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# Universalism and Imperialism: The True-False Paradox of International Law?

Emmanuelle Jouannet\*

## Abstract

*This article examines one of the central recurrent questions in international law: the relation between the universalism of certain of its principles and the possibility that they are imperialist in nature. The author illustrates how, in this regard, international law has, from its very origins, been the bearer of a paradox; a paradox that is, moreover, constitutive of the discipline, and from which international law cannot escape without itself ceasing to exist as such.*

My intuition, which is not new but which I would like to reformulate here, is that international law has, since its beginnings, contained a paradox; an inherent paradox that in large degree explains the link between international law and imperial or hegemonic practices. This paradox stems from the fact that international law, past and present, is the reflection of a particular – Western – culture, whilst at the same time claiming not only to internationalize but also to almost universalize the values that it conveys. My question is thus the following: Is this inherent paradox itself constitutive of international law? That is to say, can international law transcend it without itself disappearing as such? Is this inherent paradox perhaps only apparent, destined to disappear with the advent of a genuinely internationalized and globalized society? And this being so, might that which could be – and has been – perceived as legal imperialism have become – or be becoming – genuine legal universalism? True or false paradox of international law? Has one history of international law come to an end? Has a new one begun? Or does the history of international law merely repeat itself?

In attempting to answer this, I will seek to understand the paradoxical logic that has driven the evolution of this twofold dimension of international law, imperialist and

\* Professor of International Law, Université Paris I Panthéon-Sorbonne.

universalist, using perspectives drawn from history, the theory of argumentation, philosophy and anthropology. This phenomenon is extremely complex, and cannot be fully grasped in terms of its legal dimension *stricto sensu* alone. It reproduces the contradictions and the finitude of the human condition (even through the logic of states), its ambivalence and its split between rationalism and irrationalism, the spirit of solidarity and the desire for domination. I will begin by tracing the history of this paradox within international law from the classical period (I) to our contemporary time (II), analysing the changes that these developments have brought about (III), before examining the possibility of finding an alternative to this paradox and addressing the issues to which it gives rise.

Such an examination strikes me as fundamental. It is at the heart of our most topical debates, and was the object of very stimulating discussion recently in this Journal.<sup>1</sup> At the same time, it is, it seems to me, divisive, not only for the discipline but also for international law and the world in general. The profound destabilization of the current international system, and the immense resentment provoked by the impression of hegemonic manipulation of that system (which had been presented in the beginning as the promise of a shared union), brings to mind certain badly-ending love stories, stories in which ‘the deepest hatred grows out of broken love’.<sup>2</sup>

## I

### *A The Universalism of Classical International Law: Between Rationalism and Regionalism*

That classical international law was the product of European legal culture is an incontestable fact that no-one now questions. International law was born with the modern European period. The first rationalist, humanist and liberal version of international law in effect came into being between the 16th and the 18th centuries, within the natural law school in Europe, and was then imposed in imperialistic manner throughout the whole world during the 19th and the first half of the 20th centuries.<sup>3</sup> There was, however, a fundamental paradox in the first law of peoples, which was adopted by the European powers and theorized by the jurists from the natural law school (Grotius, Pufendorf, Wolff, Vattel): while being a direct product of European thought, and thus of a narrowly regional vision of international law, from one specific culture and civilization, it was conceived by its founders as being composed of norms that were abstract, neutral and universally applicable to all states, whatever their legal cultures or traditional ways of understanding law. Certainly, the category of peoples referred to as ‘barbaric’ was presented at all times as an obstacle to the immediate application of international law, but the fact remains that, in principle, the highly formalistic

<sup>1</sup> See ‘Symposium: Europe and International Law’, 16 *EJIL* (2005) 124.

<sup>2</sup> Simmel, ‘Conflict’, in G. Simmel, *Conflict and the Web of Group Affiliations* (1955), at 46.

<sup>3</sup> For an illuminating account of the domination of the European model of international law during this period, despite the existence of other models developed by other civilisations, see Onuma, ‘When was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilisational Perspective’, 2 *Journal of the History of International Law* (2000) 1.

and egalitarian character of this law was intended for universal application. This universality of international law was simply postulated with regard to a more complex reality, and was limited to Christian Europe in the first instance, whilst nonetheless enjoying recognition as such. According to Vattel, for example, '[d]ifferent people treat with each other in quality of men, and not under the character of Christians, or of Mohammedans'.<sup>4</sup> Such universality can be explained by its link to rationalism. From its origins within the natural law school, this universality had in effect been supported by a rigorous rationalism. It was Reason, common to all, that provided the foundation for the in-principle universality of the law of peoples, as it was from this basis that the rights and duties of individuals and states could be deduced. It compelled states to mutually regulate their relations in order to further coexistence, peace and the well-being of their populations. The opposition between the universal and the regional thus refers back, at a deeper level, to that between the rational and the cultural.

International law would remain, for the entire classical period, torn between these two trends: regional/cultural on one hand and universal/formal on the other, in a manner progressively more complex as the discipline developed. From the end of the 18th century, the universalist spirit of the founders of the Natural Law school was superseded by the understanding of the law of nations as a law of European nations, as a result both of the constant development of positivism (the law of nations being no longer based upon a nature and a Reason common to all, but rather solely on the actual law existing between states, that is, at that time, European law) and the rising awareness of a European identity and power at that time in rapid expansion. The idea that there existed a specifically European law of nations appeared very clearly with the publication in Germany in 1789 of F. G. de Martens' *Precis du droit des gens modernes de l'Europe* or, in Austria in 1819, of *Droit des gens modernes de l'Europe* by J. L. Klüber; before this, works had been given titles that were considerably more general in nature, such as Pufendorf's *Of the Law of Nature and Nations* (1672) or Vattel's *Law of Nations; or The Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). However, this European focus was itself on occasion surpassed in favour of new national or regional visions of international law, which claimed to offer a version of international law that was better adapted to the particular culture in question, and thus to international legal rules adopted locally or regionally. These were, then, the different European, and also American, visions of international law, on occasion united in one and the same work, such as the *Traité de droit international public européen et américain* (1885) by the French jurist Paul L. E. Pradier-Fodéré.

At the same time, the rational universalism that had underpinned the first conceptualizations of the law of nations was somewhat weakened, albeit without the idea of rational, universal law ever being wholly abandoned. In fact, it was relegated to the status of theoretical law, distinguished by the authors of the time from practical, positive law. This is illustrated perfectly by the work of the major Latin-American diplomat Carlos Calvo, published in 1870 under the name *Droit international théorique et pratique*.

<sup>4</sup> E. de Vattel, *The Law of Nations, or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (trans. B. Chitty, 1883), Bk. II, ch. XII, §162.

Bringing the universalism of the Enlightenment into disrepute, the romantic spirit and the historical school of law of the 19th century made major contributions to the growing awareness of the particularities of each actor, which in turn encouraged nationalism and imperialism; both in terms of states themselves, and of their understandings of the law. These specific, cultural visions of international law were in turn challenged, after the disaster of the First World War, through the construction of the grand, abstract and formal doctrinal approaches of the inter-war period, again principally European, such as those of Kelsen, Scelle or even Lauterpacht. Put otherwise, conceptions of international law have constantly oscillated between, or have simply intermixed, a rational and universalist vision of law and a regional, positivist and romantic one; acknowledging, moreover, that the universalist conception is itself the product of a distinctively Western tradition of thought, even as it claims to transcend all cultural or sociological divisions, at least in holding them irrelevant for the purposes of legal analysis.

### ***B The Universalism of Classical International Law, Imperialism and Colonialism***

The formal, abstract, conceptual and universal character of international law thus represented one of its greatest strengths, while at the same time serving to conceal the ambitions of the European, and later the Western, states in terms of empire and domination, and the submission of the world to their own conceptions of economic and legal order. The basic paradox within international law meant that it could combine a universalist façade with discriminatory and imperialistic practices. Indeed, its extension to the universal level was not possible without completely recasting all non-Western political entities into the mould of modern European states, which in turn required the irreparable destruction of all traditional forms of polity in existence. Moreover, throughout the entire classical period, international law – proclaimed as universal and applicable to all states – represented in reality the concrete translation of a territorial and colonial imperialism which entrenched, *in law*, discrimination between states and thus the non-universality of law, even as it legitimated the imperialistic imposition of this juridical model, as well as the appropriation of land and the administration of territories. If we understand imperialism to mean domination and the imposition on others of one's own legal and economic systems,<sup>5</sup> it cannot be denied that classical, Eurocentric international law both accompanied and legitimated this imperialism, whether it be through the system of direct appropriation, the right of effective occupation, the definition of sovereignty as almost absolute, the mandate or trusteeship systems, and so on.<sup>6</sup>

This pattern has been repeated through numerous centuries of our history; the universality of ideas masking each time the violence of conquest. There was the idea of the

<sup>5</sup> For the *legal* definition of colonialism and neo-colonialism see J. Salmon (ed.), *Dictionnaire de droit international* (2001), at 193–194. For a broader definition see Le Roy, 'Colonies', in S. Rials and D. Alland (eds.), *Dictionnaire de la culture juridique* (2003), at 231. For definitions of imperialism and of forms of domination the reader is referred to the distinctions drawn by S. Sur, *Relations Internationales* (2004), at 140 ff.

