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# Martti Koskenniemi and the Historiographical Turn in International Law

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Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*. Cambridge: Cambridge University Press, 2001. Pp. 583. Hardback £85.00. ISBN-10: 0521623111

## Abstract

The *Gentle Civilizer of Nations* constitutes one of the most significant efforts to review the history of international law to be published in recent years. It is possible to say that Martti Koskenniemi's book represents much more than the final word on a subject; it is, in fact, the first word. For this reason, the book opens up many possibilities for a renewed debate in the field of the history of international law. The present article discusses seven controversial themes of the book in order to underline the strong and weak points of *The Gentle Civilizer of Nations*. The author concludes by proposing that we need to take seriously the historiographical turn that emerges in Koskenniemi's recent work and advocates that this should lead the discipline to a historical turn, where memory would play an essential role in its development.

## 1 Introduction

The cover of *The Gentle Civilizer of Nations* might evoke in the reader – as it did in this author – a feeling of desolation and hopelessness. The Cambridge University Press edition of the book by the Finnish international lawyer Martti Koskenniemi portrays on its cover the famous painting by Max Ernst entitled *Europe After the Rain*, dated 1942. This work depicts a completely devastated landscape and the profiles of what could be two women – whose faces are not visible – coming upon the scene. It is

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possible that Ernst's intention was to show the destruction of the European civilization and the consequences of a war caused by this civilization.

Despite the strength of feelings it evokes, there could not have been a more suitable cover image. The same feelings of desolation and hopelessness aroused by the cover are produced in the reading of the book, although it does offer a few paths for hope.

Koskenniemi is one of the most competent and erudite theorists of international law today. Despite the fact that for a long time his extensive body of work was read within only a limited number of intellectual circles – usually newstream enthusiasts, NAIL (New Approaches to International Law) affiliates or the post-modernists in international law – more traditional schools of thought in international law have begun to heed his ideas.<sup>1</sup>

Although the theory of international law is the focus of his work, it is very difficult to classify the theory that Koskenniemi develops. Some authors have tried to associate him with the critical legal studies movement.<sup>2</sup> His initial writings did in fact indicate a close connection with this movement. However, Koskenniemi himself has emphasized that such association would be a simplistic one.<sup>3</sup>

In considering his place in the so-called NAIL, in the newstream or in the post-modernist literature of international law, it is important to bear in mind that these are not formally established theoretical schools of international law, but rather groups of authors who share a critical view of the traditional doctrines of international law.<sup>4</sup> When understood in this broader sense, it is possible to claim that Koskenniemi is part of these movements.

Nonetheless, whether or not his initial works may be classified as belonging to a particular movement or school, *The Gentle Civilizer of Nations* seems to place Koskenniemi's work outside existing categories. As noted by Rein Müllerson, this book represents a significant evolution in relation to the Finnish author's earlier important volume on the theory of international law, namely, *From Apology to Utopia*. While in this earlier book Koskenniemi sought an intellectual authority to follow – hence the excessive number of references to works by, for example, Foucault and Derrida – *The Gentle Civilizer of Nations* signals a level of maturity in which originality and the discussion of his own ideas render the search for an authoritative intellectual figure less important.<sup>5</sup>

<sup>1</sup> One of the reasons for the ample dissemination of his work is the fact that Koskenniemi, instead of excluding himself from the most traditional institutions for the research and dissemination of international law, has tried to include himself in them. Examples of this are his election to the UN International Law Commission, to the *Institut de Droit International*, and the summer course he gave at the 2004 session of the Hague Academy of International Law.

<sup>2</sup> See Purvis, 'Critical Legal Studies in Public International Law', 32 *Harvard Int'l LJ* (1991) 81.

<sup>3</sup> Koskenniemi, 'Letter to the Editors of the Symposium', 93 *AJIL* (1999) 351.

<sup>4</sup> See Kennedy and Tennant, 'New Approaches to International Law: a Bibliography', 35 *Harvard Int'l LJ* (1994) 417.

<sup>5</sup> Müllerson, 'Review of Martti Koskenniemi's *The Gentle Civilizer of Nations: the Rise and Fall of International Law*', 13 *EJIL* (2002) 732.

More than this, *The Gentle Civilizer of Nations* led to – and this is the main thesis of the present article – a historiographical turn in Koskenniemi's work and has undoubtedly encouraged a historiographical turn in the field of international law as a whole.

The expression *historiographical turn* refers to a constant and growing need on the part of international lawyers to review (even to confirm) the history of international law and to establish links between the past and the present situation of international norms, institutions and doctrines. The historiographical turn also involves the need to overcome the barriers that separate the theory from the history of the discipline. The growing number of publications on the history of international law has allowed historiographical studies to increasingly influence the study of international law.

Specifically in regard to Koskenniemi, it was his own historiographical turn that paved the way for the writing of the book under review in this article. As he himself acknowledges, *The Gentle Civilizer of Nations* was written as a continuation of *From Apology to Utopia* and as a response to its critics who had argued that it is not enough to describe international law as a set of argumentative practices, as was done in *From Apology to Utopia*. Instead, it is necessary to understand why international lawyers take certain positions and support certain arguments at different times and places. This is the main objective of *The Gentle Civilizer of Nations*.

Among the various branches of historiography, Koskenniemi's work shares more common ground with the history of ideas or perhaps intellectual history.<sup>6</sup> His historiographical turn, however, does not seem to have distanced him from the conviction that the focus of a theory of international law must take into account an analysis of the argumentative chains seen through a historical perspective. In other words, according to Koskenniemi himself, international law is not simply what international lawyers do or think but, rather, it is the investigation of how international law as it was practised in the past can heighten the self-understanding of international lawyers today.<sup>7</sup>

The book is divided into an Introduction, a Conclusion and six chapters. Some of these chapters were previously published in different formats and fora: this is the case of Chapter 2, on international lawyers and imperialism; Chapter 5 discusses the work of Lauterpacht; and Chapter 6 investigates the influence of the work by Carl Schmitt and Hans Morgenthau in what is referred to as the 'turn to international relations'. Even though the author does not make any express reference, the ideas of Chapters 3 and 4 – on the role of the German and French international lawyers, respectively – had

<sup>6</sup> In fact, there is still a heated debate on whether intellectual history and the history of ideas have the same object of study. For a discussion on this topic, see, e.g., Chartier 'Intellectual History or Sociocultural History? The French Trajectories' (trans. J. P. Kaplan), in D. La Capra and S. Kaplan (eds.), *Modern European Intellectual History: Reappraisals and New Perspectives* (1982), at 13–46. In the present article, for eminently practical reasons, they will be treated as synonymous.

