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Even the Dead Will Not Be Safe: International Law and the Struggle Over Tradition

Andrew Lang and Susan Marks

How and why might we come to know the past? According to Walter Benjamin, 'the past can be seized only as an image that flashes up at the instant when it can be recognized and is never seen again'.¹ Benjamin continues: 'To articulate the past historically does not mean to recognize it "the way it really was"'. Rather, it 'means to seize hold of a memory as it flashes up at a moment of danger'.² What kind of danger? Writing in 1933, Benjamin had a very particular and dreadful peril in mind, but he characterises the moment of danger in general terms as 'a conformism that is about to overpower tradition'. 'In every era', he writes, 'the attempt must be made anew to wrest tradition away from a conformism that is about to overpower it'.³

Benjamin is presenting here a distinctive vision of history-writing that ties it, on the one hand, to the idea of an arresting 'flash' that lights up in an instant and is gone, and on the other hand, to the idea of tradition that is always on the verge of lapsing into conformism. We come to know the past (he seems to be suggesting) not, or not primarily, by means of rational explication or interpretation, but through an embodied and even perhaps in some sense magical process that enables us to recognise and seize the there-and-then in the here-and-now. And we do this – we take hold of memories as they flash before us – in order to reclaim the tradition to which those memories belong from the forces that would otherwise overpower it. For Benjamin, '[o]nly that historian will have the gift for fanning the spark of hope in

¹ W.Benjamin, 'Thesis V on the Philosophy of History' in *Illuminations*, H. Zorn (trans.) (London: Pimlico, 1999),247.

² W.Benjamin, 'Thesis VI on the Philosophy of History' in *Illuminations*, H. Zorn (trans.) (London: Pimlico, 1999), 247.

³ *Ibid.*

the past who is firmly convinced that *even the dead* will not be safe from the enemy if he [the enemy] wins'.⁴

Viewed in this light, history-writing – the 'articulation of the past historically', in Benjamin's formulation – is a terrain of struggle over tradition. Conversely, the struggle over tradition reveals history-writing as an effort to rescue the dead not just from obscurity, but from misappropriation, understood by Benjamin as appropriation in the service of the ruling order. The English word 'tradition', from the Latin *tradere* (to hand over or hand down), refers both to an action and to the object of that action. We do certain things at certain times 'by tradition'. We also appeal to 'tradition' as a reason for doing things. 'Traditions' are our inheritance from earlier generations. Theologically speaking, there is divine authority not only in the scriptures, but also in oral 'tradition'. Aesthetically speaking, it is of interest when someone follows 'in the tradition' of another. In one early and now obsolete usage, 'tradition' denoted as well the act of giving up, surrender, or – most intriguingly, considering what Benjamin writes – betrayal.

International law is a tradition in the sense, and to the extent, that it is made up of beliefs, practices, habits and unwritten rules which are handed down and carried forward within the community of international lawyers. What is at stake in the struggle over this tradition? What forms of conformism currently threaten to overpower it? Can historical research 'fan the spark of hope in the past' of international law by challenging those forms? What would it mean to seize hold of international legal history through acts of recognition and apperception, themselves occasioned by momentary instances of what Benjamin calls elsewhere 'profane illumination'?⁵ Our paper takes up these questions. But they are big questions, and we will only be able to address them here in a small and suggestive way. In doing so, we turn to the manifestly illuminating work of Martti Koskenniemi, which is also

⁴ Ibid (emphasis in original).

⁵ W. Benjamin, *One Way Street and Other Writings*, E. Jephcott and K. Shorter (trans.) (London: Verso, 1997), 237.

profane in Benjamin's sense that its author penetrates the mysteries of the world as a 'reader' and 'thinker', rather than as a 'dreamer' or an 'ecstatic'.⁶

We will begin by revisiting Martti's marvellous study of the history of international law, *The Gentle Civilizer of Nations*.⁷ Before *The Gentle Civilizer* was published, Martti presented parts of the study in a series of lectures at the University of Cambridge, and we will also refer to those. Both in the preliminary lectures and in the book, he made very clear the conformist threat to international legal tradition that most troubled him: managerialism – the eclipse of ethical engagement and political responsibility by a form of professional practice in which international lawyers experience and represent themselves as the 'diplomat's [and international business executive's] best helper'.⁸ We propose in what follows that Martti's history of international law can be read as an attempt to counter this threat by recovering a practice of responsible moral agency which he takes to have been lost, or badly weakened, in contemporary times. How does he go about this? After all, agency is not given, but made.⁹

In the succeeding parts of our paper, we highlight three aspects of his method (if that is the right word). One invokes the power of similarity, setting up exemplars or role models from the past. Another puts us into contact with the past, such that it becomes an active force in the present. A third involves the production of artefacts for use in these ways. Similarity and contact recall the phenomenon of 'sympathetic magic' which anthropologists once saw as a feature of pre-modern cultural life. Thus, there was the idea that an effect could be produced simply by imitating it. And there was the idea that things or people that had been in contact would continue interacting even after contact had been severed. In Benjamin's hands, sympathetic magic becomes the 'mimetic faculty', the human 'gift of producing similarities ...

