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## A Century of French International Law Scholarship

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# A CENTURY OF FRENCH INTERNATIONAL LAW SCHOLARSHIP

*Emmanuelle Jouannet*

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## A CENTURY OF FRENCH INTERNATIONAL LAW SCHOLARSHIP

*Emmanuelle Jouannet\**

### I. INTRODUCTION

In this study of contemporary French scholarship in the field of international law, I aimed to reveal its reality at the dawn of the 21st century, but I quickly discovered that it is difficult to understand the current trends in this area of scholarship without first placing French international legal thought in the broader context of the evolution of international law itself. It seems that the increased stature of international law and its considerable expansion since 1945 are both accepted and problematic. This evolution is not problematic in and of itself; the problem lies in the increased interest it arouses and the different meanings attributed to it. At the same time, this study is accompanied by inquiries into the nature, purposes, and functions of international law.

While such inquiries are hardly new—these issues have always been the subject of study<sup>1</sup>—they lead to new conclusions when undertaken in a doctrinal context that has itself considerably evolved. On one hand, it has never been harder to answer these questions given that contemporary French scholarship is dominated by positivism in all its forms: formalist, pragmatic, utilitarian, objectivist, and historicist. This is not necessarily regrettable, nor does it signal a doctrinal decline; rather, I am simply stating my observation that the supremacy of positivist thinking obliterates and amputates law from part of its critical dimension and its possible responses to the evolution of

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1. Since the interwar period, *see, e.g.*, Maurice Bourquin, *Règles générales du droit de la paix*, 35 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL [RCADI] 5 (1931) ("It has become commonplace to say that international law is in full blown transformation. . . . That is what makes it a fascinating subject today. At the same time, that is the problem in studying it: it is complex and full of contradictions."); GEORGES SCELLE, COURS DE DROIT INTERNATIONAL PUBLIC 2 (1948) [hereinafter SCELLE, COURS DE DROIT] ("International law is completely changing today and is full of gaping holes."); Emile Giraud, *Le droit international public et la politique*, 110 RCADI 421, 450 (1963) (insisting on international law's non-linear variations); FERNAND L'HUILLIER, LES INSTITUTIONS INTERNATIONALES ET TRANSNATIONALES, at XV (1961) (wondering whether the mid-20th century corresponds to a 'second creation' of international law); LOUIS CAVARÉ, LE DROIT INTERNATIONAL PUBLIC POSITIF, at VII (Jean-Pierre Quéneudec ed., 1967) (1961) (speaking of continually moving matter); Henri Rolin, *Principes de droit international public*, 77 RCADI 309 (1950) (very accurately describing the state of mind of internationalists after the war and their different attitudes towards the upheavals occurring in international law at the time). *See generally* ALEJANDRO ALVAREZ, LE DROIT INTERNATIONAL NOUVEAU. SON ACCEPTATION - SON ÉTUDE (1960); MICHEL VIRALLY, *Le droit international en question*, in LE DROIT INTERNATIONAL EN DEVENIR: ESSAIS ÉCRITS AU FIL DES ANS 13 (1990) [the collection: hereinafter VIRALLY, LE DROIT INTERNATIONAL EN DEVENIR]; Philippe Cahier, *Cours général de droit international public. Changements et continuité du droit international public*, 195 RCADI 13, 21 (1985); Prosper Weil, *Le droit international en quête de son identité. Cours général de droit international public*, 237 RCADI 25, 306-12 (1992); Charles Chaumont, *Cours général de droit international public*, 129 RCADI 335, 343 (1970) [hereinafter Chaumont, *Cours général*].

international law.<sup>2</sup> On the other hand, another intimately related evolution is the decline in major theoretical constructions, even positivist ones, which were the glory of French scholarship during the inter-war period. As a result, it is impossible today to refer to these pre-established theories with certainty.

International law is growing and evolving due to an unprecedented need for law at the international level and because contemporary scholars have given up their illusions of absolute, universal knowledge.<sup>3</sup> Instead, they view this evolution as a present phenomenon and examine a whole series of issues that have solutions apparently owing nothing to the great works of the past. Of course, authors still do refer to traditional works, but they are no longer satisfied with traditional solutions. It is troubling to see how much contemporary international law needs theorizing, but at the same time does not encourage firm theoretical commitments because it is in constant motion.<sup>4</sup>

Today, public international law scholarship—and all legal experience within international public law—fits within these evolving contexts. As a result, this study of contemporary French scholarship takes account of these contexts to reveal both general and specific trends. In other words, I aim to pinpoint what in our international law scholarship results from a general doctrinal evolution and what makes it specifically French. I am, of course, not suggesting that this summary represents the great variety of French internationalist thought; my goal is to highlight some of the directions that today's authors are taking and to suggest problems that might result.

Contemporary French internationalist scholarship is conditioned by history, yet independent of it. Due to its roots in the present, this area of scholarship deals with current legal reality, but this reality, like French scholarship, is historically constituted. It contains within itself, however, strands of thought that lead us outside the historical box to contemplate issues of legal theory. Two distinct approaches result: the first is more historical and seeks to evaluate how legal theory has evolved and how it is positioned in relation to past doctrines; the second is more directly theoretical and tries to determine the conditions that make the current configuration of legal theory possible. I will discuss these approaches in turn.

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2. For example, issues related to *jus cogens* are easily solved with the defense of a neo-Jusnaturalist law and it is interesting to see that the drafters of the Vienna Convention of 1969 introduced the concept of *jus cogens* in reference to the natural law that was then the focal point of many discussions. Charles de Visscher, *Positivism et jus cogens*, 75 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 5, 6 (1971).

3. See, e.g., Prosper Weil, *Toujours le même et toujours recommencé: les thèmes contrastés du changement et de la permanence du droit international*, in *ÉCRITS DE DROIT INTERNATIONAL* 7 (2000) [hereinafter Weil, *Toujours*] (“The relativity of legal truth is probably the only uncontested truth of this international law which, like all science worthy of the name, must be a lesson in intellectual modesty and tolerance.”).

4. See Charles Leben, *Une nouvelle controverse sur le positivisme en droit international public*, 5 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 121, 122 (1987) [Leben's work: hereinafter Ch. Leben, *Une nouvelle controverse*; the collection: hereinafter DROITS].

## II. THE EVOLUTION OF CONTEMPORARY FRENCH DOCTRINE

For several centuries, the random or supposedly imperfect nature of international law required a theoretical reply from international scholars to justify the existence and the foundations of the law that they studied.<sup>5</sup> Consequently, several schools of thought emerged, all of which contributed to forming an international legal view within which the French doctrine of international law developed. These schools of thought all responded to the issues of the existence and nature of international law; accordingly, they also inquired into the functions and purposes that this law could or should fulfill. As a result, they can be considered relatively complete and coherent systems of thought.

In France, the works of Louis Le Fur and Georges Scelle<sup>6</sup> are particularly good examples of this period of major doctrinal construction, which reached its apex during the inter-war period. For example, Scelle's *Précis de droit* was published in 1932 with the revealing subtitle *Principes et systématique* and presented itself as a complete explanation of international law—from its nature and foundations to its techniques and objectives.<sup>7</sup> Even though the most recent intellectual configurations can be distinguished from the works of Scelle and Le Fur on several points, they are still rooted in these vast speculative edifices, or at least in those that held fast as international law and internationalist doctrine evolved. In short, I suggest that the evolution of French internationalist doctrine reflects the expansion of international law and the generalized doctrinal movement toward positivism.

### A. *The Expansion of International Law*

The tremendous expansion of international law into new fields of application after World War II and, I believe more significantly, since the 1970s is perhaps of greatest

5. ANTONIO TRUYOL Y SERRA, DOCTRINES CONTEMPORAINES DU DROIT DES GENS, 5 (1951) [hereinafter SERRA, DOCTRINES] (“The law of nations has a singular destiny. It seems to be an intruder pretending to occupy a place that does not belong to it. It therefore requires justification and this justification is, in fact, not one of its lesser attractions.”).

6. The following list is not exhaustive: Louis Le Fur, *La théorie du droit naturel depuis le XVII<sup>e</sup> siècle et la doctrine moderne*, 18 RCADI 259 (1927) [hereinafter Le Fur, *La théorie du droit naturel*]; LOUIS LE FUR, LES GRANDS PROBLÈMES DU DROIT (1937); Louis Le Fur, *Règles générales du droit de la paix*, 54 RCADI 1 (1935); Georges Scelle, *Règles générales du droit de la paix*, 46 RCADI 327 (1933) [hereinafter Scelle, *Règles générales*]; GEORGES, 1 PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE (1932) [hereinafter SCELLE, PRÉCIS DE DROIT DES GENS, vol. 1].

7. See SCELLE, PRÉCIS DE DROIT DES GENS, vol. 1, *supra* note 6. See also Robert Charvin, *Le droit international tel qu'il a été enseigné: Notes critique de lecture des traités et manuels (1850-1950)*, in MÉLANGES OFFERTS À CHARLES CHAUMONT: LE DROIT DES PEOPLES A DISPOSER D'EUX-MÊMES 135, 138 (1984) [the collection: hereinafter MÉLANGES OFFERTS À CH. CHAUMONT] (stating that beginning with Georges Scelle, as an example, textbooks become more theoretical). Indeed, the treatises and textbooks of Scelle's contemporaries or authors preceding him are much less “systematic” even though they treat theoretical issues relating to the nature, existence, and foundations of international law. See generally PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC (8th ed. 1922) (Fauchille was the direct successor to Henry Bonfils); AMÉDÉE BONDE, TRAITÉ ÉLÉMENTAIRE DE DROIT INTERNATIONAL PUBLIC (1926); ALFRED CHRÉTIEN, PRINCIPES DU DROIT INTERNATIONAL PUBLIC (1893); R. PIÉDEDELIÈVRE, 1 PRÉCIS DE DROIT INTERNATIONAL PUBLIC OU DROIT DES GENS (Paris, F. Pichon 1894) [hereinafter PIÉDEDELIÈVRE, PRÉCIS DE DROIT, vol. 1]; R. PIÉDEDELIÈVRE, 2 PRÉCIS DE DROIT INTERNATIONAL PUBLIC OU DROIT DES GENS (Paris, F. Pichon 1895) [hereinafter PIÉDEDELIÈVRE, PRÉCIS DE DROIT, vol. 2].

importance. To illustrate, international law's expanded application to interstate as well as internal relations has allowed it to govern an increasing number of new areas that were formerly reserved to states. Similarly, international law is becoming more specific and complex in its application that it previously was. This is primarily due to the considerable development of conventional law, as well as to the growing importance of unilateral action by states and international organizations. International law is also becoming more judicialized with the unprecedented creation of international courts.<sup>8</sup>

I won't repeat here all of the aspects of this evolution; they are discussed elsewhere.<sup>9</sup> Some commentators have already shown, and interpreted differently, the impact of this evolution on the role of scholarship in general.<sup>10</sup> I would simply like to point out two direct manifestations of this evolution—first, the uncontested existence of international law and second, its increasing specialization and technicality—and evaluate their repercussions on French internationalist doctrine.

### 1. *The Uncontested Existence of International Law*

Curiously, one of the primary effects of the evolution of international law has gone largely unnoticed: in the last few years, international law has become so visible that no one really questions its existence. Although there will no doubt always be a few members of the American realist school who deny its existence, they would be hard-pressed to convince anyone.<sup>11</sup> And even though Raymond Aron somewhat convincingly maintained in 1961 that international public law did not exist,<sup>12</sup> his position would

8. See Gilbert Guillaume, *La CIJ. Quelques propositions concrètes à l'occasion du cinquantenaire*, 2 RGDIP 329 (1996) (ICJ President remarking on this evolution in international law).

9. See, e.g., ANTONIO CASSESE, *LE DROIT INTERNATIONAL DANS UN MONDE DIVISÉ* (1986); L'AVENIR DU DROIT INTERNATIONAL DANS UN MONDE MULTICULTUREL: COLLOQUE (René-Jean Dupuy ed., 1984); Suzanne Bastid, *Le droit international de 1955 à 1985*, 30 *Annuaire Français de Droit International* [AFDI] 9 (1984); MICHEL VIRALLY, *Adaptation du droit international aux relations nouvelles entre états*, in MÉLANGES M. VIRALLY 79 (1991); Manfred Lachs, *Le droit international à l'aube du XXI<sup>e</sup> siècle*, 96 RGDIP 529 (1992); MONIQUE CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS: ESSAI SUR LA FONCTION DU DROIT INTERNATIONAL* (1995) [hereinafter CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS*].

10. See André Oraison, *Réflexions sur "la doctrine des publicistes les plus qualifiés des différentes Nations" (Flux et reflux des forces doctrinales académiques et finalisées)*, 24 *REVUE BELGE DE DROIT INTERNATIONAL* [RBDI] 507, 508-09 (1991) [hereinafter Oraison, *Réflexions*]; Antonio Truyol y Serra, *Théorie du droit international public: Cours général*, 173 *RCADI* 9 (1981); *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* (R. ST. J. MACDONALD & DOUGLAS M. JOHNSTON, eds. 1983). With respect to French doctrine, see René de Lacharrière, *Notes sur les orientations de la doctrine in MÉLANGES OFFERTS À CH. CHAUMONT*, *supra* note 7, at 363-81 (1984) [hereinafter R. de Lacharrière, *Notes*]; PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 326 (4th ed. 1998) [hereinafter P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*].

11. DOMINIQUE CARREAU, *DROIT INTERNATIONAL* 36 (6th ed. 1999) (citing the anecdote of an American journalist who, during the Gulf War, compared international law to God in that they are both often invoked without our ability to prove their existences). On this school of thought and its current incarnation, see ANDRÉ-JEAN ARNAUD, *DICTIONNAIRE ENCYCLOPÉDIQUE DE THÉORIE ET DE SOCIOLOGIE DU DROIT* 134-38 (2d ed., 1993) [hereinafter *DICTIONNAIRE ENCYCLOPÉDIQUE*]; Françoise Michaut, *L'approche scientifique du droit chez les réalistes américains*, in *THÉORIE DU DROIT ET SCIENCE* 265, 265-80 (Paul Amselek ed., 1994).

12. RAYMOND ARON, *PAIX ET GUERRE ENTRE LES NATIONS* (1961). See also LOUIS DELBEZ, *LES PRINCIPES GÉNÉRAUX DU DROIT INTERNATIONAL PUBLIC: DROIT DE LA PAIX DROIT PRÉVENTIF DE LA GUERRE*

be much less convincing today. The expansion of international regulation in certain areas recalls in a striking manner a more global movement of law<sup>13</sup> and recreates the same problems for jurists, namely how to determine which among this multitude of texts presents the classical characteristics of a legal text.<sup>14</sup>

However, the problematic nature of this expansion must not be allowed to obscure a nice surprise that it holds for legal scholars: as both internal and interstate relations bear the mark of international law today, scholars can be assured of its purpose. This assurance implies a silent, almost unacknowledged, revolution in the attitude of French internationalists. Simply respecting international rules is now sufficient to prove their existence; therefore, the theoretical issue of international law's existence can be set aside. Previously, one had to demonstrate that it did, in fact, constitute a legal system by setting out the definition of international law and its differences and similarities with domestic law. The imprecise and incomplete nature of the system also made it necessary to shore up the major principles. Now, one can simply empirically note the existence of international law.

Of course, the simple fact of this observation is even more dispositive when it coincides with the generalization of the positivist perception of law among French internationalists. However, the existence of international law is still a primary and irreducible fact that, in a certain way, simplifies the work of international legal scholars, who now find themselves in a situation similar to that of domestic legal scholars. This situation is much more comfortable, I must admit, where the inarguable existence of the legal system eliminates the need to address fundamental issues.<sup>15</sup> As David Ruzié writes, for example, "it is better to consider the international legal order an objective reality, the existence of which is established by history. There is no need to look for its foundations, it is a fact."<sup>16</sup>

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DROIT DE LA GUERRE 11 (3d ed. 1964) (discussing Aron's influence); GEORGES BERLIA, *Politique internationale et droit international* (1964), in DROIT PUBLIC INTERNE ET INTERNATIONAL: ÉTUDES ET RÉFLEXIONS 483 (1980) [the collection: hereinafter DROIT PUBLIC INTERNE].

13. See, e.g., SIMONE GOYARD-FABRE, LES FONDEMENTS DE L'ORDRE JURIDIQUE 166-77, 215-18 (1992) [hereinafter GOYARD-FABRE, LES FONDEMENTS] (analyzing this movement from a philosophical viewpoint); Simone Goyard-Fabre, *Le droit est-il de ce monde?*, 4 DROITS 35 (1987) (analyzing this from a legal viewpoint).

14. See Michel Virally, *La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre les auteurs et textes qui en sont dépourvus*, 60-1 ANNUAIRE DE L'INSTITUT DU DROIT INTERNATIONAL 328 (1983). See also Prosper Weil, *Vers une normativité relative en droit international public*, 86 RGDIP 5 (1982) [hereinafter Weil, *Vers une normativité*]. For a direct comparison with domestic law, see Jean Chevallier, *La dimension symbolique du principe de légalité*, 6 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L'ÉTRANGER [RDP] 1651 (1990).

15. See, e.g., Pierre-Marie Dupuy, *Sur le maintien ou la disparition de l'unité de l'ordre juridique international*, in HARMONIE ET CONTRADICTIONS EN DROIT INTERNATIONAL 17, 20 (Rafaa Ben Achour & Slim Laghani, eds., 1996) [hereinafter P.M. Dupuy, *Sur le maintien*]; contra Denis Alland, *Le droit international 'sous' la constitution de la V<sup>e</sup> République*, 5/6 RDP 1649, 1651 (1998) (considering this type of inquiry very current because it reemerges with respect to challenging the primacy of international law in domestic law; however, identifying primacy with existence is not convincing in practice or in theory). See also EMMANUEL DECAUX, DROIT INTERNATIONAL PUBLIC 9-15 (2d ed. 1999) (expressing particular concern for the practical challenges to international law).

16. DAVID RUZIÉ, DROIT INTERNATIONAL PUBLIC 11 (15th ed. 2000) (citing Roberto Ago).

But the current change of attitude with respect to international law is clearer after reading the works of some of the most well-known French internationalists of a few decades ago. While today one need not justify the existence of this area of law under study, it is interesting that until the 1970s authors systematically addressed the problem, at least as a preliminary matter. For example, in his *Droit international public positif* of 1950, Louis Cavaré expressed this preoccupation,<sup>17</sup> as well as the need to address theoretical issues:

This research is all the more necessary as debate on this chapter (current concept of positive international law) is far from over. Various scholars continue to contradict each other and government practice is not constant. Moreover, some challenge the positive nature ascribed to public international law, calling everything into question. This leads one to look at the problem in its entirety . . . and inquire as to the nature of the existing relationship between the state and law.<sup>18</sup>

Almost two decades later, in her classes at the Paris law school in 1966-1967, Suzanne Bastid still felt obliged to defend the very existence of international law. But she did so based on a series of observable facts that demonstrated state recognition of its existence.<sup>19</sup> In fact, Bastid's reasoning, based on empirical observation rather than theoretical arguments like Cavaré's, is interesting primarily because it anticipated what the French internationalist position would eventually become. Bastid concluded that "the existence of rules of law is a *fact* of international life, just as within the state framework, individuals must obey the law established by the state."<sup>20</sup>

The textbook by Quoc Dinh Nguyen, Alain Pellet, and Patrick Daillet, which has been re-edited several times, repeats what is now considered established fact by the contemporary school of thought: "observing, even superficially, international life and relations provides the most obvious and probably the most convincing proof of the existence of international law . . ." <sup>21</sup> And even though the expansion of international law that began in the 1970s-1980s clearly supported this statement, until recently, internationalists still continued to question the very existence of international law. Referring, for example, to Guy de Lacharrière's emphasis on the role played by states' foreign policy, Michel Virally wrote in 1989 that such analyses could induce or reinforce a certain pessimism with regard to international law, but could also, on the contrary, lead to "rather optimistic conclusions, in any case delightful ones for jurists,

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17. See also MARCEL SIBERT, 1 TRAITÉ DE DROIT INTERNATIONAL PUBLIC 4-8 (1951).