<sup>7</sup> The reference Koskenniemi makes to the idea that international law is what international lawyers do or think seems to result from a silent debate he engages in with himself. Ten years ago, he said: 'International Law is a projection of what international lawyers think and do': Koskenniemi, 'Introduction', in M. Koskenniemi (ed.), *International Law* (1992), at p. xxvii.

already been discussed, albeit in a simplified manner, in his article *Les doctrines du droit international dans le temps*.<sup>8</sup>

The present article intends to analyse the work of Koskenniemi through a decidedly historical lens, pointing out some of the main contributions of *The Gentle Civilizer of Nations* to the recent historiography of international law, as well some of its weak points. The central thesis of this article is that *The Gentle Civilizer of Nations* represents a historiographical turn in the work of Koskenniemi and paves the way for the same in the field of international law. However, the work of Koskenniemi does not sufficiently take into consideration several methodological aspects that should have been analysed or more thoroughly developed.

This article is divided into three sections. The first section will give a brief overview of the central premises of the work, emphasizing its historical-methodological aspects. The second section will highlight the strong and weak points of the book. Lastly, some concluding remarks will be made.

## 2 Structure of the Book

This book is based on what the author refers to as the two fundamental intuitions about the history of international law between 1870 and 1960. The first is the fact that previous historical analyses did not understand the radical transition that took place in international law between the first half of the 19th century and the emergence of a new self-awareness and enthusiasm that took over the community of international lawyers between the years 1869 and 1885. Such an intuition leads to one of the main (and most interesting) theses of the book: modern international law was not inaugurated with the publication of works by Grotius, Vattel and others, but instead, with the founding of the *Institut de Droit international* or the creation of the *Revue de droit international et de législation comparée*.

The second intuition leads to the conclusion that whatever emerged after 1869 had petered out by 1960. The result of this end (or decline) gave rise to a depoliticized legal pragmatism on the one hand, and the prevalence of imperialist political agendas in international law, on the other. Another goal of the book is to provide a historical narrative which allows a distinction to be made regarding the current situation of international law.<sup>9</sup>

Any book on the history of international law could opt for one of two possible approaches, as Koskenniemi asserts. The first approach would lead to a currently common meta-historical reflection on international law, which divides the field into

<sup>8</sup> Koskenniemi, 'Les doctrines du Droit International dans le temps', in Société Française pour le Droit International, *Le Droit International et le temps (Colloque de Paris)* (2001), at 35–47.

<sup>9</sup> Koskenniemi makes excessive use of the term 'profession' to designate the work of international lawyers. For a brief discussion of the use made by Koskenniemi of the term, see Simpson, 'Review of Martti Koskenniemi's *The Gentle Civilizer of Nations: the Rise and Fall of International Law*', 96 *AJIL* (2002) 995.

epochs.<sup>10</sup> The second would encourage biographical research on international lawyers, whose lives would be analysed individually. In recent years, a series of studies have adopted this approach.

Koskenniemi, however, rejects both of these approaches: the first because it leads to sweeping conceptual abstractions, which are usually reductionist in nature and which group together very different schools of thought into a small number of periods or epochs; the second is rejected because it only emphasizes the role of a handful of great minds without giving due attention to the external factors which invariably influenced the work of those authors.

Thus, *The Gentle Civilizer of Nations* adopts a different approach, the narrative of which demonstrates what international lawyers thought or did in a short period of time, without appealing to conceptual abstractions and epochs and without conducting simple biographical analyses of the authors. Nor is this narrative based on any closed methodology. Furthermore, this narrative does not preclude other possible ones. Even though the book's narratives, Koskenniemi claims, focus on the white European man – particularly German, French, English and North-American – it is also important that the history of women and non-Europeans be recounted in order to ensure a comprehensive understanding of the field's past.

Nonetheless, even when referring to the white (and European) man, some issues prove to be problematic. Koskenniemi does not propose to write a neutral narrative – writing about the past is always a political act. Political acts, however, can treat the leading players in an unjust manner.

Koskenniemi acknowledges that his work could be classified as belonging to the history of ideas. However, such an association could not embrace a conception of history as a monolithic or linear narrative of progress or as a theory about the causal determination of ideas. For this reason, the author expresses his preference for the term 'sensibilities' rather than ideas. To him, international law that rises and falls would not be (only) a set of ideas or practices, but a kind of sensibility that hints at ideas as well as practices and also includes wider aspects of political faith, perception of self and society, as well as social constraints in which international lawyers live and work.

The first chapter (The Legal Conscience of the Civilized World) intends to unequivocally demonstrate how the founding of the *Institut de Droit international* and the *Revue de droit international et de législation comparée* influenced the international lawyers of the 19th century to the extent that it reinaugurated international legal thought. What brought together the men who intended to carry forth this reinauguration was a shared *esprit d'internationalité*, which would foster the respect of peoples and nations

<sup>10</sup> Two recently published works, which share this common approach as well as other methodological premises, should be acknowledged in this context: the translation by M. Byers of W. Grewe, *The Epochs of International Law* (2000) and Steiger, 'From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law', 3 *Journal of the History of International Law* (2001) 180.

for common principles upon which to guide their mutual relationships, but also their own legal domestic systems.

The *esprit d'internationalité* emerges at a time of full-fledged European imperialist expansion into the rest of the world. International lawyers had both a marginal and an important role in the process of European expansion. It was marginal in the sense that European politics did not wait for the opinion of international lawyers before expanding international commerce, dividing Africa or determining capitulations. International law, in many aspects, was used only to justify the imperialist policies. On the other hand, the doctrine propounded by international lawyers made it easier – and in no way hindered – the consolidation of European expansion.

The objective of Chapter two (*Sovereignty: a gift of civilization: international lawyers and imperialism 1870–1914*) is to show the relationship between international lawyers and imperialism and how the *esprit d'internationalité* could be used in the context of such a relationship. Universal international law, as the product of a *Droit Public de l'Europe* to be disseminated to the rest of the world, was based on a contradiction brilliantly summed up by Koskenniemi in the following terms: 'In order to attain equality, the non-European community must accept Europe as its master – but to accept a master was proof that one was not equal'.<sup>11</sup>

In Chapter three, Koskenniemi offers a truly original narrative of the history of the German international legal thought after the emergence of the idea of a spirit of internationality, which took place until the 1930s – in other words, until the ascent of national-socialism. The title of the chapter is itself an indication of the message Koskenniemi wishes to transmit: *International Law as philosophy: Germany 1871–1933*. It seems like the greatest accomplishment of the chapter is its demonstration that the German thought in regard to international law was linked to a more encompassing reflection about the State and, as a result, about public law itself.<sup>12</sup> From the observations made by Koskenniemi, it is possible to understand why the theories about the relationship between international and municipal law became so popular among German lawyers. To view international law apart from or connected to municipal law would imply supplying a common scientific language to both branches, even if the

<sup>11</sup> Koskenniemi, *supra* note 1, at 136.

