
International Law in Europe: Between Tradition and Renewal

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Abstract

International law is a European tradition. Nevertheless, like many other European traditions, it imagines itself as universal. Throughout its history, it has been associated with projects such as Christianity, secular statehood, enlightenment, 'civilization', free trade and human rights. International law's association with particular ideas or preferences does not, however, even slightly undermine it. There are no authentic universals that one could know independently of their particular manifestations. The key question is a political one: Are there good reasons for extending the scope of such ideas or preferences? Answering this question may not have been assisted by the turning of some of them into kitsch. But is that the condition of their universality?

I.

A failing state is ruled by a despotic government. Reports of massacres of a religious minority circulate among European capitals. There is frantic diplomatic activity. Will the international community be able to prevent war? Negotiations prove useless but European statesmen are still reluctant to take action. Finally, one Great Power can no longer stand idle. It feels, writes a famous international lawyer, obliged to pull the sword in order to 'safeguard the recognised interests that are worthy of the sympathy of all civilised nations'.¹ The other powers are shocked. They accuse the intervening state of making an illegitimate attempt to advance its territorial interests. They cannot believe that it could be acting out of the most noble motives. They cannot because, that lawyer explains, 'worshipping material goods has taken such proportions

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¹ F. Martens, 'Étude historique sur la politique russe dans la question d'Orient', IX *Revue de droit international et de législation comparée* (RDI) (1877) 49.

in European societies, the domination of ideas of pure materialism has come to be so deeply embedded in the spirits that it has become inconceivable that a whole nation might wish to advance to the assistance of its brothers and co-religionists out of pure love for them'.²

Does this sound familiar? Here the Baltic-German Professor Friedrich Martens defends Russia's intervention in Turkey in 1877, in the *Revue de droit international et de législation comparée*, the first professional international law journal. Russia has, Martens writes, in French, 'declared war on Turkey in the interests of humanity'.³ He admits that collective intervention would have been preferable and quotes Prince Gortchakow: 'the authority of the Great Powers must be exercised collectively, and common action by the Great Powers would be the best means to attain an amelioration of the intolerable conditions created for Christians by the Porte'. If some powers are unwilling to take the burden of humanity, this cannot mean that no other power may do this. After all 'fundamental principles of international law' are at issue.⁴ In such case, every state must have the right to take action individually.

II.

To invoke international law in such a situation is a European tradition. It is a European tradition in the same sense that wearing a tie at formal meetings is. Everyone can do it. But it has a context and a history. One can do international law better or worse, but the criteria of excellence have been set by Europeans: Cicero and Roman law, Catholic intellectuals, Vitoria in the sixteenth or Louis le Fur in the twentieth century, protestant activists, Hugo de Groot in the seventeenth, or Johann Caspar Bluntschli in the nineteenth century. Identity is narratives we tell about ourselves: the article on 'Europe' in Diderot's *Encyclopédie* proves the supremacy of European civilization by Europe's contribution to the establishment of the law of nature and of nations (*droit de nature et des gens*).⁵ A twentieth-century way of making this point is to agree with Max Weber and to define what is European by the aim of the rationalization of society through law.

None of these men thought of Europe in merely local terms, but generalized it into a representative of the universal. The principle of generalization may have changed: Roman civilization (and law), Christianity, the 'humanity' of the Enlightenment, science and capitalism in the nineteenth, modernity in the twentieth and globalization in the twenty-first century. It is hard to tell these ideas apart. They all claim the status of an Esperanto, transcending the time and place in which they are spoken.⁶ When Sir Hersch Lauterpacht wrote his critical commentary of the Universal Declaration of

² *Ibid.*, at 67.

³ *Ibid.*, at 50.

⁴ *Ibid.*, at 54.

⁵ Fontana, 'The Napoleonic Empire and the Europe of Nations', in A. Pagden, *The Idea of Europe. From Antiquity to the European Union* (2002), at 117.

⁶ See, further, Koskeniemi, 'Legal Universalism: Between Morality and Power in a World of States', in S. Cheng (ed.), *Law, Justice and Power: Between Reason and Will* (2004), at 46–48.

