can be challenged.'<sup>115</sup>

Koskenniemi wishes to sustain the possibility of an open, inclusive, politics – and hence, of freedom – in a postmodern age. Borrowing from the work of Ernesto Laclau he argues for a specific approach to the (legal) *decision(s)*, for these not only constitute and reproduce the discipline but more importantly, remain the only true terrain of the political.<sup>116</sup> What Koskenniemi is getting at – at an abstract, ahistorical level – is a '*practice of decision-making that persists in time and through which the aspirations of self-determining communities remain alive*'.<sup>117</sup> It is upon a general theory of politics and 'the decision', then, that not only his historical argument for a culture of formalism emerges,<sup>118</sup> but also his image of the subject is constituted.

The moment of decision, for Koskenniemi and Laclau, is never determined. It takes place amongst indeterminacy – or, for Laclau, in a field of 'undecidability'.<sup>119</sup> Even if the extent of this indeterminacy may be in question (whether any choice is open to the individual, or whether this choice is constrained by, say, a structure, or whether such a structure always underdetermines the choices open to an individual),<sup>120</sup> a decision is always a self-grounding and free moment. It is also a moment that represses possible alternatives that cannot be enunciated or carried out.<sup>121</sup> The decision is itself defined by this exclusion – it becomes part of what it is. Finally, a decision is also defined by an internal split between the particularity of its claim and

112 M. Koskenniemi, 'Theory: Implications for the Practitioner', in P. Allott (ed.), *Theory and International Law* (1991), 1, 45. See also Koskenniemi, *supra* note 4, at 516.

113 M. Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', (2012) 26 *International Relations* 3, at 19.

114 *Ibid.*, at 19.

115 Koskenniemi, *supra* note 85, at 30.

116 E. Laclau, 'Deconstruction, pragmatism, hegemony', in C. Mouffe (ed.), *Deconstruction and Pragmatism* (1996), 47, 53.

117 Koskenniemi, *supra* note 4, at 508 (emphasis added).

118 *Ibid.*, at 507.

119 E. Laclau, *Emancipations* (1996), 92.

120 Here we see the difference between deconstructionists, structuralists and positivists (Hart, Kelsen). Each – irrespective of the level of indeterminacy for which they argue – would not deny the non-grounded nature of a decision. At a different level of analysis, it would be suspect to conclude the Koskenniemi expands his indeterminacy thesis, from a certain structuralism, to the deconstruction of Ernesto Laclau; even if he does rely on the latter's theory of the decision. But Koskenniemi would no doubt agree with Laclau when he says: 'what counts as a valid decision will have the limits of a structure which, in its actuality, is only partially deconstructed. The madness of the decision is, if you want, as all madness, a regulated one.' Laclau, *supra* note 116, at 57.

121 *Ibid.*, at 48.

the trace of universality that is required to make this claim.<sup>122</sup> The task is to open up the particularity of a decision, to show how it reaches beyond what it is, into what it is always lacking, as the lawyer seeks to grasp the linkages it shares with other positions:

[T]he dependence of every particularity on a universality that defines it, and constitutes the ground from which it may experience itself as unfulfilled, devoid of some aspect without which it cannot fully realize itself. Through attention to that “lack,” that absence of what a particular feels it should possess in order to be full itself, focus is directed to its universal aspect ... By directing attention to that universality, the particular is opened up, and its communal lien, its shared property or value with other particularities, is revealed.<sup>123</sup>

Koskenniemi’s culture of formalism – and the theory of decision he draws upon – is one that reminds us that the passage from undecidability to decision as being political, through and through. His critical agenda is, again, defined by the wish to expose and question dominance and the distilleries of power, whilst finding a way towards inclusion and a constant reach towards community. In exposing and questioning the ‘lack’ or universalism within a particular position, his culture of formalism challenges how each particular seeks dominance. And it seeks inclusion in a pluralistic world by placing a particular position in correspondence with other positions that have a similar basis.<sup>124</sup> As a cultural demand, it is aimed at ‘persuading people to bracket their own sensibilities and learn openness for others’.<sup>125</sup> But the culture of formalism is above all a form of *praxis* – a theory of action. It requires a small but important act immediate to, and in, the moment of each decision, knowing that the discipline’s construction and reproduction requires that these decisions need to be made over and over, and each time anew. But it also ought to be seen a form of *praxis* that emerges from the historical edges of the discipline, one that may be learned again from a past. It is history that gives it ‘coherence and a distinct *feel*’.<sup>126</sup>

