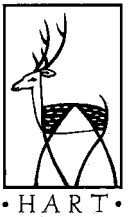
THE POLITICS OF INTERNATIONAL LAW

Martti Koskenniemi

The Politics of International Law

MARTTI KOSKENNIEMI



OXFORD AND PORTLAND, OREGON
2011

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-939-5

Typeset by Hope Services Ltd, Abingdon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

PREFACE

I

The chapters in this book examine different ways in which the intervention by international law in particular contexts – diplomatic crises, governance problems as well as academic disputes – takes on a contested, political appearance. They survey international law's operation *as* a (vocabulary for) politics and are thus eminently not about international law *and* politics. The conjunctive form would suggest a meeting of two separately identifiable entities whose action upon each other would then be subjected to analysis. As the two 'theoretical' chapters at the beginning expressly argue, I do not think there are such separate entities. Nothing in this book participates in the sometimes fashionable enquiries of international law's 'impact' on politics or vice-versa. Such an enquiry would be like examining Christianity's relationship to religion. The relationship (if that is the correct word) is not one of two entities colliding against each other but one of identity. International law is an *expression* of politics much like Christianity constitutes one type of expression of religious spirituality. Both also operate as technical languages that are resorted to by trained professionals and lay persons alike in order to communicate human aspirations, fears and ambitions. In the case of international law, such sentiments are invoked so as to support or criticise particular actors or practices in the contexts of action we like to call 'international' or today perhaps 'global'.

Nor is there any discussion of the nature of 'politics' or the 'political' in this book – at least not the kind of political theory discussion that used to preoccupy (German) intellectuals during the inter-war era and has resurfaced every now and then in the analyses of the conditions of international and domestic order. The 'politics of international law' refers to no jurisprudential thesis about the *real nature* of politics or (international) law. Instead, it points to the experience of a certain fluidity and contestability that most people – lawyers and non-lawyers – have when they enter the world of international law and find themselves in the presence of alternative and often conflicting rules, principles or institutional avenues between which they are expected to choose and realise that it is by no means self-evident how to justify that choice. Topics such as the intervention by the North Atlantic alliance (NATO) in Kosovo in 1999, the operation of the Strasbourg human rights institutions, the trial of former President Milosevic, or the 'fragmentation of international law', discussed below, all involve choice and the experience that more is involved in that choice than applying a pre-existing principle. The

essays below take that experience seriously and not just as an effect of a technical or communication failure that could be corrected by 'interpretation'. International law, they suggest, is not about operating an algorithm but about deciding between alternative types of action each of which may, with some ingenuity be brought within the conventions of plausible legal argument. The question 'who will win, who will lose' is never far from the surface of such choices and it is to that question the following chapters seek to give a sense of concreteness and urgency.

The 'politics of international law' in this book connotes the intervention of what is sometimes labelled a 'prejudice' or a 'bias' in legal work. Nothing pejorative is meant thereby. As I have elsewhere explained in detail, and as I hope to make clear in chapters 1, 2 and 12, indeterminacy, decision and bias are inevitable aspects of all work in international law, from giving legal advice to drafting judgments of international tribunals, from academic system-construction to the argumentative interventions by activists.[1] They give meaning and applicability to abstract standards, and make the legal vocabulary 'tick' by directing it to the defence or critique of alternative positions. To speak of 'politics' is intended to highlight the reality of choice in international law and to contrast it with the technical production of the justification for it. In this way, I hope to convey a realistic view of the operation of international law as a *practice* of decision-making that interferes in peoples' lives instead of a theoretical exercise in deduction-subsumption from abstract rule-formulations, principles of 'justice' or the 'policies' of international institutions. We need the legal vocabulary to justify our decisions and to support or critique the choices of others. But the vocabulary does not decide on our behalf. We remain responsible. If there is an underlying critical motif in these chapters, it is directed at the point where the experience of choice is lost and where standard interpretations begin to appear as inevitable results of an impartial legal reason or where institutional routine has become so entrenched that it is no longer recognised as the contingent result of past choices that it is. That international law itself tends to become, to use a well-worn phrase, 'part of the problem', is often a consequence of the emotional and political intensity of its vocabularies. Expressions such as aggression, genocide, torture or right to life, among others, are key parts of the professional language and make powerful appeals for choosing in particular ways. But they speak to the heart so that the mind may find it indecent to object.[2] To lose the experience of contestability even of such words, however, and thus one's distance from the institutional commitments one has made, is to be complicit in the way the world is.