⁶ Ibid.

⁷ M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001).

⁸ M. Koskenniemi, 'Letter to the Editors of the Symposium', *American Journal of International Law*, 93 (1999) 351, 352.

⁹ Timothy Mitchell makes this point in the context of a fascinating account of the fabrication of 'agencies, connections, interactions and forms of violence' in modern Egypt. See T. Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press, 2002), 52.

[and] of recognizing them'.¹⁰ Benjamin thought the mimetic faculty was at its strongest in pre-modern societies, but he did not doubt that it also persisted in modernity in multifarious forms. As we shall see, the 'flash' that was his way of expressing historical comprehension may be one such form.

Two Lectures and a Meeting

In late 1997 Martti Koskenniemi delivered the Hersch Lauterpacht Memorial Lectures at the University of Cambridge. The lecture series was inaugurated in 1983 to commemorate the contribution to international law of Sir Hersch Lauterpacht, Whewell Professor of International Law at that university from 1938 to 1955. Martti began his first lecture by evoking another lecture, delivered in the same city almost sixty years earlier by Hersch Lauterpacht himself.¹¹ The occasion was a meeting of the Cambridge University League of Nations Union that took place very shortly after Lauterpacht's arrival to take up his chair, in November 1938. At this moment of impending war, Lauterpacht stood before the assembled enthusiasts for the League of Nations to discuss the failure of international law and institutions to keep the peace. As Martti recounts the story, Lauterpacht spoke in a 'rhetorical, anxious tone',¹² appealing directly to his audience: "[W]hat have we to do ...?"

Ought we to abandon the League ... ? Ought we to maintain it and adapt it to the needs of a retrogressive period? Ought we to [reform it] so as to make acceptable for everyone? Ought we to admit that if peace cannot be achieved by collective effort, there are other good things than can be achieved through it?¹³

The answers were clear to Lauterpacht. There must be no giving up on the project of liberal internationalism. Equally, however, there could be no denying that the 'we' to whom he appealed had become thoroughly 'estranged from the course of inter-war

¹⁰ W. Benjamin, 'On the Mimetic Faculty' in *Reflections: Essays, Aphorisms, Autobiographical Writings*, E. Jephcott (trans.) (New York: Schocken, 1978), 333.

¹¹ The story is retold in Koskenniemi, *The Gentle Civilizer of Nations* 353-5 and M.Koskenniemi, 'Lauterpacht: the Victorian Tradition in International Law', *European Journal of International Law* 2 (1997) 215, 215-17.

¹² Koskenniemi, 'Lauterpacht' 215, 216.

¹³ *Ibid*, 215-16.

politics – the politics of national over common interests, ... the reign of “short-sighted benefits” over stable and balanced growth, and the rise of dictatorships “on a scale unprecedented in history”.¹⁴ How were he and his audience to deal with this estrangement? The strategy they needed to adopt appears to have been no less clear to Lauterpacht. Just as, centuries earlier, the man whom he regarded as the ‘father’ of international law, Hugo Grotius, had ‘[sought] authority from the customs of the Romans’, so Lauterpacht would invite his audience to ‘[turn] to the past’.¹⁵ He and they would retain their relevance, hold onto their principles, and fight back in the name of their community, their tradition, by recovering the memory of “better peoples and better times”.¹⁶ Thus, Martti reports:

To find a place for law in a dangerous time, Lauterpacht looked back to the middle of nineteenth century, hoping to resuscitate its liberal rationalism and its ideal of the rule of law, its belief in progress, its certainty about the sense and direction of history.¹⁷

Martti writes of the ‘tone of unmitigated Victorian nostalgia’ that inflected Lauterpacht’s lecture as he spoke of the ‘heyday of the bourgeois century’ and lamented the decline of progressive outlooks, initiatives and institutions since that time.¹⁸ In Lauterpacht’s words, ‘How immeasurably far backwards do we seem to have travelled from those days of unbounded optimism?’¹⁹ As is indicated also in the passage quoted above, Lauterpacht regarded the interwar years as a period of ‘retrogression’. In Martti’s gloss, this was a ‘retrogression from the cosmopolitanism that inspired Wilson in Paris in 1918-19, but which owes its origin to the high liberalism of a century earlier’.²⁰ Yet if Lauterpacht ‘never gave up’ the liberal ideals of the nineteenth century,²¹ Martti observes that he also belonged firmly in the

¹⁴ Ibid, 216.

¹⁵ Ibid.

¹⁶ Ibid. See S. Neff (ed.), *Hugo Grotius: On the Law of War and Peace* (Cambridge University Press, 2012), 15: ‘History in relation to our subject is useful in two ways: it supplies both illustrations and judgements. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred ancient examples, Greek and Roman, to the rest.’

¹⁷ Ibid.

¹⁸ Ibid, 217.

¹⁹ Ibid, 216.

²⁰ Ibid, 217.

²¹ Ibid.