<sup>12</sup> Perhaps this is the reason current German international legal thought still makes use of a series of analogies taken from domestic public law. The near obsession of German international lawyers about having the United Nations Charter become the Constitution of the world is a perfect example of this: see Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *RCADI* (1993) 195; Frowein, 'Reactions by not Directly Affected States to Breaches of Public International Law', 248 *RCADI* (1994) 345; Simma, 'From Bilateralism to Community Interest in International Law', 250 *RCADI* (1994) 217; Faßbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia J Transnat'l L* (1998) 529. The idea of giving international law a constitutional character by means of the UN Charter was criticized by the author of *The Gentle Civilizer of Nations*: see Koskenniemi, "'The Lady Doth Protest too Much" Kosovo, and the Turn to Ethics in International Law', 65 *MLR* (2002) 160. At any rate, some German international lawyers have also already begun to criticize this idea. See Paulus, 'From Territoriality to Functionality? Towards a Legal Method of Globalization', at 5–10, available at <http://www.cpogg.org> ([www.cpogg.org/paper%20amerang/Andreas%20Paulus.pdf](http://www.cpogg.org/paper%20amerang/Andreas%20Paulus.pdf)).

conclusion was for a separation of legal orders – the solution advocated by dualism.<sup>13</sup> Philosophy emerged as a tool in the struggle to organize and theoretically explain the relationship among States. However, as Koskenniemi notes, the political debates in which the international lawyers participated always took a philosophical turn, but when philosophy was not able to provide an answer, there were no political institutions in which to find safe haven.

The *esprit d'internationalité* also had an impact on French international lawyers. Chapter 4 (International Law as Sociology: French 'Solidarism' 1871–1950) analyses its scope. French scholars believed in 'the essential determination of individuals by the moral or social laws of their collectivities'.<sup>14</sup> The state was an ephemeral body, at most an instrument or a means for the actions of the collectivity that surrounds the individuals. From this individualistic perspective, the state did not represent an ethical idea but a merely utilitarian one. In fact, the view of the state as an instrument led several international lawyers to think of international law in a federalist fashion. However, as Koskenniemi notes with insight, the French internationalist movement of this time firmly established the identity between French interests and those of the rest of the world. The relationship between the interests of France and those of the rest of the world, however, really represented an attempt to spread French values abroad.

Originally written for and published in a symposium organized by the *European Journal of International Law* on the work of Hersch Lauterpacht, Chapter 5 (Lauterpacht: The Victorian Tradition in International Law) seeks to explain the impact of this thinker on international legal discourse. The methodology adopted by Koskenniemi in this chapter is distinct from that adopted in the preceding chapters. Not only does the focus of the study shift towards the analysis of a single author, but the biographical tone becomes more relevant in the description of this author's work. The intellectual refinement associated with Lauterpacht, along with the defence and dissemination of Victorian values, successfully influenced international legal thought after World War II. As noted by Koskenniemi, *The Function of Law in International Community* espouses the view that judges should be responsible for filling the gaps left by norms through the application of general and moral principles of law. The important interpretative role assigned to judges would obviate the need for grand theories of international law. *The Function of Law in International Community* would therefore be the last book ever to be written on the theory of international law – a theory proposing the end of all theories, the accepted and sophisticated face of legal pragmatism.<sup>15</sup>

The last chapter (Out of Europe: Carl Schmitt, Hans Morgenthau, and the Turn to 'International Relations') of *The Gentle Civilizer of Nations* gives an account of the

<sup>13</sup> See G. Galindo, *Tratados Internacionais de Direitos Humanos e Constituição Brasileira* (2002), at 9–15.

<sup>14</sup> Koskenniemi, *supra* note 1, at 268.

<sup>15</sup> This, perhaps, is what led Anthony Carty to say that Lauterpacht is partly responsible for the demise of the theory of international law in the United Kingdom: see Carty, 'Why Theory? – The Implications for the International Law Teacher', in P. Allott *et al.*, *Theory and International Law: An Introduction* (1991), at 77.

history of the development of international law in the United States from the 1950s onwards. Koskenniemi's intention is to prove that international law was shadowed by the so-called turn to international relations. Paradoxically, it was two German legal scholars who had a decisive role in this process, contributing to the formation and moulding of the new discourse, which had initially intended to substitute the legal discourse about international reality:<sup>16</sup> Carl Schmitt and Hans Morgenthau. Despite the fact that Schmitt wrote countless books in the field of international law, his contribution was cast aside by international lawyers for many years. Nevertheless, his work had an undeniable influence on the works of Morgenthau. The effect of Schmitt's influence on the work of Morgenthau was to open the way for the creation of an academic field of study that would be more than just an offshoot of international law or an exotic variation of sociology or ethics. The chapter also brings forth an interesting analysis of how the theory of international relations in the United States was able to influence international lawyers – even though it attempted to deny international law – and to establish not Law's Empire but the Empire's Law.

In the last part of this chapter – perhaps the most interesting of the whole book – Koskenniemi sets out his own theoretical (or non-theoretical, as he would prefer) approaches to international law. According to Koskenniemi, international law should allow itself to be guided by what he refers to as a culture of formalism. In the legal world, the culture of formalism implies that jurists cannot forget one central issue: valid law. If it is true, as he asserts, that it is possible to extract something positive from Kelsen's work – the idea that it is not the judge's responsibility to delve into the sociological description nor into moral speculations – it is not possible to take the issue of valid law to certain levels, as Kelsen seems to have done. It is also necessary to proceed to a criticism regarding valid law since it can emerge in an informal manner (in the absence of the state) or be, in fact, unjust. In this regard, it is not possible to make the claim that the law becomes exclusively a matter of determining what is black or what is white (that is, valid or not valid), just as it is not possible to ignore the fact that formalism feeds off a culture of resistance to power, a social practice that involves responsibility, openness and equality, whose importance cannot be reduced to political positions of the competing parties. Koskenniemi acknowledges that distinct versions of formalism can be found among the group of men who, in 1873, were united by a common *esprit d'internationalité* or among German or Austrian professors.

The greatest and main task of formalism is to become formal and never succumb to the substantive. Using the original contributions made by the post-Marxist Argentinean political theorist Ernesto Laclau as a reference, Koskenniemi writes that, in his understanding, the universality preached by formalism is based on the idea of 'lack'; that is, the universality that such a culture purports to have is negative rather than positive.

<sup>16</sup> This thesis is not exactly new. The research of Marcus Faro de Castro, e.g., arrived at similar conclusions: see Castro, 'Westfalia a Seattle: A Teoria das Relações Internacionais em Transição', *Cadernos do REL* N° 20 (2001).