<sup>6</sup> On all of these issues see Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', *5 Social and Legal Studies* (1996) 321 and A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005).

universal, and there was the conquest. During the first colonization of the Americas, Christopher Columbus believed in the universal victory of Christianity, as he explained in his letter to the Pope of February 1502: 'I hope in Our Lord to be able to propagate His holy name and His gospel throughout the universe',<sup>7</sup> even if greed, the search for power and gold, went with him. A few centuries later his sentiments would be echoed in the emblematic writings of one Joseph Conrad at the time of the great European colonization of the world: 'The conquest of the world, which mostly means the taking it away from those who have a different complexion . . . than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea; and an unselfish belief in the idea – something you can set up, and bow down before, and offer a sacrifice to . . .'<sup>8</sup> The same theme was again taken up in the final conclusions of the French Government before the Permanent Court of International Justice in the *Nationality Decrees* case of 1923, in terms of the protectorate system: ' . . . that there should at last be established by an authorised opinion of the Court, if not a full statute, then at least a general rule of principle applicable to different protectorates . . . [and] considering that this rule should draw its inspiration above all from the worthy goal of the protectorate . . . [which is] a work of civilisation . . . in the success of which all are equally interested. . . .'<sup>9</sup>

The professionals in the field made a decisive contribution of course to the development of this dual aspect through international law, which represented a somewhat ambivalent translation of all the domestic notions these jurists were able to externalize. They participated in its elaboration, its teaching and its diffusion, maintaining the idea of a law that is conceived of as being inter-national, and rationally applicable to all states (or to the 'civilized' ones, initially), but equally of a law that is the product of a particularly European genius. They were adherents of a faith at once liberal, humanist, civilizing and colonialist, without ever perceiving the contradiction in that position. It may be useful to recall again here some of their arguments, in order to illustrate the manner in which they bear testimony at once to the paradox of law and to the ambivalence of their own sentiments. According to the jurist J. de Hornburg, for example, 'the civilised must set the example of a superior justice . . . the civilised nations must help the "inferior races" to enter into the political system of states'.<sup>10</sup> In the same manner, J. Lorimer, for many years an advocate and professor in Edinburgh, relied upon natural law to demonstrate the inequality between civilized states and barbaric peoples. He developed his famous theory of the three spheres, differentiated according to degrees of humanity and civilization among peoples, and to which must be applied different sets of rules: 'As a political phenomenon, humanity, in its

<sup>7</sup> Quoted in T. Todorov, *The Conquest of America: The Question of the Other* (trans. R. Howard, 1999), at 10.

<sup>8</sup> J. Conrad, *The Heart of Darkness* (2000), at 20; quoted in E. Saïd, *Culture and Imperialism* (reprint 1994), at 69.

<sup>9</sup> PCIJ, Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921*, PCIJ, Ser. B., No. 4, 1923, at para. 7.

<sup>10</sup> Hornung, 'Civilisés et barbares', XVII *Revue de droit international et de législation comparée*, 1904, 552 [*les civilisés doivent donner l'exemple d'une justice supérieure . . . les nations civilisées doivent aider les "races inférieures" à entrer dans le système politique des Etats*].

present condition, divides itself into three concentric zones or spheres – that of civilised humanity, that of barbarous humanity, and that of savage humanity. To these . . . belong, of right, at the hands of civilised nations, three stages of recognition – plenary political recognition, partial political recognition, and natural or mere human recognition . . .’<sup>11</sup> Alphonse Rivier, the famous professor at the Universities of Berne and Brussels, went even further, noting in his 1896 work *Principes du droit des gens* that ‘[b]etween ourselves and the peoples of inferior race a chasm is opening’.<sup>12</sup> This being said, confronted with the evolution of international relations, and in particular the entry of Turkey into the concert of European states, there came progressive recognition that international law could be applied to China, Japan and to the Muslim states. Jean Gaspard Bluntschli, the great professor of law at Munich and Heidelberg, thus railed, in his 1868 work entitled *Le droit international codifié*,<sup>13</sup> against the absurdity of inserting any limit to the application of the law of nations; yet even he considered the civilized nations to be more eminently the ‘representatives of international law’. This is the same frame of mind that we find, for example, in the work of the French jurist A. Merignhac.<sup>14</sup> Put simply, authors started to progressively apply the law of nations to the whole group of states whilst maintaining at the same time – and without second thought – the distinction between civilized and non-civilized peoples; this allowed them to justify the great period of colonization, but also contributed later to the slow decay of their dreams, as Koskenniemi has shown so well in his book dedicated to the ‘gentle civilizers’.<sup>15</sup>

International law has been marked by this inherent paradox right up to the present day. It explains, in part, the vices of European colonialism and, at the same time, the success of a law sufficiently abstract and formal to be considered as compatible with the majority of non-European cultures. It seems to me that this last point needs to be emphasized in order to avoid any misunderstanding on the matter: if it is readily evident that it was European colonialism and imperialism that expanded this legal model to the rest of the world, with disastrous consequences in human, cultural and political terms, it is nonetheless the case that it is only through precisely this abstraction, this formalism, that European international law has been able to sustain itself until the present day. It functioned, first of all, as a factor of inclusion/exclusion as the public law of European states, then of ‘civilized’ states (integrating those states

<sup>11</sup> J. Lorimer, *The Institutes of Law of Nations, a Treatise of the Jural Relations of Separate nPolitical Communities* (1883, reprinted 1980), i, at 101–103; quoted in Xifaras, ‘Commentaire’, in E. Jouannet and H. Ruiz-Fabri (eds.), *Droit international et impérialisme en Europe et aux Etats-Unis*, Société de législation comparée (2007).

<sup>12</sup> A. Rivier, *Principes du Droit des gens* (1896), at 8.

<sup>13</sup> J.G. Bluntschli, *Le droit international codifié* (1868).

<sup>14</sup> A. Merignhac, *Traité de droit international public* (1905).

<sup>15</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (2002). See also by the same author, ‘Nationalism, Universalism, Empire: International Law in 1871 and 1919’, Paper presented at the Conference on *Whose International Community? Universalism and the Legacies of Empire*, Columbia University Department of History, 19–20 April 2005; and ‘International Law and Imperialism’, in D. Freestone, S. Subedi, and S. Davidson (eds.), *Contemporary Issues in International Law: A Collection of the Josephine Onoh Memorial Lectures* (2002), at 197–218.



considered civilized even as it excluded those subjected to colonization), and finally came to encompass all of the states in the world. This does not mean that it is politically neutral, as it remains a product of European liberal thought; nor does it mean that we must content ourselves with it, as it continues to be a factor of exclusion just as much as it is of integration. It only means that we cannot ignore the importance and the benefits that this formalism represented – and still represents – in terms of rendering coexistence and cooperation between multiple political entities possible; political entities that are very different culturally, and that are characterized by profoundly different objectives, values and conceptions of their common political goods.

## II

### A Contemporary Developments

Nevertheless, the situation today may seem profoundly different, as international law has clearly evolved since 1945, with the fundamental stages being the post-World War II period, the 1960s (decolonization), and the 1990s (the end of the Cold War, and the new 'globalization'). With decolonization, the colonial project seemed to have been definitively extinguished, and the imperialism of territorial conquest totally condemned following the traumas of the two World Wars. For their part, globalization and the end of the Cold War had, it seemed, enabled the emergence of an inter-subjective consensus on international law and its values, which had simply not existed previously at the global level. And we should not underestimate the breadth of these changes. These include, for example, the (relative) weakening of the state, but above all the fact that a territorialized, discriminatory and specialized law was replaced, during the second half of the 20th century, with a law extended to all, without any discrimination in law, and based *a priori* upon respect for the territorial integrity of each *de facto* independent political entity. If 'universal' means extension 'to the entire planet', or 'to all individuals of the same class',<sup>16</sup> then it seems that we may conclude that international law has been universalized, at least in terms of its application to states, and that it is now accepted as such by all – and no longer imposed in hegemonic fashion.

It is, undoubtedly, necessary to distinguish between the notions of universality and generality, which are sometimes confused. International law, which has been thus extended to all (where necessary by force), is composed of both general and special rules; and general law – if it is customary in nature – can be the subject of a 'persistent objection', and thus not applicable to all. This, of course, means that 'general' and 'universal' are not coterminous. The generality of law, of rules, refers to its applicability to one category of being, to a plurality of subjects; universality, on the other hand, refers to the totality of beings, to all subjects. By 'universal extension', and thus the universalism of international law, we thus mean that it is this model for the generation and application of rules that has been extended throughout the entire planet in a universal manner, with its

<sup>16</sup> *Dictionnaire Petit Robert 1* (4th edn., 1980), at 2050 [s'*étendre à toute la planète*] [à tous les individus d'une même classe].

sets of general and special rules and their respective fields of application, with its primary and secondary rules, and with the principle of reciprocity functioning as the internal motor driving its implementation. In doing so, and coming back to our original proposition, we would have moved at last to a situation of genuine universality as far as the subjects of international law are concerned; to a new, post-Cold War and post-colonial law, founded upon an authentic consensus, in which discrimination and exclusion were no longer established in law (excepting, perhaps, in the form of positive discrimination), and which was no longer the simple translation of one continent's own hegemonic vision for the world – and to which the globalization of practices, and of law, would bear witness.

As we all know, however, in spite of these developments, the issue of the imperialism of international law, or of some of its values, has reappeared, and is, indeed, just as sharply and as frequently denounced today as it was previously. Why? By what strange devices can a law that has become *a priori* non-colonial and non-discriminatory, a law accepted by all, come to be suspected as the mere reflection of a particular hegemony?

Clearly, there are a number of different explanations for this. The links between international law and imperialism are multiple, and are far from being completely removed. Obviously, the mere fact that law is an instrument of social power means that it can be manipulated by the hegemonic powers of the moment. Moreover, certain current practices of occupation, of indirect administration of territory, of access to fossil fuel resources, and of the free deployment of transnational private practices and the most powerful economic operators, etc., undoubtedly call to mind the territorial element of the classical system of appropriation or certain neo-colonial practices. However, it is not this neo-colonial element, territorial or economic, that I want to refer to here. As noted above, my goal is to analyse the universalism/imperialism of international law in terms of the values of modern legal humanism; that is, put briefly, in terms of the human rights proclaimed in the 'Universal' Declaration of 1948,<sup>17</sup> and the common substantive principles considered specific to the contemporary international order (such as the right to peace, to a healthy environment, etc.). I will limit the analysis to the example of human rights as these are clearly emblematic of the new legal humanism, and of this new substantive universality; they represent these common values of contemporary international law which compete with the classical understanding of international law as based upon territorial sovereignty.<sup>18</sup>

## B *The Formal and Substantive Universalism of International Law*

Certainly, classical international law was equally a vehicle for the values of its originators. 'Formal' does not mean 'vacuous',<sup>19</sup> contrary to what we might sometimes think; formal law always formalizes a particular content or subject-matter. Substance and form are shaped reciprocally, and the formal/substantive opposition, which I have

<sup>17</sup> For an extremely in-depth analysis of this subject see M. Delmas-Marty, *Les forces imaginantes du droit. Le relatif et l'universel* (2004).

