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*Reflections on the Necessity of Regional Approaches to International Law Through the Prism of the European Example: Neither Yes nor No, Neither Black nor White**

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Invited to speak at the opening of the Second Biennial Conference of the Asian Society of International Law, which focused on *International Law in a Multi-Polar and Multi-Civilizational World: Asian Perspectives, Challenges, and Contributions*, I had to reflect on the specific contributions our regional societies supposedly bring to international law. More specifically, the underlying idea was that of a regional vision or approach to international law which could be more or less rooted in a tradition. I soon realized that our regional societies could be viewed in a rather ambiguous or ambivalent way, since they could be seen as a means of promoting a regional vision as well as a means of enabling people to meet beyond the domestic scope, which is the horizon of most academics, if not practitioners, to share their views on international law at large. The two views are not entirely incompatible but they do not carry exactly the same spirit regarding the purpose of regional societies.

The ambivalence originates in the necessity we feel to justify our own existence. On the one hand, we can be very pragmatic and point out that the regional level, empirically conceived, is a sort of "critical" level to organize events and network. National is not enough any more for most countries. Global is too much. Regional is, let us say, practicable. This is especially true for young people. At the same time, none of our regional societies pretends to be exclusively regional but strives to be truly international and able to attract from all over the world. On the other hand, the temptation to refer to a more "ideological" rationale and therefore to identity is never very far away. In a way, the idea of reaching beyond national boundaries is

* Name of a French game where the player has to answer a series of quick questions without pronouncing one of these common words. This article is based on a speech given at the Second Biennial Conference of the Asian Society of International Law, *International Law in a Multi-Polar and Multi-Civilizational World: Asian Perspectives, Challenges, and Contributions*, Tokyo, Japan, 1–2 August 2009.

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very seductive, but one should not forget that one identity is always built upon another. The region can be the space where solidarity is found but it is also, most of the time, the place where the most important tensions develop. The maximum tension occurs between neighbours, which is the dark side of the maximum of commonalities or of common interests.

I therefore felt the need to further reflect on this idea of a regional approach to international law, an idea towards which I felt reluctant from the beginning because I do not believe it is the purpose of regional societies to disseminate or promote a distinctive regional vision of international law, being that a regional vision is quite different from the idea of regional insights into international law. Quite logically I have focused on what could be the arguments in favour of the need for a European approach to international law.

I.

It seems almost impossible, at first glance, to give a negative answer to the question of such a need, if only because, to a certain extent, such a European approach to international law already exists.[1] One could think this is the case because such an approach was, at least in part, necessary. This statement derives from the observation of reality. In a great number of situations, for instance, the European Union (EU) speaks with one voice, which posits the upstream existence of the definition of a common approach. However, this tautological reasoning is unwise in the sense that it presupposes the existence of a European approach even before having shaped in more precise terms what this approach might be and what it might entail. Yet, as will be discussed later, this is the essence of the issue. While the given example seems obvious, it demonstrates how quickly certain biases can be taken, such as assimilating the European approach and the approach of the EU. Furthermore, while this tautological reasoning excludes a purely negative answer, it nevertheless does not necessarily and naturally lead to a purely positive answer either. A positive answer is obviously tempting, if only because it seems politically correct at first sight. Yes, such an approach is necessary if Europe is to exist as a reality and not only as a project. How could Europe indeed assert itself as an actor if it does not have its own approach to international law, even if this approach can be shared well beyond Europe's borders? However, such a univocal and general answer can only arouse suspicion. What if there is a hidden side? A hidden side which for that matter is not that well hidden because, Europe's past or that of a certain number of European countries being what it is, the issue quickly sparks off the suspicion that the aim is to reflect on the device for a renewed imperialism. This suspicion can never be entirely dispersed. Whether we want it or not, in the background of such a reflection always lies a play of influence. The wording of an answer that is affirmative in its two dimensions—such an approach exists, and such an approach needs to exist—therefore carries its own limit, considering how obviously the approach is conditioned and thus relative or contextualized.