‘modernist camp’ of the twentieth century.²² Believing that ‘[l]aw is how it is interpreted’, he hewed to a sophisticated modern interpretivism that stressed the ‘primacy of interpretation over substance, [and] process over rule’. This led him into ‘an institutional pragmatism that’, Martti notes, ‘is ours too’.²³

As Martti presents him, then, Lauterpacht ‘bridges the gap between the liberal rationalism of the nineteenth century and the functional pragmatism of the late twentieth century’. His commitment to Victorian ideals of progress and the ‘harmony of interests’ combines with a modern ‘hermeneutics of judging’ to give his work both a ‘historical and contemporary feel’. Martti concludes: ‘Close and distant at the same time, [Lauterpacht] is uniquely placed to provide an understanding of why it is that we stand now where we do’.²⁴ So where *do* we stand now (or where did we stand in 1997, when Martti delivered his lecture)? In the discussion that followed this evocation of Lauterpacht’s 1938 address to the Cambridge University League of Nations Union, as well as in Martti’s other speeches and texts, it emerged that his interest in Lauterpacht was occasioned at least in part by a belief that the later twentieth century too was a period of decline and fall for international law. For Martti, this fall consisted of a descent into precisely that functional pragmatism which Lauterpacht had anticipated. By the end of the twentieth century, functional pragmatism had become pervasive ‘managerialism’.

In Martti’s telling, the ‘managerial’ mindset sees international law as functionally responsive to the objectives, values and interests of states, and assesses it by reference to its effectiveness in facilitating the achievement of those objectives, values and interests.²⁵ Managerial international lawyers tend to lose sight of the gap between law as an instrument and law as a ‘surface over which we carry out our

²² Ibid, 218.

²³ Ibid, 219.

²⁴ Ibid, 221.

²⁵ M. Koskenniemi, ‘What Use for Sovereignty Today?’ *Asian Journal of International Law*, 1 (2011), 61-70, 66; M. Koskenniemi, ‘Miserable Comforters: International Relations as a New Natural Law’, *European Journal of International Relations*, 15 (2009), 395-422, 406ff.

projects and ... criticize those of others'.²⁶ At the same time, managerial international lawyers are disposed to treat the law's purposes as given, asking only questions about how those purposes should be implemented, rather than 'engaging the point of international law' as an object of contestation.²⁷ As they imagine and undertake it, the role of the international lawyer is to be 'counsel for the functional power-holder'; there is no, or only very limited, space for acting as a 'moral politician' who uses 'critical reason [to] measure today's state of affairs from the perspective of an ideal of universality'.²⁸ At its worst, managerialism obscures 'the way power works and [makes] particular intellectual or social hierarchies appear as natural aspects of our lives'.²⁹

Martti writes that, like Lauterpacht, 'we too are historically situated in a project that is not only an abstract exercise in ideas but a continuum of political, moral and professional choices'.³⁰ If managerialism inclines us to forget this, then for Martti international legal renewal depends on recovering the memory. In practical terms, the challenge is to locate resources that could engender a sense of responsible moral agency in the professional practice and self-image of the international lawyer. Following his forebear, Martti finds these resources by turning to the past. *The Gentle Civilizer of Nations* famously traces the origins of modern international law to the 'men of 1873': a group of European lawyers, diplomats and politicians who met in Ghent in September 1873 to inaugurate the *Institut de droit international*. As he depicts them, these men were people with projects: not 'philosopher-lawyers', but men of action; practical, engaged men, who were convinced that the role of the lawyer was to contribute to social progress, rather than observe it from a scholarly distance.³¹ Domestically, their causes were characteristic of mid-century Victorian

²⁶ M. Koskenniemi, 'Miserable Comforters', 395-422, 412.

²⁷ M. Koskenniemi, 'The Politics of International Law – Twenty Years Later', *European Journal of International Law*, 20 (2009) 7, 18.

²⁸ Koskenniemi, 'Miserable Comforters', 395-422, 401, 411, 414, 415.

²⁹ Ibid, 16.

³⁰ M. Koskenniemi, 'Lauterpacht', 211, 215.

³¹ Koskenniemi, *The Gentle Civilizer of Nations*, 57-8.

liberalism: penal reform, electoral reform and enfranchisement, child labour, universal education.³² Internationally, their instincts were cosmopolitan.

Despite the economic depression of the 1870s, these men were advocates for freedom of commerce and the protection of property rights, taking such measures to be integral to any strategy for assuring peace among nations. Disturbed by the conduct of the Franco-Prussian war in 1870-71, they looked to humanitarian law to make hostilities less savage. They urged arbitration as a means of international dispute settlement, and encouraged efforts to promote mutual understanding between nations, in the interests of securing peace and preventing unnecessary war. Above all, they adhered to a vision of law which conceived it not as sovereign command, but as the emanation of a 'popular consciousness', itself best understood as 'popular conscience'. To them, the jurist's task was to act as the mouthpiece of that popular consciousness/conscience, discerning its content through scientific reason, philosophical reflection and historical enquiry.³³ Against that backdrop, Martti shows how the men of 1873 came to understand their role in highly moralised terms, and to represent their new profession (now notoriously) as the 'legal conscience of the civilized world'.³⁴ It is this moralised sensibility which, in Martti's telling, most clearly sets these inaugural international legal professionals apart from the managerialists of today.

