



Introduction

The Law of International Lawyers

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‘Words are politics. When vocabularies change, things that previously could not be said, are now spoken by everyone; while what yesterday seemed obvious, can no longer be said at all. With a change of vocabularies, new speakers become authoritative’.¹ A few years ago, this is how Koskenniemi introduced his readers to an incisive critique of multidisciplinary scholarship. Koskenniemi’s emphasis on the political nature of words served a specific purpose, to warn international lawyers against the siren song of objectivity and neutrality that can be found in some schools in international relations today. However, the insight that speaking a language is a political act through which worlds are created or foreclosed transcends the specific context of current debates on multidisciplinary. For one, it also applies to the words of Martti Koskenniemi himself.

For decades, Martti Koskenniemi has not just been an influential writer in international law; together with a handful of other scholars² he has been nothing less than a game changer. After the publication of *From Apology to Utopia*, it became possible to speak of international law’s indeterminacy in ways that did not exist before. Another game-changing act was performed with *The Gentle Civilizer of Nations*. The book transformed the self-image of the discipline, pointing at the nineteenth century, elitist-cosmopolitan roots of the profession and giving rise to a large number of studies dedicated to the history of international law as a professional and colonial enterprise. A third game-changing move occurred when Koskenniemi turned his attention to the problem of functional differentiation, expert rule and managerialism in international law. In a relatively short period of time, the politics of fragmentation, the perils of managerialism and the pitfalls of instrumentalism moved centre stage in debates on international law. With, at the time of the publication of this volume, a new upcoming

book, it is likely that the world of international law will be redirected again, this time towards a study of the close connections between sovereignty and property, international and domestic law as well as law between the fields of law, politics, diplomacy and morality.³ Also the method chosen for the new book is likely to set an agenda for future research: a study of how, since the late middle ages up to the 1870s, individual jurists, theologians, philosophers, politicians and political scientists have used vocabularies of law to advance particular projects.

And indeed, with a change of vocabulary, new speakers became authoritative. While critical legal scholarship used to be a marginal enterprise in international law, it is now pretty much established as one of the ways in which international law can be studied. An illustration of the growing ‘mainstreaming’ of critical perspectives is the publication of a widely used textbook that adopts Koskenniemi’s critical approach as a starting point.⁴ Another indication is the slight unease within critical legal circles about their own success, which has spurred renewed reflections on the relation between power and critique.⁵ However, it is not just the critical stream that has become authoritative; it is also (and even more) specific persons that came to enjoy authority to speak. By now, Martti Koskenniemi has been established as an authority in international law, as evidenced by countless invitations to act as keynote speaker, his role in the United Nations, special issues being dedicated to his work⁶ and numerous references to his work in academic publications, almost as if an article on international law is incomplete without the invocation of the voice from Helsinki.

At first sight, the current popularity of Koskenniemi’s work may come as a surprise. After all, his work poses fundamental challenges to what Judith Shklar has called the ‘ethos of legalism’; an ethos that is still predominant among (international) lawyers today, including many of whom enthusiastically quote Koskenniemi’s work.⁷ Legalism, in Shklar’s account, is an attitude made up of four interrelated elements:⁸ (1) it views social relationships in terms of rights and duties as determined by more general rules; (2) it treats law as something ‘out there’, something that can be grasped through legal training and education; (3) it believes in the possibility to separate law from non-law (morality, politics, aesthetics etc.); and (4) it fears and fights arbitrariness. To underscore the latter point, Shklar affirmatively quotes De Tocqueville’s observation that lawyers, ‘if they prize freedom much, they generally value legality still more: they are less afraid of tyranny than of arbitrary power.’⁹ Koskenniemi’s work puts many of these elements into question. The idea that social relations

