A Journal of the Voyage from Apology to Utopia

By Anne Orford[*]

> … fulfilment of my first ambition – to describe international law in a way that would resonate with practitioner experience – necessitated that I resist the pull of either excessive "formalism" or excessive policy-oriented "realism". In the course of writing, however, I began to realise that this way of stating the problem also contained the seeds of its resolution ... I needed to think about my own experience as far from idiosyncratic and to examine the contrast between "formalism" and "realism" as an incident of the *standard experience of any international lawyer* in the normal contexts of academy or practice.[1]
>
> … the translation of experience into texts is necessarily a process of symbolizing, a process of bringing invisible things into focus in the horizontal lines of the written page.[2]

The twinned themes of writing about experience, and the experience of writing, shape the new Epilogue to Martti Koskenniemi's *From Apology to Utopia.* The Epilogue offers a sustained meditation upon the difficulties and pleasures of these two related experiences – the experience of the legal practitioner and/as the experience of the lawyer as writer and reader. Koskenniemi himself tends to reserve his frequent use of the word 'experience' for his attempt to reflect upon the world of the practising foreign office lawyer in which he was immersed while writing *From Apology to Utopia*. Yet his Epilogue also makes visible the difficulties and possibilities involved in 'the translation of experience into texts'. In other

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[1] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 565 (REISSUE WITH A NEW EPILOGUE, 2005).

[2] PAUL CARTER, THE ROAD TO BOTANY BAY: AN EXPLORATION OF LANDSCAPE AND HISTORY 31 (1989).

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words, one of the 'invisible things' that Koskenniemi attempts to 'bring into focus in the horizontal lines of the written page' is the experience of writing itself – in particular, of that kind of writing which tries to 'capture the experience' of practising in the 'field'.[3]

I began thinking about my contribution to this symposium while I was at work on a paper about international law and the South.[4] In order to prepare that paper, I was reading – amongst other things – Paul Carter's *The Road to Botany Bay*. Thus I found myself reflecting upon *From Apology to Utopia* while I was reading Carter's poetic account of the exploration of Australia, and in the process the two books began to seem uncannily related. Both were published in the late 1980s, both were organised around notions of writing and grammar, both concerned disciplines that were closely bound up with the practice of imperialism, and both were, until recently, much in demand but out of print (Carter's remains so). As a result, of the many ways in which I might have approached the new edition of *From Apology to Utopia*, and in particular the relation of experience and writing in the Epilogue, I found myself doing so through the notion of exploration. In particular, the Epilogue began to seem like the kind of explorer's journal that Carter reads to such wonderful effect in *The Road to Botany Bay*. International law has a long relationship to this genre of travel writing. Vasuki Nesiah points to this in her suggestion that, in their romance with the frontier and in their habits of mapping history onto territory and vice versa, international lawyers closely resemble those Western explorers who were such a productive part of the colonial encounter.[5] It was explorers whose writing named and brought into European circulation the territories that they documented. Yet their journals also had an open-ended quality, a capacity to engage with that which they encountered on their journeying. Their writing was primarily about the *experience* of travelling, and addressed in part at least to those who might come after them. Koskenniemi makes clear that the experience of the practitioner is the mode in which he writes: 'philosophy does not set the book's horizon. Instead, *From Apology to Utopia* seeks to articulate practitioner experience as against doctrinal accounts of the field'.[6] Perhaps we might then read the Epilogue as a traveller's tale – *A Journal of the Voyage from Apology to Utopia*.

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[3] KOSKENNIEMI, *supra* note 1, 562.

[4] Anne Orford, *International Law and the South as a Legal Space*, paper presented at the *Of the South* symposium, Griffith Law School, June 2006, on file with author.

[5] Vasuki Nesiah, *Placing International Law: White Spaces on a Map*, 16 LEIDEN JOURNAL OF INTERNATIONAL LAW 1 (2003).

[6] KOSKENNIEMI, *supra* note 1, 569.

