

---

# Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi

Pierre-Marie Dupuy\*

## Abstract

*Martti Koskenniemi's criticism of the 'universality' of international law, ensuing from the European tradition, initially sounds quite stimulating, although not really new. Yet, one may be inclined to think that such criticism is also rather inaccurate, inasmuch as it remains both equivocal and ambiguous. This seems particularly true at a time when general international law, as it claims in essence to be universal in scope, is under attack from those who, in the name of their assumed unique position in the world community, aim to weaken the very notion of an international legal order. Nevertheless, as this order is indeed 'cosmopolitan', in the Kantian sense of the word, it is at the same time celebrated, especially by a number of non-governmental organizations which constitute the most active component of international civil society. Martti Koskenniemi's reductive vision does not seem to take account of this important phenomenon.*

The title of Martti Koskenniemi's paper, originally presented in Florence in May 2004 at the inaugural conference of the European Society of International Law, does nothing to capture the force of what is a rich and provocative piece.<sup>1</sup> The article is characterized by the easy, intelligent and erudite style that we have long come to expect from the man who wrote *The Gentle Civilizer of Nations*.<sup>2</sup> Yet, as sometimes happens with this author (who is as prolific as he is stimulating), the elaborate language used is in danger of obscuring the general meaning of the text. The task, then, is to find out precisely what Koskenniemi actually meant; and also to inquire as to whether the

\* Professor of International Law, European University Institute. Member of the Editorial Board. E-mail: pierre-marie.dupuy@iue.it

<sup>1</sup> 'International Law in Europe: Between Tradition and Renewal', this issue, at 113.

<sup>2</sup> M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (2001).

substance of what he had to say was not merely contradictory – not always a serious flaw – but fundamentally ambiguous, which can be even more damaging.

In invoking the European tradition, Koskenniemi in fact takes up a discourse that has been around for a long time. This theme was introduced mainly by the proponents (whether jurists or diplomats) of the critical thought emanating from developing countries on the threshold of independence, more than 40 years ago. Arriving on the international scene after having been subjected to the colonial yoke of some of those ‘civilized nations’ referred to in Article 38 of the Statute of the International Court of Justice, certain authors (and participants on the international plane), such as Mohammed Bedjaoui,<sup>3</sup> Georges Abi-Saab<sup>4</sup> or Mohammed Bennouna,<sup>5</sup> to name but three of their most distinguished representatives, established themselves as skilful interpreters of what was then known as the ‘Third World’. In its name, they vigorously contested the structure and content of ‘international law’, in particular customary international law, that decolonized countries were told to accept, in its entirety, as the political condition for entry into a club; the club of sovereign states, for a long time closed to those wishing to join and largely dominated by those who founded it, characterized by their taboos, their traditions and their . . . customs.

It is within this context that these authors criticized, in particular, the manner in which Westerners, that is (until the end of the First World War) European states, had managed to use to their own profit and solely in their own interests those values that they themselves had declared to be universal. It was even in the name of the famous ‘sacred trust of civilization’, after the Treaty of Versailles and the creation of the League of Nations, that they reinforced the legitimacy of colonial expansion, to further increase it in severity and in scope. This ‘Third Worldist’ critique, although militant, appears even less contestable upon consideration of the fact that the assembled nations at the Berlin Conference of 1885, for whom universal international law meant ‘European public law’, did not even attempt to hide their aim: to link the consolidation of *their* international law to the right they claimed to divide the wealth, natural riches and human resources that existed, in particular in Africa and Asia, amongst themselves.

In any event, the fact that Koskenniemi’s critique, for all its skilful exposition, is neither new nor particularly original is not sufficient reason to discard it. It always remains relevant to current events. It is easy to see, in particular, the importance of his reminder after the intervention of the Western allies in Kosovo without a United Nations mandate. This formal violation of the Charter’s rules was carried out in the name of the universal values that form the right of peoples to self-determination, or that of all human beings to exercise their fundamental freedoms.<sup>6</sup>

<sup>3</sup> M. Bedjaoui, *Pour un nouvel ordre économique international* (1979).

<sup>4</sup> See complete biography of his works in his *Cours general de droit international* 207 RdC, at 25–28.

<sup>5</sup> See De Wart and Peters, *International Law and Development* (1988), bibliography at 439–451.

<sup>6</sup> Would we even consider, however, denying that these values were effectively ignored in Kosovo by the Milo-sevich regime? In any event, there is no need to refer here to the invasion of Iraq by the United States and Great Britain, as this decision was essentially American, and was vigorously and overwhelmingly opposed by public opinion in all European countries; in Britain, Spain and Italy as strongly as in Germany or France.