18. CAVARÉ, *supra* note 1, at 110-11. See also Charles Rousseau, *Principes de droit international public*, 93 RCADI 373, 388-89 (1958). Rousseau takes up issues relating to the existence of international law, placing them in direct relation to the need to understand the particular nature of international law. In his view, those who doubt international law's existence have misunderstood the profound reality of its particular nature and structure. In fact, international law is an autonomous normative order that creates legal obligations based on states' "recognition" of their obligatory nature. See also DELBEZ, *supra* note 12, at 26-29.

19. Suzanne Bastid, *Droit international public: Principes généraux*, in LES COURS DE DROIT 14-15 (1966) [hereinafter Bastid, *Droit international public*] (observing six facts, including the existence of legal departments in ministries, bodies responsible for legal issues within international organizations, and the application of international law by national and international courts).

20. *Id.* (emphasis in original).

21. NGUYEN QUOC DINH, PATRICK DAILLIÉ & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 88 (4th ed. 1992).



who are proved correct in believing not only that international law exists, after all, but that it is neither insignificant nor futile . . . .<sup>22</sup> From this standpoint, G. Lacharrière's book,<sup>23</sup> published in 1983, arrived just in time: there, he demonstrated that states themselves consider international law to exist and to constitute a generally effective system,<sup>24</sup> regardless of how they implement it. The entire scientific community received the book very favorably and no one, as far as I know, has cast doubt on Lacharrière's analyses, which were based on his acute observation of government legal practice and have since become the scientific support for today's international scholars.<sup>25</sup>

Recent editions of most French textbooks confirm this trend by ignoring this issue and taking the reality of their subject for granted.<sup>26</sup> However, certain textbooks insist just as importantly on the technicality of their subject, thereby revealing another aspect of the evolution of contemporary international law and its repercussions on French internationalist doctrine.<sup>27</sup>

## 2. *The Greater Specialization and Technicality of Contemporary International Law*

It is not surprising that, owing to its development, international law has become more complex and specialized. This is characterized by a proliferation of methods and procedures for creating and applying international norms, multiple and differentiated institutions, and technical and specialized texts, resulting in more and more rules and fewer and fewer general principles. From a law suspected of being more theoretical than real, or more diplomatic than legal, international law has evolved into an articulated set of sometimes extremely technical rules, the very technicality of which is sometimes ambiguously considered to be a clear sign of their legal existence.<sup>28</sup> In fact, some of the more politicized areas of international law, such as peace or stability,

22. MICHEL VIRALLY, *Réflexions sur la politique juridique des états*, in VIRALLY, *LE DROIT INTERNATIONAL EN DEVENIR*, *supra* note 1, at 124 [hereinafter VIRALLY, *Réflexions*].

23. GUY DE LACHARRIÈRE, *LA POLITIQUE JURIDIQUE EXTÉRIEURE* (1983) [hereinafter G. DE LACHARRIÈRE, *LA POLITIQUE JURIDIQUE*].

24. *Id.* at 196-97. On the criterion of effectiveness, which is decisive in G. de Lacharrière's studies, see Guy de Lacharrière, *La réglementation du recours à la force: Les mots et les conduites*, in MÉLANGES OFFERTS À CH. CHAUMONT, *supra* note 7, at 348 [hereinafter G. de Lacharrière, *La réglementation*].

25. On reactions to G. de Lacharrière book in France, see VIRALLY, *Réflexions*, *supra* note 22, at 123-31; CARREAU, *supra* note 11, at 37; Jean Combacau, *Science du droit et politique juridique dans l'enseignement du droit international. A propos de: Guy de Lacharrière, "La politique juridique extérieure"*, 84 RGDIP 980, 980-89 [hereinafter Combacau, *Science du droit et politique juridique*]; Alain Pellet, *Le Sage, le prince et le savant (A propos de "la politique juridique extérieure" de G. de Lacharrière)*, 112 *Journal de droit international* 407, 407-14 (1985).

26. P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 11; JEAN COMBACAU & SERGE SUR, *DROIT INTERNATIONAL PUBLIC 1* (1993). See, e.g., NGUYEN ET AL., *supra* note 21, at 84-95. Some authors take up these issues more to illustrate an old theoretical debate than to truly express concern over existence, which they consider proven through observation. See Phillippe Manin, *DROIT INTERNATIONAL PUBLIC 13-14* (Masson 1999) (1979); CARREAU, *supra* note 11, at 36-37. See also Cahier, *supra* note 1, at 25.

27. See, e.g., COMBACAU & SUR, *supra* note 26, at V ("[A]s with the most rigorous domestic law disciplines, international law rests on a technique. It is this technique we would like to discuss here.")

28. Or, at least, the scientific nature of international law. Here again, there is an overall movement of law in its entirety. See, e.g., ANDRÉ-JEAN ARNAUD, *LES JURISTES FACE À LA SOCIÉTÉ* 195 (1975).

are governed by a few, relatively poorly defined major principles and fairly inefficient procedures. As Jean Combacau recently underscored, these politicized areas probably give the public the impression of both uselessness and inefficiency.<sup>29</sup> But despite its negative image, contemporary international law has nonetheless become an ordinary branch of law due to its specialization and technicality,<sup>30</sup> and this branch interferes constantly with states' domestic law.

To deal with this increasing specialization, French scholars have developed a highly technical and specialized knowledge of the law that in no way resembles the major general considerations of the past.<sup>31</sup> The pre-1945 tendency of French international scholars to generalize stemmed in part from the relative simplicity of the subject under study<sup>32</sup> as well as its clear demarcation from domestic law. From this perspective, things have completely changed, even though this change really only occurred about a dozen years ago. As Georges Flécheux remarked, "[a] man of my generation has seen the legal landscape surrounding him change radically."<sup>33</sup> Similarly, there have been consequences for teaching and researching in France. For example, an extremely interesting publication by the Société Française pour le Droit International shows that today, international law holds a more prominent place in the law school curriculum than it has held in the past.<sup>34</sup> It is now considered a fundamental discipline, and numerous specialized programs have been created to allow students to deepen their understanding of its various branches.<sup>35</sup> And although some may lament it,<sup>36</sup> specialized research topics have also become more numerous than those related to the general theory of international law.

As a consequence of this specialization, international law has become fragmented. Similarly, breaking up the discipline into different specialties corresponds to the diversification of areas in which contemporary international law applies. This is why French internationalists are not so much generalists as they are "eminent specialists," particularly of whichever branch of international law is experiencing a boom, such as human rights, the environment, or international criminal law. This is perfectly understandable, considering that maintaining expert command of even one of these branches requires constant effort.

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29. See Jean Combacau, *Conclusions Générales*, in SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL [SFDI], ENSEIGNEMENT DU DROIT INTERNATIONAL: RECHERCHE ET PRATIQUE 259, 260 (1997) [Combacau's work: hereinafter Combacau, *Conclusions Générales*; the collection: hereinafter SFDI, ENSEIGNEMENT DU DROIT].

30. See, e.g., P.M. Dupuy, *Sur le maintien*, *supra* note 15, at 20.

31. Oraison, *Réflexions*, *supra* note 10, at 513. This specialization is, however, a fairly old claim. See Jean Pierre Adiren François, "L'influence de la doctrine des publicistes sur le développement du droit international," in MÉLANGES EN L'HONNEUR DE G. GIDEL 275, 278-79 (1961).

32. See ANDRE-JEAN ARNAUD, POUR UNE PENSÉE JURIDIQUE EUROPÉENNE 21-51 (1991) (presenting an interesting parallel with European legal thought).

33. See Georges Flécheux, *La pratique du droit international: Table ronde*, in SFDI, ENSEIGNEMENT DU DROIT, *supra* note 29, at 116.

34. See generally SFDI, ENSEIGNEMENT DU DROIT, *supra* note 29.

35. But see Combacau, *Conclusions générales*, *supra* note 29, at 271-74; CHARALAMBOS APOSTOLIDIS, DOCTRINES JURIDIQUES ET DROIT INTERNATIONAL: CRITIQUES DE LA CONNAISSANCE 480 (Eyrolles 1991) (1987) [hereinafter APOSTOLIDIS, DOCTRINES JURIDIQUES] (critiquing this type of teaching).

36. See Geneviève Burdeau, *La recherche en droit international: Atelier*, in SFDI, ENSEIGNEMENT DU DROIT, *supra* note 29, at 27-36.

Under such conditions, emphasis is inevitably placed on practice, which is considered a way to better understand the problems raised by the implementation of multiple norms and, therefore, as the means to better understand the complex reality of international law. In truth, it would be wrong to think, as some have suggested,<sup>37</sup> that the practitioner-researcher is a new breed, because the most renowned internationalists have always been, in one way or another, practitioners of international law. For example, Gilbert Gidel, Louis Renault, Jules Basdevant, Albert de la Pradelle, and many others have been celebrated for establishing a link between international legal theory and practice.<sup>38</sup> What has changed, however, is the way in which their contribution is perceived: no longer simply a necessary condition, their intimate knowledge of practice is now considered sufficient in and of itself to producing a satisfactory theorization of international law. This may be fairly obvious to many internationalists, but practice was only recently given such high value and that status is not necessarily a foregone conclusion. Theory can, in fact, escape the practitioner who looks at law as a nuclear scientist would look at her subject, reducing it to a series of individual legal experiments.<sup>39</sup>

#### B. *The Generalization of Positivism*

Admitting that the evolution of international law induces new behaviors on the part of scholars, it is also true that this factual, concrete evolution coincided, in a related manner, with the doctrinal evolution of a certain type of positivism. Without retracing that well-known movement here, I would like to make a few brief observations regarding the directions taken by positivism in France in order to measure their current effects. However, I am conscious that this type of approach may seem without interest today or even misplaced because French international law theorists seem to want to escape the confines of any system of dogmatic thought whatsoever. In addition, as I will show below, these theorists focus on other, apparently more concrete, preoccupations. By using overly rigid denominations or divisions that are based on both observation and intellectual freedom (considered obsolete by some<sup>40</sup>), I may misrepresent their intellectual evolution, which is much more flexible and permeable. Conscious of this pitfall, I would nonetheless like to suggest that this behavior is the product of positivism's evolution in France, which affects us all, at least in part.<sup>41</sup>

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37. *Contra* Oraison, *Réflexions*, *supra* note 10, at 509 (illustrating the differentiation between the "new" practitioner from the purely theoretical professor). However, even internationalists of the 18th and 19th centuries were practitioners as well as teachers or theoreticians.

38. *See generally* MANFRED LACHS, *LE MONDE DE LA PENSÉE EN DROIT INTERNATIONAL: THÉORIES ET PRATIQUE* (1989) (writing on the careers of the noted authors).

39. *See* CHRISTIAN ATIAS, *THÉORIE CONTRE L'ARBITRAIRE* 96-101 (1987) [hereinafter ATIAS, *THÉORIE CONTRE L'ARBITRAIRE*] (arguing that theory may escape the practitioner who reduces the law to a series of individual legal experiments). Despite the appeal of that argument, French international scholars are far from convinced that thorough training in general theory leads to a better mastery of legal technique. *See, e.g.*, L'ENSEIGNEMENT DE LA PHILOSOPHIE DU DROIT: ACTES DU COLLOQUE INTERNATIONAL 11-15 (Michel Troper & Françoise Michaut eds., 1997).

40. Oraison, *Réflexions*, *supra* note 10, at 578.

41. That being said, even if one goes further, certain difficulties arise such as the polysemy of the term "positivism." On one hand, the ambiguity of the concept makes it almost impossible to distinguish clearly

A quick survey of various authors writing in French gives an impression of continuity rather than a break with the past, as though international scholars had steadily and unavoidably accepted legal positivism. In fact, positivism's evolution was not quite so linear. Now, I don't want to give in to the temptation to generalize—either through simplification or stereotype—with respect to French internationalist thinking, nor do I want to present positivism as inevitable in the French way of conceptualizing international law. But there is a solid positivist tradition and this doctrinal evolution has gone through several phases that produced different structural configurations of the most recent doctrinal debates: natural law doctrines have been phased out, while positivist doctrines have been diversified.

### 1. *The Abandonment of Natural Law Theories*

At first glance, it would seem that the positivist legal tradition is rooted in the philosophical works of Auguste Comte, notably *Discours sur l'esprit positif* of 1844, whose extraordinary influence is better understood today.<sup>42</sup> It is likely that French internationalists were introduced to this doctrinal movement by scholars of domestic law,<sup>43</sup> exemplified by Basdevant.<sup>44</sup> Scholars generally recognized that Comte's positivism was at once both a philosophy and a scientific method. The internationalists, however, emphasized the scientific aspect, that is, the idea of making the study of law a science. In fact, the new "positive spirit" aims to gain scientific understanding of legal reality through a rigorous method based on objectivity and realism that excludes not only idealism, but also excessive abstraction or generalization.

What is most interesting, perhaps, is to see how, in some ways, this approach was very easily adapted to the earlier conceptions of the majority of French internationalists. International law, which must be the subject of this scientific approach, can in fact be nothing more than the law evidenced by conduct. It is thus inevitably likened to positive law, that is, the law in force between states. There is, therefore, a very simple continuity with prior internationalist doctrines that, while preserving the

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between its various doctrinal branches. However, on the other hand, by rediscovering the divisions in our internationalist doctrine, we may be able to escape this ambiguity.

42. See generally LESZEK KOLAKOWSKI, *LA PHILOSOPHIE POSITIVISTE* (1976). See also Simone Goyard-Fabre, *De quelques ambiguïtés du positivisme juridique*, in 13 *CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE: DU POSITIVISME JURIDIQUE* 25 (1988). In fact, positivism is a much older intellectual configuration, but Auguste Comte gave it new meaning, specifically in French legal thought, which contemporary international scholars have inherited. Indeed, all French legal thinking was touched by this new scientific momentum, the direct effects of which can be seen in various forms in the works of authors such as Henri Capitant, Georges Ripert, François Gény. Leon Duguit, Maurice-Jean-Claude-Eugène Hauriou, or Raymond Carré de Malberg.

43. See SERRA, *DOCTRINES*, *supra* note 5, at 62. For evidence of this permanent influence, see also Maurice Bourquin, *Règles générales du droit de la paix*, 35 *RCADI* 5, 34 (1931); CAVARÉ, *supra* note 1, at 71; Charles de Visscher, *Cours général de principes en droit international public*, 86 *RCADI* 449, 451 (1954) [hereinafter Ch. de Visscher, *Cours général*].

44. See generally Jules Basdevant, *Règles générales du droit de la paix*, 58 *RCADI* 473 (1936). Basdevant was certainly one of the first positivists in the strict sense of the word, at least as he expressed himself in 1936, when he deliberately ignored the concept of a rational or ideal law. However, afterwards his thought seems to have evolved. *Id.* at 477-79. See also Charles Chaumont, *Jules Basdevant*, 8 *AFDI* 1, 1-3 (1967) (discussing Basdevant's influence on French jurists).

idea of a natural law, favors the study of positive international law. The positivism of this period generally expresses a fairly simple, voluntarist conception of law: international law is a product of state consent, which is the foundation of the law it produces. According to Robert Redslob, for example, positive law can arise from the convergence of the consent of the parties.<sup>45</sup>

From this standpoint, the increasing value given positive law by the scientific movement reinforces the conceptual movement, but at the same time, the definitive exclusion of natural law from the new internationalist legal science constitutes the point of departure of a true break. At the time, even though most French internationalists favored the study of positive law, natural law continued to play a critical function: natural law of whatever stripe, ideal, rational, theoretical, or intuitive,<sup>46</sup> enabled jurists to denounce positive international law's weaknesses in legal terms and attempt to remedy them. As authors insisted on or defended this notion of natural law, France developed a natural law doctrine, often reinforced by fervent Catholicism, which was much more influential than one might think, as shown by its preponderance until WWII. Of course, it was a dualist doctrine that focused on positive law; nonetheless, taking into account a higher natural law constituted one possible way to try to resolve problems related to international law. This is why Jusnaturalism always reemerges during periods of instability, when its critical function in particular is called upon,<sup>47</sup> as is shown in the studies by Georges Goyau, Father Yves de la Brière, then Antoine Pillet, Amédée Bonde, Albert de la Pradelle, Robert Redslob, Louis Renault, and Louis Le Fur.<sup>48</sup>

Comte's scientific approach signaled a break with the past that was only completed with the works of Léon Duguit and Georges Scelle. Scelle's contribution in this respect is well-known;<sup>49</sup> in short, he replaced the old natural law/positive law dichotomy with that of objective law/positive law.<sup>50</sup> Still, Scelle's concept of objective law was not very far from that of natural law because he linked it to a "dynamic natural law."<sup>51</sup> In that respect, it was a sort of evolving natural law: an objective law that was the direct expression of the natural, biological, and causal natural laws of all societies; a law that evolved in relation to phenomena of social solidarity.<sup>52</sup> Moreover, social objective law fulfilled the same function as natural law: in translating what was

45. ROBERT REDSLOB, *TRAITÉ DE DROIT DES GENS* 59 (1950).

46. On the variety of these expressions and their meanings, see Le Fur, *La théorie du droit naturel*, *supra* note 6, at 349-52.

47. See, e.g., Charvin, *supra* note 7, at 154 (convincingly criticizing this doctrine's presuppositions).

48. See, e.g., PIÉDEDELIVRE, *PRÉCIS DE DROIT*, vol. 1, *supra* note 7, at 1-11; REDSLOB, *supra* note 45, at 5-9 (differentiating ideal natural law from contractual positive law); DELBEZ, *supra* note 12, at 42-43; BONDE, *supra* note 7, at 7. See generally Alain Pellet, *Le droit international public; ses éléments constitutifs, son domaine, son objet*, 1 *RGDIP* 1, 236-64 (1894); Le Fur, *La théorie du droit naturel*, *supra* note 6, at 353-54. For an in-depth discussion, see also SERRA, *DOCTRINES*, *supra* note 5, at 61-66.

49. For a fairly recent study, see Hubert Thierry, *The Thoughts of Georges Scelle*, 1 *EUR. J. INT'L L.* 193 (1990).

50. SCELLE, *PRÉCIS DE DROIT DES GENS*, vol. 1, *supra* note 6, at 5.

51. *Id.* They are in fact so close that authors such as Le Fur consider that Scelle's natural law could just as easily have been called "objective law." See Le Fur, *La théorie du droit naturel*, *supra* note 6, at 267.

52. SCELLE, *PRÉCIS DE DROIT DES GENS*, vol. 1, *supra* note 6, at 4 ("[T]his static conception of natural law is unacceptable.").

necessary for social solidarity, it became the reference to which positive law had to conform.<sup>53</sup> Of course, social objective law remains obligatory even when detached from objective law, but if it does not conform, it can destroy solidarity and provoke revolution.<sup>54</sup>

Scelle was not unreasonably disturbed by the contradiction in terms presented by an objective law that is natural, historical, and incidental.<sup>55</sup> His conception translated across all of the development of the contemporary social and historical sciences and the desire, properly humanist, to replace classical, interstate society with an international, federalist, and solidarity-building society that was centered on the individual.<sup>56</sup> At the same time, however, the relative proximity between internationalist theories of natural law and social objectivism was a real advantage for French scholars, because by rallying to objectivist theories in times of crisis, they were able to discuss the essential themes of Jusnaturalism without exposing themselves to criticism. Indeed, objective law allowed the natural law of old to take on its critical function while eliminating the unacceptable presuppositions—subjectivity and universality—on which some authors assert that it was based. Additionally, because objective law was not an ideal law but rather an existing and historically constituted law,<sup>57</sup> this substitution took place without breaking with the idea of national law (as Cavaré had done, for example<sup>58</sup>) while incorporating this new approach into that of positivism. Moreover, some French scholars were able to do this without necessarily adopting all of the themes developed in Scelle's sociologism;<sup>59</sup> they retained the principle of this objective, social, and historical law as well as the vision of an international society striving to achieve social solidarity among individuals. This is how, in all its various manifestations, Scelle's sociologism contributed significantly to eliminating Jusnaturalism from French internationalist doctrine.

The almost complete disappearance of natural law doctrines from the French internationalist legal landscape was also due to the influence of Hans Kelsen's normativism, which dated from the same period as Scelle's sociologism. These schools of thought did not really take hold in the French doctrinal universe until about 1960, but pinpointing the date, as well as other contributing factors, requires a finer analysis than I can present here.<sup>60</sup> However, the issue of natural law was not

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53. *Id.* at 5.

54. *Id.*

55. Compare this to Le Fur's objective natural law which is "invariable." Le Fur, *La théorie du droit naturel*, *supra* note 6, at 388-89.