A. The institutions of exploration

Reading the new Epilogue with a head full of tales of British naval expeditions, I was struck – admittedly not for the first time – by the ease with which Koskenniemi accepts, even embraces, the constraints of institutional life. International law as practised by advisers to governments, and the bureaucratic structures within which these advisers live, provides the framework for Koskenniemi's arguments about both the meaning and the political possibilities of 'the choice to refer to "law" in the administration of international matters'.[7] In this sense, his Epilogue serves as a reminder of the potential constraints that institutionalisation exercises upon what might otherwise appear to be a 'substantively open-ended' discourse.[8]

Comparison with the world of colonial explorers provides a useful means of thinking through these institutional limits and the way Koskenniemi engages them. For eighteenth century explorers such as the iconic Captain James Cook who claimed possession of New South Wales for the British, and even more so for those later explorers who were given the task of mapping the interior of what became known as Australia, British institutions exerted a powerful influence upon the conditions of life and work. Explorers were carefully chosen based upon skill and attitude, and were given detailed instructions by their employers, whether the British navy, the Royal Society, the Secretary for the Colonies or the local colonial administration. Eighteenth century sea-going explorers such as Cook were both dependent upon, and answerable to, the hard-won support of institutional and individual sponsors, and this support came only once explorers had demonstrated their 'competence' as navigators or masters on other expeditions.[9] In the case of later explorers appointed by the Colonial office or by colonial administrators to provide accounts of expeditions into the interior of southern and western Australia, the incentive 'of rewards and career advancement' together with the establishment of rules concerning the writing of the explorers' journals ensured that to a large degree journals reflected government interests and opinions.[10] These explorers were, at least in part, the 'representatives of imperial nations, seeking out new markets and new territories for plantation and settlement', and their journals manifest 'the discursive character of colonial relationships'.[11]

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[7] *Ibid*, 616.

[8] *Ibid*.

[9] JC BEAGLEHOLE, THE LIFE OF CAPTAIN JAMES COOK 15–98 (1974).

[10] SIMON RYAN, THE CARTOGRAPHIC EYE: HOW EXPLORERS SAW AUSTRALIA 40–42 (1996),.

[11] ANNA NEILL, BRITISH DISCOVERY LITERATURE AND THE RISE OF GLOBAL COMMERCE 1 (2002).

In a similar way, the institutions of the state structure the approach to international law adopted by Koskenniemi. In this sense, his writing is in marked contrast to much contemporary critical engagement with international law. It is almost an axiom of such critique that the institutional and doctrinal constraints of the profession and the tradition of international law must be rejected. This is in part because of the anxiety many international lawyers feel about the ways in which international law is and has been complicit in enabling empire. Koskenniemi's critical project is in marked contrast to this trend, in that he fully accepts the tradition of international law and its institutional forms.

For instance, Koskenniemi appears sanguine about the constraints that had been imposed on him as a writer and speaker of law by his place in a bureaucratic hierarchy.

> Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where the Finnish interests lay, or what type of State behaviour was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again.[12]

Perhaps more significantly, Koskenniemi accepts the ongoing limits that the existence of this world of practice imposes upon what can be said by international lawyers even outside the bureaucratic world of 'superiors at the Ministry'. Thus Koskenniemi is moved to begin his project by his dissatisfaction with existing academic works and their failure to discuss the use of rules and principles 'in the institutional contexts in which international lawyers worked'.[13] He explains in the Epilogue that in writing *From Apology to Utopia,* he sought to capture the distinct experience of international law and to find a way to transmit 'professional competence' more effectively to students.[14] This notion of 'competence' is central to what Koskenniemi terms the 'descriptive' aspect of his project. Competence in international law involves mastering 'a complex argumentative practice in which rules are connected with other rules at different levels of abstraction and communicated from one person or group of persons to another so as to carry out the law jobs in which international lawyers are engaged'.[15] Competence matters – it recurs throughout the Epilogue as a way of explaining what it is to use legal

[12] KOSKENNIEMI, *supra* note 1, 564.

[13] *Ibid*, 564.

[14] *Ibid*, 565-6.

[15] *Ibid*, 566.

language well,[16] as a guide to understanding what law is,[17] and as the only way of understanding the politics of law.[18]

> *From Apology to Utopia* assumes that there is no access to legal rules or the legal meaning of international behaviour that is independent from the way competent lawyers see those things.[19]

Competence is thus a product of the social world of a particular group of professionals. It is also an important constraint upon the behaviour of those who wish to enter, or be recognized as competent members of, that professional community. The need to appear competent and effective to the members of a given community is a constraint upon other impulses, perhaps to write something that does not reflect the shared assumptions and protocols of that community or to adopt a different style. To be accepted and then recognized as an 'effective language-user' requires the capacity to use language with skill in ways that are generically acceptable.[20] *From Apology to Utopia* thus 'instructs international lawyers in the nature of what they intuitively recognize as their shared competence'.[21]

This has two political implications for Koskenniemi's descriptive project, which are worth pausing to note. First, attending to the 'experience' of the competent professional shapes the ways in which Koskenniemi assesses the effectiveness of writing, including academic writing. Competence involves conforming to a set of rules about the use of legal language, rules that Koskenniemi derives from the world of practice, but then applies to the academy. These rules work to constrain methodological innovation. If the '"feel" of professional competence is the outcome of style', then to read or write against the prevailing style is to make 'a professional and social mistake'.[22] For these reasons, it is not possible to make idealistic or

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[16] *Ibid*, 567.