<sup>18</sup> On this point see the remarkable book by O. de Frouville, *L'intangibilité des droits de l'homme. Régime conventionnel des droits de l'homme et droit des traités* (2004).

<sup>19</sup> P. Ricoeur, *Oneself as Another* (trans. K. Blamey, 1992), at 262–263.



made use of here, must be understood as relative. All law transcribes the values of those that create it; it is not a substance-less form, but the translation of the values of the society it regulates. It would be completely erroneous to suppose that the first classical international law, extended over the entire planet, was purely formal. It served as a vehicle for the form of the modern state, and, with territorial and colonial domination, it imposed certain values of internal organization that destroyed the cultures of the colonized peoples. It is, however, true that the values inherent in classical international law were principally those of coexistence and cooperation; they thus allowed, in principle, for each state (and later each newly decolonized state) to pursue its own objectives, requiring the acceptance of only a minimum of legal commitments. Moreover, as already noted, this is one of the ways in which international law succeeded in imposing itself; through what I have referred to here, in somewhat particular fashion, as the formalism of classical international law, that is to say, the fact of being essentially composed of enabling rules and norms allowing cohabitation between entities with profoundly different subjective values and conceptions of justice.<sup>20</sup>

Today, the formalism of international law still subsists, and with it the principle of formal universality (the equal application over the entire planet of the international legal order of European origin, without discrimination between states). However, the pursuit of genuinely common objectives at the international level, of a common justice, necessitates, it would seem, a still more advanced integration of different traditions and cultures in order to define and adapt to these new objectives; and thus necessitates a new period of acculturation. If we have truly moved from a liberal and principally formal law, aimed only at ensuring respect for the sovereignty (or freedom) of each state, to a more multiform and complex law, characterized by greater solidarity, which still flirts with this idea of sovereignty while at the same time seeking to surpass it in favour of a common good, if the goal of international law is no longer merely to respect the freedom of states but also the promotion of this common good (which could, for example, be the liberty and well-being of *individuals* this time around), then international law is currently undergoing a process of substantivization, which is necessarily accompanied by the desire to harmonize the values of each actor while overcoming some of the most irreducible cultural divisions. This corresponds in part to certain absolutely essential distinctions introduced by P.-M. Dupuy in his general course at the Hague, between formal unity (characteristic of the classical period) and substantive unity (characteristic of the contemporary period).<sup>21</sup> That we speak of 'universality' in this context is linked to the fact that these humanist values, these new goals, are most often understood as being founded upon human nature, or the interests of the community in its entirety, and thus as necessarily applicable to all living beings. We can thus see here the underlying mark of Western rationalism, which had provided, since the writings of the natural law school, the foundation for

<sup>20</sup> This was analysed by Koskenniemi as the transposition of political liberalism into international law, largely through the principle of the formal primacy of law over the substantive conceptions of states. See Koskenniemi, 'The Politics of International Law', 1 *EJIL* (1990) 1.

<sup>21</sup> P.-M. Dupuy, *L'unité de l'ordre juridique international. Cours général de droit international public* (2002).

the law of nations. This substantive universality is simply an assumption, as the legal texts devoted to human rights are more of general than of universal application; however, the underlying rationalist foundations of these rights lead us to the conclusion that they will be universalized in the long run. Moreover, certain categories of conventions, certain customs, and certain general principles concerning such rights ‘aim to achieve universality’.<sup>22</sup>

Furthermore, when we speak of a common good or of common values in contemporary international law, we do not mean that international law imposes *a priori* a particular form of religion, culture, morality or conception of happiness. Staying, once again, with human rights and democracy, these ideas express a juridical and liberal conception of ‘justice’ that should remain neutral *vis-à-vis* the varying conceptions of the good, and aim instead to respect the plurality of subjective individual values and goods, the internal plurality of each state, and the cultures, religions and opinions of each individual. It is a set of values based upon pluralism and tolerance.<sup>23</sup> It is also true, however, that these common legal values, instituting pluralism, liberty and tolerance, are themselves based upon one particular idea of ‘justice’ which corresponds to that which is considered a ‘common good’ of international society itself, and the end that it pursues. As demonstrated well by Charles Taylor, conceptions of rights necessarily presuppose a conception of what is good for human beings;<sup>24</sup> and this common good, manifested in the new values of contemporary international law, lays claim to an element of universality that transcends the historical context of the emergence of those values, ultimately allowing them to be opposed against any state – and any non-liberal state in particular – no matter what its own legal culture or national vision of justice or common goods might dictate.

### III

#### *A The Problem of the New Substantive Universalism of Contemporary International Law*

Here we have reached the central point in this discussion, in the evolution of international law outlined here and of all the debates that it has generated; put very simply, the question of formal universalism is substituted for that of its substantive counterpart. And the issue of imperialism arises again in the latter context, and in a more insidious manner, for at least two principal reasons.

<sup>22</sup> Dupuy, ‘Préface: fragmentation du droit international ou des perceptions que l’on en a?’, in R. Huesa Vinaixa and K. Wellens (eds.), *L’influence des sources sur l’unité et la fragmentation du droit international* (2006), at 20 [s’assignent d’atteindre à l’universel].

<sup>23</sup> Although, of course, this ideal of liberal neutrality has been seriously disputed. See, in terms of domestic societies and from a communitarian or moralistic point of view, M. Sandel, *Liberalism and the Limits of Justice* (2nd edn., 1998), and M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1984). For a critical perspective on international society see Koskenniemi, *supra* note 20.

<sup>24</sup> C. Taylor, *Sources of the Self: The Making of the Modern Identity* (1992), at 125.

Firstly, the proclamation of a new substantive universal (a common good) signifies a ‘turn to ethics’,<sup>25</sup> a potential moralization of law, which leads actors unconsciously down the path of a *deformalization* of international law itself. Common juridical values, such as democracy or human rights, become fundamental, and guaranteeing them is sometimes understood as necessary due, in effect, to their own intrinsic value, and not due to the fact that they are inscribed in the texts of positive law. Set at the very foundations of the international legal order, at the same level as sovereignty, they must, according to some, serve to alter the other formal rules of classical international law. The intervention in Kosovo, George Bush’s ‘crusade’, or the notion of the ‘just war’ (which has reappeared recently) are all illustrative of this development.<sup>26</sup> War has been rehabilitated by appeal to morality, and not to law, because it has become once again a means to achieve a good. It is, moreover, worrying to see many renowned philosophers defending, alongside a number of jurists, armed interventions on the sole basis of morality and legitimacy, while considering, of course, that this option should only be open to Western liberal states.<sup>27</sup> Such positions seem to display a degree of forgetfulness about the basic ambivalence that this sort of interventionism generated in international law’s past, and also a real ignorance of the specificity of international law as law.<sup>28</sup> Certainly, an eminent author such as Habermas may persist in seeking to demonstrate the legal, as opposed to the moral, nature of human rights (and thus their legal formalization), but that which underpins these rights is evidently ethical in nature, and this led many to look beyond law.<sup>29</sup> The defence of a common good of this sort, then, requires at once not only a heirarchization of rules, and a relativization of sovereignty and the reserved domain of states, but also, with increasing frequency, a relativization of legal formalism, as there is an underlying imperative to act which trumps the need to respect existing law – and which thus imposes a model that risks appearing hegemonic.

Secondly, the substantive legal values that aspire to universality are once again Western values. As noted by Ricoeur, despite the fact that, for example, the texts relating to human rights have been almost unanimously ratified, ‘the suspicion remains that they are simply the fruit of the cultural history belonging to the West, with its wars of religion, its laborious and unending apprenticeship of tolerance’.<sup>30</sup> Their claim to universality is itself founded, as already noted, on Western rationalism, just as was the first law of nations; and in the same manner, it undoubtedly serves to mask what

<sup>25</sup> Koskenniemi, “‘The Lady Doth Protest too Much’”, Kosovo, and the Turn to Ethics in International Law’, 65 *MLR* (2002) 159.

<sup>26</sup> For an interesting discussion of this point see, e.g., M. Walzer, *Just and Unjust Wars: A Moral Argument With Historical Illustrations* (4th edn., 2006). See also, among an important body of literature, the contributions to B. Delcourt, D. Duez, and E. Remacle (eds.), *La guerre d’Irak. Prélude d’un nouvel ordre international ?* (2004) and O. Corten, *Le retour des guerres préventives: le droit international menacé?* (2003).

<sup>27</sup> See Walzer, *supra* note 26. See also M. Canto-Sperber, *Le bien, la guerre et la terreur* (2005), at 226, and R. Falk, *The Great Terror War* (2003).

<sup>28</sup> For one fairly typical example of this see T. Todorov, *Le nouveau désordre mondial. Réflexions d’un Européen* (2003), at 85.

<sup>29</sup> J. Habermas, *La Paix perpétuelle. Le bicentenaire d’une idée kantienne* (1996), at 89.

<sup>30</sup> Ricoeur, *supra* note 19.