1. See the symposium "Europe and International Law" (2004) 15 European Journal of International Law 857.

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The purpose is henceforth not only to acknowledge the fact that the answer is necessarily "situated", in the sense that it is intrinsically linked to the person who expresses it, and that it may very well vary depending on the professional situation, origin, and education of the said person. In this case, the answer will inevitably be very French considering the underlying (legal) culture, or even very (pro-)European considering the underlying convictions. It is precisely those convictions that have prompted an active commitment to the setting up of the European Society of International Law, whose objectives include supporting a better assessment of the role of the European tradition and the development of European points of view on international law. This already gives a first lead. Beyond the convictions it carries in itself, the project of promoting the development of European points of view on international law implies that such points of view do not exist, or not sufficiently, and that the existing European approach needs to be strengthened or completed. The question of the necessity for a European "vision" has, for that matter, already been raised in the works of the European Society, and Sir Michael Wood has emphasized his preference for the reference to a European approach rather than a European vision of international law,[2] a preference with which I fully agree, while also taking into consideration a certain number of doubts he has expressed.

However, sticking to such a "situated" answer, which only adds one point of view to many others, seems to somewhat mutilate the objective of this reflection. As was mentioned right away, the question of the necessity for a European approach to international law is political in the sense that it is necessarily connected to a project. Giving an answer thus equates to siding with or against the project, more or less consciously and with more or less nuances. However, I do not believe this should be voiced within this article. I have therefore focused on the question and, more specifically, used doubt as a methodological device to question the necessity for a European approach to international law, in order to reflect on the level on which the issue arises and on what it means or implies. To a certain extent, reflecting on the question—which aims at clarifying its nature and which identifies its complexity—relieves me from the necessity of providing an answer, each one being free to choose his or her own.

II.

As it is considered here, the question is essentially formulated at the scholarly level, based on the hypothesis that one or several European approaches already exist(s) in practice in the realm of legal policies (what can or could qualify as a European approach will be discussed later in this article). In this latter register, the issue is not so much to investigate whether a European approach is necessary, but rather to assess whether the existing approach(es) should be modified, strengthened, softened, etc., both in substance and procedure.

2. Michael WOOD, "A European Vision of International Law: For What Purpose?" in Hélène RUIZ FABRI, Emmanuelle JOUANNET, and Vincent TOMKIEWICZ, eds., *Select Proceedings of the European Society of International Law*, Vol. 1 (Oxford: Hart Publishing, 2008), 151.

When directed at or asked by scholars, the question obviously aims for the critical assessment of what exists, but it also questions scholars on their own positioning. Should they develop and promote, for and by themselves, a European approach? This implies the clarification of the meaning of "scholars", because the word can have at least two meanings. The first meaning is material and encompasses "legal thought" on the whole, and thus a corpus of ideas. The other is organic and embraces the authors of said legal thought, and also constitutes a professional field. However, the stake remains the same, which is a play of influence. This calls into question the prestige of the expressed thought as well as that of the body voicing it. But before the issue of an actual European approach can be debated, this stake calls for clarification, which brings me to consider the state of scholarship and its purpose.

A.

The first and most obvious observation is the fragmented or even atomized character of academia (the notion refers to the organic meaning of scholarship), based on an essentially national partitioning. Such a partitioning does not exist for other international law practitioners, whose very activities imply a constant exchange capable of reducing the potential tropism induced by their education. The academic partitioning is largely due to the fact that professional careers are first and foremost national, although this situation is not univocal through time. We can, indeed, observe the current co-existence of academic systems which, after a period of self-sufficiency, have integrated into their education the requirement of studies abroad, and academic systems which were once extroverted due to their incomplete character but have progressively withdrawn as they developed.

The accumulation of these various factors, empirically observed here, has created a mutual relative ignorance of the scholarship in other countries. The European construction certainly urges looking beyond national borders through policies which target the specific fields of education—with programmes such as Erasmus or the European harmonization of diplomas—and research, but also through the growing requirement of setting up international/European networks as a precondition for research funding.