[17] *Ibid*, 569.

[18] *Ibid*, 571: 'The politics of international law is what competent international lawyers do. And *competence is the ability to use grammar in order to generate meanings by doing things in argument*.'

[19] *Ibid*, 568-9.

[20] *Ibid*, 572.

[21] *Ibid*, 573.

[22] Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM J INT'L L 351, 357 (1999). ('To write a deconstructive memorandum for a permanent mission to the United Nations would be a professional and social mistake' (357); 'The distant and impersonal language of authority employed by the International Court of Justice stands in sharp contrast to the passionate advocacy of Amnesty International or Greenpeace. To mix up the contexts would be a professional mistake' (360)).

philosophical arguments if one wants to be recognized as a competent international lawyer. The profession is 'no longer seeking a transcendental foundation from philosophical or sociological theories'.[23] The only test of the effectiveness of a legal text is pragmatic – was it effective? 'Did the problem "go away"?'[24] Being an effective user of legal language, whether within the world of practice or the world of the academy, involves accepting the constraints of a discipline that is anti-theory and anti-philosophy.

Perhaps for these reasons, Koskenniemi is at pains to make clear that 'philosophy does not set the book's horizon'.[25] While 'philosophical reflection' may add 'direction and complexity' to one's arguments, such reflection does not determine the meaning of expressions such as sovereignty or custom. Instead, what such concepts mean is determined by 'how those expressions are used by lawyers in particular situations'.[26] Professional training may therefore properly involve learning to theorize about sovereignty or custom. This familiarity with theory, however, is useful only to the extent that it makes practitioners 'more effective language-users and the fact that it does so is the only unchanging criterion through which its success may be measured'.[27] Thus while Koskenniemi stresses that academics also practise the law ('it is only the context in which they do so that makes them special'),[28] his test of what counts as efficacy or success relies upon acceptance by 'the predominantly non-theoretical community of the [international] legal profession.'[29] The practice that theory purports to influence is taken to be the practice of advising superiors at the Ministry, say, or arguing in front of judges. Koskenniemi thus adopts the approach taken by pragmatists such as Stanley Fish that theory 'is entirely irrelevant to the practice it purports to critique and reform. It can neither guide that practice, nor disturb it'.[30]

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[23] KOSKENNIEMI, *supra* note 1, 575.

[24] *Ibid*, 585.

[25] *Ibid*, 569.

[26] *Ibid*, 572.

[27] *Ibid*, 572.

[28] *Ibid*, 617.

[29] COSTAS DOUZINAS, RONNIE WARRINGTON AND SHAUN MCVEIGH, POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW 144 (1993).

[30] Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE LAW JOURNAL 1773, 1797 (1987).

As Costas Douzinas, Ronnie Warrington and Shaun McVeigh have argued, the pragmatic appeal 'to the protocols of authorised communities of interpreters' is profoundly conservative.[31] The pragmatist's distrust of theory is premised upon the idea, as outlined in the descriptive part of Koskenniemi's project, that

> every community of interpreters … develops its unique sense of professional competence, etiquette and good sense, with its own tacit and explicit conventions. These will determine what particular instances of the common enterprise pass the tests of competence and professionalism. All appeals to reason and method that stand outside the received conventions and wisdom are superfluous.[32]

Yet it is the prior determination of who constitutes the relevant audience for a piece of writing, and thus the 'community of interpreters', which shapes the conservative *telos* of pragmatism. For Koskenniemi, the audience for theory is understood to be that same 'small and marginal group of legal professionals' or practising lawyers whom he imagines as the principal audience for all legal writing.[33]

When Koskenniemi does consider the kinds of methodological innovations that may be necessary to change the ways in which international decisions are made or challenge the consensus around a particular issue, he imagines this in terms of bringing in another discipline or practice. Thus in discussing the responsibility of the decision-maker at times of war, Koskenniemi comments:

> … the problem of war might lie not in choosing the right level of discourse or of abstraction, but rather in disturbing the moment in decision-making so that the person making the decision would also actually feel responsible, when existential freedom is there … How can you detach the technical expert, the decision-maker, at the moment when he lets the technical expertise press the button, detach himself from the technique and experience the freedom of not doing it (or doing it, of course)?[34]

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[31] DOUZINAS, WARRINGTON AND MCVEIGH, *supra* note 29, 137.