‘the West does not wish to see of the West’.<sup>31</sup> Some, moreover, make absolutely no effort to hide this, and argue quite explicitly in favour of a new task of civilization in this sense; this position is illustrated well by the works of the American scholar G. Schmitt, according to whom the US is the only ‘civilized’ power with both the capability and the will to impose its values on the ‘non-civilized nations’, thus meaning that the latter group cannot pose a threat to international peace and security.<sup>32</sup>

The debate over which values should be inscribed in international law – a debate that has characterized the beginning of this century – thus reintroduces, in an acute if slightly different manner, the dilemma posed by international law’s inherent paradox and the question of imperialism. All positive law of necessity has its roots in culture. The new legal values of contemporary international law are thus drawn from a particular – Western – culture, but can be applicable if they are genuinely recognized as legitimate by those to whom they are to be applied. And they will not be recognized as such unless they are based on a common ethics or a global culture that, for the moment, does not exist. It is for this reason that it is not surprising to see, in this very evolution of international law towards the universalization of certain legal values, which are perceived of as Western, some very lively cultural resistance re-emerging with such force today. The stronger the intergrationist and universalist elements within international law, the more each will seek to ensure the domination of his own system and personal vision of that discipline. This is what is referred to, in the human rights field, as the dispute between universalism and contextualism. Certainly, it is perfectly true that the victims of human rights violations, wherever they may be, are not at that moment particularly concerned about their cultural or national identities;<sup>33</sup> and it is without doubt in the shared experience of suffering that humans most resemble each other, and are drawn together. We cannot, however, ignore the parallel, concomitant fact of the existence of some very strong reactions against that which is perceived as a new legal imperialism. Above all, we must not underestimate the perception that certain peoples, individuals and states have of these legal values; actors who, notwithstanding their superficial acceptance of such norms (which is very often forced, or simply strategic), consider that, from their own point of view, they are in fact confronted with a form of legal imperialism.

This leads us to the question, much discussed at present, of what is referred to as ‘liberal imperialism’. This expression, which may appear contradictory, is at the very heart of the issue of the current universality of the values embodied in international law. These humanist values, presented as universalizable by contemporary international law, are, of course, originally those of liberal democracies, be they European or American; and may, on this basis, be perceived of as the fruits of a policy of imperialism or Western hegemony, liberal in nature, which merely repeats in another form

<sup>31</sup> To paraphrase the famous title given by Legendre to his series of lectures in Japan; see P. Legendre, *Ce que l’Occident ne voit pas de l’Occident. Conférences au Japon* (2004).

<sup>32</sup> Schmitt, *Le Monde*, 23–24 Mar. 2003.

<sup>33</sup> As emphasised recently by Dupuy in ‘Some Reflections on Contemporary International Law and the Appeal to the Universal Values: A Response to Martti Koskenniemi’, 16 *EJIL* (2005) 131.

the 'civilizing missions' of the past. We may recall here the writings of J. Hornung, de J. Lorrimer or G. Bluntschli, and the fact that the 'internationalists' of the 19th century, who supported and legitimated colonialism, were, for the most part, genuine humanists and genuine liberals, sharing an authentic, internationalist faith and thoroughly convinced of the rightness of their cause.<sup>34</sup> The serious accusations that are occasionally levelled against any possible contemporary 'liberal imperialism' are perfectly understandable given both the past history and dramatic present of international law; they force us to reflect on the issues they raise, even if we do not necessarily agree with all of their conclusions. Indeed, the real issue is the extent to which the 'democratization of the world' through international law, within a globalized and/or an 'internationalized' framework, simply repeats the errors of the past or, to the contrary, allows us to free ourselves from them.

At the very least, it is essential to realize that we cannot simply act *as if* the issue of the imperialism of the legal values embodied in international law had been disposed of by virtue of the transcription of human rights into positive international law, their general acceptance through the ratification of international instruments, and thus their near-universalization at a textual level. It is also important to recognize that, in raising such questions, we are not seeking to 'comfort tyrants', but rather simply to take into consideration certain reactions not only of governmental actors, but also of peoples and individuals themselves. Take, for example, the images of Iranian women, veiled from head to toe, protesting against human rights and equal status between the sexes. An anecdote recounted by C. Delsol may also serve to illustrate this point. She recalled how, at the beginning of the latest intervention in Iraq, 58 American intellectuals wrote an open letter to German and Saudi intellectuals explaining their support for the action taken by George Bush; taken, in their view, in defence of freedom and human rights. One hundred and fifty-four Saudi intellectuals responded, very courteously, in the following manner:

The American signatories focus their attention on the need to separate Church from State, and they see in this a universal value that should be adopted by all of the world's nations. We others, Muslims, see the relationship between religion and the State differently. . . We consider secularism to be inapplicable to a Muslim society, as it denies members of that society their right to implement the general laws that shape their lives, and defies their will under the pretext of protecting minorities.<sup>35</sup>

There is thus a phenomenon of resistance that must be taken into consideration, in order to determine its scope; on which, in our roles as teachers and practitioners of contemporary international law, we must reflect; and which have, moreover, rightly generated much debate. Indeed, as H. Arendt emphasized, however well founded we

<sup>34</sup> See Koskenniemi, *The Gentle Civilizer*, *supra* note 14.

<sup>35</sup> C. Delsol, *La grande méprise* (2004), at 150 [*Les signataires américains concentrent leur attention sur la nécessité de séparer l'Eglise et l'Etat, et ils voient là une valeur universelle que devraient adopter toutes les nations de la terre. Nous autres, musulmans, nous voyons différemment les relations entre la religion et l'Etat. . . Nous considérons que la sécularisation est inapplicable à une société musulmane, parce qu'elle dénie aux membres de cette société le droit d'appliquer les lois générales qui modèlent leurs vies, et viole leur volonté sous le prétexte de protéger les minorités*].

might think certain values to be, the fact that they are perceived of as imposed (even indirectly), the fact that they are viewed as hegemonic, inevitably encourages the ‘rise to nationhood’,<sup>36</sup> and, in time, the inevitable defeat of those values. Today, we would perhaps speak in terms of culture and identity as much as in those of nationality; the principle, however, remains the same, as reactions of this sort are expressions of the legitimate aspiration of each individual to have his or her singularity respected; moreover, such a position can be dangerous, as it can lead to the entrenchment of oppressive traditions.<sup>37</sup> This, in turn, can lead doctrine into the same type of resistance, through what Delmas-Marty has so accurately termed a particularly intransigent ‘dogmatic relativism’,<sup>38</sup> which can be seen as the counterpart of the dogmatic universalism both of the Enlightenment and of certain contemporary partisans of the universalism of international law.

### **B Two Universalisms: European and American**

At this point, the question arises of the ‘two universalisms’, European and American, both characterized by a strong will to universalize democracy and human rights through international law, but differing in the manner in which they seek to impose this.

Indeed, we can distinguish between an ‘experimental’, ‘persuasive’ universalism (European), and a ‘compelled’ universalism, imposed by force (American). This distinction has become common of late, and its repercussions for the issue of imperialism are immediately evident: based upon unilateral force, the American project would be imperialist, while the European one, relying only on persuasion and acceptance, would not be. Regarding American universalist legal imperialism, the work of A. Lorite Escorihuela is fascinating;<sup>39</sup> he shows, in very thoroughly documented fashion, how the neo-conservatives, currently in positions of some power, have absolutely no ambitions to turn international law into a weapon of imperialism. To the contrary, they have created something of a trend towards ‘international nationalism’, where they appear to be solely concerned with the protection of US sovereignty, viewing international law as mere fact, and not as law. It is, however, a combination of the way in which certain events developed and the implicit affiliation between the American neo-conservative and liberal-democratic movements that has created this ‘liberal imperialist’ legal foreign policy in terms of human rights and international law. The conservative – but extremely voluntaristic – policies of George Bush have finally provided the requisite means for concretizing the humanist ideals centred around the human rights and the democracy of liberal Americans. It is thus this doctrinal and

<sup>36</sup> H. Arendt, *The Origins of Totalitarianism* (new edn., 1973), at 134.

<sup>37</sup> Béji, ‘La culture de l’inhumain’, in J. Bindé (ed.), *Où vont les valeurs?* (2004), at 55.

<sup>38</sup> See Arendt, *supra* note 36, at 46 ff.

<sup>39</sup> Lorite Escorihuela, ‘L’impérialisme comme produit dérivé: la doctrine internationaliste contemporaine aux Etats-Unis’, in Jouannet and Ruiz-Fabri (eds.), *supra* note 11. See also, by the same author, the more in-depth ‘Cultural Relativism the American Way: The Nationalist School of International Law in the United States’, 5 *Global Jurist Frontiers* (2005) 1, available at: [www.bepress.com/gj/frontiers/vol5/iss1/art2](http://www.bepress.com/gj/frontiers/vol5/iss1/art2).



political complicity, which is *a priori* surprising but easily explained by the currently prevailing circumstances, that marks the origins of an American imperialism that does not balk at the prospect of imposing liberal ideals by force, in violation of the rules of formal law.

By way of an example in terms of Europe, Barbara Delacourt has brilliantly analysed<sup>40</sup> the position adopted by Robert Cooper, an ex-foreign policy adviser to Tony Blair, and current Director General for External and Politico-Military Affairs at the General Secretariat of the Council of the European Union. He has shown himself to be a fervent defender of the new 'European liberal imperialism', but is at pains to differentiate his own position very clearly from the imperialist and universalist claims of the Americans. He asserts that the EU is a 'post-modern' empire, as, far from resorting to the use of force, it gives preference to persuasion over coercion in working towards the expansion of its political and economic model: "Military occupation is not the road to democracy": democracies are not made by written laws which can be exported as a package. They depend on unwritten rules and understandings: those civil servants don't take bribes and generals stay out of politics, for example.<sup>41</sup> The approach adopted by the EU thus does aim to universalize the liberal democratic values of international law, but seeks to do so by using methods, contrary to those used by the Americans, that break with the European colonial past. Instead, dialogue with third countries and recourse to international institutions is preferred, in order to foster within these countries the desire for political and economic transformation, which would in turn allow for the introduction of democracy and human rights. Barroso has framed the matter thus: 'In the past, we had empires. Now we have, if I may put it this way, an anti-imperial empire, which will allow us to manage globalisation in a way that respects our values.'<sup>42</sup>

This opposition is rapidly becoming a commonplace in our discipline. It represents the results of the different geostrategic relations, the consequences of the respective power of the two continents (the hyper-power of America against the mere power of the Europe) or, at the level of legal culture, the opposition between the instrumental pragmatism of the Americans (who use international law as it suits them in order to realize their values) and the formal legalism of the Europeans (who view law as an ideal model for behaviour, with their own example serving, of course, as that model), as persuasively explained recently by S. Sur.<sup>43</sup> It may also be suggested, to paraphrase M. Gauchet,<sup>44</sup> that the two continents no longer define their identity in fundamentally

<sup>40</sup> Delcourt, 'La séduction du concept d'impérialisme libéral auprès des élites européennes : vers une redéfinition de la politique étrangère de l'Union Européenne?', in Jouannet and Ruiz-Fabri (eds.), *supra* note 11.