would be governed by objective and non-arbitrary rules that substitute power for reason is fundamentally challenged by his indeterminacy thesis of legal argumentation. Moreover, for Koskenniemi law is not ‘out there’ but rather ‘between us’. While his work knows many ruptures in topics, tones and arguments, there is one theme that runs through his oeuvre from the late 1980s until the present day, ‘without international lawyers, there would have been no international law’.¹⁰ Or, put differently, ‘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’.¹¹ Instead of treating law as something to be discovered through its sources or through naturally given categories, Koskenniemi refocuses attention to the ways in which argumentative structures, sensibilities, taboos, authorities etc. are constructed and contested in the professional field. Paradoxically, the focus away from international law as being ‘out there’ may also explain why Koskenniemi’s work (eventually) resonated within such a wide audience. After all, international lawyers recognize his world as their own. Koskenniemi’s work is about the things that international lawyers do, the grammar they use, the social worlds they inhabit, about the anxieties and hopes that drive the field, about the ways in which international lawyers reflect (or refuse to reflect) upon themselves as the ones that ‘think and make international law’.

The insight that international law is (also) the product of the imagination of international lawyers constitutes the starting point of this volume. The chapters in this book reflect the breadth of Koskenniemi’s oeuvre and thus vary widely in terms of substance, approach and political program. Yet, they all engage with the question what it means to make sense of the world through international law, and what it is to be an international lawyer. The chapters thereby also immediately speak to the work and person of Martti Koskenniemi, who has never set himself (totally) apart from the field he studies, critiques and defends. As a consequence, many of the oppositions, tensions and paradoxes that characterize the (international) legal profession somehow reappear in Koskenniemi’s reflections upon international law and his ideas about legal scholarship. Without making any claim to be exhaustive, we have identified three (overlapping) oppositions or tensions that run through different parts of Koskenniemi’s work from the late 1980s until the present day. None of the three are mere intellectual propositions; they reflect what international lawyers experience when they make interventions in the name of international law and they relate to some of the anxieties of contemporary international legal scholarship. Another way of considering them is as indicative of the

different ‘styles’ that are available to international lawyers. The relevance, force and meaning of these styles are different in different contexts and how they are put to use depends on the ‘politics, fears and passions’ of the individual lawyer.¹²

The *first* pertains to the complicated relation between the indeterminacy of international law and the ‘culture of formalism’. As Koskenniemi sets out in the epilogue to *From Apology*, international law is indeterminate because ‘it is based on contradictory premises and seeks to regulate a future in regard to which even single actors’ preferences remain unsettled’.¹³ As a result, any conceivable position can be defended in terms of international law.¹⁴ And yet, when Koskenniemi expresses sympathy for Wolfgang Friedmann’s stance in the 1966 debates on the US intervention in the Dominican Republic, it is precisely because Friedmann defends a legal mind-set, the reality of international law and the integrity of the legal profession. In this way, Friedmann expresses the anti-formalist style of legal argumentation that is at the heart of Koskenniemi’s culture of formalism. Moreover, when international law is under threat of liberal universalism, managerialism or certain forms of interdisciplinary scholarship, Koskenniemi defends it as the vocabulary to express injustices on a global scale, while characterizing the (international) rule of law as another ‘name for the external institutions that administer what is a moral-political project’.¹⁵ Here again, he links the culture of formalism to an anti-instrumentalist understanding of international law. Of course, there is no necessary contradiction between the indeterminacy thesis and the culture of formalism. In some important respects, lack of determinacy is rather a precondition for the idea of international law as a moral-political project that cannot be reduced to merely an instrument for higher purposes.¹⁶ Nevertheless, arguing about international law in terms of the indeterminacy thesis comes with quite different styles, anxieties and purposes than arguing about international law in terms of a culture of formalism. This is evidenced in the different chapters in part one of this volume, which take up different relationships between indeterminacy and formalism. Building on different intellectual traditions and adopting quite different styles of reasoning, formalism and indeterminacy are discussed by Gregor Noll, David Dyzenhaus, Nigel White, Jaye Ellis, Eric Posner and Jutta Brunnée & Stephen Toope.