[32] *Ibid*, 138.

[33] KOSKENNIEMI, *supra* note 1, 568-9.

[34] Remarks of Martti Koskenniemi in REVIEW ESSAY SYMPOSIUM. THINKING ANOTHER WORLD: "THIS CANNOT BE HOW THE WORLD WAS MEANT TO BE", 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 255, 292 (2005).

His answer is that perhaps the decision-maker should turn away from law, perhaps (after all this pragmatism) to theory. But it is not through the figure of the lawyer that this theory will speak, but through the figure of the philosopher.

> One institutional solution might be to bring philosophers into the Security Council, to have concurrently different discourses with different levels of abstraction, to create the kind of confusion in which responsibility and freedom might be possible.[35]

Here, the lawyer is incapable of speaking philosophically, even if the lawyer can see that this might be necessary as a matter of institutional technique. The constraint on the lawyer is not imposed by language or by the institution, but by the desire to be recognised as competent, as someone who knows how to speak the language of power with skill and efficacy. Elsewhere, Koskenniemi suggests that if a critical distance from the diplomatic or academic consensus produced by international law is necessary in order to articulate the experience of injustice which that consensus silences, then 'a change of style may be necessary' – perhaps 'giving up the conventions of generalizability and commensurability that are typical of law' and 'writing a novel'.[36] Lawyers may want to cede ground to philosophers or novelists, but they can't themselves be poetic or philosophical without risking their reputation as competent professionals.

A second political implication of Koskenniemi's relationship to existing institutions is that the Epilogue is not a revolutionary manifesto. Many in international legal circles today understand this as a revolutionary moment, in which radically new thinking is required to address the challenges facing us.[37] While Philip Allott argues that 'we find ourselves orphaned, disabled, unable to dredge up anything from the great tradition which has created liberal democracy, created capitalism, which has created almost everything, for better and for worse',[38] Koskenniemi in contrast accepts that as an international lawyer, he is heir to specific intellectual traditions and institutions, and chooses to accept that inheritance fully.[39] This is particularly

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[35] *Ibid*.

[36] Martti Koskenniemi, *supra* note 22, at 361.

[37] See the transcript of the wide-ranging discussion on whether or not we are living in revolutionary times published as *Roundtable – War, Force and Revolution*, in PROCEEDINGS OF THE 100TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (2006) (*forthcoming*).

[38] Remarks of Philip Allott in REVIEW ESSAY SYMPOSIUM. THINKING ANOTHER WORLD: "THIS CANNOT BE HOW THE WORLD WAS MEANT TO BE" 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 255, 259 (2005)

[39] For the notion that inheritance involves a choice, see JACQUES DERRIDA, NEGOTIATIONS 110–11 (Elizabeth Rottenberg ed and trans, 2002).

so when he speaks of or to his students. In the opening pages of the Epilogue, Koskenniemi explains the impulse for writing *From Apology to Utopia* as pedagogical. He describes the problems posed for legal education by the traditional conception of international law as 'a huge number of rules for students to learn'.[40] The aim of the book was 'to articulate the *competence* of native language-speakers of international law' in order to help the student understand the ways rules and principles are used in legal work.[41] It is in order to achieve this that

> we instruct students or younger colleagues to learn by following up closely what legal institutions … and respected members of the profession do or have done in particular cases, how they have connected rules to each other so as to produce complex arguments that we recognize as exemplary in their power.[42]

In the closing pages of the Epilogue, he explores further what it means to understand oneself as guided by legal institutions and respected members of the profession.

> To commit oneself to international law is to allow its grammar to enter as one's second nature but still to maintain the position of choice – at a minimum a choice to work with colleagues with certain preferences in institutions with a certain bias.[43]

Similarly, in *The Gentle Civiliser of Nations,* Koskenniemi reflects about what it means to identify with the internationalist spirit or take on the international as a space of commitment in our times. He concludes:

> … one could do worse than remember that however one imagines what one is doing, and how that relates to other people's being, history has put the international lawyer in a tradition that has thought of itself as the "organ of the conscience of the civilized world".[44]

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[40] KOSKENNIEMI, *supra* note 1, 566.

[41] *Ibid*, 566-7.

[42] *Ibid*, 567.

[43] *Ibid*, 615-6.

[44] MARTTI KOSKENNIEMI, THE GENTLE CIVILISER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 516 (2001).