We have given, we hope, a fair account of Martti's diagnosis and prescription. But how is the recovery to occur? Historical investigation can put before us a moralised, as distinct from managerialist, sensibility, but how is it to make that image impinge on lived reality? It is a striking part of Martti's wager that 'connection' is the real battle in the struggle over international legal tradition. Through Martti, we connect with Lauterpacht, and beyond him, with the men of 1873. Through Martti's connection with Lauterpacht, we also connect with the earlier nineteenth century 'classical liberals', and still further back, with Grotius. At one level, this

³² See, e.g., Koskenniemi, *The Gentle Civilizer of Nations*, 18.

³³ *Ibid*, 51-54.

³⁴ *Ibid*, 41.

multigenerational story spanning centuries simply signals that there exists a shared disciplinary tradition to which all international lawyers belong. It situates us on a common historical trajectory. In doing so, it emphasises the importance of individuals and their projects, and invites us to consider the specific conditions under which those individuals became as they were and acted as they did, along with the specific contexts in which their projects arose, took shape and were (more or less conflictually) pursued. At another level, however, Martti's multigenerational account plainly invites us to consider as well what those individuals and their projects might mean to *us*.

Lauterpacht and the men of 1873 appear as, in some way, role models. While Martti comments on Lauterpacht's tone of unmitigated nostalgia, he is certainly aware that his own writing has a tone of nostalgia too. That is part of the sense in which Lauterpacht is a role model. The original meaning of nostalgia was homesickness. First discussed in the seventeenth century, it was an illness diagnosed in Swiss mercenaries fighting in the lowlands of northern France and Italy who became sick from longing for the mountains of home. Nostalgia comes, as we know, from feelings of loss and estrangement. Of course, Martti's admiration for Lauterpacht and the men of 1873 is by no means uncritical. It is plain that the world in which they lived is not one to which he would seek to return. Nonetheless, the thrust of his narrative is that there was something valuable in the work of Lauterpacht and the men of 1873 which has been lost, and that that loss is our loss. The estrangement from some form of moralised sensibility, Martti seems to suggest, has estranged us from our tradition and thus also from ourselves. In putting this across, Martti asks us to notice Lauterpacht's *feel*, which is both antiquated or 'historical' and 'contemporary'. Holding up to our eyes his shifting telescope, he leads us to *see* that Lauterpacht is at once 'distant' and 'close'. Like Martti himself, Lauterpacht becomes a 'bridge' which *connects* us to the past – and does so not just in a symbolic way, but also through the senses.

As foreshadowed in our introductory remarks, our own wager is that this phenomenon of ‘connection’ has something to do with the exercise of what Benjamin called the mimetic faculty. To explore this further, we need now to make a short theoretical side-trip to (re)familiarise ourselves with the main, relevant contours of the concept to which Benjamin himself appeals: mimesis.

On Mimesis and Sympathetic Magic

Mimesis is a concept with a tangled and fascinating history.³⁵ An ancient Greek term, it is most commonly translated into English as ‘imitation’, but also sometimes translated as, or associated with, a variety of other terms, including: correspondence, emulation, resemblance, mimicry, verisimilitude, representation, depiction, realism, repetition, simulation and duplication. The word comes from the root *mimos*, meaning a person who imitates, as well as a particular theatrical or perhaps dance genre of the time that revolved around imitation. Although he did not invent the term, Plato appears to have set the initial, and in some respects enduring, frame of reference for thinking about the concept of mimesis. He used the term to theorise representation and what he took to be its dangers. Representation posed for Plato the question of the relation between images and reality. Inasmuch as that is a relation of similarity, but necessarily also of difference, the thrust of his analysis was that representation opens the way to distortion, deception and manipulation. Mimesis encourages us to think we are confronted with reality when in fact we are confronted with biased and falsifying images. Plato’s student, Aristotle, was famously more positive in his assessment of aesthetic representation. To him, mimesis might not be without dangers, but it is also a matter of great skill and has the capacity to promote virtue and understanding.

Accounts of mimesis indicate that, from Roman times until eighteenth century, the term was most commonly rendered as the Latin *imitatio*. Whereas for Plato and

³⁵ Most of what follows comes from M. Potolsky, *Mimesis* (New York: Routledge, 2006), an exemplary survey of a concept, to which are heavily indebted. See also A. Melberg, *Theories of Mimesis* (Cambridge University Press, 1995) and G. Gebauer and C. Wulf, *Mimesis: Culture, Art, Society*, D. Reneau (trans.) (University of California Press, 1996).

Aristotle, the focus was on the imitative relationship between images and reality or between art and life, for thinkers of these later times a primary concern was the imitative relationship between a master and his (or, much more rarely, her) disciples. Thus, mimesis came to refer to the emulation of exemplary forerunners. Importantly, a distinction appears to have been drawn between emulation and 'mere' copying. Aspiring artists and writers were taught to use skill and judgement in learning from role models and deploying old forms in new ways. Beginning around the seventeenth century, however, this way of approaching artistic activity and knowledge production began very evidently to lose ground. Descartes articulated a philosophical 'method' that involved searching 'for no knowledge other than what can be found within myself'.³⁶ Later philosophers and artists likewise emphasised contemplation and originality – the individual genius, rather than the fertile tradition – as the basis of scholarly insight and artistic achievement.