### 3.4. The Last Refuge: Ethics

So where does this leave the professional international lawyer? It would seem to leave her on the precipice of a pragmatism that Koskenniemi often seems resistant to.<sup>127</sup> This may be, as Outi Korhonen acutely points out, an acknowledgment of the Weimar trauma that shapes the European condition.<sup>128</sup> In his critical readings of Kant he arguably seeks to ground an identity for the international lawyer that does not deliver her into pure strategy and tactics – and the pragmatism this often presumes. Specifically, he identifies a subject who may apply the high standards of his culture of formalism and uptake the task of the discip-

122 Laclau, *supra* note 116, at 48.

123 Koskenniemi, *supra* note 4, at 505–6.

124 Koskenniemi, *supra* note 74, at 18.

125 Koskenniemi, *supra* note 4, at 502.

126 *Ibid.*, at 503 (emphasis original).

127 *Ibid.*, at 516. See also M. Koskenniemi, ‘Formalism, Fragmentation, Freedom: Kantian Themes in Today’s International Law’, (2007) 4 *No Foundations* 7, at 23.

128 Korhonen, *supra* note 76, at 214–1919.

line's 'moral regeneration'.<sup>129</sup> He resuscitates Kant's 'moral politician', as against his 'political moralist', arguing that the cultural practice of international law lies in the 'crystallisation of personal virtue'.<sup>130</sup> Ushering the international legal professional towards the attainment of a specific mindset and highly moralized sensibility. Towards a:

spiritual perfection [that] prepares a mindset from which to judge the world in a manner that aims for the all the virtues of the "inner morality of law": honesty, fairness, concern for others, the prohibition of deceit, injury and coercion.<sup>131</sup>

I do not think that Koskenniemi sees his call for 'personal virtue' as reducible to any given set of moral norms. Much in the vein of Aristotle, I think he probably appreciates its unwillingness to be pinned down and the diversity of its elemental parts. But my concern lies elsewhere; within a productive tension produced by his myriad of texts. This tension, simply put, is between the stabilized image of the professional and an image that encourages the fragmented and destabilized.<sup>132</sup> Or, to put it in terms of his theoretical leanings; between his Kantian turn and his appreciation of Laclau.

In regards Kant, the morally charged image of the individual which we obtain from Koskenniemi's 'men of 1873' would seem to deliver us into a 'moral sensibility' that survives and thrives absent the particularities of the situation in which any decision is made. It exposes an image of a constituted individual who simply needs to apply these characteristics to any given particular situation. Or put another way, an authentic individual with a *given stabilized identity* who may carry out the tasks of the culture of formalism in any particular situation that may arise. The individual, here, appears external to the competing rationalities of our fragmented world and his internal moral and political constitution is able to bring out the universals contained in their particularities. He is capable of bracketing his own preferences and remaining open to the perspectives of others. Hannah Arendt, following Kant and Aristotle, recognized this moralized individual to also be the political beast. An *actor* who had 'the ability to see things not only from one's own point of view but also from the perspective of all those who happen to be present', with this being 'one of the fundamental abilities of man as a political being insofar as it enables him to orient himself in the public realm, in the common world'.<sup>133</sup> For this individual, freedom comes from being able to adjudge one's situation, its competing particularities and its possible universals, from the standpoint of some internalized moral sensibility.