This embrace of the full legacy of a tradition and of given institutions is unusual amongst critical scholars. And yet Hannah Arendt suggests that when we educate, we must assume full ownership of the traditions we seek to transmit: 'Education is the point at which we decide whether we love the world enough to assume responsibility for it'.[45]

B. The categorising impulse - towards a grammar of international law

In the pages of *The Journal of the Voyage from Apology to Utopia,* as in many accounts of sea-going voyages of exploration in the eighteenth century, more than one mode of knowledge is in operation. A ship such as Cook's *Endeavour* was the instrument for many kinds of knowledge production – including that involved in botany, surveying, cartography and astronomy. These different forms of knowledge involved different techniques, attitudes, priorities and understandings of the relation between objects and the location in which they were found.

Koskenniemi's journal also involves two distinct and at times competing modes of knowing. The first aims at the collection and categorisation of data. Koskenniemi's desire 'to articulate the *competence* of native language-speakers of international law' in a way that can transmit this competence to students or younger colleagues leads him 'towards a grammar of international law'.[46] The grammar of international law consists of the 'limited number of rules' that organize 'the system of production of legal arguments'.[47] International legal arguments 'are grouped in typical ways'.[48] The production of a grammar involves the identification of the types underpinning these 'typical' patterns of argument – the oscillation between sources and sovereignty based arguments and the internal splitting of those types into fact-oriented or law-oriented arguments on the one hand, and will-based or justice-based arguments on the other. The result of this grammar is a family tree of argumentative types, according to which all international legal arguments can be categorised. This categorisation can be thought of as a 'machine' for 'the production of competent arguments in the field'.[49]

[45] HANNAH ARENDT, BETWEEN PAST AND FUTURE 196 (1977).

[46] KOSKENNIEMI, *supra* note 1, 563.

[47] *Ibid*, 568.

[48] *Ibid*, 569.

[49] *Ibid*, 617.

The 'descriptive' aspect of Koskenniemi's project resembles one kind of knowledge produced during voyages of exploration – the 'gathering of data' about countries, people, flora and fauna, as the material basis for the 'universalising abstractions' of eighteenth century philosophy, botany and jurisprudence.[50] In *The Road to Botany Bay,* Carter explores this botanical mode of knowledge and its representatives in the two figures of Joseph Banks and Daniel Charles Solander, both of whom accompanied Captain Cook on the voyage of the *Endeavour* to the Pacific in 1770. Banks and Solander made use of the classificatory system developed by Carl Linnaeus, a Swedish botanist. That system of classification was based upon the collection and definition of type specimens. Generic descriptions were then drafted on the basis of that 'type', and new specimens and species could then be compared with existing types on the basis of observable characteristics. The system was simple and ensured that all novel flora could be 'assigned to existing genera' and arranged 'within a universal taxonomy, a taxonomy characterized by tree-like ramifications'.[51] Eighteenth century botanical knowledge was indifferent to 'the claims of locality and the limits of observation' – the 'circumstances of discovery' were rendered irrelevant.[52] Indeed, botanical knowledge was produced through transporting specimens to Europe for display in quite different spaces, such as botanical gardens or herbariums. In these 'unencumbered spaces', 'creatures present themselves one beside another, their surfaces visible, grouped according to their common features, and thus already virtually analysed, and bearers of nothing but their own individual names'.[53] In that system, as Carter comments, '[k]nowledge … is precisely what survives unimpaired the translation from soil to plate and Latin description'.[54]

Such a system of classification is extremely useful as a mechanism (or 'machine') for organizing new information. The impulse or urge towards the universal

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[50] NEILL, *supra* note 11, at 2. Koskenniemi's twentieth century version of grammar does differ in important ways from the eighteenth century practice of botany as well as from eighteenth century grammar, particularly in terms of 'the relation of representation to that which is posited in it' (see MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES 238 (1970)). My interest here is in that which continues across the rupture, which according to Foucault marks the 'entire visible surface of knowledge' in the early nineteenth century (217). In particular, natural history and grammar both persist with the practice of analysing identity and difference through the positing of a system consisting of formal elements, producing 'the continuous, yet articulated, table that was set up in the teeming profusion of similitudes, the clearly defined order among the empirical multiplicities' (237).

[51] CARTER, *supra* note 2, at 20.

[52] *Ibid*, 21.

[53] FOUCAULT, *supra* note 50, at 131.

