

**International Law: Constitutionalism, Managerialism and the Ethos of  
Legal Education**

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Last May the European Court of Justice gave its judgment in the MOX Plant case. The case had to do with the operation of a nuclear reprocessing plant at Sellafield, United Kingdom. A complaint had been raised by Ireland against the United Kingdom on account of the potential environmental effects of the plant under two international treaties. One was the OSPAR Treaty related to the protection of the environment of the North Sea. The other was the United Nations Convention on the Law of the Sea from 1982. Having heard about these proceedings, the European Commission, for its part, raised a claim against Ireland on account of the latter's having taken the United Kingdom -another member State of the European Union- to international arbitration, that is to say, to be subject to legal scrutiny under rules other than those of European law by bodies other than European ones.

The Court found against Ireland on all grounds of the Commission's complaints. Ireland had failed to respect the exclusive jurisdiction of the ECJ and to cooperate with Community organs in accordance with the EC treaty.<sup>1</sup>

For an international lawyer, this is a stunning case. Not, however, because it was unprecedented, on the contrary. Since the late 19th century, nation-States understood one aspect of their sovereignty as the unconditional primacy of their legal order to anything imposed from the outside. The MOX Plant case is stunning because it falls squarely on the oldest, and most conservative trajectory of European thinking about the role of international law and its relations with national law. It shows the ECJ imagining the European Union as a sovereign whose laws override any other legal structure. To appeal to international law against the United Kingdom, Ireland was violating the sovereignty of European law, like

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<sup>1</sup> ECJ, Case C-459/03, 30 May 2006.

Soviet dissidents, once upon a time, in appealing to the 1966 UN Covenant on Civil and Political Rights, seeking thereby to break out of the hermetic absolutism of the Soviet order.

The ECJ's view of the relations of European and international law follow the strictures of late-19<sup>th</sup> century German public law.<sup>2</sup> The two legal orders are separate, while, for EU organs, the primacy of European law is imposed as a constitutional necessity. This is the traditional dualistic position which Hans Kelsen once analysed as, in fact, a monist position with the primacy of the national legal order, a position that Kelsen saw as both solipsistic and imperialistic – this language is his.<sup>3</sup> *Solipsistic* in the sense of capable of seeing nothing other than one's own legal system; *imperialistic* because everything taking place in the world is judged from its perspective. Or, I should like to say, so long as this is convenient. In the *Bankovic* case, in the only slightly different context of the European human rights regime, the European Court of Human Rights held that it had no jurisdiction to adjudicate upon the bombing of Serbia by European war planes because it did not cover the actions of European States outside Europe when those acts could not be seen as regular acts of administration of the kind the ECHR had perceived in Turkey's behaviour in Northern Cyprus, and it would again see in Russia's actions in Moldova.<sup>4</sup>

But my point today is not to attack European self-centredness, or its hypocrisy. I refer to the MOX Plant case as an illustration of what is happening today to public international law, the way in which it is being sliced up into regional or functional regimes that cater for special audiences with special interests and special ethos. A *managerial* approach is emerging that envisages law beyond the state as an instrument for particular values, interests, preferences. This -I would like to suggest- is to give up the universalism that ought to animate international law and provide the *conditions* within which international actors may pursue their purposes without subscribing to those purposes itself. It is often said that international law is unable to respond to the challenges of globalisation. This critique presumes that international law is a technique for problem management. And as such, its diplomatic mores and institutional structures seem altogether too weak, even dysfunctional. The marginalisation of international law by the ECJ in the MOX Plant case is merely one example of a special

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<sup>2</sup> See in particular, **H. TRIEPEL**, *Völkerrecht und Landesrecht*, Leipzig, Hirschfeld, 1899.

<sup>3</sup> **H. KELSEN**, *Das Problem der Souveränität und die Theorie des Völkerrechts*, Tuebingen, Mohr, 1920.

<sup>4</sup> **ECHR**, *Bankovic and others v. Belgium and 16 Other Contracting States* [admissibility], 12 Dec. 2001, ECHR 2001-XII, § 82. See also **ECHR**, *Loizidou v. Turkey*, 18 Dec. 1996, ECHR 1996- 70, § 52.1.

international regime and a special ethos – the European regime, the European ethos claiming priority over anything general, even less universal. The European project, the Court is saying, enjoys precedence over the international project.

But Europe is not the only such project. Take for example, the *trade law project*. The WTO has been the centre of the construction of an impressive legislative edifice and case-law geared to the management of comparative advantage through free trade. The relationship of that project with other international rules is much debated: trade and human rights, trade and labour, trade and environment. The trade position was clearly stated by the Appellate Body (AB) in the *Beef Hormones* case in 1998. Faced with the question as to the status of the so-called precautionary principle under the WTO covered treaties, especially the Agreement on Sanitary and Phytosanitary Substances (SPS Agreement), the AB concluded that whatever the status of that principle “under international environmental law”, it had not become binding for the WTO.<sup>5</sup> This approach suggests that international law comes to us in separate boxes such as “trade law” and “environmental law” that may have different principles and objectives that do not apply across the boundaries between such boxes. But how do such boxes relate to each other?

