International Law in Europe – New Horizons

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"International Law in Europe" is a fairly wide topic even without any outlook for the future. It raises many questions. In particular, the term "Europe" lacks a precise connotation. Nobody would deny that here in Florence we are in Europe. Machiavelli's "Il Principe" and Brunelleschi's cupola both represent European thinking and creativity. This feeling of being at home may get lost as we proceed to certain more peripheral areas of the continent. Fortunately, for the purposes of this presentation no general theory of the "essence" of Europe is needed. Nor is it necessary to distinguish between good and bad or modernity and backwardness. Since law is the relevant parameter, the necessary identification will have to be made on account of those elements that tie Europe together as a legal space.

I. The Concept of Europe

To dwell on such constitutional elements of cohesion amounts to leaving aside geography, focusing instead on historical experiences. How nations behave, how they assess international law as a system of rules for conduct in foreign affairs is indeed deeply permeated by the past. Lessons may be learned from a common destiny, and it is in particular great calamities from which the promise of a better future may emerge and may then be translated into legal rules.

Undoubtedly, it is the two World Wars of the last century which have deeply moulded the intellectual and ideological landscape of Europe. As a response to the forces of evil, Europeans began to build common institutions. Today, we can identify three different Europes at the organizational level. Still the smallest Europe is constituted by the European Union, a group of 25 States which began as a community of just six States back in 1952, only a few years after the end of World War II. While at its start this "little" Europe was mainly concerned with economic issues, it has gradually moved into many additional dimensions of governmental activity, thus taking features closely resembling the profile of a State. Going one step higher, one encounters the Europe of the Council of Europe, an international organization which currently counts 45 members, among them, in particular, Russia and Turkey as well as a number of States from the Caucasian region: Armenia, Azerbaijan, and Georgia. Lastly, account has to be taken of the Organization for Security and Cooperation in

Europe (OSCE), an entity which includes, over and beyond the States geographically located in Europe, Canada and the United States. As the name OSCE indicates, its members identify themselves as European nations in a political sense.

In other words, a rich choice is offered to the observer. From the very outset, however, we can say that we shall refrain from construing the concept of "Europe" as broadly as the OSCE. The happy initiative to found a European Asociation of International Law took its inspiration to no small extent from the assumption that by certain characteristics Europe is different from the United States of America. If the United States was included in the concept of Europe the key question as to whether there exists today some kind of dividing line between Europe and the large nation on the other side of the Atlantic would be eclipsed. But it is precisely this question which needs to be addressed, not least in light of recent events which we all are aware of. Again, this attempt to differentiate has nothing to do with prejudices that look for different levels of merit. What matters is no more than intellectual clarity.

Now, as far as the selection between the two remaining candidates for Europe is concerned, we cannot avoid noting that among the members of the Council of Europe there are in particular two large States which possess an identity displaying many specific features. I am referring to Russia and Turkey. To be sure, Russia has for centuries played a pivotal role in European history. On the other hand, it has written extensive chapters of Asian history. During its time as Soviet Union, it was a power that vied for world-wide domination with the United States. Consequently, Russia cannot simply be classified as one of the many European nations. Its imperial past still has a tremendous impact on its official conduct and makes it a monument of solitude. The same is true of Turkey. Turkey has gone through such unique historical experiences that it stands apart from the rest of Europe, not rejected, but rather respected as a people that, not least because of its size, does not easily fit into the institutional framework of a potential European government, although in many respects it has become an integral part of Europe in recent decades. Essentially, therefore, the focus will be on the countries of the European Union.

II. The Main Features of International Law in Europe

Europe was a continent torn by war for centuries. After the Napoleonic wars, it lived a relatively calm 19th century, notwithstanding the wars fought for the unification of Italy and the wars which led to the establishment of the German Empire. Then, however, came the

cataclysm of the two World Wars. Despite losses of millions of human lives, World War I still did not yet induce the European public at large and the leading statesmen to look for radically new forms of mutual relationships. To be sure, the League of Nations was established, but this move was founded on a half-hearted strategy only. The traditional rivalries continued unabated and the peace treaties of 1919 did little to pave the way for a more peaceful future.

After the end of the criminal Hitler regime, which had engulfed the whole of Europe in war and destruction for six long years after its initial actions of terror in Germany itself, mentalities changed. First came the establishment of the Council of Europe in 1950.[1] Although this was a highly symbolic move, projecting a picture of European unity, it could have remained a largely ineffective matter of diplomatic routine since the Council operates according to classical methods of international cooperation. Additionally, nobody could overlook the sad fact that Europe was divided. What was proudly called the Council of Europe was in fact a Western European organization only, and even in the restricted circle of the States to the west of the iron curtain a glaring gap existed in the Iberian Peninsula: Portugal and Spain had not yet emancipated themselves from the dictatorships which held their peoples under a firm grip.