[54] CARTER, *supra* note 2, at 21.

allowed European travellers to make sense of the overwhelming novelty or exotica of the New World and to fit this within existing knowledge systems.[55] Koskenniemi's systematic description and classification of the grammatical structures of international law is in turn a valuable tool for making sense of the often overwhelming novelty of legal texts or arguments – for preparing a lecture on the way a particular WTO decision moves between norm and exception, say, or making sense of the dizzying oscillation between arguments based on sovereignty (consent) and sources (community values) in the same decision.[56]

And yet something is lost in the reduction of the diversity of language or the world into parts or specimens, ready to take up membership of an established family or to be classified according to universal types. Joseph Banks suggests some awareness of this in his comment on an expedition to collect bird specimens at Botany Bay: 'My business was to kill variety and not too many individuals of any one species'.[57] Yet as Carter comments, 'There is, in Banks' philosophy, no sense of limitation, no sense of what might have been missed, no sense of the particular as special'.[58] There is something of this feel to the descriptive part of Koskenniemi's project; 'his knowledge is always complete: each object, found, translated into a scientific fact and detached from its historical and geographical surroundings, becomes a complete world in itself'.[59]

One way to think about this loss in the context of Koskenniemi's project is to compare the task of producing a grammar to that of engaging with the rhetorical aspects of language. In his *Allegories of Reading,* Paul de Man comments of 1970s French literary semiology that as 'the study of grammatical structures' was refined, the study of rhetoric (understood as the study of tropes and the figurative dimensions of language rather than the art of persuasion) began to be treated as a

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[55] On the crisis that the 'discovery' of the New World posed to Western thought and the influence of this crisis on international law, see generally Jennifer Beard, THE POLITICAL ECONOMY OF DESIRE: INTERNATIONAL LAW, DEVELOPMENT AND THE NATION STATE (forthcoming 2006).

[56] For the systemisation of legal techniques for responding to a conflict of norms or the relation between norm and exception, see FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM THE DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION, A/CN.4/L.682, 4 April 2006, and for the oscillation between sovereign and source-based arguments, see KOSKENNIEMI, *supra* note 1, 573-589.

[57] CARTER, *supra* note 2, at 20.

[58] *Ibid*, 22.

[59] *Ibid*, 22.

'mere extension of grammatical models'.[60] De Man questions whether 'rhetoric can be included in such a taxonomy'.[61] Grammatical systems tend towards universality and the creation of a single model that can apply to all versions or uses of language. For de Man, rhetoric cannot be subsumed within an ordered taxonomy because figural language is based upon 'deflection', the 'subversion of the consistent link between sign and meaning that operates within grammatical patterns'.[62] As Douzinas, Warrington and McVeigh put this, 'figural language creates meanings and implications that cannot be accounted for by logic or grammar' and thus rhetoric cannot be reduced to grammatical codes.[63] By concentrating on the grammar of international law, Koskenniemi ignores the capacity of language to mean more or other than its author intended it to mean, to misfire, or to be deflected. As a result, he can imagine that it is possible for competent international lawyers to attain 'a full mastery of the grammar and a sensitivity to the uses to which it is put'.[64] The meaning of language is determinate – indeterminacy is produced by the skill of the language-user and his or her capacity to make language work to achieve certain goals and to leave future choices unconstrained. Thus 'the claim of indeterminacy here is not at all that international legal words are semantically ambivalent' but that international law is indeterminate as a result of the contradictory or indeterminate preferences of the actors speaking this language.[65] Legal language can reliably be put to the uses that a skilled lawyer (or his superior) determines as the desirable end or 'to defend *any* course of action'.[66] Yet Koskenniemi insists that the successful classification and mastery of language does not mean the death of politics or the end of the voyage. If we turn to the second kind of knowledge at work in his journal, we can get a sense of why this is so.

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[60] PAUL DE MAN, ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST 6 (1979).

[61] *Ibid*, 7.

[62] *Ibid*, 8.

[63] DOUZINAS WARRINGTON AND MCVEIGH, *supra* note 29, 140.

[64] KOSKENNIEMI, *supra* note 1, at 617.

[65] *Ibid*, 590.

[66] *Ibid*, 591.