While this progressive opening aims to ward off the threat of marginality, and its benefits are obvious, one cannot help but wonder about its detriments (this question underlies the resistance to the said approach). Here appears the stake of identity, which is sometimes expressed through its linguistic aspect. This linguistic aspect is the essence of a dilemma between the argument that to be read—and readable—by the largest possible public one needs to write in a common language, and the objection that all concepts or modes of reasoning cannot necessarily be transported from one language into another. This dilemma is more or less resolved depending on the countries, the advantage clearly going to the English language. But in the background lies the more or less confessed conviction of specificity and the desire to protect its potential erosion. Whether the problem is considered vain does not matter, for its relevance lies in the lessons it carries on the springs of a European approach (the exact nature of which remains to be investigated). From the organic perspective which is mentioned here, this approach refers to the idea of an academic world

identified on a European scale. Obviously this is not brought about easily and requires several tools of mutual attestation and recognition. In this context, the recent evolution regarding the organization of education and research programmes will soon produce effects which will eventually retroact on the work of scholars.

B.

The scholars' vocation must naturally lead them to confront the practical development of a European approach to international law, in order to connect its specific appearances to a narrative perspective, or even to imagine its theoretical possibility and the conditions thereof. From this perspective, the question of the necessity of a European approach to international law can be linked to several scholarly debates which have taken place in recent years on the existence of a European tradition of international law, or even the historically European character of international law.[3] This further correlates with a renewed interest in the study of legal cultures or traditions which echo, in the legal field, reflections such as the one on the clash of civilizations. This also goes together with a better visibility of the theme of a given legal system's influence on international law, maybe because this influence has been identified as a specific stake. This desire for influence is particularly easy to fathom considering that the idea of different legal systems, and at the same time of different conceptions of law or of typical legal traditions or cultures, is already familiar. The most obvious and widespread example is the differentiation/opposition between the so-called continental—or Romano–Germanic—law and common law. Comparative law which, as a methodology (differentiated from the study of foreign law) increasingly infiltrates international law, rests its origins on such archetypal approaches. These approaches have also impregnated international law, although to a lesser extent, through requirements such as those relating to the composition of international courts and tribunals (see, for example, Article 9 of the Statute of the International Court of Justice). Although comparative law has demonstrated the limits of such system categorization or type identification, it nevertheless gives credence to their existence. From the very beginning of the process, comparative law explains—and thus includes as "normal" variables—the notions of influence, borrowing, mimicry, and transposition, but also of hybridization and distortion. The idea of exporting–importing legal models is not new in itself. One only needs to remember, besides the effects of colonization, the nineteenth-century journeys undertaken by famous personalities such as Boissonade in order to "help" or encourage the transposition of entire corpora of norms, which are nowadays echoed by the multiple missions mandated to help certain countries to (re)build their legal system.

3. Martti KOSKENNIEMI, "International Law in Europe: Between Tradition and Renewal" (2005) 16 European Journal of International Law 113; Oliver GERSTENBERG, "What International Law Should (Not) Become: A Comment on Koskenniemi" (2005) 16 European Journal of International Law 130; Pierre-Marie DUPUY, "Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi" (2005) 16 European Journal of International Law 137; Gerald L. NEUMAN, "Talking to Ourselves" (2005) 16 European Journal of International Law 142. See also Alexander ORAKHELASHVILI, "The Idea of European International Law" (2006) 17 European Journal of International Law 315.