<sup>41</sup> Cooper, 'Military Occupation is Not the Road to Democracy' (3 May 2004), available at: [www.looksmart.com](http://www.looksmart.com): quoted in Delacourt, *supra* note 39.

<sup>42</sup> *Le Monde*, 7 Oct. 2005; cited in *ibid.* [*Dans le passé, nous avions des empires. Cette fois, nous avons, si j'ose dire, un empire anti-impérial, qui va nous permettre de gérer la mondialisation dans le respect de nos valeurs*].

<sup>43</sup> Sur, 'Conclusions', in Jouannet and Ruiz-Fabri (eds.), *supra* note 11.

<sup>44</sup> He is, however, only speaking in terms of Europeans. See M. Gauchet, *Un monde désenchanté?* (2004), at 13–14.

the same fashion; that the Europeans have undergone ‘a profound change in the definition of that identity’, which has significant implications for their understanding of international law. It seems that the Europeans no longer define themselves solely in terms of that which they are working towards, but also by that which they have been. This does not mean that they are able to escape from their imperialist past, but rather that they define their identity precisely with regard to that (colonial and imperialist) past. The United States, on the other hand, gives the impression that it defines itself, essentially, in terms of what makes it move forward. It is thus possible to discern some interesting distinctions that are worth identifying but which are also easily deconstructed. In doing so, we can immediately grasp the relative element within such distinctions. Historical identities define themselves through interaction with each other, while both pragmatism and legal formalism can be found now on both sides of the Atlantic (in particular due to the influence of Anglo-Saxon currents of thought in Europe), even if the dominant approaches remain pragmatism in the United States and formalism in Europe.<sup>45</sup> Moreover, we know full well that the European techniques of ‘persuasion’ are often very close to those of compulsion. For example, the economic interests involved make it very difficult for parties to challenge the requirements of conditionality used in the granting of aid or the signing of agreements at the European level; simple persuasion is often accompanied by very heavy pressure, which the concrete inequalities between the parties make it impossible to resist.

The idea of a kinship, even a complicity, between these two universalisms – and these two hegemonies? – is thus just as rich as that of their dissimilarity. It is plausible to suggest that we may be witnessing an implicit, if temporary, understanding at the external level which mirrors, without wishing to elide the differences between the two, the internal division within America between the neo-conservatives and the democratic liberals: that is, an understanding between Europe and the US that the latter will act as the armed enforcer of the former, in the name of the ideals that they share as liberal democrats.

### **C Globalization**

Lastly, the issue of globalisation also arises at this point. We cannot ignore that this movement towards the universalization of the legal values of human rights and democracy is inscribed within the contemporary phenomenon of globalization. The two must not be confused, even if the relations between them are ambivalent and if they are both denounced by some as processes of imperialism. Universalization here refers to legal values that are common to all, while globalization refers to certain phenomena that seem to somehow globalize themselves, to a dynamic inherent in cultural, economic, technological and legal development, freed from the constraints of the Cold War. Universalization thus seems to imply a desire and a choice, whereas globalization is simply the necessary result of the interplay of the powers that be, in which we find principally the values of economic and political liberalism and of

<sup>45</sup> See, on this point, my own study entitled ‘French and American Perspectives on International Law: Legal Cultures and International Law’, 58 *Maine L Rev* (2006) 292.

the market economy.<sup>46</sup> Delmas-Marty has phrased the question in these terms: 'Can globalisation succeed where Westernisation failed?'<sup>47</sup> Will it enable an ordering of the pluralism of systems and cultures in existence, and not seek to impose a model of hegemonic unification, such as the Eurocentric models of the past? Recently, the phenomenon of globalization has indeed seemed to extend over all countries of the world, leading to dialogue between cultures and countries who are integrating more and more into international institutions, as the entry of China into the WTO illustrates. It favours the hybridization and intersection of concepts, whereas European colonization and the importation of its law led merely to their destruction and replacement by the European model.<sup>48</sup> Globalization, moreover, as Alston has rightly noted,<sup>49</sup> creates normative spaces that are detached from all forms of state sovereignty; spaces that we are not always even aware of, but that can contribute to the creation of other common perspectives.

Even if, however, it is evident that these trends towards a sort of legal, pluralist globalization exist, it seems equally clear that, at the same time, such trends also bring back many difficulties of the classical period, reawakening the desire for domination and hegemony. Indeed, some see globalization not as a space for the hybridization of cultures, but rather as the victory for those transnational forces that are the most powerful, and thus the most hegemonic.<sup>50</sup> In still more pessimistic fashion, an author such as Jean Baudrillard sees in globalization the end of both the universal and of cultural particularity, as it represents, according to him, 'the triumph of unipolar thought over universal thinking'.<sup>51</sup> While the universalism of human rights respects cultural differences, globalization destroys everything in its path. Globalization thus itself appears torn between harmonization and hegemony.

## IV

### A *The Possibility of an Alternative?*

The tension between the universal and the particular occupies a central place in the realm of theory, in particular since the beginning of the modern period. This tension,

<sup>46</sup> See, in this sense, K. Postel-Vinay, *L'Occident et sa bonne parole* (2005), at 45.

<sup>47</sup> Delmas-Marty, 'Comparative Law and International Law: Methods for Ordering Pluralism', 3 *University of Tokyo J Law and Politics* (2006) at 44 ff.

<sup>48</sup> See M. Delmas-Marty, *Le relatif et l'universel* (2004).

<sup>49</sup> See, e.g., Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization', 8 *EJIL* (1997) 435. See also Teubner, 'Global Bukovina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law Without a State* (1997), at 3–28; Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law', 10 *Indiana J Global Legal Studies* (2003) at 25 ff.

<sup>50</sup> As, e.g., in the notion of 'global empire' in E. Balibar and I. Wallerstein, *Race, nation, classe. Les identités ambiguës* (1998).

<sup>51</sup> Baudrillard, 'From the Universal to the Singular: The Violence of the Global', in J. Bindé (ed.), *The Future of Values: 21st Century Talks* (2004), at 20.

this paradox, has pervaded international law through and through in both the past and the present of the discipline. As a result, it feeds universalist visions and sustains, at the same time, imperialist, or at least hegemonic, practices; practices that need not, moreover, have their roots within the purely Western context.<sup>52</sup> It thus includes, but is not limited to, Western practices. In the same manner there is, no doubt, as P. Hassner has suggested, a ‘hidden universal’<sup>53</sup> behind the multiple cultural, regional and individual visions of international law; equally clearly, however, there is, as Koskenniemi has emphasized, a disguised imperialism, albeit a benevolent hegemony, behind universalizing approaches.<sup>54</sup> This gives rise to the question: Can we escape from the profound paradox of legal thinking within which we are trapped, and to which, in a singularly disturbing manner, the practices and the principles of international law, as analysed by N. Berman, constantly refer us back? Are we prisoners of a choice between total relativism and hegemony? Must we either remove the substance from international law in order to arrive back at an approach that is more essentially formalistic and respectful of all human cultures, or accept the substantive values of contemporary law, and the idea of the (hegemonic) primacy of the Western legal culture of human rights?<sup>55</sup> Are all claims to universality necessarily hegemonic, as Koskenniemi suggests? Or could we, perhaps, conceive of international law and rights in a less radical fashion, such as envisaged, for example, by Dupuy or Alston?<sup>56</sup> Does another alternative exist?

This question will remain debated among ourselves, members of the internationalist discipline, according to our own conceptions of law, politics and morality; and all positions are worthy of respect. These positions have given rise to a debate both necessary and decisive for the future of contemporary international law. Here, I would like to offer a few reflections, beginning with the following passage by Ricoeur:

One must, in my opinion, . . . assume the following paradox: on the one hand, one must maintain the universal claim attached to a few values where the universal and the historical intersect, and on the other hand, one must submit this claim to discussion, not on a formal level, but on the level of convictions incorporated in concrete forms of life. Nothing can result from this discussion unless every party recognizes that other potential universals are contained in so-called exotic cultures. The path of eventual consensus can emerge only from mutual recognition . . .<sup>57</sup>

The path that is recommended here is not to renounce the possibility that there can be genuinely shared universals, which are thus not necessarily imposed in hegemonic fashion. This, however, requires that we move from rational discussion, which does not give rise to impassés based on the culture, personal identities and forms of belief of each party. In truth, these philosophical considerations are offered at such a level of

<sup>52</sup> Many other civilizations have made claims of universality, as well illustrated by A. Toynbee, in his *L'Histoire* (1978).

<sup>53</sup> P. Hassner, *La violence et la paix. De la bombe atomique au nettoyage ethnique* (2000), at 278.

<sup>54</sup> Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’, 17 *Cambridge Review of International Affairs* (2004) 197.

<sup>55</sup> A dilemma already formulated by F. de Smet, *Les droits de l'homme. Origine et aléas d'une idéologie moderne* (2001), at 140.

<sup>56</sup> See Dupuy, *supra* note 33, and his discussion with P. Alston in ‘The Effects of Rights on Political Culture’, in P. Alston (ed.), *The European Union and Human Rights* (1999), at 96–116.

<sup>57</sup> Ricoeur, *supra* note 19, at 289.

generality that they seem to make global agreement possible, and at the same time put a smile on the face of the internationalist confronted by the harsh realities of international life. They can, however, be fleshed out through adapting them to internationalist legal discourse, to the concrete practice of international law. I will thus seek to develop these ideas through an exploration of contemporary practice in terms of the evolution of argumentation and negotiation at the international level, the philosophical question of foundations, the issue of cultural identities, and finally the ambivalence of international ideas. It is, it seems to me, through drawing together these scattered elements of the problem that we might shed some light on this solution.

