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Inge Van Hulle *

The Comforts and Confines of the Legal Imagination

* Max Planck Institute for Legal History and Legal Theory, Frankfurt am Main, vanhulle@lhlt.mpg.de

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The Comforts and Confines of the Legal Imagination

In *To the Uttermost Parts of the Earth*, Martti Koskenniemi walks us through the legal imaginations of intellectuals operating within the lecture halls of Salamanca and Göttingen, in the Italian city states, on the bustling streets of Amsterdam, and within the palaces of Versailles and Westminster with a narrative ease and analytical sharpness that is awe-inspiring. It stands without question that this work is an intellectual tour de force. A comparable analysis of the major traditions of European law-writing in an international context simply does not exist for the period 1300–1870. What we do find is excellent, more focused studies on major thinkers (the »European white men«) or particular legal traditions or area studies. However, Koskenniemi has done so much more than merely present us with an overview of European legal thinking. In fact, from the outset he warns the reader that »this is not a history of international law«, but rather a history of the legal imagination. It is through the use of their legal imagination that lawyers, intellectuals, advisors engaged in their craft. They used the languages available to them in an exercise that Koskenniemi calls *bricolage*, namely the puzzling together of legal concepts and arguments in order to »imagine« a novel interpretation of an old problem or to solve a pressing legal issue. In what follows, I will focus mainly on some of the methodological implications of the concept of the legal imagination in conjunction with Part III, which focuses on Britain.

Legal imagination as described by Koskenniemi has an important sociological dimension: intellectuals were shaped by the legal vocabularies they were educated in. When thinking about the world beyond their own borders, they projected on an international level the legal tools, idioms and grammar they had encountered in their immediate domestic surroundings. If this all sounds quite straightforward – i.e. to say that the history of ideas is shaped by the context in which those ideas were formed, has by now become commonplace in intellectual history – the result, however, certainly is not. In fact, one might say that in *To the Uttermost Parts of the Earth* international legal thought has

finally become »domesticated« (for lack of a better term). What is recounted is indeed not a static world of legal reasoning confined to what we would traditionally associate with international law (i.e. war and peace, treaties, jurisdiction, etc.), but the dynamic and creative process of action and reaction of early modern and enlightenment intellectuals to all manner of legal incidents, ideas and concepts that they encountered first and foremost at home, but which gradually also encompassed the world outside of Europe. In doing so, international legal thinking is connected to ideas on the science of government, reason of state and political economy that circulated in the domestic settings in which intellectuals operated. The methodological implication is that a focus on the legal imagination allows for a view that transcends contemporary boundaries of legal sub-fields, such as private law, public law or international law, which are all too often projected onto the past.

The book also provides an insight into Koskenniemi's own legal imagination, into the process of *bricolage* he pursued in what he considers to be driving forces behind legal debates about power in the early modern world and in the selection of protagonists. In this particular instance the author's attention is drawn towards the uses of power in society, as exemplified by discussions about sovereignty and property. For example, Part III of the book reveals how Britain's legal and commercial culture centred around the creation of a flourishing nation based on commerce. From the outset, merchants and private companies received a special role in enhancing the power of the state through arguments that highlighted the benefits of peaceful commerce. While monopolies were abhorred by some, the navigation laws guaranteeing total control over all colonial trade nevertheless acted as a kind of »Magna Carta« of the seas. The specificity of the history of English international legal thinking has already been argued by others (Michael Lobban, Daniel Hulsbosch and David Armitage, to name but a few) in – perhaps most obviously – the varying interpretations of the notion of *ius gentium* or the existence of an insti-

tution such as Doctors' Commons, which provided a home to English civil lawyers.

