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FRENCH AND AMERICAN PERSPECTIVES ON INTERNATIONAL LAW: LEGAL CULTURES AND INTERNATIONAL LAW

Emmanuelle Jouannet[*]

> "We cannot extract ourselves from our traditions but *the manner* in which we follow them depends on us."
>
> —Jürgen Habermas[1]

I want to begin my consideration of French and American perspectives on international law by addressing more generally the question of the relationship between legal culture and international law in order to broadly contextualize the descriptions of French and American perspectives on international law that are the subject of this Article. I would like to stress at the outset that it seems to me that there does not exist any global or cosmopolitan vision of international law, but, on the contrary, an inevitable multiplicity of particular national, regional, individual, and institutional visions. This is so because the actors in the international arena are conditioned by their own legal cultures and not by a cosmopolitan legal culture, which at present does not really exist. To be sure, there certainly exists a common language, which is international law itself, and in this sense a common embryonic culture,[2] but this language is expressed through individual voices that are the products of particular, diverse legal cultures.[3]

This state of affairs is particularly striking today. It is reinforced by multiple pluralist and multicultural claims in the face of an increasingly global international society.[4] It is also the result of a new understanding of law, which sees it as rooted in culture and language. We might say that at present both factual and doctrinal considerations are leading to a new awareness of the need to see international law in its historical and cultural contexts. This is, however, a complex situation with both advantages and disadvantages.

As is clear from the current practice of international law, the existence of different legal cultures and of the different ways of envisioning international law, which results

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1. JÜRGEN HABERMAS, DE L'USAGE PUBLIC DES IDÉES: ÉCRITS POLITIQUES 1990-2000 at 5 (2005).

2. *See* Robert Y. Jennings, *An International Lawyer Takes Stock*, 39 INT'L & COMP. L. Q. 513, 526 (1990).

3. This statement is based on the idea that a culture is transmitted by means of a language, which in turn reacts with it, but that it is also an integral component of the existence of a society. EDGAR MORIN, LA MÉTHODE: LES IDÉES, TOME 4 at 18 (1991). Perhaps we can at least maintain that this is true in the sense of a "cultural tradition." On this point, see JEAN-PIERRE WARNIER, LA MONDIALISATION DE CULTURE 7 (3d ed. 2004).

4. ARGUN APPADURAI, APRÈS LE COLONIALISME: LES CONSÉQUENCES CULTURELLES DE LA GLOBALISATION (2001).

from these cultures, does not by any means foreclose the possibility of thinking about the bridges that might exist between cultures and about the points of convergence which might unite them around a common set of norms. By its very function, international law requires real interaction between different legal traditions by means of mutual reception of norms more or less freely agreed to. Furthermore, to recognize the diversity and a certain irreducibility of legal cultures can be quite positive, especially when it permits us to take into account the different cultural contexts in which international law exists, thus allowing us to better understand our divergences in interpretation and application of international law, as well as the more general problem of interpretation itself.[5]

But these diverse historical and cultural contexts within which international law is situated also present a risk, one with which we are presently confronted. In periods of great instability, like that which exists today, these differences are often used to reinforce antagonisms and interpretations in direct opposition to international law by creating conceptions of international law that are no longer national, but nationalist and/or imperialist. These diverse antagonisms and interpretations go so far as to produce a profound uncertainty in the secondary rules of the international system or even in its fundamental principles. This can completely destabilize the system without bringing to it a new, really satisfying solution, since the nationalist conception tends to reject the common model and the imperialist conception seeks to unilaterally impose its own model. That said, however, these periods of crisis are not totally negative for they do not create these problems *ex nihilo*, but rather reveal in a brutal but necessary way the dilemmas and the deadlocks that are inherent in the presently-existing international legal system itself and in the different perceptions that people have of the system. In so doing, these dilemmas and deadlocks oblige us to do something about them.[6]

Are not Franco-American differences with respect to international law, at least at first sight, the perfect example of different and opposed cultural perspectives on international law? Is it not evident that international law does not have the same significance and does not have the same meaning for a Frenchman or an American, because each perceives it only through his own legal culture and consistent with a conception of law which sometimes is in direct opposition to that of the other? To be sure, Americans and the French agree much more often than one sometimes thinks,[7] but their cultural perspectives, at the same time both similar and different, can give way to the radicalized positions of contending rivals.[8] And even if we can laugh at the idea that Americans might take a position based on what the French think, because Americans are so focused on their own internal concerns and are for the most part

5. For an in-depth consideration of contextualization, see OUTI KORHONEN, INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAWYER'S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY (2000).

6. *See* Martti Koskenniemi, *The Empire(s) of International Law: System Change and Legal Transformation*, 8 AUSTRIAN REV. INT'L & EUR. L. 61-68 (2003).

7. *See* LAURENT COHEN-TANUGI, L'EUROPE ET AMÉRIQUE AU SEUIL DU XXIe SIÈCLE 201 (2004).

8. On the general French view of the United States, see L'AMÉRIQUE DANS LES TÊTES: UN SIÈCLE DE FASCINATIONS ET D'AVERSIONS (Lacorne et al. eds. 1986); RICHARD KUISEL, LE MIRROIR AMÉRICAIN: 50 ANS DE REGARD FRANÇAIS SUR AMÉRIQUE (1990); PHILIPPE ROGER, L'ENNEMI AMÉRICAIN: GÉNÉALOGIE DE L'ANTIAMÉRICAINISME FRANÇAIS (2002).

uninterested in what others think, I have to say, based on my observations of what happens in France, that periods of crisis revive old antagonisms. Let us take the recent example of the adoption, in October 2005, of the Convention for the Protection of Cultural Diversity by UNESCO. The American ambassador to the organization called it a "bad idea,"[9] while France, represented by its President, became the most active spokesman for it. According to the American Edwin D. Williamson, who was undoubtedly expressing the general opinion in his country, it was a "bad idea" to create the International Criminal Court, while the great majority of French people, on the contrary, saw it as a positive step forward.[10] Besides, does not the United States Department of Justice deem the way in which the majority of judges on the United States Supreme Court take foreign judicial decisions into consideration to be an "imminent attack by marauding members of the French Supreme Court[?]"[11] And what should we say about the direct confrontation in the Security Council before the second invasion of Iraq, where the two camps were represented by the French Minister of Foreign Affairs, Dominique de Villepin, and the American Secretary of State, Colin Powell, which was without doubt the most highly publicized media event in the diametrically opposed perspectives of the two countries?

It might be objected that the Franco-American division only reproduces on a smaller scale the division between Europe and the United States, and that in itself it is without real interest. Although the divide between Europe and the United States is certainly similar to that existing between France and the United States, it would, however, be profoundly reductive to obscure Franco-American differences for that reason. For the present, the internal divisions in Europe between the "old" and the "young" Europe prevent a clear understanding of what might be a "European perspective" on international law, into which a French perspective would be integrated. The emergence of Europe has without doubt contributed to amalgamating a French perspective on international law into a more general European perspective. But, although the legal cultures of European nations intersect somewhat in a European view of international law, a European perspective lacks coherence, is difficult to define or describe, and is in any case quite changeable. Also, neither the Europe under construction (the European Union), nor common ways of thinking, nor shared values can preclude, for the time being, the continuation of different cultural and linguistic contexts at the national level in which particular visions of international law are rooted.

Moreover, the Franco-American divide is both specific and exemplary in itself, because it is much simpler to see than the divide between Europe and the United States. Whatever the manifest imbalance in power, it matches two states having two historically-based national perspectives. For that reason, they are distinct and easily

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9. *See* Helene Ruiz-Fabri, *Is the Nature of the International Legal System Changing? A Reply*, 8 AUSTRIAN REV. OF INT'L & EUR. L. 179 (2003).

10. Edwin D. Williamson, *Realism versus Legalism in International Relations*, 96 AM. SOC'Y OF INT'L L. PROCEEDINGS 262 (2002).

11. Humorous and bitter observation by Deborah Pearlstein, intended to illustrate the aggressive position of the United States Department of Justice with regard to the willingness of some Justices to take into consideration certain foreign judicial decisions, not as precedent, but only for information. *See* Deborah Pearlstein, *Who's Afraid of International Law? Conservative Disdain for International Law and Judicial Deliberation is Reaching New Heights*, THE AMERICAN PROSPECT (ONLINE EDITION), Apr. 5, 2005, http://www.prospect.org.

identified. I am well aware that to speak of "national" perspectives in this respect might seem problematic and fraught with presuppositions. But it is not a question here of defending some romantic vision of the nation-state or of obscuring all those contemporary phenomena, which relativize the national context. Nor is it a question of reducing the legal culture of each of the two countries to the idea of a national culture.[12] It is simply to recognize the persistence of the phenomenon of national identity within France and the United States, an identity that is linked to a particular culture and to a particular perspective on international law.[13] Not to recognize this identity would be to deny an important aspect of reality that consists in the "paradoxical resistance" of the national idea at the time of globalization[14] and its impact on Franco-American differences concerning law; for it inevitably consolidates and reinforces the positions of each nation and their cultural identities. In addition, even if this study is limited to national cultural perspectives, we must bear in mind that the problem is considerably broader and includes the question of the recognition of multiple cultures that are infra-, trans-, and supra–national.

Finally, this confrontation of French and American perspectives on international law is all the stronger since neither of these visions is content to remain withdrawn within itself. Very much to the contrary, each of our two countries clearly prides itself on its particular vision of international law and claims that it incarnates a model susceptible of being adapted to the entire world. By virtue of their histories and their own cultures, each of these two legal visions has a tendency to extend to the global level in ways that often intersect and conflict. As André Kaspi has remarked:

> [B]etween the French and the Americans the commonalities are not lacking. What unites them separates them. Here are two nations which both have the calling to embody the great aspirations of humanity . . . . Two nations which, however, at the dawn of the third millennium do not have the same weight. America is surprised that France can have the same ambitions as it does. France is no longer the beacon of humanity and believes that the United States has stolen that role from it.[15]

It is certainly true that today there is the potential for an evolution, which can transcend the Franco-American division because the stakes are so high. For instance, either we remain at the level of deliberately competing models or we see that there is the possibility of a harmonization, albeit without unification, of our different traditions around a legal culture that is in part common to both countries. Would not that only

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12. The very notion of the nation-state as a concept of cultural identity is illegitimate in the United States according to JACQUES PORTES, *Qu-est ce que la culture américaine*, *in* ETAS-UNIS, PEUPLE ET CULTURE 160 (2004), who revisits the well-known work of Anthony D. Smith on the "ethnic renaissance" in the United States. The idea of a national culture is an idea deconstructed by modern social science. *See, e.g.*, DENYS CUCHE, LA NOTION DE CULTURE DANS LES SCIENCES SOCIALES 88 et seq. (2004); Sally Engle Merry, *Anthropology, Law and Transnational Processes*, 21 ANN. REV. OF ANTHROPOLOGY 357 (1992); Carol J. Greenhouse, *Perspectives anthropolgiques sur l'américanisation du droit*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 44 (2001); ANNELISE RILES, THE NETWORK INSIDE OUT (2000).

13. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW (2000).

14. Alain Renaud, *Les deux logiques de l'idée de nation*, *in* CAHIERS DE PHILOSOPHIE JURIDIQUES: ETAT ET NATION 10 (1988).

15. ANDRE KASPI, LES ÉTATS-UNIS D'AUJOURD'HUI: MAL CONNUS, MAL COMPRIS, MAL ARMÉS, 315 (1999).

be a confirmation of our ability to draw on the heritage of 1945 and of the 1960s and 1970s to confront the problems of the present? Does that heritage, admittedly seriously burdened by its own insufficiencies and distorted by the contradictory rationales, whether nationalist or even imperialist, of the cultural legal models of each, deserve to be sacrificed? Given our different cultural conceptions of international law that at times engender profound misunderstandings, is not our common heritage, both historic and cultural, which aims at subjecting international relations to the rule of law to eliminate violence, still sufficiently alive in our memories and our lived experience so as not to be totally squandered in the name of the necessities of particular policies of this government or that? If we are capable of working together to adapt our common heritage to contemporary needs, no longer underestimating our own legal cultures through which we view international law, but at the same time rejecting the radical exclusivity of one vision or another, might not our common heritage provide a sufficient basis for the resolution of our disagreements?[16]

It seems to me that the present international legal system is threatened with disappearance, not only because of its internal dysfunctions, but also because of the international context of post-Cold War destabilization, which encourages competition between different national and cultural visions that all make claims to be valid models.[17] Some will regret this while others will see in it the possibility for the emergence of new forms of world governance. Whatever view one has of the matter, however, it seems to me that a large part of the debate revolves around the possibility of resolving the contradiction between a formalist, internationalized, even globalized, vision of law, on the one hand, and diverse, particular legal visions on the other. We need to analyze these distinct cultural legal models to understand what legal ideas and values are expressed by each of them. A schematic presentation of the French and American models can perhaps help us to make such a comparison if one goes about it in a dispassionate way. That is to say, we must try to understand the irreducible part of each legal culture and the truth, which inheres in it judged by its own criteria, and we must try to better understand the force fields and true divisions, which form around and are expressed in terms of contemporary international law, and in so doing disregard political posturing and the espousal of extreme political strategies.

As I will try to demonstrate, the simplified images that one has of the views of the other create a static Franco-American divide, which derives from our different legal traditions and which produces effects in practice. Also, these simplified images often reveal "the shortcomings of our own culture or our ignorance of it as well as the prejudices that we have toward the other,"[18] and they cannot avoid betraying the existence of a certain ambivalence in the positions taken on the two sides of the

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16. For a general consideration on this point, which goes beyond cultural divisions, see the remarkable presentation by Pierre-Marie Dupuy, *L'Unité de l'ordre juridique international*, 297 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 33 (2002). For a presentation of the question of the compatibility of international legal cultures in historical perspective, see Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentili's Combination of Pragmatic Pluralism and Normative Judgment*, 92 AM. J. INT'L L. 713 (1998).

17. Marti Koskenniemi, *International Legislation Today: Limits and Possibilities*, 23 WIS. INT'L L. J. 61 (2005).

18. Elisabeth Zoller, *L'américanisation du droit constitutionnel: Préjugés et ignorances*, *in* L'AMÉRICANISATION DU DROIT 78 (2001).

Atlantic. Moving towards a more dynamic understanding of legal cultures can compensate for the reductive aspect of a static presentation and allow us to evaluate more precisely their scope and effects. The ultimate question, which is present throughout this study, is the following: supposing that the static and dynamic descriptions of Franco-American differences are significant—whatever the fundamental substantive content of these differences actually is—can the Americans and the French transcend, at least in part, their own legal tradition of conceiving international law and their own cultural vision of international law to enter into a real inter-cultural dialogue? And if yes, to what degree and in what manner?

I. STATIC DESCRIPTION OF THE FRANCO-AMERICAN DIVIDE AND DIFFERENCE OF LEGAL CULTURES

A. Legal Culture, Models, and Cultural Stereotypes

By legal culture, I refer to one of its most classic meanings as "the values and attitudes which tie together the system and which determine the place of the legal system in the society considered as a whole."[19] Legal culture is both internal and external, as Lawrence Friedman has shown,[20] that is to say, internal to the professional legal world and external as it encompasses all members of the society. The two comprise a set of common principles, values, and concepts, a shared discourse and practice, maintained by the modes of teaching and thought of each country or region of the world, and which are a part of a particular tradition of thought.[21]

It is undeniable that general culture itself—politics, religion, national interests, economic and geo-strategic considerations, and *raison d'État*—is at the heart of these national visions as well as of the external legal policies that flow from them, and that they influence the legal culture of each country. The three examples cited in the

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19. DICTIONNAIRE ENCYCLOPÉDIE DE THÉORIE ET DE SOCIOLOGIE DU DROIT 141 (Andre-Jean Arnaud ed., 2d ed. 1993). On relations between civilizations, cultures, and legal thought, see also ANDRE-JEAN ARNAUD, POUR UNE PENSÉE JURIDIQUE EUROPÉENNE 21 (1991); YADH BEN ACHOUR, LE RÔLE DES CIVILISATIONS DANS LE SYSTÈME INTERNATIONAL (DROIT ET RELATIONS INTERNATIONALES) (2003).

