As Sounding Brass, or a Tinkling Cymbal? Reflections on the Inaugural Conference of the European Society of International Law

By Morag Goodwin and Alexandra Kemmerer[*]

The enlargement of the European Union, the attempt to put together a constitution we can all live with, the divisions rendered raw by passionately opposed positions on the prosecution of the so-called "War on Terror" are just some of the issues which make identifying oneself as European so damn confusing of late. The inaugural conference of the European Society of International Law, held at New York University's Villa La Pietra in Florence on 13 – 15 May 2004, saw the question of what precisely Europe is fall to the international lawyers to answer. The process of drafting a European constitution had already provided the constitutionalists with the opportunity to ponder what it is that defines us and, more specifically, distinguishes us from our American cousins;[1] in Florence, the international lawyers had their turn to mull over such questions.

Massive over-subscription meant not simply that only those who had booked early were guaranteed entry but perhaps too that there was no lack of willingness to step up to the challenge. The perceived need to answer the question of a European *raison d'être*, and hence justify the formation of a European Society of International Law at this time, was what this inaugural conference was all about. This was made clear in the opening session. The big names of European international law stepped up to the plate, swung their bats at American hegemony and the ball, if intended to re-

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[1] For example, Georg Nolte's UNIDEM conference at Göttingen, 23-24 May 2003. For a report of that conference and its conclusions, *see* M. Goodwin and P. Zumbansen, *American and European Constitutionalism Compared*, 4 GERMAN LAW JOURNAL 613 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04No06/PDF_Vol_04_No_06_613-627_Legal_Goodwin_Zumbansen.pdf.

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present anything more than anti-Americanism,[2] somehow got lost in the beautiful gardens of La Pietra.

The conference organisers however sought to provide a positive understanding of European-ness, yet the implicit undertone remained one of a Europe defined in the negative, a Europe that was not America. According to Bruno Simma, President of the new society and ICJ Judge, "European" is not a notion of geographical belonging or origin, but a state of mind. Providing support for Simma's inclusive assertion that "European" is simply a way of being, his colleague in the ESIL enterprise, Philip Alston, an Australian now based at NYU, professed Europe his adopted spiritual home. Alston tasked the new society with elaborating "a truly European vision of international law that can be a shining example."

Critical voices were also present. Martti Koskenniemi (Helsinki), in his noteworthy keynote speech on the following day, cast a cold eye on such expressions of well-intended pathos. "We Europeans share a common intuition: international law will be as we are - treaties are laws, the General Assembly is a parliament, the Security Council a world government, the Charter a constitution."[3] Already in the opening session, Joseph Weiler (New York) had not shied away from criticising his co-panellist Christian Tomuschat (Berlin) for glorifying European human rights standards.[4] Weiler, making a strong case for the "secularization of international law,"[5]

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[2] Pierre-Marie Dupuy's (Paris/Florence) sentiment that the new society should be understood not as a rival to ASIL but rather as a dialogue partner, was not shared by his compatriot Alain Pellet (Paris) nor by Christian Tomuschat (Berlin), both of whom clearly understood ESIL as necessary to act as a bulwark against American hegemonic unilateralism.

[3] For an inspired and inspiring discussion of the constitutionalisation of international law against the background of alternative visions of a "New World Order" such as hegemonial liberalism, neoliberal and post-marxist designs and the anti-Kantian project of a Schmittian "Völkerrechtliche Großraumordnung" (international legal order of wide spaces), *see* J. HABERMAS, *Das Kantische Projekt und der gespaltene Westen. Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN 113 (2004). In his emphatic call for a continuation and renewal of the Kantian project, Habermas refers, *inter alia*, to B. Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 529 (1998) and J.A. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHT DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT – VÖLKERRECHT UND INTERNATIONALES RECHT IN EINEM SICH GLOBALISIERENDEN INTERNATIONALEN SYSTEM 427 (2000).

[4] In his contribution, Christian Tomuschat highlighted repeatedly the ban on torture in European human rights law and presented a detailed overview of the European Court of Human Right's Jurisprudence on Article 3 ECHR.