The existence of special regimes is a commonplace of international practice. 10 years ago in the *Legality of Nuclear Weapons* case (1996), the International Court of Justice structured its opinion by successively examining human rights law, environmental law, humanitarian law and the law on the use of force.<sup>6</sup> In the more recent *Palestine Wall* case (2004), it debated at length the relationship between what it called international human rights law and international humanitarian law.<sup>7</sup> The rules within the boxes were different: one prohibited killing, one permitted and regulated it. Which should have precedence? The importance of choosing the right box was highlighted by the Arbitral Tribunal set up under the UN Convention on the Law of the Sea in the MOX Plant case. Three different treaty-regimes were applicable. Let me quote the Tribunal: “even if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in [the UNCLOS], the rights and obligations under these agreements have a

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<sup>5</sup> European Communities - Measures Concerning Meat and Meat Products (Hormones), 13 Feb. 1998, **WT/DS26/AB/R, WT/DS48/AB/R**, §§ 123-125.

<sup>6</sup> ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *Rec.*, 226.

<sup>7</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *Rec.*, 130, §§ 86-113.

separate existence from those under [the UNCLOS]”.<sup>8</sup> This meant, the Tribunal held, that the application of even the same rules by different institutions might be different owing to the “differences in the respective context, object and purposes, subsequent practice of parties and *travaux preparatoires*”.<sup>9</sup>

It is not only that the boxes have different rules. Even if they had the same rules, they would be applied differently because each box has a different objective and a different ethos, a different structural bias: to examine nuclear weapons from a human rights perspective is different from looking at it from a laws of war perspective; a free trade perspective on chemical transports does not render the same result as an environmental perspective, *whatever the rules*. And the objective and the ethos of a regime are not just some incidental aspect of it. What is significant about projects such as trade, human rights, or indeed “Europe”, is precisely the set of values or purposes that we link with them. To be doing “trade law” or “human rights law”, or “environmental law” or “European law” ‘-as the representatives of those projects repeatedly tell us- is not just to operate some technical rules but to participate in a culture, to share preferences and inclinations shared with colleagues and institutions who identify themselves with that “box”.

Now this would not be too significant if the boxes had clear-cut boundaries and we could resolve jurisdictional overlaps by some superior set of rules. This is how international law saw itself in the late-19th century when the boxes were legal systems of sovereign states. But now there is no such superior set of rules. It is international law itself that is broken down into such boxes, each of them -remember- both solipsistic and imperialistic. The boxes do not emerge from any overarching plan. They grow spontaneously, through *functional specialisation* that has separated spheres of international life and made them increasingly autonomous from each other. Much of modern sociology is about this and tends to convey it as natural, inevitable process. But if it is so, then it is inevitable only in the sense that the predominance of powerful interests where there is no law is inevitable. In fact, there is nothing natural or inevitable about such boxes. They emerge from field-construction, of narration, of pinning informal labels on aspects of the world that describe them from the perspective of particular interests or objectives. And any international event may be

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<sup>8</sup> **International Tribunal for the Law of the Sea**, *MOX Plant case, Request for Provisional Measures Order [Ireland v. the United Kingdom]*, 3 Dec. 2001, *ILR*, 2005, p. 273, § 50.

<sup>9</sup> *Ibid.*, pp. 273-274, § 51.

described from any such perspective: the processing of nuclear materials by the sea relates at least to environmental law, trade law, the law of the sea, perhaps the law of maritime transport and certainly also human rights. The characterisations do not follow from the “nature” of the activity but the interest from which it is described. An activity does not fall into a box because of what it is like intrinsically, but what the perspective is from which we want to describe it. And, we have to ask, how is that perspective determined?

A man with a hammer sees every problem as a nail.<sup>10</sup> A specialised institution is bound to see every problem from the angle of its specialisation. Trade institutions see every policy as a potential trade restriction. Human rights organs see everywhere human rights problems, just like environmental treaty bodies see the political landscape in terms of environmental problems and so on. This is why the ECJ saw in the operation of the British nuclear installation a problem of European law, not a problem in the law of the sea or a problem of the pollution of the North Sea environment. Of course the ECJ would be happy to deal with matters relating to the pollution of the seas, because, in so doing, it could make sure that it was treated from the perspective of the interests and preferences -the project- it is called upon to advance. This is like the nation-State, once upon a time understood by some German lawyers as a “*Gesamtplan des menschlichen Kulturlebens*” – a total plan of human social life.<sup>11</sup> In the same way, every system, every regime is capable of extending to the whole world, covering everything from its own perspective, the combination of solipsism and empire that Kelsen detected in the project of the nation-State.

Yet the analogy with the State goes further. In the recent WTO case on the European prohibition of Genetically Modified organisms the question arose whether the Panel should take account of the 1992 Convention on Biological Diversity and the related Biosafety Protocol of 2000. It could do so under Article 31 (3) (c) of the Vienna Convention on the Law of Treaties according to which international agreements -including the WTO agreements- should be interpreted by taking account of the *other obligations* of the parties. The Panel found, however, that *all* parties to the WTO treaty had to be parties to that other treaty as well. Because the United States had not joined the biosafety protocol, it could not be

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<sup>10</sup> D. KENNEDY, “Tom Franck and the Manhattan School”, *NYU-J.Int’lL&Pol.*, 2002-2003, p. 399.