The culture of formalism seeks to understand not that which the particular can accomplish if it achieves universal status, but that which it lacks in order to become universal. This entails approaching the particular by using a negative, rather than positive, principle asking the following question: What do we lack? Only then can particularism be kept from turning into imperialism or oppression. That is the reason why Koskenniemi emphasizes that the universality that the culture of formalism seeks is not a fixed principle or a process, but a horizon of possibilities that is impossible to achieve. In this sense, universality functions as the means by which the many particularisms may be articulated.

This is a brief description of the structure of Koskenniemi's book.

### 3 A Critical Evaluation of *The Gentle Civilizer of Nations*

*The Gentle Civilizer of Nations* is undoubtedly a landmark in historiographical studies in international law. Koskenniemi demonstrates his unparalleled command over the sources with which he works and, moreover, the book is teeming with innovative and brilliant interpretations of events in the international scene or of the work of the international lawyers studied.

As mentioned in the Introduction, the following remarks are intended to draw attention to the strong, as well as the weak, points in Koskenniemi's work. The remarks focus on historical-methodological aspects and do not intend to exhaust the criticisms or the possibilities that *The Gentle Civilizer of Nations* opens to further historiographical studies of international law.

#### A *The Historiographical Turn in International Law*

*The Gentle Civilizer of Nations* represents a landmark in Koskenniemi's works and inaugurates a new approach in the field of international law as a whole. The recourse to the historiographical dimension for an understanding of the foundations of the field can be found in many of the works of the authors connected to the newstream.<sup>17</sup> However, when Koskenniemi says that *The Gentle Civilizer of Nations* should be read as a continuation of *From Apology to Utopia*, he establishes a more intimate connection between theory and historiography and this has many implications.

Theory and historiography have always existed in a state of tension. Historians have never felt at ease in adopting abstract models for the explanation of reality and theorists have never been comfortable with the particularism with which historians analyse past events. This tension was considerably accentuated by the influence exerted by positivistic ideas over the social sciences and historiography. This gave rise

<sup>17</sup> There is a strong link between history and the writings of many authors affiliated to the newstream. This link was strongly emphasized in the authoritative work of Deborah Cass: see Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', 65 *Nordic J Int'l L* (1996) 341.

to a mutual distrust between the sciences that based themselves on theoretical models, on the one hand, and those based on historiography, on the other.<sup>18</sup>

Given this context, it seems as though the historiography of international law should overcome two challenges which Koskenniemi, in his work, seeks to accomplish. Firstly, particularly after the Second World War, international law was infused with a pragmatic spirit<sup>19</sup> which relegated both historiographical analysis<sup>20</sup> and theoretical analysis to the background. This produced a legal discipline, as astutely pointed out by Koskenniemi, which allowed itself to be easily manipulated by diverse agendas due to the fact that the theoretical models used to explain the international legal system were outdated or fragile and because there was no self-awareness of the discipline concerning its own past.

The return to historiography and theory represents an attempt not only to strengthen the theoretical and historiographical perspectives on the field, but also an attempt to fill the void created by pragmatism, namely the void that resulted from ignoring the most recent developments in philosophy, anthropology, social sciences or even historiography. From this point of view, the privileged position that Koskenniemi and the newstream attribute to theory and historiography is commendable, though this does not exempt them from making mistakes.

The second challenge regarding the relationship between theory and historiography is that of overcoming the positivistic influence that divides theorists and historians. The field of international relations – which still maintains strong ties with international law (at least in its non-realist version) – is proof of the concrete possibility for closer ties between the two areas. Several authors have attributed the distance between historiography and the theory of international relations to the pronounced positivistic influence on the field of international relations.<sup>21</sup> Initially, theory and history could be brought closer together by overcoming the positivistic paradigm and identifying the common ground shared by historians and theorists. In an authoritative and erudite work, Thomas Smith investigated the ties between historiography and theory in the works of the main 20th-century scholars of international relations and concluded that a marked division should not endure. According to Smith:

historical work should, in epistemology, inhabit a middle ground between naïve chronicle and pure subjectivism. In method, it should abandon the treasure-house view of history in favor of greater reflection and research. In place of trying to distill the essence of politics from history, theorists might wade deeper into history's complexities. A more supple conception of theory is

<sup>18</sup> For this discussion, see, e.g., Gaddis, 'History, Science, and the Study of International Relations', in N. Woods (ed.), *Explaining International Relations since 1945* (1996), at 32–48.

<sup>19</sup> See, especially, Purvis, *supra* note 3, at 81–127 and Kennedy, 'A New Stream of International Legal Scholarship', 7 *Wisconsin Int'l LJ* (1988) 1.

<sup>20</sup> Hueck, 'The Discipline of the History of International Law – New Trends and Methods on the History of International Law', 3 *Journal of the History of International Law* (2001) 200.

<sup>21</sup> To mention only a few examples: Kennedy-Pipe, 'International History and International Relations Theory: a Dialogue beyond the Cold War', 76 *Int Affairs* (2000) 741; B. Buzan and R. Little, *International Systems in World History: Remaking the Study of International Relations* (2000); Armitage, 'The Fifty Years' Rift: Intellectual History and International Relations', 1 *Modern Intellectual History* (2004) 98.

also in order. Theory should seek as much light as possible, and avoid a monolithism that flattens diversity and closes off ideas. For the ancient Greeks, theory meant considering, contemplating, or speculating outside of fixed forms of thought. In this vein, theorists might reconsider involuted theory, and instead relax their scientific claims and nomothetic judgments, and tether their ideas closer to the ambiguities of the material. Oakeshott often said that a 'conversational' style of theorizing was more fruitful than rudely juxtaposing truth claims.<sup>22</sup>

There is no question that Koskenniemi's work significantly narrows the gap between theorists and historians of international law.

### ***B International Law and the Linguistic Turn in Intellectual History***

Koskenniemi himself emphasizes that his work is an investigation in the field of the history of ideas. His objective is to understand what the international lawyers of a defined period of time (1870–1960) thought and how they acted. However, he spends very little time discussing the methodological tools (or style tools, as he would most likely prefer<sup>23</sup>) of the area of the history of ideas or of intellectual history that he will use. This has a few implications for his work.

Intellectual historians have maintained an open channel of communication with the fields of linguistics and philosophy of language since the 1960s. As a result of such communication there has been a linguistic turn in the studies of intellectual history – which has also affected historiographical studies in general.<sup>24</sup> The influence of the methods used by intellectual historians can already be discerned in many studies about the history of law in general. William Fisher III, in an interesting study on the influence of the methods of intellectual historians on law historians, identified four groups or schools of thought in intellectual history that have been used by law historians (structuralism, contextualism, textualism and new historicism). Regardless of whether or not authors follow these schools implicitly or explicitly, the fact is, as Fischer III demonstrates, there is room for the incorporation of new discussions of intellectual history into law and, specifically, into international law.