Human Rights in 1950, he attributed those rights to the tradition of British liberalism, *Magna carta* to John Locke, but he had no doubt of their universal import. Indeed, the greatest flaw in the Declaration was that it was not immediately binding.⁷ Like Martens, he was speaking the language of humanity, as did Javier Solana as NATO planes were flying to Serbia in 1999. As did Italy's Prime Minister only a few months ago:

We are in Iraq for exactly the same reason as in Kosovo, Afghanistan, and many other places where the weak suffer difficulties. It is a humanitarian mission that we shall strictly accomplish.⁸

But how can a particular tradition speak in the name of humanity? What possible reason might the Turks, the Serbians and the rest of the world have to believe that? Surely this is the stuff of colonialism. Reporting to his colleagues at the *Institut de droit international* in 1880, Sir Travers Twiss noted that the Koran – unlike the Bible – prohibited equality between the House of Islam and the infidel states and that thus '*la civilisation turque sera toujours incompatible avec la notre*' – there was no reason to give up the universal practice of consular jurisdiction.⁹ Here universality became the name for universal privilege.¹⁰

The historian Anthony Pagden has observed that there is today a 'double imposition for most European states: the need to repudiate their imperial past while clinging resolutely to the belief that there can be no alternative to the essentially European liberal democratic State'.¹¹ We see this in the anxious efforts by the European Union to convince others that the human rights conditionality in its development agreements is not neo-colonialism. But what should we then think of the absence of comparable clauses in any agreements with Australia or New Zealand? And why would Turkey's accession be a problem?

Before I continue, let me state my conclusion. The fact that international law is a European language does not even slightly stand in the way of its being capable of expressing something universal. For the universal has no voice, no authentic representative of its own. It can only appear through something particular; only a particular can make the universal known. A danger and a hope are involved. The danger is that of mistaking one's preferences and interests for one's tradition – and then thinking of *these* as universal, a mistake we Europeans have often made. Therefore, I will suggest that we should take much more seriously those critiques of international law that point to its role as a hegemonic technique. Once that critique has been internalized, however, I want to point to its limits. If the universal has no representative of its own, then particularity itself is no scandal. The question would then be: Under what conditions might a particular be able to transcend itself? What particular politics might we have good reason to imagine as a politics of universal law?

⁷ H. Lauterpacht, *International Law and Human Rights* (1950).

⁸ Vernet, 'L'Europe face au chaos irakien', *Le monde*, 11 May 2004, at 15.

⁹ Twiss, 'Rapport', *L'Annuaire de l'Institut de droit international* (1879–1880), I, at 303–305.

¹⁰ I have discussed a similar problem in Koskeniemi and Lehto, 'The Privilege of Universality: International Law, Economic Ideology and Seabed Resources', 65 *Nordic Journal of International Law* (1996) 533.

¹¹ Pagden, 'Introduction', in Pagden, *supra* note 5, at 11.

III.

But first, realism. ‘Whoever says humanity wants to cheat’. This famous quote from the French nineteenth-century socialist Pierre-Joseph Proudhon points to the constant danger of *false universalism*, the universalism of Empire. As political realists from the Right and Left, Carl Schmitt and E. H. Carr have emphasized, the appeal to common interest often reflects the speaker’s wish to realize his special interest without having to fight.¹² The ruling class always described its rule in this way. And so the best representatives of the *Droit public de l’Europe* – the Göttingen juriconsult Georg Friedrich von Martens and the Heidelberg professor Johann Ludwig Klüber restated the principles of the *ancien régime* as the groundwork of a new diplomatic modernity in 1815. Renewal meant return to tradition. In successive editions of his *Droit des gens de l’Europe* von Martens reprinted his critique of the 21 principles of international law that had been proposed to the French *Assemblée Nationale* in the first years of the revolution (1792). Peoples were not ready for self-determination. An international law based on agreement between Christian Kings was in everyone’s best interest.¹³