[5] Having in mind J.H.H. WEILER, UN' EUROPA CRISTIANA (2003) (published in German as EIN CHRISTLICHES EUROPA (2004), this topic, at first, came as a bit of a surprise. [For a first review of Weiler's book in English, *see* R. Howse, *Piety and the Preamble*: *Joseph Weiler's A CHRISTIAN EUROPE claims a place for Christianity in Europe's proposed new constitution,* 3 LEGALAFFAIRS No. 3, 60-62 (May/June 2004); *see, also*, A. Kemmerer, *Geht mit Gott. Europas Verfassung braucht ihn: Was der Jurist Joseph H.H. Weiler vom Papst*

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urged his spiritual European brethren to rely on the well-established European virtue of reasonable self-criticism and called too for subtle translation of European constitutional structures and values into the global realm of international law.

That this conference brought together international lawyers not just from Europe (although it was not quite as geographically represented as it will hopefully become)[6] but from the different perspectives that make up the realm of international law was its strength; its perhaps understandable desire to make the case for Europe its weakness. The latter ranged from an almost rabid anti-Americanism from certain speakers to a sort of jingoistic profession of the advantages of the European approach. However, barring the parroting of Kagan's overly discussed thesis that Europeans are somehow implicitly multilateral to the American's inherent unilateralism,[7] there was little at the conference to provide flesh to Alston's vision, nor to suggest what precisely made us Europeans quite so wonderful and the Americans such a threat to the world.

Had "we" Europeans all been opponents of the increasingly disastrous-looking intervention in Iraq – were the Italians, Spanish, Polish, Brits, etc. to be excluded from this European back-slapping – or did this sense of "we" refer rather to the community of international lawyers, in which case shouldn't a hefty share of the American international lawyers – in general, no lovers of Bush – have been included in this celebration of our greatness? Which, in a sense they were. Like kings dispensing gongs, the assumed superiority of the Europeans at times appeared to be conferring honorary European citizenship upon those of our America and Antipodean colleagues present, as if there were no greater distinction to bestow. The

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gelernt hat, FRANKFURTER ALLGEMEINE ZEITUNG, 31 October 2003 (No. 253) at 37]. However, Weiler's argument that international law has still not experienced its "turn to modernity" and has not yet recognised the people as its true subjects instead of focussing on the cloaked power of the sovereign Leviathan, did not miss its point – and finally turned out to be strikingly coherent with Weiler's overall theoretical approach when he introduced the complex structure of the European Union and its inherent principle of "constitutional tolerance" as a model for the discipline of international law.

[6] Unsurprisingly, the Europeans were in the numerical majority (255 of 347, i.e. 73.5 %, of all registered conference participants were nationals of the 25 EU Member States, among them 28 participants from the 10 new Member States; 19 participants were nationals of "other European states," i.e. Switzerland, Norway and Turkey), although seemingly chased closely by the Australians (11 participants) and North Americans (21 participants). But the small number of colleagues from the Middle East, Africa, Asia or South America was unfortunate and notable. (All data were provided courtesy of the ESIL secretariat, Academy of European Law, Florence.).

[7] For a thorough and multifacetted discussion of Robert Kagan's position, *see* the contributions by Afsah, Bratspies, Buckel, Dilling, Lotherington, Miller, Paulus, Smith, and Wissel, 4 GERMAN LAW JOURNAL No. 9 (1 September 2003) *at* www.germanlawjournal.com.

echoes with the *mission civilisatrice* inherent at the founding of international law were unmistakable.

So much for the atmosphere. The conference was organised into a series of fora and agorae, both offering a large number of parallel sessions (three for the fora and between five and six for the agorae); there was thus a wide variety of choice as to themes and an impressive range of scholarship assembled under the various headings.[8] In contrast to the Minorities Forum (of which, more below), the International Legal Theory Agora felt like an international occasion. The participants came from a wider realm than merely Europe and, as is perhaps the nature of theory, touched upon issues and themes of genuine importance and interest to international lawyers everywhere. The limited time span each of the speakers were granted only allowed them to really hint at their deeper arguments and ideological commitments, but there was nevertheless much of value to be taken away and mulled over at leisure.