<sup>11</sup> See E. KAUFMANN, *Das Wesen des Völkerrechts und die Clausula ‘rebus sic stantibus’*: *Rechtsphilosophische Studie zum Rechts-, Staats- und Vertragsbegriffe*, Tübingen, 1911.

applied.<sup>12</sup> The position is identical with the classical constitutional law dualism that accepts that international obligations may be applied in domestic organs only if their provisions have been incorporated as parts of domestic law. Applied to a multilateral treaty with dozens of parties, the requirement of *identical* membership makes it practically impossible ever to find a multilateral context where reference to other treaties -the other box- would be allowed. The panel buys what it calls the “consistency” of the WTO Treaty at the cost of the consistency of international law.

Now the various regimes or boxes -European law, trade law, human rights law, environmental law, investment law and so on- all tend to act in this way. Human rights bodies have developed a steady jurisprudence under which the interpretative principles applicable to human rights treaties differ from principles applicable to other treaties, enabling an activist role by human rights bodies.<sup>13</sup> Or think of the criminal law box. In the *Tadic* case, the ICTY, observed that the standard of responsibility to judge foreign involvement in civil war set down by the ICJ in 1986 -that is, whether that foreign power had *effective* control over domestic guerrillas- was not applicable in international criminal law where a broader standard of “overall control” was applicable.<sup>14</sup> It is hardly a surprise that the direction of the deviation is in favour of wider jurisdiction of the relevant expert organ.

This is *managerialism*. Each regime understood as a purposive association and each institution assumed to have jurisdiction wide enough for realising it. There would be nothing irregular here if that process were controlled by something like an international political society determining the jurisdiction of each regime. This was the utopia of inter-war sociological jurisprudence that saw the League of Nations and other international organisations as parts of a global process of functional differentiation through which a global society regulated its own affairs. This was a radical cosmopolitan view that took from Kant

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<sup>12</sup> *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, 29 Sept. 2006, **WT/DS291-293/R**, p. 335, § 7.74. On the general problem, see C. McLACHLAN, “The Principle of Systemic Integration and Article 31 § 3 (c) of the Vienna Convention”, *ICLQ*, 2005, pp. 279-320.

<sup>13</sup> See **Human Rights Committee**, *General Comment No. 24, relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 1994, **UN Doc., CCPR/C/21/Rev.1/Add.6**, reprinted in **UN Doc. HRI/GEN/1/Rev.6**, at p. 161, § 11; **ECHR**, *Belilos v. Switzerland*, 29 Apr. 1988, *Series A*, Vol. 132, § 50.

<sup>14</sup> See **ICTY, Appeals Chamber**, *Tadic Case*, IT-94-1-A, *Judgement*, 15 July 1999. See also *ILM*, 1999, pp. 1540-1546, §§ 115-145.

and Benjamin Constant the view that trade and interdependence will lead into a global federation in which humanity's affairs are conducted under a universal republic.

But there is no global legislative power, no world government under which the WTO could be seen like a global ministry of trade, the Kyoto process as activities of a global environmental ministry or trials of war criminals as something carried out by a global executive arm. Carla del Ponte looks almost like a private entrepreneur. Differentiation does not take place under any single political society. Instead it works through struggle in which every purpose is hegemonic in the sense of seeking to describe the social world through its own vocabulary so that its own expertise would apply and its structural bias would become the rule. The "wide reading of security" by the Security Council is one example. "Sustainable development" is still a fragile compromise between development and environmental experts. Every conceptual move is a move in a game of power where the one that has mastery over the concept, will also have the power to decide.

The realisation of a particular purpose is no automatic affair, however. Contingent events and novel problems emerge constantly. The purpose needs to be translated into appropriate reactions to changing circumstances. To undertake this, there have to be experts - treaty bodies, committees, compliance groups and so on- to find the right policy that will guarantee the optimal realisation of the purpose in practice, to interpret and draw conclusions from it. Out of a huge scope of materials, let me give you just one recent example. At its most recent session in 2006, the International Law Commission (ILC) finalised a "Draft Convention on the Law of Transboundary Aquifers" – the rights and obligations with regard to the world's groundwater resources.<sup>15</sup> The draft invites States to construct "plans" for each aquifer system, taking into account "the present and future needs and alternative water sources for the aquifer states". The "relevant factors" that should be taken into account include items such as "the natural characteristic of the aquifer system", "the social and economic needs of the States concerned" and "the existing and potential utilisation of the aquifer" and so on, with the final paragraph according to which:

"The weight to be given to each factor is to be determined by its importance with regard to specific transboundary aquifer or aquifer system in comparison with that of other relevant factors. In

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<sup>15</sup> ILC, *Draft Report of the International Law Commission on the Work of its Fifty-Eighth Session*, Chapter VI: Shared Natural Resources; *Draft Articles on the Law of Transboundary Aquifers adopted by the Commission on First Reading*, A/CN.4/L.694/Add.1, 4 July 2006.

determining what is equitable and reasonable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs".<sup>16</sup>

This pattern is repeated in many recent instruments.<sup>17</sup> To agree to a treaty is to agree on a continued negotiation and contextual deal-striking, with functional interests in a decisive position. It is easy to understand why this would be so. Management on a global scale is difficult. The unforeseeability of future events, including the effect that any determining rules might have in practice suggests that such rules ought not to be laid out at the outset. For every rule might cover some case which we would not wish to cover – and it might fail to attach to situations where we would have wanted to apply it, had we only known of such situations beforehand. Hence global management will have to take place by open-ended standards that leave experts with sufficient latitude to adjust and optimize, to balance and calculate.