But if modernity became principally preoccupied with liberation from tradition, modern (and postmodern) theorists went on to use the concept of mimesis to highlight and investigate a huge array of ways in which 'the doctrine of the similar'³⁷ nonetheless remained pivotal. Their work spans literary theory,³⁸ psychoanalytic theory,³⁹ critical social theory,⁴⁰ historiographical theory,⁴¹ anthropology,⁴² post-colonial theory,⁴³ and art and architectural theory,⁴⁴ among other bodies of thought. In very general terms, it seems that at least two themes run through this literature.

³⁶ R. Descartes, *Discourse on Method*, D. Cress (trans.) (Indianapolis: Hackett, 1998), 5.

³⁷ See W. Benjamin, 'Doctrine of the Similar (1933)', K. Tarnowski (trans.), reprinted in *New German Critique*, 17 (Spring 1979) 65.

³⁸ Perhaps the best known work on mimesis is Erich Auerbach's study of the 'representation of reality in Western Literature', first published in 1946. See E. Auerbach, *Mimesis*, W. Trask (trans.) (Princeton University Press, 2003). Regarding the extraordinary conditions under which this text was composed, see A. Krystal, 'The Book of Books', *The New Yorker*, 9 December 2013.

³⁹ See, e.g., S. Freud, *The Joke and Its Relation to the Unconscious*, J. Crick (trans.) (London: Penguin, 2002). The concept is also held to be latent in much of Freud's other work, e.g. on the theory of identification.

⁴⁰ See, e.g., T. Adorno and M. Horkheimer *Dialectic of Enlightenment*, J. Cumming (trans.) (New York: Continuum, 1993), 180-86.

⁴¹ See, e.g., H. White, *Figural Realism: Studies in the Mimesis Effect* (Baltimore, Johns Hopkins University Press, 2000).

⁴² See, e.g., M. Taussig, *Mimesis and Alterity* (London: Routledge, 1993).

⁴³ See, e.g., H. Bhabha, *The Location of Culture* (London: Routledge, 1994).

⁴⁴ See, e.g., T. Adorno (R. Hullot-Kentor, trans.), *Aesthetic Theory* (New York: Continuum, 2002) and, in architectural theory, N. Leach, *Camouflage* (Cambridge, MA, MIT Press, 2006).

One is the idea that what we may imagine as ‘autonomous’ often has an imitative aspect. This may be unconscious, as with Freud’s theory of identification with others as the basis of selfhood. Or it may be conscious, as with literary accounts of convention, influence and the confidence or anxiety associated with it. But either way, mimesis points to the difference that lies at the core of identity, the succession without which there can be no initiative. The second theme concerns the ambiguities of imitation. Is it a compliment to the one imitated or an insult? Scholars remind us that satire and parody work by producing resemblances, and so too does mimicry. In an important contribution to post-colonial theory, Homi Bhabha postulates a concept of ‘colonial mimicry’.⁴⁵ From the perspective of the coloniser, the colonised must be sufficiently similar to be ‘civilisable’, but sufficiently different to justify domination. Yet this condition of being ‘almost the same, but not quite’ is also unsettling, inasmuch as colonial authority is threatened by a mimetic relation that is inevitably ‘at once resemblance and menace’.⁴⁶

The conjunction of resemblance and menace is one way in which the ambiguities of mimesis may be felt, but it is not the only one. To bring out another, it is helpful to return for a moment to Renaissance *imitatio*. In his study of mimesis, Matthew Potolsky recalls the account given in 1336 by the Italian poet Petrarch of his ascent of Mount Ventoux in southern France.⁴⁷ Petrarch explains that he wanted to make the climb because of a passage he had read in Livy. Livy recounts in this passage how Philip of Macedon had climbed Mount Haemus in Thrace because he believed that he would be able to see from the summit as far as Italy in the west and the Danube in the north, and this would help him as he contemplated war with Rome. Potolsky observes that ‘Petrarch’s desire is imitative’; he wants to climb a mountain in order to gain an expansive view, just as the ancient king Philip of Macedon had done. Yet ‘this imitation is complicated by ambivalence’.⁴⁸ For it was part of the point of Livy’s retelling that Philip never got to see the anticipated panorama: the summit of Mount

⁴⁵ H. Bhabha, *The Location of Culture*, 121-131

⁴⁶ *Ibid*, 86 (emphasis omitted).

⁴⁷ Potolsky, *Mimesis*, 62-3. See F. Petrarch, *Selections from the Canzoniere and Other Works*, M. Musa, (trans.) (Oxford University Press, 1985), 11.

⁴⁸ Potolsky, *Mimesis*, 62.