The Minorities Forum, in contrast, was entirely a European affair. Disappointingly, there was no effort to look outside the confines of the Council of Europe, OSCE and EU systems of minority protection to international approaches or analogous comparisons with groups such as indigenous peoples. Whilst they offered a decent introduction to the over-lapping European systems of minority protection, to anyone with any prior knowledge, the presentations and discussion presented little new. It would have been interesting, rather than merely lauding the European approach, to have had it placed within a global context. It is of course an underhand compliment to reproach ourselves purely by examination of those cases in which we have got it wrong; by solely noting our moments of intolerance, the impression given is one of a situation in which tolerance is the norm. A member of the European Romani population, an asylum-seeker or European Muslim, if asked, would be likely to give a very different impression of European tolerance for difference, and the ritual breast-beating did not conceal the conclusion that European systems of protection were deemed the only ones worthy of consideration.

Inside and outside (legal) perspectives alike were discussed in the forum dedicated to the EU as an international actor, although even as sophisticated a speaker as Pieter Jan Kuijper (Brussels), the European Commission's principal legal advisor,

[8] In a spirit of egalitarianism, all the speakers – from the world famous to the just starting out – had to apply to take part in these sessions and the selection was based upon the quality of the submittes abstract, which could explain the unexpected absence of a number of high-level European scholars who were perhaps waiting for a personal invitation. The combination of established and unknown made for interesting discussions and will hopefully become an established part of the conference tradition. The decision to include and encourage young scholars at such a high-level forum is to be lauded.

could not bridge the gap between high-spirited (outside) expectations and the bold complexities of (inside) institutional and political architecture. The often deplored fragmentation of EU external policies is mirrored by a kaleidoscopic multiplicity of actors and activities and a structure of multifaceted relationships with international organisations.[9] The well-established post-Maastricht pillar structure, more and more blurred in the field of external relations by cross pillar-agreements and -activities, will de facto not be changed upon an eventual entering-into-force of the Draft Constitutional Treaty. However, as Marise Cremona (London) stressed, the Constitutional Treaty may strenghten "the Union's obligation to practise what it preaches" and effectively require an enhanced solidarity among Member States and the Union.

As the EU so often stands in the shadows of her own disagreement when it comes to external policy, Michael Reisman's (Yale) self-characterisation of his opening panel's title "international law in the shadow of empire" as "grossly misleading" and as drawing "our attention away from the truly important questions: HIV/AIDS, poverty, religious fundamentalism" could hardly be described as disappointing. The "truly important questions" in Florence fell by and large within the difficult relationship between freedom and security. The unquestioning ease with which these issues fell into the discourse of the Kantian project of perpetual peace, as if we were somehow still in the midst of the Nineties' optimistic belief in a new World Order, was puzzling. No doubt, Kant's programmatic essay "On perpetual peace"[10] constitutes one of the most inspiring core elements of the European international law tradition. But, as Jürgen Habermas' recent essay on the future of the "Kantian Project"[11] as well as the presentations of many of the "coming stars" at the ESIL conference demonstrate[12] – we can not simply ignore the *Kehrtwende* of

[9] One such relationship of remarkable complexity, the relation between EU/EC and UN, was illustrated by Piet Eeckhout in his paper on the legal status in EU Law of UN Security Council Resolutions, largely based on excerpts from P. EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION: LEGAL AND CONSTITUTIONAL FOUNDATIONS (2004) .

[10] I. KANT, ZUM EWIGEN FRIEDEN (1795) or, in English translation, I. KANT, PERPETUAL PEACE AND OTHER ESSAYS (T. Humphrey trans., 1983).

[11] J. HABERMAS, *Das Kantische Projekt und der gespaltene Westen. Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN 113 (2004).