So we are left with *managerialism* in the precise sense that law turns onto rules of thumb or soft standards that refer to the best judgement of the experts in the box - substance, thoroughly committed to advance the purposes of the appropriate box. That is why they have been elected to serve in those bodies in the first place. That is why solipsism and empire seem unavoidable: Trade bodies condemned to advance trade, human rights bodies human rights, environmental bodies, environmental interests and so on.

International lawyers -especially European international lawyers- have sought to combat this through the vocabulary of *constitutionalism*. They have tried to imagine that a kind of a federal world is *already* there, that the UN Charter can (and ought to) be read like a world constitution. Perhaps, after all, Latin formulas such as *jus cogens* or obligations *erga omnes* represent universal values.<sup>18</sup> But which values? No doubt, free trade for trade bodies,

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<sup>16</sup> Draft Article 5 § 2, *ibid.*, p.4.

<sup>17</sup> Draft Article 5 § 2, *ibid.*, p. 4.

<sup>18</sup> For an early twentieth-century suggestion to deal with international law in a constitutional way, see **A. VERDROSS**, *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna, Springer, 1926. Today, Christian Tomuschat writes of international law as a "comprehensive blueprint for social life" in his "International Law: Ensuring the Survival of Mankind on the Eve of A New Century", *RCADI*, 2001, Vol. 281, pp. 63-72. See also the commentary and elaboration in **A. VON BOGDANDY**, "Constitutionalism in International Law. Comment on a Proposal from Germany", *Harv.Int'lL.J.*, 2001, pp. 223-242. For a Francophone version, see **P.-M. DUPUY**, "L'unité de l'ordre juridique international", *RCADI*, 2002, Vol. 297, especially pp. 269-313 (on *jus cogens*). See also **S. KADELBACH**, "Ethik des Völkerrechts unter Bedingungen der Globalisierung", *ZaöRV*, 2004, pp. 1-20; and **E. DE WET**, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order", *Leiden Journal of International Law*, 2006, pp. 611-632.



human rights for human rights organs, environmental values for environmental regimes, security for the Security Council, each such “value” again sub-divided into a mainstream understanding of its practical implications and a minority challenge. Constitutionalism, as we know it historically, relies on some basic understanding of the common good, some sense of a law as a shared project for a reasonably clearly defined (and often historically informed) objective.<sup>19</sup> In the international world, there is no semblance of this – that is to say, beyond the very values of free trade, human rights, clean environment, fight against impunity and so on – values that demand managerial regimes for their realisation. If fragmentation and delegalisation have set the house of international law on fire, grasping at values is to throw gas on the flames.

A more plausible constitutionalism is formal and suggests that no special regime has ever been understood as independent from general law. In a typical case from 1928, for example, a claims commission interpreting a treaty did not hesitate to state as follows:

“Every international convention must be deemed tacitly to refer to general principles of international law for all the questions that it does not itself resolve in express terms and in a different way”.<sup>20</sup>

This seems practically self-evident. No lawyer will refuse to find States as States, or ask for evidence for the rule of *audiatur et altera pars* merely because a technical regime is silent about such matters. They are structurally given, not positively enacted. This, I suppose, is why in its very first case, the WTO Appellate Body observed that the WTO agreements “should not be read in clinical isolation from public international law”<sup>21</sup> and later specified that “[c]ustomary international law applies generally to the agreements between WTO members”.<sup>22</sup> “Boxes” such as the European or Inter-American human rights convention make constant reference to general international law without any act of incorporation.<sup>23</sup> Last year

<sup>19</sup> As articulated, e.g., in **T.R.C. ALLEN**, *Constitutional Justice. A Liberal Theory of the Rule of Law*, Oxford University Press, 2001, pp. 21-25.

<sup>20</sup> *Georges Pinson Case* (Fr. v. Mex.), *R. Int'l Arb. Awards*, 1928, No 5, p. 422.

<sup>21</sup> **Appellate Body**, *United States - Standards of Reformulated and Conventional Gasoline*, 20 May 1996, **WT/DS2/AB/R**, DSR 1996-I, p. 16.

<sup>22</sup> **Panel Report**, *Korea - Measures Affecting Government Procurement*, 19 January 2000, **WT/DS163/R**, § 7.96.