The actual scope of these influences and their durability could obviously be debated. But, in any event, they participate in a certain form of perennial mythology. European comparative lawyers from the beginning of the twentieth century, for instance, were seeking a "common law", which is to comparative law what universal law is to international law. With this background, it is interesting to observe the current tendency of both the reactivation and the interconnection of these same problems, in a context where global and local confront each other, where domestic and identity issues have become particularly sensitive, and where specific historical eras are re-examined. This linkage is new, commensurate to the increasing interconnections between the various national laws and international law, while comparative lawyers formerly were not used to considering international law as a subject of their study. The issue of national—or regional—approaches to international law was a question left to international lawyers and we rediscover today, through the history of international law,[4] that lively debates existed almost a century ago,[5] and the emergence of new approaches.[6] This temporality of the necessity to plunge back into history is definitely noteworthy, as are the various disciplinary linkages. Indeed, reflecting on a European approach to international law necessarily confronts the actual or supposed plurality of national approaches existing in Europe, and therefore implies, one way or another, integrating a comparative perspective.

This can be all the more fruitful since, incidentally, comparative law has naturally been shaken by the substantial expansion of international law, which has begun to model national laws more or less intrusively, while at the same time harmonizing or standardizing entire areas (even though domestic law experts are not always as aware of this trend as they should be, especially in Europe, where EU law or the law of the European Court of Human Rights often acts as a filter or shield). A potential

4. Mark W. JANIS, *The American Tradition of International Law: Great Expectations 1789–1914* (New York: Oxford University Press, 2004); Taslim Olawale ELIAS, *Africa and the Development of International Law* (The Netherlands: Martinus Nijhoff Publishers, 1972); Ram Prakash ANAND, "The Role of Asian States in the Development of International Law" in Rene-Jean DUPUY, ed., *The Future of International Law in a Multicultural World* (Alphen aan den Rijn: Samson-Sijthoff, 1984) 105; ONUMA Yasuaki, "In Quest of Intercivilizational Human Rights: Universal vs. Relative Human Rights Viewed from an Asian Perspective" in Daniel WARNER, ed., *Human Rights and Humanitarian Law: The Quest for Universality* (The Hague: Kluwer Law International, 1997) 43; ONUMA Yasuaki, "Towards an Intercivilizational Approach to Human Rights" in Joanne R. BAUER and Daniel A. BELL, eds., *The East Asian Challenge for Human Rights* (New York: Cambridge University Press, 1999) 103; ONUMA Yasuaki, "A Transcivilizational Perspective on Global Legal Order in the Twenty-First Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts" in Ronald St. John MACDONALD and Douglas M. JOHNSTON, eds., *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (The Netherlands: Martinus Nijhoff Publishers, 2005) 151. See also Emmanuelle JOUANNET, "Regards sur un siècle de doctrine française du droit international" (2000) Annuaire Français de Droit International 1; Enzo CANNIZZARO, "La doctrine italienne et le développement du droit international dans l'après-guerre: Entre Continuité et Discontinuité" (2004) 50 Annuaire Français de Droit International 1.

5. Héctor Gros ESPIELL, "La doctrine du droit international en amérique latine avant la première conférence panaméricaine" (2001) 3 Journal of the History of International Law 1.

6. Antony ANGHIE and B. S. CHIMNI, "Third World Approaches to International Law and Individual Responsibility in International Conflicts" in Steven R. RATNER and Anne-Marie SLAUGHTER, *The Methods of International Law* (Washington, DC: American Society of International Law, 2004); Kazimierz GRYZBOWSKI, *Soviet Public International Law: Doctrines and Diplomatic Practice* (Leyden: Sijthoff, 1970); Andre PATRY, "La conception soviétique du droit international" (1971) 9 Canadian Yearbook of International Law 102; Tarja LÅNGSTRÖM, *Transformation in Russia and International Law* (Leiden: Martinus Nijhoff Publishers, 2002).

influence on international law thus seems to have a double trigger, in the sense that it also becomes an influence through international law. Certain notions or ideas stemming from a national law system will eventually penetrate another national law system via international law. This pertains to the perception of law as a modelling device. The stake of influence increases commensurate to the development of international law-making, which is nowadays far from being a law system solely for interstate relations but rather an increasingly substantial law designed to produce effects in increasingly open national systems. It has become impossible to distinguish between or compartmentalize the inside from the outside. International law consequently acquires many features from the comparative lawyers' "common law", and certain comparative lawyers are thus opening the debate on the pluralistic or imperialistic character of its elaboration, and are thereby joining the concerns of certain international lawyers.[7]