The boost which pushed Europe onto a new road came from the European Convention of Human Rights, the first major emanation of the Council of Europe. It was not so much the notion of human rights that made the originality of the Convention; that notion had surged within the United Nations. Rather, the innovation consisted in the establishment of procedures for international review of governmental conduct by a European Commission and Court of Human Rights. To be sure, the initial arrangements were bold and timid at the same time. Whereas the introduction of a compulsory procedure of inter-State applications (Article 24, now Article 33) could be called a revolutionary change in that it departed from the classical concept according to which any international proceeding of judicial adjudication requires actual consent of the respondent State, the admissibility of the remedy of individual application (“petition”, Article 25, now Article 34) depended on an additional declaration of acceptance being made by the State against which the application was directed, and the jurisdiction of the Court had to be accepted by another separate declaration. Originally, the response to this invitation to States to voluntarily place themselves under international control

was rather reluctant. France did not even deign to ratify the Convention, waiting for almost 30 years until 1974 although Strasbourg had been chosen as the seat of the two review bodies. On the other hand, Germany became one of the parties of the first hour and immediately accepted the individual application in an obvious desire to demonstrate to the world at large that it had totally gotten rid of any remnants of its criminal past and that it had nothing to hide. It is well known that since the entry into force of the 11th Protocol the remedy of individual application has become a compulsory element of the conventional regime. As from the 1st of November 1998, hence, all the States parties to the Convention became subject to judicial scrutiny as to the compatibility of their actions with the rights set forth therein. Although the machinery is grinding under the burden it has to deal with, it has not yet been crushed by the weight of that responsibility.

Before coming to some more general conclusions, let me also refer to the process of European integration. In the aftermath of World War II, there were many conflicting views regarding the way in which Germany should be prevented from engaging once again in imperialist policies. The solution eventually found was to establish a joint venture, namely the European Coal and Steel Community, as a complement to the Council of Europe. To participate in this truly momentous endeavour a great deal of courage and trust in the workability of the new regime was necessary. An integral part of that system was a High Authority, which was empowered to enact binding regulations with direct effect vis-à-vis the enterprises subject to its jurisdiction, but only within boundaries strictly delimited by treaty rules, and a Court of Justice, which could be seized in all instances where it could plausibly be alleged that the relevant treaty rules had been infringed. In 1958, the scope *ratione materiae* of the supranational entity was enlarged to cover the entire field of the economy through the establishment of the European Economic Community and majority voting expanded. Concerning the scope *ratione personae*, it took many years before the original six members were joined by other Western European States. The United Kingdom, initially a skeptical observer of the process of integration, took that decision with effect as from 1 January 1973 together with Denmark and Ireland. Eventually, just a few days ago, ten new members came aboard the ship which by now has grown to a powerful actor in international relations.

What I have just tried to outline may sound trivial, just like an insipid account of events well-known to everyone here in this room. However, the relevant facts had to be briefly recalled

[1] The Statute of the Council of Europe was signed on 5 May 1949; it entered into force on 3 August of the same

before making the decisive point. For decades now, comprising half a century, some of the European States have been living ander a regime of diminished States sovereignty. They have not felt inhibited from placing themselves under binding rules, more often than not adopted by majority vote, which deeply interfere with almost all aspects of public life. Legislative bodies are not free any longer to make determinations as they see fit, in case of conflict between rules of Community law and national law the former prevail, and eventually any act of governmental authority alleged to infringe civil rights and fundamental freedoms may be challenged before the Strasbourg Court of Human Rights. Just recently, the European arrest warrant has tightened the network of cooperation in one of the most delicate fields of State sovereignty, namely criminal jurisdiction.

In sum, in Europe a new international law has taken shape, a law of cooperation which believes in collective wisdom, leaving little room for unilateral action by individual States. Behind this development, a strong political conviction can be perceived, the conviction that peace and well-being can best be preserved by common institutions through law-oriented procedures which provide every member concerned the right to raise its voice and thus to participate in the decision-making process. In fact, in the geographical area where this new regime has been in operation, not a single armed conflict has erupted. Peace has prevailed in Western Europe for almost 60 years now. Given its past of almost continuous wars and fighting, this success appears almost as a miracle. And yet, the recipe of success seems to be fairly simple. It consists in tackling any emerging problems collectively, in anticipating the difficulties which the future may carry along with it by converting the quest for a livable future into a common project. To assess this strategic culture, its great reliance on soft power tools and its distancing from hard power, as nothing but a sign of weakness as does Robert Kagan[2] seems in fact somewhat superficial.