However, despite the fact that it was to mark the opening of an international law society, Koskenniemi's paper is not first and foremost that of a legal technician – a role that he is undoubtedly capable of assuming. Rather, it is that of a moralist, fully conscious of the abuses in terms of which international law has been, and continues to be on a daily basis, much more the instrument than the object. There is nothing more that can be said about this approach; I myself have too often criticized the pseudo-neutrality of classical positivism to reproach my colleague for having unmasked not only the ideologies that are hidden behind legal formalism, but also the abuses to which the appeal to general norms of supposedly universal standing can lead.<sup>7</sup>

Koskenniemi's critique, however, does not stop there. He poses a question: 'how can a particular tradition speak in the name of humanity?'. He answers a little later, in very peremptory fashion: 'the fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal. For the universal has no voice, no authentic representation of its own.' But to then denounce the 'universalism of Empire' in order to postulate, a little further on, the equivalence of 'American imperialism' and 'European imperialism'! Both fundamentally identical, despite their differences, in their common tendency to make use of the convenient alibi of universal values in order to mask the initiatives that they undertake in the strict promotion of their own interests.

Without wishing to indulge in polemics, as Koskenniemi's argument, like the man himself, deserve better than that, I would like to explain why I feel that his piece is not entirely free from either naivety or partiality, failings that can today lead to a dangerously equivocal result.

1. Firstly, it's naivety. It is easy to get the impression that Koskenniemi at once discovers and takes offence at the fact that law, without necessarily being reducible to a 'super-structure' in the sense used by Marx, is in any event an *instrument* of international politics. Short of going back to the heroic naivety of someone like Kelsen (but not Kant, whom Koskenniemi treats somewhat thoughtlessly towards the end of his text), it is readily evident, to paraphrase Clausewitz's famous saying, that 'law is [also] the continuation of politics by other means', even if it is also 'something concerned with justice'.<sup>8</sup> This is true in that states still today invoke it, in diplomatic notes, before the United Nations or international judges, in order to defend first and foremost their own interests, and to ensure that they prevail over those of others.

In such a context, it seems obvious that if the legal system in question includes norms which establish the peremptory nature, and thus the primacy, of universal values as common to the 'international community as a whole', then the temptation will be strong for each to invoke them in support of his own cause, in order to better hide the fact that behind the common 'us' lies the self-interested 'me'. It is therefore true that the appeal to grand principles and to community morality can often degenerate into

<sup>7</sup> See P. M. Dupuy, *L'unité de l'ordre juridique international*, *Cours général de droit international*, 297 RdC (2002) 9, esp. at 28–33, 207–213, 269.

<sup>8</sup> See Leben, 'Droit: quelque chose qui n'est pas étranger à la justice', *Droits* (1990) 35.

extremely biased strategies, which merely use *jus cogens* as a pretext, or references to the ‘international community’ as a smokescreen, to accomplish their aims. Examples abound of such universal concepts being hijacked in support of aims that are anything but.

Reflecting on the manner in which the concept of ‘peremptory norms’ and ‘obligations *erga omnes*’ were introduced into the discipline at the end of the 1960s, and how certain principles that we would place in these categories have since been invoked, the famous quote from Charles Péguy springs to mind: ‘Everything begins in mysticism [*la mystique*] and ends in politics [*la politique*]’! In other words, the instrumentalization of law is not a European speciality. It is inherent to its social use. Koskenniemi would doubtless not deny this; however, caught up in the dynamics of his own rhetoric, he arrives at the same result as he would have had he forgotten it.

2. It is this point, I fear, that the second, more damaging flaw in Koskenniemi’s brilliant article arises. Not simply a relative naivety, but also a certain partiality; as the use of law, which has achieved peremptory status since the introduction of the idea of *jus cogens* (and this is main target of the critique), for the promotion of particular interests is not the exclusive privilege of Europeans. This Koskenniemi does not deny; however, throughout his article, he confuses two very different things: the fact that Europeans were historically the first to make use of law in this manner, on one hand, with the idea that the misuse of universal values is above all a European speciality on the other.

Now, if this was true in the past – and no-one would dream of denying this – it is certainly no longer the case today. All states – *all*, not only those whose past or present power has encouraged imperialistic impulses – are given to invoking substantive morality in support of formal rules in order to illustrate that not only do they have general international law on their side, but that universal ethics also support their position.

In this respect as in others, Koskenniemi’s approach is, historically speaking, out of date. It is true that it was Western (but not only European) states that drew upon their national traditions in order to incorporate, into the United Nations Charter of 1945, principles such as the right of peoples to self-determination or to the protection of fundamental liberties. And their sincerity should not necessarily be doubted, if we remember that they did so in order to better renounce the sordid heritage and utter abjection of the Shoah.

