

Conversations with Professor Martti Koskenniemi First Interview: 2 December 2008

This is the inaugural interview for the Eminent Scholars Archive with the incumbent of the Arthur Goodhart Visiting Professor of Legal Science.

Professor Martti Koskenniemi is Professor of International Law and Director of the Erik Castrén Institute of International Law and Human Rights at the University of Helsinki.

The interviewer is Lesley Dingle. Her questions and topics are in bold type, while Professor Koskenniemi's answers are in normal type. The interview was recorded at the Squire Law Library, and the audio version is available on this website. Questions and answers are sequentially numbered. All footnotes and [comments] added by LD.

1. Professor Koskenniemi, over the last few years I've interviewed several Cambridge scholars for the Eminent Scholars Archive. By definition these have all been Emeritus academics. To link the project with current faculty activities we've included a section on the Goodhart Visiting Professor. We plan to expand this section to include interviews but, for practical reasons, to date we've only listed the various incumbents and you are our first interviewee. I hope you will agree to be interviewed again at the end of your sojourn where perhaps you could give a retrospective view of your time here. The audio and transcripts, along with a photograph or two, will appear on the Eminent Scholars website and as the years pass we hope this will build a permanent record of the Goodhart Professors and their individual perspectives on their time here.

I have listened to Professor Crawford's introduction of you, and indeed your own presentation at the LLM subject forum a couple of weeks ago, which is now on the Faculty website, and I wonder if you could say now, for a wider audience, what generally your aspirations are for your time in the Faculty as the Goodhart Professor?

Well, I suppose it's clear that the most important aspiration is to be able to conduct the research which I came here to conduct, which is historical research. And the surroundings and the environment for carrying this out are really brilliant, excellent, I couldn't wish for anything better. I could wish that my mind were sharper and that it would be easier. It's been an uphill battle these first few months, not because of the reasons of the context but because I'm carrying a rather complex argument which tends not always to succeed.

2. Perhaps you would like to say something specific about your preferred teaching style. I recall one of my previous interviewees, Professor Hepple, gave an interesting account of how he tried and failed, by his own admission, to introduce the American case method at Cambridge, but because of the college based tutorial system he was thwarted.

Yes, well, I am a very authoritarian, traditional European monologue holder, at least at the outset, because I have such a specific approach to international law I find that I have to get this through first. And if we start a conversation at the beginning then I never get my own message across. So this means that during these double lectures that I always give here in Cambridge, as well as in other places, I tend to do the talking until the last lectures when then the message has come across and we can look at the message from the outside and have a conversation on it. But up until that moment I talk and the students are silent. And I try to talk in an entertaining way and I walk around in the class and wave my hands a lot and sometimes lose myself in anecdotes or stories, and I hope that that takes something away



from the experience of passivity that I impose on the students.

3. I notice in your Festschrift¹ your colleagues made a special mention of how much at home you are in not only Helsinki obviously, but Paris, New York and Cambridge. I wondered why Cambridge?

Well, in Britain Cambridge is the best place for an international lawyer and my association with James Crawford, as well as others has been longstanding, and of course Elihu Lauterpacht and Sir Robert Jennings as well. So that's the reason. So I do go to London every now and then and I have to confess, but I don't like London as a city, in comparison to Paris and New York. Maybe it's just that I haven't been there long enough. Although I have good friends and colleagues in London, I have never really wanted to stay there for longer periods. And so for me Britain, for good or for bad, is Oxbridge really. I did a one-year postgraduate degree in Oxford twenty years ago so I know that town pretty well but, to me, Cambridge, because of the strength of the international law tradition here, is the more important one.

4. Professor Koskenniemi, it seems I have such an eminent international lawyer in my sights and because so many of Cambridge's eminent scholars over the years have been international lawyers – I'm thinking of Professors McNair, the Lauterpachts, Jennings, Bowett, Crawford etc. – I must ask you just some aspects of this topic. Coming to the Lauterpachts, as you know, I've interviewed Sir Eli and I know that Sir Hersch, in particular, is someone who seems to have fascinated you. Could you take a retrospective look at his contributions to the development of the subject and say how you think his ideas, his notions and, perhaps, his principles have stood the test of half a century, or not as the case may be?

Yes, well, that is the question that I pose myself every day, and I suppose my, to date, five essays on him that I've written all ask that question². And there is no easy way to respond. I have a certain distance towards that tradition myself. I don't think of myself as in it but outside it, and I'm divided in my assessment of it. In my Chorley lecture at the London School of Economics last year, I think I went as far as I am able to go now in order to give a definite assessment. There I said – this is printed in the *Modern Law Review*³ – and there I said that the project that he had together with McNair – I think McNair is a very important figure here – the project they had was trying to establish international law as a serious professional technical discipline at British universities, in the British academia in general, as well as in the Foreign Office.