However, a tension materializes because this image of the professional international lawyer emerges within the same context of Koskenniemi's application of

<sup>129</sup> Koskenniemi, *supra* note 74, at 16 (para. 32); see also M. Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization', (2007) 8 *Theoretical Inquiries in Law* 9, at 18.

<sup>130</sup> Koskenniemi, *supra* note 87, at 414–15.

<sup>131</sup> Koskenniemi, *supra* note 74, at 21 (para. 29).

<sup>132</sup> We see this tension play out differently in two main texts: Koskenniemi, 'Formalism, Fragmentation, Freedom', *supra* note 127, at 23–34; and Koskenniemi, *supra* note 74, at 15–16.

<sup>133</sup> H. Arendt, *Between Past and Future* (1968), 221.

Laclau. This, in contrast, produces a fragmented and decentred subject. An individual is only produced or momentarily stabilized, between a given situation in which he must reside and the moment of decision.<sup>134</sup> She may live between competing vocabularies or within (and sometimes without) a structure of professional argument, but this never determines her position or her moment of decision. But the competing rationalities, vocabularies or particulars of our postmodern international law produce the subject as she positions herself within them.<sup>135</sup> This innately political animal<sup>136</sup> never finds itself whole and can never be its own ground, but is rather briefly and fleetingly constituted in the moment of every decision.<sup>137</sup> This is a subject who can only view herself as ever changing, fragmented between competing demands and constantly seeking freedom in every new moment and every new context. But if Koskenniemi's understanding was arrested here then we would be left on the precipice of pragmatism. Here the lawyer is situated and yet reflective, capable of instrumentalizing a given moment of decision or given context, or the perspective with which one appreciates a specific moment; small strategic acts are the realization of an immediate freedom. But Koskenniemi's culture of formalism, and the moral and political sensibility upon which it rests, resists such an image of the international lawyer.

The fragmented and destabilized image of the lawyer that we see is stabilized within the cultural practice of law; it becomes a sort of 'regulated madness' if you will. But even as the individual is embedded in this culture, she remains distinct. She may be *located* in the moments between situation and decision, but is able to briefly separate herself from the grounds of her own construction. She is capable of incorporating the particular claims of others, of an openness of perspective, and of knowing those places in the world that garner despair and those that may give pleasure. She becomes what Pierre Schlag has referred to as the 'relatively autonomous self'.<sup>138</sup>

Koskenniemi's willingness to seek refuge in a project of moral regeneration and the 'cultivation of virtue'<sup>139</sup> seeks to influence this brief moment where his image of the individual stands alone and impartial. In this moment of commitment, Koskenniemi attempts to *bring prudence to critique*, to sustain a politics where critique may run out of steam and effect. His idea of a political and moral *sensibility* is premised on a 'reproachful attitude, composed of suffering, contempt and rage against everything that has power',<sup>140</sup> but with the learned lesson that power's distilleries cannot be escaped and that critique cannot fail to collaborate. But as it reaches towards a col-

134 E. Laclau, *New Reflections on the Revolution of our Time* (1990), 60.

135 '[W]e do simply have subject positions within the structure, but also the subject as an attempt to fill these structural gaps. That is why we do not have just *identities* but, rather, *identification*.' Laclau, *supra* note 116, at 210.

136 Laclau, *supra* note 134, at 61 ('any subject is, by definition, political').

137 'Thus every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences.' Koskenniemi, *supra* note 4, at 508.

138 P. Schlag, "'Le Hors de Texte, C'est Moi': The Politics of Form and the Domestication of Deconstruction', (1990) 11 *Cardozo Law Review* 1631, at 1667–8.