What is particularly compelling, however, is Koskenniemi's illustration of how legal thinking happened in dialogue with early strands of political economy and the conclusions he draws from this in explaining the dearth of major intellectual writings on the law of nations in Britain at the turn of the 18th century. It is indeed true that apart from a few attempts by people such as Sir James Mackintosh and the lawyer-turned novelist Robert Plumer Ward,¹ British intellectuals did not cultivate international law to the extent that their French or German counterparts did. International (legal) thought between the end of the 18th century and the start of the 19th century has already been the focus of (legal) historians, such as Jennifer Pitts and Casper Sylvest, primarily through the lens of the rise of liberalism and empire. These contributions also take into account the writings of Jeremy Bentham, James Mill, John Stuart Mill and, of course, John Austin, but it remains unclear why »international law was relegated to the fringes of academic or intellectual preoccupations« in England.²

Drawing a line from Smith to Bentham and Austin, Koskenniemi highlights the importance of a strand of thought that considered law-making as an exercise in political economy. Bentham had discredited both common law and natural law. Policy-makers were advised not to focus on some abstract notion of what was morally good, but rather through observation to focus on which actions caused pleasure or pain. International law was then seen as the law of »a universal commercial society«, bolstered by the state so that individuals could maximise profits and minimise losses. This, combined with the shock of the Napoleonic wars and the preponderance of Britain on the high seas and in colonial trade, meant that there was no great need to reflect on the law of nations.

In a last section of Part III, British attitudes towards the world outside of Europe are scrutinised. Early 19th-century British foreign policy is

characterised by Koskenniemi as revolving around the »centrality of mercantile interests and the involvements of the government in protecting them while presenting itself as merely enforcing the rule of law«. Intervention supposedly only occurred for the protection of trade. This point is illustrated by reference to some of the »gunboat« policies of British Foreign Secretary, Lord Palmerston, who indeed epitomises what some have called Britain's »informal empire«. I wonder to what extent the abolition of the Transatlantic slave trade is the »odd duck« in Koskenniemi's story that posits intervention as happening solely for economic reasons. By 1780, a group of abolitionists of diverse backgrounds condemned both slavery and the slave trade on the basis of arguments centring on natural law, Christianity, liberty and reason. Abolitionist lobbying led to the famous Act for the Abolition of the Slave Trade in 1807. Humanitarianism thus proved a major driver for legislative change. The slave trade was also widely condemned by British intellectuals and legal protagonists, even though British merchants stood at the helm of the Transatlantic slave trade in the 18th century. David Eltis has shown that it was destined to become even more profitable, in fact.³ It is true that Britain's actions to secure the abolition of the slave trade internationally were driven by economic motives. As Koskenniemi also points out, intervention for the purposes of suppressing the slave trade often intersected with economic arguments and with ideas of so-called legitimate commerce, which in reality meant free trade with Britain. Nevertheless, Palmerston himself instigated anti-slave trade actions abroad and supported the violent suppression of slave traders in West Africa (e. g. when Captain Joseph Denman bombarded the Gallinas in 1840) with great enthusiasm also in the absence of economic motives.⁴

At the end of his analysis, Koskenniemi offers some thoughts on the limits of the legal imagination. We are indeed prisoners to the legal language and concepts that we are imbued in, if only because, as lawyers and academics, employing

1 There are more authors than James Mackintosh and Robert Pulmer Ward. For a general overview of most British international legal writing for the early nineteenth century, see CASPER SYLVEST, *International Law in Nineteenth-Century Britain*, in:

British Yearbook of International Law 75 (2004) 9–70.

2 SYLVEST, *International Law in Nineteenth-Century Britain* (n. 1) 13.

3 DAVID ELTIS, *Economic Growth and the Ending of the Transatlantic Slave Trade*, Oxford 1987.

4 INGE VAN HULLE, *Britain and International Law in West Africa. The Practice of Empire*, Oxford 2020, 96–99.

authoritative language is often the only way to make a credible argument. I think an awareness of this is both depressing and hopeful. Depressing, because, as the European language of the law has spread outside of Europe's borders, it has suppressed or obliterated all else. The question is to what extent we can recover or reimagine a legal language that does justice to the experiences and past of the Global South. Hopeful, because Koskenniemi's book should remind us of the respon-

sibility we have as educators in shaping the legal imagination of others through what we write, say and do. It is up to us to help a new generation both within and outside our law schools and history departments to rise beyond the past and current limits of our discipline imposed by Eurocentrism, racism and gender bias.

