The Gentle Civilizer of Nations:

The Rise and Fall of International Law 1870–1960

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The Gentle Civilizer of Nations

The Rise and Fall of International Law 1870–1960

Modern international law was born from the impulse to "civilize" late nineteenth-century attitudes towards race and society, argues Martti Koskenniemi in this highly readable study of the rise and fall of classical international law. In a work of wide-ranging intellectual scope, Koskenniemi traces the emergence of a liberal sensibility relating to international matters in the late nineteenth century, and its subsequent decline after the Second World War. He combines legal analysis, historical and political critique and semi-biographical studies of key figures (including Hans Kelsen, Hersch Lauterpacht, Carl Schmitt, and Hans Morgenthau); he also considers the role of crucial institutions (such as the *Institut de droit international* and the League of Nations). His discussion of legal and political realism at American law schools ends in a critique of post-1960 "instrumentalism." Along with the book's other chapters, this provides a unique reflection on the possibility of critical international law today.

MARTTI KOSKENNIEMI is Professor of International Law at the University of Helsinki and member of the Global Law School Faculty at New York University. He was a member of the Finnish Ministry for Foreign Affairs from 1978 to 1995, serving, among other assignments, as head of the International Law Division. He has also served as Finland's representative at a number of international bodies and meetings, including numerous sessions of the UN General Assembly; he was legal adviser to the Finnish delegation at the UN Security Council in 1989–1990. His main publications are *From Apology to Utopia. The Structure of International Legal Argument* (1989), *International Law Aspects of the European Union* (edited, 1997) and *State Succession: Codification Tested Against the Facts* (co-edited, with Pierre Michel Eisemann, 1999).

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I cannot resist the thought that if we were able to . . . refrain from constant attempts at moral appraisal – if, in other words, instead of making ourselves slaves of the concepts of international law and morality, we would confine these concepts to the unobtrusive, almost feminine, function of the gentle civilizer of national self-interest in which they find their true value – if we were able to do these things . . . then, I think, posterity might look back upon our efforts with fewer and less troubled questions.

George Kennan, *American Diplomacy* (Expanded edn., University of Chicago Press, 1984) pp. 53–54.

To the memory of Vieno Koskenniemi (1897–1989), the gentlest of civilizers

Preface

The essays in this book are inspired by many sources and reflect various conversations I have had with international lawyers in the course of the past four years or so. The initiator of the idea of the book was Professor Sir Elihu Lauterpacht, who kindly invited me to give the Sir Hersch Lauterpacht Memorial Lectures at the University of Cambridge in 1998, and in that connection pointed out that this privilege also involved a commitment to prepare the lectures for publication. Eli's hospitality in Cambridge in 1997 and the discussions I had with him also underlie my interpretation of his father's work in chapter 5. As always, I am indebted to Professor David Kennedy from the Harvard Law School for innumerable conversations and collaborative projects, Dighton weeks and weekends, shorter and longer periods together and in wider company in the Boston area, Helsinki and other places, at various stages of writing of these essays. But the only person to have read the whole of this work, and whose comments and criticisms are reflected on every page, as in everything about its author, is Tiina Astola. This book would not exist without them.

Many other friends and colleagues have been involved. The comments and work of Dr. Outi Korhonen are reflected in the description of the culture of late nineteenth-century internationalists. The account of international lawyers and imperialism (chapter 2) draws on the important work of Professors Antony Anghie and Nathaniel Berman, and from discussions I have had with them over the years. That section owes much to the invitation I received from Dr. Surya Subedi to give the Josephine Onoh Memorial Lecture at the University of Hull in February 1999. I also want to thank the participants in the international legal history project under Professor Michael Stolleis at the Max Planck

Institute for Legal History in Frankfurt for the debate on persons and problems relating to my German story (chapter 3), among them particularly Dr. Betsy Roeben, whose work on Bluntschli I have plundered in chapter 1 and Dr. Ingo Hueck whose writings on the institutional aspects of the German inter-war scene underlies sections of chapter 3. I am grateful for a number of French friends and colleagues, too, among them in particular Professors Pierre Michel Eisemann and Charles Leben, who directed me to primary and secondary materials without which I could not have made sense of the French story in chapter 4. I also thank Doyen Vedel for correspondence on Louis Le Fur, Dr. Oliver Diggelmann for a discussion and a copy of his unpublished dissertation on Max Huber and Georges Scelle as well as Professor Geneviève Burdeau and Mr. Pierre Bodeau for providing relevant materials or references. Chapter 6 on Carl Schmitt and Hans Morgenthau and the "fall" of international law collects several strands of conversation over the years. Some of it draws on papers and discussions at a conference organized by Dr. Michael Byers in Oxford in 1998, and a continuous debate I have had with Professor Anne-Marie Slaughter about the meaning and direction of her "dual agenda." David Kennedy's work underlies much of the description of the American scene. People with whom I have discussed various aspects of the following essays but whose influence cannot be clearly allocated to particular sections include Philip Allott, David Bederman, Thomas M. Franck, Gunther Frankenberg, Benedict Kingsbury, Karen Knop, Jan Klabbers, Mattias Kumm, Susan Marks, Reut Paz, Jarna Petman, and Joseph Weiler. The librarians at the Library of Parliament (Helsinki) were again as helpful as ever. Colleagues at the Erik Castrén Institute of International Law and Human Rights (Helsinki) bore without complaint the additional burden of my absent-mindedness about current matters that needed attention. At home, Aino and Lauri took their father's excessive book-wormishness with a fine sense of irony. So did my mother, Anna-Maija Koskenniemi. I thank them all.