The methodological options taken up by Koskenniemi largely ignore the debates that have been held in the field of intellectual history in recent decades. The only reference made, albeit indirectly, to this debate is when he subscribes to the concerns expressed by Foucault.<sup>25</sup> This does not, however, exhaust the debate on methodology that Foucault directs towards intellectual history. Nor do historians view Foucault's work with a favourable eye, but then again nor did Foucault feel comfortable among

<sup>22</sup> T. W. Smith, *History and International Relations* (1999), at 183–184.

<sup>23</sup> For the distinction between method and style in Koskenniemi, see Koskenniemi, *supra* note 4, at 351–361.

<sup>24</sup> Jay, 'Should Intellectual History Take a Linguistic Turn? Reflections on the Habermas-Gadamer Debate', in La Capra and Kaplan, *supra* note 7, at 86–110.

<sup>25</sup> In a more recent work, Koskenniemi seems sympathetic towards the propositions of the so-called Cambridge School of the History of Political Ideas – which has almost nothing in common with Foucault's structuralism. See Koskenniemi, 'Why History of International Law Today?', 4 *Rechtsgeschichte* (2004) 61, at 64–65.

historians.<sup>26</sup> One of the criticisms commonly made of Foucault by professional historians was that his command of the sources was weak, which caused him to make mistakes when placing the data he collected within the correct historical context.<sup>27</sup>

The fact that Koskenniemi does not give due consideration to the methodological debate of intellectual history and its specific impact on the history of law does not indicate his affiliation to one of the branches. What is meant is that a thorough discussion of these branches would give greater methodological depth to *The Gentle Civilizer of Nations*, making it more susceptible to and allowing a more comprehensive debate in the field of international law.

### C Rationality in Context

Even though, as Müllerson has already noted, the more recent works by Koskenniemi indicate an expanding gap between his work and that of certain authors, such as Foucault or Derrida, Koskenniemi can still be considered an international lawyer favourably disposed towards post-modernist movements. In this sense, it is possible to discern a dwindling enthusiasm for the idea that rational criteria are capable of explaining reality. As proof of this, one has only to think that one of the issues that drew attention to him was precisely his – extremely astute, it must be noted – criticism of rationality and objectivity in international legal discourse.<sup>28</sup> The criticism directed towards rationality interferes with the very methodology adopted in *The Gentle Civilizer of Nations*. Koskenniemi seems to have no misgivings in using terms such as ‘intuition’ instead of ‘hypothesis’ – as perhaps a more rigorous scientific discourse would deem necessary – or ‘sensibility’ and ‘credo’ in lieu of ‘ideas’ to develop his narrative on the history of international law between the years 1870 and 1960.

It is undeniable, because men are not purely rational beings or because rationality is a choice that can conceal interests that exclude certain segments of society, that many of the promises contained in a rational scientific discourse cannot be realized. Nonetheless, it should be noted that many individuals have produced intellectual work based on the premises of such a discourse. Furthermore, as Cass Sunstein has pointed out in the course of his description of some of the misuses that philosophy has been put to, there are many philosophers who believe that emotions possess important cognitive dimensions, or even represent a form of cognition, demonstrating their belief that many emotions are based on value judgments. However, a democratic society often ignores emotional aspects because they are considered overly parochial. Such an exclusion might not result from a mistaken distinction between reason and emotion, but instead might emerge from the idea that certain institutional constraints should be in place to limit the actions of human beings occupying certain positions.<sup>29</sup>

<sup>26</sup> Noiriell, ‘Foucault and History: the Lessons of a Disillusion’, 66 *The Journal of Modern History* (1994) 547.

<sup>27</sup> Ruppert, ‘Divinatio et eruditio: Thoughts on Foucault’, 13 *History and Theory*, (1974) 191.

<sup>28</sup> The first chapter of *From Apology to Utopia* is completely devoted to objectivity: see M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), at 1–51.

<sup>29</sup> Sunstein, ‘On Legal Theory and Legal Practice’, *Nomos XXXVII* (1995) 272.

If that is the case, how, one might ask, is it possible to analyse the sensibility of many authors in regard to international law if they seem to single-mindedly seek to remove any trace of irrationality (and objectivity) from their work? How is it possible, for example, to ascertain if an author such as Jellinek was 'sensitive' or not to the *esprit d'internationalité* if Koskenniemi himself says that he based his work on the unproven assumption that there was an intrinsic rationality in the European political order which explained why the freedom of state self-legislation would not lead to anarchy or imperialism?

Two counterarguments may be presented in relation to the preceding paragraph. First, deference to rationality does not necessarily preclude deference to sensibility. Second, even if certain authors try to base their analyses purely and exclusively on rationality, such an endeavour is virtually inconceivable as it is always possible to discern ways in which the author acted irrationally when drafting his work – which sensibility moved him, for example. Such counterarguments could be further developed if it were not, as it were, a work about the history of a legal discipline.

In an influential article published in the 1960s, Quentin Skinner pointed out – in a direct attack against those subscribing to the textualist method in the history of ideas – that analysing the past with a contemporary outlook can transmute history into mythology.<sup>30</sup> Nothing can prevent a specific analyst from doing so, but when he does proceed in this manner, he is going outside what constitutes a strictly historiographical field. At this point, it is necessary to draw an essential distinction to allow a better understanding of the work undertaken by historians. A non-historian intellectual is not concerned with what an analysed author meant when he said or wrote something, but rather with what that which was said or written means today. The historian, on the other hand, is interested in the extent to which the use of words by a certain author coincides with the use made of the same words by his interpreter in the present.<sup>31</sup> It is not a matter of acknowledging that there are well-known or undisputed historical facts. The criticism directed to factual history, which focused especially on the positivistic influence on historiography, has already established this. It is, instead, a matter of placing the interpretation of the past in its correct context, i.e., the past, since the historian's foremost duty is to avoid transforming the past into a mere reflection of the present.

When Koskenniemi uses the terms 'intuition', 'sensibility' or 'credo' he is not trying to establish that the international lawyers he studies thought of reality in such terms. In other words, he does not try to persuade the reader that this terminology was used by the international lawyers he studies. In fact, such terms could have been part of their vocabulary or maybe these authors thought of them differently,<sup>32</sup> but,

<sup>30</sup> Skinner, 'Meaning and Understanding in the History of Ideas', in Q. Skinner, *Visions of Politics. Vol. I: Regarding Method* (2002), at 57–89.

<sup>31</sup> Pocock, 'Languages and their Implications: the Transformation of the Study of Political Thought', in J. G. A. Pocock, *Politics, Language and Time: Essays on Political Thought and History* (1989), at 7.