20. LAWRENCE M. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 223-67 (1975). Contemporary works are extremely numerous and often relativize, and rightly so, the distinction between internal and external culture. Certain authors study the impact of culture in general, others stress the notion of legal culture. *See, e.g.*, Adda B. Bozeman, *American Policy and the Illusion of Congruent Values, in* STRATEGIC REVIEW 11-23 (1987); WERNER LEVI, LAW AND POLITICS IN INTERNATIONAL SOCIETY 135 (1976); James Piscatori & Moorhead Wright, *Cultural Diversity and International Law: Problems of Normative Order in International Relations, in* COMMUNITY: DIVERSITY AND A NEW WORLD ORDER: ESSAYS IN HONOR OF INNIS L. CLAUDE 21-45 (Kenneth W. Thompson ed., 1994); Manohar L. Sarin, *The Asian-African States and the Development of International Law, in* THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW: AN INTRODUCTION 33 (F.E. Snyder & S. Sathirathai eds., 1987); R.J. Vincent, *The Factor of Culture in the Global International Order, in* YEARBOOK OF WORLD AFFAIRS 252-62 (1980); Alejendro M. Garro, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461 (1995); Alison Dundes Renteln, *Cultural Bias in International Law*, 92 AM. SOC'Y OF INT'L L. PROCEEDINGS 232 (1998).

21. This notion of legal culture is clearly a western one for it denotes the ascendancy of law—and of a certain conception of law—within a society, which has not always been necessarily shared. *See* CHRISTOPH EBERHARD, DROITS DE L'HOMME ET DIALOGUE INTERCULTUREL 118-19 (2002); Robert Vachon, *L'étude du pluralisme juridique—une approche diatopique et dialogale*, 29 J. LEGAL PLURALISM & UNOFFICIAL L. 163, 164 (1990).

introduction—cultural diversity, the International Criminal Court, and the use of force—are perfect examples of the constant interaction among these different factors. It would therefore be patently absurd to equate American and French conceptions of international law with their own legal cultures alone. It is interpretative pluralism, recommended in his time by Raymond Aron,[22] which seems to me the only approach that avoids the dogmatism of particular interpretations and offers the key to a real understanding of the legal positions of the two countries. But it would impoverish analysis to deny the influence of a separate legal culture and to consider that it is only a general cultural model, or a political, economic, and social model, which places the two countries in opposition to each other; or that their differences result only from the interplay of those interests and power relations on which the media focus their attention. It is also their different legal models, arising from their own traditions of thought, which separate them. To be more precise, it is their particular perspectives on rules of international origin (whether they seek to govern international, transnational, or domestic relations) which create divisions between the two countries. The particular perspective which each country has on international law must itself be distinguished from existing positive law in the strict sense so as to distinguish the content of positive law from the cultural, practical, and professional contexts in which it operates and in the prism of which it is interpreted.[23] In so doing, legal culture acts for the most part subconsciously, which makes it so difficult to identify. Even to want to talk about it is to presuppose that one's self is determined by a legal culture and that legal culture continues to produce effects on us.[24]

What are, then, the two legal cultures of the United States and France? How should we identify them here? Undoubtedly, we have to start with some history and return to the the 18th century French and American revolutions which have marked our two countries, and the world, with imprints both common and opposed.[25] Contemporary descriptions of law in France and the United States are rooted in their histories, their general cultures, their religions, and their deeply-held moral doctrines, and are reinforced by the broader philosophic orientations of empiricism and rationalism which exist historically on both sides of the Atlantic.[26]

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22. RAYMOND ARON, LE SPECTATEUR ENGAGÉ 247-63 (1981).

23. Matthias Reimann, *Droit positif et culture juridique. L'américanisation du droit européen par réception*, *in* L'AMÉRICANISATION DU DROIT 64 (2001); *see also* L. Cadiet, *L'hypothèse de l'américanisation de la justice française: Mythe et réalité*, *in* L'AMÉRICANISATION DU DROIT 90 (stressing the difference to be established between reality and practice on the one hand and the discourse of ideas on the other).

24. The idea is that Americans and the French think and act unconsciously within the context of paradigms "culturally inscribed in them." *See generally supra* note 5, at 213 (discussing paradigms more generally). I do not pursue these matters here.

25. Alain Renaut, *Révolution américaine, révolution française*, *in* HISTOIRE DE LA PHILOSOPHIE POLITIQUE, Tome 4 LES CRITIQUES DE LA MODERNITÉ POLITIQUE 21-36 (1999).

26. PIERRE LEGRAND, LE DROIT COMPARÉ 88-89 (1999); MICHAEL OAKESHOTT, RATIONALISM AND POLITICS 61-70 (1962). The common bases of this opposition are found also at the heart of philosophy, CHRISTIAN DESCAMPS, LA PENSÉE SINGULIÈRE DE SARTRE À DELEUZE: QUARANTE ANS DE PHILOSOPHIE EN FRANCE 28 (2003); and of American legal thought, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992).

But it is evidently impossible to retrace here the complex evolution of these two legal-political traditions. Therefore, I will deliberately proceed otherwise by outlining, in the form of two models, what seem to me to be the principal fundamental aspects of the cultural background of the two countries as it relates to their conception of international law today. This first consideration requires more precision. First, it is clear that being both French and an international lawyer, I bring to the task my own subjectivities and personal background; all the more so since I do not intend to refrain from focusing critically on the prejudices and stereotypes that each has of the other. In addition, the models that I intend to describe will be presented as the "dominant" models within each culture, that is to say, as the model which predominates in American and French legal cultures. In so doing, I am certainly aware that each dominant model coexists with other, more minor, forms of legal culture, which are also known in the other country—even if only in a simplified and static cultural model of the other. Furthermore, this connection to international law is necessarily experienced less concretely and more at a distance for most French and American people, so I intend to focus my consideration on legal professionals and the political and institutional actors in the area of international law in the two countries to situate the cultural characteristics of their discourse. But since internal legal culture and external legal culture remain in constant interaction, I will employ the terms "the Americans" and "the French" in an imprecise way, all the while knowing that such an approach necessarily smoothes over differences internal to each culture. I am also fully aware that this is an undertaking doomed to failure if one seeks in this way to describe an objective reality. That is why I intend only to look at the Franco-American division subjectively, as producing a "mirror-effect" where each failing in the tradition of the other highlights characteristics of its own. That is to say that, without being an incorrect portrayal of French or American legal culture, the Franco-American binary division that I am going to try to describe will necessarily be stereotypical, for it is meant to be an encapsulation of subjective representations, conscious or unconscious, that each presently has of the other and of itself because of its own legal tradition. Is this not what often rallies Americans to one side and the French to the other when there is a crisis between the two countries? Is it not their latent hostility with respect to the representation that they have of the legal model of the other which is presented as a foil or counter-model, which pushes them to insist on the virtues of their own representation?[27] And is this not true even though they are aware of the multiple currents and tendencies which run through their own tradition?

This being said, I propose a dominant model of American legal culture as judicial, realist, and pragmatic, and a dominant model of French legal culture as legalistic, positivist, and formal. These differences between legal models, which are historically situated and rooted in the legal traditions of the two countries, have two consequences when projected to the international level: first, internal legal models are transposed to the international level; and, second, these internal legal models conflict with an internationalist model. This exacerbates, in a way, the Franco-American divide. Given the necessity to limit this study, I will, however, describe only the first division and will develop only the second.

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27. CHRISTOPHE JAMIN & PHILIPPE JESTAZ, LA DOCTRINE 296 (2004).

B. Differences in Franco-American Internal Law Projected to the International Level

The least publicized aspect of our differences is our different conceptions of domestic law. And yet it is without doubt more suggestive, subtle, and significant, during this time of globalization, because it results in an unrelenting struggle between the two legal traditions for influence at the international level.[28] And this difference certainly exerts an influence on the second division that we will soon explore. What is involved here is the continuous "selling" of each national legal model in order to influence the establishment of international norms and institutions that reflect the principles of the Anglo-Saxon tradition or the continental French tradition.[29] We know, for example, that in private international law the American common law is expanding its influence thanks to the increase in international private ordering arrangements brought about by globalization and the technological and technical innovations, principally north-American, that accompany it (bioethics, computer science, etc.).[30] Of course, we are also familiar with the struggle for influence in public international law between the two models in matters which pertain to international criminal tribunals, the drafting of the decisions of international courts, the role of the judge, unwritten law, and the adoption of multilateral or bilateral conventions.

This real opposition at the international level is rooted unsurprisingly in the great legal traditions of the two countries: the French civil law tradition and the American mixed tradition of common law and civil law.[31] These traditions still shape the legal mentalities of the great majority of American and Frenchmen within the two societies. It seems evident that the two traditions also have repercussions on the conceptions that the French and Americans have of international law, even if these conceptions take shape only in the middle ground between domestic legal culture and the specific arrangements of international society, as well as in the multiple currents of thought that cut through the profession on the two sides of the Atlantic. We must then identify

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28. For example, consider the influence large American law firms have on the transformation of national legal cultures. Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. OF GLOBAL LEGAL STUD. 382 (2003). *See also* Conseil d'État, RAPPORT SUR L'INFLUENCE INTERNATIONALE DU DROIT FRANÇAIS (2001).

29. ANTOINE GARAPON & IOANNIS PAPADOPOULOS, JUGER EN AMÉRIQUE ET EN FRANCE: CULTURE JURIDIQUE FRANÇAISE ET COMMON LAW 289 *passim* (2003).

30. Bernard Audit, L'AMÉRICANISATION DU DROIT 9 (2001); E. Allan Farnsworth, *Mythes ou réalités*, *in* L'AMÉRICANISATION DU DROIT 22 (2001); H. Muir Watt, *Propos liminaires sur le prestige du modèle américain, in* L'AMÉRICANISATION DU DROIT 35 (2001).

31. On the two traditions of civil law and common law, see J.H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW (2000); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION (2d ed. 1985); LEGRAND, *supra* note 26, at 87 *passim*. On the civil law tradition in France, see ANDRE-JEAN ARNUAD, LES ORIGINES DOCTRINALES DU CODE CIVIL FRANÇAIS (1969); JOHN BELL, FRENCH LEGAL CULTURES (LAW IN CONTEXT) (William Twining & Christopher McCrudder eds., 2001). On the anglo-saxon paradigm, see LEGRAND, *supra* note 26, at 87. On the American paradigm more specifically, which combines common law and civil law elements, see GRANT GILMORE, THE AGES OF AMERICAN LAW 10 *passim* (1977); GLENN, *supra* note 13, at 250 *passim*. For broader philosophic perspectives on specific aspects of the common law model, see ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 22 *passim* (1992); Elisabeth Zoller, *États-Unis (culture juridique)*, *in* DICTIONNAIRE DE LA CULTURE JURIDIQUE 656 (S. Rials & D. Alland eds., 2003).

Franco-American differences about international law by examining the legal cultures of international lawyers that have developed in France and the United States.

C. Franco-American Differences Regarding International Law

The second legal division between France and the United States is much more obvious and highly publicized than the first. It does not involve the promotion of a domestic model at the international level, but rather the defending of one's own particular conception of international law. We are aware that today this endeavor arouses high emotions, but in any case it has always been a ground for discussion, misunderstandings, and sometimes lively debate between the two countries. It seems to me that the opposition between the legalistic and formalistic French tradition and the pragmatic and realist American tradition asserts itself here in a much more clear-cut manner.[32] Even though Americans question pragmatism as a school of thought, on the importance that it has in the United States, and on its relationship with realism,[33] it remains that the American conception of international law is perceived—and perceived by the majority of Americans—as more pragmatic and realistic than the French conception because the American conception is much more concerned with judging the validity of international norms and institutions by their effectiveness in practice in a concrete environment. As opposed to the pragmatic and realist American conception, whether it be liberal, leftist, or conservative, the French conception may be defined as legalistic, systematic, and formal, and focused on respect for existing rules as established according to the formal procedures prescribed by the system. Of course in France, too, the formalist, positivist view can be criticized or presented in a more nuanced form, but it still seems to me to be the dominant model for conceptualizing international law.

Presented in a very general manner, these two conceptions do not necessarily appear antagonistic, but rather complementary. In fact, tensions arise between them only when they are pushed to extremes, like today. On the American side, realism seems to lead to a strictly instrumentalist and skeptical vision of law, and on the French side formalism seems to lead to an overly rigorous, unrealistic, and dogmatic vision of law. For example, according to the French jurist Serge Sur, Americans defend more and more openly a model of deregulation of international relations and of de-legitimization of international institutions which he sees as accompanying a policy of hegemony without leadership and without international legitimacy.[34] And the

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32. I am here using the term "realist" in a broad and non-philosophical sense. Also, I am not using it in the very precise sense used by David Kennedy in his in-depth works on internationalist doctrine. David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7 (1994).

33. *See, e.g.*, Richard H. Steinberg et al., *Realism and Legalism*, 96 ASIL Proc. 260 (2002) (panel discussion among Richard H. Steinberg, Edwin D. Williamson, Stephen D. Krasner, and Andreas Paulus). On pragmatism as an element of American culture in its own right, see ADRIEN LHERM, LA CULTURE AMÉRICAINE 73 (2002).

34. Serge Sur, *Impérialism et droit international en Europe et en Amérique*, *in* LE DROIT INTERNATIONAL ET L'IMPÉRIALISME EN EUROPE ET AUX ÉTATS-UNIS (H. Ruiz-Fabri & E. Jounnet eds., 2006). For an emphatic criticism of instrumentalism, see Martti Koskenniemi, *What Is International Law For?*, *in* INTERNATIONAL LAW 89 (Malcolm D. Evans ed., 2003).

American jurist Richard Pildes denounces what he calls "the dark side of legalism"[35] in emphasizing that the supposed virtues of legalism and legal formalism sometimes have unacceptable human and political costs. If we push this analysis a little further, there emerges from it the sense of a deep opposition with respect to the recognized value of international law as law. International law appears to be discredited by Americans[36] while it is highly valued by the French.[37] Concurrently, there is a tendency for the French to defend monism with priority accorded to international law and an even stronger tendency on the American side to look at the relationship between domestic law and international law from a very pronounced dualist perspective (if not from a monist perspective with the primacy of internal American law).[38]

I would like here to pursue the following idea. It seems to me that Americans are posing two questions that are critical for the future of contemporary international law, two major concerns that the French can fully understand and share: questions regarding the *legitimacy* and the *efficacy* of existing international law. But the French and Americans do not agree on the manner of posing these questions or on the way to resolve them, because they view international law from fundamentally different perspectives, principally because of their different legal cultures.

D. Pragmatism and Realism as the Dominant Model of the Legal Culture of American International Lawyers

Let us begin from the most radical position adopted by certain American jurists. The study by Richard Pildes attracted my attention because it expresses perfectly the attacks that can be made on French legal formalism. The author seeks to demonstrate that the rigid, pre-established, transparent, and general character of international rules, what he calls legalism, prevents a real consideration of particular contexts within which all international action of an exceptional nature must be appropriately evaluated. Thus, for example, the desire to obtain at any price a resolution of the Security Council can delay, if not prevent, a humanitarian intervention, and thereby allow an ethnic cleansing to take place, such as that which occurred in Kosovo. Similarly, George Bush's decree establishing military commissions to try certain categories of "enemy combatants" was issued much too precipitously, before knowing exactly the type of person who would be apprehended, so that it unnecessarily aroused a flood of criticism that would have been limited if he had acted after, rather than before, arrests had been

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35. Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145, 148 (2003). Also, for an emblematic presentation of the present American position on formalism, see John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379 (2005); Michael F. Glennnon, *Why the Security Council Failed*, 82 FOREIGN AFF. 16 (2003); ROBERT KAGAN, LE REVERS DE LA PUISSANCE: LES ÉTATS-UNIS EN QUÊTE DE LÉGITIMITÉ 63 (2003).