[12] However, unlike his young fellow (legal) philosophers Fleur Jones (Sydney) and Basak Cali (London), who in Florence emphasized the paradigmatic character of Guantánamo, Jürgen Habermas does not bid an easy farewell to the *rule of law,* to governance through law, by dwelling extensively upon the *State of Exception* (a notion he does not even mention). Habermas instead emphatically admonishes the United States to return to internationalism "and to take up again the historical role of a pacemaker on the road of international law's evolution into a cosmopolitan order." J. HABERMAS, *Das Kantische Projekt und der gespaltene Westen. Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN 113, 116 (2004) ("Das Kantische Projekt kann nur dann eine Fortsetzung finden, wenn die USA

September 11th, but have to situate our thinking about international law within the turn from Kant's utopian peace to the *State of Exception* elaborated by Carl Schmitt and Giorgio Agamben.[13] As Guantánamo Bay has become a key site in the understanding of zones of legally structured and bounded lawlessness, this paradigm of the ever-changing international law cannot simply be ignored.

Therefore, it came as no surprise that the Closing Plenary, dedicated to the "discussion of an important and timely topic to be decided," turned – against the backdrop of the recent reports from the Abu Ghraib prison - into an assessment of the difficult relationship of freedom and security, law and lawlessness.[14] Human rights lawyers such as Conor Gearty (London) and Olivier de Schutter (Louvain-la-Neuve) described a shift in their professional self-perception: "We have always seen human rights as an evolving, progressing field of law, an evolving *ius commune* – but now we find ourselves in a defensive position, are forced to justify ourselves, are confronted with new challenges."

Examining the radical extension of the right to use force in the post-Cold War period, Nico Krisch (Oxford/New York) had in a previous forum sketched three different approaches – functionalist, moralist, and realist -, and emphasized the importance of hegemonic power for the interpretation of current events.[15] While his co-panellists – among them Barbara Delcourt (Brussels) and Christine Gray (Cambridge) – and discussants clearly distinguished Europe from the US, Krisch treated the US and Europe as part of one unit (Western states): "Since they act in common

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zu ihrem nach 1918 und nach 1945 vertretenen Internationalismus zurückkehren und erneut die historische Rolle eines Schrittmachers auf dem Weg der Evolution des Völkerrechts zu einem 'weltbürgerlichen Zustand' übernehmen.").

[13] *See* G. AGAMBEN, AUSNAHMEZUSTAND (HOMO SACER II.1) (2004); U. Raulff, *Interview with Giorgio Agamben – Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life*, 5 GERMAN LAW JOURNAL 609 (2004), *available at* http://www.germanlawjournal.com/pdf/Vol05No05/PDF_Vol_05_No_05_609-614_special_issue_Raulff_Interview.pdf.

[14] Only Outi Korhonen (Brussels) refused to participate in the panel's *ad hoc* response to the current news from Iraqi prisons. Korhonen gently insisted upon sticking to the plenary's initially announced topic and gave a carefully elaborated presentation on the problem of representation, which lies "at the heart of the question of good and evil in international law" - and certainly not only as far as the upcoming election process in Iraq is concerned. For a discussion of current challenges of the "War on Terror" on domestic law foundations of civil liberties, *see* the contributions by Achelpöhler, Agamben, Dinh, Dumitriu, Lepsius, Niehaus, Mertens, Morgan, Newman, Safferling, and Zöller, 5 GERMAN LAW JOURNAL 435-617 (2004), *available at* www.germanlawjournal.com.

[15] The effect of US predominance on the principle of sovereign equality is discussed in detail by Nico Krisch in N. Krisch, *More Equal Than the Rest? Hierarchy, Equality and US Predominance in International Law*, UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135 (M. Byers and G. Nolte eds., 2003).

on most issues, including issues on the law of the use of force, there is more reason to treat them in common than to treat them separately – which also highlights the extent to which Europe, despite its insistence on being a civil power in world affairs, exercises and strengthens Western dominance". Does it? Maybe even because of its deep internal divisions?

