ESIL Reflections
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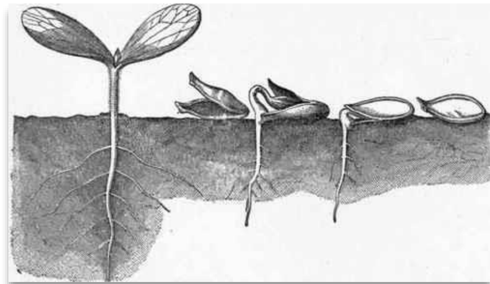

International Law, Universality, and the Dream of Disrupting from the Centre

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This ESIL Reflection is the transcript of the keynote introduction delivered by the author at the 14th Annual Conference of the European Society of International Law that was held in Manchester on the theme 'International Law and Universality', between the 13th and the 15th of September 2018. The original spoken nature of these observations is preserved.

Dear colleagues and friends, ladies and gentlemen, *cher(e)s collègues et ami(e)s, mesdames et messieurs*, welcome to Manchester! *Bienvenue à toutes et tous à Manchester*. It probably occurs to many of you that hosting the 14th annual meeting of the European Society of International Law in Manchester on the theme of 'international law and universality' is very symbolically loaded. In fact, as many of you may know, Manchester is the place where Friedrich Engels wrote *The Condition of the Working Class in England* at the time this city was the centre of world capitalism and the powerhouse of an empire; Manchester is also where Emmeline Pankhurst conducted her life-long campaign for women's suffrage; Manchester is where the fifth Pan-African Congress that decisively entrenched the idea of decolonization of Africa was convened in October 1945. In the history of the city of Manchester, just like in the history of international law, imperialism and resistance have always gone together.

As you are starting to realize, I am going to deliver these introductory remarks in English, not doing justice to the bilingual character of the European Society of International Law. Obviously, the few words of French spoken at the beginning of my intervention today were just lip service. My indifference towards the bilingualism of this learned society may have struck you (or not). This

may have shocked you (or not). I believe that the way in which I have treated the bilingualism of this learned society potentially raises a number of difficult questions that bring us straight to the *very theme* of this conference: universality. For instance, you may wonder how an international lawyer whose mother tongue is French can justify speaking in English whereas French is one of the official languages of the learned society he is addressing. In this regard, many explanatory considerations can possibly cross your mind at the moment. It may be that I have relinquished the power that I have – and that I am expected to wield by my French-speaking peers – to re-affirm the role and weight of the French language in the discipline. It may be that I feel intimated to speak French in a British academic environment, especially in presence of the highest authority of this university. It may be that I am another victim of the global domination of the English language and of a contemporary form of linguistic cultural imperialism. It may simply be that I have sold my soul to the Empire. It may be that I have surrendered. It may be that we have all surrendered.

And yet, there maybe is another way to look at what is happening here. What if the oppressor in our story is the French language itself? What if my freedom is precisely to speak English and emancipate myself from my mother tongue? What if speaking the language of the Empire would precisely be what makes me free? What if the oppressed in our story is the native English speaker who has been deprived of her language? What if the hegemony is that of people like me who appropriate English to have their voice heard globally?

But we are maybe not getting the story right yet. What if the oppressed in the story are all the users of other languages that the bilingual character of the European Society of International Law leaves out? What if bilingualism in our context boils down to an imperialistic duopoly? What if the bilingualism of this learned society is a hegemony of sorts? What if the oppressed in the story are also those on whom French and English have been imposed through colonial rule and bilingualism? After all, French and English are just some languages.

As you may appreciate, I have not even started the substantive introduction you expect me to deliver and questions of universality, particularity, counter-universality, resistance, alterity, hegemony and empire already are with us. The example of the bilingualism of this society particularly shows the extent to which universality, resistance to universality, particularity, and counter-universality constitute similar universalizing moves. In the end, who is the oppressor? Who is the oppressed? Isn't the oppressed also the oppressor? Isn't the oppressor also oppressed? Isn't the claim that one is oppressed by the universal discourses of others just another universalizing move? Where is the universal? Where is the counter-universal? Where is the particular? Aren't counter-universality and resistance to universality possible contradictions in terms?