139 Koskenniemi, 'Formalism, Fragmentation, Freedom', *supra* note 127, at 24.

140 Sloterdijk, *supra* note 57, at xxxiv. See also Koskenniemi, *supra* note 87.

lective conscience, reaching into the language of moral rectitude, is it not simply a form of self-messaging for the individual lawyer? Perhaps it can only remain as a persistent form of therapy? Whatever one's position, Koskenniemi wishes the individual to see that both her cultural history is defined by a specific morality *and* that the potential of her agency lies in cultivating this lineage. At the foundation of this image of the international lawyer is a brooding and entirely repressed nostalgia. Perhaps we are left with Richard Rorty's 'liberal ironist'?<sup>141</sup>

But to what extent does this image of the international lawyer's agency enable or incapacitate her? Koskenniemi has always abandoned critique at the precise point that it can no longer provide effect, or a form of collaboration and collectiveness. But it remains highly questionable, just as it was to Max Weber, whether surrendering the individual to a form of liberal humanism is at all an effective strategy. Baudrillard's counterpoint is no doubt pertinent:

The effects of moral conscience, of collective conscience are entirely mediated effects, and one can read in the therapeutic ardour with which we try to resuscitate this conscience, how little life it retains.<sup>142</sup>

The conditions in which Koskenniemi undertakes his project of moral regeneration, and the avenues through which he makes claims to freedom, may tinge his project with a sense of utopianism. But to the extent that it overestimates the capacity of imagination, and of cultivated virtue, it may be considered with scepticism. Is this merely a question of manning the last refuge? Koskenniemi is all too aware, like Sartre before him, that 'freedom is also a way to govern human beings'.<sup>143</sup> To invest in virtue as the last refuge against false promises and possibilities is perhaps where Koskenniemi's nostalgia and utopianism meet.

#### 4. CONCLUSION

Michel Foucault famously spoke of the 'author', describing him as not merely the author of his own work, but one that has 'produced something else: the possibilities and rules for the formation of other texts'.<sup>144</sup> The significance of *From Apology to Utopia* and *The Gentle Civilizer* lies not in the intricacies of its text or the status of its author, but rather in its intertextuality. Namely, how they and Koskenniemi enable and shape other texts within our discipline. In undertaking an inquiry into the subject, I have sought an entirely different approach to both Koskenniemi and David Kennedy;<sup>145</sup> one enmeshed in the intellectual vehicles of a given text and the text's strategies of containment, i.e., exposing what it does not let us see, but depends upon.

<sup>141</sup> Rorty, *supra* note 81, at xv–xvi.

<sup>142</sup> J. Baudrillard, *La Transparence du Mal: Essai sur les Phénomènes Extrêmes* (1990), 97.

<sup>143</sup> Koskenniemi, *supra* note 74, at 15 (para. 31).

<sup>144</sup> M. Foucault, 'What is an Author?', in J. Faubion (ed.), *Aesthetics, Method and Epistemology* (R. Hurley and others (tr.), 1998), 205, 217.

<sup>145</sup> Kennedy's is a more ethnographic approach, see D. Kennedy, 'When Renewal Repeats: Thinking Against the Box', (2000) 32 *New York University Journal of Law and Politics* 335.

In Koskenniemi's texts we find a recursive belief in the potential of the international lawyer. It is not a dogmatic belief, even if it remains a constant. But as I have attempted to show the images of the international lawyer we see throughout his texts not only straddle various ways of thinking about the world (critical reason/imagination; transcendent freedom/imminent freedom etc.), but the subject is always struggling with certain tensions that define her. Faith in our capacity comes with a required humility.

But an important point remains: the images of the subject that you see in this essay only appear as complete *within* Koskenniemi's texts. Because these images – of both the critic(al subject) and the pragmatic professional – are shaped through their interaction with the multiple other images of the international lawyers with the discipline, the international lawyer is always in the *process of becoming*. We are constantly adjusting to rethink our place, role and capabilities within the discipline. We do so as we read Koskenniemi's texts at different points in history and as we read them alongside other canonical texts; to become aware that we are doing so, and how, is an important first step towards re-imaging our role within today's international legal order. And the uncertainties, conflicts and tensions found in our social world are not only found there; they are an integral part of how we ought to think of ourselves. The small contribution of this article is to suggest that we need to be willing to shake our own (critical) foundations, no matter how deep they run. Even if, and perhaps especially because, it is our identity – and our actions – at stake.