56. SCELLE, *PRÉCIS DE DROIT DES GENS*, vol. 1, *supra* note 6, at 32.

57. This substitution particularly stands out not only in Scelle's work, of course, but also in that of Marcel Sibert. See SIBERT, *supra* note 17, at 16. See generally BERLIA, *La doctrine de Georges Scelle: Étude de quelques thèmes*, in *DROIT PUBLIC INTERNE*, *supra* note 12, at 355; Rolin, *supra* note 1, at 310-12.

58. CAVARÉ, *supra* note 1, at 3-5, 70-87.

59. See, e.g., Basdevant, *supra* note 44, at 475. For a general overview of the understanding of legal sociology in international law at about this time, see Bartholomew Landheer, *Les théories de la sociologie contemporaine et le droit international*, 92 *RCADI* 519 (1957).

60. Of course, this is not the only reason for the decline of Jusnaturalism. See, e.g., CHARLES DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 66-68 (4th ed. 1970) [hereinafter CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*] (illustrating the increased influence of imperialist politics in the 19th century and the fact that the law-politics relationship contributed to the obsolescence of the "necessary law" proposition). Without denying the pertinence of this interpretation,

necessarily eliminated with natural law itself,<sup>61</sup> and certain, very marginal authors, may still be called Jusnaturalists.<sup>62</sup> Certainly, it was at this time that positivism began to become the heavily dominant intellectual configuration of French doctrine. This is shown by the fact that the historical division between positive and Jusnaturalist theories was replaced by divisions within the positivist movement.

## 2. *The Original Split Between Sociologism and Voluntarism*

In this regard, the sociological trend in international law ushered in by Scelle had the much more obvious effect in France of splitting French international law scholars into the Scellian and the anti-Scellian schools which we still speak of today.<sup>63</sup> This division arose from the fact that, while part of the positivist movement, sociological objectivism was also a doctrinal movement that developed in reaction to the dominant voluntarism of the internationalists of the time.<sup>64</sup> For Scelle, voluntarism was wrong on almost all counts because it embodied the classical doctrine which he wanted to break away from and to which he, among others, indirectly ascribed the inability to maintain peace.

At the time, there was the recurrent issue of foundations. For Scelle, reestablishing the objective law/positive law dichotomy enabled the foundation of positive law to be linked to the fact of social solidarity from which it emanated. For the voluntarists, the only fact they needed to acknowledge was states' "recognition" of the obligatory nature of international law.<sup>65</sup> The form that this voluntary foundation took is not important for this discussion, particularly because French voluntarists, being perhaps more pragmatic, seem to have been much less eloquent on these issues than Italian or German scholars. But this was not the essential issue for Scelle, whose strongest criticism was directed at bad "legal technique,"<sup>66</sup> accusing classical authors of false realism because, in their analyses of international law, they announced as legal realities what were mere fictions.<sup>67</sup>

the more relevant consideration is that until the mid-20th century, French authors continued to support the idea that an objective order was superior to law created by human consent.

61. The critical function of social objective law illustrates this concept, and that critical function should be preserved. *See generally* FRANÇOIS EWALD, *L'ÉTAT PROVIDENCE* (1986) (arguing for maintaining natural law, and discussing how society is problematic without natural law).

62. For example, Jean Touscoz considers his belief in spiritualist naturalism to be a result of his Catholicism. *See* JEAN TOUSCOZ, *DROIT INTERNATIONAL* 45 (1993). On the other hand, an author such as Paul Reuter does not seem to be a Justnaturalist despite the interpretation of Nguyen Quoc Dinh. *Compare* NGUYEN ET AL., *supra* note 21, at 80 (explaining that only certain moral principles undoubtedly found law, which is altogether different from the beliefs of Justnaturalists), *with* Paul Reuter, *Principes de droit international public*, 103 *RCADI* 425, 650 (1961) [hereinafter Reuter, *Principes de droit international public*].

63. *See, e.g.*, Combacau, *Science du droit et politique juridique, supra* note 25, at 984. *See also* R. de Lacharrière, *Notes, supra* note 10, at 368.

64. *See* SCELLE, *PRÉCIS DE DROIT DES GENS*, vol. 1, *supra* note 6, at 35-37. *See also* ALAIN PAPAUX & ERIC WYLER, *ETHIQUE DU DROIT INTERNATIONAL* 45 (1997).

65. *See also*, Giraud, *supra* note 1, at 427; Rousseau, *supra* note 18, at 389; Bastid, *Droit international public, supra* note 19, at 14-15.

66. SCELLE, *PRÉCIS DU DROIT DES GENS*, vol. 1, *supra* note 6, at 69.

67. *Id.* at 68-69.

Presenting his doctrine as “a new positivism,” or “neopositivism,” which, contrary to “classical positivism,” did not “resort to defective experimentation,”<sup>68</sup> Scelle undertook a realist observation of the most important (although ignored by classical authors) social facts in order to deduce the elements of his own conception of an international legal system.<sup>69</sup> Questioning the classical notion of the sovereign state, which he viewed as the worst of the fictions generated by formal (and obsolete, according to Scelle) voluntarism, Scelle proposed an international society in which interstatism gave way to the requirements of international, interindividual solidarity. This is another way that voluntarist dualism directly contradicts Scelle’s monist vision of law.<sup>70</sup>

In the end, the basic, fundamental principle underlying all of Scelle’s internationalist works and the one that enabled him to spur the progress of international society, was the principle of the “limitation of the state by law.”<sup>71</sup> Scelle wanted to create and defend this principle against the risk of arbitrariness, or even the negation of international law, which is inherent in classical voluntarism because it is a statist voluntarism. Accordingly, Scelle was driven by a particular vision based on the idea of progress, on the constant concern for relativizing the role of state consent in order to advance international law, to which future jurists would either rally or oppose. In his 1933 lectures, Scelle concluded that “[i]nternational law will advance to the extent it becomes *superstate*, but collapse to the extent state autarchy is maintained.”<sup>72</sup>

### 3. Normativism’s Limited Influence

Although the initial differences between these schools of thought persisted, their premises changed. Some authors, such as Marcel Sibert, overcame these differences by borrowing ambiguously from both schools of thought,<sup>73</sup> but they were nonetheless considerably influenced by Kelsen’s normativism. As I mentioned earlier, it was at this time that Kelsen published elements of his normative theory applied to international law.<sup>74</sup> Numerous studies have emphasized Kelsen’s resonance with and attraction for jurists.<sup>75</sup> However, Kelsen’s normativism influence may have had only a very limited

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68. *Id.* at 68.

69. *Id.* at 9 (criticizing the fictions of the Nation-person, sovereignty and interstate society).

70. Scelle finds that two main laws arise from this voluntarist dualism: (1) primacy of the international legal order, and (2) functional overlapping, according to which governments have jurisdiction to act as an organ of the international legal order. See SCELLE, COURS DE DROIT, *supra* note 1, at 21-22.

71. GEORGES SCELLE, 2 PRÉCIS DE DROIT DES GENS: PRINCIPES ET SYSTÉMATIQUE 70 (1934).

72. Scelle, *Règles générales*, *supra* note 6, at 693.

73. See, e.g., SIBERT, *supra* note 17, at 16, 33 (considering the concept of international public order, while criticizing a certain sociologism).

74. See Hans Kelsen, *Théorie générale du droit international public: Problèmes choisis*, 42 RCADI 117 (1932); Hans Kelsen, *Les rapports de système entre le droit interne et le droit international*, 14 RCADI 231 (1926).

75. See, e.g., Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT’L L. 287, 287-300 (1998) [hereinafter Leben, *Hans Kelsen*]; Anthony Carty, *The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law*, 9 EUR. J. INT’L L. 344 (1998) [hereinafter Carty, *The Continuing Influence of Kelsen*].



direct influence on French international law scholars.<sup>76</sup> For example, unlike the Vienna School in Austria, no normativist school was created in France, and, unlike the Swiss scholar Paul Guggenheim, no contemporary international scholars claim to be Kelsenians.<sup>77</sup> Nonetheless, post-1945 French scholarship bears witness to normativism's contribution to the legal vocabulary and even to the method of posing and resolving issues. In some ways, normativism defined the conceptual apparatus of positivism. In addition, Kelsen also theorized the role of science in international law in terms that made a profound impression on international scholars.<sup>78</sup> However, Kelsen's normativism is most evident in the way in which it indirectly came to support the anti-Scellians.

Kelsen's theory strengthened certain positions of French traditional voluntarism more than gaining direct support from committed normativists. At first glance, this influence may seem both surprising and paradoxical because Kelsen's doctrine seems closer to objectivism than voluntarism.<sup>79</sup> Scelle had in fact welcomed its monist conception of law and its critique of sovereignty and natural law.<sup>80</sup> Indeed, both authors highlighted the weaknesses of classical voluntarism, but throughout contemporary French thought, their differences turned out to be more important than their similarities.

While Kelsen and Scelle's shared critique of voluntarism is remembered, it is sometimes forgotten that Kelsen also severely criticized sociological theories,<sup>81</sup> which is why their conceptions of law were diametrically opposed. Where Scelle included law in social fact, Kelsen instituted a very firm separation between fact and law—between “is” and “ought to.” And while Scelle's positivism discovered the just legal rules that express social solidarity in the unfolding of historical events, Kelsen limited the scientific study of law to its legal existence and excluded value judgments from scientific rationality. The well known schism instituted by Kelsen immediately influenced the delimitation of legal science, which was limited to observing existing positive norms: interpretation based on explanations of a sociological, psychological, or axiological nature was prohibited. Theory had to be “pure,” or ideologically neutral; that is, it had to abstain from making any value judgments. Normativism was therefore a type of formalism, and from this standpoint as well, it strengthened classical voluntarist doctrine. Kelsen's doctrine seems to be at the root of the original, radical differences among contemporary French international scholars that persist today.

But if so many French international scholars were swayed by normativism, why didn't they adopt it wholesale, rather than remaining voluntarists? There are several reasons, the first being, perhaps, the existence of a deeply rooted French tradition

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76. See MICHEL VIRALLY, *LA PENSÉE JURIDIQUE VI* (1960) [hereinafter VIRALLY, *LA PENSÉE JURIDIQUE*].

77. See generally Paul Guggenheim, *Les principes de droit international public*, 80 *RCADI* 5, 6-33, 80-96 (1952).

78. See Leben, *Hans Kelsen*, *supra* note 75, at 287-305.

79. See SERRA, *DOCTRINES*, *supra* note 5, at 46-47; VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at VIII; NGUYEN ET AL., *supra* note 21, at 78-79.

80. See, e.g., SCELLE, *COURS DE DROIT*, *supra* note 1, at 69.

81. See Hans Kelsen, *La méthode et la notion fondamentale de la théorie pure du droit*, 42 *REVUE DE MÉTAPHYSIQUE ET DE MORALE: PARISSANT TOUR LES TROIS MOIS* 183, 187-88 (1935).

tending toward voluntarism rather than normativism, though the problem of founding the validity of international law also stands out as a decisive issue. Kelsen was so thoroughly unconvinced by the theory of a hypothetical fundamental norm<sup>82</sup> that internationalists probably preferred a voluntarist foundation. More generally, however, a construction that was considered abstract and detached from the reality of the international legal order was rejected as being unacceptable in practice, as Paul Reuter remarked in 1961.<sup>83</sup> From that point on, internationalists attracted by normativism have retained only those elements of the theory that support their own conception of international law.

#### 4. Marginalization of the Reims School

Thus the voluntarist approach persisted along with sociologism and even enjoyed an unexpected and paradoxical resurgence in France during the 1960s, 1970s, and 1980s with a specific militant school of thought. This school was very close to Marxism-Leninism, espousing the causes of Third World countries (and, thus, a new international economic order) while developing a new approach to international law. Part of this approach is discernible in the acts of the colloquia of Reims,<sup>84</sup> which reveal a doctrinal reflection on international law for which there are few examples today. Whether one agrees with the positions adopted, the remarkable vitality and dynamism of the “Reims School,” the most eminent representatives of which are Charles Chaumont and Monique Chemillier-Gendreau, must be applauded. In truth, Chaumont’s first works date from the inter-war period, but they gained favor with decolonization and emerging third-world thought. Later, in his lectures in The Hague, Chaumont criticized classical international law as being both Eurocentric and strictly formalist: an “unjust law” that stabilized a set of unequal relationships and forces within international society.<sup>85</sup> An application of the dialectical method revealed contradictions at work in international society and showed that change was the very principle of international law: progress, if it existed, could only be the result of contradictions that were overcome and then renewed. But in criticizing both false realism and the fictional nature of concepts used in classical doctrine, Chaumont maintained his voluntarist heritage: provided it was real, state consent was the

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82. In fact, the theory of a hypothetical fundamental norm is often misinterpreted. See GOYARD-FABRE, *LES FONDEMENTS*, *supra* note 13, at 355 (clarifying the theory of a hypothetical fundamental norm remarkably well).

83. See Reuter, *Principes de droit international public*, *supra* note 62, at 478-79. See also Rousseau, *supra* note 18, at 398; NGUYEN ET AL., *supra* note 21, at 103; MICHEL VIRALLY, *Notes sur la validité du droit et son fondement*, in VIRALLY, *LE DROIT INTERNATIONAL EN DEVENIR*, *supra* note 1, at 75-101 [hereinafter VIRALLY, *Notes sur la validité*]; CAVARÉ, *supra* note 1, at 75; DELBEZ, *supra* note 12, at 38-39; CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, *supra* note 60, at 82.

84. See *RÉALITÉS DU DROIT INTERNATIONAL CONTEMPORAIN: LES RAPPORTS ENTRE L’OBJET ET LA MÉTHODE EN DROIT INTERNATIONAL (ACTES DE LA HUITIÈME RENCONTRE DE REIMS) (1989)* [hereinafter *ACTES DE LA HUITIÈME RENCONTRE DE REIMS*]; *RÉALITÉS DU DROIT INTERNATIONAL CONTEMPORAIN: FORCE OBLIGATOIRE ET SUJETS DE DROIT (ACTES DES DEUXIÈME ET TROISIÈME RENCONTRES DE REIMS) (1976)* [hereinafter *ACTES DES DEUXIÈME ET TROISIÈME RENCONTRES DE REIMS*].

85. Chaumont, *Cours général*, *supra* note 1, at 343-44.

foundation of international law because it translated the sovereign will of peoples. "All the rest is literature."<sup>86</sup>

This school of thought is much richer than I can develop here, although its contribution stems more from sociology than from legal theory, and its attempt to demystify existing law is more satisfying than its reconstruction work.<sup>87</sup> Today, the analyses of the Reims School constitute givens for all French internationalist thought to the extent that they bring out, with great discipline and consistency, the tensions and contradictions at work behind the formalism of international law. The Reims School also expresses the legitimate hope for change and a strict requirement not to speculate in the abstract, but to address problems related to positive legal reality. That said, as Jacques Mourgeon indicated in 1974,<sup>88</sup> Marxist obedience is not necessary in order to take into account the unequal relationships at work in international society. Indeed, Marxism collapsed along with the various third-world variants that it had inspired. This is not to say that third-world thought is no longer followed in France, but that it takes other routes, and Marxist thinkers have had to regroup, no doubt at the price of painful revisions.<sup>89</sup> However, a major portion of the the ideological and epistemological foundation of the Reims School<sup>90</sup> no longer hold in the contemporary world, where philosophical criticism has revealed the internal contradictions of Marxism and its unacceptable political and ethical extensions. And yet, even though some (such as Robert Charvin, Francine Demichel, and Madjid Benchikh) still defend the Marxist analysis of international law as a "method of continuous creation,"<sup>91</sup> this method was essentially inadequate in developing a domestic understanding of international law and resulted in the inevitable marginalization of this movement, even in its current variants.<sup>92</sup>

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86. *Id.* at 367.

87. For a critique in this sense, see Alain Pellet, *Discours et réalités en droit international public. Reims: apport et limite d'une méthode*, in ACTES DE LA HUITIÈME RENCONTRE DE REIMS, *supra* note 84, at 8 [hereinafter Pellet, *Apport et limite d'une méthode*].

88. Jacques Mourgeon, *Conditions actuelles de l'élaboration du droit international public*, in L'ÉLABORATION DU DROIT INTERNATIONAL PUBLIC: SFDI COLLOQUE DE TOULOUSE 1, 3 (1975) [the collection: hereinafter SFDI COLLOQUE DE TOULOUSE].

89. See APOSTOLIDIS, *DOCTRINES JURIDIQUES*, *supra* note 35, at 72-85, 258-62 (providing an very interesting critique).

90. See Pellet, *Apport et limite d'une méthode*, *supra* note 87, at 8. Indeed, while Marxism provoked a certain critique within the Reims School, it seems that this school always shared Marxism's intellectual structure and analyzed international law as a domination technique. See APOSTOLIDIS, *DOCTRINES JURIDIQUES*, *supra* note 35, at 258-62 (showing that the methodological choice of the materialist dialectic is based on a theory of materialist knowledge and that even if it is not strictly Marxist, it has the same limits and perverse effects).

91. MADJID BENCHIKH, ROBERT CHARVIN & FRANCINE DEMICHEL, *INTRODUCTION CRITIQUE AU DROIT INTERNATIONAL* 9 (1986).

92. That is, international law in its Marxist or Maoist version. This does not mean, however, that the Reims School's critical inspiration has not endured, specifically in the international law of development. See, e.g., Ahmed Mahiou, *Une finalité entre le développement et la dépendance*, in LA FORMATION DES NORMES EN DROIT INTERNATIONAL DU DÉVELOPPEMENT 17 (Maurice Flory, Ahmed Mahiou & Jean Robert Henry eds., 1984) [hereinafter LA FORMATION DES NORMES].

### C. Overall Assessment of this Evolution

Overall, the only lasting division that contemporary French international scholars have directly inherited is the one that splits French positivism into sociologism and voluntarism. This division has emerged over the last forty years as legal positivism gained preference over Jusnaturalist doctrines. The shift gained strength from collapse of the Marxist school (and the marginalization of those it inspired), as well as the incorporation of certain elements of normative theory. This is not to say that the current doctrine can be neatly divided into two schools of thought, but these two schools still constitute the two major, historically constituted pillars. In France, both have been presented as scientific and realist approaches to international law and they share a theoretical foundation upon which the various contemporary positions are built. In other words, these two schools of thought structured the contemporary doctrine without limiting or reducing it. Therefore, while international scholars' legal thinking developed in a highly technical fashion, it otherwise resembled that of scholars of other branches of law. I do not mean this disparagingly; it is merely the logical result of the evolution of both international law itself and the scholars who analyze it.

I turn now to the effects of this evolution on the tenor of the most recent debates. Has this overall shift in thinking been costly for the internationalists because it aims to eliminate Jusnaturalism from doctrine and speculation from methodology? Have French scholars really abandoned Jusnaturalism and speculation? What are the implications either way?

### III. CONFIGURATION OF THE CONTEMPORARY FRENCH DOCTRINAL DEBATE

Just mentioning a doctrinal debate implies that there is one. This is not evident today when numerous authors, generally Anglo-Americans,<sup>93</sup> make scathing attacks (which in themselves arouse my suspicion) on the sort of general agnosticism in which all international doctrine seems to be plunged, which they assert means not only the end of doctrine, but also of international law. In this regard, they are simply repeating an old criticism of positivism's technicality and formalism, and of scientism in general.<sup>94</sup> In a more measured manner, some French authors have arrived at the same conclusion,<sup>95</sup> pointing out that as international law became a positive science, French

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93. See, e.g., ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS*, at vii, 25-39, 128-31 (1986); Carty, *The Continuing Influence of Kelsen*, *supra* note 75, at 344-54; David Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT'L L.J.* 1 (1988). See also MARTTI KOSKENNEIMI, *FROM APOLOGIA TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT*, at XIII-XVI, XIX-XXIV (1989). These authors write from a critical legal studies perspective. I do not want to stereotype, however, as their critiques are quite varied and do not affect the Anglo-American school and the Continental or European school in the same way. Moreover, they seem to incorporate several different influences ranging from American realism—and the criticism of formalism—to the interpretative and deconstructionist school, which seeks to highlight the psycho-sociological strategies behind each interpretation of international law norms. See, e.g., *id.* at XXIV.