36. Especially by the current conservative movement, which does not even consider it to be law. *See, e.g.*, JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 3 *passim* (2005).

37. *See, e.g.*, Dominique de Villepin, the French Minister of Foreign Affairs, speech at the United Nations Security Council (Mar. 19, 2003).

38. For a current discussion of conservative ideas that lead to a dualism of an ontological nature, see Alejandro Lorite Escorihuela, *L'impérialisme comme produit dérivé: une lecture partisame de la doctrine internationaliste contemporaine*, in LE DROIT INTERNATIONAL ET L'IMPÉRIALISME EN EUROPE ET AUX ÉTATS-UNIS (H. Ruiz-Fabri & E. Jouannet eds., 2006).

made. In short, the general idea is not to let oneself be seduced by the supposed virtues of international legalism and perhaps, at a deeper level, to think that the law is able to do everything in international relations, when often it can do nothing at all.[39]

It is interesting to observe how the perspective exemplified by Professor Pildes' article, over and above its conjectural and doctrinal aspects, expresses certain constants of American legal culture. Even if it is deliberately advanced in support of a particular policy, it is rooted in the pragmatic legal conception that I have presented as typically American, in which one must be able to take into consideration and to evaluate the practical consequences of any action and of any norm. This realistic and pragmatic perspective is far removed from the prevailing French rationalist perspective, and for that reason, often remains largely unrecognized or ignored, if not even at times caricatured by the French as materialist and opportunist; even though it simply expresses another view of international law that we must understand. One of the principal concerns for Americans today is the effectiveness of international law, while for the French the concern is primarily that of its existence. Americans are more concerned with actual consequences of international norms, and the French are more concerned with respect for their modes of production. The rules of international law are directly evaluated by Americans as a function of their ability to resolve concrete cases; they are specific to a given situation, and the result of pragmatic action. This analysis is not inherently surprising, but what is notable about it in this context is that it goes to the heart of American legal culture and can go so far as to link, in a way unknown in France, validity and effectiveness in the consideration of norms. In a certain respect, for Americans, no rule exists which is valid *a priori*, every rule must prove itself, to be defined and refined in its application in specific cases. International law, therefore, is primarily what public and private actors make of it, and the ways in which they interpret it and apply it in the specific contexts in which they find themselves. There is thus a reforming and evolving dimension in the pragmatic conception of Americans, which is part of their belief in progress and change[40] and which contrasts with what is perceived as the conservatism of French formalism, charged with maintaining at all cost an existing situation, even if that situation is unsatisfactory.

In line with this pragmatic conception of law, one sees reemerge—strikingly in the Pildes' study—realist-type considerations, going beyond pragmatism, which reflect one of the strongest and most characteristic constants of the culture of American international lawyers. Born within the discipline of international relations, realism has permeated the discipline of international law in the United States in a way that is totally unknown in France. It is notable by what has been called rule skepticism, which has become commonplace in the American tradition of thought. To briefly describe this

39. This is true, at least, when applying formal law in exceptional situations. *See, e.g.*, THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002). *Cf.* Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 EUR. J. INT'L L. 209, 220 (2003) (noting that the strict application of the "standard of necessity" to justify self-defense may lead to paralysis).

40. *See* Isabelle Richet, *Optimisme et réussite individuelle*, in ÉTATS-UNIS, PEUPLE ET CULTURE 110 (2004). For an example of a moderate American conception, but one which would be perceived as dangerous in France, see for example Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359 (2002).

fundamental element of the professional American culture, one can say that rule skepticism develops in several steps. At the outset it is critical of the general nature of rules, which are always backward-looking and present a false picture of contemporary reality; it then highlights their intrinsically ambivalent meaning; it also stresses the fact that there always exist conflicting counter-rules and exceptions to the rules; and finally it demonstrates that the rules do not offer any solid basis for action because they are always the product of compromises between several desired objectives.[41] In its extreme political version, realism (political realism in the field of international relations) can go so far as to deny the legal nature of international law, but in its moderate legal version (legal realism in the field of international law), it seeks above all to lower the level of abstraction and the generality of rules to orient them towards more flexibility and subtlety in order to adapt international law to the actors and to their actual expectations.[42] Furthermore, there is in this a teleological vision of law, which goes beyond an exclusive concern for the result. It suggests an analysis of law not only in terms of results produced but of ends sought, thus presenting the question of whether a particular decision or rule is "good policy," in addition to the question of its effectiveness in bringing about a desired result.

In directing analysis into the paths it does, realism produces long term effects within American culture that can be seen today, even in its present form which is more adapted to the globalization context.[43] The fact is that, for Americans, the international legal norm is most often understandable only in relation to the political environment in which it is situated (the political stakes, power relationships, governmental structures, emergence of new actors, etc.) that collectively determine the behavior of actors and account for the rules or sources of law that they favor. This results at times in according decisive weight to the political and social context as an element of interpretation, which can go so far as to considerably enlarge the power to interpret existing rules. Reference to the political, economic, and social environments will be the only object of study for realists who view international law simply as a political fact. Deriving from the same source is also the distrust of Americans for excessive abstraction or generality with respect to law. For them, it would only be a sign of an intention to impose a code of conduct based on purely logical considerations without

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41. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991).

42. Compare Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuse in Internal Conflict: Toward a World Public Order of Human Dignity*, *in* THE METHODS OF INTERNATIONAL LAW 47, 47-48 (A.M. Slaughter & Steven R. Ratner eds., 2004), with K.W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, *in* THE METHODS OF INTERNATIONAL LAW 127, 127-28 (A.M. Slaughter & Steven R. Ratner eds., 2004) (presenting two versions of realism). It seems to me that none of the other American approaches described (feminist, CLS, TWAIL, International Legal Process) represents the general perspective of legal realism. Significantly, the only positivist approach presented is by two Germans and explicitly criticizes legal realism. *See* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, *in* THE METHODS OF INTERNATIONAL LAW 23, 23 (A.M. Slaughter & Steven R. Ratner eds., 2004).

43. *See e.g.*, JAMES N. ROSENAU, TURBULENCE IN WORLD POLITICS: A THEORY OF CHANGE AND CONTINUITY (1990); James M. Rosenau, *Les processus de la mondialisation: Retombées significatives, échanges impalpables et symbolique subtile*, 24 ÉTUDES INTERNATIONALES 497 (1993).

taking into account the objective realities of international economic and political relations, because, culturally, Americans do not like grand, formal, pre-determined structures and distrust the excessive use of legal categories.[44]

In every tradition of thought a dominant model coexists with minor models. And we must not ignore them even in a simplified approach to the dominant model. Thus, the French see quite clearly that Americans are necessarily formalistic when they discuss and utilize the formal institutions and rules of international law. As Duncan Kennedy has so well said, formalism (or rather the extent of formalism) is tied to two things: the extent of necessity to conform to rules and the extent of sanction in case of non-conformity.[45] From this perspective, most Americans retain a certain minimum of formalism in their conception of international law, even if their extent of necessity is much less than that of the French because of their overriding skepticism with respect to rules. This residual formalism manifests a minor strand in the legal culture of American international lawyers. It is tied, it seems to me, to the simple necessity of argument at the international level about rules and institutions, but also to a profoundly legalist and procedural domestic tradition, which is much more formalist than that of international lawyers.[46] So, even if viewed from a static and stereotypical perspective, the culture of American international lawyers presents itself in a binary form with a dominant realist/pragmatist component, but with a formalist variant that is also an integral part of their culture.[47]

We know very well, however, that the dominant, pragmatic, and realist American tradition has consequences for the teaching of international law, which in turn maintains and deepens this tradition and its skepticism with respect to rules. The teaching of international law in the United States is both interdisciplinary and practically oriented. Even though American universities are known for their production of a multitude of subtle and extremely sophisticated approaches, the teaching of law aims at the acquisition of practical professional competence.[48] Reasoning is wide-ranging,

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44. On the critical legal studies movement, see DAVID KENNEDY, THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 348-57 (2004); for liberal thought, see Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273 (1997); for the realists, see K.W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, *in* THE METHODS OF INTERNATIONAL LAW 130 (A.M. Slaughter & Steven R. Ratner eds. 2004).

45. Duncan Kennedy, *Legal Formalism*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 8634 (Neil J. Smelser & Paul B. Bates eds., 2001) [hereinafter *Legal Formalism*]. In reality this is only one of the many meanings of formalism described by the author, who has brilliantly demonstrated the linkage in time and space of questions of formalism and anti-formalism. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997).

46. The American system, to the extent that it is procedurally oriented, may be viewed as formalist. *See* Frederick Schauer, *Formalism*, 97 YALE L. J. 509 (1988). Present-day neo-conservatives are undoubtedly alone in totally compartmentalizing these two aspects of American legal culture when we observe their extreme formalism with regard to internal law and their anti-formalist realism with regard to international law.

47. This is true even though the respect of Americans for certain fundamental procedural guarantees, like due process, also has a substantive component. However, I do not want to consider these precise distinctions, because it is not within the scope of this study.

48. For a description of the evolution of this approach, see *supra* note 27, at 274.

less based on logic and synthesis than on the analysis and teaching of specific cases. Also, the teaching of international law is directly linked to the teaching of international relations,[49] economics, literature, psychology, and of course political science. There is incontestably an openness of the legal discipline to other disciplines because legal and judicial reasoning habitually and deliberately take into account considerations not strictly legal or formal, whether they derive, for example, from the moral, sociological, psychological, or political domains, or simply are consequentialist.[50] Abuses of deductive reasoning are denounced along with formalism, and law teaching tries to surmount them by taking a realist and interdisciplinary approach. Different types of documents that allow students to take into account the legal actors and to place them in their social, political, and economic contexts are emphasized, as are cases.[51] The contribution of these other disciplines thus is felt much more naturally and explains also that the American conception of law has for many years integrated a law and economics perspective—sometimes excessively—a perspective which does not exist in France. In this spirit of openness to other perspectives, there are no barriers separating the domains of private and public law, so that the domain of international law includes the consideration of private as well as public relationships, the interrelationships of private actors, transnational commercial relations, and, today, the idea of world governance. This leads Americans to reject once again the limitations of the French conception of a rigid law, formal or perceived as such, as too strictly inter-state, a conception of law that is not adaptable to the intermixing of public and private legal regimes brought about by globalization. Some of these accusations are patently false and stem from caricature, for the French have for a long time modernized their vision of international law, as we shall soon see. But it is undeniable that by not adopting the public/private division, Americans regard the individual and the private actor as occupying a much larger place in international law, which necessarily implies that Americans have a different conception of international law.[52] The importance accorded to the public/private division goes back to underlying conceptions of law. These conceptions permeate both the American and French visions of law: private, contractual, and liberal for Americans, in which law is a tool for use by private individuals just as much as by public actors; public and state-centered, for the French, in which law inherently carries the mark of the state.

Moreover, we should note that American legal culture, and the American conception of law and its teaching, exercise a real attraction on French young people and practitioners. As H. Muir-Watt explains,[53] it would be misleading to attribute this to the sole fact of American hegemony. Such an attraction can be explained in part by its realistic, pragmatic, interdisciplinary vision, but also because the law has lost its

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49. On this point which seems to me very important for understanding the teaching of international law in the United States, see Anne-Marie Slaughter, et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 367 (1998).

50. GARAPON & PAPADOPOULOS, *supra* note 29, at 48.

51. JAMIN & JESTAZ, *supra* note 27, at 280.

52. J. COMBACAU, *Statut du droit international et statut des internationalistes: ce qui est et ce qui pourrait être*, *in* ENSEIGNEMENT DU DROIT INTERNATIONAL RECHERCHE ET PRATIQUE 268 (1997) (recommending to French internationalists that they "devallelize").

53. H. Muir-Watt, *Propos liminaires sur le prestige du modèle américain*, *in* L'AMÉRICANISATION DU DROIT 33 (2001).

sacred aura (*un droit désacralisé*) and is now seen as within everyone's reach. In the United States, there exists a real culture of questioning, which exists to a much lesser extent in France.[54] Realist thought, especially critiques of law (Critical Legal Studies, Feminist Jurisprudence, Critical Race Studies, etc.)—critiques that we in France often have the tendency to marginalize today out of ignorance of what they represent—have led to a "de-sacralization" of law because of their challenge to legal rationalism. This challenge goes much further than what we in France recognize and manifests the capacity of the United States to integrate into its conception of law even minority and extremely critical elements.[55] In so doing, the American discipline of international law appears today to be crisscrossed by many more currents of thought than in France, where a positivist conception of international law still largely predominates.[56] Although significantly reworked in light of contemporary developments, the French positivist conception of law remains the oldest of the modern approaches and, for that reason, can be regarded as embodying old ideas in relation to the modernity and inventiveness of the multiple American conceptions.[57] It is this dogmatism of the formalist French conception that is indirectly challenged and through it the persistence of a scientistic positivism is considered archaic and out of date, privileging the study of norms to the neglect of decisions and privileging the state to the neglect of all other non-state actors.[58]

E. Formalism and Positivism as the Dominant Model of the Legal Culture of French International Lawyers

It is perfectly true, it seems to me, that the French position remains largely formalist and legalistic because of its own legal culture and history. This formalism and legalism may shock Americans, when viewed from the perspective of their own legal culture, and make French law teaching less attractive, but Americans do not always understand, or sometimes forget, what is at stake for the formalist and positivist French conception with respect to its own legal tradition. Behind the reproach addressed to a too rigid legal formalism, very often lurks the scorn or the suspicion, well-anchored it seems in America today, of a hypocritical position that is only an expression of weakness.[59] Incarnation par excellence of the "old Europe" and of a nation considered to be in decline, France would take refuge behind formal principles of law, because it no longer has the necessary power to impose its own vision of world

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54. *Id.* at 33-34.

55. *Id.*

56. The size of the United States also explains this diversity. The uniform methodology of French internationalists is most certainly encouraged by the centralized system of recruitment of law professors. On this point see the analysis for constitutional law of MICHEL TROPER, POUR UNE THÉORIE JURIDIQUE DE L'ÉTAT 247 (1994), which is also pertinent to international law.

57. *See* SIMMA & PAULUS, *supra* note 42, at 23.

58. For a critique of positivism, see Wiessner & Willard, *supra* note 42, at 52. This epistemological and methodical reductionism of French positivism renders it incapable today of understanding the full scope of legal phenomena and thus of expressing and communicating it.