The strong belief in the virtues of cooperation is also manifested at world-wide level by the acceptance of the Rome Statute for an International Criminal Court by all of the member States of the European Union. It is one thing to proclaim one's attachment to commonly shared values, but such confessions of faith lag miles behind the actual resolve to establish common institutions and to accept being controlled by independent institutions. What some countries may see as an infringement of national sovereignty, has become for the European nations a distinctive sign of their identity.

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year.

To my mind, this success story of multilateralism is the main lesson which Europe could teach the world if ever it wished to teach any lesson. It should be added that notwithstanding some irritations, which have occurred from time to time, the system has withstood all criticisms and crisis situations. Let me give just a few examples.

The Strasbourg mechanism for the protection of human rights has never been impressed by the contention that certain irregular measures were justified by the particular exigencies of the situation. One of the many spectacular proceedings was instituted by *Ireland v. United Kingdom* on account of the treatment of suspected IRA terrorists in Northern Ireland. It is common knowledge that in its judgment of 18 January 1978[3] the Court condemned the methods employed by the British police without characterizing them, however, as torture. In the *McCann* case, which again concerned suspected IRA terrorists, the Court, although by a slim margin of just one vote, did not hesitate to stigmatize the gunning down of three men in Gibraltar as a violation of the right to life. To date, no judgments have been rendered by the Court on measures taken on the basis of the new statutes enacted after 11 September 2001 in the United Kingdom like in some other countries.[4] Vis-à-vis Turkey, the Court has never refrained from accurately examining the situation even when Turkey invoked Article 15 as justification for the measures taken by it.[5] Never has the system of protection been sacrificed for the benefit of considerations of national security.

Concerning the legal order of the European Communities, the same positive assessment can be made. The applicable legal rules have consistently been complied with. France's attempt to introduce, through the Luxembourg compromise of January 1966, unanimity as the regular modality of voting in the Council was overcome step by step; it is now definitively defunct. It must be acknowledged, however, that the Communities have been able to sail in calm waters for more than half a century now. A severe challenge could be averted at the last minute when Greece blocked exports to Macedonia contrary to Community rules.[6] The difficulties encountered in that case show that the Community regime may not be infallible in all circumstances. In any event, the Court of Justice of the European Communities has been able to extend its influence step by step. Although it encountered serious difficulties from time to

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[2] Of Paradise and Power, New York 2003, p. 33.
[3] Publications of the European Court of Human Rights, Series A, Vol. 25 (henceforth: A 25).
[4] Anti-terrorism, Crime and Security Act 2001, 14 December 2001.
[5] Recently: judgment in *ELCI and Others v. Turkey*, 13 November 2003.
[6] *Commission v. Greece*, [1994] ECR I-3040.

time – when it handed down such spectacular decisions as *Costa v. ENEL*,[7] where the primacy of Community law was proclaimed as a matter of principle, or *ERTA*,[8] where the treaty making power of the Communities was interpreted as following the internal distribution of powers – it eventually was able to meet with acceptance from all member States.

In other words, since decades Europe has been living within a framework of fairly well-defined rules largely adopted by majority vote and under a *gouvernement des juges*, without suffering any major hardship from that reliance on collective mechanisms of decision-making.

III. Europe as a closed shop?

The question may be asked though whether the principles evolved internally are suitable as propositions on a world-wide scale. Is Europe a closed shop, where special rules are in operation which cannot possibly be extended to relations with third States? In responding to this doubt, one should first of all note that the European system has shown a tremendous power of attraction. As already stressed, it has been able to extend its philosophy of cooperation far beyond the original group of Six. A long queue of candidates is waiting to join the club and a further extension of the Union seems to be almost inevitable. However, at the present juncture one should not be overoptimistic. The new Union of 25 is still awaiting its test of viability. What worked out extremely well in what was until a few days ago a group of 15 States will not necessarily operate as successfully in a Union of 25 or an even larger membership. It is clear also that the power of absorption of the Union is limited. It would certainly fail in trying to extend its membership to other continents.

However, the Union has extended its hand to nations from other continents by practicing a policy of solidarity which is implemented not by unilateral determinations according to its own whims and fancies, but which has strong organizational underpinnings designed to permit a frank exchange of views about all pressing needs. To the greatest extent possible, the Third World nations with which Europe has established a special relationship, the so-called ACP countries (African, Caribbean, Pacific), are accepted as partners who may voice their concerns through an institutionalized dialogue. This openness does not increase the amount of funds available for distribution. But it does matter in what form policies are conceived and implemented. Vis-à-vis the ACP nations, Europe does not see itself as a hegemon who

[7] [1964] ECR 1253.
[8] [1971] ECR 263.

imparts orders to be followed. It is prepared to listen and also to correct its policies if the circumstances so warrant.