Haemus was shrouded in mist when he reached it, so his journey was futile and he only succeeded in exhausting his troops.⁴⁹ As Potolsky reads it, the ‘example of Philip suggests that, although the ancients remain a source of inspiration for the present, their path is fatally flawed’. Petrarch plainly finds something inspiring in Livy’s story of Philip. He seeks to ‘retain the idea of classical imitation [but] without necessarily endorsing all the ideals of the classical world’.⁵⁰

So far we have seen that mimesis confronts us with the role of imitation in human and social affairs. It also confronts us with the ambiguities of imitation, whether because there is mocking menace as well as resemblance, or, more benignly, because what is involved is inspiration rather than endorsement in all respects. Insofar as imitation is a token of admiration, the concept of mimesis delivers a reminder that that admiration is rarely unmixed or without some reservation or disquiet, and that a heightened awareness of imperfections may be among the by-products of enthusiastic copying. Our focus to this point has been on mimesis in the relation between images and reality (art and life, narrative and experience, representation and truth) and in the relation between people or groups of people (master and disciple, self and other, coloniser and colonised). However, mimesis does not arise only in those relations, and before concluding this brief survey of ideas associated with the concept of mimesis, we should note an influential strand in the study of mimesis that goes back to the work in the late nineteenth century of the Scottish anthropologist and scholar of comparative religion, James Frazer.

Frazer’s monumental work *The Golden Bough* (first published in 1890) is commonly credited with being the first systematic study of the practices and principles of ‘magic’.⁵¹ The study was based mostly on information about the non-European world related to Frazer by other anthropologists and by travellers, but it also included discussion of European practices, both pre-Christian and, controversially, within

⁴⁹ Livy writes: ‘When they came down they said nothing to contradict the general notion – not because the different seas, mountains and rivers could in fact be seen from one place, but to prevent their futile expedition from providing material for mirth.’ See T.Livy, *Rome and the Mediterranean: Books XXXI- XLV*, H. Bettenson (trans.) (London: Penguin, 1976), XL: 22, 462.

⁵⁰ Potolsky, *Mimesis*, 63.

⁵¹ J. Frazer, *The Golden Bough: A Study in Magic and Religion* (Ware: Wordsworth, 1993).

Christianity. Frazer argued that magic revolved around two general principles.⁵² One, which he called the 'Law of Similarity', was that 'like produces like, or that an effect resembles its cause'. Thus the 'magician infers that he can produce any effect he desires merely by imitating it'. The second, which Frazer called 'the Law of Contact', was that 'things which have once been in contact with each other continue to act on each other at a distance after the physical contact has been severed'. Here the magician 'infers that whatever he does to a material object will affect equally the person with whom the object was once in contact'. Frazer proposed that both these 'laws' could be 'comprehended under the general name of Sympathetic Magic' – 'sympathetic', because 'both assume that things act on each other at a distance through a secret sympathy'.⁵³

Frazer's idea of sympathetic magic extends the discussion of mimesis so that it encompasses not only the relation between images and reality and between people or groups of people, but also the relation between people and objects. Indeed, his idea extends mimesis so that it encompasses the entire animate and inanimate worlds in their complex interrelation. As Potolsky puts it, *The Golden Bough* describes a 'sympathetic network [that] binds humans, animals and objects in a kind of mimetic network of reciprocal influence'.⁵⁴ Frazer discusses examples of imitative magic that include the burning of effigies of people to whom harm is desired to be done, and the display of images or totems of fish, birds and other animals to encourage food supply. He also discusses examples that show how contact activates the mimetic magic in a special way. Body parts, clothing and footprints are treated as though they maintained a connection to the person to whom they belonged long after any physical connection to that person has been broken. In one practice, a woman digs up earth from a man's footprint, puts it in a pot, and plants a flower in it so as to cause love to blossom between them.⁵⁵

⁵² See *ibid*, 11-47.

⁵³ *Ibid*, 12.

⁵⁴ Potolsky, *Mimesis*, 138.

⁵⁵ For these examples, see Frazer, *The Golden Bough*, 12-13, 17-19, 38-41, 43-44.

As these examples also illustrate, sympathetic magic involves the production of artefacts – effigies, totems, flower-pots – and their use to take advantage of correspondences between the animate and inanimate. On the one hand, the artefact may work by imitation or representation – an effigy that resembles a person, a totem that mimics the swimming of a fish. On the other hand, it may trade on contiguity or on the power of what Frazer terms ‘contagion’ – a flower that acts on the ‘owner’ of a footprint out of the soil of which it was grown. In both cases, the artefact brings what is distant into active relation with those near at hand. The anthropologist Michael Taussig has drawn on Frazer’s work to explore the phenomenon of mimesis in capitalist modernity.⁵⁶ Taussig is particularly interested in this artefactual aspect. He highlights ‘the notion emerging from Frazer’s discussion of imitative magic as power that the copy extracts from the original’.⁵⁷ To Taussig, copies do not merely reflect their original; they interact with their original in a way that renders the latter susceptible of appropriation and influence. In his words, ‘[t]he wonder of mimesis lies in the copy drawing on the character and power of the original, to the point whereby the representation may even assume that character and that power.’⁵⁸

Fanning the Spark of Hope in the Past

Our side-trip has taken us across many branches of thought and many, widely disparate historical epochs. For all that this concept is concerned with similarity and contact, it is a feature of accounts of mimesis that they have a decidedly dizzying quality, and we recognise that ours may be no exception. Steadying ourselves now, we can begin to discern some elements that bear on the issues we raised earlier. You will recall that our interest was in the tradition of international law, and that we found in Martti Koskenniemi’s work the argument that managerialism is the ‘conformism’ that currently threatens this tradition. We followed something of Martti’s attempt to wrest the tradition of international law away from its managerialist orthodoxy by recovering a moralised sensibility and commitment to

⁵⁶ M. Taussig, *Mimesis and Alterity* (London: Routledge, 1993).