94. See Paul Amssek, *Propos introductif to THÉORIE DU DROIT ET SCIENCE* 8-12 (Paul Amssek ed. 1994). As for the idea of a general doctrinal decline, it has become a genuine "common ground." See Denis Alland & O. Beaud, *Ouverture: Dix ans de Droits*, 20 *DROITS* 4 (1994). See generally CHRISTIAN ATIAS, *EPISTÉMOLOGIE JURIDIQUE* (1985); ATIAS, *THÉORIE CONTRE L'ARBITRAIRE*, *supra* note 39.

95. See, e.g., R. de Lacharrière, *Notes*, *supra* note 10, at 363-65; APOSTOLIDIS, *DOCTRINES JURIDIQUES*, *supra* note 35, at 3-10; MICHEL VIRALLY, *A propos de la "lex ferenda"*, in VIRALLY, *LE DROIT*

scholars stopped questioning it as they had in the past.<sup>96</sup> They claim that under calmer skies, they have eliminated general theoretical reflection, which no one could prove contributed to an overall understanding of the legal phenomenon. But this is precisely where the price to be paid may be highest, even with regard to the real advantages that French scholars gained through the increased technical dimension of their knowledge of the law. This seeming paradox is observable today: the formidable expansion of international law goes hand in hand with an almost comparable reduction in the scope of internationalist scientific thought.<sup>97</sup> International scholars may therefore no longer have the means to adequately theorize contemporary international law. By becoming agile professionals who have no soul and doubt the usefulness of doctrinal work, we have become the gravediggers of our own theory. This is far from a new criticism, but it now applies fully to contemporary French international scholars who are happy to disengage from theory.<sup>98</sup>

In spite of the truthfulness of certain critiques and the seriousness with which they must be regarded, I am not convinced by this description of slow doctrinal decomposition: it is old and exaggerated and does not correspond at all to the reality of the contemporary French doctrinal debate. Responding to such an extremely complex criticism would require summoning a more general movement stemming from the subjectivism and relativism that dominates French legal culture today. I will nonetheless try to identify what the contemporary doctrine is, not by systematizing in a general way what international law theory should be, but by moving empirically through various attitudes and positions. Even though a brief assessment will be necessary, I believe it will become clear that, above all, the debate is hidden and has changed.

#### A. The Hidden Doctrinal Debate

Building a general theory seems almost inconceivable today and would, no doubt, be received with irony by a few contemporary internationalists. As René de

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INTERNATIONAL EN DEVENIR, *supra* note 1, at 213-26 [hereinafter VIRALLY, *A propos de la "lex ferenda"*]; André Oraison, *La place des jurisconsultes*, 24 RBDI 527, 527-34 (1991) [hereinafter Oraison, *La place des jurisconsultes*] (revealing even greater nuances). See generally Paul Amsselek, *L'interpellation actuelle de la réflexion philosophique par le droit*, 4 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 123 (1987); Jacqueline Gatti-Montain, *Le droit et son enseignement: Un demi siècle de réflexion*, 4 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 109 (1987); Simone Goyard-Fabre, *Le droit est-il de ce monde?*, 4 DROITS: REVUE FRANÇAISE DE THÉORIE JURIDIQUE 35 (1987).

96. See Peter Haggemacher, *Les origines du droit international au début des temps modernes: Projections et perspectives*, in 500 ANNI DI SOLITUDINE. LA CONQUISTA DELL'AMERICA E IL DIRITTO INTERNAZIONALE 125, 125-26 (1994) [hereinafter Haggemacher, *Les origines du droit international*].

97. See generally Jean-Jacques Bienvenu, *Remarques sur quelques tendances de la doctrine contemporaine en droit administratif*, 1 DROITS 153 (1985); Philippe Jestaz, *Déclin de la doctrine?*, 20 DROITS 85 (1994) (offering this observation with respect to private law).

98. At least, French international scholars are suspicious of doctrinal constructions. See Suzanne Bastid, *Ambitions et limites de l'ordre juridique international*, in ÉTUDES DE DROIT INTERNATIONAL EN L'HONNEUR DU JUGE MANFRED LACHS 45, 54 (Jerzy Makarczyk ed., 1984) [hereinafter Bastid, *Ambitions et limites*] (criticizing the "system makers"); LAURENT LUCHINI & MICHEL VOELCKEL, 1 DROIT DE LA MER, at I (1990) (claiming that they want to avoid overly speculative grand constructions). As I indicate below, the point is to show that one is realist.

Lacharrière remarked laconically in 1984, “We have to get used to the idea that theoretical syntheses and doctrinal controversies are part of the past, and that today’s preoccupations inevitably turn away from them.”<sup>99</sup> To be sure, contemporary internationalist thought has become so fragmented and specialized and has so staunchly resisted the erection of vast speculative edifices that the major systems of thought of the past have taken on the character of relics or curios. There seems to be a feeling that a healthy halt was called to this old, overly theoretical system of international law, which seemed to get bogged down in sterile dogmatic quarrels and which, for some, symbolized the errors of the past. The mistrust of the systematic and speculative approach is deeply rooted in our minds. But does this mean doctrinal debate has been extinguished in France? I think it is simply hidden behind this methodological attitude, which requires a closer examination in order to better understand its scope.

### *1. Limits of the Doctrinal and Factual Evolution*

First of all, it is beyond dispute that this mistrust resulted from the doctrinal and factual evolution discussed above. The desire for concreteness and the need to specialize and engage only in empirical observation of positive law encouraged French scholars to back away from overarching theories. But these factors were not enough to define it. Without going into detail, I will try to indicate the breadth of the problem with a few simple observations. The first positive theories, whether normativist, voluntarist, or sociological, sought to develop a general system of thought. Positivism, thus understood at the time, was far from a definitive obstacle to developing a general theory. Similarly, the increased specialization of international law contributed to this more pragmatic and technical approach, but I would not go so far as to say it definitively precluded any attempt at elaborating a system of thought. With these factors in mind, I will examine the recent shift in the methodological focus of French scholars, which can be seen as a return to the original spirit of positivism. In fact, re-emphasizing the realist method crystallizes the rejection of abusive generalizations and partially dispels the ambiguities related to this attitude.

### *2. Renewed Realist Methodological Focus*

From this point of view, two authors with very different backgrounds, Charles de Visscher and Guy de Lacharrière, embody the desire to return to a realist vision of international law. Both seem to have had the rare privilege of having a direct impact on the current behavior of French internationalists. Therefore, whether or not internationalists agree with their understanding of international law, they continue to

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99. R. de Lacharrière, *Notes*, *supra* note 10, at 364. Of course, we still study various issues of this order and sometimes even issues directly related to the “general theory of international public law,” but we no longer seek to develop a complete theory on international law. See Weil, *Toujours*, *supra* note 3, at 6 (collecting essays under the title of “International Law”). This is probably a more recent phenomenon than we think, as evidenced by authors who still seemed to want a systematic doctrinal construction in the 1960s. See, e.g., Rousseau, *supra* note 18, at 374 (proposing a general theory). However, Rousseau represented the end of the systematic doctrinal movement. See François, *supra* note 31, at 277.

provide a reference point.<sup>100</sup> At the same time, they strengthen the positions of their respective schools of thought.

Visscher breathed new life into positivism—undertaking a kind of self-critique that set the doctrine back on track and choosing a deliberately realist approach that avoided too many formal generalizations.<sup>101</sup> He also adopted a sociologizing perspective, which resurrected the prior litany of sociologist criticisms of voluntarism. In his lectures in The Hague in 1954, Visscher asserted that a realist approach was absolutely necessary in the normative science of international law because it was less developed than others. Therefore, factors that constituted obstacles to the effectiveness of rules had to be taken into consideration: “the only productive doctrine is one that takes reality into account.”<sup>102</sup> He thus criticized any approach that was too formalistic and associated formalism in a very classical way with voluntarism, which he incorrectly considered to be “the old-fashioned relic of a bygone era.”<sup>103</sup> Visscher’s realism was designed to keep “the law in contact with social fact.”<sup>104</sup> However, he did not veer into classical sociologism—the “chimerical enterprise” he criticized as wanting to directly deduce law from social fact.<sup>105</sup> Denouncing both the voluntarists and the sociologists, Visscher focused on methodology.<sup>106</sup> His central preoccupation was to discover a method for understanding international law in its complex reality. He wanted to avoid the temptations of the mirage of abstract and formal constructions

100. With respect to Ch. de Visscher, see Chaumont, *Cours général*, *supra* note 1, at 368; CAVARÉ, *supra* note 43, at 87; René-Jean Dupuy, *Cours général de droit international public*, 165 RCADI 39 (1979) [hereinafter R.J. Dupuy, *Cours général*]; DELBEZ, *supra* note 12, at 11; P.M. DUPUY, DROIT INTERNATIONAL PUBLIC, *supra* note 10, at 6; Rolin, *supra* note 1, at 309, 319 n.2. With respect to G. de Lacharrière, see Alland, *supra* note 15, at 18, 24; Combacau, *supra* note 25, at 980-89; Alain Pellet, *Le “bon droit” et l’ivraie—Plaidoyer pour l’ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)*, in MÉLANGES OFFERTS À CHARLES CHAUMONT, *supra* note 7, at 465, 471 [hereinafter Pellet, *Le “bon droit” et l’ivraie*]; Hubert Thierry, *Internationalisme et normativisme*, in GUY LADREIT DE LACHARRIÈRE ET LA POLITIQUE JURIDIQUE EXTÉRIEURE DE LA FRANCE 370, 377 (1989) [hereinafter Thierry, *Internationalisme et normativisme*]; CARREAU, *supra* note 11, at 37; DECAUX, *supra* note 15, at 11; LUCCHINI & VOELCKEL, *supra* note 98, at 1.

101. Ch. de Visscher, *Cours général*, *supra* note 43, at 449; Charles de Visscher, *Méthode et système en droit international*, 138 RCADI 75, 75-79 (1973) [hereinafter Ch. de Visscher, *Méthode et système*]. See also Paul de Visscher, *Cours général de droit international public*, 136 RCADI 9 (1972) [hereinafter P. de Visscher, *Cours général*]; René-Jean Dupuy, *La contribution de l’Académie au développement du droit international*, 138 RCADI 51, 65 (1973) (raising this aspect of Ch. de Visscher’s doctrine). See also JOE VERHOEVEN, LA RECONNAISSANCE INTERNATIONALE DANS LA PRATIQUE CONTEMPORAINE: LES RÉLATIONS PUBLIQUES INTERNATIONALES 843-44 (1975) (citing Ch. de Visscher). Verhoeven’s dissertation director was P. de Visscher, who with respect to this issue, rightly believed that there was a “Louvain school.” See Paul de Visscher, *Préface* to VERHOEVEN, *supra* note 101, at XI. This Belgian school cultivated Ch. de Visscher’s realist and methodological orientation, which had the impact on French doctrine that I have previously discussed.

102. Ch. de Visscher, *Cours général*, *supra* note 43, at 450.

103. *Id.* at 453.

104. *Id.* at 450.

105. *Id.* at 451. Ch. de Visscher was criticized by some dialecticians. See, e.g., Monique Chemillier-Gendreau, *Le rôle de l’effectivité en droit international*, in ACTES DES DEUXIÈME ET TROISIÈME RENCONTRES DE REIMS, *supra* note 84, at 79-100.

106. This thought is better expressed in Ch. de Visscher’s brief remarks at The Hague in 1973. See Ch. de Visscher, *Méthode et système*, *supra* note 101, at 76.

that were developed without reference to reality, preferring instead the concrete and tedious observation of existing legal norms and situations.<sup>107</sup>

In an entirely different way, G. de Lacharrière also expressed concern with the realist method; but he supported the voluntarist vision of law. Criticizing the divorce that all too often occurs between words and things or between legal discourse and the reality of behaviors,<sup>108</sup> G. de Lacharrière demanded that international law be understood as, above all, the subject of state strategies,<sup>109</sup> and that international scholars adopt a deliberately realist approach. He explained that “describing existing law as opposed to that which appears desirable is the jurist’s first task.”<sup>110</sup>

Despite the fact that the originality of Visscher and G. de Lacharrière’s respective backgrounds is undeniable and tends to presage their later doctrinal split, these differences do not overshadow the shared desire of these authors to “return to things.” It is easy to see that French international scholars of all stripes found these authors’ approach seductive to the extent that they, particularly Visscher, expressed the contemporary tendency to want to create distance from major systems of thought as they became dogmatic and embodied a false idealist vision of international law. It also seems that a strong and generalized critique of the formalism of classical law encouraged internationalists to try to avoid its excesses by using the reality of the international legal order to justify their interpretations.

The classical quarrel between idealism and realism is therefore reemerging within the French scientific community.<sup>111</sup> Each side claims to have a resolutely realist method and, on this pretext, criticizes others for waxing too idealistic about international law.<sup>112</sup> But this insistence on claiming to be realists is the primary characteristic of the contemporary French approach to international law.<sup>113</sup> Oddly enough, this is what connects all French international scholars—they all, even the Marxists,<sup>114</sup> claim allegiance to it—and at the same time divides them. As everyone knows,<sup>115</sup> there is a realist tradition of legal sociology in international law, symbolized somewhat by Aron, but also defended by Scelle and later by all those who more or less emphasize international law as a social discipline. But it is remarkable to see that voluntarists, often accused of being formalists, criticize the realists for their idealist leanings.<sup>116</sup>

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107. CH. DE VISSCHER, THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC, *supra* note 60, at 9-10.

108. G. de Lacharrière, *La réglementation*, *supra* note 24, at 356.

109. G. DE LACHARRIÈRE, LA POLITIQUE JURIDIQUE, *supra* note 23, at 10.

110. G. de Lacharrière, *La réglementation*, *supra* note 24, at 361.

111. Ch. de Visscher did not believe that an idealist vision of international law had to be abandoned entirely. Instead, he suggested that it had to be associated as closely as possible with an approach that was close to reality in all other respects. See Ch. de Visscher, *Cours général*, *supra* note 43, at 450.

112. Reuter, *Principes de droit international public*, *supra* note 62, at 650; MICHEL VIRALLY, *Sur la prétendue ‘primitivité’ du droit international*, in VIRALLY, LE DROIT INTERNATIONAL EN DEVENIR, *supra* note 1, at 98 [hereinafter VIRALLY, *Sur la prétendue*]; P.M. DUPUY, DROIT INTERNATIONAL PUBLIC, *supra* note 10, at 8, 363; Pellet, *Le “bon droit” et l’ivraie*, *supra* note 100, at 487; R. de Lacharrière, *Notes*, *supra* note 10, at 370-71.

113. See P. de Visscher, *Cours général*, *supra* note 101, at 9.

114. See, e.g., Chaumont, *Cours général*, *supra* note 1, at 362 (criticizing others’ false realism).

115. VIRALLY, *Réflexions*, *supra* note 22, at 126. See also DELBEZ, *supra* note 12, at 11.

116. See, e.g., R. de Lacharrière, *Notes*, *supra* note 10, at 370 (criticizing Scellism for its false realism and illusion of being a science when it is, in fact, an idealist vision that does not correspond to the reality of existing law).



If we set aside for the moment what divides idealists and realists, it is easier to see what they have in common. It is not realism in the strict sense (recently criticized by Antonio Cassese) according to which international law is considered to obey only power and strength.<sup>117</sup> Nor is it the more qualified political realism of G. de Lacharrière or the sociologizing realism of Visscher because the disagreement is centered between these two versions. Instead, it is a methodological realism that emphasizes fidelity to the real. It is the idea, this time shared by all, that thinking about international law should not get bogged down in all-or-nothing dogma or in theoretical contributions the supposed universality of which prohibits criticism.

Before 1945, the desire to turn law into science produced very abstract theories because this level of abstraction was the sign of a scientific approach.<sup>118</sup> But when these theoretical edifices fossilize the science of law and distance/remove/separate it from the shifting reality of international law, it is time to escape, particularly because science is now considered as the area in which all truths may be challenged.<sup>119</sup> We are thus witnessing today the erosion of the great edifices in favor of an approach that refuses to be predetermined by earlier doctrinal choices. Everything has become the subject of acute observation, of the fine interpretation of existing international law, and therefore of methodological choices pertinent to this movement.

In such a context, contemporary authors are no longer able to lay claim to a certain legal idealism in the name of a doctrine that now fails them, a doctrine that they do not want to reinvent. Nonetheless, they have not drifted into a limited realism; they take into account the idealist dimension inherent in most representations of international law, by either identifying it as a utopia, as do René-Jean Dupuy and Serge Sur,<sup>120</sup> for example, or by incorporating it into the now-common distinction between *lex lata* and *lex ferenda* that Virally considered one of the most fundamental achievements of legal thinking.<sup>121</sup> In the end, this is the point of departure for all contemporary French discourse. The distance between contemporary French doctrine and general theory or the major constructions of the past should therefore not be surprising. The change results in part from the specialization of international law and has now been fully legitimated by the realist turn of the last few years. This doesn't mean this attitude is irreproachable, but scholars seem sufficiently sure of their choices to be contented with them. Hence, we see the homage paid today to the great French international scholars, such as Charles Rousseau, Michel Virally, Paul Reuter, and Hubert Thierry, who

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117. ANTONIO CASSESE, *VIOLENCE ET DROIT DANS UN MONDE DIVISÉ* 12 (1990).

118. This was indicated earlier by Ch. de Visscher in *Méthode et système*, *supra* note 101, at 75. This effort to be abstract was in fact a reaction to the heteroclitite and anecdotal nature of numerous earlier works. See Charvin, *supra* note 7, at 138.

119. See VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at I (“In law, as elsewhere, the time has come to stop chasing the chimera of a decisive truth.”). See also Weil, *Toujours*, *supra* note 3, at 7.

120. See Serge Sur, *Système juridique international et utopie*, in 32 *ARCHIVES DE PHILOSOPHIE DU DROIT: LE DROIT INTERNATIONAL* 35, 35-45 (1987) [hereinafter Sur, *Système juridique international et utopie*]; RENÉ-JEAN DUPUY, *LA CLÔTURE DU SYSTÈME INTERNATIONAL: LA CITÉ TERRESTRE* 154-59 (1989). On the notion of myth, see generally, RENÉ-JEAN DUPUY, *LA COMMUNAUTÉ INTERNATIONALE ENTRE LE MYTHE ET L'HISTOIRE* (1986) [hereinafter R.J. DUPUY, *LA COMMUNAUTÉ INTERNATIONALE*].

121. See VIRALLY, *A propos de la “lex ferenda”*, *supra* note 95, at 213-23. During my years as a professor, I have discovered only one author who has had the courage to admit his idealism, even while defending sociological objectivism. See Pellet, *Apport et limite d'une méthode*, *supra* note 87, at 5.

always asserted their desire to abstain from developing great doctrinal constructions and to avoid abusive systemization.<sup>122</sup>

As R.J. Dupuy explained with respect to Visscher,

[t]he great merit, to my eyes, of these latest visions of international law . . . lies precisely in their diversified approach and in the fact that they tend not to present a new theory, but rather, they implement methods of analysis . . . . Systemic views all want to be fundamental truths, cosmogonies, explanations of the finalities of history. My ambition conforms to the last message of Ch. de Visscher.<sup>123</sup>

This refusal to enlarge the “store of theories,” to borrow another of Dupuy’s phrases, was at the heart of Visscher’s book, and it is hard not to think of the incredible chasm that seems to be opening up in this regard between scholars of the present and the past. As Scelle famously put it,

[a]ll international scholars belong to the school of legal philosophy that dominates their teaching. It is only by being dishonest with oneself or one’s students that a scholar can avoid emphasizing what he believes to be scientific truth. Unless one is presumptuous, one must discuss doctrinal concepts different from one’s own.<sup>124</sup>

At the same time, such a compliment addressed to the great Belgian jurist might be surprising on the part of one of France’s most eminent theoreticians. R.J. Dupuy’s work is indeed remarkable for its attempt to conceptualize the state of contemporary international society without relying solely on a technical analysis of the law. Of course, his highly original method of open dialectic is intended to be realist and overcomes any idea of theorizing. In R.J. Dupuy’s work, as in Visscher’s, method

122. Hubert Thierry did not “concern himself with developing a system or forming a school. He did better: he formed minds, enabling those of us who were close to him to fully be or become ourselves.” Serge Sur & Emmanuel Decaux, *Avant propos* to MÉLANGES OFFERTS À H. THIERRY (1998) [hereinafter MÉLANGES OFFERTS À H. THIERRY]. Other authors have underscored Virally’s refusal to remain closeted in existing systems and his attachment to the realism of Ch. de Visscher. See Mario Bettati, Jean-Pierre Queneudec & Jean-Didier Sicault, *Hommage du comité de rédaction de la RGDIP*, 93 RGDIP, at VIII (1989). Pellet and Pierre Michel Eisemann considered Reuter to be “one of the most penetrating internationalists of his time;” however, they felt that he was not dogmatic and that “he did not create a ‘school,’ but did not lack for disciples who were often quite talented.” Pierre Michel Eisemann & Alain Pellet, *Avant propos*, to PAUL REUTER, LE DÉVELOPPEMENT DE L’ORDRE JURIDIQUE INTERNATIONAL: ÉCRITS DE DROIT INTERNATIONAL, at V, VII (1995) [hereinafter REUTER, LE DÉVELOPPEMENT DE L’ORDRE JURIDIQUE INTERNATIONAL]. They underscored that “his free spirit, concerned with others’ freedom, preferred to advance by small touches,” namely by incorporating “all facets of a reality he well knew too complex to be apprehended by ‘system makers.’” *Id.* See also Jean Combacau, *Paul Reuter, le juriste*, 35 AFDI, at VII, IX, XVII, XVIII (1989) (an homage to Reuter indicating that he never created a school, but that “his works are the richest and most personal of contemporary law,” and that he had no taste for systematicity and warned against overusing abstractions); René-Jean Dupuy, *Paul de Visscher à l’Académie de droit international, in ÉVOLUTION CONSTITUTIONNELLE EN BELGIQUE ET RELATIONS INTERNATIONALES: HOMMAGE À PAUL DE VISSCHER*, 1, 2 (1984) (“I would simply like to remark on the striking feature of his scientific approach: realism. Having often visited and inventoried the store of theories, he found it well enough stocked and did not want to add another system to all those piled up in there.”).