I could not have written this book without one year's leave of absence from the University of Helsinki, made possible by a grant received from the Finnish Academy (Suomen Akatemia).

Parts of this book draw on materials that I have published earlier. Chapter 5 on Lauterpacht is essentially the same essay that was published in (1997) 8 *European Journal of International Law* (pp. 215–263). Chapter 2 contains passages included in 'International Lawyers and Imperialism' in *Josephine Onoh Memorial Lecture 1999* (University of Hull,

2000). Chapter 5 is a development of my 'Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations', in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 1999) pp. 17–34.

The cases where I have used existing translations of French or German materials can be seen from the notes and the bibliography. The rest of the translations are my own.

Martti Koskenniemi,
Helsinki, January 17, 2001

Abbreviations

AFDI	*Annuaire français de droit international*
AJIL	*American Journal of International Law*
Annuaire IDI	*Annuaire de l'Institut de droit international*
ARWP	*Archiv für Rechts und Wirtschaftsphilosophie*
ASIL	*American Society of International Law*
BYIL	*British Year Book of International Law*
EJIL	*European Journal of International Law*
ICJ	International Court of Justice
IDI	Institut de droit international
ILA	International Law Association
PCIJ	Permanent Court of International Justice
RdC	*Recueil des cours de l'Académie de droit international*
RDI (Paris)	*Revue de droit international*
RDI	*Revue de droit international et de législation comparée*
Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
RGDIP	*Revue générale de droit international public*
ZaöRV	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

Contents

Introduction

I

This book grew out of the Sir Hersch Lauterpacht Memorial Lectures that I gave at the University of Cambridge in the fall of 1998. It is, admittedly, quite a bit longer than those original lectures were, but it is still informed by the same interest. This was to expand upon an article I had written a year earlier on Hersch Lauterpacht himself for the *European Journal of International Law* and in which I had attempted to cover the same ground I had done in a book ten years earlier, but from an altogether different perspective. In that book I had described international law as a structure of argumentative moves and positions, seeking to provide a complete – even "totalising" – explanation for how international law in its various practical and theoretical modes could simultaneously possess a high degree of formal coherence as well as be substantively indeterminate.[1] The result was a formal–structural analysis of the "conditions of possibility" of international law as an argumentative practice – of the transformational rules that underlay international law as a discourse – that relied much on binary oppositions between arguments and positions and relationships between them. But as perceptive critics pointed out, whatever merits that analysis had, its image of the law remained rather static. Even if it laid the groundwork for describing the production of arguments in a professionally competent international law practice, it fell short of explaining why individual lawyers had come to endorse particular positions or arguments in distinct periods or places. Even if it claimed that all legal practice was a

[1] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, Lakimiesliiton kustannus, 1989).

"politics of law," it did not tell what the "politics" of international lawyers had been. Like any structural explanation, it did not situate the lawyers whose work it described within social and political contexts, to give a sense that they were advancing or opposing particular political projects from their position at universities, foreign ministries, or other contexts of professional activity.

The Lauterpacht essay – the only one of the chapters below that has been previously published as such – chose another approach. It tried to put in a historical frame the development of the ideas and arguments of one of the twentieth century's most influential international lawyers. The 1998 lectures were an extension of that essay, an exploration of why Lauterpacht came to hold the positions he did and what happened to the heritage he left. This book can (but need not necessarily) be read as a continuation of that effort. It constitutes an experiment in departing from the constraints of the structural method in order to infuse the study of international law with a sense of historical motion and political, even personal, struggle. To the extent that what emerges is a description of a particular sensibility, or set of attitudes and preconceptions about matters international, it might also be described as a series of essays in the history of ideas. But in such case, no assumption about history as a monolithic or linear progress narrative is involved, nor any particular theory about causal determination of ideas or by ideas of something else. If instead of "ideas," the essays choose to speak of "sensibility," this is because the fluidity of the latter enables connoting closure and openness at the same time, as does the more familiar but slightly overburdened notion of "culture." The international law that "rises" and "falls" in this book is, then, not a set of ideas – for many such ideas are astonishingly alive today – nor of practices, but a sensibility that connotes both ideas and practices but also involves broader aspects of the political faith, image of self and society, as well as the structural constraints within which international law professionals live and work.