<sup>23</sup> In the *Bankovic Case* (1999), the European Court of Human Rights “recall[ed] that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law, although it must remain mindful of the Convention’s special character as a human rights treaty. The Convention should be

the ILC adopted a Report on “fragmentation” where it found no legal regimes *outside* general international law. The boxes of trade, environmental protection or human rights did have special rules for rule-creation, rule-application and change. This is what made them special after all. But when those rules run out, or regimes fail, then the institutions always refer back to the general law that appears to constitute the frame within which they exist.<sup>24</sup> In this respect, European jurisprudence seems to have got it right. Law is a whole – or in the words of the first conclusion made by the ILC Study Group, “International law is a legal system”. You cannot just remove one of its fingers and pretend it is alive. For the finger to work, the whole body must come along.<sup>25</sup>

This kind of constitutional holism is right to suggest that functional regimes or expert systems do not float in a normless vacuum. Their claim to validity and speciality is completely dependent on a general law somewhere “out there”. But there do not exist definite hierarchies to resolve *conflicts* between such regimes. Although the ILC Study Group discovered that no regime, however special, was autonomous from international law, it did not feel it appropriate to give indication of whether in cases of conflict the special regime should be read as an *exception to* or an *application of* the general law. Practice showed examples of both, and it was impossible to determine which way the equation should go in the abstract. After all, such cases express the tension between particularism and universalism and the mere speciality or generality of a regime gives no conclusive reason to prefer it.<sup>26</sup> It is not even clear what “general” and “special” mean in this context. It may be natural for international lawyers to think of their specialisation as “general”. But it is unsurprising that other lawyers see it as a particularly exotic craft relevant mainly for the quaint rituals of the

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interpreted as far as possible in harmony with other principles of international law of which it forms part” [*Bankovic v. Belgium and others*, at p. 351, § 57; references omitted]. For a discussion, see **L. CAFLISCH and C. TRINDADE**, “Les conventions américaine et européenne des droits de l’homme et le droit international général”, *RGDIP*, 2004, pp. 5-63.

<sup>24</sup> *Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law, Report of the Study Group of the International Law Commission*. Finalized by Martti Koskenniemi **A/CN.4/L.682**, 13 April 2006. The way allegedly “self-contained” regimes link to general international law is discussed on pp. 65-101. The 42 conclusions prepared by the Study Group on the question of fragmentation on the basis of the ‘Analytical Report’ are contained in *Fragmentation of international law: difficulties arising from the diversification and expansion of international law: Report of the Study Group of the International Law Commission, A/CN.4/L.702*, 18 July 2006, pp. 7-25.

<sup>25</sup> For two more recent examples in a burgeoning literature, see, **A. LINDROOS and M. MEHLING**, “Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO”, *EJIL*, 2005, pp. 857-878; **B. SIMMA and D. PULKOWSKI**, “Of Planets and the Universe: Self-Contained regimes and International Law”, *EJIL*, 2006, pp. 483-530.

<sup>26</sup> For the inconclusive discussion in international law of the status of regional vs. universal regimes and for the conclusion on ‘general law’/‘special law’ relations see ‘Analytical Report’, *supra* note 24, pp. 102-115.

diplomatic tribe, living somewhere between 45th and 52nd Streets, Second Avenue, NYC. The same is true of cases of lateral “box-conflict”. Of course, an EU rule might conflict with the law of the sea, or a regime on the use of force might conflict with a principle of humanitarian law. But in the absence of a meta-rule about what to do in such a case -a rule, in other words, that would set definite priorities between the preferences of “trade”, “human rights”, “environment” and so on- what to do will have to depend on the circumstances.<sup>27</sup>

Constitutionalism responds to the worry about the “unity of international law” by suggesting a hierarchical priority to institutions representing general international law (especially the United Nations Charter).<sup>28</sup> Yet it seems difficult to see how any politically meaningful project for the common good (as distinct from the various notions of particular good) could be articulated around the diplomatic practices of United Nations organs, or notions such as *jus cogens* in the Vienna Convention on the Law of Treaties. Fragmentation is, after all, the result of a conscious *challenge* to the unacceptable features of that general law and the powers of the institutions that apply it. This is why there will be no hierarchy between the various legal regimes in any near future. The agreement that some norms simply *must* be superior to other norms is not reflected in any consensus regarding who should have final say on this. The debate on an international constitution will not resemble domestic constitution-making. This is so not only because the international realm lacks a *pouvoir constituant* but because if such presented itself, it would be empire, and the constitution it would enact would not be one of an international but an imperial realm.<sup>29</sup>

The problem with constitutionalism is that it imagines itself as a project of institutional *architectonics* based on the assumption that what is wrong with the world is the heterogeneity of interests, preferences, values, the nature of the international world as an “anarchical society”. Constitutionalism aligns itself with European nostalgia since the Renaissance for the Roman Empire as the uncorrupted “origin” of European politics. The constitutionalists still grapple with the division of Christendom and the fragmentation of the Holy Roman Empire – separateness and sovereign powers as a tragedy to be overcome by future unity. From this view, international law ought to be seen as an *institutional project*, a

<sup>27</sup> See especially ‘Conclusions’, *supra* note 24

<sup>28</sup> See especially **B. FASSBENDER**, “The United Nations Charter as a Constitution of the International Community”, *Col.J Transnat’LL.*, 1998, pp. 530-619.