This gives evidence of the fact that scholars can exempt themselves neither from observing the existing European approach(es), nor from calling into question their own relative positioning in terms of their approach to international law, including by considering the hypothesis of an approach, or even a legal thought, that is already more or less consciously—or at least increasingly becoming—European. But once this statement is made, the central question regarding the essence of a European approach can no longer be circumvented.

III.

The question is more intricate than it seems at first glance. A series of other questions need to be answered beforehand by going back, to a certain extent, to the starting point. For instance, whether it is necessary, in order to clarify what would be a European approach, to specify who is or would be its author, as well as where, when, and how this approach would appear. Only when these questions have been answered will it be possible to question why such an approach is or should be necessary, by analysing what its objectives and purposes are or should be. All these questions also require critical assessment of the existing approach in order to determine whether it needs to be modified, replaced, completed, etc.

A.

Defining what qualifies as "European" is not simple. The adequacy of a geographical criterion is relative, which becomes obvious at the margins of the continent. The most striking example is the endless argument on whether Turkey is a member of Europe (the answer being affirmative as far as the Council of Europe is concerned, while the issue is much more debated with regard to the EU) or the questions

7. See E. Alejandro ALVAREZ *et al.*, *Mireille Delmas-Marty et les années UMR* (Paris: Ed. de la Société de Législation Comparée, 2005); Mireille DELMAS-MARTY, *Trois défis pour un droit mondial* (Seuil, 1998); Mireille DELMAS-MARTY, *Etudes juridiques comparatives et internationalisation du droit* (Favard, 2003); Mireille DELMAS-MARTY, *Le relatif et l'universel* (Seuil, 2004); Mireille DELMAS-MARTY, *Vers un droit commun de l'humanité* (Textuel, 2005); Mireille DELMAS-MARTY, *Le pluralisme ordonné—Les forces imaginantes du droit* (Seuil, 2006).

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regarding the countries likely to accede to the Council of Europe. Besides, this criterion does not conceal the fact that factors other than the geographical one are at play and that the choice is, ultimately, a political one. Indeed, what are these other factors?

One could opt for an institutional approach and therefore emphasize the Europe either of the EU or that of the Council of Europe, which do not have the same perimeter—while keeping in mind that Europe has been divided for a long time between West and East, which has necessarily left marks which a radical reconsideration of this division cannot simply override.[8] However, unity does not necessarily spring from the reconsideration of a division, while the existence of a division does not exclude the existence of common points or even of a common core. In the end, one is faced with the same difficulty as that stemming from the implementation of legal norms whose beneficiary is a group or a collective body whose outer limits have not been defined. The example of a population is most striking in order to clearly identify the risk of a too extensive or too reductive inclusion. This example gives evidence of the limits of any attempt at objectification, and of the necessary (re)introduction of a subjective criterion, such as the famous sense of belonging or the "desire to live together". From this point of view, one needs to remember the distinction between the level of legal policies and that of scholars. Indeed, while the aforementioned politico-institutional references (the EU and the Council of Europe) not only make sense but are an imperative for the former, they lose this same sense for the latter.

This clearly does not and should not prevent certain academics from choosing to promote the development of a European approach to international law that would be specific to these institutions or shared by its Member States. However, it means that there is no reason—unless a certain atavism or heredity is claimed, but this attitude is unacceptable—why such a posture should be the exclusive prerogative of the natives of the areas thus carved out, unless those who live and work there are included. The difficulty in finding a satisfactory formulation clearly demonstrates how slippery that slope can become. As Sir Michael Wood elegantly phrased it, "It's all in the mind, or in your approach, but this is completely circular: presumably on this view there are Europeanized Americans and Americanized Europeans."[9] But it then becomes a question of content and leads back to the sense of belonging, and one must henceforth identify the basis of such a sense because it implies, once the hypothesis of a militant posture or of adherence to the political project of European integration is set aside, the existence of a common core which would specify Europe but also unite it. In that context we refer to values or to a legal culture which could result in a certain commonness of approach. This brings us to successive leads: the European approach determined as such by the position of those who express it, and the European approach determined by its content.

