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0521623111 - The Gentle Civilizer of Nations: The Rise and Fall of International Law

1870-1960

Martti Koskenniemi

Excerpt

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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).

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“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

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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

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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*.

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The most important exception to this was their support of official imperialism, as discussed in chapter 2 below. Until 1914, they did advocate the extension of Western sovereignty beyond Europe as the only organized way to bring civilization to their “Orient.” After the First World War, however, they started increasingly looking for internationalized solutions to colonial problems.

Finally, the recounting of the story about the “rise” and “fall” of international law seemed to me necessary not only because of what it might tell us of the profession as it was then but what it could say of it as it is now. I hope that these essays provide a historical contrast to the state of the discipline today by highlighting the ways in which international lawyers in the past forty years have failed to use the imaginative opportunities that were available to them, and open horizons beyond academic and political instrumentalization, in favor of worn-out internationalist causes that form the mainstay of today’s commitment to international law.² This is not to say that I should like to propose a return to the themes of academic or political controversy in which the protagonists of this book were once engaged. Return to “gentle civilizing” as a professional self-definition is certainly no longer plausible. But this is not to say that international lawyers could not learn from their fathers and grandfathers in the profession. Understanding the way they argued in particular situations, often in great crises and sometimes heavily involved as participants or even victims, provides a sense of the possibilities that could exist today. The limits of our imagination are a product of a history that *might have gone another way*. There is nothing permanently fixed in those limits. They are produced by a particular configuration of commitments and projects by individual, well-situated lawyers.

So although this book covers quite a bit of the same ground as the one I published ten years ago, the move from structure to history makes this a completely different work. Or almost does. For the play of apology and utopia is of course effective in the writings of the lawyers I discuss below and continues to account for the fact that they became highly regarded representatives of the profession. But I have consciously tried to downplay that aspect of their work, and to focus instead on the political and in some cases biographical context in which they worked and on the professional and political projects that they tried to advance through their

² Cf. also Martti Koskenniemi, “Between Commitment and Cynicism; Outline of a Theory of International Law as Practice,” in *Collection of Essays by Legal Advisors of States, Legal Advisors of International Organizations and Practitioners in the Field of International Law* (New York, United Nations, 1999), pp. 495–523.

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practice, on the struggles for power and position in which they were engaged, and on their defeats and victories.

III

The move from structure to history in the analysis of international law is thus the first ambition of this book. But to refer to “history” probably begs more questions than it answers. Lawyers – especially those with an interdisciplinary interest – should bear in mind that the grass is not necessarily any greener in the adjoining fields. Historiography, like sociology or philosophy, is at least as much riddled with methodological controversy, and uncertainty about premises, as law is. What *kind* of history, then, do the following chapters offer to the reader? Two alternatives had to be discounted at the outset. One was the grand history that would paint a canvas of “epochs” following each other under some metahistorical law about the workings of “culture” or “power” on the destinies of peoples or civilizations, patterns of creation, flourishing, and decline. There already were such histories and little could be added to them that would be new or interesting.³ Perhaps more importantly, they implied philosophical, methodological, and political assumptions that seemed hard to sustain. Already the identification of the relevant “epochs,” not to say anything about the ways in which they reduced a complex world into hierarchical blocs, following each other in a more or less monotonous parade headed by laws of interdependence, Great Power policies, or perhaps “progress,” seemed burdened with contestable assumptions about what was central and what peripheral, what valuable and what harmful in the past, and failed to address the question