Generations of international lawyers from Oppenheim and de Visscher onwards have accepted the dictum about the balance of power as a precondition for a working international legal order, supplemented on the private law side by the Mandevillian theory of the market. Both pieces of nineteenth-century European folklore express a subtle authoritarianism: cynicism as utopia. This had once so repelled Rousseau that he wrote his second discourse as an indictment of the very ideas of natural law and civilization – he was of course thinking of European civilization – as being responsible for the destruction of natural human goodness.¹⁴

We hear Rousseau’s voice in the speech by the Representative of India in the Security Council in 1999 dismissing the argument that when bombing Serbia, the West was acting on behalf of the international community.¹⁵ What ‘international community’? In 1885 – the year of the Berlin African Congress – the *Institut de droit international* passed a resolution celebrating the philanthropy of King Léopold of the Belgians for having assumed the humanitarian task of administering the failed state of the Congo. The Belgian members of the *Institut* defined the King’s administration as an international mandate. When the campaign against Léopold began in the early years of the twentieth century, most Belgian lawyers rallied to the defence of their King. Baron Edouard Descamps, for example, wrote a 600-page track *L’Afrique nouvelle* to celebrate the civilizing mission in the Congo. But we remember him as the man who introduced ‘general principles of law recognised by civilised nations’ in the statute of the Permanent Court of International Justice.¹⁶

¹² See Schmitt, ‘Völkerrechtliche Formen des modernen Imperialismus’, in *Positionen und Begriffe im Kampf gegen Weimar-Genf-Versailles 1923–1939* (1988), at 162–180 and E.H. Carr, *The Twenty-Years’ Crisis 1919–1939* (2nd ed., 1946), especially at 51–53.

¹³ G.-F. von Martens, *Précis de droit des gens de l’Europe* . . . (2 vols. 2nd French edn. by C. Vergé, 1864).

¹⁴ J.-J. Rousseau, *A Discourse on Inequality* (1984 [1755]).

¹⁵ Representative of India in UNDOC S/PV 3988 (24 March 1999), at 15–16.

¹⁶ The details can be found in my *Gentle Civilizer of Nations. The Rise and Fall of International law 1870–1960* (2001), at 157, 159–166. See, in particular, E. Descamps, *L’Afrique nouvelle* (1903).

For a long time, Europe's use of international law was determined from its position of overwhelming power. Vitoria was a scholar of empire and Bluntschli – the first to write about universal human rights in a manual on international law – dined with Bismarck. For these men, the fact that international law was both European and universal peaked in the practice of the *mission civilisatrice* of their particular country. One needed not to be a nationalist, however. Georges Scelle, a good left liberal was so impressed by science and modernity that he saw no reason for self-determination in his functionalist utopia¹⁷ – *la solidarité* coincided with the rule by a global technocracy. As men of power, Europeans wanted to assist in what Kant had taught them was a teleologically oriented universal history:¹⁸ and fought two wars before they gave up looking for the one tribe among themselves that would stay humanity's course.

Today, Europe no longer speaks from such a position. But it still speaks the language of universal international law, perhaps uncertain about who will listen. Pierre-Marie Dupuy's recent general course in the Hague is focused precisely on the theme of unity and diversity, with *jus cogens* and obligations *erga omnes* as the antidote to a fragmentation of the law into special regimes representing special interests.¹⁹ We Europeans share this intuition: the international world will be how we are. And we read international law in the image of our domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary, the Security Council as the police. Today, that tradition is most visibly articulated in the debate – especially vocal in Germany – about the constitutionalization of international law under the UN Charter.²⁰

How differently the Americans see the world! Legalization, is just a policy choice, a matter of costs and benefits – with no *a priori* reason to believe that the latter would outweigh the former.²¹ And no real obligation to obey international law, just a weak maxim of prudence.²² The international law professor is an almost extinct species at United States law schools. And why not? In his widely read pamphlet, Robert D. Kaplan called for leadership with a pagan ethos. 'The moral basis of our foreign policy will depend upon the character of our nation and its leaders, not upon the absolutes of international law.'²³ *Nur der, der kann, darf auch* wrote Erich Kaufmann in 1911 from

¹⁷ G. Scelle, *Précis de droit des gens* (2 vols, 1932–1934), I, at 143–145. See also Koskenniemi, *supra* note 16, at 331–335.