123. R.J. Dupuy, *Cours général*, *supra* note 100, at 39.

124. SCELLE, PRÉCIS DE DROIT DES GENS, *supra* note 6, at VIII (cited in APOSTOLIDIS, *supra* note 35, at 7); NGUYEN ET AL., *supra* note 21, at 107. See also, e.g., Le Fur, *La théorie du droit naturel*, *supra* note 6, at 263 (“After a period of negation of all law other than positive law, I finally realized that one cannot make law without a minimum of philosophy and even, as I will show, metaphysics.”).

prevails over system.<sup>125</sup> But all the same, if any contemporary author has theorized and systematized doctrine, it seems to me that it is R.J. Dupuy. There is thus a misunderstanding that must be cleared up.

### 3. *Dispelling Ambiguity*

In fact, I am tempted to believe that such a consensus formed around methodological realism because it resembles the best of the positivist tradition: the idea that legal theories can be developed only from rigorous observation of existing reality and that their truth depends on conformity with that reality. This approach has merit as a simple method for overcoming doctrinal disputes, as Jean Touscoz indicates.<sup>126</sup> Of course, no method is neutral, and this one falls within the positivist vision of law, but it is sufficiently general for all of us to lay claim to it. In this way, it undeniably supported the general turn of French scholars towards this pragmatic and methodological positivism that was so decried by some. And yet, the attention paid to empirical observation—the focus on method itself to the detriment of formal generalizations—has not had the devastating consequences that some have ascribed to it. The problematical dimension of such an attitude stems in part from an ambiguity—the inaccurate description that this approach necessarily excludes all doctrinal discussion.

First of all, if French internationalists are no longer builders of great theories, it is for the simple reason, underscored by R.J. Dupuy, that we have inherited them directly. Regardless of the epistemological attitude, the fundamental choices that we try to make can only be made in the conceptual space that others defined earlier. These theories are no longer unchallenged truths; they are understood. This is the result of the evolution that I discussed earlier. This sort of blank slate of the past maintains—wrongly so, according to some—the illusion that we are totally free, while at the same time, the basic requirements of these great constructions inevitably persist.<sup>127</sup> Try as we might to abandon them,<sup>128</sup> or to suggest that internationalists need

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125. R.J. Dupuy, *Cours général*, *supra* note 100, at 39-42. I cannot explain here R.J. Dupuy's realist method, which provided a particular insight into contemporary international law but, at the same time, because of its specificity, no doubt had much less influence on French internationalists than did Ch. de Visscher. The open dialectical method is much more original and interesting than the Marxist dialectic because R.J. Dupuy proposed using a dialectic that avoided the pitfalls of historicism. His work, therefore, seems very contemporary in its refusal to overcome contradictions and its acceptance of inevitable analytical dispersion. He calls for thinking about the persistence of relativism while introducing a positive function of utopia in the unfolding of history. In this respect, Kant is no doubt a source, as well as Scelle and especially Alexandre Marc. See Claude Nigoul, *René-Jean Dupuy et le fédéralisme de Georges Scelle à Alexandre Marc*, in *HUMANITÉ ET DROIT INTERNATIONAL: MÉLANGES RÉNÉ-JEAN DUPUY* 233, 233-40 (1991). Chaumont's dialectic, on the other hand, takes directly from Hegel, Marx, and no doubt, Mao. Without denying the fruitfulness of their respective contributions, Scelle and Marc both developed an external approach to law that is closer to sociology, or even at times to philosophy, than to legal theory.

126. TOUSCOZ, *DROIT INTERNATIONAL*, *supra* note 62, at 48-49. For a more in-depth study, though the same conclusions are not always reached, see generally Norberto Bobbio, *Sur le positivisme juridique*, in *MÉLANGES EN L'HONNEUR DE PAUL ROUBIER* 53, 53-73 (1961).

127. See Michel Troper, *Positivism*, in *DICTIONNAIRE ENCYCLOPÉDIQUE DE THÉORIE ET DE SOCIOLOGIE DU DROIT*, *supra* note 11, at 462.

128. Oraison, *Réflexions*, *supra* note 10, at 578; R. de Lacharrière, *Notes*, *supra* note 10, at 367-68; Amselek, *L'interpellation actuelle de la réflexion philosophique par le droit*, *supra* note 95, at 124.

to use more imagination,<sup>129</sup> I do not see how legal thinking can escape them definitively. The very idea of a response that is not based on either a positivist or Jurnaturalist vision of law leaves me deeply puzzled. Thought has structures that are not indefinitely renewable. It is a fact that law can be defined in multiple ways; however, it is also true that these definitions rest, even implicitly, on a few basic choices that also constitute unavoidable limits. This is why contemporary French thought made its choices in this doctrinal universe—opting for a pragmatic positivism that stands uncontested in its domination of the behaviors and reflexes of just about all contemporary authors.

In expressing myself this way, I am suggesting the image of a deliberate and conscious choice; however, this movement toward a certain type of positivism was no doubt much more complex and difficult to analyze. This observation might also have a profoundly pessimistic aspect, and at bottom, it might reinforce the idea of a doctrinal decline. But making a simple assessment from a limited number of existing positions expressed on the nature and the foundation of law does not preclude the possibility of renewing the issue by situating these positions within our modernity. Rather than trying unsuccessfully to reject the theoretical models of the past, I believe we are trying to reconstitute them and, at the same time, oppose their dogmatic derivations, which warrant criticism for inducing an outdated vision of international law.

Within the resultant non-dogmatic perspective, developing a general theory that takes into account current epistemological requirements is entirely imaginable. And it is not prohibited to follow parallel routes that might lead to understanding the specificity of international law and that might therefore lead scholars out of the impasse in which the old quarrels seem to be mired, even if all thought eventually leads there. This is where the merit lies, for example, in Virally's phenomenological approach and from Eric David and Jean-Paul Jacqu e's taking into account of language<sup>130</sup> to Charles Leben and H.L.A. Hart's return to Alexandre Koj ve's works.<sup>131</sup> All express an appealing desire to find another way to approach the understanding of international law, as well as a belief in the value of doctrinal work.

Next, in French culture there is a real reticence to make very firm or definitive theoretical commitments because beyond an objective agreement on basic principles, theoretical positions can be multiple and contradictory. As some have remarked, it is much more difficult to place French international scholars according to doctrine because they lack a school of thought to defend.<sup>132</sup> The permeability and flexibility of points of view, which are only exposed in fragments, generally prohibit an overall

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129. VIRALLY, *Sur la pr tendue*, *supra* note 112, at 100.

130. *Contra* Eric David, *Le performatif dans l' nonciation et le fondement du droit international*, in M LANGES OFFERTS   CH. CHAUMONT, *supra* note 7, at 241-61 (David takes language into account in a materialist perspective); *see* Jean-Paul Jacqu e, *Actes et norme en droit international public*, 227 RCADI 357 (1991).

131. *See* H.L.A. HART, *THE CONCEPT OF LAW* 37 (1961).

132. This proposition is contrary to those of authors writing at the beginning of the twentieth century. *See, e.g.*, Charvin, *supra* note 7, at 135.

theoretical understanding.<sup>133</sup> However, here again, the relative and episodic nature of taking positions in no way stops doctrinal reflection from unfolding. It represents a limit, but does not constitute the contemporary period, which is epitomized by the fallibility of science. It also represents an advantage because, by accepting multiple interpretations, it *a priori* avoids monolithic thought.

In other words, doctrinal reflection is simply hidden behind this posture that corresponds to the new requirements of reason. To back up that statement, I will provide a few examples of this persistence in France, though I am fully conscious that my analysis requires further development. First, I would underscore that some French authors have very clearly taken a doctrinal path. These authors include Serge Sur, Jean Combacau, Quoc Dinh Nguyen, Alain Pellet, Patrick Daillet, and Pierre-Marie Dupuy. In different ways, these authors have all asserted their positivism to enable readers to better understand their approach.<sup>134</sup> In the same way, when an author such as Prosper Weil engages in polemics, he can stir up true passions.<sup>135</sup> By giving our authors credit for their theoretical commitments, which sometimes pushes them, such as in the case of Weil, to expose themselves greatly, I am responding to another element of the critique. While some find the research climate in France highly convivial,<sup>136</sup> others see in this relative entente a mutual tolerance that is close to total indifference as to each other's commitments, which is prejudicial to the existence of a true doctrinal debate.<sup>137</sup> No one would deny, however, that when Weil published his article on relative normativity in 1982, a great controversy broke out in France that is far from over, as I will show below.<sup>138</sup>

Still, international scholars have not given up on systematizing the many legal rules of the international order on the pretext that they are the subjects of particular practices that overly individualize them. While international law becomes more and more dispersed in diverse practices, it still needs to be organized according to a global system that French scholars have a talent for expressing consistently and systematically, as Combacau's remarkable studies illustrate.<sup>139</sup> Through this activity

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133. Accordingly, I applaud the recent publication of books regrouping articles written by contemporary French authors such as Reuter, Virally, and Weil.

134. See, e.g., COMBACAU & SUR, *supra* note 26, at V; P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 7-8; NGUYEN ET AL., *supra* note 21, at 107.

135. See Leben, *Une nouvelle controverse*, *supra* note 4, at 121-30 (indicating that the controversy started in 1971 at the SFDI Colloque d'Orléans on economic international law). See generally Prosper Weil, *Le droit international économique: Mythe ou réalité?*, in *ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE* 3, 3-34, 117-56 (1972) [hereinafter Weil, *Le droit international économique*]. See also P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 327-62; Alain Pellet, *Contre la tyrannie de la ligne droite: Aspects de la formation des normes en droit international de l'économie et du développement*, in *XIX SOURCES OF INTERNATIONAL LAW: THESAURUS ACROASIMUM* 291, 294-95 (1992) [hereinafter Pellet, *Contre la tyrannie de la ligne droite*]; Thierry, *Internationalisme et normativisme*, *supra* note 100, at 370-80.

136. Burdeau, *supra* note 36, at 34. According to R. de Lacharrière, it is a milieu "with gentle customs." R. de Lacharrière, *Notes*, *supra* note 10, at 369.

137. BENCHIKH ET AL., *supra* note 91, at 49-50.

138. Weil, *Vers une normativité*, *supra* note 14, at 5-47.

139. See generally Jean Combacau, *Le droit international: bric-à-brac ou système?*, in 31 *ARCHIVES DE PHILOSOPHIE DU DROIT: LE SYSTÈME JURIDIQUE* 85 (1986) [hereinafter Combacau, *Le droit international: bric-à-brac ou système?*] (cited frequently by internationalists as the article that makes it

of legal dogmatism,<sup>140</sup> French scholars contribute to the rational comprehension of this proliferation of legal texts and acts, thereby ensuring an essential legal certainty.<sup>141</sup> Numerous specialists accomplish this in each branch of law as well; so even though specialization is responsible for French doctrine's losing its past attraction, it has also contributed to its efficiency and influence.<sup>142</sup> Some authors, in fact, have defined the various levels of theorization at which international scholars may work and the degree of influence that this work may have on the development of international law.<sup>143</sup>

This differentiation of functions is inherent in positivism, but it is interpreted differently depending on whether or not one sees this as an established fact. I would at least bet that by systematizing in this way all the rules of international law, and those of each of its branches, contemporary French authors perceive the value of their work other than in terms of professional productivity. Their approach is no doubt more modest than that of their predecessors because they do not aim to reconstruct a complete legal system by deducing principles *a priori* considered intangible. Their work is also no doubt less ambitious because authors are more conscious today of their work's lack of legal reach. They are nonetheless aware of the future of their discipline and the essential role that they may play in it, even if the perception of this role varies with the task one assigns oneself as a scientific jurist. The fact that some, perhaps most, of us now firmly separate international law from ethics and/or are clearly conscious of power games, in no way precludes international scholars from believing in certain values, even if these are perceived as contingent and evolving. I would also note that technical judgment is maintained by all French international scholars, and from this point of view, it is entirely possible to criticize existing positive law.

The over-generalized critique of a certain methodological or pragmatic positivism, and the misunderstanding of ideological neutrality that it sometimes implies, obscures the more qualified reality of the status of the international scholar and the way in which she understands her own role. Is it rash to say that peace and order, and even a certain international justice, whether perceived as liberal or distributive, punitive or reparative, are the objectives pursued by the great majority of French authors, whatever their doctrinal affinity? This is at least the overall feeling I come away with after reading their work.

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possible to understand the specificity of the international legal order). Its positivist point of view is nonetheless criticized. See, e.g., Monique Chemillier-Gendreau & Charalambos Apostolidis, *La notion de méthode et ses implications dans l'identification du droit international*, in ACTES DE LA HUITIÈME RENCONTRE DE REIMS, *supra* note 84, at 41, 44. See also Jean Combacau, *Droit international public*, in I ENCYCLOPEDIA UNIVERSALIS 802-04 (Supp. 1980) [hereinafter Combacau, *Droit international public*].

140. I am taking a risk using the term "dogmatism," but I mean it in the very simple sense of an effort to systematize existing legal rules. See DICTIONNAIRE ENCYCLOPÉDIQUE DE THÉORIE ET DE SOCIOLOGIE DU DROIT, *supra* note 11, at 188. In this sense, within the context of legal dogmatism, a theory of law is "a set of concepts and statements used to systematize legal norms in a precise manner." *Id.* at 190.

141. For an overall analysis of this phenomenon, see François Ewald, *Pour un positivisme critique: M. Foucault et la philosophie du droit*, 3 DROITS 137, 137-42 (1986).

142. To borrow an idea put forward with respect to our private law doctrine by Philippe Jestaz. See Jestaz, *supra* note 97, at 96.

143. See P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 9; Sur, *Système juridique international et utopie*, *supra* note 120, at 43-44; Serge Sur, *Actes, normes, droit: Dix mille signes*, 11 DROITS 59, 62 (1990); Michel Virally, *Cours général de droit international public*, 183 RCADI 25, 25-26 (1983) [hereinafter Virally, *Cours général de droit international public*].

In any case, French international scholars have not necessarily given up on studying the legal phenomenon itself, as the highly interesting studies by several authors show.<sup>144</sup> However, it is true that French scholars have abandoned a certain type of thought in the last few years: the philosophy of law. This abandonment is a clear sign of the progress of positivism, which, in making law a science, relegated all or part of speculative reflection to philosophy.<sup>145</sup> It thereby provoked a distribution of competences between international law and philosophy that is similar to that between the science of international law and sociology or political science. This does not mean that international scholars are definitively closed to non-legal approaches; it simply requires an awareness of what we do when we do it.<sup>146</sup> Interdisciplinarity does not seem to be the panacea, as each discipline sees the law-subject differently, and its implementation is delicate.<sup>147</sup> It is for now, however, one of the only ways of counterbalancing the necessary partitioning of our discipline with pertinent contributions from different disciplines.<sup>148</sup>

French international scholars continue to question the foundations of their subject, although they do so less often and in a more pragmatic way. Their doctrinal discourse assumes and expresses a freedom of thought that seems to me fully legitimate, although some think it is destined to fail. But far from a sign of regression, it indicates a reevaluation of the realist approach to which contemporary scholars refuse to be subjugated,<sup>149</sup> although they freely incorporate certain aspects of past doctrinal contributions. This is why there is no identifiable school of thought in France in the strict sense; however, neither has doctrinal thought dissipated into multiple interpretations. At least, nothing that I have read leads me to such a conclusion. To be sure, the foundations of such an approach are still shaky and require further investigation to avoid any individualistic dissipation, but this return to “things” can already be seen as an escape from the cloistering of legal thought within rigid theories. Freed from an entire corpus of presuppositions, French doctrinal thought has been maintained, but

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144. The works of Virally are commonly cited but one can also see, *inter alia*, Sur, Pellet, Leben, Apostolidis, Chemillier-Gendreau, Chaumont, P.M. Dupuy, and Alland, whose studies show a modern trend towards diversified doctrinal thought.

145. This has already been presented and studied by Apostolidis. See Apostolidis, *supra* note 35, at 2-10. I would also mention two major contemporary jurists who also incorporate philosophy: Virally and R.J. Dupuy. On R.J. Dupuy, see Hubert Thierry, *De la clôture à l'ouverture: Réflexions sur la pensée de R.J. Dupuy*, in MÉLANGES R.J. DUPUY 295, 295-302 (1991); Nigoul, *supra* note 125, at 233-40.

146. See Combacau, *Science du droit et politique juridique*, *supra* note 25, at 989 (discussing the possibility of fewer functions).

147. On different ways to envisage interdisciplinarity, see François Ost, *Science du droit*, in DICTIONNAIRE ENCYCLOPÉDIQUE, *supra* note 11, at 540, 543; François Ost, *Dogmatique juridique et science interdisciplinaire du droit*, 17 RECHTSTHEORIE 89, 89-110 (1986). See also ARNAUD, LES JURISTES FACE À LA SOCIÉTÉ, *supra* note 28, at 120-21.

148. See Oraison, *La place des jurisconsultes*, *supra* note 95, at 578; CHEMILLIER-GENDREAU, HUMANITÉ ET SOUVERAINETÉS, *supra* note 9, at 79; Oraison, *Réflexions*, *supra* note 10, at 578; Combacau, *Conclusions Générales*, *supra* note 29, at 275.

149. Contemporary scholars refuse to be subjugated as a result of this “intimate torment born of the dissatisfaction caused by the solutions adopted one after the other.” Roberto Ago, *Science juridique et droit international*, 90 RCADI 856, 900 (1956) [hereinafter Ago, *Science juridique*].

contemporary scholars have brought it back within the limits of current scientific activity.<sup>150</sup>

I hope I have cleared up at least part of the misunderstanding. However, a more fundamental uncertainty persists: whether the very tenor of the inquiry produced is not in itself an indication of the infamous doctrinal decline. Although one might agree with me that French international scholars continue to engage in doctrinal inquiry, one might object that their positivism has weakened their principles. Whether we discuss international law or not makes no difference because we have lost the intellectual means to conceptualize the reality of contemporary international law. This is a dispositive inquiry because it will ascribe to our shared doctrinal foundation responsibility for the incapacity to correctly conceptualize contemporary international law. My answer is based on the idea that not only is our doctrinal debate hidden, it has changed.