But if we have the West to thank for this innovation, which is not shameful in itself, then it is to the aforementioned ‘Third World’ countries that we owe, from the 1960s onwards, the proposal that any treaties contrary to ‘peremptory norms’ should be null and void in their entirety. The concept of *jus cogens* and its initial inclusion in Article 53 of the Vienna Convention on the Law of Treaties were above all a victory for the South over the West. And ‘obligations *erga omnes*’, set forth in the famous paragraph 33 of the International Court of Justice’s ruling in the *Barcelona Traction* case was not intended to please Western states, but rather to encourage developing countries to once again go down the ICJ route, which they had abandoned following its ultra-conservative decision in the *South-West African* case.

It was not Western countries, even less European ones, that invoked the absolute nature of sovereignty over natural resources in order to nationalize foreign private property and thus attempt to acquire genuine economic sovereignty over their own riches. It was the developing countries, collectively, who achieved the adoption of Resolution 1803 in the General Assembly, or, a little more than 10 years later, of the Charter of the Economic Rights and Duties of States. In doing so, they were of course primarily defending their own interests; but they were also fighting for a certain idea of how international law should be orientated, and of how the North should assist the South in its development in the best interests of both.

Today, it is not Dominique de Villepin (who has curiously become Minister for the Interior in his own country) who most eloquently argues before the United Nations that respect by all, Empires or micro-states, for international law as the best method of maintaining the peace and promoting human rights; rather it is the Secretary-General of the United Nations himself, Kofi Annan, who can hardly be described as European (unless in reference to his long period of study at the Graduate Institute of International Studies in Geneva!). This proves at least two things: the first is that the invocation of the universal has not been a peculiarly European strategy for a long time; the second, which moreover Koskenniemi does not deny but rather dilutes in a digression on 'kitsch' (the ambiguity of which I will touch on later), is that the appeal to universal values cannot necessarily be reduced to the partisan promotion of particular interests.

Once, 15 years ago, when speaking to an Iranian friend who had narrowly escaped the prisons of the Islamic Republic, I made some contrite remarks on the potentially neo-colonial character of the human rights claims made by Jimmy Carter's America or the European Community. He answered, with justified vehemence, 'You other Europeans should drop your scruples and your guilty conscience when you speak of human rights. They are our common good. When an Iraqi, Turkish or Afghan dissident is tortured in prison, he suffers in the same way that a French or British person would in a suburban police station. And he has as much need as them of Amnesty International's aid!'

We should not, therefore, be afraid of demanding the promotion of universal values that have already been integrated into the norms of positive law. They are not (or not only) our part of our European heritage, but the common heritage of mankind, and the automatic suspicion of such norms on principle should be left to those (among whom I will not insult Koskenniemi by including him) nostalgic for Carl Schmidt.

3. At this point, it is necessary to draw attention not only to what is naïve and partial in Koskenniemi's argument, but also to what makes it profoundly equivocal in character.

Koskenniemi returns several times to Pierre-Joseph Proudhon's famous words: 'whoever says humanity wants to cheat!'. He adopts this somewhat disillusioned formula as his own, insofar as such realism calls us back to that systematic suspicion regarding the invocation of values common to all. It is true that we all have a duty to think clearly and rationally, even with regard to ourselves, when appealing to the

universal. But it is here that Koskenniemi, whether consciously or not, blurs the different perspectives and confuses the identity of law with the manner in which it is abused, or the concepts that underpin it with the discourses of our politicians.

In his own words: ‘The realist critique usefully reminds us that, in law, political struggle is waged on what legal words such as “aggression”, “self-determination”, “self-defence”, “terrorist” or “*jus cogens*” mean, whose policy they will include, and whose they will exclude.’ There can be no doubt that we must be wary of those who invoke the universal, for they often have something to hide. Often, but not always. And they are not all of the same nature. Some govern, others are in opposition; men and women of power and domination. Others are militants, actors in ‘international civil society’ who seem to have no place in the world evoked by Koskenniemi, at least in the article of relevance to me here. Certainly, the variations of political ‘kitsch’ that he offers give us no criteria for distinguishing between sincere and cynical appeals to international morality. This passage leads us instead to the conclusion that ‘kitsch’ is absolutely inevitable, and that it is better to abstain from resorting to grand principles than to run the risk of falling into an imperialism of ‘*bien pensants*’, as Georges Bernanos would say.