¹⁸ Kant, 'Idea for a Universal History with a Cosmopolitan Purpose', in I. Kant, *Political Writings* (H. Reiss (ed.), 1970), at 41–54.

¹⁹ Dupuy, 'L'Unité de l'ordre juridique international, Cours général de droit international public', 297 *Recueil des Cours* (2002).

²⁰ For a brief overview of the discussion, see Bryde, 'Konstitutionalisierung des Völkerrechts und internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003) 61.

²¹ See generally J. L. Goldstein *et al.*, *Legalization and World Politics* (2001) and Pildes, 'Conflicts between American and European Views of Law: The Dark Side of Legalism', 44 *Virginia Journal of International Law* (2002) 145.

²² This is so because '[t]here is little reason to believe that the resulting system as a whole is just – though particular regimes or arrangements within the international system may be – and that individuals throughout the world, or their governments, owe any duty to it': Posner, 'Do States have a Moral Obligation to Obey International Law?', 55 *Stanford Journal of International Law* (2003) 1916.

²³ R. D. Kaplan, *Warrior Politics. Why Leadership Demands a Pagan Ethos?* (2002), at 131.

within another Empire.²⁴ US attitudes to law read like the imperial authoritarianism of early twentieth-century Germany.

The terms of the debate seem clear. On the European side, Jürgen Habermas has defined them as follows:

The crucial issue of dissent is whether justification through international law can and should be replaced by the unilateral, world-ordering politics of a self-appointed hegemon.²⁵

Most Europeans think this way. Even Jacques Derrida saw recently the world's hope in Europe's return to the tradition of international law and institutions.²⁶ But – as many Americans have pointed out – isn't this, too, a hegemonic manoeuvre, an attempt by Europe to regain some control in a novel configuration of forces? European generals may no longer lead invasion forces, but European lawyers in the ICC may always prosecute American generals who do.

IV.

So is there no difference between the American politics of empire, and the European politics of law? Before I can answer this, I first need to say a few words about the limits of realism. 'Whoever says humanity wants to cheat' is a useful reminder that a universal law, too, has no voice of its own, that all we hear are voices making claims under the law. But it builds on a distinction between honesty and cheating that presupposes the existence of the universal standard that its users sometimes put to question. Let me explain. If the realist means that there are no universal principles at all, that everybody can only mechanically repeat their own preference, then the realist merely states a truism and nothing follows. The question of right and wrong, good or bad, cannot even be raised. But the critic invariably wants to say more, namely that the position of the opponent is inauthentic and politically wrong.

If nobody can utter anything on behalf of the international community, because nobody can claim to represent it, then the Indian Representative in the Security Council during the Kosovo crisis was merely stating a platitude with no critical bite whatsoever. But this is not how anybody understood what he was saying. His point was that the NATO action was wrong, the claim to act on behalf of an international community was a perversion because the international community *in fact did not accept the bombing, or the West as its representative*. In other words, taken as a criticism – and it is *always* made as such – the realist point is in fact based on a standard of universality and a denial that the opponent meets it. When Hans Morgenthau indicted the Geneva system of international law as not merely inefficient but harmful, he was relying on generalizations about human nature that are absolutely central to realist

²⁴ 'Only the one who can, may also': E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911), at 151.

²⁵ Habermas, 'Interpreting the Fall of a Monument', 4 *German Law Journal* (2003) 706.

²⁶ G. Borradori, *Philosophy in a Time of Terror. Conversations with Jürgen Habermas and Jacques Derrida* (2003), at 116–119.

political morality. To attack legalism by the eternal laws of human nature, and a politics or prudence – the realist credo – is not to be against universalism but to have another opinion of where the universal lies.²⁷

So I come to my first conclusion. The realist critique usefully reminds us that, in law, political struggle is waged on what legal words such as ‘aggression’, ‘self-determination’, ‘self-defence’, ‘terrorist’ or ‘*jus cogens*’ mean, whose policy they will include, and whose they will exclude. To think of this struggle as *hegemonic* is to highlight that the objective of the contestants is to make their partial view of the meaning appear to be the total view, their preference seem like the *universal preference*.²⁸ But from the fact that there is no authentically universal position, it does not follow that all positions are the same. Indeed, were this the case, we would have no reason to take the realist critique seriously, no basis to distinguish between honesty and cheating. The real difficulty lies in being able to make that distinction – and I can invoke nothing better than the personal histories of all of us to make the point that we constantly *do* make that distinction.