59. KAGAN, *supra* note 35. It seems to me that this position, clearly expressed by Robert Kagan, appears to manifest the general feelings of many Americans, including internationalists, although they may not be so blunt.

order.[60] In essence, respect for formal law (the Kyoto Protocol, the decision-making procedures of the Security Council, or the International Criminal Court, for example) is seen by the French as a rampart against the arbitrary action of more powerful states. It is perfectly clear that France wants to oblige the United States to adhere to this same rule. This is what the French jurist Jean-Marc Sorel rightly calls "the force of international law."[61] But it is not only the imbalance of power which explains the French position; there is also the strong legal tradition where legality goes together with generality and equality. In the French legal tradition, the generality and transparency of the rules are of prime importance, so much so that decisions not based on general principles appear to be arbitrary. The culture of equality is profoundly rooted in the French mentality, while that of equity characterizes the American way of thinking.[62] And what Americans call legal formalism is exactly what the majority of the French call quite simply 'the law,' that is, the positive international law adopted by the subjects of international law in their conventions, their resolutions, and their customs. Whatever the ambiguities or contradictions in that law, it is certain that any other conception would appear to them particularly dangerous and would be a false description of law and the possibilities of ascertaining it.[63]

Moreover, there has undeniably been an evolution of the French tradition of legal positivism, of which Americans seem to be unaware. The former tradition of state voluntarism still exists, but it is now frequently integrated into a more general conception of international law as an autonomous system of law which includes subjects other than states and takes into account the different regimes or sub-systems that comprise it. International rules are now considered to constitute a coherent whole articulated in the form of a true international legal system (or as an overlapping of systems and orders) and drawing their validity from their formal origin according to the rules of the system.[64] Furthermore, the question of interpretation has come to occupy such an important place in French thinking about international law, because it tempers the formalism of the rules and the method of strictly deductive reasoning that Americans generally associate with formalism.[65] These developments certainly do not

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60. KASPI, *supra* note 15, at 283.

61. Jean-Marc Sorel, *L'ONU et l'IRAK: le vil plomb ne s'est pas transformé en or pur*, 108 R.G.D.I.P. 845-54 (2004).

62. I do not want to underestimate the importance in internal culture of equal protection guaranteed by the American Constitution, but only to point out the fact that because of their realism, Americans have recourse much more often to equity than the French. And do we not very often see within international tribunals continental judges express this vision as compared with Anglo-Saxon judges? This is all the more interesting to observe when it sometimes leads to fundamental differences in reasoning (*e.g.*, in individual opinions) but without the recommended resolution necessarily being different. For more information on French judges sitting on the International Court of Justice, see Gilbert Guillaume, *Les juges français à la CIJ*, *in* LA COUR INTERNATIONALE DE JUSTICE À L'AUBE DU XXIÈME SIÈCLE: LE REGARD D'UN JUGE 120, 13 (2003) (focusing on his comment on Judge Gros, who regretted the turn of the Court toward equity).

63. P. Weil, *Vers une normativité relative en droit international*, 86 R.G.D.I.P. 5 (1982).

64. For the most well-developed theory of this conception, see Jean Combacau, *Le droit international, bric-à-brac ou système*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85 (1986). On the evolution of positivism in France, see Emmanuelle Jouannet, *Regards sur un siècle de doctrine française du droit international*, 46 A.F.D.I. 14 (2000).

65. *Legal Formalism*, *supra* note 45, at 8635. For a discussion of interpretation in France, see for example the classic work, SERGE SUR, L'INTERPRÉTATION EN DROIT INTERNATIONAL PUBLIC (1974).

prevent the general persistence of what I have called legal formalism in contrast with realism—formalism in the sense of respect for formally existing rules and for the formal processes by which these rules are created—within the French tradition, but they do demonstrate that when American critics take aim at the archaic or outmoded character of the French legal thought, they often go astray.

The legal formalism of the French is linked, of course, to their positivist legal tradition, even if updated.[66] Realism as a school of thought in international relations has had very little influence on legal culture and the internationalist discipline in France, as demonstrated by the example of the very feeble echo of the ideas of Raymond Aron in France, in comparison to the very considerable influence of Hans Morgenthau in the United States.[67] That does not mean that the French lapse into idealism or naive optimism, as I will explain later, for they consider their positivistic approach as fundamentally realistic. But their realism, which is primarily of a methodological type, does not at all lead them to the same conclusions as American legal realism. Formalist French positivism requires maintaining a strict distinction between law and non-law, not because of a persnickety dogmatism as Americans might think, but in order to maintain the predictability and security inherent in the legal rule, in contrast with the political decision or the moral or religious rule. From this point of view, the French certainly consider themselves to be much more realistic than the Americans. Basically, if one limits oneself to the profession, it is interesting to see how much the Americans and the French seem to agree on the need to clarify the choices to be made on the legal level, but they go about making these choices radically differently because they have profoundly different conceptions of law: Americans see law as an all-encompassing sociological and political phenomenon, while the French see it exclusively as a body of rules and principles. Americans consider that one can clarify the choices to be made only by situating the law in an approach that includes the political, economic, or social context. The French think, on the contrary, that such clarification is only possible with the interpretation of the legal rules themselves. Both agree also in wanting to improve existing law—while also seeking to differentiate *de lege lata* and *de lege ferenda*—but where the French limit their analysis to technical considerations concerning the law, completely internal to the law itself, Americans do not reject reference to value judgments and external considerations.

Nevertheless, just as in the United States, the French tradition makes itself felt in the teaching of international law. Legal reasoning is much more systematic, logical, and synthetic, and is based on legal categories. It is done from textbooks (*manuels*) and the study of cases or legal texts, but without other materials. It has to be rigorous and isolated from all ethical, moral, political, sociological, or economic considerations, in order to grasp what makes law unique. The teaching of international law is logically and tightly compartmentalized, and distinct from other disciplines; most of the time the division between the public and private spheres is strictly maintained and it remains much more deductive than in the United States. Certainly, the study of cases has

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66. *See, e.g.*, Charles Leben, *Une nouvelle controverse sur le positivisme en droit international*, 5 DROITS 121 (1987); Serge Sur, *Quelques observations sur les normes juridiques internationales*, 4 R.G.D.I.P. 901 (1985). For a critique of formalist French internal positivism, see Dupuy, *supra* note 16.

67. *See generally* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 at 440-45 (2002).

become widespread and education has become professionalized, but it no less remains true that its objective is above all to teach a set of rules and not to learn to elaborate arguments on the basis of particular cases. The cases serve primarily as examples to illustrate the rules and not as training in argumentative method. This does not necessarily mean that legal practitioners are less well-educated in France than in the United States—but not better either—for specialized and compartmentalized education in legal technique is perhaps more easily mastered and assimilated than the interdisciplinary and sophisticated education in the United States, even when it is presented in the context of concrete cases. Legal training of an exclusively technical sort suffers from the disadvantages of its disciplinary compartmentalization, but there are compensations made for the drawbacks of an overly dogmatic education. France has been able to find an equilibrium, often ignored by others, which has been described by Philippe Jestaz and Christophe Jamin as "a well tempered dogmatism,"[68] where the rigor of the legal reasoning taught is as useful to practitioners as the American technique of argumentation and the "market place of ideas"[69] that today seems to characterize the interdisciplinary currents in American law schools.[70]

F. The Opposition of the Two Internationalist Cultures

In a similar vein, although the French conception is often considered to be rigid, unrealistic, and reductionist by Americans, American approaches may be perceived in France as ideological, moralistic, or quite simply confused, for they mix in political, economic, or social considerations, which could be considered foreign to law, thereby making decision-making or legal action uncertain. This accusation, seemingly one of a strictly epistemological nature, is rooted in a profound uneasiness felt by the French when confronted with any distortion of what for them is the law; confronted also with an American conception of international law, which tends more and more to tie legality to effectiveness. To consider as legal only those rules that are effectively and efficaciously applied is foreign to French legal culture, for the legal rule would become unstable, uncertain, and unpredictable if its existence were dependent on its end product and its effectiveness in practice.[71] According to the French conception, law erects safeguards which cannot always be respected. This is best expressed by one of our writers in a way that would undoubtedly make an American international lawyer shudder: "The destiny of law is to remain partially ineffective."[72] It is not that effectiveness is ignored in France by international legal culture. To the contrary, for several decades now it has been considered important,[73] but it is important in a way that necessarily remains limited as opposed to the requirements of American pragmatism and realism. It is true that the caricature and the stereotypes do not differ that much from my description of the American conception, because taken as a whole

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68. JESTAZ & JAMIN, *supra* note 27, at 303.

69. *Id.* at 291.

70. American law schools attract students by their intellectual effervescence but which at the same time distances the university world from the concrete world of professional practice. *See* STEPHEN CARTER, ECHEC ET MAT 244 (Robert Laffont ed., 2003).

71. DENYS DE BÉCHILLON, QU'EST-CE QU'UNE RÈGLE DE DROIT? 62 (1997).

72. *Id.* at 61.

73. *See* Jouannet, *supra* note 64, at 27.

the pragmatic and realistic American conception aims less at abstractly connecting the validity and effectiveness of legal rules than at encouraging the study of the specific and effective consequences attributable to the rule in its political context. But excesses are possible.

It is precisely this tendency toward the growing legal de-formalization of international law that the French fear in the American conception of international law, whether it be by means of the most classic American political realism, the culture of the marketplace, or the present-day expansion of a moralistic view of law. In the quest for effectiveness by the Americans, there is, for example, very often an economic approach to law, which strongly offends the French when it goes to the point of viewing law as a consumable good or when economic rationality is seen as the sole criterion for the evaluation of the efficiency of international institutions.[74] For the French, it is evident that legal logic differs from economic logic, even when both take into account, as they are doing more and more, cost-benefit analyses of legal institutions and norms. But very often also the perception that the French have of the American conception is exaggerated when they see, in the economic approach of the Americans, only the characteristic signs of American economic hucksterism and an extreme and unlimited neo-liberalism. They misjudge both the ethical significance of American utilitarianism and the cultural importance of political liberalism as integral parts of American culture in which certain rights are simply not negotiable.[75]

More generally, the realism and pragmatism of the Americans are discredited by the French for their absolutism and for their pernicious effects when they lead to a skeptical conception of law, where Americans can go so far as to deny the existence of legal rules because they regard the formalist conception of law as totally unrealistic. I do not really believe that the French are any more oblivious than Americans to the weaknesses of existing international law and international institutions, but they do not draw the same conclusions. It is the implicit idealism underlying the American tradition which the French reject, the very absolutism of its conception that can appear as a disappointed absolutism, as H.L.A. Hart has described, when confronted with the limits of formalism.[76] In the same vein, American moralism, which is today resurgent, is an integral part of American culture, but remains foreign to French legal culture, which is built on the fundamental distinction between law, religion, and morality. Americans are certainly equally committed to the separation of church and state, but they do not make as clear a separation between morality and law.[77] This does not mean to say that the French do not make moral judgments on the law or that they are unaware of the way in which the law embodies certain values, but they are firmly convinced of the fundamental soundness of the separation of law and morality. For example,

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74. For internal law see CADIET, *supra* note 103, at 106; Richard A. Posner, *The Law and Economics Movement*, *in* 77 PAPERS AND PROCEEDINGS OF THE AMERICAN REVIEW 1 (1987). On the history of this movement, which has generated a considerable amount of literature, see Ejan Mackaay, *La règle juridique observée par le prisme de l'économisme—Une histoire stylisée du mouvement d'analyse économique du droit*, 1986 REVUE INTERNATIONALE DU DROIT ÉCONOMIQUE 43 (1986).

75. *See* RONALD DWORKIN, PRENDRE LES DROITS AUX SÉRIEUX (1995).

76. H.L.A. HART, LE CONCEPT DE DROIT 171-72 (M. Van de Kerchove, trans. 1976). For an incisive and stimulating critique of the American position obscured by the concept of effectiveness, see Jean-Marc Sorel, *L'ONE et l'IRAK: le vil plomb ne s'est pas transformé en or*, 108 R.G.D.I.P. 845 (2004).

77. *See generally*, DIANA L. ECH, A NEW RELIGIOUS AMERICA (2002).

existing violations of international law ought not, according to the French, to be justified by moral (or religious) standards to which one wants to accord legal effects not formally recognized by the community of states.

For such a moralization of law would unilateralize applicable regimes for the benefit of the one who has the just cause (moral cause), allowing free rein to excesses which the law is no longer able to control.[78] The example of the treatment at Guantánamo is, from this point of view, particularly shocking for the French.

In reality, the subject is very delicate to consider in terms of culture, because the great majority of American international lawyers has raised objections to the Guantánamo situation in such a way as to produce a veritable internal split between the government's position and that of the professional academic world;[79] and it would be totally false to argue that, from a cultural perspective, all Americans support arbitrary methods of detention (or even torture). Nothing is more contrary to the American legal tradition of guaranteeing fundamental procedural and substantive rights. There is, however, an acceptance by a segment of the population of what is claimed by the government as necessary for security. This said, it appears to me also true that the legal moralism that accompanies the justifications advanced by the present American government represent an important aspect of American legal culture; and that this moralization of law is shared this time by many professional liberal international lawyers, even though they criticize the errors of Guantánamo.

At this point we can clearly see an opposition with French formalist legal culture, for the European history of wars of religion, fanaticism, and just wars is deeply rooted in the cultural, historic, and legal heritage of the French and allows us to explain in part the French conception of international law, which strives for neutrality, formality, objectivity, and a foundation of the separation of law and morals. The scientistic and methodological positivism of French professional culture of the 20th century was certainly critical in the formation of this contemporary conception of law. It would evidently be too long an undertaking to retrace here its extremely long and complex development, but at least we can take a look at its contemporary repercussions when confronted by the more moralistic discourse of Americans on international law. Culturally, the French now consider that institutionalized judicial procedures alone are able to guarantee the protection of all, while the invocation of the moral principles underlying the formally-existing rules leads to interventions and the radicalization of conflicts by polarizing governments, and also by obliging third parties to intervene. Finally, true to their legal tradition, the French also defend respect for legal formalism and legalism against the moralization of law in order to avoid arbitrariness and above all, the temptation to open that well-known Pandora's Box.

In any case, Americans may rightly call attention to the scientistic illusion in this claim to objectivity and the lack of responsiveness of existing international law to

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78. *See* OLIVER CORTEN, LE RETOUR DES GUERRES PRÉVENTIVES: LE DROIT INTERNATIONAL MENACÉ 82 (2003); TZVETAN TODOROV, LE NOUVEAU DÉSORDRE MONDIAL: RÉFLEXIONS D'UN EUROPÉEN 37 (2005).

79. *E.g.*, Interview by Mark Colvin with Richard Falk (Aug. 3, 2005), *available at* http://www.abc.net.au/cgi-bin/comon/printfriendly.http://www.abc.net.au/pm/content/2005/s1429548.htmcgi-bin/comon/printfriendly. Criticism has also come from the judiciary. *See, e.g.*, Charles Lane, *The High Court Looks Abroad*, WASH. POST, Nov. 12, 2005, at A5 (statement of Justice Sandra Day O'Connor at West Point, Oct. 20, 2005).

contemporary terrorism; and remind the French of their own past as a colonial state fighting for its own security or to impose its own domination. Guantánamo may also force the French to confront a more recent past than that of the old just wars of the 17th and 18th centuries. In the history of French colonialism of the 19th and early 20th centuries, it was the very legal formalism of the French that accompanied and legitimized profoundly unjust, arbitrary, unequal situations, for the benefit of the most powerful colonial state. The force of international law was thus here in the service of the policy of expansion of the European states and did not play its part as a barrier to the excesses of the powerful. Moreover, the elaboration of the legal system of discrimination in the colonies, by a positivist doctrine that saw itself as neutral and objective reinforced the legitimization and the ordinariness of the process.[80] In other words, abuses such as Guantánamo can be as easily linked to the American anti-formalist tradition as to the French formalist tradition, and it will be for each country to understand what in its legal tradition can be manipulated or utilized to nationalist, imperialist, or colonial ends. There is thus a blot on French legal culture just as there is on American legal culture that neither can ignore by simply denouncing the other; and it would be appropriate for each to understand what in its legal tradition can be manipulated or utilized for nationalist, imperialist, or colonial ends.