But the conference to one side, what was the European Society itself to be about? The ESIL website (http://www.esil-sedi.org) provides the founding goals of the new organisation. It lists five. First, to foster an exchange of ideas on matters of common interest; second, to encourage excellence in scholarship; third, to enable a forum for European- wide discussions, fostering the involvement of up-and-coming scholars; fourth, to promote a greater public awareness of international law; and fifth, to encourage, and this is perhaps worth quoting, "a greater appreciation of the role of the European tradition and to develop European perspectives in international law." It is surprising that ESIL's founders feel that the European tradition is not given due recognition for its contribution to international law at the same time as putting together an excellent conference session on International Law's Colonial Past. It has been persuasively argued for years now that the international legal system came about in response to the European desire to enforce their superiority over everybody else, to bring order to the savages and to justify control over them; moreover, that it was self-consciously instrumental in constructing a European identity.[16] The rest of the world cannot be thrilled with the prospect that the Europeans appear to be turning yet again to the international system as a means of addressing their identity problems, nor at the apparent lack of humility learned in the intervening century or so.

Considering the location (Florence) and the timing (Saturday morning), it was surprising that there were so many present at the somewhat chaotic founding session of ESIL, although nowhere near the number of Society members registered and present for the conference.[17] Perhaps predictably in light of the inordinate amount of time European institutions spend discussing the issue of languages,[18] the main

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[16] For example, A. Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARVARD LAW REVIEW 723, 734 (1993). Basing her analysis upon the writings of the nineteenth-century international lawyer, the Reverend Thomas J. Lawrence, Riles concluded that, "International law … is the creative product of its European cultural context, the codification of European norms, and the best hope for the perpetuation of European supremacy." *Id.* at 733-734.

[17] 347 participants, *see, also*, *supra* note 6.

[18] For an exploration of the "ambiguous role of the European Union, an organisation that claims to respect and protect linguistic diversity, but also, by its action or inaction, lets it crumble," *see* B. de Witte, *Language Law of the European Union: Protecting or Eroding Lingustic Diversity?*, *in* CULTURE AND EUROPEAN UNION LAW (R. Craufurd Smith ed., forthcoming); *see, also*, F.C. Mayer, *The Language of the European*

part of the discussion was allowed to revolve around the question of linguistic diversity within the Society; that the issue of languages had already been discussed in the opening session on the Friday evening and that the Society's Constitution, while noting the importance of linguistic diversity, claimed English and French as the Society's official languages, did not prevent the matter being raised by several speakers.

From linguistic diversity, the location of future conferences was the issue seemingly of second-most interest to society members, a fact that brings one in mind of the old anecdote about the nature of committee meetings, in which a committee with the building of a nuclear power station and the painting of the bike shed as items on its agenda spend all their time discussing which colour to paint the shed. Florence was put forward as a spiritual home for the Society – the biannual conference to be held there. However, others argued that the conference should "travel" around Europe and be organised in co-operation with national societies, thus working towards two of the Society's stated aims of enabling local young scholars (unable to afford an expensive Tuscan capital in the tourist season) to take part and of fostering greater public awareness of international law (although these points were not made by any of the speakers). One might have hoped for a little more concentration from lawyers as to the real issues at hand.

Little attention was paid, for example, to what the Society shall do in the two-year interval between conferences, although a welcome intervention from Erika de Wet (Amsterdam) attempted, in vain, to draw the discussion back to the question of how to involve young researchers in the project of the European Society. De Wet suggested establishing themed working groups, which would meet in various cities around Europe and into which young scholars could be incorporated, an idea which appeared to meet with general approval although no decision appeared to be taken upon it. Another speaker suggested that the editors of European-based international law journals could form a discussion group under the auspices of the Society, but again no decision was taken. In fact, the founding session appeared to take no decisions at all (although as the minutes of the meeting are not yet available on the ESIL website, this is difficult to verify), presumably meaning that the newly elected Executive Committee will itself take the decisions as to where and when the next conference will be and what the Society will do in the interval.