<sup>29</sup> This is why international constitutionalism has always been dependent on the constructive efforts of the international law profession.

project about blueprints for perpetual peace, *civitas maxima*, and world government. This is why no law review article seems credible unless it ends with an institutional proposal. No talk about the United Nations is worth its salt unless it takes a stand on the UN Reform. This quintessentially modern response to social anxiety, inspired by an 18th century legacy of rational planning and pragmatic application.

Now I am aware that I am lecturing at the outset of a new term at the European University Institute, a training ground for academic lawyers. The view I have sketched suggests that this training should be above all about institution-building and management; the professional ideal the expert at a functional organisation – perhaps the WTO, perhaps the EU, perhaps the European Court of Human Rights. These institutions embody the spirit of modern functionalism to which modern lawyers, too, should be trained. It is not surprising that this educational programme is so often dressed in the language of interdisciplinarity. And so academic lawyers painstakingly learn the new vocabularies: to speak, instead of institutions, of regimes; instead of “rules”, of “regulation”; to change the language of government to “governance”; responsibility to “compliance”; lawfulness to “legitimacy”, and, finally, to think of international law as a kind of “international relations”.<sup>30</sup>

Through this vocabulary, law is finally drained out of international law, conceived as a professional technique for the management of values, purposes, ideals. For the managerial sensibility law was anyway always only a second best, a pointer to good purposes, but pointless if those purposes were known, and harmful if poised against them. To be a lawyer would be to exist as a cog in the regime-machine, thoroughly committed to the fulfilment of that value, purpose, or community, assumed to exist *outside the regime*, as a condition of its possibility and thus outside of critical reflection.

But this creates two problems: Which value (box) to choose? And how to translate it into determinate policy-decisions? We often concentrate only on the first difficulty – as I have done in this talk, too. Should legal training be about human rights or trade? In what ratios should students receive European law and international law? We feel that much depends on such choices, the management of fragmentation at the level of the Law School. But I am

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<sup>30</sup> For the political these significance of this linguistic transformation, see my “Miserable Comforters. International law as New Natural Law”, in **P. KORKMAN**, *Universalism in International Law and Political Philosophy*, 2007 (forthcoming).

uncertain about the crucial nature of those choices. For there is another, at least equally untractable problem, namely how to obtain access to what such values or boxes mean in practice? After all, each of them is conflictual and indeterminate. There is always a majority and minority view of what they mean -or ought to mean- in practice. Which means that even if you chose “human rights” as the appropriate box of expertise, you would still not know whether to favour the right of privacy or the freedom of speech, the freedom to act or the freedom to be safe from other peoples’ acting. And is free trade after all about creating wealth or eradicating poverty, aggregate utility or distribution? And what are the purposes of criminal law - peace or justice? And so on. To solve such questions, each regime -each box- must refer to the discretion of its managers. The rule by the regime is always rule by the structural bias in the relevant form of expertise. It may be that the box you choose as your field of specialisation will determine what kinds of decisions you will make in the future, how your professional life will turn out. But it may equally well be that it is you who decides what it means to say “human rights”, or “security”, or “free trade”. Let me retrace a bit.

This kind of critique of values and purposes – drawing attention to their conflictual and indeterminate nature, and to the *hubris* involved in thinking that they could rule the world, resembles the critique of *Schwärmerei* that was the core of Immanuel Kant’s political work. Against the popular misconception that it is some critical legal studies extravaganza, one cannot emphasise too much that every aspect of the indeterminacy of values and purposes was already laid out in Kant’s attack on both the empirically oriented natural law of Pufendorf and the tradition of civil philosophy on the one hand, and on the abstractions of Wolffian scholasticism on the other.<sup>31</sup> Against them, Kant conceived his strong legalism. Law as the protector of freedom against the projects of unfreedom that were the efforts to think of human beings as objects of management, best visible in the management of absolutist States. But Kant’s legalism is not – as it is often believed – a legalism of rules or institutions. It is a legalism of the legal mindset.<sup>32</sup> Rules are a helpful reference but in themselves, far from sufficient. In Kant’s vivid language:

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<sup>31</sup> For a useful discussion of the two streams of German natural law in the 18th century, see **I. HUNTER**, *Rival Enlightenments. Civil and Metaphysical Philosophy in Early Modern Germany*, Cambridge University Press, 2001.

<sup>32</sup> The text below follows largely my “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization”, *Theoretical Inquiries in Law*, 2007, pp. 9-36.