³ The standard English-language introduction remains Arthur Nussbaum, *A Concise History of the Law of Nations* (Revised edn., New York, Macmillan, 1954). Like that work, most of the writing in the field has been undertaken by Germans. See particularly Wilhelm Grewe, *Epochen des Völkerrechtsgeschichte* (Baden-Baden, Nomos, 1984) recently published as *The Epochs of International Law* (trans. and rev. by Michael Byers, Berlin and New York, de Gruyter, 2000). Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (2 vols., Freiburg and Munich, Alber, 1958 and 1963), is a collection of citations, chronologically arranged to support the author’s sometimes idiosyncratic theses. Shorter recent introductory overviews are Karl-Heinz Ziegler, *Völkerrechts-geschichte. Ein Studienbuch* (Munich, Beck, 1994) and Antonio Truyol y Serra, *Histoire du droit international public* (Paris, Economica, 1995). Still impressive is Robert Redlob, *Histoire des grands principes du droit des gens depuis l’antiquité jusqu’à la veille de la grande guerre* (Paris, Rousseau, 1923). An extensive (though not exhaustive) bibliography is Peter Macalister-Smith and Joachim Schwietzke, “Literature and Documentary Sources relating to the History of Public International Law: An Annotated Bibliographical Survey” (1999), 1 *Journal of the History of International Law*, pp. 136–212.

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of narrative perspective. Moreover, having to pay attention to enormously difficult questions about the miracle of historical progression, or the nature of the “law” employed in such narratives, would have undermined my wish to focus on something much less ambitious and more immediately relevant – namely, how the profession ended up being what it is today. Such histories are reductionist in the sense that they, like the structuralism of my earlier book, flatten the work of individual lawyers into superficial decorations on the surface of the silent flow of periods into one another, the emergence and transformation of great ideas or legal principles.

I wanted to bring international law down from the epochal and conceptual abstractions. I wanted to examine the way it has developed as a career choice for internationally minded lawyers in the course of a relatively brief period, the experiences of which would still resonate in the lives of today’s international lawyers. It may be too much to say that international law is *only* what international lawyers do or think. But at least it is that, and examining it from the perspective of its past practitioners might enhance the self-understanding of today’s international lawyers in a manner that would not necessarily leave things as they are. Quite apart from such a practical concern, I also wanted to look beyond the commonplace view that there are single, homogeneous periods when “international law” has been either this or that. Like any social phenomenon, international law is a complex set of practices and ideas, as well as interpretations of those practices and ideas, and the way we engage in them or interpret them cannot be dissociated from the larger professional, academic or political projects we have. I wanted to articulate some of those projects, and thus to describe the lawyers as actors in particular social dramas. International law is also a terrain of fear and ambition, fantasy and desire, conflict and utopia, and a host of other aspects of the phenomenological lives of its practitioners. I also wanted to take a step in the direction of describing it in terms of their occasionally brilliant insights and (perhaps more frequently) astonishing blindness, the paradoxes of their thought, their intellectual and emotional courage, betrayals and self-betrayals.

For the fact is that although international lawyers were of course interested in the same phenomena in particular periods, they treated those phenomena from a variety of standpoints that reflected national backgrounds, political preferences, and personal idiosyncrasies. Although all inter-war lawyers were writing about the League of Nations, it would be completely wrong to assume that they wrote from

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a similar perspective – indeed, that there would have been an orthodox position about the League in the profession in the first place. Although the alternative positions were perhaps not so many – one could be either broadly “enthusiastic” about or “disappointed” with the League, or take a principled or a strategic attitude towards it – merely to describe those positions seemed still too “flat.” One needed to describe those positions in the context in which they were taken. For example, one could be “for” the League because one was a pacifist, because that suited the foreign policy of one’s *patria*, or in order to forestall attempts towards a more intrusive federalism in Europe, or any mixture of such reasons. In order to attain a credible description that accounted for unity as well as variety one needed to understand each position by reference to some sort of a contextual background from which it arose.