The *second* is about the relation between structure and freedom; between the lawyer as construction and as constructor of the discipline. One of the aims of Koskenniemi’s work has been to lay bare the structural conditions under which international law is practiced. In *From Apology*

this took the form of an analysis of the linguistic deep structure or grammar of international legal language as the ‘condition of possibility’ of international legal argumentation. Any ‘competent’ international lawyer has to follow certain formal argumentative patterns in order to be heard. In later publications (including the epilogue to the reissued *From Apology*), this was extended to the economic, socio-political and professional structures that determine how international law is practiced and to explain why certain biases distort its application. Being an international lawyer is not only about obtaining a competence in formal reasoning, but also about being able to operate in a social environment that determines what can be said and how things can be said. At the same time, however, Koskenniemi’s work can be read as a continuous attempt to explicate where international lawyers appear as active subjects that make and remake the field of international law and legal decision making. None of the different styles available to international lawyers, Koskenniemi argues, provides ‘the comfort of allowing the lawyer to set aside his or her ‘politics’, his or her subjective fears and passions’.¹⁷ Despite the fact that international law is structured in terms of grammar, professional positions and power relations, it is the individual subject who has to perform her politics. In addition, the critical subject emerges as the one who bears responsibility for her choices and carries the burden of guarding international law’s ‘horizon of universality, . . . culture of restraint (and) commitment to listening to others’.¹⁸ This interplay between structure and individual agency, between the discipline and the disciples of international law is taken up in part two of this volume, in the chapters by Nicholas Rajkovic, Sahib Singh, Friedrich Kratochwil and Frédéric Mégret.

The *third* tension in Koskenniemi’s work pertains to the use of history in international legal argumentation and the self-understanding of international lawyers. As may be recalled, one of the driving forces behind Koskenniemi’s turn to history was the acknowledgement that the structuralism of *From Apology* rendered a rather static picture of international law.¹⁹ While the reader learned that international legal argument left room for radically different substantive arguments, she found little that helped her understand why individual lawyers came to adopt certain positions. Koskenniemi’s answer was a reconstruction of the history of the discipline through a study of the sentiments, anxieties and political struggles of individual international lawyers. The publication of *Gentle Civilizer* spurred renewed attention for the history of international law and the legal profession, both in the discipline as a whole and in the work of Koskenniemi himself. The turn to history also functioned as a corrective

to established accounts of international law, for example when it comes to the importance of the profession's self-awareness in the late nineteenth century. In this context, 'history' refers to what happened in the past, and one of the tasks of critical scholarship consists of deconstructing flattened, biased or simply mistaken accounts of the development of the course of international law. However, 'history' is never just a matter of recording past events. Invoking history is a political act that involves selection, storytelling and making interventions that could have implications for the present and the future. This is certainly true for Koskenniemi's use of history. *Gentle Civilizer* is not a neutral report of what drove international lawyers since the late nineteenth century; it is also an intervention in current debates on managerialism, multi-disciplinarity and the role of law in international politics. In similar fashion, the culture of formalism is not just a set of principles to live by in the future; it is also the articulation of a sensibility that Koskenniemi brought to life through his stories of international lawyers from the past. The use of history in international law will thus always be judged by both the past and the future; something that is reflected in part three of this book, in the chapters by Anne Orford, Samuel Moyn, Andrew Lang and Susan Marks and Liliana Obregón.

The three topics identified above are all rooted in Koskenniemi's personal (professional) experiences with international law. The impressive amount of literature, the various intellectual traditions and disciplines upon which his work is built;²⁰ all are mobilized to articulate intellectually what he experienced as lawyer, as advisor and as academic. His career has been formed by his time as diplomat for Finland in its International Law Division and UN Permanent Mission in New York (1978–94), the various Finnish International Court of Justice cases he was involved in, as member of the Administrative Tribunal of the Asian Development Bank (1997–2002), and as member of the International Law Commission (2002–6), where he led the drafting of the report on the fragmentation of international law. Informed by his experiences in practice, Koskenniemi tried to articulate and critically examine his concerns with the state of international law as a professional practice and an academic discipline. In David Kennedy, Koskenniemi found an intellectual sparring mate and ally to develop and articulate this critique. Meeting at a diplomatic cocktail party in Geneva in 1985, the practising lawyer that yearned for the academy (Koskenniemi) and the academic that was considering a career in practice (Kennedy) recognized in each other a similar sense that the international law field had lost a sense of professional self-awareness and intellectual spirit. Moreover, rather than leaving international law behind