Like my earlier work, this book examines the rather surprising hold that a small number of intellectual assumptions and emotional dispositions have had on international law during its professional period. This time, I have attempted to bring these assumptions and dispositions together in the form of a series of narratives that traces the emergence of a sensibility about matters international in the late nineteenth century as an inextricable part of the liberal and cosmopolitan movements of the day, and that dissolved together with them some time during the second decade after the Second World War. Like the liberal reformism which

created it, modern international law was defeated as much by its spectacular successes as its equally striking failures. Many of the political objectives of the first modern international lawyers – the men who set up the *Institut de droit international* in 1873 – were sooner or later realized in their domestic societies: general suffrage, social welfare legislation, rule of law. Support for international institutions and advancing the international rule of law became defining attributes to a new multilateral diplomacy, however much "idealist" and "realist" accounts might have disagreed about their centrality to the conduct of foreign policy. But many large objectives proved to be unrealizable – global federalism, peace, universal human rights – while some turned out to have consequences that were the exact opposite of the lawyers' expectations: the projection of Western sovereignty in the colonies is the most conspicuous example. What was distinctive about the internationalist sensibility was not only its reformist political bent but its conviction that international reform could be derived from deep insights about society, history, human nature or developmental laws of an international and institutional modernity. While the first generation of internationalists imagined that those insights were embedded in their shared Victorian *conscience*, later generations sometimes departed from this assumption in one or another direction, only to return to it in a secondary, or default mode some time in the immediate post-war era. The attempt to imagine international law either as a *philosophy* or a *science of the development of societies* that was pursued with energy in Germany and France during the first half of the twentieth century failed to produce or even support viable policies and collapsed with the inter-war world in 1939. The profession never really recovered from the war. It was, instead, both depoliticized and marginalized, as graphically illustrated by its absence from the arenas of today's globalization struggles, or turned into a technical instrument for the advancement of the agendas of powerful interests or actors in the world scene. As a sensibility, it was compelled to fight nostalgia, or cynicism, or both.

II

This book is informed by two intuitions I have had about the history of international law in the period from 1870 to 1960. One was the sense that earlier accounts of the profession's pedigree failed to give an adequate sense of the radical character of the break that took place in the field between the first half of the nineteenth century and the emergence

of a new professional self-awareness and enthusiasm between 1869 and 1885. A central thesis of chapters 1 and 2 is that modern international law did not "begin" at Westphalia or Vienna, and that the writings by Grotius, Vattel, G. F. von Martens or even Wheaton were animated by a professional sensibility that seems distinctly different from what began as part of the European liberal retrenchment at the meetings of the *Institut de droit international* and the pages of the *Revue de droit international et de législation comparée* from 1869 onwards. My second intuition was that whatever began at that time came to an effective (if not formal) end sometime around 1960. About that time it became clear that the late-Victorian reformist sensibility written into international law could no longer enlist political enthusiasm or find a theoretically plausible articulation. Chapters 5 and 6 (the essays on Lauterpacht and Morgenthau) contain the argument about precisely in what that "end" consisted – the emergence of a depoliticized legal pragmatism on the one hand, and in the colonization of the profession by imperial policy agendas on the other.

In addition to telling the story of the "rise" and "fall" of international law I wanted also to highlight the profession's academic and political enthusiasms and divisions during the approximately ninety years of its prime, and to do this by focusing on the links between what are too often portrayed as arid intellectual quarrels with the burning social and political questions of the day. Much was at issue in those debates for the participants, and we recognize that in the passionate tone their arguments often took. I did not, of course, want to resuscitate old debates out of antiquarianism, but to examine an additional intuition I had that the profession in its best days could not have been as "idealistic" or "formalistic" as standard histories have suggested. In fact, as chapters 3 and 4 on Germany and France hope to make clear, the received image not only fails to articulate the variety of approaches and positions that lawyers took in their writings and practices, but is sometimes completely mistaken. One of my desires is that the ensuing account will finally do away with the image of late nineteenth- and early twentieth-century lawyers as "positivists" who were enthusiastic about "sovereignty." If any generalization can be made in this regard, it is rather that these men were centrists who tried to balance their moderate nationalism with their liberal internationalism. In Europe, they saw themselves as arguing against the egoistic policies of States and in favor of integration, free trade, and the international regulation of many aspects of domestic society, including human rights. Their *credo* was less sovereignty than a *critique of sovereignty*.