C. Notes for navigators – exploration as a mode of knowing

Exploration involves an address to the institutional sponsors of the journey – those for whom certain outcomes or effects were desired. Captain Cook journeyed to the Pacific aware of a number of institutional goals, including those of witnessing the Transit of Venus and contributing to the development of a method for determining longitude, discovering the Great Southern Land and enabling the collection of botanical specimens by Banks and Solander.[67] Yet in his journals and letters home, Cook produces a mode of knowledge that departs from the classificatory model that expressed so well the imperial designs of the journey's sponsors. Carter contrasts 'botany's concern to reduce the variety of the world to a uniform and universally valid taxonomy' with the 'dynamic' mode of knowing that was the basis of exploration – a mode of knowing 'concerned with the world as it appeared'.[68] Carter argues, against the dominant tradition of imperial historicism, that Cook's journals should be read as 'records of travelling',[69] rather than as sources of facts that prove the existence of an Australia laid out waiting to be found.[70] Such journals, together with the letters home of explorers and their unfinished maps, record the 'specificity of historical experience'.[71] Cook's journals reveal his 'active engagement with the road and the horizon',[72] and his interest in the 'quality of the travelling', not merely in what it will yield.[73] To take one example, the names Cook gave to islands, reefs, bays and mountains were not chosen in the way a botanist names plants, but allude 'to the journey itself' – its sponsors, events that occurred during the journey, allusions to other places visited and named, and so on.[74] Carter argues that we should treat these names, 'like the weather, the winds and clouds, which form so important a part of the ship's log, as metaphors of the journey'.[75] These names celebrate 'the travelling mode of

[67] BEAGLEHOLE, *supra* note 9, 99-127.

[68] CARTER, *supra* note 2, at 18.

[69] *Ibid*, xxii.

[70] *Ibid*, xxi.

[71] *Ibid*, 4.

[72] *Ibid*, xxii.

[73] *Ibid*, 25.

[74] *Ibid*, 7.

[75] *Ibid*, 9.

knowledge' and an active engagement with the ocean and coastline,[76] but also an ironic, equivocal and reflective relationship to language. As Carter describes this:

> Cook moved in a world of language. He proceeded within a cultural network of names, allusions, puns and coincidences, which far from constraining him, gave him, like his Pacific Ocean, conceptual space in which to move.[77]

In just such a sense, Koskenniemi inhabits a world of language, which 'far from constraining him', gives him room to move. Despite his sense of being bound to comply with disciplinary protocols, and to answer to institutional interlocutors, Koskenniemi's writings retain an open-ended feel. For Koskenniemi, the language of international law is not static, nor are its institutions rigid. To the extent that legal institutions are constituted by collections of rules and procedures, all such rules and procedures are open to competing interpretations.[78] In turn, the goals of legal institutions are the product of negotiation or domination, and thus the realisation of any one goal requires accommodating or overruling the goals of others.[79] As a result, 'in the absence of a natural social order every actual institution … remains only an experiment'.[80] For many with a formalist bent, the task of doctrine should be to ensure that legal institutions and texts are coherent, and that the parts of the system should relate to each other in some stable fashion.[81] Instead, Koskenniemi insists upon both the impossibility and the undesirability of such goals. He constantly works at the limits of institutions and forms, performing an understanding of the international lawyer (and indeed of every decision-maker) as at once bound and free.[82]

The 'travelling mode of knowledge' of the explorer values gaps on an unfinished map as highly as the lines that have been filled in. Thus when Cook writes a letter to the Admiralty in 1770 summarizing the *Endeavour's* progress, he reflects both his consciousness of the need to have some tangible fruits of his travel and his sense

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[76] *Ibid*, 9.

[77] *Ibid*, 7.

[78] KOSKENNIEMI, *supra* note 1, at 604.

[79] Koskenniemi, *supra* note 34, at 282.

[80] KOSKENNIEMI, *supra* note 1, at 560.

[81] *Ibid*, 564.

[82] On this sense of the responsibility of the decision-maker, see further Anne Orford, *A Jurisprudence of the Limit*, in INTERNATIONAL LAW AND ITS OTHERS 1 (Anne Orford ed., 2006).

that 'attentive exploring was a form of knowledge quite as valuable as actual discoveries'.[83]

> Altho' the discoveries made in this Voyage are not great, yet I flatter my self they are such as may merit the attention of their Lordships, and altho' I have fail'd in discovering the so much talk'd of Southern Continent (which perhaps do not exist) and which I my self had much at heart, yet I am confident that no part of the failure of such discovery Can be laid to my Charge.[84]

For Koskenniemi, too, the gaps and blank spaces are as important and informative as the discoveries.

> A 'gap' will remain between all such languages and what it is that we choose, whether the bias, or its contrary. The existence of this 'gap' is not insignificant for professional practice. If the practice is not determined by an interior structure or vocabulary, then it cannot be reduced to an automatic production of such a structure of vocabulary either. The decision is made, and its consequences are attributable not to some impersonal logic or structure but *to ourselves*.[85]

Koskenniemi writes for the lawyer who confronts this gap – who is in the position of having to make a decision while recognising that law does not compel any one result. He urges us to understand this as a political moment, and yet one that is constrained in important ways 'by the choice to refer to "law" in the management of international matters'.[86]The ideal of constitutionalism or of the rule of law thus speaks to the 'law-applier' and the way he or she 'approaches the task of deciding in the narrow space between fixed textual understandings on the one side and predetermined functional objectives on the other without endorsing the proposition that the decisions emerge from a "legal nothing"'.[87]

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[83] CARTER, *supra* note 2, at 26.