In my view, the question of the bilingual character of this society to which I have resorted to here as a brief illustration allows one to grasp some of the tensions, contradictions, and ironies at the heart of any debate on international law and universality. Unmasking these questions, these tensions, these contradictions and these ironies and questioning some of our commonly accepted linear progress narratives should be international lawyers' main ambition when they engage with international law and universality. The time to renew international law's universality narratives or rehabilitate the universality of international law is long gone. Our time is about promoting disruptive thinking about international law and universality.

This contestation of universality narratives of international lawyers and the promotion of disruptive thinking call for two sets of observations. My first series of remarks pertains to the very idea of contesting universality: haven't we been here before? It must be acknowledged that the contestation of universality narratives is not new in international legal scholarship. For instance, it is nowadays commonly contended that universality has been an ethos, a credo, a consciousness, a branding, a self-justificatory linear narrative at the service of the establishment of a new discipline at the end of the 19th century. It is nowadays commonly accepted that, since the professionalization of international law, universality has been conducive to the consolidation and legitimization of a new set of practices as well as the formation of disciplinary identity. Nowadays, we are familiar with the dark side of what used to be seen as a virtuous universal project defended with genuine earnestness by well-intentioned international lawyers. We are nowadays used to hearing that the universal project of international law has made a mess of the world and that the invocation of the universality of international law has been complicit in some of the worst atrocities of the 19th and 20th century. Nowadays, many of us have come to think that universality narratives – just like human rights – have ceased to be a tool for emancipation and for progress. The imaginary possibilities of universality narratives in terms of emancipation and progress have dramatically diminished over the last years.[1] Nowadays, universality is no longer a catalyzing force against oppression. Nowadays, oppression is no longer fought in the name of universality. Actually, restating the interest of one as characteristic of all has nowadays become suspect. Likewise, nowadays most of us realize our disciplinary histories and critical histories all remain organized around the same markers all located in the West. Nowadays, we realize that the historiographical imagination of international lawyers continues to be confined to the same figures, all the same white males found in the centre. Nowadays we realize that even our critique of law and Empire is confined to Europe and European imperialism. In sum, the suspicion towards universality is common nowadays. Very few international lawyers still experience a genuine earnestness towards the linear progress narratives that comes with the idea of the universality of international law and believe that universality has been achieved by and through international law. In that sense, the critical tone of my speech today is certainly not unprecedented. And yet,

[1] See the work of Cornélius Castoriadis, L'institution imaginaire de la société (Le Seuil 1975).

although suspicion towards universality narratives and universalization moves is somewhat banal, I am adamant that a critical engagement with the idea of universality must be perpetuated and continuously repeated. The next days are about perpetuating this critical engagement.

This contestation of universality narratives of international lawyers and the promotion of disruptive thinking calls for a second set of observations. This pertains to the very idea of disrupting universality within the framework of the annual meeting of the European Society of International Law taking place in Manchester. This second set of observations raises, in my view, even more fundamental and difficult questions about the credibility of all what we are attempting here, and generally of any international lawyer' engagement with the idea of universality.

When one inhabits the centre, everything around looks universal. When one inhabits the centre, one does not see the hegemony, the imperialism, the repression of difference, the denial of alterity, and the symbolic violence against the periphery. When one inhabits the centre, alterity boils down to refreshing exoticism. Inhabiting the centre transforms our cognitive aptitude and make us blind.[2] When one inhabits the centre, and especially when one inhabits this part of the world, one does not realize the privilege to have never experienced the collapse of societies and culture under colonial rule. When one inhabits the centre, one does not realize the privilege to have never experienced both the humiliation and the pride of having to subject oneself to the standards of entry to the universe set by the centre.[3] When one inhabits the centre, can one seriously speak about universality? To put it even more bluntly: can we take seriously the thoughts on universality of a white western male who grew up in a former colonial power, was educated in the West and secured his academic position in part because he is a white male from the West? Can we take seriously what a learned society based in Europe and primarily composed of Western and white scholars has to say about universality? Can international lawyers in this part of the world seriously and credibly do what they are trying to do here?