<sup>32</sup> For a discussion regarding the possibility of authors having thought of certain concepts even if they did not have the opportunity to express them in writing, see Prudovsky, 'Can We Ascribe to Past Thinkers Concepts They had no Linguistic Means to Express?', 36 *History and Theory* (1997) 15.

whatever the case, it is unclear since Koskenniemi does not present strong arguments to either prove or disprove this. As J. G. A. Pocock said, ‘a heuristic construction does not become a historical hypothesis until it is reworded in such a form that it can be tested by the rules of historical evidence’.<sup>33</sup>

At this point, Koskenniemi’s work distances itself from the field of historiography to enter the realm of criticism against the legal doctrines of the past.

### *D Continuities, Discontinuities and the Esprit d’internationalité*

Another methodological shortcoming that can be identified in Koskenniemi’s work is his analysis of the origins of the *esprit d’internationalité*. The thesis put forth by Koskenniemi can be considered, at the very least, extreme. Unlike the vast majority of authors, he claims that international law emerged in the second half of the 19th century – at least international law as it is understood today. From the perspective of the history of ideas, Koskenniemi aims to prove that the second half of the 19th century is noteworthy because it marks a discontinuity in discourse in relation to the international law practised in previous periods. It is well known that the work of Michel Foucault is characterized by his attention to historical discontinuities. In particular in *The Archeology of Knowledge*, Foucault seeks to demonstrate how the traditional history of ideas placed an emphasis on the continuities, creating a false sense of coherence in scientific discourse. One of the roles of archeology would be to unveil the discontinuities of the discourse and offer a less distorted view of the development of scientific discourse. As already noted, Koskenniemi expressly acknowledges that his work is informed by the idea of discontinuity developed by Michel Foucault. But it is possible to direct a criticism towards Foucault, which also seems pertinent to *The Gentle Civilizer of Nations*.

Foucault criticized the traditional history of ideas for placing the continuities outside the realm of discourse, relegating the analysis of discontinuities to a marginal role. His project, in the *Archeology of Knowledge*, was to situate both the continuities and the discontinuities within the same realm of discourse.<sup>34</sup> However, in his veritable ‘obsession’ for discontinuities, Foucault himself seems to have strayed from his original project.<sup>35</sup> In other words, Foucault emulated the traditional history of ideas in its treatment of continuities: he placed the discontinuities outside the realm of discourse.

The same problem can be identified in Koskenniemi, at least from the point of view of the role of the historian of ideas. He accepts, as an *a priori* fact, the existence of an *esprit d’internationalité* and does not earnestly strive to prove that this spirit did not

<sup>33</sup> Pocock, *supra* note 32, at 31. This seems to be the understanding also of Mark Bevir when he analyses the problem of tradition. According to Bevir, the existence of a tradition ‘depends on the adequacy of our understanding of the beliefs and practices we classify as part of them, not on the principle by which we classify these beliefs and practices’: Bevir, ‘On Tradition’, 13 *Humanitas* (2000) 46.

<sup>34</sup> M. Foucault, *The Archeology of Knowledge* (trans. A. M. Sheridan Smith) (1972), at 174–175.

<sup>35</sup> Poster, ‘The Future According to Foucault: The Archeology of Knowledge and Intellectual History’, in La Capra and Kaplan, *supra* note 7, at 151.

already exist.<sup>36</sup> The problem is not to ascertain if such a spirit emerged, but if it is a result of an extreme breach. Here, he does not seek to analyse the discontinuities as breaches in continuity, but inverts the order to find discontinuities without opposing continuities.

When Koskenniemi proposes a breach in the historiography of international law – emphasizing a discontinuity in the second half of the 19th century – he takes for granted, and thus does not establish this in a clear and specific way – the distinctions between the international lawyers before and after the emergence of the *esprit d'internationalité*. For example, he does not detain himself on the analysis of authors of the first half of the 19th century. Moreover, Koskenniemi presupposes that this discontinuity is associated with a sudden breach. Could not there have been any international lawyers advocating ideas similar to those championed by the group led by Gustave Rolin-Jacquemyns at the same time as them or even before them?

### *E History as Narrative*

Koskenniemi maintains that his work is based on the perspective of history as narrative. However, he does not expound on this topic in a satisfactory manner. The absence of a clear explanation regarding this aspect gives rise to a confusion about the meaning that Koskenniemi ascribes to the term 'narrative'.

The notion that historians cannot limit their work to verifying facts that took place in a specific period in the past has been gaining way in recent years.<sup>37</sup> The view that the past would have an objective existence as a story waiting to be told would be misleading, especially since the interpretation of history is affected by the passage of time<sup>38</sup> – Thucydides' interpretation of the Peloponnesian War differs from a contemporary interpretation of the Peloponnesian War not only because of the different characteristics of the interpreter, but also due to the temporal proximity or distance to it.

But the criticism directed to the existence of historical facts fixed in time or to historiographical objectivity has led many authors to adopt the view of history as literature.<sup>39</sup> Hayden White is one of the foremost representatives of this view. According to White, no matter how much effort a historian makes, his narrative of the past will always be based on a literary model. In order for the historian to convey meaning to his history, he must always, either implicitly or explicitly, resort to literature.<sup>40</sup>

<sup>36</sup> Robert Cryer had already noticed this when he said: 'Koskenniemi bases his argument on the fact that the Rolin's 1868 manifesto sought to break from that which went before, and did not cite earlier scholarship': Cryer, 'Déjà vu in International Law', 65 *MLR* (2002) 935.

<sup>37</sup> See Skinner, 'The Practice of History and the Cult of the Fact', in Skinner, *supra* note 31, at 8–26.

<sup>38</sup> See Roth, 'Narrative Explanations: the Case of History', 27 *History and Theory* (1988) 1.

<sup>39</sup> As Thomas Smith has already pointed out, the treatment of history as literature is not new to historiography. It was already possible to discern views in this sense in the nineteenth century: see Smith, *supra* note 23, at 160.

<sup>40</sup> See, e.g., White, 'The Question of Narrative in Contemporary Historical Theory', 23 *History and Theory* (1984) 1.

Besides White, many historians have taken a view of history as literature to the extreme so that, often times, the telling of the past has muddled the boundaries between history and fiction.

However, one must note that the advocates of history as literature have their own interpretation of the meaning of the word 'narrative'. It is important to recall that the term is used, also by mainstream historians, to denote a specific kind of explanation, peculiar to historiography. Historians who distance themselves from the post-positivistic paradigm, for example, have attributed an important role to narrative, distinct from the role ascribed to it by the advocates of history as literature, aiming to maintain an epistemological legitimacy in the narrative.<sup>41</sup> Other historians, based on rational criteria, have used certain typically allegorical elements to explain the peculiar discourse of historiography, without establishing the identity between history and literature.<sup>42</sup>

At any rate, and this should be emphasized, the use of the term 'narrative' is far from being undisputed and the discussion regarding its meaning is one of the topics that has sparked one of the most important controversies among historians. As has already been mentioned, it is widely known that Koskenniemi harbours intellectual affinities for the most diverse post-modernist schools of thought. Given that the view of history as literature is not unanimously supported by post-modernist authors, and much less by the mainstream of historiographical thought, what does Koskenniemi mean when he says he is seeking to emphasize history as narrative? He does not explain whether he does or does not use the methodological tools employed by those who advocate history as literature in his own narrative of the rise and fall of international law.

