

# The Case for Comparative International Law

Martti Koskenniemi\*

The very title of a ‘Finnish Yearbook of International law’ might seem to have something oxymoronic about it. What is a law that is in some way both ‘Finnish’ and ‘international’ simultaneously? This is no Finnish speciality. Many yearbooks and journals on international law and human rights profess a national or regional allegiance in the titles: African, American, Asian, Australian, Austrian, Baltic, British, European, French, Israeli, Italian, Nordic, Polish, Spanish... And so on. It deserves to be noted that this was not always the case. As international lawyers began to organise themselves within the confines of the *Institut de droit international* in the 1870s and thereafter, the journal that became the new profession’s flagship was called *Revue de droit international et de la législation comparée* (RDI, 1869). Its name flagged the alliance its founders sought between international law and liberal domestic reform. But it avoided pointing to any regional or national affiliation. The same was true of the first few journals that followed in Europe: the *Revue générale de droit international* (Paris, 1894) and the *Zeitschrift für Völkerrecht* (Kiel, 1906). The pattern (if it was such) was broken with the *American Journal of International Law* in 1904, no doubt because lawyers on the far side of the Atlantic wished to make a point that the new world, too, had specialists in the field who were interested in participating in its development. It is a familiar dialectic that repeats itself here. When one inhabits the centre, one feels no need to mark out one’s place. One is ‘there’ and everybody knows it. In the periphery, things look different. There it might well seem advisable to highlight one’s exotic location, and to raise a different voice – or if not that different, nevertheless a voice from a different direction, a ‘fresh’ voice. A competitive ambition may be involved: perhaps to show off, perhaps even to challenge the centre and to suggest that, properly understood, ‘here’ is where it now is. Did the establishment of the *European Journal of International Law* in 1989 enhance the central role that European lawyers have had in the discipline? Or should it be understood as a resigned admission that Europe, too, was finally just a locality among others – like French cuisine being as ‘ethnic’ as all the rest.

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\* Professor of International Law, University of Helsinki; Director Erik Castrén Institute of International Law and Human Rights

The title of the ‘Finnish Yearbook’ – now celebrating its 20th anniversary – does not only give cause for reflecting on the sociological distinctions that constitute the field of international law. There is also a substantive angle to the matter. When I went to law school in the 1970s the international law textbook at use was Erik Castrén’s *Suomen kansainvälinen oikeus* – ‘Finland’s International Law’.<sup>1</sup> That book began with two brief chapters on the general notions of international law and its sources, but then moved on to treaties with special importance for Finland, such as the UN Charter and the Treaty on Friendship, Cooperation and Mutual Assistance (FCMA) with the Soviet Union. Also included was a discussion of the ruling dualist view concerning the position of international law in the Finnish constitution. The student was offered separate chapters on Finland’s territory, the international regulation affecting the status and position of individuals in Finland, an overview of governmental institutions with international law tasks, Finland’s status at international organizations, constitutional treatment of treaties and Finland’s international responsibility. Out of seventeen chapters, six were devoted to the rules of warfare – on land, sea and in the air, as well as civil war. Its organization and much of its substance situated it well in the context of the Cold War. Castrén himself had advised the Finnish Ministry for Foreign Affairs during the second world war and remained the leading international law expert for the first two and half decades thereafter. The perspective of the book was indeed distinctly Finnish – reflecting Finland’s (that is to say, Castrén’s) wartime experiences and the policy of neutrality that the country was diligently pursuing.

A very different type of a book is available for Finnish law students today. They now read Kari Hakapää’s *Uusi kansainvälinen oikeus* – ‘New International Law’ - with the ‘new’ surely seeking distance to the ‘old’ world before 1989 - offering a contemplation on the constant increase of legal materials so that a big part of professionalism consists in being well informed of ‘latest developments’.<sup>2</sup> Although Hakapää himself worked for many years as legal adviser with the Foreign Ministry, his book (the first edition of which came out when he had already moved to the University) partakes of the wide European genre of textbooks that downplay the national perspective. They may, with Hakapää, make reference to domestic laws or emphasise disputes or events of national interest, but carefully present most of the materials from a point of view in the geographical and historical nowhere. This is the perspective of the ‘international community’, of course, that in the Finnish case coalesces with the standpoint of the United Nations and associated organizations. In this respect, it follows most European international law textbooks. This does not mean that we no longer encounter the ‘Castrén approach’ anywhere. For example, ‘Foreign Relations Law’ in the United States and *Droit des relations internationales* in France cover much of the

1. Erik Castrén, *Suomen kansainvälinen oikeus* (WSOY: Porvoo, 1959).

2. Kari Hakapää, *Uusi kansainvälinen oikeus* (3rd edn, Talentum: Helsinki, 2010).

ground that that work did. International law teaching in the United Kingdom often concentrates on what UK courts have done in foreign affairs related cases and German works foreground a constitutionalist reading of the materials that highlight the position of public and constitutional law in the German legal system. This is not the place to engage in a comparative survey of international law textbooks - a limited study was carried out a few years ago<sup>3</sup> - but to make the point that to publish a 'Finnish Yearbook of International Law' participates in a field of legal activism that is not at all free from local approaches and, no doubt, biases of various kinds.