V.

So here is the glimmer of hope I promised. From the fact that law has no shape of its own, but always comes to us in the shape of particular traditions or preferences, it does not follow that we cannot choose between better or worse preferences, traditions we have more or less reason to hope to universalize. This may require lowering the expectations of technical certainty and increasing sensitivity to the ways in which law gets spoken. But we constantly differentiate between experiences of the world that are merely particular and those that transcend particularity. Let me give an example.

We look at the image of Western soldiers torturing Iraqis and feel that an exceptional violation is being committed. Why exceptional? Because, we feel, something more takes place here than infliction of pain on single individuals. When the general of an occupying army first denies that anything has happened, and then says that, well, if something did happen, it should be attributed to private vice, and then eventually we learn that whatever happened was part of a routine, then a particular experience leaves its local environment. Our imagination links it up with the *leyenda negra* of Spanish America, the *Vernichtungsbefehl* of General von Trotha that led to the decimation of the Herero population in German South West Africa in 1906; to the use by British soldiers of Indian resistance fighters as live cannon-balls after what the Empire called the ‘mutiny’ of 1857. Perhaps we see a glimpse of what Klaus Barbie did to Jean Moulin in a prison cell in Bordeaux in July 1943 or to the 44 Jewish children of Izieu. As lawyers we might also recall how Barbie’s attorney in Paris 20 years ago

²⁷ The moral standing of political realism is highlighted in R. N. Lebow, *The Tragic Vision of Politics. Ethics, Interests and Orders* (2003).

²⁸ I have dealt with this at more length in ‘International Law and Hegemony. A Reconfiguration’, 17 *Cambridge Review of International Affairs* (2004) 197.

observed that we bow our heads to those children because we remember the suffering of the children of Algeria.²⁹

This chain of associations could be continued endlessly. But I stop here to note that here lies the significance of the humbled Iraqi prisoner, taken from his family in the dark of the night – you fill in the details, we all can, because there is something here that, though new, is also strangely familiar in what it suggests. Now my point is this. Despite the sophisticated suspicion of ‘whoever invokes humanity wants to cheat’, invoking humanity – or any other language that transcends the merely particular – may be better or worse as a reaction to the singular event, provide a more or less adequate insight into the nature of what is going on. When I worked with the foreign ministry, I often felt that this was precisely what was expected of the lawyer. For the politicians, every situation was new, exceptional, crisis. The lawyer’s task was to link it to what had happened previously, a case, a precedent, tell it as part of a history. The point of the law was to detach the particular from its particularity by linking it with narratives in which it received a generalizable meaning, and the politician could see what to do with it.

But how is it possible to find the universal in the specific? Merely invoking the suffering of someone may also be an act of silencing or manipulation. There never were tyrants, ethnic cleansers or professors of international law who did not justify themselves by the absolute need to rectify some past suffering. It is one thing to be tortured, and another to be a professor in a discipline that deals with other peoples’ being tortured. So how to tell the story in its universal meaning without erasing its particularity? Art does this all the time. When Euripides has Medea slay her children or perhaps more relevantly when Dario Fo recounts the accidental death of an anarchist, particular stories, linked with very easily definable traditions emerge from their particularity towards the universal. Religion does this, too, and I often wonder to what extent international law is becoming a political theology in Europe – the concern that students, journalists, lawyers and non-lawyers nowadays have about the international legality of this or that action. Saint Paul’s Christianity, as expressed in his Antiochian speeches, is offered not merely for the Jews, nor even for the Romans, but for all. Why could not tradition do this, especially tradition as narrative – perhaps a European narrative – like the stories that art and religion tell us in a way that is larger than the events recounted on their surface?