8. Ineta ZIEMELE, "Legitimacy of the Vision: Central and Eastern Europe" in Ruiz Fabri *et al.*, eds., *supra* note 2 at 139–50.

9. Wood, *supra* note 2 at 151.

B.

The idea of a European approach determined by the position of its issuer mainly if not exclusively refers to legal policies, or what can be more neutrally called practice. The fact that the EU as such has a foreign policy, and thus meets and sometimes directly participates in international law-making and its implementation, necessarily implies that it has an approach to international law which is a European approach. Even if there are other European perimeters, the facts are that this characterization has been mainly linked to the EU, including by scholars, and that it has become common and usual to refer to it so in that sense.

One could argue that this approach is a specialized one, linked to the distribution of competences between the EU and its Member States, but this does not do justice to reality. The entanglement of these competences, clearly illustrated, for instance, by the extent taken by the category of mixed agreements and the desire—albeit unequal depending on the domain—to develop a common foreign policy, has led to a multiplication of topics on which the EU speaks with one voice. A certain domino or contamination effect undoubtedly takes place, which prompts Member States to adopt common positions, including when such a unified position is not strictly required by EU law.[10] Furthermore, Europeans have to deal with the fact that many actions have already been undertaken, on the internal level, to aggregate their diversity and that they therefore need to articulate both the "inside" and the "outside", so that what is done on the outside would not jeopardize what is planned on the inside, particularly when the same issues are at stake. This is also the meaning that could be read into the case-law on external implied or implicated competences. What could appear to be a requirement of consistency does not exclusively concern Europeans, but also their interlocutors. This tendency transcends the borders of the EU, not only through the exhortation directed at candidate countries to align with the EU members' practices and positions but also beyond, for instance with the co-ordination attempts carried out within agencies such as the Committee of Legal Advisers on Public International Law (CAHDI), although they are not always successful. Further on, it is also a question of "mechanics" in the sense that the means and procedures to decide on a common approach need to be specified. The particular care with which these procedures are determined, and their implementation monitored, gives evidence to the fact that what is called a European approach, although this approach is certainly desired, is neither spontaneous nor easy to agree on. The European approach to international law therefore stems from a harmonization or unification process, very much like the entire European construction process. It carries a different dimension from that linked to the EU as an actor in international relations and thus oriented to the "outside".

An internal component also comes into play, relating to the implementation of international law within the EU legal system, and it is obvious that both components

10. Vaughan LOWE, "Can the European Community Bind the Member States on Questions of Customary International Law?" in Martti KOSKENNIEMI, ed., *International Law Aspects of the European Union* (The Hague: Kluwer Law International, 1998) 149; Anne-Marie SLAUGHTER and William BURKE-WHITE, "The Future of International Law is Domestic (or, The European Way of Law)" (2006) 47 Harvard International Law Journal 327.

can retroact on one another. The principles of this internal component are laid out by the EU treaties, but the way in which they are understood and implemented affects their potential impact. One significant example is provided by the European courts, and particularly the European Court of Justice (ECJ), which have an approach to international law that can unquestionably be qualified as European, in the sense that it is promoted by a European body. This needs to be taken into account, considering the effects their views can produce on external decision-making. This is a different way of demonstrating that, exactly like national approaches, the springs of a European approach are closely linked to the functioning of the internal legal system of the EU and to the consistency it requires. It is therefore not only a negotiated approach, a mere addition of common approaches, or a common denominator to national approaches. Rather, it creates a competition not only between national approaches, but also between itself and these national approaches (however, that they are competing does not imply that they are conflicting). The degree to which a European approach seems necessary is tightly linked to the desired degree of integration. This, however, implies tackling the subject of content and objectives.