The opposite alternative would have been to abstract the larger context altogether and to write biographies of individual lawyers. This, too, is an old tradition of writing history in the profession, though it had fallen out of fashion in recent decades.⁴ The “realist” spirit was incompatible with the assumption that individual lives could have a significant effect on the grand course of international politics. However, the discredit into which “grand history” has more recently fallen as well as the changing political circumstances may be giving biographical history a new relevance. The recapitulation of the Western Canon in the field, as begun in the pages of the *European Journal of International Law*, follows naturally from the political changes since 1989. It may now (again) seem possible to describe the history of the field in terms of the progress of Western humanitarian liberalism from Vitoria to Gentili, Grotius to Vattel, Oppenheim to Lauterpacht.⁵ But whatever the value of such a biographical orientation, as method it seems no more credible than epochal history. It, too, reduces the field – this time to a projection of a few great minds – and fails to account for the external pressures to which the doctrines of those men sought to provide responses. Much of recent historiography emphasizes history as narratives. This seemed a much more useful perspective and a challenging one as well.

⁴ Cf. Albert Geouffre de Lapradelle, *Maîtres et doctrines du droit des gens* (2nd edn., Paris, Editions internationales, 1950); *Les fondateurs du droit international* (Intr. Antoine Pillet, Paris, Giard, 1904). Truyol y Serra, *Histoire*, also belongs largely to this group.

⁵ Cf. the Symposia in the *European Journal of International Law* on Georges Scelle (1990), 1 *European Journal of International Law* (*EJIL*), pp. 193–249; Dionisio Anzilotti (1992), 3 *EJIL*, pp. 92–169; Alfred Verdross (1995), 6 *EJIL*, pp. 32–115; Hersch Lauterpacht (1997), 8 *EJIL*, pp. 215–320; Hans Kelsen (1998), 9 *EJIL*, pp. 287–400.

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No doubt, interest in the historical aspects of the profession is increasing, even dramatically, as evidenced for instance in the launching of the *Journal of the History of International Law/Revue d'histoire du droit international* in 1999. The best new writing in the field emerges from a theoretical awareness of the difficulties in continuing doctrinal work as in the past without taking stock of the narratives with which the field has justified them and re-telling those stories so as to make methodological or political points. As elsewhere in the social sciences, Michel Foucault's work has been very influential in proposing a study of international law's past that would focus on discontinuities rather than continuities, the relationship between narratives and power as well as delineations of disciplinary autonomy so as to effect subtle maneuvers of exclusion and inclusion. One of the most remarkable feats in the discipline's self-construction has been its overwhelming Eurocentrism: so it is no wonder that much of that new work has concentrated in describing international law as part of the colonialist project.⁶ Chapter 2 makes a small contribution to those studies. But there are other exclusions and inclusions as well, some of which have to do with disciplinary struggles within the legal profession (international law's relations to private international law, or constitutional law, or public law generally), some between law and other areas of study, such as sociology or philosophy, some between professional activities (law – politics – diplomacy), others with the production or reproduction of more general cultural hierarchies. If all the protagonists in this book are white men, for instance, that reflects my concern to re-tell the narrative of the mainstream as a story about its cosmopolitan sensibilities and political projects: indeed to articulate precisely in what the limits of its horizon consisted. This should not, however, be read so as to exclude the possibility – indeed, the likelihood – that in the margins, for instance as objects of the administrative regimes developed by or with the assistance of international lawyers, there have been women and non-Europeans whose stories would desperately require telling so as to provide a more complete image of the profession's political heritage.

Thus the following essays are neither epochal nor biographical in the various forms in which such histories are usually written. They form a kind of experimentation in the writing about the disciplinary past in

⁶ Here I think especially of the new work by Antony Anghie, David Bederman, Nathaniel Berman, Anthony Carty, David Kennedy, Karen Knop, Outi Korhonen, Carl Landauer, and Annelise Riles.

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which the constraints of any rigorous “method” have been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession that plays with the reader’s empathy. The essays do not seek a neutral description of the past “as it actually was” – that sort of knowledge is not open to us – but a description that hopes to make our present situation clearer to us and to sharpen our own ability to act in the professional contexts that are open to us as we engage in our practices and projects. In this sense, it is also a political act. I hope that it does not treat its protagonists unjustly. But if it seems that it does, then I have Goethe’s ironic response to fall back on, namely, that it is the one who acts that is always unjust, and the one that merely observes, that is just.