It seems that there is something discouraging, even vaguely despairing, in Koskenniemi’s argument. If the passionate demand for self-scrutiny leads to paralysis, we should perhaps begin to wonder if we have not gone too far in our denunciations of those who appeal to the universal; in any event, this is what I invite Koskenniemi to consider. Insofar as he places ‘legal words’ such as ‘aggression’, ‘self-determination’, ‘self-defence’, ‘terrorist’ or ‘*jus cogens*’ (this latter lowered to the unenviable status of ‘kitsch’ *par excellence*) on an equal footing, he falls, curiously enough, into the same trap as the formalist positivists, of whom there are many in my own country. This trap consists in forgetting that ‘*jus cogens*’, even if it is the product of a particular strategy, is also, *hic et nunc*, a positive law; not merely a ‘legal word’ devoid of any coherent meaning. For reasons of space I will do no more here than refer the reader to my recent book, in which I demonstrate both the easily identifiable content of the concept, and its *effective* application in international case-law. Not primarily, certainly, that of the ICJ, but rather that of regional authorities for the protection of human rights, and in particular the Inter-American Commission and Court of Human Rights, which have proved to be far in advance of their European counterparts. At the global level, the United Nations Human Rights Committee has not limited its use of the concept to its famous ‘General Observation’ no. 24; and one can hardly suspect this organ of being dominated by European states when it has often held them rigorously to account for violations of the rights whose adoption on the international plane they themselves contributed to.<sup>9</sup>

If we were to follow Koskenniemi, and accept that in invoking the peremptory nature of the right of peoples to self-determination or prohibition on the unilateral use of force we are still necessarily employing a specific strategy that makes use of the recourse to universalism in order to support a particular cause, then why continue to

<sup>9</sup> See ‘Le *jus cogens*, une révolution?’, in Dupuy, *supra* note 7, second section, chapter III, at 269–314.

believe in the rule of law? How can we respect a discipline and a body of rules that only offer a choice between the alibi of morality and that of a narrowly selfish formalism? This pessimistic and disillusioned view seems all the more incongruous given that today it is Europeans that are too often assailed by doubt and the United States convinced that it has right on its side, allowing it to bypass its obligations arising from legal multilateralism.

Koskenniemi's reflections, while they enable him to ease his guilty conscience at having been born European, also fail to address another major phenomenon in the contemporary world: the emergence of an 'international civil society' (which is far from being merely European), which demands of states that they respect the obligations that they have accepted in terms of the promotion of the rights of humans, peoples or Nature. International law is today considered by many to be too important to be left in the hands of politicians and their diplomats.<sup>10</sup> It is no longer defined only subjectively, by reference to its classical subjects (states), but also objectively, through consideration of the content of international norms; norms that, as Hersch Lauterpacht had already recognized in the 1930s, are in the final instance structured towards the realization of respect for the rights and interests of human beings.

Koskenniemi's brilliant article also passes over in silence the tremendous efforts made in terms of the development, through the promotion of international penal tribunals, of a genuine international justice. Yet this phenomenon is without real precedent other than that provided by the tribunals at Nuremberg and Tokyo; and it was brought about at a global level through the efforts of states not only from Europe but from other continents also. Law, of course, remains a strategic discourse, but there also exists a universal strategy of human rights and respect for the human person within humanity. It is this that provides the basis for the judicial prosecution of 'crimes against humanity'. In this context, to content oneself with the assertion that the appeal to the universality of values is suspect by nature appears decidedly limited.

At a time when 'organic intellectuals' in America, referred to by Koskenniemi himself, are emphasizing the 'dark side of legalism'<sup>11</sup> and posing the question of whether states have a moral obligation to obey international law,<sup>12</sup> it is perhaps not the right moment to be encouraging European internationalists to doubt the sincerity of their own convictions that favour the rule of law at the international level. It is enough simply to remind them that their actions in the promotion of universal values, which have now been integrated into the rules of positive law, must always be carried out resolutely but with vigilance, without naivety but also without compromise.

Perhaps, in the end, this was all that Koskenniemi was trying to say. A pity, then, given his talent and ability to persuade, that he chose to do so in such an equivocal and disenchanting manner.

<sup>10</sup> *Ibid.*, fourth section, chapter II, at 414–428.

<sup>11</sup> See J. L. Goldstein *et al.* *Legalisation and World Politics* (2001) and Pildes, 'Conflict between American and European Views of Law: The Dark Side of Legalism', 44 *Virginia Journal of International Law* (2002).

<sup>12</sup> Posner, 'Do States have a Moral Obligation to Obey International Law?', 55 *Stanford Journal of International Law* (2003) 1916.