“A physician therefore, a judge or a statesman, may have in his head many admirable pathological, juridical or political rules, in a degree that may enable him to be a profound teacher in his particular science, and yet in the application of these rules he may very possibly blunder—either because he is wanting in natural judgment (though not in understanding), and whilst he can comprehend the general *in abstracto*, cannot distinguish whether a particular case *in concreto* ought to rank under the former; or because his faculty of judgment has not been sufficiently exercised by examples and real practice”.<sup>33</sup>

But if the rules of law do not spell out the conditions of their application, then their virtue cannot rest on what their words mean or on what they purport to achieve in practice. “Rules” are just like “policies”, “objectives” or “values” – open-ended and conflict with each other. No abstract description of a box translates automatically into action. To think otherwise was precisely the illusion that Kant detected in all previous thought. It was not a politically innocent illusion; the *ancien regime* stood on it, the illusion that social conflict was already settled in some ideological heaven and that the only task for the lawyer was to bring it down so that everyone could bow to its hierarchies. *A Versailles of the imagination*. By contrast, Kant invites us to refuse to believe in our having access to such heaven when only correctly managed. Instead, what we do have access to is our freedom that in social life means our autonomy from other people’s projects. There never lacked projects for enlisting freedom for this or that cause. But law is not one of those. Instead, it is a standpoint, or a language, through which those projects may be subjected to critical analysis. Law is that which is precisely *not* constrained in a box – including, of course, the box of the nation-State. This is why Kant saw all law as aiming to become universal law and a lawful external environment a precondition for legality at home.<sup>34</sup>

This redefines legal training as education not in box-management but in critical sensitivity to the contexts in which lawyers are called upon to act as professional wielders of power. Where managerialism thinks of the legal judgment as a product of regime-rationality, and thus attributable to the institution, or to technique, Kant sees the judgement as the original product of the decision-maker, and thus attributable to that person. Against managerialism as ideology, law is enlightenment as responsibility, but not as any particular meaning of a text or practice, nor as a systemic effort to apply some external objective, purpose, or value. Instead, it would have to be law as a *mindset* with which the law-applier approaches the task of

<sup>33</sup> I. KANT, *Critique of Pure Reason* [1781], Vasilis Politis, Everyman’s, 1991, pp. 140-141, A132-34.

<sup>34</sup> See, I. KANT, “Perpetual Peace”, in *Political Writings*, 2nd ed., Hans Reiss, Cambridge University Press, 1991, pp. 107-108.

judgement within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other, without endorsing the proposition that the decisions emerge from a “legal nothing” (decisionism). I think about this in terms of the spirit of the legal profession, and the aim of legal training.

It is, I suppose, with this in mind that in 1795, observing the French Revolution, Kant made the distinction between the “*political moralist*” and the “*moral politician*.”<sup>35</sup> The former, he wrote “makes the principles subordinate to the end.”<sup>36</sup> These ends have no independence from the ends of *some* people, namely, those managing the regimes and their advisers. Kant stresses the degree to which political moralists are enchanted by their “realism,” that always enables finding a strategic consideration to justify coercing other people. For Kant, their particular vice is viewing society -that is, other human beings- as objects for external purposes – that is to say, not ends in themselves. And when those others, the objects of what I see as the right purpose, realise that they are no longer treated as free, Kant writes, they “become, in their own eyes, the most wretched of all earthy creatures”.<sup>37</sup>

Against managerialism, Kant endorsed the mindset of the *moral politician*, the actor conscious that the right judgement cannot be reduced to the use of instrumental reason. Instead, in judging, that person would seek to act as what Kant calls a “genuine republican” – that is, someone who sees it as his or her task to encompass the perspective of the whole.<sup>38</sup> And how is that possible? As is well-known, Kant’s political theory is complemented by his analysis of the faculty of imagination operative in aesthetic judgement.<sup>39</sup> Such judgement -for instance, awe before the Brunelleschi Cupola- cannot be subsumed under a rule but it is not just a subjective whim either. For it claims general assent somewhat like the legal judgement, too, claims it. To say, “this is valid law” is not to say this is *good* or *useful* or *something I happen to desire*. None of us as lawyers would mistake a sentence about valid law to be only about social objectives or states of mind. And yet, we puzzle over what legal “validity” -the

<sup>35</sup> For this link, see **A. TOSEL**, *Kant revolutionnaire : Droit et politique*, Paris, PUF, 1990, pp. 19-21.

<sup>36</sup> **I. KANT**, *Perpetual Peace*, at pp. 118-1121.

<sup>37</sup> *Ibid.*, p. 123.

<sup>38</sup> *Ibid.*, pp. 116-125, especially at p. 122.

<sup>39</sup> **I. KANT**, *Critique of the Power of Judgment*, Paul Guyer, Cambridge University Press, 2000. For the suggestion that the Third Critique forms the core of Kant’s political theory, see especially **H. ARENDT**, *Lectures on Kant’s Political Philosophy*, Chicago University Press, 1982. But see also **A. RENAUT**, *Kant aujourd’hui*, Paris, PUF, 1997, pp. 405-415.

legal *proprium*- might mean. What is it, that differentiates the lawyer from the trade expert, the human rights expert, the environmental specialist, or the international relations scholar?