Many of the chapters here highlight the strategic dimensions of legal work: how to argue for particular positions? How to find a legal justification – or to attack the justification by one's adversary? But I will also ask the question of the limits of such

[1] See the 'Epilogue' in my *From Apology to Utopia. The Structure of International Legal Argument Reissue with a New Epilogue* (Cambridge University Press, 2005).

[2] I have discussed this especially in my 'International Law in Europe: Between Tradition and Renewal', 16 *European Journal of International Law* (2005) 113–24. See also David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press 2005).

a view. Is there an independent 'politics' of a legal formalism that insists on process rather than outcome? I think there is. But as I argue in chapter 8, I also think that there is a point at which formalism will break down under the weight of other considerations. If neither formalism nor anti-formalism will save us, then focus will inevitably turn back to ourselves as lawyers, activists or academics, and our sensitivity to what is important in the practical contexts in which we act. It is true that institutional practices are often well-entrenched and hard to change – not to mention that their very fixedness may make us lose the sense that any large transformation is at all possible. The power of cynicism may also achieve that even the identification of complacent hypocrisy goes no way to eradicating it. And how useful is it, really, to open the imagination if all it does is to make one even more conscious of the enormous distance between present reality and utopian hope? These are hugely important existential questions that a book on 'the politics of international law' cannot pretend to resolve. But at least such a book can give expression to the experience of fluidity and contestability and provide tools for the cool-headed analysis of what our participation as legal language-users in our professional contexts does to the world and to ourselves.

II

The original essays on which the chapters below are based were written over a time-span of 20 years. I have updated or slightly modified many of them so as to make them suitable for this book. That they appear in a largely (though not completely) chronological order is a coincidence that reflects the way my attention and professional engagements have shifted from one subject to another. Part I of the book – chapters one and two – lays out the argument about the operation of the 'politics of international law' and serves as a kind of general introduction to the rest. Those interested in human rights, collective security, criminal law or 'fragmentation', for example, may go directly to the relevant chapters. Nevertheless, all the chapters illustrate in different ways the operation of the argumentative structure presented at the beginning and a full grasp of this book may require at least some slight attention to the discussion of the operation of the legal grammar presented there.

Part II examines collective security as a platform for the use of legal argument in the context of the first Iraq crisis in 1990–91 and in the anxious debates among European lawyers during the 1999 Kosovo crisis. If the latter offers an exemplary case of the over- and under-inclusiveness of the legal vocabularies of the use of force, intervention and self-defence, the former provides a sketch of an institutional context where those vocabularies became surprisingly fixed in legal terms. The two chapters together examine both the effects and the limits of formal legal argument conducted under the terms of Chapter VII of the UN Charter. They seek

to refute both the (political realist) view that law has nothing to say when vital interests of states are at issue, and the (legal deductivist) position that law actually dictates how we should behave in those situations.

The work of ambition and uncertainty, innovation and stasis in the human rights field constitutes the subject of Part III. It seems clear that the much-debated rise of human rights in international institutions in the 1980s and 1990s came about as a response to the perceived weakness and retrograde politics of statehood that people tended to identify at the heart of 'traditional' international law. But the effort to replace old diplomatic languages by aiming directly at the 'good' values of human rights did not free us from the experience of uncertainty and choice. It did not take long before the institutionalisation of human rights law opened the argumentative avenues to the familiar logics of conflicting rights, rules versus exceptions, and the whole business of interpretative controversy. None of this speaks in favour of departing from rights as a professional vocabulary. There is no other language (at least no other language *now*) that would do better what rights-language tried to do. Therefore I have joined the critique in chapter 5 with a constructive discussion in chapter 6.

Part IV juxtaposes the operation of international law in 'limit situations' – in the context of crimes against humanity and nuclear weapons – with more routine types of institutional work and legal argument. Chapters 7 and 8 analyse the effect of massive ideological and emotive pressures in the fight against impunity and the debate on nuclear weapons on the legal vocabulary and points to the operation of *power* behind moral indignation and commitment. Chapters 9 and 10 are about power, too, but this time as it appears through the routine use of the law in struggles over jurisdiction to decide. They examine international law as a 'universalisation project' within which particular interests come to seem generally shared and enquire into the possible contribution that law makes in contrast to, say, religion or economics as alternative languages of universalisation.