So you see, I am conscious that I am speaking at the Inaugural Conference of a European Society of International Law. I am reminded of another meeting that took place in September 1873 in Ghent, Belgium, and resulted in the establishment of the *Institut de droit international*, the first professional association of international lawyers. The 11 men who met at the Town Hall of Ghent were different from us, universalists *sans peur et sans reproche*. In Article 1 of the Statute of their Institute, they defined themselves as the ‘juridical conscience of the civilized world’. They had no scruple about speaking in the name of civilization, associating it unambiguously with European

²⁹ See S. Chalandon and P. Nivelle (eds.), *Crimes contre l’humanité: Barbie, Touvier, Bousquet, Papon* (1998), at 138.

civilization.³⁰ Our voice is less confident, our defences stronger, harder to penetrate. We relativize ourselves: we are just Europeans, beg your pardon. The word 'civilization' and the language of conscience fit poorly in our rhetoric. Are we better off than those colleagues who set up the profession of international law 131 years ago? Not because of our relativism, often inseparable from our cynicism. But neither because of our humanitarian sentimentality, the language of universal human rights, rule of law. Our quick compassion towards humanitarian disasters far away.

VI.

A student once pointed out to me that towards the end of *The Unbearable Lightness of Being*, Milan Kundera puts forward a theory of political kitsch. What is that theory? There is a totalitarian kitsch of the Grand March, exemplified in the May Day parade in Moscow, but also in the raised fists of European intellectuals at an anti-American rally. American kitsch happens when a senator looks from the window of his car at four children playing on the grass and says to the woman beside him 'Now that's what I call happiness'. Let me quote Kundera:

How did the senator know that children meant happiness? Could he see in their souls? What if, the moment they were out of sight, three of them jumped the fourth and began beating him up? The senator had only one argument in his favour: his feeling. When the heart speaks, the mind finds it indecent to object. In the realm of kitsch, the dictatorship of the heart reigns supreme. . . . Kitsch causes two tears to flow in quick succession. The first tear says: How nice to see children running on the grass! The second tear says: how nice to be moved, together with all mankind, by children running on the grass. It is the second tear that makes kitsch kitsch.³¹

Now kitsch links to non-kitsch like the reproduction of the image of a small gypsy boy with enormous eyes and a single tear running on his cheek links to Medea or the Dario Fo play. It tells easy truths and simple certainties. As Kundera says, kitsch is a lie, and the function of that lie is to 'set up a folding screen to curtain off death'.³²

³⁰ I have recounted this in *Gentle Civilizer*, *supra* note 16, at 39 *et seq.*

³¹ M. Kundera, *The Unbearable Lightness of Being* (1999 [1984]), at 248.

³² The definition and significance of kitsch was an often-treated topic of inter-war cultural theory and aesthetics. An influential discussion is Greenberg, 'Avant-Garde and Kitsch' from the *Partisan Review* of 1939 defining kitsch as 'vicarious experience and faked sensations . . . the epitome of all that is spurious in the life of our times'. Kitsch uses the resources of a past cultural tradition for popularizing and financial purposes. It is the antithesis of the *avant-garde*, the two being opposite phenomena of industrial, bourgeois society. See C. Greenberg, *Art And Culture* (1973), at 3–19, 10. A more neutral and complex discussion is waged by the sociologist Norbert Elias in a work from 1934, also defining 'kitsch-style' as an aspect of bourgeois modernity, borrowing from past styles and conditioned by instruments of technological reproduction and the tastes of mass society. For Elias, kitsch reflects a time of stylistic uncertainty, competition, even formlessness, and responds to dreams of leisure and individual 'feeling'. Elias sees kitsch as also having a positive role in forming the background against which talent and brilliance become visible: N. Elias, *Kitschstil und Kitschzeitalter* (2004 [1934]), especially at 25, 29–33. I thank Nathaniel Berman and Gunter Frankenberg for the references. Both Greenberg and Elias, however, wrote during the inter-war period when their shared modernism provided a stable basis on which to differentiate between 'art' and 'kitsch'. Today, it is much harder to believe in such a distinction and, indeed, much 'art' seeks constantly to transgress that boundary.