## **B *The Evolution of Argumentation-negotiation at the International Level***

To say that international law is paradoxically torn between the two extremes, *a priori* indissociable, of universalism and imperialism, does not rule out the emergence of more subtle practices that are sensitive to the context of contemporary globalized society. This emerging form of international law is, perhaps, much more complex than we realize, as it represents not merely a set of formal rules, a toolbox, but also a cultural product that has been expanded to cover the whole planet. It remains an expression of the (hegemonic) values of the most powerful, but it does so now in the crucible of globalization and of prior practices of colonization. And we cannot simply ignore the changes occurring beyond Europe, beyond the West, which are bringing multiple implications with them. In place of the total assimilation, the horrors and the degradation of the legal imperialism of classical colonialism, there is today perhaps something more subtle at work, which moves beyond both the primitive hegemony of the majority culture and the radical deconstruction of all notions of the universal; and which may include, for instance, as the work of A. Appadurai illustrates,<sup>58</sup> examples of reappropriation of majority (Western) culture by minority (non-Western) cultures.

In reality, as we have seen, international law is both part of the problem and part of the solution, as, if it conceals the hegemonic goals of the most powerful actors, it can also be considered as the paradigmatic space within which inter-subjective practices of negotiation and deliberation over the elaboration and application of values, principles and rules may flourish, whether this takes place at the level of specialized or general institutions, in the context of judicial decisions or diplomatic discussions.<sup>59</sup> The concrete inequalities between the partners in international discussion/negotiation are quite rightly denounced; however, it is also important to emphasize that this inequality may sometimes work to the advantage of the weaker party, or to that of both, and thus contribute to the emergence of a pluralized yet common legal value. The classic objection, which holds that consensus cannot exist between profoundly

<sup>58</sup> A. Appadurai, *Après la colonisation. Les conséquences culturelles de la globalisation* (2001).

<sup>59</sup> On this point see also the work of M. Delmas-Marty and M.L. Izorche on fuzzy logic and the national margin of appreciation doctrine, in 'Marge nationale d'appréciation et internationalisation du droit: Réflexions sur la validité formelle d'un droit commun en gestation', in UMR, *Variations autour d'un droit commun, Premières rencontres de l'UMR de droit comparé de Paris* (2002), at 88.

different socio-cultural systems, does not always stand, and does not always translate systematically into the hegemonic victory of the legal values of one of the two, or pure decisionism.<sup>60</sup> A number of years ago, Koskenniemi recounted the manner in which discussion over the famous definition of ‘aggression’ unfolded at the UN.<sup>61</sup> From within a classic realist perspective, and as a privileged observer of UN practice, he remarked that each representative participated in the discussion ‘with two objectives in mind: firstly, that the resulting definition would not impede his or her own state from taking action in defence of its essential interests; and secondly that it would prevent all action that might be prejudicial to those interests’.<sup>62</sup> This interpretation is without doubt perfectly correct, because precisely what was at stake here was the defence of the vital interests of a state in the case of any act of aggression against it; and this explanation of state interests certainly remains persuasive. Nevertheless, it seems that this argumentative structure is only decisive in decisions relating to these famous vital interests, and that in a number of areas of international law the defence of these interests is intermixed with the possibility of sharing or accepting the position of the other. In her inimitable fashion, H el ene Ruiz-Fabri has provided a humorous account of the ‘script’ for the recent UNESCO negotiations on the Convention on Cultural Diversity;<sup>63</sup> and here we can clearly see the appearance of the more complex contemporary processes of argumentation and decision. And the same applies to the much-discussed relations between the subsystems and specialized (fragmented) branches of contemporary international law. Whether we think of the negotiation rounds of the WTO or the decisions of its Appellate Body, of resolutions of UN institutions, of inter-state treaties on environmental issues, anti-personnel mines or the International Criminal Court, or even of the decisions taken by regional human rights courts, all of the practices of these institutions reflect, to my mind, an exercise in the elaboration and/or application of international norms which, without eliminating the hegemonic element, are nonetheless particularly nuanced. The multiplicity of actors invited nowadays to participate in major international conferences, such as NGOs, associations, multinationals, etc., reinforces the idea of more subtle approaches to both discussion and decision.<sup>64</sup>

To argue this is not to naively preach the idea of an ideal and utopian consensus, which, if it were to be realized, would undoubtedly amount to an oppressive appeal

<sup>60</sup> For the current debate surrounding decisionism and the misunderstandings that it creates today, I refer the reader to my article, ‘Pr esentation critique de la pens ee de M. Koskenniemi’, in M. Koskenniemi, *La politique du droit international* (2007).

<sup>61</sup> *Ibid.*, at 158. In English, see Koskenniemi, ‘The Place of Law in Collective Security’, 17 *Michigan J Int’l L* (1996) 455.

<sup>62</sup> *Ibid.* [en ayant   l’esprit deux objectifs : 1) d’abord que le r esultat n’aboutisse pas   emp echer son Etat de conduire une action pour d efendre ses int er ets essentiels. 2) ensuite tenter de pr ev enir toute action qui serait pr ejudiciable aux int er ets de son Etat].

<sup>63</sup> Ruiz-Fabri, ‘Naissance d’une convention’, in *M elanges J. Salmon* (2006).

<sup>64</sup> Here again, however, the argument cuts both ways, as, even if these approaches can lead to the promotion of common values, as in the case of the adoption of the Statute of the International Criminal Court, it can also impede the adoption of an agreement based upon universal values, as occurred during the World Summit on Sustainable Development in Johannesburg in 2002. See the *Report on the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20.



for a despotic and uniform world. Neither is it to preach that 'harmony of interests' is the inevitable outcome; this illusion was thoroughly exposed by the realist critique.<sup>65</sup> As emphasized by Koskenniemi,<sup>66</sup> the hegemonic formulation and implementation of legal values remains a decisive factor in international law, as these processes also remain an expression of the political choices and cultural identities of each party. This insight is one of that author's fundamental contributions to the discipline. It must also be noted that the minutes of certain negotiations and decision-making processes, of the UN and of other institutions, show that the framework within which these take place has genuinely become more complex today; and that there is sometimes, on the part of the most powerful actors, a desire to avoid conflict, any likely future frustrations, and even injustice, and an awareness that this can be achieved through more concerted and consensual negotiating and decision-making policies than used previously.

The evolution of international society, and thus globalization, but also advertising, the media presence of domestic law and the role of public opinion, the proximity between opponents, and the necessity of recourse to legal argumentation; all of these must be taken into consideration as new parameters of international law. A number of conflicts, and of tactical or strategic errors, are the result of unilateral policies of these phenomena, or of states, and of 'dogmatic decisions taken on the basis of ill-informed dossiers'.<sup>67</sup> The most recent example of this is undoubtedly the latest war in Iraq. Even if, however, actions of this sort will inevitably recur, evaluations of efficacy by states now sometimes include a certain 'decentering' of their individual positions, not as a result of generosity (which doesn't exist at the inter-state level), but rather an awareness that it is in their interests to accept a situation that, although not in itself preferable to strictly mutual concessions, may be reversed in their favour in another context.<sup>68</sup> Everything is linked to the play of a 'principle of sociality', where the advantage that one can gain from balancing different positions and concessions is less than the cost that this would represent for one's adversary; thus one party may forego that benefit in order to avoid any negative consequences stemming from the frustrations, or changes of heart, of the other.<sup>69</sup> Certainly, these procedures are more cumbersome and are at risk of paralysis, however, overall they produce fairer, less arbitrary, and hence more efficient decisions; they also encourage the emergence of the famous 'pragmatic universals', as discussed by Ferry and Lacroix,<sup>70</sup> in terms of the elaboration and application of the norms and in particular the common values that define the new substantive universal element of international law.

<sup>65</sup> Notably, of course, by Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 261.

<sup>66</sup> Koskenniemi, *supra* note 60, at 295 ff.

<sup>67</sup> J. M. Ferry and J. Lacroix, *La pensée politique contemporaine* (2000), at 385.

<sup>68</sup> On this point from a perspective that, although theoretical, has a genuine explanatory power in terms of current international practice see *ibid.*, at 384 ff.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

### C *The Foundations of Human Rights?*

Of course, all of this is not simply a choice between reasoned argumentation, capable of encouraging the emergence of or applying common values, and a political decisionism that always contains an element of irrationality and hegemonism. This discussion refers back, at a more profound level, to underlying philosophical concepts that must be brought to light in order to better understand what is at stake in the debate, and the imperialism/universalism paradox of rights. Whether we want to acknowledge it or not, it seems to me that here, once again, the question of an objective foundation of international law and human rights must be raised. The problem of foundations has for a number of years now been set aside by the large majority within the discipline, in favour of an approach that views our theoretical activities in this field as a simple exercise in problem clarification (whether the viewpoint is realist, deconstructionist, formalist or pragmatist); all extravagant pretensions to solving the problem of foundations – associated with the errors of classical natural law approaches – have been left to one side. To ignore a problem, however, is not to resolve it; and this one may come, indirectly, to be raised again. It is, moreover, this absence of reflection on the foundations that has afflicted the discipline, at the very moment that it begins its ‘turn to ethics’.

The absence of an ultimate foundation for law in the contemporary era explains the indeterminacy of each actor’s standpoint, and the ultimate recourse by some to subjective, political solutions. The turn to liberal internationalism and classical positivism has led most jurists to abandon all idea of an objective foundation for international law since the 1950s. At the same time, however, this itself appears paradoxical, as this internal discourse among internationalists has completely disregarded the entire contribution of a large part of contemporary legal theory, which has confronted in a different manner the question of any possible objective foundation for a universalization of rights. It has thus apparently closed itself off from all of the contemporary discussion (involving Appel, Habermas, Rawls, Renaut, and so on) on the inter-subjective foundation of ethical principles, including those pertaining to law, and in particular to human rights. In truth, however, this is an exaggeration; it seems to me that many liberal internationalists are aware of this possible foundation.<sup>71</sup> But when they are writing from within the profession, it is as if they dare never openly address it, lest they fall foul of the facile and well-known critiques from the viewpoint of an overly strict positivism, from realism or from deconstructionism. Or they present the idea that rights are rationally and inter-subjectively elaborated, without ever for that linking them to precisely that which is capable of founding them as such. I am not, however, developing a critique here; I am simply expressing my surprise, without looking to endorse either side. Indeed, everyone is free to view the contributions by these authors

<sup>71</sup> There are, of course, exceptions to this. In France, e.g., see O. de Frouville, *L’intangibilité des droits de l’homme. Régime conventionnel des droits de l’homme et droit des traits* (2004); I am only dealing here with what seems to me to remain the majority view within the entire internationalist discipline.

as contestable, and, perhaps in particular, as overly liberal; it is, however, difficult to avoid the need to discuss them in a well-argued fashion, and to link them to our internationalist reflections on the universality of rights and of international law.