On the other hand, it can hardly be argued that within their domestic jurisdiction European States take international law more seriously than nations from other continents. To be sure, there are certain positive tendencies. According to the Constitutions of Germany and Italy, for instance, general rules of international law are part of internal law, taking even precedence over ordinary statutes. Many other countries grant general primacy to international treaty law, either on the basis of an explicit provision of the Constitution (France) or as a result of case law developments (Belgium, Luxembourg). But this tendency has not yet become a general practice. In the United Kingdom, in particular, rules of international law can generally be overridden by the *lex posterior* of a parliamentary statute; only Community law is exempted from legislative derogation power.

IV. The weaknesses of the European construction

There are a number of weaknesses of the European approach which should not be overlooked. Not everything is perfect. Enthusiasm for the European way of handling foreign affairs should not become equivalent to naiveté.

The European system of cooperation is slow and cumbersome. In relations with third countries, the Common Foreign and Security Policy (CFSP) is still based on the principle of unanimity. In crisis situations, it may take much too long to make the necessary decisions. The war in the territory of the former Yugoslavia, in particular in Bosnia and Herzegovina, where an American initiative was needed to stop the murderous attacks against Sarajevo, foreshadowed the difficulties in reaching a common standpoint; at that time the CFSP had just been inaugurated after the entry into force of the Maastricht Treaty. In contrast, the Iraq war illustrates the deficiencies of a policy which lacks effective decision-making procedures. The fact that France and Germany resolutely opposed the American plans for a preventive war against Iraq while Italy and Spain supported the American strategy demonstrates very clearly that the system of cooperation lacks internal coherence and is in danger of easily disintegrating under external pressures. In that regard, Europe's performance is in urgent need of being improved. A system of governance must be able to withstand even a stormy period.

Currently, the European Union's CFSP still has many features of a fair-weather construction only so that its model character remains somewhat doubtful.

V. The societal breeding ground of international law in Europe

International law does not rely only on the existing governmental structures. It evolves under the impact of authoritative decision-making, but academic discourse also contributes to a significant extent to defining its shape and contours. Can one speak of a specific European academic community? We are here to found a European society of international law. Is this just a beginning, or the formal consolidation of a state of affairs which can already be observed in hard facts? Whoever has been able to read a broad sample of American legal periodicals is compelled to draw the conclusion that American academic discourse mirrors more often than not a rather closed universe. Mostly, doctrinal sources are drawn from other American publications. To jump across the Atlantic with a view to exploring European voices does not belong to a method widely resorted to. Even a leading periodical like the American Journal of International Law excels in parsimony vis-à-vis European writings. Whoever dares to express his/her ideas in French, German, Italian or Spanish finds himself/herself in the position of a pariah. Normally, he/she will simply go unnoticed.

Is Europe better in this regard? Do European publications display a greater degree of pluralistic openness? Unfortunately, the balance sheet is hardly any more positive. Of course, there are limits to what can be legitimately required of an international lawyer. Nobody expects him/her to read Finnish or Dutch. But references to publications written in other languages than English remain a rare occurrence. In France, it has become an obsession to cite exclusively French authors in order to strengthen the French language. Only a small fraction of authors continue carefully to collect and discuss what they can find in the literature of different linguistic sources. A praise is deserved in this regard by writers from Belgium, Germany, Italy, the Netherlands and Switzerland – and also by one widely known author from Finland. Progressively, the English language advances as the *lingua franca* of international law. This process of impoverishment has also affected the European Journal of International Law. Born as a bilingual publication, it has thrown French over board since it was taken over by Oxford University Press. Obviously, to have just one language of communication provides many advantages. But it leads also to intellectual aridity. Europe should not choose the easiest road.

As a continent of openness, Europe should also listen to voices from Third World countries. Unfortunately, there are not too many of them. The lead that Europe has preserved together with North America in all legal disciplines is clearly visible also in the field of international law. But precisely for that reason European writers should take pride in taking note of those few voices, in particular if they give expression to disagreement and criticism. Dialogue on legal issues should not remain confined to Europe and North America: It should include all those voices able to articulate reasonable arguments, wherever they may come from. Inasmuch as the Europeans criticize the Americans for building international law from home-grown ideas only, the Europeans must show their awareness of the necessities of transregional, transcultural, and transethnic dialogue.

VI. European international law?

Some listeners may have waited until this very last moment for me to put the question: Is there a specific general international law of European orientation? My tentative answer is: no. All the principles, mechanisms, and procedures which I have tried to highlight have been introduced by treaty law. But in fact Europe is prepared to assume far-reaching treaty obligations, with a view, in particular, to protecting the core values of the international community. What I have wanted to show is that these devices make up a framework which is highly suitable for the attainment of the paramount goals of present-day international law, namely to secure international peace and security and to promote and protect human rights. This is not tantamount to saying that a specific European international law has come into existence. The unity of international law constitutes a cherished achievement which should not be abandoned lightly.