Book Review


Those following contemporary debates concerning the UN mandate in Bosnia, the war against the Taliban regime in Afghanistan or US resistance against the ICC will regularly encounter arguments stemming from older sediments of international law – be it from the foundational era of the UN, the disputes relating to the League of Nations in the 1920s and 1930s or the foundational age of modern international law in the late 18th century.

Such arguments come with a specific historical complexion. They have engrained themselves deeply into the politics of States and peoples. The underlying conflicts remain present to a greater degree than what most of us wish to acknowledge. Wherever overlapping State borders or ethno-cultural boundaries produce conflicts, wherever war crimes demand punishment, wherever minorities request help by other States or invest in terror, and wherever superpowers intervene by force we shall find a struggle on international law. A ‘right’ is claimed or conjured, and the legal position of the adversary is denied.

This is why the history of international law is such a fascinating overlap of politics and law. Although weak in implementation and rhetorically abused, international law flows from modernism’s attempts to reduce the use of force, to craft procedures of conciliation, to mould individual and collective rights into binding documents and to institutionalize courts. According to Martti Koskenniemi, a Finnish lawyer, it is ‘the gentle civilizer of nations’. Using a contemporary history of science, his book recounts the epoch of international law, only some hundred years in duration, and part of a past that has only recently elapsed. Koskenniemi is interested in the European writers of international law, with their visions and insights as much as their blindness and fears. Rather than subjecting their positions to a ‘rational reconstruction’ for the ends of legal theory, he addresses them as statements of their era, relating them to their contexts in the history of ideas, politics and publishing. This requires much sensitivity and a comprehensive knowledge of European debates; although international law develops in a context of international communication, it remains entangled in the texture of national interests and habits of the mind.

Koskenniemi sets out by describing the new demand for international law, as it was repetitively articulated in the early 18th century. Old international law, cast as a twin of rational natural law of the 17th century, ceased to function adequately since the Vienna Congress. The metamorphosis of dynastic States into nation States gave a strong impetus to ‘internationalism’. Rail traffic opened the door to international conferences and world exhibitions. ‘Progress’ was endowed with pathos beyond question.
The Red Cross, the Olympic movement, pacifism and women’s movement emerged. What is more, so did institutes of international law, publishing journals in their discipline. Sceptics of international law disputed with its proponents. While the ‘civilized nations’ acquired colonies and subjugated peoples for the sake of CCC (Civilization, Commerce, Christianity), a minority of international lawyers became increasingly concerned with the legal regulation of imperialism and colonialism. Among international lawyers as a whole, however, a majority took a liberal position and regarded a ‘healthy’ nationalism as patently obvious. For these lawyers, it was perfectly normal to preach European superiority and to negate the legal capacity of ‘Negro chieftains’ with whom they concluded written contracts.

In doing so, Germans took different approaches than the French or the British. Having recently emerged and still suffering an inner lack of confidence, the German Reich insisted on its ‘sovereignty’ and assumed the role of a sceptic vis-à-vis international law. At the Hague conferences, it played a rather infelicitous and refraining role. It was only after World War I and ‘Versailles’ that Germany and Austria discovered the central role of a scientifically elaborated form of international law, and decided to found institutes endowed with related tasks. On some hundred pages, Koskenniemi unfolds a brilliant panorama of the German doctrine as it developed between 1871 and 1933, incorporating digressions on Austria and Switzerland. As much as individuals displayed their own specificities and characteristics, the mighty currents of politics and a meta-individual mental climate cast them into a typology. Schools emerged. One gathered around a central political idea (‘against Versailles’), another focussed on a conception of scientific theory (‘the Vienna school’), while some outsiders sought to further bolster pre-war pacifism.

The French concepts of international law between the Third and the Fourth Republic (1871–1950) is exposed in an equally sovereign manner. Its theorists were constrained by a diverse system of political relations, and followed different philosophical traditions. Unprejudiced, the lines of scientific positivism, a glorious national history and a sociological perspective (Durkheim, Duguit) were interwoven with normative conclusions in international law. The borderline between teaching and practising international law was less rigidly drawn, and the profession of the minister and the professor seemed compatible with each other. In retrospect, Georges Scelle leaves a specific impression: a liberal and a democrat, he invested his hopes into an institutionally balanced world state and sought to transmute wars into global-internal policing conflicts.

The third main segment of the book is devoted to Britain. At its centre, we find Hersch Lauterpacht (1897–1960), who emigrated in 1923 from Austria to Great Britain. Lauterpacht was a dominating figure, mediating between Victorian England and the ‘functional-pragmatic’ international law of the early nineteenth century. He appears as the great sage, who unified his Hapsburg and British experiences into a rational and optimistic vision of international law. In addition, he applied the casuistic thinking of common law methodically onto international law and was given the opportunity to draw on it as a judge.

Considering important names such as John Westlake, E.H. Carr, Julius Stone, Lassa Oppenheim and Georg Schwarzenberger, Lauterpacht was by no means a singular actor in British international law. By focussing on Lauterpacht, Koskenniemi is able to demonstrate and magnify how the dramatic global state of affairs and the fate of emigration affected a theoretical position in law (The Function of Law in International Community, Oxford 1933), and how Lauterpacht reacted to both in his