But there is disappointingly little by way of a comparative study of international law. Some of the professional organizations, such as the International Law Association (ILA) and the *Institut de droit international* have occasionally discussed law teaching or national and regional approaches to various problems. A few years ago, the *Société française pour le droit international* carried out a comparison of the teaching of international law in European countries and Pierre-Michel Eisemann from the University of Paris-I (Sorbonne) chaired an international *réseau* that produced a still useful comparative assessment in Europe of the position of international and European law in many EU member States.<sup>4</sup> Comparative analyses have also been carried out on the national laws and regulations relating to the law of the sea and on the implementation of UN and EU sanctions.<sup>5</sup> But generally speaking, existing works are limited to collating national reports without further analysis. An approach that would take seriously the variations of approach, technique and substance of international law is largely absent.

The reasons for this may be easy to understand. To emphasize local, regional or national approaches to international law might seem to undermine the internationalist spirit of the profession which, as David Kennedy noted many years ago, is so characteristic to it. International lawyers are *committed* to international law in a way that cannot be said about the relationship of administrative or tax lawyers to their special fields. Something big seems to depend on international law and the commitment of international lawyers to the way its rules and institutions stand above local rules and institutions. It is only once *that* commitment is localised at say, Second Avenue, New York, somewhere between 43rd and 49th Streets, or Geneva's international centre, that the *actual* locations or localizability

3. Outi Korhonen, 'Current Trends in European International Law Publications', 9 *European Journal of International Law* (1998) 553 – 573.
4. See Société française pour le droit international, *Journée d'études. Enseignement du droit international. Recherche et pratique* (Pedone 1997), especially 133-230; Pierre Michel Eisemann (ed.), *L'intégration du droit international et communautaire dans l'ordre juridique international. Étude de la pratique en Europe* (Kluwer: The Hague, 1996).
5. Tullio Treves (ed.), *The Law of the Sea. The European Union and its Member States* (Nijhoff: The Hague, 1997); Vera Gowlland-Debbas (ed.), *National Implementation of UN Sanctions. A Comparative Study* (Nijhoff: The Hague, 2004).

of international law begins to seem obvious and, perhaps, significant for analysis. It has become a standard trope in postcolonial studies to localize the most banal forms of ‘internationalism’ and ‘cosmopolitanism’ as outlooks of the middle classes of certain European-originated environments, thereby detaching activists from an unthinking association with certain historical institutions.<sup>6</sup> There are many kinds of ‘international’, these studies suggest, each with a particular bias. A serious comparative study of international law would contribute to that same shift – to thinking of the world no longer in terms of what Hegel used to call abstract universals but seeing all players as *both* universal and particular at the same time, speaking a shared language but doing that from their own, localizable standpoint. It would, to put it somewhat grandly, contribute to the ideology critique of international law, and of the institutions sustained by *that* professional vocabulary.

The view that there is a single, universal international law with a homogeneous history and an institutional-political project emerges from a profoundly Eurocentric view of the world. This is nowhere more evident than in the history of international law where it is simply impossible to operate without reference to Roman law, *jus naturae et gentium* and *Droit public de l'Europe*, the struggles between the emperor and the pope, the conflict between Catholicism and Protestantism, the Peace of Westphalia, or the Concert of Europe. The vocabularies of statehood, sovereignty, self-determination and human rights refer back to European thinkers and jurists, and events placed in Europe or dictated by Europeans – which is not to say that they could not resonate elsewhere, too. But to take that for granted is to commit the quintessentially European sin of thinking of that experience and those vocabularies as somehow grander than themselves. It is true that there have been studies on something like international law in the ancient Near East.<sup>7</sup> But it is only recently that steps have been taken to examine colonization from the perspective of the colonized. The point of view of the ‘Other’ is being searched in studies on East Asian, Chinese, Japanese, Latin American, Ottoman and Islamic systems of international relations and law.<sup>8</sup> But these studies, too, tend to receive their perspective, concepts and

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6. See e.g. Pheng Cheah & Bruce Robbins, *Cosmopolitics. Thinking and Feeling beyond the Nation* (University of Minnesota Press, 1998) and my ‘Cosmopolitanism’, in Monica Garcia & Pamela Slotte (eds), *Cosmopolitanism. Revisiting the Imaginations of Europe* (forthcoming).