We can, moreover, clarify what is at stake in these debates by considering the direction taken by the philosophy of law more generally, at the same time as the turn towards liberal positivism in international law. The two are, it seems to me, linked. Legal philosophy was decidedly devalued in favour of a Kelsenian-style general theory, considered by the positivists/normativists as alone scientific. More globally, positivism deprived itself of the possibility to fully resolve the problem of foundations, referring it back to the realms of philosophy. It is crucial to understand here, however, that even this latter field remained deeply divided. On one side, the post-Heideggerian tradition cultivated historicism, relativism, deconstruction of rationality, and a legal anti-humanism; to the extent that this element of philosophical thought – in which we must include the deconstruction movement – came in fact to indirectly reinforce legal positivism in decrying all critical perspectives based upon an idea of justice, and in holding that no principle can rightly be championed under the banner of universality. On the other side, however, in reaction to this philosophical movement, an entire branch of contemporary philosophy has explored the possibility of a re-foundation, through examining, not the object of the concept of ‘law’, but rather the concept itself, and thus the conditions of possibility of its universal element and its dissociation from both facts and from morality. These trends of thought have led to an awareness of the decisive role played by practical rationality and inter-subjectivity. This contemporary philosophy of practical rationality, necessarily post-Kantian, has been able to accommodate within itself the turn to linguistics and hermeneutics, and creates the possibility of founding a formal universal on the basis of which we can reach decisions, enabling us to move beyond the problem of the reversibility of concepts. We can thus adopt a position that is not in this sense unstable or contingent, but neither is it naïve or loaded with metaphysical baggage as previously, and that enables a refounding of reason and a certain universality of values after the deconstruction carried out within the post-Heideggerian philosophical currents inspired by Foucault, Derrida, Wittenstein, etc.

It is thus equally essential to understand this second aspect of the issue of the philosophical foundation (or lack thereof) of rights in order to fully understand the more implicit elements of the universalism/imperialism debate. It allows us to approach in another fashion a question that seems eternally destined to renew the well-known divisions particular to the legal discipline. This said, it does not exhaust our discussion of the paradox of international law, which must, in my view, be completed through an examination of the contribution of contemporary anthropology and the issues related to cultural identities.

#### ***D Values and Conflicts of Cultural Identity***

As we know, the issue of culture is raised forcefully in efforts to explain certain fundamental conflicts that cannot be resolved by argumentation or negotiation alone,

and that can disrupt the inter-subjective rationalization of debate. The non-imperialist solution of universalization does not lie merely within the current developments in argumentation and negotiation in an interdependent and globalized world. We are confronted here by the plurality of cultures, which ensures that disagreements over which norms to adopt and apply become, above and beyond state-based economic and political conflicts, conflicts of identity. Cultural conflicts are existential conflicts in which values are implicated, unlike, for example, conflicts of interest.<sup>72</sup> As a result, nothing could be more dangerous than to reduce these conflicts to questions of foreign policy or of simple economic interests; the more we try to ignore them in such a manner, the more powerfully they will reappear and seek to reassert themselves. It is apparent that these cultural conflicts cannot be resolved solely through negotiation, argumentation or simple imitation, but also require resorting to a process of ‘reflexive appropriation’.<sup>73</sup> This argument put forward by Habermas is, to my mind, fundamental. It is philosophical in character, and is based upon an extensive critical approach to the value of traditions and cultures.<sup>74</sup> It demonstrates that the problems of legal culture cannot be dealt with at the international level in the same manner as any other type of conflict, and that it is essential that (internationalist) jurists look for solutions at the level of training, education and teaching. The question of genetically modified organisms, for example, is far from reducible to a commercial issue between Europe and the United States. There exists, behind the high economic stakes at issue, a risk culture that is profoundly different on either side of the Atlantic. This issue thus cannot be resolved by negotiation alone.<sup>75</sup> The same holds true *a fortiori* in terms of the legal values relating to human rights, and conceptions of civil liberties, democracy and international justice. How to sustain, moreover, the argument I made above concerning rational negotiation between partners, when faced with the emergence of certain phenomena, such as contemporary terrorism, existing beyond the state and fed by a hatred of the West, which plainly call into question all notions of any sort of rational negotiation or discussion? This is illustrated by an Al-Qaida statement, after the Madrid bombings of 11 March 2004, which is all the more significant here as it deals directly with the issue of international law itself: ‘the international system built-up by the West since the Treaty of Westphalia will collapse; and a new international system will rise under the leadership of a mighty Islamic state’.<sup>76</sup>

Here, it seems that a solution cannot be produced by some new form of rational discussion; rather – excepting, of course, the political solution – it requires ‘reflexive appropriation’. It is thus also necessary to learn to identify different legal cultures, both to better appropriate them and perhaps sometimes to better free ourselves from them – our own included. This is not intended to gloss over different identities and conflicts in favour of an improbable and odious universal uniformity; far from it. It

<sup>72</sup> J. Habermas, *Une époque de transition. Ecrits politiques 1998–2003* (2005), at 218.

<sup>73</sup> *Ibid.*, at 218, 225 [*appropriation réfléchie*].

<sup>74</sup> J. Habermas, *De l’usage public des idées* (2003), at 25 ff.

<sup>75</sup> See P. Lamy, *La démocratie-monde. Pour une autre gouvernance globale* (2004), at 62.

<sup>76</sup> Quoted (in French), e.g., in Canto-Sperber, *supra* note 27, at 63, n. 2.

merely allows us to appreciate the element of truth that exists in each, those elements that are potentially convergent and those that are irreducible. In truth, the example of Al Qaida is too radical, as an appropriate path is particularly difficult to find, whether it be by negotiation or by 'reflexive appropriation', when confronted by such fundamentalism. Here elements of irrationality and resentment, pushed to their very extremes, come into play, which leads us to a final anthropological and psychoanalytical point: in elaborating and evaluating the universalism of international law, whether it be from a realist or a formalist perspective, we always make, as I have just done, the same assumption regarding the rational behaviour of the human being in society. In doing so, we risk ignoring the profound ambivalence of human behaviour and its repercussions for the institutions and rules of law. It is this last point that I would like address here, in order to clarify, down to its ultimate foundation, the paradox of international law.

### ***E The Ambivalence of Internationalist Conduct and Ideals***

The fourth aspect of the awareness and recognition of the importance of identity refers back to a level still more profound than that of anthropology. Is an analysis of their relation to different cultures and traditions sufficient to understand the scope of these values that have once again torn international law between universalism and imperialism? The answer, it seems, is no; even if this is precisely one of the errors most frequently made by jurists in adopting polarized positions over the problem of cultural diversity. M. Canto-Sperber has quite correctly remarked that, contrary to the teachings of the most dogmatic relativists, values are not defined merely in terms of one given culture. Certain values can indeed 'correspond to general characteristics of human beings',<sup>77</sup> thus expressing not merely a cultural, but an anthropological human identity. The dignity of the person, the experience of freedom, the ideal of cooperation are thus common across all cultures, as many of the major historians of cultures and civilizations have remarked; we can find them in medieval Islam just as in the China of Confucius. Different cultures simply have different intellectual or institutional means of expressing and operationalizing them: there exist, for example, many different ways of living the dignity of the person, or of guaranteeing the enjoyment of freedom or equality. But these anthropologically common values, as defined by Canto-Sperber, refer back once again to common, rational human identity, constructed from reason and not from passion. We thus find here an underlying logic of rationalism at work; a proposition that I do not deny, but would like to complete by considering ambivalence to be a fundamental component of the human identity.

I would, in fact, like to take up here the excellent series of analyses carried out by the American legal scholar N. Berman. He has, for a number of years, studied the manner in which the world of international law, the legal rules and institutions, reflects the

<sup>77</sup> *Ibid.*, at 239.

deep ambivalence of our own conduct.<sup>78</sup> Both the classic realist description of state actors, which presented states as being uniquely concerned with their own national interests, and idealist analyses that saw them as behaving normatively as a result of solidarity with other states, have been surpassed by a more fundamental and psychoanalytical reflection on human ambivalence. Basing his work on a serious and thorough analysis of the contribution made by the field of psychoanalysis, Berman leads us to reflect on the fundamental categories of human anthropology in a manner a little different from that of, for example, P. Legendre in France.<sup>79</sup> Taking up one of the foundational ideas of modern psychoanalysis, developed in particular by M. Klein,<sup>80</sup> he shows that the human being is constitutively ambivalent in his or her relation both to the other and the self, and that this impassable dimension of human identity has reverberated, at a civilizational and historical level, throughout the major edifices of international law: where, for example, they sought to mask hegemonic projects behind a universalizing or civilizing façade, or sought to channel rather than hide passions, as in the complex and audacious projects of the inter-war period for Upper Silesia or the Saarland, elements of which we find in certain particularly interesting UN plans in places such as Palestine, Bosnia or Kosovo; or, inversely, where the rules of law and legal discourse attempted – without ever succeeding – to repress passions, coming down directly in favour of an authoritarian approach, which claims to be an objective and rational response to a problem, as, for example, in the most recent intervention in Iraq; or where again they are used to justify both one thing and its opposite in different contexts (think, for example, of self-determination). And, whatever their utilitarian logic, the cold monsters that are states reproduce this ambivalence through their foreign legal policies, which remain cloven in ambivalent fashion around their perceptions of the significance and utility of international law. States make constant use of a distinction between ‘good’ and ‘bad’ uses of international law, which reflects their own traditions and national identities. It is this that renders their foreign legal policies irreducible to simple utilitarian calculations, satisfaction of interests or the quest for domination; moral and cultural considerations will inevitably form part of these policies<sup>81</sup> – a proposition that is accepted as given these days, but of which, for a long time, both realists and idealists in the post-war period underestimated the importance; that is, in terms of the strength of the emotional feeling, of tribalism, and the violence of cultural conflicts, overlapping closely, of course, with the desire for recognition, for stability, and with the defence of national interests.<sup>82</sup>

<sup>78</sup> Berman, ‘Les ambivalences impériales’, in Jouannet and Ruiz-Fabri (eds.), *supra* note 11; Berman, ‘“But the Alternative is Despair”: European Nationalism, and the Rhetoric of Reconstruction’, 106 *Harvard L Rev* (1993) 1792; Berman, ‘Modernism, Nationalism, and the Rhetoric of Reconstruction’, 4 *Yale J L & Humanities* (1992) 351; and Berman, ‘A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework’, 33 *Harvard Int’l LJ* (1992) 353.