⁵⁷ *Ibid*, 59.

⁵⁸ *Ibid*, xiii.

responsible agency that existed in former times.⁵⁹ This took him back to Hersch Lauterpacht in the 1930s and earlier still, to the founders of the *Institut de droit international* in 1873, with their sense of being the ‘legal conscience of the civilized world’. What unfolded was a multigenerational story in which Lauterpacht served as a bridge, connecting us to the past.

What is to be gleaned from our discussion of mimesis? In the first place, *similarity* is plainly central to Martti’s method. As already suggested, Lauterpacht and the men of 1873 are presented as, in some way, role models. The logic of Martti’s story is that these men incarnate the kind of sensibility we need to recover. From the perspective of his critique of managerialism in international law, they are our exemplary forerunners, the ancestors on whom we should model ourselves. Just as a crowd might seek to produce harm to a person by burning him in effigy or a community might seek to produce an abundance of fish by scattering fish-shaped totems in the sea, so Martti seeks to produce a new generation of morally charged international lawyers by prompting the imitation of earlier generations of them. Importantly, however, the principle of similarity is not the principle of sameness. Needless to say, Martti is not seeking to encourage the revival of a professional self-identity as the ‘legal conscience of the civilized world’. Nor is Lauterpacht’s ‘liberal rationalism, ideal of the rule of law, belief in progress, and certainty about the sense and direction of history’ a helpful outlook for the project Martti envisages. Like Petrarch following in the footsteps of Philip of Macedon – or rather, like Livy narrating the story of Philip – Martti offers his history as a source of *inspiration*, inviting us to imitate these international lawyers from the past but without necessarily endorsing all the ideals they espoused.

Secondly, Martti’s method also involves *contact*. Like the law of similarity, the law of contact presupposes that things act on each other at a distance. That distance may be spatial – a distant location – but, as we have just seen, it may also be temporal – a

⁵⁹ For the purpose of this paper, we take at face value Martti’s claim that a ‘moralised sensibility’ is the (sole or primary) alternative to managerialism and a suitable way of overcoming its hegemony. However, we question this claim in A. Lang and S. Marks, ‘People with Projects: Writing the Lives of International Lawyers’, *Temple International and Comparative Law Journal* (forthcoming).

distant time or distant times. There is no soil to dig up from the footprints of those who lived long ago, and nor are there generally any body parts left or items of clothing. But the metonymic principle of contiguity still finds forms of expression that are distinct from those associated with the metaphorical principle of resemblance. Martti reports that Lauterpacht is reputed to have kept an engraving of Grotius on the wall of his study.⁶⁰ If true, Grotius died in 1645 and Martti does not say when the engraving was made and, in particular, whether it was made before 1645. But this surely does not matter. Whether or not the engraving had ever had – or could ever have had – any direct physical contact with Grotius, it seems reasonable to suppose that Lauterpacht hoped to produce by it a kind of *contagion* through which Grotius would act on his (Lauterpacht's) thoughts and on his writing, and would guide him in his work. We have seen that Martti hopes to produce a kind of contagion too. He wants to bring Lauterpacht himself into our world, and to make us 'see' and 'feel' him as a presence who might act on us.

A third aspect of Martti's method concerns the production of *artefacts*. It is, for the most part, *things* that do the work of activating mimetic connection. These things may be fabricated objects, like effigies, totems, flower-pots or engravings. They may also be intellectual products like texts. Petrarch only knew about Philip of Macedon's ascent of Mount Haemus because he read about it in Livy's *History of Rome*. And reading about it there, he was evidently struck by something in Livy's telling of the story. But it seems that what really inspired Petrarch was the classical idea of imitation – Roman *imitatio* – itself. He set out to recapture it and give it fresh life in post-classical times. Livy's text was able to inspire Petrarch to imitate Philip because it was a point of contact with this idea. Might we think of Martti's various texts in a similar way? If so, they can be understood to perform something of the function of the flower-pot in the south Slavic practice we mentioned earlier. Just as the flower-pot serves to put the woman into contact with the distant owner of the footprint, so the text would serve to put us into contact with earlier generations of international lawyers. And just as the flower-pot is made out of the footprint but does not

⁶⁰ He apparently also had photographs of Hans Kelsen and Arnold McNair. See Koskeniemi, 'Lauterpacht, 215, 217-8.

resemble the footprint or its owner, so the relation between the text and those earlier generations would not be a relation of fidelity. It would need to be rooted in or 'made out of' the historical evidence, but it would depend less on faithful accuracy – on presenting the past 'the way it really was' (to recall Benjamin's phrase) – than on correspondence.