Without accepting the excess of Guantánamo, however, which they have forcefully denounced, even liberal American international lawyers and those who view international law from a critical perspective, point out the inadaptability of existing international law to contemporary terrorism, relying on their pragmatic and realist culture of "effectivity," and also call attention to the scientistic illusion of the French objectivist claim that law and morals should be strictly separated. In so doing, some Americans, asserting their neutrality and objectivity, make no bones about reminding France of its own past, by confronting it with Vichy or its history as a colonial state striving to protect its security or to impose its domination.[81]

Finally, the way in which French and Americans establish the existence of a rule of customary international law is also revealing of their cultural differences. These differences are hidden behind contemporary debates concerning the use of force, humanitarian intervention, and "legitimate preventive self-defense."[82] Americans prioritize practice itself in a very flexible manner. Similarly, Americans prioritize all types of actions and behaviors, if they are those of "major states," because their realist and policy-oriented perspective leads them to consider such actions and behaviors as decisive. In so doing, they once again want to go beyond legal formalism by insisting on the primacy of a customary law that is more adapted to specific circumstances and also more directly based on moral and political values than on an overly rigid agreed-

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80. This is especially true of positivist doctrine of the mid-20th century, because formerly it was as much natural law-based and was linked to the movement of moralization of international law (with the same effects). On the question of the neutrality of positivism in France, especially with respect to Vichy, see the debate between Danièle Lochak and Michel Troper, *in* THÉORRIE DU DROIT ET SCIENCE, VARII AUCTORES 293-309, 310-24 (P. Amselek ed., 1994).

81. N. Berman, *Les ambivalences impériales*, *in* LE DROIT INTERNATIONAL EN EUROPE ET EN AMÉRIQUE (H. Ruiz-Fabri & Emmanuelle Jouanet eds., 2006) (forthcoming).

82. *See generally* Oliver Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT'L L. 803 (2006).

upon text. Conversely, the French (and Europeans) have the tendency to prioritize the existence of *opinio juris*, and more formal criteria for the determination of custom, but of course not neglecting practice and the material aspect of custom.[83] They engage in a more restrictive interpretation of the material aspect of customary law so as not to systematically devalue the formal text as such.[84]

Similarly, the French regard the formal international rule as the preeminent final product and essential to resolving, constraining, or limiting violence within the context of international law itself. Conversely, for Americans, formal law is seen as only one means among others to attain peace and stability. And by a very continental-type conflation of formal law and law in and of itself, the French see their conception embodying the defense of international law itself, and the security, predictability, and elimination of violence that it represents. This expresses an unquestionable confidence in the virtues of international law, which is not really shared by Americans, whatever their political persuasion. Let us avoid caricatures, however, even in a simplified description of cultural approaches, which might tempt us to say that Americans delight in defending a skeptical or cynical conception of international law. In the United States, where the idea that "no one is above the law" is historically and culturally much stronger than in France,[85] it is evident that Americans believe in the virtues of law. But it is also true that this belief seems to be directed much more toward domestic society than toward international society. The French frequently entertain the idea that Americans take a very Hobbesian view of international society and that they contrast the well-ordered domestic society with total "international disorder." This is a perception that presumably can support any particular American policy, academic orientation, or governmental declaration. It is also an idea that is advanced by the discipline of international relations, but seems to be present to a lesser degree today in the legal culture of American international lawyers. It seems that the contemporary evolution of international law, its growing technical complexity, its continuous development in a variety of areas, its becoming more commonplace in some respect, and the globalization of society and of law[86] are many of the factors that have led to the modification of many classical conceptions. In effect, most American international lawyers—and surely most Americans—now perceive international law as a more mature and complex system than they thought and which, from this point of view, is not too far removed from continental conceptions. However, this in no way prevents Americans from adopting a more skeptical view with respect to the efficacy and legitimacy of the international legal system because of their own culture and their conception of law, which is much less transferable to the international level. Is it

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83. Beyond the particular division considered here, Professor Corten has elaborated in detail a distinction between "extensive" and "restrictive" analysis. *Id. passim.*

84. *Id.* On the American position, which seems to be widely shared, see Sofaer *supra* note 39, at 212-13. *See generally* Richard N. Gardner, *Neither Bush nor the "Jurisprudes,"* 97 AM. J. INT'L L. 585 (2003); William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557 (2003).

85. ELISABETH ZOLLER, DE NIXON À CLINTON: MALENTENDUS JURIDIQUES TRANSATLANTIQUES 95 (1999).

86. J.J. ROCHE, THÉORIE DES RELATIONS INTERNATIONALES 132 (2d ed. 1997). For a more classic American presentation, see Louis Henkin, *International Law: Politics, Values, and Functions*, 216 R.C.A.D.I. 45 (1989).

because the excesses of judicial authority within the United States push Americans to avoid replicating the same mistakes at the international level, as has been suggested?[87] It seems more probable to think the opposite, that is, here too we are seeing the more general effects of North American legal culture where law must be applied in practice by means of effective and equitable procedures. This is true also for international law, although we are dealing with an international society still largely lacking in the means of enforcement and in a sufficient number of impartial tribunals. Even if Americans do not challenge the existence of an international society under law, even if some go so far as to develop again and in a much more positive fashion, the vision of a cosmopolitan international society, a true international community, Americans cannot put an end to a culture of distrust, which was already present during the brightest hours of Wilsonian idealism.[88]

The comparative pessimism which endures about international society encourages the development of an American national vision that, even in its liberal form, leads to supporting international action in favor of the international community only to the extent that it advances the most immediate interests of the United States.[89] This is a realistic policy that any state, including France, would certainly adopt, and that the French would accept as politics as usual,[90] but which in the United States seems to have been transformed into an integral aspect of American legal culture. One sees its direct effects in regard to the Kyoto Protocol, the non-ratification of the Convention on the Elimination of Chemical Weapons, the rejection of the Treaty on Anti-Personnel Mines, the commercial activity of the pharmaceutical industry, and the existence of the International Criminal Court. As André Kaspi testily remarks, American opinion "makes foreign policy an outgrowth of internal policy";[91] a view which Robert Kagan supports by commenting that "the internationalism [of Americans] has always been a product derived from their nationalism."[92] This attitude, which has been the subject of much comment, certainly fuels the lack of understanding and the sharp criticism on the part of the French as well as other Europeans. It would be particularly offensive to think that this attitude betrays a tolerance on the part of Americans of anti-personnel mines, dictators, or pollution, for example, because such an attitude is most of the time linked to their world-wide involvements that expose them more than other countries

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87. *See generally*, Pildes, *supra* note 35.

88. See generally the analyses of ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Benjamin B. Ferencz, *A Brief Summary of New Legal Foundations for Global Survival*, http://www.benferencz.org/legal.htm; THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

89. *See* JUSTIN ROSENBERG, THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS (1994).

90. *See* GUY LACHARRIÈRE, LA POLITIQUE JURIDIQUE EXTÉRIEURE DES ÉTATS (1983).

91. KASPI, *supra* note 15, at 218.

92. ROBERT KAGAN, LA PUISSANCE ET LA FAIBLESSE 138 (Hachette Litterature ed. 2004).

to many complex and delicate situations that need to be managed.[93] At the same time, however, this attitude does express what seems to have become a true nationalist culture: the subordination of international law to American interests and an enduring and profound distrust of international law itself. It is when pressure to ignore foreign jurisprudence and even treaties that bind the United States is applied to the Supreme Court of the United States and the courts of the states that this attitude is most insidiously and disturbingly expressed to foreigners (including the French).[94]

This conception of international law and international society is contrary to the more cosmopolitan French and European Kantian tradition.[95] The French are generally perceived by Americans as always coming down—in a more Kantian way, so to speak—on the side of a world pacified by the peaceful settlement of disputes, the institutionalization of inter-state society, and the expansion of international law itself. This image, however, must be put in a comparative perspective to be properly understood, as it is often presented in a false and reductionist manner.[96] Of course there is certainly in France, as in Europe, an underlying cultural foundation for the Kantian cosmopolitan ideal. But, just as Kant did not envision the cosmopolitan world as completely institutionalized, the French too rejected the French jurist Georges Scelle's idea of a world state—a fashionable view during the inter-war period. French legal culture has always adapted very well to the political interplay of international relations. The classical vision of an inter-state society that it has so long embraced could only reinforce this realist tendency, so that, contrary to what Americans might think, there is in effect very little idealism (at least claimed as such) in present-day French internationalist culture. Even the objectivist monism of Georges Scelle, so emblematic abroad of the French idealist conception of law (progressive and leftist in its political orientation) was presented as being much more realistic than all other representations of law because it was grounded in a denunciation of the abuses of legal fictions in international law. However, for the French as a whole, the respect for a certain legal formalism, in order to avoid dilution of the legal rule from political influences, remains the line not to be crossed. It is this realist (and not idealist) conception of international law that does not correspond with the American realist conception of international law and with American skepticism regarding rules. One might say, however, that the dominant French model remains positivist formalism with a minor realist component. Thus one can see very well the link between the French tradition of legal positivism (whether sociological, voluntarist, or systemic) and the desire for a clear legalization of power relations, because the perspective is always that of establishing a world of law that could not be confused with one governed by

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93. *See* LAURENT COHEN-TANUGI, LES SENTINELLES DE LA LIBERTE: L'EUROPE ET L'AMERIQUE AU SEUL DU XXIe SIECLE 201 (Odite Jacob ed. 2003). For a comprehensive assessment of the attitude of the United States toward the implementation of treaties, see Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313 (2001). For a critique of current discourse of the American government, see Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, 79 FOREIGN AFF. 9 (2000).

94. *See* Pearlstein, *supra* note 11 (discussing the Vienna Convention on Consular Relations).

95. JURGEN HABERMAS, UNE ÉPOQUE DE TRANSITIONS. ÉCRITS POLITIQUES 1998-2003 at 394 (Fayard ed. 2005).

96. Especially by Robert Kagan, with respect to Europe and the United States. *See* KAGAN, *supra* note 92, at 138.

moralism or politics alone—a world that should substitute institutionalized legal procedures for deciding questions of intent (*e.g.*, enemy non-combatants) or judging the unilateral actions of national power politics (*e.g.*, the second intervention in Iraq).

As a result, culturally, the French have the tendency to respond to international problems by recommending the adoption of new norms (the more law there is, the more stability will rule)[97] or new international institutions, like in the areas of economic relations, the environment, or criminal justice. On the other hand, Americans will seek active approaches, implementation, and oversight, which will not necessarily be legal (without necessarily being contrary to law) or institutional in nature;[98] and will be critical of the over estimation of a law that is never enforced or the existence of a paralyzing bureaucracy divorced from reality. The image that each has of international institutions (and of their officials) has become quasi-symbolic and reflects this profound disagreement. Given their broad conception of international law, both public and private, Americans will see law symbolized in international commercial law and private international law, in the law pertaining to international trade, including the World Trade Organization, rather than in the great resolutions of the United Nations. For Americans, the law is just as much at the disposition of private actors and organizations as it is an instrument of state power. On the other hand, the United Nations remains the symbol of international law for the French, and without doubt, in some respects, for Americans as well.[99] The French, however, still see the United Nations as the site of possible progress and envision the international official as being *a priori* in the service of the common good,[100] while Americans more and more have the tendency to see the United Nations as the symbol of the paralysis of international law—thus again making the link with their culture of distrust of all bloated, over-hierarchic bureaucracies. Samuel Huntington even characterizes the rejection of this type of bureaucracy as an American paradigm.[101] According to the French, however, this is a misguided American obsession. In reality, it seems to me that the French come to the same conclusion as the Americans regarding a certain loss of credibility and effectiveness of the United Nations, but they do not assign to it the same causes. The French are more optimistic about the organization itself, certainly because of their legal culture, but also because it is not the United Nations or institutions in general that they hold responsible for the deadlocks in the system, but more the lack of will on the part of states.[102]

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97. According to Jean Combacau, there is a majoritarian "Scellian" tendency in French doctrine, Jean Combacau, *Les réactions de la doctrine à la création du droit par le juge en droit international public*, in LA RÉACTION DE LA DOCTRINE À LA CRÉATION DU DROIT PAR LES JUGES, 31 TRAVAUX DE L'ASSOCIATION HENRI CAPITANT 402 (1980).

98. Sigfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 93 AM. J. INT'L L. 316 (1999).

99. *See* KAGAN, *supra* note 92, at 63 (recalling the commitment of Americans to multilateral action in the context of the United Nations. Moreover, the author suggests that the Americans claim to have created the United Nations. Despite this, Americans have a much more negative image of this institution than the French.).

100. On public administration in France, see YVES MÉNY, LA CORRUPTION DE LA RÉPUBLIQUE (1992).

101. Samuel Huntington, *Paradigms of American Politics*, 89 POL. SCI. Q. 20 (1974).

102. *See* Jean Combacau & Paul Reuter, *Ce n'est pas la faute de l'ONU si les Nations Unies le sont si peu*, *in* INSTITUTIONS ET RELATIONS INTERNATIONALES 355 (2d ed. 1982).

Furthermore, parallel to the way in which they envision the possibilities of law, it is also the relationship to war that is envisaged in a profoundly different manner within the legal cultures of international lawyers in France and the United States. More than 80% of Americans think that war can lead to the establishment of justice in international law, while only 50% of Europeans (including the French) are of that persuasion.[103] Moreover, when American and European (including French) views of human rights are contrasted, the common opinion is that Europeans (including the French) do not seek to impose their conception abroad, but only to promote its development in their own countries, while Americans today are ready to impose their view by military force.[104] There is therefore a relationship to war and the use of force which is more easily accepted, from a cultural perspective, in one country than in the other. Everyone is in agreement in thinking that these attitudes can be explained in part with reference to the history of past wars and suffering which have been experienced differently by Europeans and Americans. But is there not also in the reforming perspective of American pragmatism, and in the American tradition, a "heroic," progressive, and active dimension, which is different from the more neutral, conservative, and pacifists perspective of French positivism?[105] Even though this is so, it would be incorrect for that reason to characterize the French as effete pacifists and the Americans as unbridled warmongers. The French have several times resorted to force, for example the first Iraq war and in the conflicts in Kosovo and Afghanistan. I do not believe for an instant that Americans have a particular love for war, although the concept of security advanced during the past few years has supplanted that of peace in the American imagination.[106] The more moderate attitudes of each country are distorted, however, by mutual prejudices and by the occurrence of certain excesses that are inherent in the relations of the strong to the weak. Each of the two camps takes advantage of these excesses to stigmatize the perverse effects of each others' positions as reflecting—to use the well-known terms of Martti Koskenniemi—either the utopian idealism of the weak (meaning the multilateral legalism of the French) or the imperialist apology of the strong (meaning the unilateralist realism of the Americans).[107]

G. *American Realist Legalism and French Formalist Legalism*

What can we deduce from these observations? Without doubt, behind the clear-cut opposition between pragmatism and formalism, from a more nuanced perspective, one can see the opposition between different conceptions of legality which derive in

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103. Poll taken in 2003. *See* ROBERT KAGAN, LE REVERS DE LA PUISSANCE. LES ÉTATS-UNIS EN QUÊTE DE LÉGITIMITÉ 9 (2003).

104. *See* Pierre Rosanvallon, *Europe-États-Unis, les deux universalismes*, LE MONDE, Feb. 22, 2005; Martti Koskenniemi, *Perceptions of Justice: Walls and Bridges Between Europe and the United States*, 64 ZAÖRV 305 (2004) (the two writers expressing different variants of this idea).

105. On the heroic character of instrumentalism, see Koskenniemi, *supra* note 34.

106. *See, e.g.*, KALEVI J. HOLSTI, THE STATE, WAR, AND THE STATE OF WAR (1996).

107. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989) (demonstrating how the realist and idealist argument developed by internationalists tends always to oscillate between apology (in the service of *Realpolitik*) and utopianism (in the service of the formal rule of law), and that these two types of accusations are very often those that the Americans and the French regularly level at each other).

part from the different legal cultures of the two countries. The formalist legality of the French is easy to see because it is not presently under serious challenge and remains relatively coherent in the perception that it has of itself. On the other hand, the American conception of legality is sometimes impossible to pin down today as it is shrouded by government policy which seems to be adopting rather atypical legal ideas and policies, when viewed in the light of the American tradition. This American conception of legality has its roots in this tradition, but it is an unusual combination of the interventionist idealism of Wilson and the isolationist moralism of the republican tradition.[108] However, one would be mistaken to reduce the American conception of international law to that of the Bush administration. The American tradition is not that of a non-legalistic realism, but rather that of a *realist legalism*, to employ here the felicitous formulation of Hélène Ruiz-Fabri,[109] who contrasts it with the *formalist legalism* of the French. That is to say that aside from the most extreme realists, Americans have, no more than the French, renounced the rule of law in transnational or international relations, but rather entertain a broader conception of what law is and a realist culture of suspicion when confronted with its ineffectiveness or its unjust character. This makes the American conception less worrisome and at the same time much more interesting. As Elisabeth Zoller has so rightly pointed out, American legal culture is characterized by "its respect for justice and for law,"[110] and one cannot understand the American conception of law if one does not keep that in mind, even if it is a question of international law.

For all that, there is still more to say regarding this opposition between different representations of international law, for we are today witnessing a common awakening of interest in questions of justice and shared values in international law, which is confusing the pragmatist/formalist division and is complicating each conception, bringing about the reassertion of other values in the two cultures. The view shared by both countries that international law is approaching a real maturity and complexity also changes the nature of the questions asked. Thus, today, an American international lawyer will not only be confronted with the question of whether international law is definite, applicable, and effective, but also in specific cases, whether it is just. The answer to this question can involve contradictory logics, because the effective law will not necessarily be the most just and the just law can sometimes be made effective only with great difficulty. But at least the inclination is there. That is what the words of Thomas Franck express, seeing in this situation the posing of new questions for international law:

> The questions to which the international lawyer must now be prepared to respond, in this post-ontological era, are different from the traditional inquiry: whether international law is law? Instead, we are now asked: Is international law effective? Is

108. ROCHE, *supra* note 86, at 19. For a thorough development of this point, see Alex Lorite Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, 5 GLOBAL JURIST FRONTIERS (2005), *available at* http://www.bepress.com/gj/frontiers/vol5/iss1/art2/.

109. Ruiz-Fabri, *supra* note 10, at 181 (calling attention to the ambiguities of "realistic legalism").

110. ZOLLER, *supra* note 85, at 3.

> it enforceable? Is it understood? And the most important question: Is international law fair?[111]

As a general matter, Americans and the French seem to agree on the view expressed by Thomas Franck that existing international law integrates into the various matters with which it is concerned the value of fairness. This is so because of our contemporary reorientation towards justice and values. But for all that, Americans and the French do not think in the same way about questions of the justness of law, or, more generally, about legitimacy in international law.[112]

H. Culture of Justice and Culture of Law

I would like to return to the question of the moralization of law by the Americans that I have already considered. First, for Americans, it seems that the question of "the justness of law" answers itself. In contrast, the French are very concerned with disassociating morals from law, and with the concept that legitimacy comes from lawfulness. That does not prevent American writers like Thomas Franck from undertaking critical analyses of discourse on this subject, but without challenging the fact that the question of the "justness of law" has become central. Moreover, if we enlarge this idea somewhat with respect to domestic American culture more generally, going beyond professional legal culture, it seems that Americans always spontaneously make an implicit distinction between "good" law and "bad" law according to inherent conceptions of justice and goodness.[113] We find here the idea, still too often a caricature, according to which all Americans think that the American conception of law is necessarily "good" or "just" because it is the product of a good and moral people. It is true that this is a notion repeated frequently by several American presidents, but, as Carol Greenhouse perceptively notes, culturally, Americans see themselves as "*agents* of law rather than as *obeying* it," because law is perceived as "an extension of their own good sense and character."[114] While this may be close to the truth, it can only promote the idea of being able to refashion law as they choose, which accentuates law's utilitarian aspect. Where Americans display an absolute certainty in favor of new, more just principles, others only see contempt for the existing formal law and arrogance. But is not a certain arrogance the best shared characteristic between Americans and the French when the latter are also convinced of the universal validity of their own conception and understanding of law? Whatever it is, the American way of envisioning the justness of law is counterbalanced by their utilitarian culture, which tempers the idea that justice is uniquely based on moral values.[115] Efficacy remains a fundamental condition of legitimacy for Americans. Because utilitarianism and moralism remain quite remote from French legal culture, the French may share this

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111. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

112. I am not directing my remarks specifically at Professor Franck's analysis, which is subtle and dissects the idea of fairness in terms of "legitimacy" and "distributive justice," which can have the same meaning, but which can also have contradictory meanings, especially at the international level. *Id.* at 7-80.

113. *See* Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 STAN. L. REV. 1901 (2003).

114. Greenhouse, *supra* note 13, at 50. *See also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

115. FRANCK, *supra* note 121, at 8-40.

dual concern but without responding to it in the same way. For the French, the "just" international law is at best the formal law that exists. Although moral justice exists, and although the legitimacy of certain institutions is doubtful or they are ineffective, it ought never to lead to a violation of the law, but rather, to its reformation by means of existing procedures or through the use of exceptions to or derogations from the rules already provided for by the law.

Given these considerations, law and justice, the two terms used by Professor Zoller, are all the more interesting. I intend to consider them separately in order to characterize the American and French conceptions of international law today. It is in effect more justice, it seems to me, than law itself, which characterizes American culture in comparison with French culture, apart, of course, from the pragmatism/formalism division.[116] The American culture of justice broadly conceived does not only comprise judicial culture, and the respect for judicial power, but more significantly a deep need for just law, which necessarily requires a just decision by a judge following equitable procedures.[117] Theories of justice, now inescapable elements of domestic American culture, seem therefore to have indirect impacts on the American conception of international law. Such a conception is, it seems, taken to its extreme by most Americans today by conflating it with their deeper moral or religious standards, including their conviction of having a mission to carry out for the rest of the world.[118] It holds out the prospect of going beyond formal international legality in order to effectuate legal principles considered to be just and already commonly accepted—like democracy or human rights—or in order to be able to intervene in desperate and exceptional humanitarian situations. This notion once again points out the contrasts between legal culture broadly conceived by the French, where, despite its tendency to paralyze and deadlock, the system legally accepted must be respected—which accentuates the rigid side of formalism. In other words, positions adopted in response to these developments amplify the dominant aspect of each culture. One might also resort to caricature to which the present governments are certainly open—as is public opinion on each side of the Atlantic frequently—by drawing the contrast between the American upholder of justice (justice, if necessary by war)[119] and the French legalist (peace through law). This would evidently be still too reductionist, because the American conception of justice normally includes respect for procedural law, while the French conception of law also claims to embody a form of justice. It is the transposition to the international level of political considerations, as well as present circumstances, which leads to pushing each model to its extreme.

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116. Americans seem to me to be much more imbued with contemporary theories of justice than the French. *See* G. Calvès, *France-États-Unis: deux cultures juridiques*, 228 Le droit dans la société, Cahiers français, Oct.-Dec. 1998, at 29; J.P. Chazal, *Philosophie et théorie du droit ou l'illusion scientifique*, L'AMÉRICANISATION DU DROIT 212 (2001).

117. This is so even if one knows the importance of the law in the United States in contrast with Great Britain. *See* M.D. Trapet, *L'hypothèse de l'américanisation de l'institution judiciaire*, L'AMÉRICANISATION DU DROIT 121 (2001).

118. The ideas of the "grand design" and the "indispensable nation" were expressed by almost all American presidents. *See* KASPI, *supra* note 15, at 212.

119. *See* Michael J. Glennon, *The New Interventionism*: the Search for a Just International Law, 78 FOREIGN AFF. 2 (1999).

However, the re-emergence of values in international law by means of human rights and the idea of international justice confront each of the two countries with its own ambivalence concerning its own legal culture. We cannot fail to recognize that the American position sometimes forces the French to directly confront their own contradictions.[120] One will recall especially the profoundly ambivalent attitude of France—and Europe—at the time of the intervention in Kosovo, since it was presented as legitimate, although not legal, on the basis of arguments identical to those of American liberal international lawyers.[121] Existing formal procedures were set aside in the name of moral principles and the acceptance of an intervention considered legitimate and just, although it was not legal. More generally, the example of Kosovo demonstrates how difficult it is to maintain a strictly legalistic and formalistic attitude with respect to the new ethical dimension of international law as long as there is a lack of effective international institutions. But while Americans deliberately rush into the breach, as in Iraq, for example, the French are much more skeptical because of their own legal culture and resist such action most of the time. There results from this, it seems to me, a perception still more complex of the American view of international law, because Americans are torn between their own domestic legal culture and the possibility of its adaptation at the international level, just as they are torn between their internationalism and their nationalism.[122] The attitude of Americans toward international criminal tribunals is revealing of this schizophrenia; and America is equally ambivalent with respect to questions of legality and legitimacy. With their support of the two international criminal tribunals for the former-Yugoslavia and Rwanda, we see Americans' desire for the judicial justice to which they are so fervently attached, but at the same time they rejected the International Criminal Court, which might involve them. And, as the Secretary-General of the United Nations has remarked, might one not think that "[t]hose who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it?"[123]

The considerations discussed above are intended to demonstrate how the fundamental values of the two societies have both positive and negative repercussions on each country's manner of conceiving international law. Economic rationality, the quest for effectiveness, the importance of morality and religion, and judicial justice are the values of the American world, which have impacts on its conception of international law. The importance and the ideal character of law that is general and equal for all, the principle of legality, the separation of morality and law, the importance of formalism, a distant relationship between law and economics, are the values of the French world, which have the same type of impacts. However, as the

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120. P.M. Eisemann, *Preface*, *in* L'INTERVENTION ARMÉE DE L'OTAN EN RÉPUBLIQUE FÉDÉRALE DE YOUGOSLAVIE, PERSPECTIVES INTERNATIONALES (2001) For a more general treatment, providing more examples, see Dupuy, *supra* note 16, at 207.

121. BARABRA DELCOURT, DROIT ET SOUVERAINETÉS: ANALYSE CRITIQUE DU DISCOURS EUROPÉEN SUR LA YOUGOSLAVIE (2003). *See also* Dominique de Villepin, Law, Force and Justice: Speech to the International Institute for Strategic Studies (Mar. 27, 2003). On the American liberal position, see Anne-Marie Slaughter, Op-Ed., *Good Reasons for Going Around the U.N.*, N.Y. TIMES, Mar. 18, 2003, at A33.

122. A schizophrenic position maintained without concern by means of a double standard—there is one rule that one applies to oneself and another that one applies to others. KAGAN, *supra* note 92, at 135.

123. Kofi Anan, Secretary-General, United Nations, address to the General Assembly (Sept. 21, 2004), *available at* http://www.un.org/webcast/ga/s9/statements/sg-english.pdf.

ambivalence that cuts across the Franco-American divide clearly demonstrates—if in fact there was any need to do so at all—French and American cultural perspectives on international law can only be viewed with difficulty from a static point of view. It is also necessary to examine them from a dynamic perspective.

II. DYNAMIC DESCRIPTION OF THE FRANCO-AMERICAN DIVIDE AND THE "REFLECTIVE APPROPRIATION" OF LEGAL CULTURES

The recourse to a more dynamic description of French and American legal cultures is not intended to overshadow the significance of the static division, which continues to produce important effects in practice,[124] but it allows us to develop a more nuanced view of differing French and American perspectives on international law. Beyond the principal legal traditions in each country, there are in fact a multiplicity of divisions within each, which illustrates both the complexity of each culture and its continuing dynamism. In my view, however, the two approaches (static and dynamic) are complementary and not antagonistic. They in fact coexist, and it seems to me that only by means of a "reflective appropriation" of these cultural visions, viewed from both static and dynamic perspectives, can we surmount the sterile disagreements and mutual misunderstandings which they engender.

A. Advantages and Limits of a Binary and Static Presentation

A schematic description of French and American legal perspectives, with carefully chosen examples, cannot fully explain their significance or claim to reveal their objective truth, but simply try to describe their most commonly shared representations. It seems to me that such a description is helpful for a general clarification of the principal orientations of each of the two conceptions and to determine which of their components are unalterable when it is a question of creating, utilizing, interpreting, or applying international law. By virtue of the conceptual categories that they produce (legal categories and concepts), cultural and national perspectives on international law are also factors in the creation of the norms of international law, and are an element in the reality that they seek to describe but in which they also necessarily participate. Without being direct sources of law, however, the role of national perspectives is not neutral. Questions concerning the interpretation of international norms, their integration into domestic legal systems, and their application by domestic tribunals can only raise the stakes because international legal actors cannot abstract themselves from their entire legal and cultural backgrounds.

Even supposing, however, that my own subjectivity and personal reconstruction have not totally distorted it, the classic, static presentation of the Franco-American division has its limitations. There is always a risk in presenting a binary description. In seeking to describe without nuances the most general perspectives, agreed upon by doctrine and practice, a binary description is necessarily reductive, because it describes a strictly-confined argumentative confrontation between two parties (here Americans

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124. *See* Alejandro M. Garo, *On Some Practical Implications of the Diversity of Legal Cultures for Lawyering in the Americas*, 64 REV. JUR. U.P.R. 461 (1995); Mark W. Janis et al., Panel Session, *Comparative Approaches to the Theory of International Law*, 80 AM. SOC'Y INT'L L. PROC. 52 (1986).

and the French) without calling into question that confrontation itself. The result of this is a conservative orientation to the reasoning and the positions adopted, which contributes to making it resistant to dialogue and communication—so that one might convey the impression of digging even deeper the ditch that one would like to fill in.[125] At the same time, this division certainly exists; we all know it, whatever the content that each gives to it, even if it means criticizing my presentation of it. The division is often obscured by other considerations, but it nevertheless dictates some of our behaviors without our really being aware of it. So it is certainly necessary to take it into account. From this point of view, we have to understand that Americans and the French lock themselves into certain ways of looking at things because of their educational systems and their ways of communicating about law. As G. Sacerdotti has so rightly remarked,[126] it is alarming to see the degree to which writers and practitioners refer only to legal materials in their own language. He cites, for example, the *American Journal of International Law*, where articles making reference to American sources alone greatly predominate.[127] If we look at the two leading French international law journals, the *Annuaire français de droit international* and the *Revue générale de droit international public*, we would see largely the same thing (with the exception of more frequent citations to European sources). Doctrine has the tendency to reproduce itself within the same body of references on each side of the Atlantic and thus continue to perpetuate among the practitioners who read it the same patterns of thought. This is undoubtedly the most intractable problem. Although they are equally captives of their own legal cultures and of a similar collective confinement, academics often have personal perspectives on international law that are more sophisticated, more discriminating, and more nuanced than those I have described, but they purvey a reductive and simplified knowledge to practitioners at large who then engage in their practice with these presuppositions. In so doing, one can go even further to say that all this occurs as if this division, incorporated by the effect of legal reasoning into the legal culture of each country, had vanished from the immediate consciousness of most professionals, becoming in this way even more powerful because it is no longer conscious. It begins then "to resemble an objective fact [that] one postulates" and by which one is conditioned.[128]

B. Dynamic Description of Legal Cultures

It is therefore desirable to return to the idea of legal culture. In so doing, I want to suggest the development of a more flexible conception of the notion of legal culture, one which is certainly truer to the complex reality of our societies and which has been developed by certain contemporary writers. I have been inspired in these reflections by the work of Eric Hobsbawm, Jürgen Habermas, Jean-Marc Ferry, Yasuki Onuma, H. Patrick Glenn, and Edgar Morin[129] on tradition, memory, and history, and I have

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125. COHEN-TANUGI, *supra* note 93, at 201.