### *B. A Different Debate*

How has the doctrinal debate changed? With the issue of foundations having been put aside and the question of the existence of international law considered outdated, French scholars now only discuss the international law in force,<sup>151</sup> basing their discussion on the evolution of international law and on positivism. This indicates a clear and important intellectual shift from what might be considered positivist reductionism. This restrictive shift in positive thinking is well-known and has been analyzed in a general way, but one must consider its implementation by contemporary French scholars in order to evaluate its logic and true scope. In fact, even if the issue of a shift is intimately related to the methodological perspectives that I have just outlined, things are still very different. Even though a sort of consensus has formed in favor of a realist methodological focus, the debate reveals significant tensions because the conflict between idealism and realism makes problems worse instead of solving them. The doctrinal shift takes two forms of unequal importance that do not cause the same disagreements: the first—a general indifference as to the issue of the foundations of the international legal system—led to the second—a disagreement on the conception of the international law in force.

#### *1. Indifference Regarding the Foundations of International Law*

The legal positivism of contemporary French international scholars therefore takes the very classical form of a theorization of positive international law. But its current

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150. Because contemporary scholars have brought French doctrinal thought back within the limits of current scientific activity, I am able to say that the study of law by international scholars is indeed a science. However, it is one that incorporates the limits that are now applicable to all social sciences. It seems to me that those who doubt that law is a science have a vision of science that is too rigid and perhaps a bit archaic. Undoubtedly, they associate it too quickly with the scientism developed since Comte, even if they correctly reveal the ulterior motives that may exist behind claims to scientific activity. See, e.g., Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 291-92. However, I do not go further into the exact determination of scientific activity because numerous interpretations can emerge here as to the descriptive or constructivist activity of this science, as well as to the highlighting of certain scientific paradigms.

151. Legal theory is “entirely occupied with the international functioning of the system.” Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 86.



scientific aim is not as far reaching as that of its predecessors because the issue of the foundations of international law was recently banished from doctrinal discourse. Scholars evade the issue of what founds the obligatory nature of the international legal system. More precisely stated, but with the same result, they reduce this issue to a simple observation. The fact that the law observed is indeed the law in force between states is now enough to consider it as law. Of course, French scholars have not given up on seeking the intelligibility of existing law and they even task themselves with describing the origin and the formation of legal rules; however, they end their inquiry precisely when it ought to turn to the norms' foundations.<sup>152</sup> The same is true with respect to the foundations of custom, which, for a long time, was emblematic of doctrinal conflicts.<sup>153</sup> It seems that in France, at least, disputes on this subject have calmed down some, even if proponents of different conceptions continue to oppose each other.<sup>154</sup> But once more, the refusal to take into account this type of problem is not inherent to positivism itself because this was a central issue for Scelle and Kelsen, as well as for a great number of French scholars. The realist turn, the taking into account of problems and even impasses, to which this type of thought led and, above all, the possibility of foregoing them due to the indisputable existence of international law, were among the factors that led French scholars to this situation. The current disinterest, which some clearly vaunt, is also a result of the fact that, at first glance, this situation causes theoretical problems but not practical ones.

In fact, those scholars whom I would call voluntarist seem to have fairly easily excluded the issue of foundations not only due to their theory's incapacity to resolve it satisfactorily, but also due to their restrictive conception of legal science.<sup>155</sup> Far from reproducing classical voluntarism, however, they have developed a much more refined approach. The conventional and collective nature of producing international law is always restated according to this approach, but the intersubjective dimension of the phenomenon of representation is incorporated as well. That is, voluntarists make observations as to both the fact of mutual state recognition of the obligatory nature of the norms that they produce and the resultant logic of intersubjective and contingent enforceability.<sup>156</sup> It is more surprising to see that most of those who develop a more objectivist conception of international law, or in any case, less strictly voluntarist,

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152. See, e.g., Serge Sur, *La coutume internationale: sa vie, son œuvre*, 3 DROITS 111, 119-20 (1986) [hereinafter Sur, *La coutume internationale*] (differentiating the issue of the law's foundations, which is a "false problem," from that of the origin of custom, which "calls for a clear answer"). See also DECAUX, *supra* note 15, at 18; P. de Visscher, *Cours général*, *supra* note 101, at 11-12.

153. See generally Brigitte Stern, *La coutume au cœur du droit international: quelques réflexions*, in MÉLANGES OFFERTS À PAUL REUTER. LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 479 (1981) [hereinafter Stern, *La coutume au cœur*].

154. For two diametrically opposed views, see VIRALLY, *Notes sur la validité*, *supra* note 83, at 86-88, and Sur, *La coutume internationale*, *supra* note 152, at 119-20.

155. Consent of the subjects of international law constitutes the origin of the law they create, but cannot constitute the foundation of validity. The principle of *pacta sunt servanda* must therefore always be called on to determine if their consent can bind them, but this principle itself cannot be founded other than by calling on non-verifiable principles. See Weil, *Vers une normativité*, *supra* note 14, at 30.

156. See Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 91, 97; see also Sur, *La coutume internationale*, *supra* note 152, at 120; DENIS ALLAND, JUSTICE PRIVÉE ET ORDER JURIDIQUE INTERNATIONAL: ÉTUDE THÉORIQUE DES CONTRE-MESURES EN DROIT INTERNATIONAL PUBLIC 429 (1994) [hereinafter ALLAND, JUSTICE PRIVÉE].

evade the moment of founding. To be sure, they may have good reasons for doing so. Contemporary criticism has, in fact, largely diffused the reductionist, and therefore highly prejudicial, nature of sociological explanations when these are restricted to a determinist and historical conception of law.<sup>157</sup> Directly deducing law from social fact does not enable one to differentiate the two and leads to dissipating juridicity in fact.<sup>158</sup> The various positions are too diffuse to interpret clearly, and at this stage, it becomes very difficult to distinguish them. These positions also contain infinitely more nuances than the original model from which they seem to occasionally take inspiration. It is therefore perhaps risky to say, but it seems to me that most contemporary authors are perfectly conscious of this impasse and no longer dare maintain such an argument. Apart from those who are still sensitive to a materialist dialectical type of analysis,<sup>159</sup> contemporary authors no longer take international law for a simple fact determined by social laws. This does not mean that they no longer seek the ethnic, social, or political origins of international law. On the contrary, they even sometimes speak of these origins in terms of foundations, but these are not foundations in the true sense of the word. These authors are less ambitious; they aim simply to relativize the role of state consent in the formation of the legal rule by taking into account its socio-political environment.<sup>160</sup> This is why the conflict between voluntarists and sociologists of the past seems to have been subtly modified over time: while the sociologists no longer tend towards a dualist (objective law/positive law) representation of international law, they are confronted with the same “limit that cannot be crossed”<sup>161</sup> as the voluntarists. They therefore substitute the issue of origin and formation for that of foundation.

In any event, this general attitude of falling back on the domestic functioning of the legal system invites a series of more or less well-founded criticisms.<sup>162</sup> Most importantly, ignoring the foundations can reduce international law to a giant legal

157. See LEO STRAUSS, *DROIT NATUREL ET HISTOIRE* (1954). See LUC FERRY, *LE DROIT: LA NOUVELLE QUERELLE DES ANCIENS ET DES MODERNES* (PHILOSOPHIE POLITIQUE, I) 45 (1984) (for his precious comments). I would also note the criticisms by the eminent internationalist, Roberto Ago, who was close to sociology but who nonetheless deviated from it on this point in his 1956 lecture series, which clearly indicated the limits of relying on social reality and “the inefficaciousness of resolving the legal with the social.” Ago, *Science juridique*, *supra* note 149, at 912-13.

158. See GOYARD-FABRE, *LES FONDEMENTS*, *supra* note 13, at 166 (presenting a convincing analysis of how directly deducing law from social fact does not enable one to differentiate the two, which leads to dissipating juridicity in fact).

159. See, e.g., Pellet, *Le “bon droit” et l’ivraie*, *supra* note 100, at 481; Chaumont, *Cours général*, *supra* note 1, at 348, 354; Nasser-Eddine Ghazali, *Les fondements du droit international public: Approche critique du formalisme classique*, in *MÉLANGES OFFERTS À CHARLES CHAUMONT* 297, 301 (representative of others who are close to materialist dialectic theses more or less directly inspired by Marxism).

160. In my opinion, P.M. Dupuy incarnates this intermediate attitude perfectly. See, e.g., P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 7-8, 326-62, 463-64.

161. Ago, *supra* note 149, at 915.

162. For different points of view, though all are critical, see Paolo Grossi, *Pensée juridique*, in *DICTIONNAIRE ENCYCLOPÉDIQUE*, *supra* note 11, at 426, 427-28; APOSTOLIDIS, *DOCTRINES JURIDIQUES*, *supra* note 35, at 60. See generally Carty, *The Continuing Influence of Kelsen*, *supra* note 75, at 344-54; R.J. Dupuy, *Cours général*, *supra* note 100, at 104; CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, *supra* note 60, at 66-68; VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at XIV-XXII; Roberto Ago, *Droit positif et droit international*, III A.F.D.I. 14, 28 (1957); GOYARD-FABRE, *LES FONDEMENTS*, *supra* note 13, at 255; BENCHIKH ET AL., *supra* note 91, at 48-51; Ghazali, *supra* note 159, at 302-04.

system running on empty, such that if its subjects leave the system on the pretext that reciprocity is inefficient, it is impossible to prove that they are legally in the wrong. I am merely making note of this type of objection, which is highly pertinent but which does not seem to bother contemporary French authors. The reasoning of those writing on this subject is coherent, even if weakened by the limits thus imposed on doctrinal analysis.<sup>163</sup> Their reasoning is based on a clear definition of the task they assign legal science and, therefore, their own research. While the legal theory of international legal scholars is limited to describing and analyzing existing international law, the philosophy of law allows for further reflection, as I mentioned earlier,<sup>164</sup> and this is the terrain on which fundamental research into the meaning and foundation of international law is carried out. Indeed, several legal philosophers are proud of this shared competence and exercise it successfully.<sup>165</sup> However, while I respect the duality of scientific and philosophical activities, it seems to me that international legal scholars can undertake this type of reflection as well. In fact, it would be highly regrettable if we abandoned this field forever to philosophers who are not international scholars. It seems to me that constitutional scholars are much less hesitant about abandoning these studies,<sup>166</sup> but, if I may say so, we are just as traditionally and logically well-situated to tackle these issues. And once again, we can do so without repudiating the positivist clarification of the distribution of activities between the legal scientist and the legal philosopher.

That said, while French international scholars generally and deliberately ignore the dimension of pure thought that such issues require, their perceptions of the existing system nonetheless diverge. Thus, after doctrinal differences disappeared with respect to the issue of foundations, they reappeared with regard to how international law operates.

## 2. *Disagreement as to the Conception of International Society*

Of all the points of divergence among French scholars, the one that seems most interesting for the purposes of this article is the current evolution of international law and the various interpretations of it because this is the central issue for many international law scholars and is, therefore, the site of the greatest tension. Accordingly, in this section I will focus on how French international legal scholars formulate this issue because their points of view reflect the nature and scope of their differences today.

This topic has caused a radicalization of positions that, in turn, may shed light on deeper sources of contemporary disagreement. The difficulty, however, is that only a few authors participate expressly in the debate, and I certainly don't want to give the false impression that all French internationalists insist on defending one or another of

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163. See, e.g., Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 91; Sur, *La coutume internationale*, *supra* note 152, at 120.

164. Unless of course one denies him even this possibility. See R. de Lacharrière, *Notes*, *supra* note 10, at 366 (presenting R. de Lacharrière's excessive position).

165. See ALAIN RENAUT & LUKAS SOSOE, *PHILOSOPHIE DU DROIT* 30 (1991); GOYARD-FABRE, *LES FONDEMENTS*, *supra* note 13, at XI-XIV, 24-26.

166. See Michel Troper, *Introduction to L'ENSEIGNEMENT DE LA PHILOSOPHIE DU DROIT: ACTES DU COLLOQUE INTERNATIONAL*, *supra* note 39, at 10.

the positions that I am going to mention. Still, it would also be a mistake to conclude that this issue is not a central one for our entire scientific community because it does engage all of us. Whether internationalists are specialists or generalists, researchers or practitioners, they necessarily have a stake in this quarrel, which results from the emergence of new, specialized areas of international law, namely development law and human rights. This quarrel has therefore provoked a number of debates exemplified by those of several colloquia sponsored by the Société Française de Droit International concerning international economic law (Orléans, 1971); the development of public international law (Toulouse, 1973); and human rights (Strasbourg, 1997).<sup>167</sup> But today the debate takes the form of a generalized discussion of the entire international legal order with the shared determination, it seems, to react to change by reconceptualizing international law itself.

Quite frankly, it is disconcerting to see the variety of conflicts identified by the authors. Internationalists are categorized as idealist Scellians or more realist anti-Scellians by Combacau, as legalists and jurists by René de Lacharrière, as harmonists and conflictualists by R.J. Dupuy, as objectivists and voluntarists by Nguyen, Pellet, and Daillet, as conservatives and reformers by André Oraison, and as internationalists and normativists by Thierry.<sup>168</sup> Similar conflict arise from the superposition and crossover among these various categories, such that they can all be reduced to two alternative representations of international law.<sup>169</sup> The first representation of international law is an anarchic and decentralized but coherent model of regulating juxtaposed state sovereigns. This representation is maintained despite the indisputable and undisputed evolution of international law because the basic structures of the international legal order remain constant despite these changes. Internationalists who support this classic conception of international law are considered voluntarists, anti-Scellians, and conservative (this last generally considered an epithet). Voluntarists

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167. *Débats sur le droit international économique*, in ASPECTS DU DROIT INTERNATIONAL ÉCONOMIQUE 105, 117-18 (1972); *Débats sous la présidence de M. le Doyen Claude-Albert Colliard*, in SFDI COLLOQUE DE TOULOUSE, *supra* note 88, at 170, 170-79 [hereinafter *Débats sous la présidence de A. Colliard*]; SFDI, LA PROTECTION DES DROITS DE L'HOMME ET L'ÉVOLUTION DU DROIT INTERNATIONAL 282 (1998). *See also* LA FORMATION DES NORMES, *supra* note 92 (containing relevant studies); ACTES DE LA HUITIÈME RENCONTRE DE REIMS, *supra* note 84, at 20-40, 73-94. Nonetheless, it is difficult to know which the predominant school of thought in France is; however, this would require a much more in-depth study than mine. Moreover, as I will show, the positions shift such that it is hard to appreciate the importance of one or the other of these two views. Indeed, opinions differ on this point. *See, e.g.*, Thierry, *Internationalisme et normativisme*, *supra* note 100, at 48 (considering that there are more normativists); Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 293 (claiming that voluntarist positivism is the most widely represented school of thought); Jean Combacau, *Les réactions de la doctrine à la création du droit par le juge en droit international public*, in XXXI TRAVAUX DE L'ASSOCIATION HENRI CAPITANT. LA RÉACTION DE LA DOCTRINE À LA CRÉATION DU DROIT PAR LES JUGES 402 n.29 (1980) [hereinafter Combacau, *Les réactions de la doctrine*] (asserting that French internationalists are mostly anti-Kelsen inspired by Scelle).

168. Combacau, *Les réactions de la doctrine*, *supra* note 167, at 402; R. de Lacharrière, *Notes*, *supra* note 10, at 369; R.J. Dupuy, *Cours général*, *supra* note 100, at 27-36; NGUYEN ET AL., *supra* note 21, at 107; Oraison, *La place des jurisconsultes*, *supra* note 95, at 535; Thierry, *Internationalisme et normativisme*, *supra* note 100, at 370.

169. Thierry also highlighted very well the various themes where this conflict is concentrated: techniques, purposes, and the notion of community. *See* Thierry, *Internationalisme et normativisme*, *supra* note 100, at 370-80.

would maintain the status quo of international relations by refusing to reform old institutions or to make new ones progress. This static vision of international law contrasts with the dynamic conception developed by others.

The second representation is that international law is moving toward the realization of a genuine international community—one that is integrated and ordered around common values that go beyond taking only states into account. These values and new purposes must therefore be promoted, as they are the ramparts against state arbitrariness and selfishness. Those who hold this more communitarian view of international society are considered Scellians, objectivists, internists, and reformers. A “Scellian” is one who conceives of the progress of international law in terms of limiting state sovereignty to the benefit of the entire community<sup>170</sup> because this conception recalls one of the major foundational principles set out by Scelle in his time.<sup>171</sup>

These two representations crystallize strong and tenacious differences, as proponents of each criticize the other for their illusory constancy and inaptitude for correctly describing reality. Given these two representations, it is hard not to believe that this is the continuation of the historically constituted split among French internationalists between voluntarists and objectivists. I would, however, argue that this is not entirely true. This belief is true to the extent that the authors diverge with respect to a certain view of the international order that reinforces their personal conception of the nature of law. But it is false because the issues are much more complex than before. Schools of thought have evolved and cross-pollinated, and ideas have been mutually enriched such that the conflict cannot be stated so simply. Those I could qualify very generally as “Scellians” are not true Scellians because no one today defends the idea of objective, causal, and social laws that explain and determine international law. In addition, the divisions are not always what they seem: some supporters of social data, such as Visscher and Virally, reach conclusions that are fairly close to those of the voluntarists and more removed from those of the solidarists.<sup>172</sup> Similarly, one finds unconditional defenders of a communitized order among the third-world-oriented voluntarists.

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170. Combacau, for example, considers that the choice is between sovereignty and the idea of a better organization of international society. See Combacau, *Les réactions de la doctrine*, *supra* note 167, at 402.

171. We know that, through federalism, Scelle wanted to defend the idea of broader solidarities to the detriment of state sovereignty and for the benefit of peace. This notion of federalism clearly influenced R.J. Dupuy, who claimed Scelle as his teacher (see R.J. Dupuy, *Cours général*, *supra* note 100, at 233), and Thierry (see René-Jean Dupuy, *Hubert Thierry*, in *MÉLANGES OFFERTS À H. THIERRY*, *supra* note 122, at 3), who is also very close to René Cassin. They all seem to defend this idea, which Combacau correctly considered to be typically Scellian, that any limitation on state sovereignty constitutes progress. See Combacau, *Les réactions de la doctrine*, *supra* note 167, at 402 n.29.

172. CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, *supra* note 60, at 114. According to Ch. de Visscher, international society and its law are characterized by “the individualist distribution of power between nations and the impossibility of going beyond this individualist distribution.” This is why R.J. Dupuy considered him an individualist conflictualist. See R.J. Dupuy, *Cours général*, *supra* note 100, at 33. See also VIRALLY, *Sur la prétendue*, *supra* note 112, at 100-01; Virally, *Cours général de droit international public*, *supra* note 143, at 27-29; P. de Visscher, *Cours général*, *supra* note 101, at 14-15 (sharing the same position because he was close to the other two).

As a result, the dividing line, the key point of divergence, is harder to apprehend because it must be searched for in strangely intermediate positions. And yet, by discovering the point of fracture, one is better able to understand the scope of this debate. In fact, studies nourishing these alternative representations highlight the discussion topics that generate irreducible conflicts<sup>173</sup> concerning the nature of legal rules and the order of which they are a part. This also means that there are two other aspects of the dispute that are less important for determining the founding terms of these representations: legal policies and the purposes defended by each side.

Some have claimed that the authors' legal policies themselves are primarily responsible for this opposition.<sup>174</sup> To be sure, the criticisms are sometimes severe with respect to the dangerous practical consequences of each point of view. For instance, those I call sovereignists<sup>175</sup> have been accused of impeding the development of contemporary international law by adopting a totally outdated conservative attitude.<sup>176</sup> As for the solidarists, they have been accused of destabilizing a system that works relatively well and has everything to lose by being reformed. Both groups are therefore mistaken not only in their theoretical appreciation of international law's evolution, but also in their understanding of the system's operation. And beneath the harshest critiques lies the other underlying aspect of the debate, which revolves around the supposed or avowed political positions of each group. The formal voluntarism of some is suspected of persisting only because western states play this game,<sup>177</sup> while the solidarists are occasionally said to only serve the interests of the Third World.<sup>178</sup> The fact that each can defend a different policy is not questioned: the problem is their implicit lack of perspective, seen when the interests to be defended become more important than the reality of international law. This aspect of the debate is inevitable due to the relationship between politics and international law, and it constitutes an

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173. Presenting this conflict in these terms differs from R.J. Dupuy's analyses. See R.J. Dupuy, *Cours général*, *supra* note 100, at 39-44. Through his open dialectic, he brought the two conceptions together without reconciling them. *Id.* at 41-42. This method allowed for taking into account the diversity of conflicts within one reality, but as a result, it did not lead to a synthesis. *Id.* at 41. Thus, as attractive, impressive, and comprehensive as this approach might have been, I do not find it convincing enough to reuse it here.