<sup>79</sup> On these issues see de Béchillon, ‘Porter atteinte aux catégories anthropologiques fondamentales?’, 50 *Revue trimestrielle de droit civil* (2002) 47.

<sup>80</sup> M. Klein and J. Rivière, *L’amour et la haine. Le besoin de réparation* (1968); M. Klein, *Essais de psychanalyse, 1921–1945* (1989); M. Klein, *Envie et gratitude* (1978), and *Développements de la psychanalyse* (1981).

<sup>81</sup> See S. Hoffman, *Une morale pour les monstres froids. Pour une éthique des relations internationales* (1982).

<sup>82</sup> Canto-Sperberg, *supra* note 27, at 140.



It is important to realize the potential impact of analyses such as these at the present time, given, as we have seen, the extent to which the formation of identity has become a crucial theme of contemporary reflection on law, on the relation between universalism and imperialism. If Berman is indeed correct in showing that our conduct, individual and collective, is ambivalent, then even our most formal ideals and legal rules are equally so; and we must thus accept the need to struggle against that which we view as wrong, and to impose that which we consider to be best, without seeking to pretend that the solutions we propose are the fruits of rational or legal reason (whether it be realist or formalist) alone.

Already a number of years ago Francis Fukuyama revived the very interesting idea that today's world had witnessed the triumph amongst humankind of a desire for universal recognition through liberal democracy (*isothumia*), over the ancient desire to prevail over the other (*megalothumia*), so that, according to him, the victory of the Western values of human rights and democracy, and of law itself, was inevitable.<sup>83</sup> This thesis was, of course, opposed by that of Huntington's clash of civilizations,<sup>84</sup> which posited instead a fragmented world and practically fixed identities. Between these two basic theses that have structured contemporary debate, but are equally excessive in their radical nature, Berman shows much more precisely that individuals and peoples remain divided between their desires in an intrinsically ambivalent fashion, and thus that it is recognition and acceptance of this ambivalence that international law should seek to build. In terms of the argument of this article, within the framework of a discussion over universal values, we must accommodate what Ricoeur called 'conviction' beside argumentation, and understand also that the pragmatic universal, which can be elaborated through argumentation, must also itself remain constitutively ambivalent. Put otherwise, the position that I have adopted here is in principle rationalist, but takes into consideration the irrationality of actors, the contingency of the world and the strength of collective passion alongside the idea of a possible universality – a universality that is not defined abstractly, but 'is constructed from that which is common to the values embodied in each culture'.<sup>85</sup>

The paradox of international law reproduces the 'dilemmas of modern reason'.<sup>86</sup> Max Weber had remarkably foretold the disenchantment of the world due to the rationalization of modern law, and its ever-increasing formalization under the reign of experts and bureaucracy. This phenomenon of rationalization is accompanied by disenchantment because the formalism and neutrality of the rational legal world associated 'the rise towards "the rational" with inevitable effects of loss of meaning'.<sup>87</sup> These effects have been reproduced at the international level, as Koskenniemi and David Kennedy have amply demonstrated in their numerous and excellent studies on the

<sup>83</sup> F. Fukuyama, *The End of History and the Last Man* (1992).

<sup>84</sup> S. Huntington, *The Clash of Civilizations* (1996).

<sup>85</sup> Canto-Sperber, *supra* note 27, at 13 [*est faite de ce qui est commun aux valeurs incarnées dans chaque culture*].

<sup>86</sup> To borrow the title from P. Raynaut's book on Weber, *Max Weber et les dilemmes de la raison moderne* (1996).

<sup>87</sup> Bouretz, 'La preuve, rationalisation et désenchantement: autour de Max Weber', 23 *Droits* (1996) 99.

matter. And we also see, without doubt, the reproduction of the same sorts of reactions against the formalism of law and its dehumanizing effects. There was thus, first of all, the rise towards a formal rationalism, through positivism and the triumph of a universal formal model. This development, however, led to its own downfall – that is to say that this formalism and this neutrality of law brought with them an excessive and rigid bureaucratization, a depersonalization of justice and a loss of meaning of the international norm, against which the contemporary world has reacted; and the reinsertion of substantive considerations of value will, perhaps, allow for the expectations of those actors until now least favoured by the system (individuals, peoples, NGOs, etc.) to be satisfied. The passage from a formal universal to a substantive (even relative) universal after the Second World War remains part of the rationalist order of the internationalist world – but might it not translate into the search for a new means of ‘re-enchanting’ the world, contrary to what Weber held? Weber did not really confront the question of an alternative, as he was held prisoner by his strictly instrumental vision of reason, which according to him, after the rejection of all possibility of transcendence, was no longer capable of providing a foundation for values. He thus closed himself off from the route taken by some contemporary thinkers, of a possible foundation based upon inter-subjectivity, a practical politics based on discussion and argumentation as much as rational decision, and the idea of a possible refoundation of meaning. This other, potential evolution of international law in my view corresponds at least as well, if not better, to the empirical conditions of contemporary international society. This should not, however, be used to hide the pitfalls, nor the need to continue deconstructing the illusions and flushing out the ambivalences of imperialism, as all of this is taking place, as I noted in the introduction, in a profoundly destabilized world, where the new, unfulfilled promises of justice have simply fed hatred and resentment. If it is in pragmatic reason that we can find – contrary to what Weber thought – the prospective possibility of overcoming the difficulties of the universal, it is also within Western reason itself that the problem resides. The path is thus narrow and uncertain.

The paradox of international law will never be definitively overcome, because international law is intrinsically paradoxical. It is paradoxical because it is both one *and* the other, it is an instrument for universalization and a reflection of ambivalent particularities; a means of domination and a space for cooperation and emancipation. Two concluding remarks are called for:

Firstly, the fact that we are compelled to take responsibility for the ambivalences of international law, exposed by Berman, and the constitutive ethnocentrism of its ideas and its values. Also, as the philosopher M. Xifaras has emphasized, ‘the justification of international law must take responsibility for the historical meaning of international law for non-Western peoples, and not simply content itself with affirming its own legitimacy in terms of its conformity with principles that have their origins in Western thought’.<sup>88</sup> We must take cognizance of the forced Westernization of the non-Western

<sup>88</sup> Xifaras, ‘Commentaire’, in E. Jouannet and H. Ruiz-Fabri (eds.), *Le droit international et l’impérialisme en Europe et en Amérique* (2006) [la justification du droit international doit prendre en charge la signification historique du droit international pour les peuples non occidentaux et ne saurait se contenter d’affirmer sa légitimité par le constat de sa conformité à des principes qui trouvent leur origine dans la pensée occidentale].

world, and accept that ‘international law remains, simultaneously and indissociably, the legal form in which both the promise of the political unification of humanity and that of the most infinite and violent conquest are contained, as it takes as its object the very terms in which the identity of the conquered expresses itself’.<sup>89</sup> It is for this reason that the role of internationalist doctrine should not be limited to systematizing existing law; it must also submit all of the principles and values embodied in international law to – perhaps even subversive – critique, as this critical contribution can, if constantly renewed, allow us to shed light on how any value, any principle, any legal universal, can mask shameful ventures, or projects of exploitation, domination or manipulation carried out by the very actors responsible for promoting or rejecting them, including internationalist doctrine itself.

Secondly, the fact that the paradox can without doubt be overcome, but only ever in a temporary and provisional manner, through the use of ‘universal pragmatics’, bit by bit alongside the development of international society. This is not the cosmopolitan society dreamed of by Kantian idealists, but neither is it that of pure power struggles as envisaged by the realists. Both of these seem too schematic with regard to a society that no longer belongs only in the realm of the exceptional or exists only between states, but which is now an extremely dense network of legal rules and an ever increasing number of actors within a more and more open framework. It is another type of society that is emerging, one that combines both ‘the greatness and the poverty’ of international law, as it still legitimates imbalances of power and wealth in favour of a small number of inevitably hegemonic actors, but at the same time seems capable of providing the site for a potential evolution; and, if contemporary international law undoubtedly reflects the emergence of contemporary neo-imperialist and neo-colonialist practices, it also permits, in the very practice of law and legal argumentation, even in its possible foundation, the emergence of new forms of pragmatic universalisms and of shared values, just as it enables the recognition of irreducible conflicts and a clear articulation of their divergence. The paradox of international law is not necessarily an aporia or an impasse; rather, it reflects the enigma of the human condition,<sup>90</sup> and the finite nature of all its institutions, law included.

<sup>89</sup> *Ibid.* [Le droit international est toujours simultanément et indissociablement la forme juridique dans laquelle se déposent les promesses d’une unification politique de l’humanité et celle de la plus infinie et la plus violente des conquêtes, puisqu’elle a pour objet les termes mêmes dans lesquels se dit l’identité des conquises].

<sup>90</sup> Delsol, *supra* note 35, at 96.