Part V – The Spirit of International Law – joins together four chapters that turn back to the subject who operates the law and to the specificity of the legal language. What are the emotional consequences of committing to a profession as fragile and uncertain about its premises and effects as international law? How to be professionally conscious of the contested basis of one's professionalism? The essay on 'miserable comforters' reminds us that the grass is no greener on the other side of the academy, however, and just as there is no distinction between international law and politics, there is no significant difference between 'doing' international law or doing international politics, either. The question is always 'how' one does this, with what sense of immersion in or distance from one's vocabulary and its institutional alignments? Based on the Chorley Lecture given at the London School of Economics in 2006, the last chapter was inspired by my participation in the debates on the 'fragmentation of international law', and can be read as a personal assessment of the conditions within which 'the politics of international law' takes place today.

III

Practically all of these chapters have been inspired by the contexts of diplomatic or academic practice in which I have been involved over the years. There is a strong autobiographical aspect to them and no doubt it is possible to see there a certain development – even if the core ideas, outlined schematically in the first two chapters, may not have changed much. Therefore I should really thank all the friends and colleagues who have accompanied me in these debates during two decades, who have heard these chapters as spoken lectures or read and made comments on them after their original publication. The context of 'critical' or 'new approaches' to international law has of course been important, whether their centre has been located at Harvard, London, New York, Paris, Melbourne, Cambridge or – as I like to think – at the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki (ECI). I am grateful for the many friends at those places; without the global context of conversations they have provided, these chapters and this book could never have been written. For this book specifically, I need to thank Emmanuelle Jouannet for her wonderful Introductory Essay, Richard Hart for agreeing to take this book to be published in English, following up on an earlier French version. Many people at ECI have participated in the revision and the technical reproduction of these essays. They include Sanna Villikka, Ilona Nieminen, Johannes-Mikael Mäki and Margareta Klabbers. I thank them all.

Helsinki, February 2011
MK

ACKNOWLEDGEMENTS

The chapters were published in their unamended form as:

Part I: *The Politics of International Law*

1) 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4–32.
2) 'The Politics of International Law. Twenty Years Later' (2009) 20 *European Journal of International Law* 7–19.

Part II: *The Law and Politics of Collective Security*

3) 'The Place of Law in Collective Security' (1996) 17 *Michigan Journal of International Law* 455–90.
4) 'The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159–75.

Part III: *The Politics of Human Rights*

5) 'The Effect of Rights on Political Culture' in Philip Alston (ed), *The European Union and Human Rights* (Oxford University Press, 1999) 99–116.
6) 'Human Rights, Politics, and Love' (2001) *Mennesker & Rettigheter* 4, 33–45.

Part IV: *Limits and Possibilities of International Law*

7) 'Between Impunity and Show Trials' (2002) 6 *Max Planck Yearbook for United Nations Law* 1–36.
8) 'Faith, Identity and the Killing of the Innocent. International Lawyers and Nuclear Weapons' (1997) 10 *Leiden Journal of International Law* 137–62.
9) 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197–218.
10) 'What is International Law For?' in Malcolm D Evans, *International Law* (Oxford University Press, 2003) 89–114 (2nd edn 2006) 57–81.

Part V: *The Spirit of International Law*

11) 'Between Commitment and Cynicism: Outline for a Theory of International Law as Practice' in *Collection of Essays by Legal Advisers of States, Legal Adviser of International Organizations and Practitioners in the field of International Law* (United Nations, NY, 1999) 495–523.

12) 'Letter to the Editors of the Symposium' (1999) 93 *American Journal of International Law* 351–61.
13) 'Miserable Comforters. International Relations as a New Natural Law' (2009) 15 *European Journal of International Relations* 395–422.
14) 'The Fate of International Law. Between Technique and Politics' (2007) 70 *The Modern Law Review* 1–32.

While every care has been taken to establish and acknowledge copyright, and to contact copyright owners, the publishers apologise for any accidental infringement and would be pleased to come to a suitable agreement with the rightful copyright owners in each case.

CONTENTS

Koskenniemi: A Critical Introduction

E Jouannet

I think international law has a wonderful political and intellectual potential (this is why I am interested in its history) but that it has in the 20th century become – *malgre soi* – a small bureaucratic discipline at law schools. My project is to try to revive a sense of its original mission, its importance. I suspect I am creating a myth (for it probably never was much better) – but myth-creation is an important aspect of political activity and activism.

(Martti Koskenniemi, commenting at a Conference at the Law Faculty of the Sorbonne, February 2004.)