In order to carry that project out one needed to do a number of things, which they were amazingly successful in doing; such as having a repertoire of cases, this is the *International Law Reports* or the *Annual Digest* as it started out. Then having the *British Yearbook of International Law* as a platform on which colleagues can comment on the cases.

¹ Petman, J. & Klabbers, J. 2003. *Nordic Cosmopolitanism: essays in International Law for Martti Koskenniemi*. Martinus Nijhoff, Leiden, 531pp.

² See, for example: Koskenniemi, M. 2001. Hersch Lauterpacht (1897 – 1960). In: Beatson J. & Zimmerman R. (Eds), *Jurists Uprooted*, Oxford University Press, Oxford, 601 - 661

³ 2007. The fate of Public International Law: between Technique and politics. *MLR*, 70(1), 1-30.



And once you have those two things, then the third thing would be to have a manual with foreign ministries. Now this would be *Oppenheim's International Law* which Lauterpacht then took on and edited in a way that I'm sure Oppenheim wouldn't have always agreed. But this then became by far the most important manual for diplomats in foreign offices.

And so, through that feat and a number of other things really in which I have gone into detail in my various essays on him, they were able in the course of the late twenties and thirties to really establish international law. It started to look like any other business of law: tax law, contracts etc. So that was a great achievement.

On the other hand I think this technical approach to the discipline also undermines some of it. I don't think it suits the ethos of the discipline to become as technical and to be in those terms comparable to other parts of the law. So that when the discrepancy between the technical aspirations of lawyers and the international political world, which is fluid, contradictory, incoherent and not easily amenable to being articulated in terms of legal concepts and categories, when that discrepancy becomes obvious then it backfires on the technical project to begin with.

As you know I've written the history of international law from 1870 to 1960 in which I made the provocative argument that international law began in 1873 and ended around 1960. What I wanted to say there was this kind of an approach at around 1960, at around Hersch Lauterpacht's death, had carried its day, that it had done what could be done in that way and it had to be re-imagined; and I think that process of re-imagining is going on.

So to summarise, in the time when Hersch Lauterpacht worked and had influence he was to me by far the most important single person in the discipline and he has to be looked at from that perspective, but the thing which he did can no longer be done. We have to think of this in a different way.

5. Also on Sir Hersch. One of the aspects that I find so impressive about his career is the almost miraculous manner that he made the transition from an activist in Vienna in the twenties to the somewhat staid English milieu of the LSE in Cambridge in such a short space of time. Do you have any ideas on how he might have managed this?

Well, I suppose Elihu has a rather more adequate picture of this. I think it was difficult and it was difficult for various reasons. The cultural environment was completely different. They had no money when they came here [1924]. Hersch's legal education was anything but a British legal education. McNair had great problems at the beginning to try to turn Hersch's head so that he could be a plausible lawyer in the British context, but he succeeded. And so at the outset I think the family, Rachael and Hersch, both felt that it was really an uphill battle, it was hard going.

But then in the space of relatively a few number of years they succeeded and he was able to establish himself. Now, mind you, he established himself at LSE where there were lots of lawyers from the German speaking environment and I don't think he could have done the same anywhere else in Britain. McNair was first appointed as Whewell Professor here in Cambridge [1935] but then taken on as Vice Chancellor at the University of Liverpool and when McNair left Cambridge [1937] he left in the certain knowledge that he would be followed by his good friend, Hersch Lauterpacht.

Now, it didn't transpire that easily and there was some opposition towards Hersch. I went to see the minutes of the small board that was set up and although the candidate who showed up - if I remember there were only three or four I think - it was obvious that Hersch was in a completely different category. It wasn't obvious to these people. So in the first meeting it was inconclusive and they had postpone for several months until they got to what, to any outsider, was an obvious result. So I deduce, but I don't have any more evidence, that



there was some opposition that I believe was related to his background. Now maybe it's because it was a German background. Maybe there was anti-Semitism too, I don't know.

6. On broader issues. International law has to grapple with very different problems, as you've intimated today, than those with which it was confronted when the UN was established and the modern era of international law was set up. Do you think, Professor Koskenniemi, that it can cope, or do you think it needs a radical overhaul and new values and norms established? I know you've written extensively on this, your book, for example, *From Apology to Utopia*⁴, and I very luckily had the chance to read your 2007 article in the *Modern Law Review*⁵. Is it possible to give your views in a nutshell?

