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0521623111 - 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*

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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

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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,

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