It's about legal practice, stupid.

By Christoph Möllers[*]

With his book "The Gentle Civilizer of Nations"[1], the Finnish expert on international law Martti Koskenniemi, became the most widely read author in his field overnight. In the "Gentle Civilizer", Koskenniemi presented a new history of international law between 1870 and 1960. The tremendous success of this book rested less on an amazing number of revealing observations, but rather on its new take on the history of this discipline. In Koskenniemi's interpretation, the scientific project of international law did not start off as an endeavour that was centred on the sovereignty of nation-states. Instead, the international lawyers of that era saw their subject in the light of the idealist political project of internationalism. When they were forced to give up their high hopes in the course of the 20th century – this is where the twist of the book lies – they not only abandoned their dreams, but also their craft as lawyers. They became mere engineers of international relations, pragmatists, and apologists of governmental power. In order to retrieve the craft of international law, Koskenniemi concludes, the discipline needs to handle legal forms in a politically reflective manner. Koskenniemi has labelled this squaring of the circle, in a much-cited expression, as the "Culture of Formalism."

[*] Christoph Möllers is Fellow at the Wissenschaftskolleg zu Berlin and Professor of Public Law at the University of Göttingen. cmoellers@jura.uni-goettingen.de. This piece has been published in German as "Auf diese Normen können Sie nicht bauen. Entwaffnung einer Zunft: Martti Koskenniemi nimmt kunstgerecht die Rationalität des Völkerrechts auseinander", *Frankfurter Allgemeine Zeitung,* 21 April 2006 (No. 93), p. 39.

http://www.faz.net/s/RubC17179D529AB4E2BBEDB095D7C41F468/Doc~E6E424C35C6FE411E8F0A9D665528511E~ATpl~Ecommon~Scontent.html Translated for the German Law Journal by Johann-Friedrich Fleisch.

[1] MARTTI KOSKENNIEMI , THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2002) [GENTLE CIVILIZER].

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Koskenniemi could easily take for granted the loss of the international lawyers' craft in his "Gentle Civilizer": in 1989, he had already provided an in-depth demonstration of this loss in his doctoral dissertation, published in English by the Finnish Lawyers' Publishing Company. After being out of print for several years, the book has now been re-published by Cambridge University Press, equipped with a new preface and a substantial epilogue by its now famous author.

The core thesis of the book is quickly told. Public International law suffers from a fundamental contradiction. On the one hand, it seeks to establish a normative order to constrain the political behaviour of states; yet, on the other hand, this legal order can only be established through the will of the very states it is meant to constrain. Thus, while public international law is legitimized in an ascending motion through states that set rules and recognize them, it is simultaneously legitimized in a descending motion by the precondition of an order that constitutes states as legal personalities, subjecting them to obligations. On the one hand, public international law claims normativity; on the other hand, it has to recognise the facts of international politics in order to be capable of delivering rules that are sufficiently relevant to be heeded. In this bundle of antagonisms between the utopia of an international community and the apology of political realities, public international law fails to provide workable normative constraints; or conversely, public international law can be used to justify anything.

Using this model, the book turns to international legal practice. With striking virtuosity, Koskenniemi dissects the decisions of the International Court of Justice, searching out the contradictions in its reasonings. At the heart of international legal doctrine, the doctrine of legal sources, he finds no footing to secure himself against a never-ending oscillation between facts and norms. While international law sometimes deduces its normativity from the political practice of sovereign states, on other occasions it neglects these norms in favour of superior legal principles. While international law recognizes a certain practice as binding on one occasion, it declares this practice to be irrelevant on another. This flexibility shows no signs of legal rationality. For every element of legal reasoning, Koskenniemi has a counter-example. Legal rationality crumbles into dust. The naked pragmatism of international legal doctrine – freed from utopian political ambitions as well as any demanding theoretical claim – had to disarm international legal doctrine methodologically. Only an insider like Koskenniemi was able to examine the legal argument so thoroughly. In its strongest moments, this book is decidedly the work of a lawyer.

Firstly, however, Koskenniemi develops this basic contradiction on a theoretical level. Liberal theories, according to Koskenniemi, are fundamentally incapable of dissolving the antagonism between individual freedom and community matters.

This leads to their fundamental indeterminacy, which is by no means a problem of linguistic uncertainty but is built into the grammar of the law itself.

This argument, sufficiently well-known from American legal criticism, takes up the weaker part of the book. The allegedly contradictory nature of liberalism is neither developed in a theoretical way, nor is it compellingly linked to public international law. One example from the new Epilogue: the Yugoslavia Tribunal construed the elements of the crime at hand extensively to the disadvantage of the accused, and according to the humanitarian intentions of the contracting parties. For Koskenniemi, this serves as a verification of his concept. According to him, liberal theories do not have to decide whether they side with the individual or rather with the community, so they are free to privilege the one or the other. This is hardly correct. It has always been the starting point of liberal theory to put the burden of proof on the political order, not on individual freedom. This is where Koskenniemi's nonchalant identification of individuals and states, as well as his procedure of putting all theory from Hobbes to Locke to Habermas into one box labelled "liberalism", collapses on top of him.

Koskenniemi's criticism of liberal law deals with an ideal of systematically cohesive legal systems, a system that became obsolete with the very development of liberal theories. What his criticism does not take into account is the fact that legal reasoning, in Kantian terms, does not belong to the domain of the intellect (*Verstand*), but rather to the power of judgment (*Urteilskraft*). It also remains unclear what a legal theory would look like if it had no room for contradictions. Above all, however, his theoretical foundations are far too sweeping. They are phrased in a way that allows for fundamental criticism of every modern legal order – a point that the book itself fails to consider. Is it not possible that public international law, to states which are at the same time both obliging and obligated, has more difficulties than other legal orders in developing a rationality of its own?

It is part of the irony of its reception that this book has been read as a theoretical piece of work. Its exceptional quality consists in a form of criticism that is itself deeply indebted to the craft of public international law through its methodology. To this craft it remains faithful even to the moment of its destruction. The reception of the book shows how remote from theory international legal science has positioned itself, to the extent that it calls "theory" everything which is not part of a case study. Koskenniemi's thesis of the overly pragmatist approach of international legal doctrine has been confirmed by the way in which his book has been received. More than likely it is not by coincidence that the pragmatist mainstream of international legal doctrine has rather left aside this book so far. Koskenniemi's conclusion from practice to theory misses the point nonetheless: a master of rhetoric, who can delight his audience with a thesis as much as with its opposite,

with all his craft has not yet disproved the conditions of the possibility of practical reason.

How should public international law go on when the conditions of legal rationality in public international law have been destroyed? Was it not logical for Koskenniemi, having destroyed the systemic structure of international law, to turn then to its history? And yet he does not want to do without public international law. Thus, at the end of the new epilogue, he invokes again the "Culture of Formalism", a political responsibility of international lawyers difficult to grasp and cloaked in the garments of professional deontology. Oddly enough, this culture of formalism conjures up terms that originate from the very theory of liberalism that Koskenniemi has spurned: transparency, equality, responsibility. Perhaps it would have been more consistent to abandon every kind of normative claim for this book. This inconsistency, however, appears to be a substantial factor in its attractiveness.

Koskenniemi deserves respect for the intellectual lack of mercy with which he takes apart the practice of argumentation in public international law. It is a unique piece of methodological critique in the field of law, being both precise and far-reaching. One can only hope that the discipline will react to this new edition. The intellectual lack of respect, however, with which Koskenniemi approaches the political theory of liberalism deserves no mercy. If someone goes far enough to stipulate political responsibility as a scientific value, he should be careful in calling useless every theory that has made freedom its starting point.