7. See e.g. Amnon Altman, ‘Tracing the Earliest Recorded Conceptions of International Law’, 11 *Journal of the History of International Law* (2009), 125-186 and 333-356.

8. See e.g. Arnulf Becker Lorca, ‘Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation’, 51 *Harvard International Law Journal* (2010) 475-552; Liliana Obrégon, ‘Completing Civilization: Creole Consciousness and International law in Nineteenth-Century Latin America’, in Anne Orford (ed), *International Law and its Others* (Cambridge University Press 2006) 247-264; and for a programmatic statement see Onuma Yasuaki, ‘When was the Law of International Society Born? An Inquiry of the History of

standards from European historiography, not least because of most of the respective scholars have been trained in and usually continue to work with European or (perhaps more often) US academic institutions.<sup>9</sup> This may be impossible to avoid, and in any case, the more important problem may be that much of this work is constrained within the conceptual confines of ‘Empire’ and ‘colonization’ – European notions and experiences of European rule. The question remains how to identify and compare autochthonous forms of thinking about inter-community relations that would not necessarily be subsumable under European legal categories but would stand on their own and thus also provide a wider comparative perspective under which European categories could be examined as equally ‘provincial’ as others.

There is a further reason for encouraging comparative studies of international law. One of the predominant themes of international law in the past decade or so has been the ‘fragmentation of international law’, the slicing up of the professional field into various special regimes such as human rights law, trade law, intellectual property law, international refugee law, law of the sea, humanitarian law, environmental law, security law, investment law, natural resources law and so on. The great practical concern has been that the ‘unity’ of international law might be eroding and that practices of forum-shopping will be encouraged as many different institutions would claim jurisdiction on a single matter, proposing to treat it in differing ways. It is not at all irrelevant whether a fishery problem, say, is brought before a body of experts in trade, natural resources or environmental law, or whether a question regarding privacy is directed to an institution specialised in security or human rights. The greatest political stakes often lie in the question ‘to which body this matter will be directed?’ Once we know which that body is, we will have pretty good idea of what the outcome will be.

By now it is evident that ‘fragmentation’ did not turn out to create the chaos that was feared as the matter was allocated by the UN to the International Law Commission in 2002. Nor did the Commission’s final report of 2006 have much of an immediate consequence in the institutional world.<sup>10</sup> The matter was, after all, not technical but political. The new regimes have grown up precisely to advance new priorities in contrast to those of old law. The regimes have come to stay and no single normative or institutional hierarchy has emerged. No effort at constitutionalization has succeeded in putting public international lawyers back in control. The international legal world had of course always been

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International law from an Intercivilizational perspective’, 2 *Journal of the History of International Law* (2000) 1–64.

9. See especially Dipesh Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference* (Reissue, with a new preface by the author, Princeton University Press, 2008).

10. International Law Commission, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, UN Doc A/CN.4/L.682 (‘ILC Report’) 13 April 2006.

pluralistic. Fragmentation merely meant that the traditional units – States – were supplemented and sometimes replaced by new units, regimes, representing not only technical specializations and professional cultures but concentrations of knowledge and interest.<sup>11</sup> Moreover, as Niklas Luhmann and his epigones have argued, these regimes tend to resemble States also in acting ways that were both solipsistic and imperialistic. They interpret all the world from the perspective of their embedded preferences, seeing in the world what they want to see, and reacting to it according to their stereotypically patterned ways. And they tend to think of their special preference as the general preference and act so as to make their viewpoint representative of the general opinion.<sup>12</sup>

As a result, following Gunther Teubner, the ILC report suggested the development of a kind of ‘conflicts of law’ for international regimes following the analogy of regular conflicts of law to deal with fragmentation problems as they emerge.<sup>13</sup> Whether or not that proposal was realistic, it highlighted the need of taking regimes seriously – in fact, taking regimes seriously in the way that we have been accustomed to taking seriously those most classical of regimes, States. In this sense, ‘fragmentation’ is really an old and familiar problem. International law has always consisted of a heterogenous aggregate of units that pretended to be ‘sovereign’ in theory and acted often precisely in the solipsistic and imperial ways sketched above. They each had their perspective on the world, and this perspective was quite naturally reflected in their (national) laws and constitutions. It was these laws and constitutions that Erik Castrén had in mind as he composed his above-mentioned textbook. One need not adhere to ‘dualist’ theories of the relations of national and international law or to the venerable German view of international law as ‘external municipal law’ to feel the familiarity of this. Indeed, this wheel was only recently re-invented by Harvard professors trying to find a legal form in which to express the solipsist universe of US legal academia.<sup>14</sup>