### *F Selection of Important Authors and Geographical Contexts*

Koskenniemi mentions that one of the problems in studying the history of international law from a biographical point of view is that, in doing so, attention is paid only to what the great masters of the discipline thought and did. Thus, the result would be a canon that cast aside the work of supposedly *lesser* international lawyers. Despite this criticism, *The Gentle Civilizer of Nations* does not devote attention to the work of those lesser authors and, in fact, even very important authors are disregarded.

In his analysis of the German and French international lawyers, emphasis is given to the great names in international law. Minimal importance is ascribed to the few *lesser* authors studied, when they are at all studied. But even authors of crucial importance are ignored, including, for example, Joseph Kunz, to whom only the most perfunctory mention is made. In the case of France, the disregard for important names reaches the ranks of Gilbert Gidel, one of the main experts in the Law of the Sea of the 20th century, and Yves de La Brière, an important international lawyer

<sup>41</sup> Bevir, 'Narrative as a Form of Explanation', 9 *Disputatio* (2000) 5.

<sup>42</sup> Jay, 'The Textual Approach to Intellectual History', in M. Jay, *Force Fields: Between Intellectual History and Cultural Critique* (1993), at 165.



with affiliations to natural law and to the Catholic doctrine in international law. But the greatest problem associated with the absence or limited treatment of these authors is the lack of a standard for the inclusion or exclusion of the work of these authors from the analysis. Certain authors need not be mentioned – Koskenniemi's work is sufficiently erudite to allow this. However, it would be necessary to explain how the important authors are distinguished from the lesser ones.

The case of England is even more questionable despite the fact that Koskenniemi does not set out to analyse, in Chapter 5, British international lawyers in general, but only Lauterpacht and the members of his inner circle. Nonetheless, an analysis of the *esprit d'internationalité* should necessarily take into consideration the most influential international lawyers of the first and second halves of the 20th century, including Arnold Duncan McNair, James Brierley, Humphrey Waldock and T. E. Holland. These international lawyers had a decisive role in either the perpetuation of the *esprit d'internationalité* or in its demise.

The absence of a specific chapter on Italian international lawyers is also questionable. As Robert Cryer has already noted, it is inconceivable that any narrative covering the developments of the field between the years 1870 and 1960 could omit a discussion, even if in passing, of the influence of Dionisio Anzilotti on the theory or practice of international law.<sup>43</sup> There are yet other relevant Italian scholars, such as Gabriele Salviole and Giorgio Balladore Pallieri, whose importance to the period studied in *The Gentle Civilizer of Nations* is clear, but who were, nevertheless, ignored.

The same can be said with regard to international lawyers of other countries, such as The Netherlands (Hugo Krabbe and Jan Verzijl), Belgium (Charles de Visscher and Paul de Visscher) and Switzerland (Paul Guggenheim and Georg Schwarzenberger), not to mention North American international lawyers (James Brown Scott, Philip Jessup and Elihu Root), to whom only brief reference is made, if at all. The history of international law was also charted by the white European men of countries such as the Netherlands, Belgium, Switzerland, Spain.

It is true that throughout his book, Koskenniemi does mention the work of authors who were not from Germany, France or England. This, however, is done with no regard for national origin. Perhaps this demonstrates the limitations of an approach based on geography,<sup>44</sup> because, as Koskenniemi himself suggests, the *esprit d'internationalité* was not contained within national borders. As he has said in a more recent study: 'The men who set up international law as a professional (instead of an academic) enterprise, distinct from diplomacy, history, and natural law, were not internationalists. They were cosmopolitans: they had little faith in States and saw much hope in increasing contacts between peoples'.<sup>45</sup>

<sup>43</sup> Cryer, *supra* note 37, at 941.

<sup>44</sup> *Ibid.*, at 940–941.

<sup>45</sup> Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', 35 *NYU J Int'l L and Politics* (2003) 473.

## G Culture of Formalism

It seems undisputed that one of the central parts of the book is that in which Koskenniemi devotes his attention to what he calls the culture of formalism. He attempts to bring the expression back into use, given that it was often misunderstood or even under-comprehended by the few people willing to accept it. In 1929, Hans Kelsen was already pointing out that the term ‘formalism’ was not used with the same meaning by those who had adopted it in their vocabulary. In fact, Kelsen suggests that the accusation that the Pure Theory of Law was formalistic tended to be part of a strategy of invalidation through rhetoric, with no scientific basis. This frustrated the Austrian legal scholar no end since it was precisely the scientific arguments that the Pure Theory of Law aimed at emphasizing in the construction of a General Theory of Law.<sup>46</sup>

Even though some people have been surprised by Koskenniemi’s defence of the culture of formalism, especially because of his acerbic criticisms of the circularity of the international legal argument in *From Apology to Utopia*, formalism has been referenced in his work before. In 1991, he made himself clear regarding the concept of statehood as a line of defence against particularisms becoming universal and leading to tyranny – a concern, it must be noted, that is central to the thought of the later Laclau and which Koskenniemi takes as a reference. Koskenniemi thus expressed himself:

It is true that as a bundle of legally significant competences, statehood receives meaning only through the perspective of substantive notions of the good life. But this does not mean that statehood should – or could – be fully overridden by any one such notion. On the contrary, statehood functions as precisely that decision-process which tackles the problems of multiplicity of ideas and interpretative controversy regarding their fulfillment. Its very formality intends to operate as a safeguard so that these different (theological) ideals are not transformed into a globally enforced tyranny.

Thus there is reason of international lawyers to continue to take statehood seriously. A law of sovereign equality may seem odious in throwing an equally non-interventionist veil over dictatorial and democratic regimes. Yet there is no guarantee that dispensing with the safeguards which support today’s distribution of power in national communities will lead to a more acceptable global redistribution. Absent a universally shared substantive faith, the very agnosticism of statehood is the best reason for upholding it – while allowing political struggle to continue in more piecemeal, tentative fashion.<sup>47</sup>

The main issue is not to establish Koskenniemi’s support for a culture of formalism before the publication of *The Gentle Civilizer of Nations*, but instead to understand whether or not he currently accepts a strong or a weak strain of formalism. When reference is made to scholars who support formalism, the more appropriate question is not ‘formalism or not?’, but instead, ‘what degree of formalism?’<sup>48</sup> Just as those who

<sup>46</sup> Kelsen, ‘Legal Formalism and the Pure Theory of Law’, in A. Jacobson and B. Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (2000), at 76–83.