The distinction between kitsch and not-kitsch is also the same as that between false and genuine universalism. The international community appears often as Kundera's Grand March – kitsch to the extent that it is invoked to defend the easy truth, the nostalgic feel for an abstract mankind, and to curtain off death. Which death? Well, for example, that of the 500 Serbian civilians who were killed as the result of the NATO bombing in 1999. The fight against terrorism is kitsch, too. According to recent State Department statistics, in the year 2003, 307 people died of terrorist attacks.³³ At the same time, 20,000 civilians have died in the coalition attacks on Baghdad. I quote Kundera: 'kitsch excludes everything from its purview that is essentially unacceptable in human existence'. Thirty thousand children die daily from causes that we have the resources to prevent. The warm feeling stuns the capacity to think clearly and to act when that would be needed.

International law is burdened by kitsch. What kind of kitsch? Well, for example, *jus cogens* and obligations *erga omnes*, two notions expressed in a dead European language that have no clear reference in this world but which invoke a longing for such reference and create a community out of such longing. Instead of a meaning, they invoke a nostalgia for having such a meaning, or for a tradition which, we believe, still possessed such meaning. They are the second tear we shed for the warmth of our feelings, the tear on the cheek of the gypsy boy.

Kitsch is, of course, everywhere. Perhaps, as I read in an airline magazine, kitsch will be the *avant garde* of the twenty-first century. Perhaps, Kundera gives this a hopeful twist: 'As soon as kitsch is recognised for the lie it is, it moves into the context of non-kitsch, thus losing its authoritarian power and becoming as touching as any other human weakness.' For our professional lives this would mean accepting that international law is a European tradition, sharing Europe's strengths and weaknesses.³⁴ Here are some things we believe in: the United Nations as the pyramidal top of a public-law governed international community. The domestic analogy that persuades us – contrary to all evidence – that the international world *is* like the national so that legal institutions may work there as they do in our European societies. Universal human rights; courts as dispensers of enlightened justice; the sense that most people intuitively accept and obey the law – kitsch assumptions vulnerable to a million critiques, but still condensing the heart's hopes. 'The brotherhood of man on earth will be possible only on a basis of kitsch', Kundera writes.

We cannot wish away the fact that the world is divided, that people disagree and fight against each other by political and military means. As international lawyers, the only arguments open to us are those provided by our tradition: *jus cogens*, obligations *erga omnes*, and all the legal paraphernalia produced by treaties, customs, international

³³ US Department of State, 'Patterns of Global Terrorism, 2003' (29 April 2004), formerly available at <http://www.state.gov/s/c/ct/rls/pgtrpt/2003/31569pf.htm> (visited 5 May 2004). Since then, the US State Department has withdrawn this document from the web and publicly disowned its conclusions.

³⁴ If you ask about America, I can only respond with the words of Franz Fanon: 'two centuries ago, a former European colony decided to catch up with Europe. It succeeded so well that the United States of America became a monster, in which the taints, the sickness and the inhumanity of Europe have grown to appalling dimensions': F. Fanon, *The Wretched of the Earth* (Preface by Jean-Paul Sartre, 1963), at 313.

institutions. They do not automatically express anything universal: indeed, more often than not they are used as instruments in hegemonic struggles. As soon as we lose sight of this, they turn into kitsch. But, Kundera writes, perhaps if we remember that this is what they are, they may turn into something else.

This view of international law as kitsch is helpful inasmuch as it helps me to finish by outlining a view that accepts the particularity of international law, but conceives its universal ambition without the involvement of the civilizing mission, or the solipsism of Empire. For this purpose, I draw a distinction between instrumentalism and formalism.

Instrumentalism is the view that sees international law as *our* possession, part of *our* civilized identity that it seeks to bear upon what it sees as power, chaos, and anarchy outside itself. Law as civilization against the barbarism of politics. This view bridges the gap between the particular and the universal by a historical fable – Kant’s view of Europe as the pinnacle of progress.³⁵ This fable makes it possible for us to see Russia bring the light of law to the chaos of the Ottoman empire, NATO to the anarchy of Kosovo, United States and its allies bringing it to what Kant would have called the *lawless state of savagery* of Saddam’s rule. What is taken as given here is that, as we are civilized, we are also in advance of history while the lives of others are only provisional.³⁶ Hence the mission; hence arrogance and racism. Nothing is at stake for us; everything is at stake for them.