126. Janis et al., *supra* note 124, at 174.

127. *Id.*

128. BÉCHILLON, *supra* note 71, at 40.

129. HABERMAS, *supra* note 1, at 25; THE INVENTION OF TRADITION (Eric Hobsbawm & Terrence Ranger eds., 2004); ERIC HOBSBAWM, NATIONS ET NATIONALISME DEPUIS 1780 (1992) (discussing national and nationalist ideas in relation to tradition); MORIN, *supra* note 3, at 131; Yasuki Onuma, *When Was the*

relied more directly on the ideas developed by Antoine Garapon and Ioannis Papadopoulos[130] on the notion of dynamic legal culture. The central idea of these writers is that "it is necessary to contrast a deterministic conception of culture with a more dynamic vision, as much concerned with its unity as by its internal divisions and tensions."[131]

Within the idea of a national legal culture resides always the fact that every legal culture is the result in part of a certain "tradition," which has been historically constructed over time.[132] It is primarily this concept of "tradition" that must be compared. We must transcend the classical conception of an immobile and sanctified tradition, petrified in its past, which supports an exclusively static conception of cultural differences regarding international law.[133] Such a conception is patently dangerous and more importantly does not fully take into account the contemporary reality of the phenomenon. Eric Hobsbawm has gone so far as to speak of "the invention of traditions."[134] The specific traditions, continental formalism and Anglo-Saxon pragmatism, which are at the foundation of French and American cultural conceptions, seem, in this light, to be able to be understood differently—that is, as imposing nothing and in no way objectively or deterministically constraining our discourse as French and Americans, but simply as advancing—or hindering—certain evolutions in thought—if not of law itself.[135] As a result, there exist many different legal cultures and specific French and American conceptions of international law, but they must be considered to be unstable, not necessarily coherent, and susceptible to evolution by challenge and discussion. The domestic legal cultures and the traditions that have produced them have been impacted by the development of communications and the interpenetration of normative regimes, as well as by globalization; they have become mutually permeable and intersect more and more to the benefit of international law.[136] Legal cultures and traditions have also experienced internal evolutions, often paradoxical and complex, which prevent us from reducing them to the homogeneous and reductionist conception of a single explanatory model. Finally, the contemporary evolution of legal thought towards hermeneutics and critical reasoning has profoundly altered the way we describe our legal cultures to ourselves. Nevertheless, we continue to identify legal cultures with a conservative and backward-looking tradition of thought by focusing solely on their traditional aspects. To do so can constitute a real epistemological obstacle to the rethinking of fundamental legal conceptions.

Law of International Society Born?: An Inquiry of the History of International Law from an Intercivilizational Perspective, 2 J. HIST. INT'L L. 1 (2000).

130. GARAPON & PAPADOPOULOS, *supra* note 29, at 23-7.

131. *Id.* at 23.

132. *See* GLENN, *supra* note 13; WARNIER, *supra* note 3, at 6-14. For additional analysis, see also PAUL RICOUER, HISTOIRE ET VERITE 297 (1955), which distinguishes between civilizations (accretion over time) and cultures ("a law of loyalties and creation").

133. On the old conception of tradition, see GLENN, *supra* note 13, at 23; C. Atias, *Présence de la tradition juridique*, 22 REVUE DE LA RECHERCHE JURIDIQUE 389 (1997).

134. HOBSBAWM, *supra* note 29, at 1-14.

135. GARAPON & PAPADOPOULOS, *supra* note 29, at 24.

136. *See generally,* RON SCOLLON & SUZANNE WONG SCOLLON, INTERCULTURAL COMMUNICATION: A DISCOURSE APPROACH (1995).

Before undertaking a more dynamic examination of legal cultures, I want to delimit more precisely French and American conceptions of international law by taking into account three factors:

1) Internal renewal is characteristic of all traditions of legal thought. By preferring today to view legal cultures as creating a dynamic process, we now see that there are possibilities for renewal and adaptation to what is new because legal cultures draw upon both the past and the present, as well as both subjective and objective components. This does not mean that the principle of renewal of the legal tradition is an end in itself—which would indeed be a real contradiction—but simply that a tradition/conception can effectively produce something new and renew the contents of internationalist thought.[137] To assess the extent to which such an adaptation is possible, one can try to analyze what in a particular tradition/conception of international law moves it forward and what immobilizes it by looking at the interplay of present-day political, economic, and doctrinal forces.[138] For example, the particular policies of such and such a government, French or American, can be examined with respect to their legal cultures and traditions to see whether the legal culture allows the development of such policies, or whether it seems to immobilize them or even cause them to retrogress.

The stakes are high, if not decisive, because these policy choices challenge doctrinal or professional legal conservatism. A classic conception produces the illusion of a non-contradictory, coherent point of view without real dissidence,[139] which in effect claims to be an objective portrayal of law, and which is most often based on an identification between legal culture and national identity.[140] Such a conception can then serve manipulative purposes of all sorts and can be resorted to by people for exclusive nationalist, colonialist, or imperialist ends. In France, for example, this approach, in terms of a national conception or tradition, was at one time privileged, but then later abandoned. In 1905, the internationalist F. Despagnet said:

> We have to create a French school of the law of nations. Our side can gain much by it without any loss of impartiality. The spirit of reason and justice which characterizes our race will permit us to maintain that the defense of our legitimate interests imbues us more than all others perhaps with a clear notion of law coupled with the firm will to respect and to serve it.[141]

Assertions of this type have, happily, totally disappeared today. They can be explained by the period and the context in which they were made. It is a conception which has little by little fallen into disuse because of the growing influence of the sociology of law and of legal positivism, which have made the idea of legal culture much less relevant as an element of law. But the cure has undoubtedly been too radical.

In the United States, on the other hand, the idea of legal culture has remained present, but it is today used in a strongly nationalist context which can even accentuate its classical, static representation. These observations are directed to the American

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137. PRESTON KING, THINKING PAST A PROBLEM: ESSAYS ON THE HISTORY OF IDEAS 56 (2000).

138. GARAPON & PAPADOPOULOS, *supra* note 129.

139. *Id.*

140. On "identity strategies," see CUCHE, *supra* note 12, at 92.

141. F. DESPAGNET, COURS DE DROIT INTERNATIONAL PUBLIC VI (3d ed. 1905).

neo-conservative school of thought that has developed a "nationalist conception of international law," in the words of Alexandre Lorite Escorihuela,[142] in which the elements of the American legal tradition are presented in an extremely conservative way.

2) We must remember the history of legal traditions and cultures. To envision the French and American cultural conceptions of international law in dynamic terms leads to viewing the influence of the past on the present and the way in which the past conditions, although without actually determining, the present-day views of international lawyers. The work of H. Patrick Glenn on different legal traditions perfectly illustrates this phenomenon.[143] An historical perspective, might better clarify and enable us to understand French and American universalisms with respect to human rights. In France, for example, as a result of disillusionment with Europe's colonial past, the defense of universalism of human rights has become somewhat tentative. The defense of universalism by the United States, on the other hand, has become dogmatic, quasi-missionary, and capable of being imposed by force, if need be.[144]

3) We must also consider the internal divisions and the external permeability of all legal cultures. It must be emphasized at the outset that there never exists a single legal culture or a single legal tradition for any given society, but a dominant legal culture and a minor legal culture, as I have already tried to show, as well as other legal cultures that exist side-by-side, are subsidiary, internal, and even legal counter-cultures.[145] A legal culture can never be viewed in isolation; it defines itself only through its opposition to other legal cultures.[146] And it is this last point that I would like to stress with respect to Franco-American cultural differences. It would be therefore very difficult to isolate any particular French legal tradition without linking it to the German or British traditions. In the same way, one cannot understand the legal tradition of the United States without considering the way in which it has been constructed relative not only to English culture but also in relation to South American and Canadian cultures,[147] and vice-versa. Of course, the French and American legal traditions have been constructed since the 18th century in opposition to each other, rooting themselves in cultural universes that are close, but yet different. The ambivalent construction of the French and American identities in opposition to each other also explains their constant permeability.

Confrontation between legal cultures does not mean perpetual competition or systematic opposition. There are as many points of convergence as differences between different conceptions of international law and it is important not to overlook

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142. Escorihuela, *supra* note 108.

143. GLENN, *supra* note 13, at 12.

144. *See* Pierre Rosanvallon, *Europe-États-Unis: les deux universalismes*, LE MONDE, Feb. 22, 2005.

145. GLENN, *supra* note 13, at 343 (applying these terms to legal culture). See also the similar idea of "counter-tradition," developed in COUNTER-TRADITION: A READER IN THE LITERATURE OF DISSENT AND ALTERNATIVES (Sheila Delany ed., 1971). On the different legal sub-cultures in France, see JOHN BELL, FRENCH LEGAL CULTURES (William Twining & Christopher McChudden eds., 2001); and in the Anglo-Saxon world, see JEREMY WALDRON, *Minority Cultures and the Cosmopolitan Alternative*, *in* THE RIGHTS OF MINORITY CULTURES 93-122 (Will Kymlicka ed., 1995).

146. Ngo Tu Lap, *Identité culturelle: la relativité de la diversité*, *in* DIVERSITÉ CULTURELLE ET MONDIALISATION 82 (Autrement ed. 2004).

147. *See supra* note 124, at 461.

them. They are the agents of change in the divisions between conceptions, as they transcend the fundamental divisions which seemingly exist between them. A searching analysis of these convergences between different legal cultures would thus show, it seems to me, that quite often the divisions have become *internal* to each culture and not *external* to these cultures; so that what we see today is a pluralism of legal divisions which transcend national frontiers and group together actors who come from different legal traditions. Is that not what present-day disagreements within both the United States and France demonstrate concerning, for example, the liberalization of international markets by means of the World Trade Organization, the inclusion of social clauses in commercial contracts,[148] the prisoners at Guantánamo, the International Criminal Court,[149] or the legality of armed intervention? Has not the idea of a duty of humanitarian intervention, which was French at the outset, been taken up today in other terms by the Americans and has it not given rise to the same passionate controversies in each country?[150] Is not the nationalism of the American conception, which is widely rejected in France, also a matter of controversy in the United States to the point of raising questions as to whether it is really an element of American international legal culture?[151] Is this not also what even the most restrained (but also important) arguments reveal, concerning the application of international law in the domestic legal order which give rise to opposing views even within each country?[152] Or academic disagreements on legal methodology and the relationship between formalism and realism?[153] Or the agreement of "liberals" concerning human rights, the desirability of democracy in states, and a cosmopolitan Kantian vision? Or discussions

148. *See* SUZANNE BERGER, NOTRE PREMIÈRE MONDIALISATION: LEÇONS D'UN ÉCHEC OUBLIÉ 67 (2003); Marcos Ancelovici, *Organizing against Globalization: The Case of ATTAC in France*, 30 POL. & SOC'Y 427 (2002).

149. *See* Benjamin Ferenz, *Heed the Lesson of Nuremburg: Let No Nation Be Above the Law*, Nov. 18, 2005, http://www.forward.com/articles/6093.

150. MARIO BETTATI & BERNARD KOUCHNER, LE DEVOIR D'INGÉRENCE HUMANITAIRE: PEUT-ON LES LAISSER MOURIR? (1987).

151. See Justice Kennedy's statement: "[N]ationalism or self-interest will obscure the greatness of American traditions." *quoted in* Charles Lane, *The High Court Looks Abroad*, WASH. POST, Nov. 12, 2005 at A05.

152. In France this debate took place mostly at the time of the construction of the European community and the resistance of French courts when faced with the prospect of the supremacy of community law. It has been revived today in the United States by references made by the Supreme Court to European law and to international law. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003).

153. For a critical French internationalist positivist position in reaction to an excessive formalism of certain French writings, see Dupuy, *supra* note 16, at 30, 94. *See also* M. Waline, *Empiricisme et conceptualisme dans la méthode juridique: faut-il tuer les catégories juridiques?*, *in* MÉLANGES EN L'HONNEUR DE JEAN DABIN Tome 1 at 359 (1963); D. de Béchillon, *Porter atteinte aux catégories anthropologiques fondamentales?*, REVUE TRIMESTRIELLE DE DROIT CIVIL 47, 50 (2002). For questions concerning methodology on the American side, see for example, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Clark Byse, *Legal Scholarship, Legal Realism and the Law Teacher's Intellectual Schizophrenia*, 13 NOVA L. REV. 9 (1988); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). *See also* KOSKENNIEMI, *supra* note 67, at 494.

on contemporary theories of justice which occur within each culture?[154] Or those among judges on the two sides of the Atlantic?[155]

All these questions clearly entail the taking of positions where arguments are intermixed and where barriers between the legal cultures of the two countries are removed. Is there not, in many specific respects and even more generally, a "constant tension" between the models of realism (in its instrumentalist form) and formalism, as Martti Koskenniemi suggests, which accompanies the possible interaction of the two cultures and their internal divisions?[156] Realism can never completely eliminate the formal rule and must recognize its positive role of "inclusion" and equality; and formalism can evolve only under the influence of a pragmatic and realistic search for rules better adapted to reality.

In other words, once we admit that there is something inherent and perhaps irreconcilable in each legal tradition and legal culture at the level of privileged values, and once we accept the idea of two fundamental models, then we can see how international legal professionals, actors, and representatives of each of the two countries made their arguments which are based on their own legal traditions and at the same time converge to a great extent, thereby facilitating borrowings and intersections between the French and American models and traditions. As I have argued, because binary and static representations are so deeply rooted in the French and American mental landscapes, these actors are far from being consciously aware of what they are doing. Over and above the principal schools of thought, and of the paradigms which orient them in a general way, each country and each culture has evolved and is continually evolving from realism to formalism, from pragmatism to system building, from empiricism to rationalism, from casuistic judicial reasoning to legalistic reasoning,[157] et cetera, and vice versa. If I take the example of France, and of its professional milieu alone, nothing would be worse today, it seems to me, than to identify "the" French conception of international law with the sociological tradition that emerged from the school of Georges Scelle or, on the contrary, with the voluntarist tradition inaugurated by Jules Basdevant.[158] This would be to freeze an intellectual position, which in any event never existed as such, and to give a false impression of reality. Not only have these currents of thought always coexisted in one form or another, but they intersect today to a great extent, so that one can identify only with great difficulty a strictly sociological or voluntarist French tradition/conception of international law. Despite the unquestionable and almost constant influence of formalistic positivism, the French legal tradition has renewed itself in more nuanced forms than might appear.

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154. *See* JACQUES LENOBLE & ANDRE BERTEN, DIRE LA NORME: DROIT POLITIQUE ET ÉNONCIATION (1990).

155. *See, e.g.*, JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (ROBERT BADINTER & STEPHEN BREYER eds., 2004).

156. Koskenniemi, *supra* note 34, at 89 (contrasting the "culture of instrumentalism" with the "culture of formalism," but in terms that seem to me to be well adapted to the French and American models).

157. On the importance of legislation in the jurisprudence of the Supreme Court, see Ana Peyro Llopis, *La place du droit international dans la jurisprudence récente de la Cour suprême des États-Unis*, 109 R.G.D.I.P. 16 (2005).

158. Although in their times they inaugurated or consolidated specific ways of conceiving international law. *See* KOSKENNIEMI, *supra* note 67, at 266.