Classical conflicts of laws always worked in close cooperation with comparative law. To understand and to deal with conflicts, it was necessary to know something about the legal systems whose conflict was at issue. For the same reason, it is today necessary for lawyers to learn to know the various regimes. And as lawyers having only recently learned with the European Union, the task is never one of merely memorizing new rules but trying to understand novel cultural and professional orientations and embedded preferences. Domestic legal

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11. See now Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford University Press 2010).

12. See e.g. my ‘Hegemonic Regimes’, in Margaret Young (ed.), *Regime Interaction in International Law. Facing Fragmentation* (Cambridge University Press 2011, *to be published*) and ‘The Fate of International Law. Between Technique and Politics’, 70 *The Modern Law Review* (2007), 1-32

13. ILC Report, *supra* note 10, at 250-253.

14. Jack Goldsmith & Daryl Levinson, ‘Law for States: International Law, Constitutional Law, Public Law’, 122 *Harvard Law Review* (2009) 1792-1868.

advisors often stress the importance of not being closed within purely domestic perspectives. It is important, they observe, to bring the international perspective to bear on domestic decision-making, to act as a kind of translator between the domestic and the alien legal orders.<sup>15</sup> This is an important aspect of their being *legal* professionals, instead of the propagandists of one or another system of value and preference. The same applies in the novel situation. To carry out a legal assignment – translation, settlement – it is insufficient to be well versed in a single project such as trade or the environment, for example. Instead, one ought to become an expert in trade *and* environment, human rights *and* security so as to be able to occupy a perspective that is larger than that offered by those small niches. Without such a larger view, it is hard to see how they could contribute beneficially to the adjustment of conflicts and the search of the just equilibrium that is the mundane everyday of operating in a pluralist world.

But in order to move confidently in a world of many regimes, one needs some point of reference from which to examine rival regimes and conflicting preferences. In order to compare, one needs a *tertium*. It is hard to see what else that could be than the domestic law in which one's legal training has been attained, in which one has received the basic legal concepts and where a certain idea of law as a profession has been internalised. There is nothing 'nationalistic' about this – most domestic laws are mixtures of many legal systems or perhaps have been received in bulk from somewhere, in Finland's case, from Germany. I was expected to read a Finnish translation of Hans Kelsen's *Reine Rechtslehre* during my first student year. Nations are no more closed billiard-balls than are regimes. In Finland, international law was closely related to public law and the chair once held by Erik Castrén had been one of international and constitutional law. By the time I came to occupy it, the reference to 'constitutional law' had been eliminated, perhaps for the same reasons for why the basic textbook no longer deals with international law 'in Finland'. This training equipped me to have an intuitive sense of the German project of the 'constitutionalization' of international law and to examining international problems from a public-law angle – while the strong jurisprudence tradition in Finnish law schools at the time tended to spice up those examinations with a dose of theoretical abstraction. I have no doubt that parallel stories could be recounted by colleagues from other countries. I am envious of Italian colleagues, for example, whose association with private international law has given them an ease with conflicts of laws my public law orientation lacks. All of this is profoundly Eurocentric, of course, and I can only admire the ease with which Indian or Chinese jurists operate in a world of plural legal regimes.

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15. See e.g. 'The Role of the Legal Adviser of the Department of State. A Report of the Joint Committee established by the American Society of International Law and the American Branch of the International Law Association', 85 *American Journal of International Law* (1991) 358-373 at 360.

For such reasons I have no doubt that a Finnish Yearbook of International Law deserves its place in the increasingly internationalised – that is to say increasingly Anglo-American – publication business. I have no false hopes that it could pose a serious counter-hegemonic challenge to ruling trends in the publishing market. On the contrary, I am grateful for Richard Hart that he has agreed to take the Yearbook under his wings. But perhaps the market is a more heterogeneous place than it might seem and below the euro-polished surfaces of current Finnish (and Nordic, European, American, Asian, Latin-American, African) contributions to international law there will be found all kinds of local idiosyncrasies that, when revealed, might teach us many things about our profession we were always vaguely aware of but did not have the language to address. There is a case for a comparative approach to international law that would not try to discover some Archimedean point between its various localities – the ‘international’ point – but would instead imagine moving between them as its proper contribution to a changing profession.