Yes. I think there are three things I would like to say in a nutshell in general terms. One is that I think diplomatic law, the law of the United Nations, the law through which public states interact with each other, will always have a marginal role in politics, for better or for worse. It will be there because diplomats, foreign offices, the public realm of states need to interact in these various ways, so one needs treaties etc. But I don't think that this will bring us perpetual peace or any of those big objectives that thinkers on international relations and international law have often wanted to relate to this practice. So my first thing is to say when I think we need this kind of a practice when our diplomats come together, international organisations, treaties, customary law, the International Court of Justice.

The second thing I want to say is that for a number of years now, or maybe one could say twenty years, the old law, public international law, has been undergoing what international lawyers now call the process of fragmentation. It has become more and more technical so that, for instance, in the United States in many law schools there are no longer courses on public international law. There are courses on international human rights law, international environmental law, international business transactions, law and globalisation etc. And all of these disciplines are by their nature much more technical, much more specialized. And their specialization also often carries a particular political bias, or a political ethos, so that if you see a group of trade lawyers you, by and large, know what parties they vote, and they will not be the same parties that if you see a group of environmental lawyers will vote. So I think this is quite natural but it's somewhat worrying and something should be done about it.

So for me it seems that it's both professionally negative as well as a small personal tragedy for lawyers to incarcerate themselves within these small worlds of, say, international investments law or international energy law and one does only that. And also one internalises the bias of the profession and becomes unable to have a broad view and a broad political view on one's own activities. This is the second thing I want to see. I call this managerialism and I find if one links point one and point two together, I find that the space left open by public international law is being occupied by managerialism.

And then I have the third point which is what I would want to do, what I would wish what kind of a contribution there would be. So my sense is that the international public realm has to be re-imagined as a democratic realm of decision making in the conditions of transparency, accountability and justice.

Now, I realize that these words are problematic and much work has to be done in

⁴ Koskenniemi, M. 2005. *From Apology to Utopia: the structure of international legal argument*, Cambridge University Press, Cambridge, 683 pp.

⁵ See footnote 3.



order to reform them into concrete institutional projects, but in order to have a counterweight to the managerialism, which as I say is now invading the spaces of the public, there should be a wider political awareness of the need for openly political debate. This in a sense is to take on the old ideological Kantian ethos, maybe Lauterpacht's and Grotius' ethos, and to rephrase it in some modern terms to think that it's possible to have an international public realm in which people with political preferences come together and try to direct the allocation of resources in this world in a fashion that's more acceptable than now. This point relies on a fundamental commitment to the idea that the world is terribly unjust and that it cannot continue as it has. If one doesn't have that feeling then none of this makes any sense.

7. Well, that's fascinating. It reminds me of one of the very quotable quotes in your 2007 piece where you said that the fate of international law is to re-establish hope for the human species and you also say that, to quote, 'I often think of international law as a kind of secular faith'.

Yes. I realize that I open myself to various criticisms and attacks when I say that, but managerialism, that is to say what I find problematic in the profession now, assumes that everything can be put in technical words and justifications, that there's always a reasonable, and there always has to be, a reasonable justification, or a reasonable reason. Let me put it this way, for what it is that we've done, and an instrumental view of what should be done. Now, I think that attitude is part of the problem because the more one looks for technical reasons the more one will find technical objections to those reasons and the more cynical one tends to become about this process as a whole.

I think in becoming technical we have lost the sense that politics really is an awareness of the unfounded-ness of the ultimate choices that we have. Awareness that there's no fundamental guarantee that what we decide or how we act politically, it may go wrong and people may suffer from it and that none of the specialisation in economics, environmental and human rights fields, gets us away from that dilemma. I want to say my consciousness of this fact might perhaps enhance the responsibility of individual actors and their sense of the need of coming together and forming a community in which we can support each other in the way in which I think people of religious faith once upon a time wanted to come together and establish. So I'm not looking for monasteries, far from that, but some sort of openly political communication about what should be done with the world instead of a technical communication that looks for a short time at costs and benefits.

8. Well, Professor Koskenniemi, I must thank you so much for these fascinating insights. I'm very grateful to you for agreeing to come and speak to me and I hope that you will be prepared to give a second interview at the end of your time. That will be in the summer and maybe you will allow me to come and record and photograph you at the Goodhart Lodge against a nice background of summer flowers.

Oh, I do hope so and perhaps at that point I can also have a discourse on my experiences here in Cambridge and my interaction with colleagues. I have already met quite a number of them and I look forward to meeting more.

I do hope so. Thank you so much.

Thank you.