174. See Thierry, *Internationalisme et normativisme*, *supra* note 100, at 377-79; Leben, *Une nouvelle controverse*, *supra* note 4, at 128-29; Chemillier-Gendreau, *Le rôle de l'effectivité en droit international*, *supra* note 105, at 82-84; Cahier, *supra* note 1, at 21-24.

175. Therefore, I qualify as one of the authors who insist on the central, insurmountable nature of sovereignty in international law without having found a more pertinent label and without wanting to confuse it with the meaning that "sovereignist" has in European Community law. Similarly, these authors are sometimes called "voluntarists," but there again, with many reservations: I am merely trying to group together authors who emphasize the role of state consent in the formation, interpretation, and application of law, without assimilating them to the classical voluntarist authors. The voluntarism of contemporary authors is, in fact, often much more lucid, qualified, and subtle in its presentation of international law.

176. See, e.g., Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 297.

177. First, according to a very classic criticism, these sovereignists are considered to be playing the game of sovereign states. See, e.g., P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 7-8. Second, they are reproached more specifically for defending the interests of western states only. See Leben, *Une nouvelle controverse*, *supra* note 4, at 128-29; R.J. Dupuy, *Cours général*, *supra* note 100, at 104; Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 297.

178. See R. de Lacharrière, *Notes*, *supra* note 10, at 367; Jean-Pierre Cot, *Préface*, in *UN NOUVEL ORDRE ÉCONOMIQUE INTERNATIONAL*, at III (1983).

element that is necessary to properly understand the dispute, which has not, however, seriously worsened over time.

But the divergence between these two groups cannot be reduced to this issue alone. One might be tempted to try to describe the entire debate in terms of these opposing interests by insisting that they are each legitimate because they reflect the values defended by each group and because positive law is considered to supply as many arguments in favor of one as the other.<sup>179</sup> But most who participate in the debate are not willing to take this consensual way out. They believe that their representations of contemporary international law do not rest on simple external political considerations, but rather on precise observations of the reality of international law which they are not likely to abandon. This is what precludes a free choice of one's position. Moreover, their differences are rooted primarily in their diverging conceptions of law. Whether the suspicions are well founded, or the interests being defended are given priority over reality, they are not sufficient for understanding the true tenor of the debate. The same holds true for their differences with respect to the purposes of international law.

Here, the debate on the purposes of international law turns more complex and difficult to understand because it is carried out at a much deeper, more subtle level. The solidarists emphasize the new purposes of international law, such as human rights, the environment, or development. Such purposes, which are a product of international civil society, even require acting on law and the institutions. Considering classical law obsolete and unequal, the solidarists seek to moralize, and subjugate contemporary law to these new requirements.<sup>180</sup> While this is indeed the end point of some theses,<sup>181</sup> most French international scholars that have a more solidarist view of international law tend to be more moderate in their expectations. They simply consider that their scientific work should take into account both international law and its new purposes. At the same time, voluntarists are accused of remaining indifferent to the moral purposes and ethical progress that some authors trace to current orientations.<sup>182</sup> As simple and traditional as it may seem, this criticism in fact contains several aspects that I would like to try to differentiate, because it seems to me they are too often intertwined in a way that impedes understanding each position.

As I've said, the voluntarists are criticized for their moral indifference and their preoccupation with not passing judgment on existing international law. According to G. de Lacharrière, jurists must separate their moral selves from their scientific selves, and this separation has opened them up to accusations of lacking generosity and humanity.<sup>183</sup> Without going into detail, I would recall, however, that this criticism is

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179. This is the point of view of H. Thierry. See Thierry, *Internationalisme et normativisme*, *supra* note 100, at 373.

180. See Guy Feuer, *Technique juridique et valeurs morales en droit international du développement*, in SFDI COLLOQUE DE TOULOUSE, *supra* note 88, at 240.

181. See, e.g., BENCHIKH ET AL., *supra* note 91, at 58, 89; MARCEL MERLE, *SOCIOLOGIE DES RELATIONS INTERNATIONALES* 40 (1975). See also *Débats sous la présidence de A. Colliard*, *supra* note 167, at 178 (comments by A. Colliard).

182. See, e.g., Maurice Flory, *Introduction générale*, in *LA FORMATION DES NORMES*, *supra* note 92, at 11.

183. G. de Lacharrière, *La réglementation*, *supra* note 24, at 361.

biased. In their work, those I would call voluntarist seem simply to be applying the strict separation between morals and law set out by Kelsen and the idea of ideological neutrality that this separation expresses.<sup>184</sup> International law can very well be subject to moral judgment and its content can appear morally good or bad. But as Roberto Ago put it so well, this moral judgment is based on the moral or immoral character of certain rules, rather than on their legal or non-legal nature.<sup>185</sup> In fact, voluntarists do not doubt the fact that international law's evolution toward ethics constitutes progress.<sup>186</sup> They simply do not want to give up one of the great conquests of positivism: namely that law's separation from morals is the necessary precursor to all scientific understanding. In short, the voluntarists refuse to pass *legal* judgment on international law.

To be sure, this restriction is considered extreme to those who think it leads to another dissipation of the specificity of law. And it may be on this precise point, which some see as the sign of a constant weakening of international legal thought, that Kelsen's radical separation should be reconsidered today. Whether or not a firm separation between international law and morals seems worrisome or artificial, attempts to overcome it have not proven convincing for the time being, and the confusion so often criticized between law and morals seems sufficiently well established that very few jurists consider rethinking it. It is extremely interesting to note here that this positivist attitude seems to be an established fact for the vast majority of contemporary French internationalists, regardless of their view of international law.<sup>187</sup> I have not seen in the writings of supporters of a more social conception of law the idea that they judge existing law objectively, or at least legally; such a judgment could only be made with reference to a preexisting social just. In the same way as the voluntarist authors, they seem to recognize the subjective and moral nature of values when they are not the subject of a legal text or practice.

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184. See Combacau, *Les réactions de la doctrine*, *supra* note 167, at 91 (“[T]he positivist in fact sees in law an order created, not given, and is not content to systematize their envisaged representations as such without seeking to establish that they are correct.”). See also Weil, *Vers une normativité*, *supra* note 14, at 30 (insisting that jurists’ ideological neutrality is necessary and that the legal system should be considered a closed world, without questioning its metaphysical or moral—namely religious—foundations). With regard to Kelsen’s treatment of this issue, see Michel Troper, *Entre science et dogmatique, la voie étroite de la neutralité*, in *THÉORIE DU DROIT ET SCIENCE* 310, 312-24 (Paul Amserek ed., 1994) [hereinafter Troper, *Entre science et dogmatique*]. In some ways, Troper’s article is a response to the prior study by Danielle Lochak. See Danielle Lochak, *La neutralité dogmatique: mythe ou réalité?*, in *THÉORIE DU DROIT ET SCIENCE*, *supra* note 11, at 293-309.

185. Ago, *Science juridique*, *supra* note 149, at 902.

186. Weil, *Vers une normativité*, *supra* note 14, at 32. I do not want to say, however, that this neutrality is possible; it seems to me that it poses very serious difficulties. *But see* Troper, *Entre science et dogmatique*, *supra* note 184, at 310-24 (trying to show the opposite). Here, I only seek to show that the approach sought through neutrality is coherent and must not be abusively reduced to a justification of any established order or to a renouncing of all moral or ethical progress.

187. See, e.g., DELBEZ, *supra* note 12, at 12 (establishing a moral foundation for the entire international system and criticizing the excesses of voluntarism, yet not going so far, by virtue of positivism, as to pass ethical or technical judgment on international law). It seems to me that this is exactly the same position, as that of Reuter. See Reuter, *Principes de droit international public*, *supra* note 62, at 650-51 (“If international law’s function is to render certain moral rules efficacious . . . the duty of those who teach it is to distinguish without separating or mixing.”). See also VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at 217.



Another type of objection is most often raised with respect to voluntarists; this must not be confused with the first. It is the idea that positive law is in any case the subject of numerous value judgments on the part of all actors in international society and that these judgments must be taken into account to gain a complete understanding of international law because they express international law's shift towards new purposes. These judgments do not result from legal science and in this sense they are extralegal; but they must nonetheless be considered by international scholars because these types of judgment have a heavy impact on the application, interpretation, and formation of international legal rules.<sup>188</sup>

Individualistic voluntarists therefore do not take into account the entire reality of their subject when they exclude from study all that is not normative—all that belongs to the ethical and socio-historical field—and restrict themselves to a logical-conceptual analysis of legal norms.<sup>189</sup> Consequently, their concern with a rigorous scientific approach is turned against them because their approach ignores part of what makes up the reality of the international system and, as a result, does not seem very realistic. For example, P.M. Dupuy considers that these sociological data “cannot be indifferent to legal analysis, if only because they have a direct incidence on legal technique. One is therefore not being ideological, nor taking one's desires for reality” by incorporating them into one's analysis. In fact, “United Nations texts express an ideology that, according to scientific positivism, well understood, cannot be disregarded.”<sup>190</sup>

But if some voluntarists may still restrict themselves to this radical and restrictive approach to international law, none of those who express themselves on these issues seem to want to hold themselves to it entirely. It seems that this approach, which can be understood in a society that is not heavily regulated, is less and less tenable in the contemporary context of the importance of international law. International scholars, therefore, at least those addressing these issues, qualify their positions. Unless they seek to maintain a regrettable confusion, most of them seem to consider law as neutral but, of course, finalized.<sup>191</sup> More precisely, all agree that law expresses value judgments, but some defend the idea that the scientific discourse of international scholars must be legally neutral, which is an entirely inapposite position.

Returning to the terms of contemporary French debate, it seems to me that it is not the principle itself of taking into account purposes that divides authors, but the choice of the purposes retained as being established by positive reality. Weil, for example,

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188. VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at 217 (indicating that values have been reintroduced into the core of legal thought, which reveals “what positivism had obscured: at its own level, positive law calls for a value judgment, not simply a technical appreciation. This judgment is not legal science, but legal actors cannot abstain from judging and their judgment constantly influences the application and interpretation of law and, therefore, its formation.”).

189. See Pellet, *Le “bon droit” et l’ivraie*, *supra* note 100, at 473-81; Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 294. According to Virally, legal science is not limited to the explanatory analysis of legal norms if its subject is the entire legal phenomenon. MICHEL VIRALLY, *Le phénomène juridique*, in *LE DROIT INTERNATIONAL DE DEVENIR*, *supra* note 1, at 74 [hereinafter VIRALLY, *Le phénomène juridique*].

190. P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 331. See also Thierry, *Internationalisme et normativisme*, *supra* note 100, at 379.

191. See, e.g., Prosper Weil, *Conclusions*, in *LA FORMATION DES NORMES*, *supra* note 92, at 363 (explaining his personal conception of law).

felt obliged to recall that contemporary international law retains the three functions inherent in classical international law, namely territorial defense, cooperation, and coexistence.<sup>192</sup> He concedes that other purposes may be added, such as development, but that such additions constitute moral and political choices.<sup>193</sup> For Combacau, who represents here an entire positivist tradition that is also embraced by authors such as Renault and Bastid,<sup>194</sup> international law maintains above all a liberal purpose: it preserves the territory and sovereignty of each state. Combacau does not ignore cooperation, but he sees it as a secondary purpose.<sup>195</sup> In other words, although these authors see law as proceeding from state consent, they also see it as serving certain purposes. But they attach no legal judgment to these purposes, and they consider as purposes only those that constitute part of the observable legal reality.

In this regard, the solidarist position is just as qualified. Their sociological approach is meant to open onto the complexity of law. They seem to be aware, however, that the results of considering social reality and purposes must not overshadow the importance of state consent in the processes of norm formation, interpretation, and application. They also recognize that the reference to sociological data must not be taken to imply direct causality.

In short, much scholarly debate results from the simple fact that scholars hold divergent views of the purposes of international law: on one hand, it is considered liberal and reparative, its function being to ensure state coexistence and cooperation above all; on the other hand, international law is seen as economic, social, and often punitive.<sup>196</sup> Having a liberal view of international law does not preclude taking into account the interests and rights of individuals, but these interests can only be realized through the functions inherent in international liberalism.<sup>197</sup> Such a purpose is perceived as insufficient by those with a more social view of international law, through

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192. Weil, *Toujours*, *supra* note 3, at 15-18. "The international normative system has never been more than an instrument to achieve these three purposes." *Id.* at 18-19. Weil asserts elsewhere, however, that law "is more sensitive to techniques than to purposes." See Weil, *Le droit international économique*, *supra* note 135, at 4.

193. Weil, *Le droit international économique*, *supra* note 135, at 3.

194. See Bastid, *Droit international public*, *supra* note 19, at 4, 16 (indicating that "law is thus constituted by a set of rules in force that are, in fact, applied," and that "law's purpose is to *limit* and *protect* human activity. The great French juriconsult Louis Renault defined law as '[a] set of rules dedicated to reconciling the freedom of each with that of others.' Law must therefore assure a certain *social order* based not on might, but on a respective *limitation* of powers that conforms to an idea of justice and social utility.").

195. Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 802 (explaining that international law is the law of an individualist society; it is a liberal law that guarantees only the protection of each one's well being).

196. There are, of course, more intermediate or qualified positions, such as those of Leben. See, e.g., Charles Leben, *Droit: quelque chose qui n'est pas étranger à la justice*, 11 *DROIT* 35, 36-37 (1990).

197. It seems to me that when Ch. de Visscher speaks of the "fins humaines du droit," he is not saying anything different. See CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, *supra* note 60, at 156-57. Moreover, some believe the more communitarian purposes are very often merely a utopian dimension or express a political choice, whereas for others, they are sufficiently well incorporated into the contemporary system to be taken into account in their own right.

which they seek to constrain state sovereignty to organize a system that is both more distributive and centered on the individual.<sup>198</sup>

Neither of these views radically precludes the other, but they are inversely hierarchical,<sup>199</sup> which is why some voluntarists are accused of an awkward conservatism.<sup>200</sup> They do not seek to fossilize the current legal and social situation to the extent their view of international law enables them to take into account the new needs of individuals and development. Nor are they reactionary, as, contrary to the solidarists, they do not seek to return to an even more unequal law. At most, they can be considered traditionalists in light of their defense of the classical form of international law. Therefore, due to the convergent evolution that overcame the reductionist aspects of past positions, all French international scholars take into account the social and normative logics of perceiving international law.

Because everyone takes into account to a greater or lesser degree both values and purposes, as well as techniques and procedures, the core of the debate lies elsewhere. The more classical voluntarists do not really challenge the taking into account of certain values and purposes, but they criticize the use of them to promote a set of rules and techniques that are not legal and that contribute greatly to destabilizing the legal system and the very concept of law. The legal order and the norms composing it are therefore the crux of the schism. I would therefore like to assess both the displacement of the debate achieved by internationalist thought as a whole and of the nature of the divisions constituting it. The debate dates from the first split between voluntarists and objectivists, and today it reinvigorates essential oppositions among French scholars, even if it is subject to the same contradictions as in the past.

The real opposition between these two conceptions of the evolution of contemporary international law centers on the structure of the international legal order. For the sovereignists, the classical horizontal structure still characterizes the international system because state sovereignty is still the basis of the legal order and prohibits either extensively centralizing the legal system or making it too hierarchical. For the solidarists, willingly called internists,<sup>201</sup> it is time to act on the new phenomena expressing the evolution of the international system towards a genuine international community, thus a hierarchical, integrated, and vertical system.<sup>202</sup>

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198. See, e.g., Monique Chemillier-Gendreau, *Principe d'égalité et libertés fondamentales en droit international*, in LIBER AMICORUM MOHAMMED BEDJAOUI 659, 659-69 (Emile Yakpo & Tahar Boumedra eds., 1999).

199. This differs from the past conceptions of most French internationalists, for whom even limited redistribution was unthinkable. See, e.g., REDSLOB, *supra* note 45, at 219 (asserting that “[a]ssigning to the law of nations a distributive function is to make it step out of its role”). See also PAUL REUTER, *DROIT INTERNATIONAL PUBLIC* 28 (6th ed. 1983) [hereinafter REUTER, *DROIT INTERNATIONAL PUBLIC*, 6th ed.] (indicating that only an absolute conception of sovereignty can stop the new purposes from being taken into account).

200. See Brigitte Stern, *Conclusions*, in LA FORMATION DES NORMES, *supra* note 92, at 374 [hereinafter Stern, *Conclusions*].

201. This “internists” label is also applied to voluntarists due to their supposed fascination with judges. See Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 298.

202. JEAN TOUSCOZ, *TRANSFERTS DE TECHNOLOGIE: SOCIÉTÉS TRANSNATIONALES ET NOUVEL ORDRE INTERNATIONAL* 21 (1978) (supporting the “decline, at least relative, of sovereignty,” but in a “dialectic way”). That is, one must first accept that sovereignty must be strengthened in order to be weakened.

The issue of the status afforded *jus cogens* norms is revealing with respect to the doctrinal split, because the sovereignists consider these norms to be part of the *lex ferenda*,<sup>203</sup> while the solidarists consider them part of positive law while nonetheless remaining the emblematic example of a legal imperative superior to state consent.<sup>204</sup> One might think that, at bottom, it all depends on the evolution of positive law and that nothing prohibits the two views from evolving and even converging in the long term. But the issue is much more fundamental: it is a question of the difference in the nature of the legal order that opposes the two camps, not a difference of the degrees in appreciation of the same legal order. The sovereignists believe that if the international order evolves into a genuine community, it will no longer be an international legal order. For these scholars, introducing legal techniques or concepts proper to a hierarchical order into the decentralized legal order introduces serious contradictions that threaten the entire system.<sup>205</sup>

[b]y speaking of international law as if it were a legal system, one seeks to indicate that you cannot throw in just any old rules like an engaging bric-a-brac; there is a logic to international law, which is not the primitive version of a legal order of which state law constitutes the evolved version.<sup>206</sup>

In other words, where the solidarists see the simple, gradual evolution of the same law, the sovereignists see the complete mutation of international law.

A second aspect to this irreducible element of the conflict concerns the legal nature of international law norms. As Leben so rightly pointed out, the separation between law and fact always creates problems.<sup>207</sup> One could even say that the issue is even more important now than before because there were previously fewer and fairly well-identified norms and also because the doctrinal foundation made it possible to establish the limit between the legal and non-legal with certainty. This issue also provides a measure of the divergence between the authors. This divergence is well-known because it has had a direct impact on the teaching and practice of positive law, and it is one that French theoreticians of international law have known perfectly well how to conceptualize.

Pellet has expressed the sociological and objectivist view of law very well, writing that international law is formed “by staking out norms;” that is, there is a sort of pre-law that can be seen, for example, in United Nations resolutions.<sup>208</sup> The voluntarists,

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203. See, e.g., Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 102 (showing that the concepts of *jus cogens* and international crime may be compatible with an abstract scheme of international law, but “for the time being, the system does not tolerate them and cannot do so without losing one of its constitutive elements”). See also R. de Lacharrière, *Notes*, *supra* note 10, at 379.

204. See, e.g., Charles Chaumont, *Mort et transfiguration du jus cogens*, in *MÉLANGES OFFERTS À P.F. GONIDEC* 469, 477 (1985); CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS*, *supra* note 9, at 364; Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 304.

205. Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 102-105; Weil, *Vers une normativité*, *supra* note 14, at 33.

206. Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 105.