If our debates were exclusively focused on geographical spatial universality in international law, I believe that the irony I have just mentioned would prove a compelling obstacle. As far as I am concerned, I would feel very uncomfortable standing in front of you today if our engagement was exclusively with geographical and spatial universality. Yet, geographical universality – and questions of colonial domination, and colonialism – only constitute one of the many dimensions

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[2] See of idea of "mis-cognition" (*méconnaissance*) famously coined by Pierre Bourdieu, 'A Lecture on the Lecture', in Pierre Bourdieu, *In Other Words: Essays towards a Reflexive Sociology* (Stanford University Press 1990) 177, 183. Bourdieu also contended: '[T]he magical ambition of transforming the social world without knowing the mechanisms that drive it exposes itself to the risk of replacing the 'inert violence' of the mechanisms that its pretentious ignorance has destroyed with another and sometimes even more inhuman violence.' ibid, 189.

[3] See Mikhail Xifaras, 'The Global Turn in Legal Theory' (2016) 29 *Canadian Journal of Law & Jurisprudence* 215, 217.

of international law and universality that we engage with here. The question of universality is much more multidimensional and goes far beyond the question of the geographical universality of international law and the imposition of international law through colonial rule, force, and coercion.

This leads me to formulate an observation of the notion of colonialism. For the purpose of our discussion on international law and universality, I am of the opinion that colonialism itself is too restrictive a notion to apprehend what international lawyers should be going after when they critically evaluate universality, universality narratives and universalizing practices. In fact, colonialism, albeit pointing to a form of violence that is still deeply informing how international law operates today, is a notion that does not sufficiently capture the various types of symbolic violence at work in the world, in the practice of international law and in our profession.[4] In fact, I have come to think that legal debates on colonialism are too often conducted in a way that makes the notion of colonialism a convenient strategy of denial or a responsibility-avoidance move. Debates on colonialism, especially when they are carried out in the centre, often prejudge the damage, the sufferance, and the needs of those that have been (and still are) oppressed under colonial rule, and hence perpetuate imperialistic moves. The notion of neo-colonialism does not do the trick either. The symbolic violence at work in the world, in the practice of international law, and in our profession is too diffused and ubiquitous to be captured, discussed, or subject to critique through colonialism or neo-colonialism. If our critique of universality narratives and universalizing practices were to focus only on colonialism and neo-colonialism, it would miss a big part of the violence that is going on. This may also be the moment to remember that a majority of the oppressed in this world may not feel oppressed by anything that looks like colonialism or neo-colonialism. Let us also remember that many of the wrong suffered outside the West cannot even be translated[5] in the notion of colonialism and neo-colonialism. Let us remember that a majority of scholars outside the West do not necessarily recognize themselves as part of TWAIL, let alone of the Global South. Those oppressed in the world, in the practice of international law and in our profession are often silenced by our international law's categories, even by the very tools that international law offers to critically engage with colonialism and neo-colonialism.[6] Confronting colonialism and neo-colonialism, whilst still constituting a pressing necessity, cannot be the exclusive focus of our debates on international law and universality.

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[4] Pierre Bourdieu sees a form of violence in the formalism of law. For him, to submit to the power of form is to submit to 'the symbolic violence'. See Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 805, 850. Derrida famously understands law as being mystical by reference to 'a silence walled up in the violent structure of the founding acts'. See J. Derrida, 'Force of Law – The "Mystical Foundation of Authority"', in Gil Anidjar (ed), *Acts of Religion – Jacques Derrida* (Routledge 2002) 230, 242. On the imposition of gendered roles, see Simone de Beauvoir, *Le deuxième sexe*, vol. II : *L'expérience vécue* (Gallimard 1949).

[5] On the idea of universality and translatability ('traduisabilité'), see Jean-François Lyotard, *La Condition Postmoderne* (Editions de Minuit 1979), 13.

[6] Jean-François Lyothard, *Le Différend* (Editions de Minuit 1983).