<sup>47</sup> Koskenniemi, ‘Theory: Implications for the Practitioner’, in Allott *et al.*, *supra* note 16, at 42–43.

<sup>48</sup> Sunstein, ‘Must Formalism be Defended Empirically?’, 66 *U Chicago LR* (1999) 640.

oppose formalism must concede to formalistic theories in many respects, the formalists must constantly fall back on formally unorthodox formulas. The problem in Koskenniemi's book is that his advocacy for formalism does not elucidate the degree of formalism accepted. He is more concerned, for example, with separating the idea of formalism from the idea of the rule of law than with explaining the limitations and shortcomings of formalism. He also ignores a central issue, peculiar to international law: how to defend formalism, given that the legal framework is more and more inclined, for example, towards informal dispute resolution?<sup>49</sup>

#### 4 Conclusions (*Anamnesis* and International Law)

Andreas Paulus has already pointed out how the post-modern doctrines of international law attempt to rewrite the past due to the failure of the international legal system – which would hinder a view of the future.<sup>50</sup> In this sense, perhaps *The Gentle Civilizer of Nations* could also be included in this movement of criticism of the past due to the scarcity of options open to the field of international law for the future. But there seems to be a more in-depth explanation for this movement which can be identified in Koskenniemi's work, as well as in the work of other post-modern authors of international law.

The post-modern doctrines in international law have always been critical of the rationalistic concept that conditioned ways of thinking about the law and its legal institutions for over 200 years.<sup>51</sup> For reasons whose explanation lies outside the scope of this article, this specific kind of rationality (which will be referred to as enlightened reason) granted memory an unimportant role in the definition of its own constitutive dimension. Nor is it a reference to the Platonic doctrine of *anamnesis* – which uses memory as a means, with help from the maieutic method, to reach a previously known truth.<sup>52</sup> The possibility of manipulating technology to the point of allowing the complete destruction of the human race, the atrocities committed in Auschwitz or the economic oppression of millions of people, especially in the developing countries, are all examples that challenge the type of reason that assigned memory a minor role or to the type of reason that acknowledged the importance of memory, such as the Platonic doctrine of *anamnesis*, but only as a means by which to allow access to pre-established truths.

The rise of enlightened reason encouraged the thinking of historiography on different bases, unlike any and all previous scientific formulas, but it also fostered a way of thinking that was completely detached from the past. For this reason, it became more convenient for Western thought to view man in abstract terms rather than to view

<sup>49</sup> Merrills, 'The Means of Dispute Settlement', in M. Evans (ed.), *International Law* (2003), at 553–554.

<sup>50</sup> Paulus, 'International Law after Postmodernism: Towards Renewal or Decline of International Law', 14 *Leiden J Int'l L* (2001) 738.

<sup>51</sup> The newstream of international law has already produced a vast body of work regarding the criticism directed to Western rationalism, specifically in reference to international law.

<sup>52</sup> Metz, 'Memoria', in J. B. Metz, *Por una cultura de la memoria* (trans. J. M. Ortega)(1999), at 3–4.

him as the subject of his own history. This is what enabled the distinction between historiography and history.

Even though the diagnosis of post-modern doctrines has often been correct, it does not perceive the role of memory in the reconsideration of enlightened reason. The criticism directed towards rationality completely ignores the achievements afforded by rationality, such as interest in freedom.<sup>53</sup> Memory, for post-modern doctrines, has the sole purpose of allowing caustic criticisms of the Enlightenment or of providing an instrument by which to view history as literature.

It is true that historiography, one way or another, is present in a significant part of critical thought, even in the forms of critical thought that are not classified as post-modern. Thus, the post-structuralists, the Gramscians, the feminists, but also the Frankfurt School, could be included in this large group that advocates critical ways of thinking.<sup>54</sup> Such movements share, for example, the perception that the historical and cultural conditions upon which the theories drew, and still draw, should be investigated, as well as a common attitude of constant re-evaluation of the constitutive categories and the conceptual structures on which an understanding of the theories is based.<sup>55</sup> In other words, making use of historiography became inherent to the critical project.

However, the use made of historiography must imply the use of history itself. And history does not mean taking delight in the facts of the past; it is not a search for a lost time or a return to the past due to a disillusionment with present times. History is, instead, the conviction that the past cannot be reconciled and that the lost time is, in fact, lost; it is the conviction that the past comprises both pleasant memories and dangerous memories and that we should carry these memories with us rather than repress them.

The use of history must bring with it a new way of thinking about the idea of reason in order to allow memory to be incorporated into it. Reason can only become truly historical when it becomes anamnestic, when it is aware of the misfortunes it has caused. That is why, as Johann Baptist Metz says, ‘anamnestic reason, therefore, is not primarily led by an *a priori* of communication and agreement, but by an *a priori* of suffering’.<sup>56</sup>

The promise *The Gentle Civilizer of Nations* holds for the establishment of a new discipline of international law is its criticism of enlightened reason, which, for a long

<sup>53</sup> Metz ‘Anamnestic Reason: a Theologian’s Remarks on the Crisis in the *Geisteswissenschaften*’, in A. Honneth *et al.* (eds.), *Cultural-Political Interventions in the Unfinished Project of Enlightenment* (trans. B. Fultner) (1992), at 191–192.

<sup>54</sup> According to Duncan Bell, critical thought in a wider sense could be characterized by the perception of how the discourse of theorists is biased and would function as a critique based on the possibility of transcendence, of the social relations currently in place, and of the current structures of thought and action: D. S. A. Bell, *The Cambridge School and World Politics: Critical Theory, History and Conceptual Change*, at 17, available at <http://www.theglobalsite.ac.uk> (<http://www.theglobalsite.ac.uk/press/103bell.pdf>).

<sup>55</sup> *Ibid.*, at 17.

<sup>56</sup> Metz, ‘Monotheism and Democracy. Religion and Politics on Modernity’s Ground’, in J. B. Metz, *A Passion for God: the Mystical-Political Dimension of Christianity* (trans. J. M. Ashley) (1998), at 143.

time, ignored history. But this possibility will only come to fruition when criticism of enlightened reason becomes more than a 'politics theory',<sup>57</sup> a criticism of no value to rationality, and allows for reason to develop a self-awareness of its past. The historiographical turn will only make sense if it allows the historical turn, if it is able to ensure that international law is eminently historical and that it become a truly anamnestic international law.

<sup>57</sup> This term is used by Habermas to criticize Foucault's proposal of a genealogical historiography: Habermas, 'Some Questions Concerning the Theory of Power: Foucault Again', in J. Habermas, *The Philosophical Discourse of Modernity* (trans. F. Lawrence) (1987), at 279.