207. Leben, *Une nouvelle controverse*, *supra* note 4, at 122-23.

208. Pellet, *Le “bon droit” et l’ivraie*, *supra* note 100, at 487; Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 308, 346 (a more in-depth discussion). See P. de Visscher, *Cours général*, *supra* note 101, at 9 (discussing the link between law and fact, and going further on this particular point than Ch. de Visscher). See also VIRALLY, *A propos de la “lex ferenda”*, *supra* note 95, at 221-22; Jacques Salmon,

meanwhile, claim that in the name of new objectives or somewhat-disguised interests, the solidarists produce only soft law, which is not law at all and therefore compromises the rigor of the normative apparatus in an extremely prejudicial fashion.<sup>209</sup> Weil, for example, has indicated in memorable terms that the juridical nature of norms must not be diluted, as law obeys the precise and formal criteria which are not seen in United Nations resolutions. Meanwhile, Sur repeats the frequent criticism of sociologists, namely that they confuse law and fact or, at least, are incapable of explaining how fact becomes law.<sup>210</sup> Some authors even claim that this lack of intellectual rigor presents a real obstacle to greater solidarity.<sup>211</sup>

I won't repeat all of the arguments here; however, by focusing on the concept of pre-law,<sup>212</sup> it is possible to reduce these arguments into a single question: what makes a rule of international law a legal rule today?<sup>213</sup> This has really become a central, irreducible issue because it reflects each person's understanding of what gives a norm its juridicity, and thereby creates a problem that authors cannot avoid from either a theoretical or practical point of view. However, it is sometimes hidden by other elements of the debate that can aggravate the controversy without focusing on the real issue. At the same time, this issue redefines the positions of each author. Some authors are perfectly well able to defend, without definitively contradicting themselves, these new objectives as well as an interstate conception of international law.<sup>214</sup>

*La construction juridique du fait en droit international*, 32 ARCHIVES DE PHILOSOPHIE DU DROIT: LE DROIT INTERNATIONAL 135, 135-51 (1987) (presenting a more in-depth study); Emmanuel Decaux, *De la promotion à la protection des droits de l'homme: Droit déclaratoire et droit programmatore*, in LA PROTECTION DES DROITS DE L'HOMME ET L'ÉVOLUTION DU DROIT INTERNATIONAL: COLLOQUE SFDI DE STRASBOURG 102, 128 (1998) (on the scope of declaratory law in the field of human rights).

209. Weil, *Vers une normativité*, *supra* note 14, at 30-32; Sur, *Système juridique international et utopie*, *supra* note 120, at 45 (insisting, *inter alia*, on the utopian dimension of such an approach the characteristic of which is "to refer to a transcendent, absolute law and to produce only a soft, circumstantial law"); G. de Lacharrière, *La réglementation*, *supra* note 24, at 359 (though his position seems to have evolved); R. de Lacharrière, *Notes*, *supra* note 10, at 379-80.

210. Sur, *La coutume internationale*, *supra* note 152, at 120-21 (radicalizing his analysis to the point of considering that "the only real choice is not between voluntarism and objectivism but between voluntarism and subjectivism, even imperialism").

211. Leben, *Une nouvelle controverse*, *supra* note 4, at 130 (citing Weil's intervention at the Aix colloquium on the formation of norms in the international law of development).

212. This idea is treated in different, though sometimes very similar ways, by other authors. See REUTER, *DROIT INTERNATIONAL PUBLIC*, 6th ed., *supra* note 199, at 35-36; CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS*, *supra* note 9, at 65-71; Feuer, *supra* note 180, at 232; PATRICIA BUIRETTE-MAURAU, *LA PARTICIPATION DU TIERS-MONDE À L'ÉLABORATION DU DROIT INTERNATIONAL: ESSAI DE QUALIFICATION* 40 (1983); Brigitte Stern, *Le droit international du développement, un droit de finalité?*, in *LA FORMATION DES NORMES*, *supra* note 92, at 51; Henri Sanson, *Le droit au développement comme norme métajuridique en droit du développement*, in *LA FORMATION DES NORMES*, *supra* note 92, at 61-66; Maurice Flory, *Vers une norme de la communauté internationale*, in *LA FORMATION DES NORMES*, *supra* note 92, at 384-87; Mario Bettati, *LE NOUVEL ORDRE ÉCONOMIQUE INTERNATIONAL* 125 (1983); Pierre Michel Eisemann, *Le gentlemen's agreement comme source du droit international*, 106 *JOURNAL DU DROIT INTERNATIONAL* 326, 338-43 (1979) (citing Gérard Cohen Jonathan & Jean-Paul Jacqué, *Obligations Assumed by Helsinki Signatories*, in *HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD* 43, 52-53 (Thomas Buergenthal ed., 1978)).

213. See Alain Pellet, *Conclusions*, in *LA FORMATION DES NORMES*, *supra* note 92, at 369.

214. See, e.g., Stern, *Conclusions*, *supra* note 200, at 374-75. See also François Borella, *Le nouvel ordre économique international et le formalisme juridique*, in *MÉLANGES OFFERTS À CH. CHAUMONT*, *supra* note 7, at 73-88.

Similarly, commentators close to the objectivist view of law can restrict themselves to the classical purposes of international law.<sup>215</sup> These positions are therefore logically permeable depending on the facet of the debate such that in the end, it is very difficult to place authors in one camp or another without greatly oversimplifying their overall understanding.

As for the rest, if I go no further than this simple description of the most well-known aspects of the debate, I will paint a false picture of contemporary thought. Other authors have written quite sensibly on the legal nature of international law norms. I cannot possibly discuss all of these authors, nor the various accepted meanings of concepts such as juridicity, validity, imperativeness, or the existence of the legal order, all of which may change meaning from one author to another and provide varying versions of how international law norms become law. I will therefore limit myself to two examples of different but parallel paths that these authors have taken to renew positivism.

One author deserving particular attention, though I have not been able to precisely determine how much his work has influenced contemporary scholars, is Michel Virally, whose work is inspired not only by Visscher's and Kelsen's, but also by legal phenomenology. Virally wanted to get right to the heart of international law and tried to show that it is based on social data or needs and on all of a society's values at any given moment.<sup>216</sup> The validity of the legal order, and thus of the international legal order, stems from its "necessary" nature: from the fact that it is the inevitable condition for any society's survival.<sup>217</sup> Likewise, the issue of any individual norm's validity can be easily resolved at the same time, as it must also depend on that of the legal order. There is something extremely seductive about this approach that turns classical reasoning upside down in two ways: it uses observation of international law to supply a definition of law in general, and it links the issue of a norm's juridicity to that of the legal order.<sup>218</sup> However Virally's concept of "functional necessity" as the foundation of the international legal order is problematic. While he seems to resolve the issue of foundation in this way, he does not seem able, even indirectly, to escape a causal and historical version of law.<sup>219</sup> Whether or not it is for this reason, supporters of a more social concept of law do not seem to completely accept this renewed, somewhat sociological view.

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215. See generally CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC*, *supra* note 60.

216. See VIRALLY, *Notes sur la validité*, *supra* note 83, at 81-85.

217. *Id.* at 83.

218. This last reversal undoubtedly comes from Kelsen's doctrine, as Virally was very strongly influenced by it. See HANS Kelsen, *THÉORIE PURE DU DROIT* 253-54 (1962) ("Law is an order and therefore, all issues of law, all legal issues, must be raised and resolved as issues relating to an order."). This conception of "functional necessity" as a legal order differs greatly, however, from the normativist conception. On Kelsen's notion of order, see Simone Goyard-Fabre, *L'idée d'ordre dans la théorie juridique de Kelsen*, in 9 *CAHIERS DE PHILOSOPHIE POLITIQUE ET JURIDIQUE* 23, 23-42 (1986).

219. See, e.g., VIRALLY, *Le phénomène juridique*, *supra* note 189, at 31 (asserting, despite being conscious of the defects of a sociological approach, that the validity of law cannot be appreciated without reference to its effective application; therefore, the legal order is a product of social fact); VIRALLY, *LA PENSÉE JURIDIQUE*, *supra* note 76, at XV-XVII. However, a much more complete study of Kelsen's work is necessary to provide a more loyal interpretation.

On the other hand, H.L.A. Hart has influenced French scholars much more directly, even though this British jurist developed a fairly similar approach.<sup>220</sup> French international scholars take less from Hart's central idea of the "open texture" of law than from his theorization of the legal order. Applying the same criteria to international law as Hart applied to domestic law, several authors willingly adopt his famous distinction between primary and secondary rules as a way to better understand the international system.<sup>221</sup> Other authors see through Hart that the specific criterion of a legal order is different from a moral order: the rule becomes legal only by belonging to such a system.<sup>222</sup> Viewed from this angle, the issue of an international norm's validity is resolved by the same detour as Virally took, but at the same time, it merely reflects the validity of the legal order, which is not established with certainty. And yet the argument is convincing, as its solution to the problem of the juridicity of international law norms, which is indispensable to today's international jurists, is more satisfying than the others.

As these two approaches illustrate, the reality of the displacement of the contemporary French positivist debate in international law no doubt lies here: the subject of study is no longer the foundation of the validity of the international order, but only the legal nature of the norm itself, which is necessary and sufficient for the purposes of the usual practice of international law. But because the issue of the foundation of the system is set aside, the juridicity of the international norm is determined by reference to an order that qualifies as a legal system because of its structure and the arrangement of the rules themselves. By itself, the legal norm, whether customary or conventional, has no meaning; it takes its meaning, as well as its legal value, from the order producing it.<sup>223</sup> The roles of consent and social data are both relativized, in that the concept of a legal order becomes central.

220. See H.L.A. HART, *THE CONCEPT OF LAW* 77-96 (1961). See generally NEIL MACCORMICK & OTA WEINBERGER, *AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM* (1986) (seeking to build on Hart). See also Charles Leben, *LES SANCTIONS PRIVATIVES DE DROITS OU DE QUALITÉ DANS LES ORGANISATIONS INTERNATIONALES SPÉCIALISÉES* 72-80 (1979); P.M. DUPUY, *DROIT INTERNATIONAL PUBLIC*, *supra* note 10, at 12.

221. Of course, the International Law Commission itself set out this distinction, but without giving it the normative significance that H.L.A. Hart did. French authors might be said to refer more to Hart's work, and their citing to him is significant. See, e.g., DENIS ALLAND, *DROIT INTERNATIONAL PUBLIC* 399 (2000) [hereinafter ALLAND, *DROIT INTERNATIONAL PUBLIC*]. Norberto Bobbio has also borrowed and elaborated on this distinction, but he seems to have had less influence than Hart on French scholars. See Norberto Bobbio, *Nouvelles réflexions sur les normes primaires et secondaires*, in *LA RÉGLE DE DROIT: ETUDES PUBLIÉES PAR CH. PERELMAN* 104, 104-10 (1971). See also Paul Dubouchet, *Pour une théorie normative de l'institution*, 54 *REVUE DE LA RECHERCHE JURIDIQUE: DROIT PROSPECTIF* 739, 740-42 (1993) (discussing both conceptions); Paul Dubouchet, *Programme pour une théorie générale du droit*, 65 *REVUE DE RECHERCHE JURIDIQUE* 329, 376-80 (1996) (same).

222. See, e.g., Charles Leben, *La juridiction internationale*, 9 *DROITS* 143, 155 (1989) (insisting on the criterion of jurisdiction as a decisive criterion and on Alexandre Kojève's idea that international law can only exist as force). See also Joe Verhoeven, *A propos de la fonction de juger en droit international public*, in *FONCTION DE JUGER ET POUVOIR JUDICIAIRE: TRANSFORMATIONS ET DÉPLACEMENTS* 447, 458 (1983) (cited by Leben). *Contra* Pellet, *Contre la tyrannie de la ligne droite*, *supra* note 135, at 298-99, 302.

223. This is generally true even for customary rules, which are considered part of the international legal order by authors describing their formation and origin according to their conception of the international legal order. It seems to me that customary rules no longer play this "role of revealing the legal system." See Stern, *La coutume au cœur*, *supra* note 153, at 479-81.

This concept of order is not a new issue: French scholars have always tended to consider international law as an organized set of rules. But what is new, it seems to me, is the way in which we link the issue of juridicity to that of legal order.<sup>224</sup> Contemporary authors can therefore more easily avoid the issue of foundation while describing, in terms acceptable to everyone, what it is that makes a norm legal. As I just mentioned, of course, the foundation of the legal order's validity itself is not established with certainty, but the overall effectiveness of this order<sup>225</sup> and the observation of its existence are sufficient to found the legal nature of the norms that this order comprises. Indeed, when one reads contemporary authors, this is a striking point of convergence: the concept of a legal order, even of a system, is widely used today and clearly predominates in general presentations of international law, as well as in more specialized studies.<sup>226</sup>

At the same time, the old rivalries are cropping up in new places. Their emblematic focus was on the issue of foundation; today, they center on the more concrete issue of integrating norms into the legal order. But when the questions of how international norms become legal norms arise, the old doctrinal divisions reappear. Put more simply and precisely, the issue is how texts, actions, and situations can be considered as having legal, rather than simply political or moral, effect. This issue, as I just indicated, is generally governed by a study of the conditions in which a norm is linked to the international legal order. But contemporary authors diverge in their appreciation of the observable legal order and of these norms depending on whether they consider this order to be established fact—institutionalized or created—as well as depending on how they interpret the evolution of this legal order. They no longer dare to refer directly to a dichotomy of the social law/positive law type, and even less so to a natural law/positive law type. Instead, they restrict their examination to simply taking into account observable criteria that enable them to say that a certain norm or

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224. Although belated, this may be a reflection or effect of a certain number of analyses of the idea of system or legal order by Santi Romano, Norberto Bobbio, and H.L.A. Hart, as well as Maurice Hauriou and Hans Kelsen. Even though they were not decisive, all of these authors insisted on the notion of legal institutionalization or order. See Michel Troper, *Système juridique et état*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 30 (1986). In truth, however, it seems to me that familiarity with the works of these authors is less important here than the transformation of international law into an extended and complex set of specialized rules.

225. I will limit myself to noting that the order is in fact generally applied, without studying the exact compliance of state conduct with the legal order. This latter issue concerns the *efficaciousness* of the legal order, which is another subsidiary (though not ignored) issue.

226. On the acceptance of the concept of legal order, see P.M. Dupuy, *Sur le maintien*, *supra* note 15, at 17. See also CHARLES ROUSSEAU, PRINCIPES DE DROIT INTERNATIONAL PUBLIC 3 (11th ed. 1987) (discussing the concept of legal order in these terms; that is, not using it as a central model to his understanding of international law). *But see* REUTER, DROIT INTERNATIONAL PUBLIC, 6th ed., *supra* note 199, at 52; Bastid, *Ambitions et limites*, *supra* note 98, at 45-54; P.M. DUPUY, DROIT INTERNATIONAL PUBLIC, *supra* note 10, at 11; ALLAND, DROIT INTERNATIONAL PUBLIC, *supra* note 221, at 17; TOUSCOZ, DROIT INTERNATIONAL, *supra* note 62, at 51; Cahier, *supra* note 1, at 26; P. de Visscher, *Cours général*, *supra* note 101, at 14; Lofti Méchichi, *Prolifération des juridictions internationales et unité de l'ordre juridique international*, in JUSTICE ET JURIDICTIONS INTERNATIONALES, 73, 73-100 (2000). See generally REUTER, LE DÉVELOPPEMENT DE L'ORDRE JURIDIQUE INTERNATIONAL, *supra* note 122 (collecting Reuter's most important works). On the concept of international legal order, see VIRALLY, LA PENSÉE JURIDIQUE, *supra* note 76, at 137; Combacau, *Le droit international: bric-à-brac ou système?*, *supra* note 139, at 137; ALLAND, JUSTICE PRIVÉE, *supra* note 156, at 429.



situation is legal—an assessment that depends on their own appreciation of law, of these criteria, and of the legal order. In a fairly new way, they also rely on the history of international law to the extent that it supports or even conditions the perception of the current legal order.<sup>227</sup>

In the end, the concrete and practical issue of integrating such norms into legal norms will only be resolved by the evolution of international law itself and the possible influence that international scholars may exercise over this evolution. From the relationship of fact/law and value, we move to that between fact/law and politics, which has always been intimately tied to international law.<sup>228</sup> The doctrinal debate in France is not limited to this strategic aspect of the relationship between law and politics, but it can always be brought back to it, as shown by Anglo-American debates on the same issue.<sup>229</sup> I would caution against underestimating, however, the impact and the practical stakes of such a theoretical inquiry.

#### IV. CONCLUSION

I recognize that my presentation of contemporary French international scholars is of course incomplete. I would therefore like to conclude by offering two remarks that attempt to outline answers to questions posed by this study.

First, why are some French scholars so concerned with the contemporary evolution of international law? It seems to me their primary concerns are the values and human purposes, as Visscher<sup>230</sup> put it, of international law. The first issue is therefore how to manage this shift in emphasis without ruining the gradually acquired positivist concept—whatever the positivist divisions might be—of what constitutes the science of international law. In other words, the issue here is whether one can and must envisage international law as independent of values and social facts. Or, stated still another way: how can values and the new human and social purposes be integrated into a positive discourse on contemporary international law? This is not a new issue, but it resurfaces today with unbelievable force.<sup>231</sup> This is not surprising, however, as the

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227. See, e.g., Weil, *Vers une normativité*, *supra* note 14, at 27-29 (renewing the discussion of what classical law is). It seems impossible to avoid a historical reinterpretation of the evolution of international law once the issue of its mutation is raised. To understand this evolution, one must understand the past. Due to the socio-historical nature of their subject, internationalists have always had a penchant for referring to history in order to support both their subject and their analyses. See APOSTOLIDIS, *DOCTRINES JURIDIQUES*, *supra* note 35, at 294; Haggemacher, *Les origines du droit international*, *supra* note 96, at 125.

228. See CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS*, *supra* note 9, at 71.

229. See, e.g., David Kennedy, *Les clichés revisités, le droit international et la politique*, in 4 *DRIT INTERNATIONAL* 9, 9-178 (2000).

230. Ch. de Visscher, *Cours général*, *supra* note 43, at 453-54.

231. On the problem of ethical values in contemporary legal discourse, see Hubert Thierry, *Cours général de droit international public*, 222 *RCADI* 9, 184-85 (1990); R.J. DUPUY, *LA COMMUNAUTÉ INTERNATIONALE*, *supra* note 120, at 174-77; Reuter, *Principes de droit international public*, *supra* note 62, at 650-51; Ch. Leben, *Une nouvelle controverse*, *supra* note 4, at 122-23; Feuer, *supra* note 180, at 231-49; VIRALLY, *Le phénomène juridique*, *supra* note 189, at 67; Ch. de Visscher, *Cours général*, *supra* note 43, at 452-54, 472; CHEMILLIER-GENDREAU, *HUMANITÉ ET SOUVERAINETÉS*, *supra* note 9, at 360-75; P. de Visscher, *Cours général*, *supra* note 43, at 12. For an idea of how foreign authors perceive the problem, see José Antonio Pastor Ridruejo, *Cours général de droit international public*, 274 *RCADI* 294 (1999); Alexander Boldizar & Outi Kordonen, *Ethics, Morals and International Law*, 10 *EUR. J. INT'L L.*

preoccupations with humanist values date from the last war. It is only now, however, given the recent evolution of international law in this direction, that they have become problematic for French scholars. Moreover, the reintegration of values into contemporary thought and the issue of their status are at the heart of a large movement of thought that goes beyond international law and even law itself, but which is inseparable from the narrowing of the discussion effected by contemporary positivist thought. This is another reason I cannot go into too much detail. I bring it up only to better define the stakes of current doctrinal divisions.

What seems to bother contemporary French authors the most is not that positive law takes into account certain values—they all see this as progress when the values are humanist—but the fear that law will be diluted in values. These two concepts are related in such a way that they stimulate a genuine doctrinal debate that partially replaces the debates of the 1960s and 1970s on the law, the use of force, and political ideologies (which could never be entirely replaced). At the same time, there is clearly an elephant in the room: the contemporary inquiry into international law is silent with respect to natural law, which in turn silences the possibility that issues of justice may be taken into account and that law may have a genuine critical function with respect to itself, rather than leaving criticism of the law to morals or politics.

The spectacular return of law to the international scene and its vast expansion create a value of reference in the world, change its purposes, and renew the international legal experience and practice. Specifically, international law is called upon to counter domestic law, which is evaluated in relation to the legal principles of international law (democracy, human rights, criminal justice). But how can this critical function of international law be founded in a world dominated by positivist legal thought? Should we take the neo-Jusnaturalist route (cleared of its elephants) or try to imagine a critical positivism?

Second, at the same time we are not faced with an impasse; rather, we are at a crossroads of paths and tendencies. This is not the place to discuss the criticisms made of contemporary international doctrine, but, in concluding this study that was limited to French scholars, I would express some reservations about the idea that we are suffering a doctrinal decline. I am not convinced that statements to that effect correspond to reality. International law has gained in importance in an unprecedented way, regardless of the parallel inflation of non-law that might be occurring as well. There is no proof of a doctrinal decline, no matter what the orientation. To be sure, the attitude of international law has changed, but at least in France, reflects the currents and commitments which are definitely much more precise than in other disciplines.

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279 (1999); Louis Henkin, *International Law: Politics, Values and Functions. General Course on Public International Law*, 216 RCADI 134 (1989).