they both decided to endeavour in making intellectual sense of ‘the consciousness of the establishment’²¹ and of the question why in their effort to settle doctrinal and theoretical dilemmas, international lawyers appeared to reproduce these dilemmas rather than resolve them. In the years after, Kennedy published his seminal *International Legal Structures* (1987) and Koskenniemi *From Apology to Utopia* (1989). Looking back on his seminal work after more than fifteen years, Koskenniemi explains one of the main reasons that informed the book as follows: ‘existing reflection on the field had failed to capture the experience I had gained from it through practice within Finland’s Ministry of Foreign Affairs, especially in United Nations contexts.’²² The self-proclaimed aim of the book at the time was to articulate, at a general level, the deep structure of the production of international legal arguments by professional lawyers. The ‘indeterminacy thesis’ that made the book so famous (and notorious) is thus no mere intellectual proposition about the nature of law. Rather, it is an explication of what it takes to engage in the practice of international law today.

This also explains why it would be a mistake to reduce *From Apology to Utopia* only to the thesis that international legal arguments cannot be sustained on their own terms. After all, professional practices are many things at the same time. A crucial aspect of the professional practice of international law is to stabilize the meaning of legal provisions, notwithstanding the lack of solid foundations in law. What is more, the legal profession tends to make international law appear as maybe not the only, but certainly the most civilized game in town. Problems that can easily be translated into the language of international law thus come with a comparative advantage to problems that are mostly perceived as belonging to the institutionally less well-developed fields such as ethics.²³ Illustrative in this respect is the difference between the enthusiasm of international lawyers for the newly developed field of international criminal law compared to the number of international law chairs, articles, master programs and PhD positions dedicated to world poverty. The professional practice of international law, in other words, is not just characterized by indeterminacy; it is also characterized by structural biases coming from different sources. The existence of such structural biases is what gives *From Apology to Utopia* its critical bite. The book not only articulates what it is to think international law, but also opens the professionals’ eyes to what it is to engage with international law:

Although logically speaking, all positions remain open ... in practice it is easy to identify ... moments where mainstream has consolidated or is only marginally threatened by critique. Professional competence in

international law is precisely about being able to identify the moment's hegemonic and counter-hegemonic narratives and to list one's service in favour of one or the other.²⁴

Enthusiasm about international law and the academy had not always been a driving force in Koskenniemi's life. In an interview Koskenniemi conveyed that he went to law school with the idea that this would allow him to 'rule the world' rather than for a real interest in international law as such, because he thought that lawyers rule the world.²⁵ After discovering that they did not, he went on to diplomatic school, with the same hopes and disappointments for the diplomatic profession. It was only in the multilateral treaty negotiations context that the real zeal for the practice of law emerged; a zeal that he later sought to articulate in his idea of 'the culture of formalism'. In *The Place of Law in Collective Security*, Koskenniemi narrates his own surprise that during the events of Iraq's invasion of Kuwait, all those diplomats with whom he worked at the UN and didn't appear to have much interest for the legal aspects of their practice before, suddenly became greatly enthusiastic about the legal status of various courses of actions that could be taken.²⁶ In his experience, this enthusiasm of his diplomat colleagues was not out of formalist naivety that law would bring the 'one right answer' nor realist cynicism that using legal language would camouflage the play of ideologies, power and interests behind a legalistic façade. Rather, during the Kuwait crisis, Koskenniemi felt a spirit of law as a working culture of the 'gentle civilizer'. Law's contribution does not lie in the substantive solutions it gives, but in the process of justification that it brings to the practice of diplomacy and in its assumption of responsibility for the policies that are chosen. Yet at the same time came a realization that the legal profession and multilateral diplomacy was little concerned with whether their professional successes also contributed to changing the lives of human beings. While skewing away from any grand theory of justice, Koskenniemi does press the point that lawyers should take responsibility for their substantive choices, as well as for the styles or methods of argumentation they adopt.²⁷ Central in his work is the view that law is not just about managing bureaucratic processes or deciding cases, but also 'to reflect upon ideal futures that contrast with present practices'.²⁸ He therefore directs his attention to lawyers to take the responsibility to understand law as a project directed at human flourishing; in the sense that 'law is meant to realize the happiness of human beings as social animals', law as the science of the flourishing of the human and cosmopolitan community.²⁹