[84] James Cook, THE JOURNALS OF CAPTAIN JAMES COOK ON HIS VOYAGES OF DISCOVERY VOLUME 1: THE VOYAGE OF THE ENDEAVOUR, 1768-1771 501 (JC Beaglehole et al. eds., 1955), cited in CARTER, *supra* note 2, at 25.

[85] KOSKENNIEMI, *supra* note 1, 615.

[86] *Ibid*, 616.

[87] Martti Koskenniemi, *Constitutionalism as a Mindset: Reflections on Kantian themes about international law and globalisation*, Tel Aviv, 28-30 December 2005, paper available at http://www.valt.helsinki.fi/blogs/eci/Tel%20Aviv%20uusi%2005a[1].pdf

But it is in its address that the Epilogue most closely resembles the travelling mode of knowledge that Carter celebrates. The literary artefacts produced by explorers – maps, journals – have more than one audience. Of course they are addressed in part to institutional sponsors, but they also record the journey, the *experience* of journeying, for future travellers.

> Few Remarks have happend sence we left Java head that can be of much use to the Navigator or any other person into whose hand this Journal may fall, Such however as have occurd I shall insert …[88]

It is in this other address, to 'the Navigator or any other person into whose hand this Journal may fall', that Koskenniemi's travelogue offers inspiration and practical wisdom to those who come after him. The Epilogue seeks to 'provide an initiation as well as a research agenda for new readers who, like I did when I first wrote the book, feel trapped in a professional language that always somehow fails to deliver its seductive promise'.[89] Sometimes, Koskenniemi seems to suggest, it is necessary to set sail again and prevent institutional life from becoming too rigid and constraining.

> Biographically, what starts out as commitment may turn to indifference, even cynicism, as the institutional practice becomes an end in itself, a brick in the wall of a structure of preferences. At that point, transformative action becomes necessary, a new bias needs to be set up, a new interpretation adopted, an unorthodox choice made. It is an important moment of enlightenment when it becomes evident that this can be done in a professionally plausible manner.[90]

A sense of the delights of movement is conveyed through Koskenniemi's frequent use of the image of the horizon.

> *From Apology to Utopia* instructs international lawyers in the nature of what they intuitively recognize as their shared competence. In particular, it shows them that nothing of this competence requires commitment to particular political ideas or institutional forms. Future horizons need not be limited by past ambitions.[91]

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[88] JAMES COOK, THE JOURNALS 199 (2003).

[89] KOSKENNIEMI, *supra* note 1, 563.

[90] *Ibid*, 615.

[91] *Ibid*, 573.

In developing his much-cited notion of international law as a 'culture of formalism', Koskenniemi draws again upon this image of the horizon: 'universality (and universal community) is written into the culture of formalism as an idea (or horizon), unattainable but still necessary'.[92]

A Journal of the Voyage from Apology to Utopia thus offers not just a map, but also a testament to the joys of movement and a guide to travelling well. Even as the stern logic of the cool structuralist sets out the terms on which lawyers must speak and write in order to be recognised as competent and efficient, even as Koskenniemi constructs a map of the field in which every argument and rule and exception is inscribed in its proper place, even as the novice is guided in the art of pragmatic reason, a voice from within the text whispers another message to the young map-maker:

> Maps are magic. In the bottom corner are whales; at the top, cormorants carrying pop-eyed fish. In between is a subjective account of the lie of the land. Rough shapes of countries that may or may not exist, broken red lines marking paths that are at best hazardous, at worst already gone. Maps are constantly being re-made as knowledge appears to increase. But is knowledge increasing or is detail accumulating?
>
> A map can tell me how to find a place I have not seen but have often imagined. When I get there, following the map faithfully, the place is now the place of my imagination. Maps, growing ever more real, are much less true.
>
> And now, swarming over the earth with our tiny insect bodies and putting up flags and building houses, it seems that all the journeys are done.
>
> Not so. Fold up the maps and put away the globe. If someone else had charted it, let them. Start another drawing with whales at the bottom and cormorants at the top, and in between identify, if you can, the places you have not found yet on those other maps, the connections obvious only to you. Round and flat, only a very little has been discovered.[93]

[92] *Ibid*, 507.

[93] JEANETTE WINTERSON, SEXING THE CHERRY 81 (1990).