It is in this context that international lawyers ought to look at claims about universality beyond the more traditional debates on the geographical expansions of international law, colonialism and neo-colonialism – although not neglecting debates on geographical universality. Critical engagement with universality narratives must be conducted from multiple perspectives that are not confined to geographical expansion, colonialism, and neo-colonialism and must include gender, the idea of the human or humanity, health, language, time, teaching, and adjudicatory practices, etc. I am of the opinion that this broadening of the notion of universality beyond its traditional geographical and spatial sense is the prerequisite for a meaningful exploration of the contentious issues of boundaries, inclusiveness/exclusiveness and the mechanisms of inclusion and exclusion that come with the universalizing practices of international law.

Broadening the notion of universality as I am suggesting here does however not spare me from delineating what we mean by universality. In this regard, you may be expecting a definition from me: something tangible, well-delineated, determinate, something you can mechanically apply and refer to in the next days. In short, something easy. After all, isn't a solid common and overarching definition the best way to provide a conference with consistency and a common thread? Isn't that the very purpose of an introductory keynote speech to set the stage by imposing a common definition on all the debates that will ensue?

I have better say it right away.[7] If this is your expectation, I am going to disappoint you. Flatly defining universality would contradict the disruptive and critical ambitions I am promoting here. How could I universalize the definition of universality and simultaneously invite you to disrupt our universality narratives and universalizing strategies? Rather than offering a flat definition, I want to approach universality as a generic notion that refers to all legal discourses, ideologies, mindsets, structures of argument, doctrines, strategies, and projects whereby lawyers seek to universalize the interest they defend. More specifically, I use universality to refer to any interpretive or argumentative move whereby the position or the interest of an individual, several individuals or a group is restated as characteristic of all people. Said differently, universality refers to whenever international lawyers turn particular preferences, constructions, or ideals into a legal claim allegedly applicable and opposable to all.

At this stage you may think that I am going from one extreme (i.e. a narrow focus on geographical or spatial universality) to another extreme (i.e. that to an overly diluted and all-embracing idea of universality). It is true that, if universality refers to any interpretive or argumentative move that restates particular preferences as a characteristic of all, one could legitimately come to think that the disruption attempted by this conference is a disruption of anything that international lawyers do. In fact, isn't universalization the very goal of legal argumentation and the core business of

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[7] I borrowed this from J Derrida, 'Declarations of independence' (1986) 7 *New Political Science* 7, 7.

international lawyers? Aren't international lawyers constantly elevating particular interests into a legal claim applicable and opposable to all? It is true that interpreting my contestation of universality narratives of international lawyers and the promotion of disruptive thinking as an invitation to ransack and repudiate all legal discourses, legal practices, and legal arguments would not be unwarranted.

This possibility that the few thoughts I have formulated so far are interpreted as a nihilistic and plainly cynical move calls for what is already my final observation today. This final remark relates to the very breadth of the disruption which I am promoting here. As we know, the world is formless until it is shaped by our discourses. The discourses we deploy, including legal discourses, are all universalizing by nature. Legal scholarship, like any discourse or linguistic activity, projects on the world a meaning and a form that is meant to be opposable to all. All legal discourses, whether doctrinal, conceptual, critical, are universalizing by nature. They are all informed by an attempt to universalize a position, an argument, or an interest. Universality is everywhere in what we do. Universalization is all what we do. It suffices to give a few examples here. Whether we claim that the Chagos Islands were severed from Mauritius in violation of the right to self-determination; whether we claim that the termination by the United States of Joint Comprehensive Plan of Action concluded with Iran does not constitute the termination of a legally binding treaty simply because the JCPA is not a treaty; whether we claim that Grotius was an agent of the Dutch East India Company; whether we claim that Lauterpacht cosmopolitanism was an hegemonic narrative of progress meant to give the discipline an identity whilst justifying its continuous expansion; whether we claim that Westphalia is a myth created by Leo Gross in the middle of the 20th century, all our legal claims, findings, arguments, critical evaluation, historical narratives are informed by are an universalizing move, that is by the ambition to make our findings or our narratives opposable to (and accepted by) all.