Contemporary constitutionalists sometimes take Kant's aesthetic move literally, and describe law as the practice of creating coherence out of the disparate materials that positive law is: law as commitment to *system*. But this is too tranquil an image, a scholar's image that looks away from the complex play of power in which lawyers and Kant's moral politicians act. There is no innocent standpoint, no meeting of horizons at some moment of brilliant hermeneutic reflection. Some will continue to win, others to lose. Losing consciousness of this is perhaps the worst possible contribution a lawyer can make. Therefore, I want to look at something else in Kant. Not law as the narrating of social power in its most coherent terms in the seclusion of the scholar's chamber or behind the official edifice of the Bar – but law as the platform on which social conflict is articulated. Today, that articulation takes place in the debates about what “human rights”, “trade”, “security” or indeed “Europe” and “the world” should *mean* and how they ought to relate to each other. To wage that debate in terms of “law” means to wage it with the effort of not being confined in any such box *a priori*, in not thinking of oneself as merely the mouthpiece of this or that series of preferences but of thinking of oneself -and thus others, too- as “free” in the (Kantian) sense of being able to take distance from those preferences and to seek to encompass the “whole”. This is what Kant's moral politicians do when they seek to act as “genuine republicans”, trying shake off sectarian interests, and advance the good of “all”.

The positive freedom provided by the technical boxes offers a way to govern societies. From the box-perspective, all human beings appear in a particular light; in terms of what role they occupy in the advancement of the box-substance; active or passive, positive or negative. However, it follows from conflictual nature of the boxes available to us, and the indeterminacy of each of those boxes, that we are never simply playing the roles, robots programmed to behave in particular ways. There is no one spot from which governmentality occurs, no determinate hierarchy or project from which subject-constitution should take place. If there is structure, there is also the indeterminacy of structure, the dangerous supplement, the crack in the mirror, the human stain. What if trade *is* human rights? What if environment *is* resource distribution? What if sovereignty *is* intervention? What if what is black is white and freedom is possible only through constraint? Last year the British High Court described



*incommunicado* detention in Iraq as a measure to protect human rights. Well, then surely everything remains open for justification and contestation. No box is sealed, what it contains depends on what we put inside.

This is why legal education ought not to be about learning rules or principles or telling the stories of political societies in their most coherent light. Instead, it could be about retelling social histories and institutions constantly anew. Look at the EU -it has been told as a peace-making pact, a customs union, and an agency for protecting fundamental rights, each such retelling pointing to a new form of expertise, a new bias, above all new subject-positions, new perspectives from which European power may be both exercised and criticised. Liberal hermeneutics is wrong in characterising the ideal legal sensibility as that of a scholarly Hercules having all the time in the world to write a chain novel out of law. But I do think it is right in suggesting that law is about *narrating*. Through law, we sometimes describe our societies in terms of rights-bearing individuals acting upon each other, sometimes as goods, services and capital crossing frontiers. Sometimes we describe the world of political alternatives in terms of environmental degradation, globalisation of democracy, a place of terror or one of sexually transmitted disease. We situate events sometimes in national histories, sometimes in world history. Each such telling is an intervention in the world that makes some things visible, renders other things invisible.

The boxes of which I have spoken consist of more or less firmly rooted vocabularies, preferences institutionalised as parts of what lawyers do, and ideas about how they ought to be educated. Although they are part of international law, they do not exhaust its meaning. As a practice of “moral politics” I see international law as a project that uses those vocabularies - and other vocabularies- in order to tell stories that seek to appeal to *everyone*, that keep alive and strengthen the ideas of freedom, equality and universality – and all the familiar virtues of the “inner morality of law”. These ideas cannot be reduced to institutional architectures or particular projects, but they cannot be upheld without such institutions and projects, either. But when an institution becomes “part of the problem”, and projects freeze into systems of preference, it is time for international lawyers to take a distance from the institution and to re-imagine the project.

Kant thought that enlightenment would bring about a universal federation of free republics, ruled by law. Whether this prognosis is realistic or not is not the point. Rather, what is important is the accompanying use of law to express a particular kind of critique of present politics. The *ancien régime* existed for the privilege of particular estates; the Revolution, as Sieyès put it, upheld the rights of the “universal estate.”<sup>40</sup> For Kant and other sympathizers, the historical meaning of the Revolution lay in the entry into politics of the “regulative idea” of universality. This is why it was not simply one more episode in the ebb and flow of dynastic struggles. A qualitatively novel form of political order was being created that set as its horizon the liberation of humanity itself. This effect, this *aesthetic effect*, was brought about by a new political language. The extreme inequality of a society of estates was articulated and attacked by the vocabulary of the rule of law.

The virtue of international law lies in such a universalizing focus, allowing political injustice to be shown and condemned as a universal wrong, not only of concern to the immediate victims but of concern to “all”. Any such wrong may of course be explained by historical causes and described in economic or sociological terms. But a vocabulary of universal law is needed to make the point, for example, that an imperial war in the Middle East violates more than the interests or benefits of its victims, that it is an objective wrong, or concern to everyone. The same is true of the danger of radioactive pollution in the North Sea. There may be an interest to narrate it as a violation of a regional bargain. But there is certainly also an interest in describing it in its *world-historical significance* – as part of some larger violation, a structure of power and a system of global preferences that is of concern to all, for which the appropriate context is not the limited interests of Irish fishermen nor even the legislators in Brussels, but humanity *tout court*. The point of international law -and thus of legal education, here at the European University Institute and elsewhere- is to provide this perspective.

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<sup>40</sup> E.J. SIEYES, *Qu'est-ce que le Tiers-État*, Roberto Zapperi, Genève, Droz, 1970, especially pp. 125-126.