I

MARTTI KOSKENNIEMI IS now well-known throughout the world, not only as a result of his position as the President of the International Law Commission's study group on the fragmentation of international law, but also on the basis of his doctrinal work. Both *From Apology to Utopia*[1] and *The Gentle Civilizer*[2] are truly remarkable intellectual achievements, each exceptionally powerful in its own way, as they have profoundly revolutionised the ways in which we can understand both international legal discourse (*From Apology to Utopia*) and its history (*The Gentle Civilizer*). In doing so, they move from a structuralist approach to one based upon historical narration and contextualisation; a progression driven not by chance, but on the contrary by the desire to clarify the object of our discipline and its effects on the international plane. Koskenniemi has never intended to produce a 'theory of international law'; indeed, he would object to the

[1] M Koskenniemi, *From Apology to Utopia; the Structure of International Legal Argument* (1989) (Re-issue with a new Epilogue, Cambridge University Press, 2005) 683. I will refer here to the recently published second edition, which contains an extremely important new epilogue in which the author himself puts his work into perspective and discusses the criticisms that have been made. The first edition, now out of print, was published in 1989 by the Finnish Lawyers' Publishing Company.

[2] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960.* Hersch Lauterpacht Memorial Lectures (Cambridge, Cambridge University Press, 2002) 569.

very term itself, as his goal has never been to be perceived as a legal theoretician or philosopher, but rather and above all as an international lawyer addressing other international lawyers. In doing so, he has sought to illustrate the ways in which international legal discourse is articulated, the ways in which it operates, and to illuminate and improve our practice of international law in full awareness of both its limits and its promise.

Indeed, when we read Koskenniemi we, in my view, become the privileged witnesses of an extremely powerful and lucid account of the linguistic and contextual reality of international legal discourse. It is, moreover, an account that is always in motion, undermining itself insofar as it cannot be exempt from the ambiguities and other difficulties that Koskenniemi is constantly seeking to overcome (as is, for example, attested to by the new epilogue to the reissue of *From Apology to Utopia*).[3] Often, we academics, after having staked out our initial arguments, are so inclined to repeat ourselves that we continue, simply restating in another form that which we said at the outset. Yet, if Koskenniemi's thought has remained deeply conditioned by his first book (and by the first of the texts in the present volume), or perhaps more accurately, by the paradigm upon which it was based, we cannot but admire the manner in which he has progressed without ever appearing constrained by any of the frontiers that often limit academic thought. Koskenniemi is an author without frontiers – personal or intellectual – and this, I think, is one of the reasons for his incredible productivity, and for the versatility and innovation of his thought. When we read many of his innumerable works, and the texts collected in this volume, we see that Koskenniemi – who speaks at least four languages – genuinely seems based at the intersection between the three great traditions that formed the three pillars of *The Gentle Civilizer*: the Anglo-Saxon, the German and the French. This intersecting of traditions and familiarity with the work of foreign authors is evident in *From Apology to Utopia*, not merely in the vast range of literature cited, but also in the very reasoning of the book itself. Although this work unquestionably reflects the influence of the Critical Legal Studies (CLS) movement in the United States, it draws, in doing so, directly on the source of French structuralism, borrowing its analytical method from the work of Levi-Strauss; it is thus less influenced by the 'Derridean' strands of CLS so popular in the United States.

That the author is familiar with these three major cultures should not come as a surprise, and can be explained in part by his education in Finland, and in part by his own personal trajectory. At the time, legal education in Finland largely followed the German tradition: Kelsen was, of course, studied; as were Laband, Gerber, Jellinek, Weber and the Frankfurt School. Curiously, however, very little in the way of Anglo-Saxon thought and, of course, even less of French international legal thinking was taught there. It was thus at University that Koskenniemi became immersed in the German jurists, and in the culture of Scandinavian realism dominated by Olivecrona and Ross. The influence of the hard realism of the

[3] Koskenniemi, *From Apology to Utopia* (2005) 562–617.

Scandinavians is also perceptible in Koskenniemi's work (he devoted an article to the subject), but he was equally able to make a very firm break with that heritage.[4] He developed a more profound knowledge of the Anglo-Saxon and French legal cultures a little later, during the year he spent at Oxford from 1982–83, and as a result of his work at the Finnish Ministry for Foreign Affairs, which led to him spending some time in France and considerably more in the world of UN multilateral diplomacy. During his travels, he discovered in particular the thought of the American critical legal scholars – and above all that of Roberto Unger, and Duncan and David Kennedy – whose direct influence can be seen so strongly in his work.

Through his education, his reading and his travels, Koskenniemi has thus become thoroughly transdisciplinary; and we can see in him an embodiment of the advantages that studying law in a manner free from disciplinary barriers can bring. Koskenniemi's thought is without such barriers, without any intellectual taboos; the different texts collected in this volume show a multi-talented author prepared to venture across all of the different landscapes of the law and its adjacent fields, into which he increasingly interweaves history, literature and the human sciences.