Constitution - Beyond Babel?, *in* THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION - GERMAN AND POLISH PERSPECTIVES 359-383 (A. Bodnar, M. Kowalski, K. Raible, F. Schorkopf eds., 2003).

As for the election itself, the sudden resignation that morning of Philip Alston, the Society's founding father, threw the principals into some confusion, and, perhaps as a consequence, the subsequent election process did not meet the structural requirements one would expect, particularly for a project keen to promote the virtues of European values. It is understandable that the majority of those who have worked so hard to make the Society a reality wish to maintain a sense of continuity they view as necessary in enabling the fledgling to mature; this was clearly in tension with the need to appear democratic. It is to be hoped though that in the years to come it is the democratic urge that gains the upper hand.

If Europe is what it does – a noble sentiment put forward by Koskenniemi – as opposed to the trumpets of self-congratulation it blows, then the European Society is perhaps basing itself upon shaky ground. This is not to suggest necessarily that the differences are greater than that which binds us; but that an awful lot of work has to be done by all for anything beyond the vague recognition that being European *should* mean something causes unified action in the international arena. The ESIL conference was both stimulating and highly enjoyable[19] yet ESIL itself presented less a rival vision of international law than a discussion about linguistic diversity, the role of national associations and the locating of subsequent conferences.

However, this is not to suggest that we don't need ESIL, that its creation was a bad thing, nor that it cannot grow into something eminently worthwhile. Rather, it feels as if the new society has simply filled the vacuum that existed, awaiting its creation. A European Society of International Law has arguably always existed in the minds of the international legal community and we should be grateful to those who have worked so hard to imagine it into existence. Rather than seeking to elaborate a European vision of international law, ESIL should perhaps attempt to find a European voice, a voice that can speak with many tongues, but a voice that may meet Koskenniemi's admonishment that Europe is what it does. For, as Austin taught a long time ago, action does not have to be the use of force. A European speech-act could be equally as powerful.

But only so if its speakers refrain from arrogant triumphalism. History has, as Martti Koskenniemi points out, put the international lawyer in a tradition that has thought of itself as the "organ of the legal conscience of the civilized world."[20] But

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[19] And this is perhaps no small thing, as maybe the social is indeed the point of all such large-sized conferences.

[20] *See, e.g.*, M. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 516 (2002). In his account of the founding of the *Institut de droit international,* Koskenniemi draws a detailed picture of the network of international law scholars later known as "men of 1873," among them the Swiss professor Johann Caspar Bluntschli in Heidelberg, one of the founding fathers of the *Institut de droit international,* and the German-

the verities of the men of 1873, the founding fathers of the *Institut de droit international*, "did not survive the critiques developed by the modernity they helped to inaugurate. (...) The vision of a single social space of 'the international' has been replaced by a fragmented, or kaleidoscopic understanding of the world where the new configurations of space and time have completely mixed up what is particular and what universal."[21] We see through a glass, darkly. A truly European narrative of international law could be a narrative of remembrance, reflecting on the discipline's expectations and disappointments, high hopes and terrible failures.[22] Engaging seriously in reflections on the *lieux de mémoire* of international law, addressing calmly the past futures of a discipline without an universal voice, the particular would be no scandal.

born American Francis Lieber at Columbia Law School in New York. *Id*. at 11 – 97. The extensive correspondence between these two leading international lawyers of the nineteenth century is an inspiring example of a fruitful transatlantic dialogue contributing to the organization of collective scientific activity in international law. *See* B. RÖBEN, JOHANN CASPAR BLUNTSCHLI, FRANCIS LIEBER UND DAS MODERNE VÖLKERRECHT 1861 – 1881 (2003).

[21] M. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS 515 (2002).

[22] For a further discussion of such a constructive form of remembrance, inspired by the German historian Reinhart Koselleck's concept of the "past future," *see* P. Zumbansen, *Die vergangene Zukunft des Völkerrechts*, 34 KRITISCHE JUSTIZ 46 (2001).