Formalism is a much less modest view of law. It accepts that, like kitsch, law is already everywhere. The Ottomans have the Treaty of Paris, 1856; Milosevic has sovereignty and Serbian self-determination and Saddam has non-use of force and the Security Council. According to this view, the choice is not between modern law and archaic politics, but my law and yours. Hersch Lauterpacht was right: there is no zone of non-law.³⁷ But Lauterpacht was also wrong: the fact that there is no such zone is not necessarily a blessing, merely a beginning. For law, like kitsch, is ubiquitous. You need to choose the law that will be yours; you need to vindicate a particular understanding, a particular bias or preference over contrasting biases and preferences. The choice is not between law and politics, but between one politics of law, and another. Everything is at stake, but for everyone. And how to distinguish? Well, in the same way we distinguish between kitsch and non-kitsch.

VII.

But I must finish the story I began with. In 1877 Russia invaded the Ottoman realm in the name of humanity and against Muslim fanaticism. What happened? Slowly, reports started coming in of certain unfortunate events: destruction of civilian life and

³⁵ See Kant, *supra* note 18. For a recent endorsement (including a critique of Kant’s ethnocentrism), see Habermas, ‘Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?’ in *Der gespaltene Westen* (2004), at 113 *et seq.*, especially at 117–137 and 143–145.

³⁶ This way of putting the civilizing mission (by special reference to James Mill’s views on India) is from U. S. Mehta, *Liberalism and Empire. A Study of Nineteenth-Century British Liberal Thought* (1999), at 87–97.

³⁷ See in particular, H. Lauterpacht, *The Function of Law in the International Community* (1933).

property, reprisals and pillage. The *Institut de droit international* law was seized, and in May 1877 a declaration was passed reminding the belligerents of their duties under the Declaration of Paris of 1856, the Geneva Red Cross Convention of 1864 and the related Brussels declaration of 1874. The passions had become ‘over-excited’, the declaration said. The duty of humanity, was to seek to circumscribe the effects of the war on the basis of ‘strict necessity’.³⁸ Neither of the belligerents’ acts were singled out, only their duties were. It was not the Institute’s task to distribute blame.

By the following year, 1878, more reports had been published, in particular by the British consuls in the region (God bless the British consuls). Mass killings, rape, torture of Ottoman civilians and suspected insurgents by Russian forces and Bulgarians in the Russian service. A British international lawyer, slightly outside the mainstream, author of the period’s best text-book, William E. Hall, approached the *Institut* proposing a new declaration condemning the Russian actions as they appeared to be not individual but to form a pattern. Hall suggested the following text:

*L’Institut se trouve forcé de constater que la Russie a manqué à ses devoirs élémentaires.*³⁹

A heated discussion followed. Some favoured the proposal but many felt it was contrary to the Institute’s obligation of scientific neutrality. Martens intervened, pointing out indignantly that the only reason for the proposal was to ‘inflict blame on the Russian government’ – anyway, peace had already been concluded. As there was no state of war, there was no reason to raise points about the laws of armed conflict, either.⁴⁰ Many agonized over the advisability of blaming a government. The matter was sent to a Commission that finally proposed that no action be taken. The reports had undoubtedly been motivated by laudable humanitarian sentiments. But the Institute could not verify them, and it was bound by its obligation of neutrality. The Plenary adopted this view, and the incident was closed.⁴¹

The Institute defined the profession it represented as the ‘juridical conscience of the civilised world’. Its members were the carriers of the European tradition of international law. That tradition, I have said, has turned into kitsch. Or has it?

³⁸ *IDI Annuaire* (1878), at 132–137.

³⁹ *IDI Annuaire* (1879–1880), Part I, at 45.

⁴⁰ *Ibid.*, and at 46–47.

⁴¹ *Ibid.*, at 47–49.