Texts are one thing, but as described in earlier sections of this paper, Martti has not only written about our connection to Lauterpacht and the men of 1873. With his Hersch Lauterpacht Memorial lecture and its evocation of Lauterpacht's own lecture in the same city almost sixty years earlier, he has also *performed* it. As recalled earlier, the word 'mimesis' was originally associated with a particular kind of performance, though apparently little is known about the genre. Whilst performance is amongst the simplest kinds of mimetic artefact, it may involve forms of imitation, impersonation or simulation that are quite subtle. Martti tells of how Lauterpacht confessed at the outset of his 1938 lecture to the Cambridge University League of Nations Union that his subject was one 'about which he felt so strongly that he was unable to trust the "freely spoken word"'; he would 'read from a manuscript in order to maintain restraint and deliberation'.⁶¹ But in fact, Martti recounts, Lauterpacht did not always maintain his usual high standard of restraint and deliberation in this lecture. Lapsing into 'informality and engagement', he 'switched to the first personal plural' and posed the questions we quoted earlier on ('[W]hat have we to do ...?' etc.).⁶² Martti's own complex interweaving of biography and autobiography, historical narrative and apparent personal disclosure⁶³ replicates this, closing the gap between the 'first persons' of the past and present by bringing them together in the body of the speaker and the circumstances of the performance.

We have spoken a lot in this paper about Martti Koskenniemi's work on the history of international law because we find it inspiring and contagious and truly inimitable. But we are also intrigued by the possibilities of the mimetic faculty for historical

⁶¹ Ibid, 215.

⁶² Ibid.

⁶³ We discuss this in some detail in A.Lang and S.Marks, 'People with Projects: Writing the Lives of International Lawyers' *Temple International and Comparative Law Journal* (forthcoming).

scholarship in the international legal field more generally. We noted earlier Benjamin's characterisation of the mimetic faculty as the 'human gift of producing similarities ... [and] of recognising them'. In a similar vein, Taussig writes of the mimetic 'sixth sense'.⁶⁴ It seems likely to us that this gift or sixth sense is itself socio-historically produced. The history of mimesis is presumably also the history of the mimetic faculty. Leaving that vast terrain of enquiry to one side, what fascinates us is the way, with mimesis, *the copy becomes the thing*. As Taussig puts it in a passage we quoted earlier, the copy '[draws] on the character and power of the original, to the point whereby the representation may even assume that character and that power'. Of course, others have theorised this phenomenon in many different ways.⁶⁵ But here we want to follow Taussig in stressing its artefactual dimensions. Mimesis is, above all, about making things – not (for the most part) things to be exchanged, but things to be used, and not things for instrumental use, but things for 'magical' use, things for use in establishing sympathetic connection across space and time.

The anthropologist Marilyn Strathern has written of a way of thinking about history in the Melanesian societies that she has studied in which the focus is less on interpretation than on 'improvisation'.⁶⁶ In this way of thinking, history is seen not as material to be synthesised, contextualised and decoded, but as a basis for improvised 'performances'. These performances are, in turn, seen as significant for their 'effects': they are for use 'the way [one] may use a knife'; one should create things with them 'the way [one] may create a mask'.⁶⁷ What kind of use? Create things to do what? Strathern reports that, in the practices she has studied, one aspect is to show 'how people act as though they had power when confronted with the untoward'.⁶⁸ We have been concerned in this paper with the untoward, in the shape of Benjamin's 'conformism that is about to overpower tradition'. How can

⁶⁴ See Taussig, *Mimesis and Alterity*, 213.

⁶⁵ See, e.g., Jean Baudrillard's work on the simulacrum and hyperreality. Among many other works, J. Baudrillard, *Simulacra and Simulation* S. G. Glaser (trans.) (Ann Arbor: University of Michigan Press, 1994).

⁶⁶ M. Strathern, 'Artifacts of History: Events and the Interpretation of Images' in J. Siikala (ed.), *Culture and History in the Pacific* (Helsinki: Transactions of the Finnish Anthropological Society, 1990), reprinted in M. Strathern, *Learning to See in Melanesia*, HAU Masterclass Series, Vol. II (2013), 157.

⁶⁷ *Ibid*, 174.

⁶⁸ *Ibid*. Strathern gives this phenomenon a rather different inflection to the one we give it here.

people act as though they retained power when their tradition is on the verge of being overpowered? The move we have discussed is to turn to the past. On this premise, it is in the earlier generations that the 'spark of hope' is to be found. The past may be a foreign country, yet those not residing there can be enabled to 'go-between'.⁶⁹ We *can* seize the past and bring it into active relation to the present. But if Benjamin is right, we can only seize it as an 'image that flashes up at the instant when it can be recognized' and then is gone. The 'flash' of recognition reveals history not simply as a set of facts to be known, but as a force to be felt, a secret sympathy to be sensed, and an occasion to be grasped for producing new artefacts that might be used to activate new connections.

⁶⁹ See L.P. Hartley, *The Go-Between* (London: Penguin, 1997 (1953)), 1 ('The past is a foreign country: they do things differently there.').