As for American schools of thought about international law, it would be just as absurd to reduce the present American conception to the realist tradition inaugurated by Myres S. McDougal or conversely, to that of American legal process of Abram Chayes, Thomas Ehrlich, and Andreas F. Lowenfeld. David Kennedy has well demonstrated how the discourse of American international lawyers is linked over time and the interactions of different currents of thought produce major cycles of enthusiasm and distrust vis-a-vis international law.[159] In any event, the contemporary American discipline of international law is witnessing an unbelievable vitality and inventiveness, which can only increase its conceptions and also its divisions about international law, none of which the external legal policies of the present government can obscure. Are not diversity and plurality moreover two of the most notable characteristics of American society and culture?[160]

To best comprehend these changing divisions, both internal and external, we must bear in mind their *continual movement* and the fact that this movement can involuntarily—or not—mask deeper divisions (that are also in motion). To be more precise, let us say that the external divisions that we erect between the French/continental and the American/Anglo-Saxon conceptions exist, but in a changeable, attenuated, and nuanced way. Moreover, let us say that these divisions are clearly less important than the divisions that are continually reforming and opposing the western tradition to a non-western tradition. That, without doubt, is much more worrisome and important for the whole world.

C. The "Reflective Appropriation" of Legal Cultures

The legal cultures of France and the United States have to be viewed in a dynamic context, one which highlights their divisions and their intersections, as much as their unity and their opposition to each other. This would assist us in better understanding their true natures and their interactions. It is their interactions, however, which permit them to retain their identity, as they confront each other. Also, they continue to remain unique unto themselves. From this uniqueness flows cultural conflicts with respect to the creation, the interpretation, and the application of norms of international law that have to be resolved. But how?

Why is this question of cultural division so important with respect to an entire society's relationship to law and its representation of international law? Why is it, perhaps that in essence, it is more important than that of political or economic divisions between our two countries? As Jürgen Habermas has already so well shown, it is undoubtedly because culture corresponds to one part of the identity and the personality

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159. *See* David Kennedy, *The Twentieth-Century Discipline of International Law in the United States*, *in* LOOKING BACK AT LAW'S CENTURY 386 (Austin Sarat et al. eds., 2002); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335 (2000). The studies of David Kennedy also rely on the idea of an internal structure of discourse among internationalists, which encloses them in language games, of reciprocal arguments and counter-arguments, which precludes any definitive and insular conception of international law. This argument is seductive and convincing with the evidence it adduces of language games within the discipline of international law. However, we will not pursue it to its logical conclusion, as it would prevent us from taking a reflective and critical position in relation to this field of argumentation.

160. LHERM, *supra* note 33, at 101.

of every individual: "Cultures form identities and wholly permeate personality structures."[161] Legal cultures also participate in the construction of everyone's identity by occupying a place sufficiently central within the general cultures of our two countries.[162] If cultures form identities, it has two critical consequences that are interrelated.

First, it follows from this that cultural conflicts are also existential conflicts that revolve around values, as opposed to conflicts of interest.[163] Consequently, nothing would be more dangerous than to reduce these conflicts to questions of foreign policy or to simple economic interests, because, in so doing, the more we would like to ignore them the more they are going to reappear and seek to assert themselves. The question of organically modified food, for example, cannot simply be reduced to a commercial question between Europe (including France) and the United States. Behind the important economic stakes, the culture of risk differs profoundly on the two sides of the Atlantic. Therefore, this question cannot be resolved by way of commercial negotiations alone.[164] It is the same for access to medicine by developing countries. The question of reconciling the need to provide medicine in case of pandemics and the protection of patent rights is evidently tied to extremely important commercial interests, but highlights also different conceptions of property, freedom, and aid to developing countries that one can envision culturally very differently, either by means of a charitable conception (the United States) or by means of a redistributive solidarity conception (France). In other words, we really have to take into account the cultural conflicts (including conflicts of legal cultures) that are hidden behind commercial and political conflicts in order to know how to respond appropriately to them.

Second, the upshot is that these cultural conflicts cannot be resolved by means of negotiation or simply by one nation adopting the solution of the other, but by means of "reflective appropriation."[165] This insight of Jürgen Habermas seems to me to be fundamental. It is philosophical in nature and is based on a deep, critical appreciation of the value of traditions and cultures.[166] Habermas' insight also demonstrates that we cannot resolve problems of legal culture at the international level in the same way as other types of conflicts, and that it is essential for international lawyers to seek solutions at the level of training, education, and teaching. We have to learn to identify legal cultures so as to better adapt ourselves to them, but perhaps also at times to temper our enthusiasm for them. I realize that what I am suggesting is the idea of assuming a critical stance toward the traditional legal culture of each country with the possibility of selectively rejecting certain aspects of it and retaining others. What I am recommending, then, is a critical and rationalist position, which will not necessarily be viewed favorably by everyone.[167] I want to reiterate that in adopting this stance, I am

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161. HABERMAS, *supra* note 95, at 218.

162. Pierre Lagrand, *European Legal Systems Are Not Converging*, 45 INT'L & COMP. L. Q. 52, 57 (1996).

163. HABERMAS, *supra* note 95, at 218.

164. *See supra* note 7, at 208; PASCAL LAMY, LA DÉMOCRATIE-MONDE: POUR UNE AUTRE GOUVERNANCE GLOBALE 62 (2004).

165. HABERMAS, *supra* note 95, at 235.

166. HABERMAS, *supra* note 1, at 25.

167. What I am suggesting is the adoption of the "rationalist tradition." On this well-known question, see Karl Popper, *Toward a Rational Theory of Tradition*, *in* KARL POPPER, CONJECTURES AND

not trying to give a strictly cultural explanation of the Franco-American division with respect to international law, but only to fully restore this perspective—along side the other explanations which are more often advanced—to account for the competing conceptions of the two countries concerning international law.

D. *"Shared Legal Culture" and "Common Historical Memory"*

To explore this idea in more depth, I want to pursue here certain paths for reflection that Jean-Marc Ferry has proposed for Europe, and to add several practical comments. We know what Europe is today; it is not a model, but rather a "laboratory" for the integration and intersection of national legal cultures.[168] However, despite several integrated legal systems at the regional level (the European Union, the European Court of Human Rights), the question of legal cultures remains a real problem, which is becoming even more dramatic between East and West. Confronted with conflicts which arise between European states, Jean-Marc Ferry has proposed the practice of a "shared political culture" and of the development of a "common historical memory."[169]

For the idea of "shared political culture," I would substitute that of shared *legal* culture, that is, the effort to develop an "amalgam" of the legal cultures of each country. This amalgam does not mean the adoption of a common policy, like that deemed desirable at the level of the European community, but simply that our different cultural ways of thinking about international law can be understood in the dynamic way that I have already described, that is, in their complex interrelation with each other. In so doing, they would have to be reconsidered and debated in the context of reflection, understanding, and deliberation. Writings would have to be translated, read, and used. The idea of "a common historical memory" is just as fundamental at the international level. It would proceed by a self-critical examination of one's own past, "by the teaching of the historical experiences of nations and by the recognition of the multiple forms of violence that they have inflicted on each other." How can we not see at the present time that this "mutual opening of national memories" is critical for the whole world?[170] Relating more specifically to the theme of this article, how can we not see that the historical memory common to France and the United States can be better understood, studied, and taught, even though both countries have revisited their common past many times, but almost always with a total lack of understanding of the perspectives of the other? Let us think about the second Iraq war and the accusations of "appeaser" leveled against the French by the Americans. The "teaching of memory" has become indispensable to jurists today in the context of a globalized society, which paradoxically, encourages the clash of national cultures.[171] Even a hegemonic

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REFUTATIONS 120-21 (1969); ALASDAIR MACINTYRE, QUELLE JUSTICE? QUELLE RATIONALITÉ 375 (M. Vignaux d'Hollande trans., 1988).

168. M. Delmas-Marty, *Comparative Law and International Law: Methods for Ordering Pluralism*, U. TOKYO J. L. & POL. (forthcoming in 2006).

169. JEAN-MARC FERRY, L'EUROPE, L'AMÉRIQUE ET LE MONDE 29 (2004).

170. *Id.* at 32. *See* Anthony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflict*, *in* METHODS IN INTERNATIONAL LAW 186 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004) (expressing this viewpoint by third-world, Latin American writers).

171. As Habermas points out, only history can lead to a true reflective distance with traditions, with our

superpower like the United States cannot do without being receptive to this common history (as well as to the shared legal culture), because it would then underestimate the capacity for reaction by other cultures and their even stiffer resistance.

E. Limited Interdisciplinary Education and the Methodology of Comparative Law

One can draw very concrete conclusions from these two ideas and from the necessity of "reflective appropriation." I will limit my discussion here, in my capacity as university professor, to teaching in the academy and legal methodology. It seems to me absolutely necessary that there be instruction in shared historical memory and legal culture (broadly conceived to include all cultural phenomena) *within the discipline of international law.* It would seem desirable that we open the discipline of international law to history and to different legal cultures if we accept the idea that national conceptions and legal cultures are significant influences on international law. In addition, it is not only the legal cultures of others, but also one's own legal culture, that it is necessary to study and to examine critically. This would surely have a paradoxical effect on the teaching of international law in France and the United States. It would be necessary to break down the walls of international legal education in France by including a course in "History, Legal Cultures, and International Law" or in "Legal Traditions and International Law." Conversely, it would be necessary in the United States to limit those courses that are already taught in an interdisciplinary way, and to refocus them on fundamental legal doctrines.

It would also be necessary to add a course in comparative law as a methodology to complement the course in history and legal culture. Can the international lawyer of today avoid being a comparativist? For a long time, comparative law has had little relevance for international law; the comparativist not seeing an object of study in a single law or a single legal system. This is reflected in the well-known views of Sir Hersch Lauterpacht and H.C. Gutteridge.[172] But globalization, the frequent interpenetration of domestic, transnational, and international legal orders, fragmentation between a variety of general and regional international legal regimes, and now the return in force of particular national and cultural perspectives all call for comparative education. In the association of comparative law and international law so lucidly recommended by Mireille Delmas-Marty,[173] is there not a basis for the solution of what we perhaps better perceive today and what might lead us to a better understanding of international law as it is presently evolving? Perhaps it could even be one of the elements of the solution to the problem posed in the introduction to this Article—that

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own legal traditions, and the legal traditions of others. HABERMAS, *supra* note 1, at 25.

172. H.C. GUTTERIDGE, COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY & RESEARCH (2d ed. 1971); H. Lauterpacht, *The So-called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31 (1931), cited in L. Amede Obiora, *Toward an Auspicious Reconciliation of International and Comparative Analyses*, 46 AM. J. COMP. L. 669, 671-72 & n.4 (1998).

173. Delmas-Marty, *supra* note 168. *See also* Mireille Delmas-Marty, *Comparative Law and the Internationalisation of Law in Europe*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 247 (Marck Hoecke ed., 2004) (explaining, with reference to European law and international law, the phenomena of legal "hybridization" and "harmonization"); Mireille DELMAS-MARTY, LE RELATIF ET L'UNIVERSEL (2d ed. 2004); Mireille DELMAS-MARTY, UN PLURALISME ORDONNÉ (forthcoming in 2006).

of the fate of our common legal heritage since 1945. We are not able to fully develop here the consequences of this association with respect to law itself, but we can at least perhaps comment on its bearing on legal cultures. If behind the same body of international legal rules—both written and unwritten—are hidden the same great cultural differences, comparative law can help us to harmonize interpretation by assisting in the understanding and the comparison of the legal cultures and national conceptions of each. The utilization of comparative law as a methodology would allow us to apply in practice the "reflective appropriation" of legal cultures. In truth, this type of reflection and the association of law and culture is a longtime characteristic of the comparative method,[174] which has been greatly refined, often very pragmatically, in the area of human rights. It should then simply be extended to the whole field of international law, which, over and above the problem of human rights, remains deeply dependent on different cultural contexts.

Although comparison seems to me to be necessary, I am not here to advocate a strictly cosmopolitan conception of law, as I have discussed elsewhere.[175] Nor am I here to advocate for the standardization of cultures or their dissolution in a possible world legal culture. If one really takes seriously the idea that culture, including legal culture, lies at the foundation of personal identity and that each culture evolves in constant interaction with others, the idea of a world legal culture is frightening because of its solvent and totalizing, if not totalitarian, aspect, since it means the complete absence of pluralism. It is the same, *a fortiori*, for all imperialist claims of particular national conceptions. "To ask a state or a people to give up its collective preferences is *de facto* to exclude it from the international system."[176] Even with respect to the interpretation of the domestic law of each state, the knowledge of the legal cultures of others can lead to an interpretation of one's own law with a better understanding of what makes one's own legal culture special or what aspects of it should be rejected. Was this not well demonstrated by Justice Stephen Breyer with respect to the public financing of religious schools, and Justice Anthony Kennedy with respect to the imposition of the death penalty on minors?[177] Similarly, the existence of different cultural conceptions of international law is not something to regret; on the contrary, it can be a source of continual emulation and of positive transmission of different legal experiences to the international and transnational levels. One can perhaps go even further and think that if these legal cultures have really become interdependent, any loss to one would be a loss for others, too. It would then be necessary to adapt the legal cultures of others to one's own to understand their degrees of divergence, the reasons for their incompatibility, and their points of convergence.

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174. The use of the comparative method in this context has given rise to numerous debates. For opposing views, see Legrand, *supra* note 162, at 52 (1996); and H. Patrick Glenn, *La civilisation de common law*, 45 REVUE INTERNATIONALE DE DROIT COMPARÉ 559 (1993).

175. It seems to me that one can think about the future in terms of the "well-ordered pluralism" and "common law" of Delmas-Marty, but on the condition of respecting the related existence of the tryptique of states/regions, international law, and globalized law. *See* Emmanuelle Jouannet, *L'idée de communauté humaine à la croisée de la communauté des États et de la communauté mondiale*, 47 ARCHIVES DE PHILOSOPHIE DU DROIT 191 (2003).

176. LAMY, *supra* note 164, at 63.

177. Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (Breyer, J., dissenting); Roper v. Simmons, 543 U.S. 551 (2005).

Comparison can lead to the harmonization of points of view, but also to the acceptance of differences in order to fully restore the salubrious interplay of political forces at the international level by providing a better understanding of the choices which must be made together. To decide how to reconcile two different cultural perspectives on law with respect to a particular problem is in effect to return to the critical question of political choice. We should no longer confuse the values that can emerge from the interaction of legal cultures with the policies which states must pursue at the international level. The lessons of shared history and the "reflective appropriation" of cultures can assist us in making choices, but they cannot replace political debate on the best way to move forward together. It is there that political debate begins and asserts its primacy.[178] Some will consider that this choice can only be made by the imposition of one's own values, but others—myself included—might think that we can also engage in collective choices.[179] And perhaps we will finally be able to attain that "diverse" identity[180] to which many today aspire.

In any event, this requires that international lawyers be willing to reconceptualize international law as a multi-cultural and historical phenomenon, not just as a tool at the disposition of each party (the American view) or simply a formal rule (the French view); and to integrate this understanding into their ways of practicing, thinking about, and teaching international law. The refusal to consider the historical, cultural, pluralistic, dialectic, and paradoxical dimensions of international law is perhaps at bottom what most unites the French and Americans today, and in this they are neglecting essential aspects of international law. In so doing, they are led into recurring impasses and useless conflicts, and, as is still the case today, into a sterile lack of understanding of each other's perspectives on international law.

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178. *See* Thomas Ferenczi, *Le passé revisité*, LE MONDE, Feb. 3, 2006, at 2.

179. *Id.*

180. Alain Renaut, *Conclusion*, 441 HISTOIRE DE LA PHILOSOPHIE POLITIQUE: LES CRITIQUES DE LA MODERNITÉ (1999).

THOUGHT VERSUS ACTION: THE INFLUENCE OF LEGAL TRADITION ON FRENCH AND AMERICAN APPROACHES TO INTERNATIONAL LAW

Dana Zartner Falstrom

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