On one reading, a number of his works such as, for example, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law' or 'International Law and Hegemony: A Reconfiguration' demonstrate that Koskenniemi has transcended the Anglo-Saxon/Continental cultural divide, and thus also that between realism and formalism: precisely the kinds of classic dichotomies from which he has sought to escape. From this particular perspective, Koskenniemi's work strikes me as unclassifiable; his piece entitled 'Perceptions of Justice: Walls and Bridges between Europe and the United States' (not included in the present volume) illustrates well his knowledge of, attachment to, and critical perspective on these two worlds, European and American, that he knows so well.[5] Thinking of Koskenniemi, I am reminded of what someone once said of Paul Ricoeur: 'he strikes out along ridges'. All of Koskenniemi's thought is located on such 'ridges': exposed to the open air and to multiple horizons, vibrant, strong, fertile, never restricted within its own confines or inward-looking, but on the contrary in constant interrelation with other worlds, other cultures, and other authors.

It would, however, be a mistake to think that by using this interdisciplinarity, these cultural intersections, Koskenniemi would lose himself on these borrowed paths among an increasing range of perspectives and theories. On the contrary, his work rests upon certain fundamental presuppositions through which he has forged his own concepts and practices, following a rigorous method of reasoning that is entirely particular to him. I will return below to certain key themes within these foundations; at this early stage, however, it suffices to note that one of the most notable elements is without doubt the inseparability of theory and practice in his work, as is shown by the numerous concrete examples to which he refers

[4] M Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism' (2003) *European Journal of International Law* 14, 653–59.

[5] M Koskenniemi, 'Perceptions of Justice: Walls and Bridges between Europe and the United States' (2004) *Heidelberg Journal of International Law* 64, 305–14.

throughout the texts collected in this volume. He always seeks to come back to practice – not in order to illustrate some deductive, theoretical argument, but rather to draw out inductively the lessons that can be learned from the practice itself, as he explains in his piece entitled 'Style as Method Letter to the Editors of the Symposium'.[6] This inextricable association between theory and practice, intrinsic to his thought, corresponds to the broader goal that Koskenniemi has chosen to pursue: not, as noted above, the production of a general theory of law, but rather the clarification of practice and discourse of international lawyers – or perhaps more accurately, the discourses and the practices that appear to him simply as different styles that we can adopt depending on circumstance, but by which we are also inevitably constrained.

This association between theory and practice has been further reflected in his working life: a scholar, and now Professor with the University of Helsinki, who has always at the same time been a practitioner. Employed as a legal counsellor in the Department of Foreign Affairs in his home country, he was, as a result of the small size of the legal department, quickly given important responsibilities. In particular, he participated in a number of United Nations Environment Programme (UNEP) working groups, and was for a number of years a member of the Finnish delegation to the Sixth Committee of the UN General Assembly. From 1989–90, including the start of the first Gulf War in Iraq, Finland was a member of the Security Council; and Koskenniemi took away from these years an insider's experience that later informed his article on 'The Place of Law in Collective Security'.[7] He was also a counsellor on legal affairs in his Foreign Ministry, working in a number of different areas, such as relations with the USSR at the time of the dissolution of the Soviet empire,[8] and a Co-Agent of Finland in the Case Concerning Passage Through the Great Belt before the International Court of Justice (he has continued this activity – also pleading for Finland in the recent Kosovo advisory opinion (2009). This constant activity in the service of his country made a lasting impression upon him, and thus something he often reflects upon in his doctrinal writings. This intimate knowledge of, and desire to remain connected to, practice accounts for the fact that Koskenniemi has never approached the study of international law in an external manner, but has always sought to conduct an internal exploration of international legal discourse, be it in terms of its structure, its operation in theory and practice, or its historical development. Here we find another of the strengths of his work. 'Normative' theories of law, international or otherwise, take as their object principles rather than rules or institutions. However, in Koskenniemi's view, the true principles of international law cannot be discovered through some sort of a priori ideological self-justification, but rather within the internal conceptualisation of international legal practice – in the way in which

[6] See chapter 12 in this volume.

[7] Chapter 3 in this volume.

[8] Amongst other writings on this experience, see M Koskenniemi et PM Eisemann, *La succession d'Etats : la codification à l'épreuve des faits* (Académie de droit international de La Haye, La Haye, Nijhoff, 2000) 1012 et M Koskenniemi et M Lehto, 'La succession d'Etats dans l'ex-URSS, en ce qui concerne particulièrement les relations avec la Finlande' (1992) AFDI 905–47.