Because universality is ubiquitous in international legal discourses, and because most of what international lawyers do is geared towards universalization, it is important to emphasize that disrupting discourses on universality in international law is not bound to verse into nihilism. For the sake of the few remarks I am sharing with you today, disruption means questioning the possibility of universality in international legal discourses.[8] Disruption means emptying some of our common claims about the universality of international law. Disruption means being suspicious when universality is invoked in international legal discourses. Disruption means shedding light on the ambiguity of resistance, reform, and contestation and revolution.[9] Disruption means challenging the self-congratulatory mindset and the satisfaction that often accompany the universalizing practices of international lawyers. Yet, challenging the possibility of a universal

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[8] For Jean-Paul Sartre, this is one of the main roles of the intellectual. See Jean-Paul Sartre, *Plaidoyer Pour les Intellectuels* (Gallimard 1972), 49.

[9] On the ambiguities of revolution, see R. Barthes, *Le degré zéro de l'écriture* (Editions du Seuil 1972), 67.

ground does not entail that we challenge its *need*. Questioning the possibility of universality does not pre-judge the need for universality in international legal thought and practice. Said differently, there shall be no mourning of universality.[10]

Time has come to conclude. As I have now emphasized (too) many times, my ambition is to invite you to be disruptive of all those legal discourses, ideologies, mindsets, structures of argument, doctrines, strategies, and projects that seek to state a particular position as a characteristic of all. I acknowledge that this form of scepticism and suspicion can be reminiscent of the work of the much acclaimed – albeit not always understood – philosopher Ludwig Wittgenstein whom I have failed to mention until now. I must say that referring to Wittgenstein in the context of my intervention today may not be totally unjustified. You may be interested to know that Ludwig Wittgenstein started a doctorate in engineering in Manchester in 1908 and, in 1911, patented a propeller blade engine now used in helicopters. He thus sought to universalize his invention (and the protection of the rights he claimed to be associated with it) while later in his career he came to demonstrate the impossibility of universal semantics. There are always good reasons to refer to our dear and much cherished Wittgenstein and today is no exception.

And yet, it is not Wittgenstein that has informed the few ideas I have been sharing with you today. Some of you may have realized that many of the above-mentioned thoughts build on insights offered by French philosophers, sociologists and linguists. You may have recognized de Beauvoir, Bourdieu, Barthes, Castoriadis, Derrida, Lyothar, Foucault, Sartre, Xifaras and others. This omnipresence of French philosophy, sociology and linguistics in my intervention brings us back to the question of bilingualism with which I started my talk. Although I spoke English all the way, not even trying to season my speech with some niceties so commonly borrowed from the French language, I have been using the categories of French philosophy, sociology, and linguistics. Under the guise of my possible subjugation to the English language, it was French thought all the way.

This cunning manipulative move is meant to remind you, once again, of the necessity to stay alert to the way in which power, domination, universalizing practices, resistance, and contestation materialize and appear. The universal may just be a particular turned dominant and the particular may just be a variant of a universalizing strategy.[11] The oppressed can be the oppressor. The loser may be the winner. The victim of imperialism may also be the hegemon. In international law,

[10] This is a statement that Derrida posthumously attributed to Jean-François Lyothar ('il n'y aura pas de deuil'). See J Derrida, 'Lyothar and Us', (2000) 6 *Parallax* 28.
[11] See the remarks of Jean-Paul Sartre (n 8), 37. Cf Ernesto Laclau, *Emancipation(s)* (Verso 2006), 27.

like elsewhere, universalizing practices and discourses and resistance thereto, not only go together, but hide what they do.[12]

At the end of the conference that I have had the pleasure to open here, I hope that you will be more aware that, behind international lawyers' universalizing moves, there are always oppressed and oppressors as well as winners and losers. At the end of this conference, I hope that you will be sensitive to the idea that universality can never be a reason for triumphalism and self-congratulation. Dear colleagues and friends, ladies and gentlemen, *cher(e)s collègues et ami(e)s, mesdames et messieurs*, this sensitivity for disruption and this aversion for triumphalism and self-congratulation constitute a form of intellectual radicalism. Intellectual radicalism is the spirit of Manchester.

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[12] Michel Foucault, 'Second Lecture at the Collège de France, 14 January 1976', in Mauro Bertani and Alessandro Fontana (eds), *Michel Foucault, "Society Must Be Defended", Lectures at the Collège de France, 1975-1976* (translation by David Macey, Picador 1997), 29.