C.

The idea of a European approach determined by its content suggests the existence, from a substantial point of view, in terms of values, of elements which identify Europe in how they perceive and deal with international law. For reasons both methodological and political, this issue is sensitive, similar to the issue of archetypes, considering the presuppositions it could convey and the implications it carries.

On the first level of analysis, it should not be more difficult to accept the notion of a European approach to international law than it was to accept the notion of a national approach, on the premise that these approaches supposedly have a clear and individuated identity and under the precondition that the elements of these identities are determined. However, a European approach necessarily competes with a plurality of rather diverse national approaches and it therefore presupposes the possibility of discovering enough unity despite the diversity, or within the diversity, and progressing towards more unity. This is the internal aspect. But there also is an external aspect, and if we acknowledge the idea of a European approach, we must also acknowledge that the external aspect carries a certain number of specificities. In other words, a European approach is both what unifies and specifies, a duality which can easily lead to ambivalence.

With regard to the internal aspect, can we consider that the European approach is rooted in a common core, a tradition, or is it only and merely a construction (the alternative is deliberately reductive and could of course be nuanced)? To assert the existence of a European legal culture which transcends national divisions is obviously prone to the objection that notable differences of legal culture persist even within Europe. One could obviously argue that it is useful or necessary to preserve this diversity, either because it is considered a valuable asset or because it serves as a barrier against a project which does not convince, or at least not entirely. Europe is not exempt from demonstrations of identity which have naturally been built upon one another. However, if what divides Europeans should not prevent them from perceiving what brings them together, it is also true that this mainly refers to an idea

of international law and of its function, which does not necessarily induce naturally shared views on the practical level. This can be understood as giving evidence of a method or reasoning which does not exclude differences, if one remembers that those who are affected often have an unclear awareness of what brings them together. One of the lessons from the historical analysis is indeed that those who have been adversaries can retrospectively seem very close. At the same time, supporting the existence of a tradition also implies that the European construction is not entirely artificial, that it is in line not only with history—which is a fact—but also with the rationale of this history. Identifying what brings Europeans together therefore also reduces the threat of a European approach steering too far away from national approaches.

Evidently, the underlying issue is one of legitimacy or, at least, of acceptability, and such a need for roots in a common core does not go without precedent. This line of reasoning has been embraced by the ECJ when it asserted the existence of general principles of European law in order to protect fundamental rights whose protection had not been secured in the founding treaties.[11] While asserting that the "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice",[12] the ECJ also introduced the reference to "constitutional traditions common to the Member States". This reference was later integrated into subsequent treaties which codified the case-law. The relevance of this comparison is manifold. First of all, it is well known that this reference to common constitutional traditions is not exclusive (there are other sources of inspiration). Furthermore, it does not create a systematic line of reasoning, implying mechanical research of the principle in every national system, because such a process would reduce it to the mere search for a common denominator. Last, but not least, the process is backed up by the reservation that a principle that is inconsistent with the bases of the European legal order must be ruled out, even if the said principle is common to all countries. In other words, the reference to a tradition functions as a "carrier", a purveyor in the sense that it links a new practice to existing ones without bindingly tying the future. It also means that the reference to a tradition is kept relatively vague with regard to its content. However, it is probably inherent in the very idea of a tradition to begin the identification process with vague ideas and guidelines which supposedly exist here and there, the first one being the idea that international law is, by its origins, a European language. That this idea can possibly be invalidated[13] does not prevent it from being solidly rooted, including in the minds of those detractors who charge the system with Eurocentrism.

This is where the second aspect comes into play, which could validate the possibility of qualifying an approach as European, validate the fact that it carries specificities, and validate the argument that it is rooted in what differentiates Europe from the rest of

11. Hélène RUIZ FABRI, "Principes généraux du droit communautaire et droit compare" (2007) 45 *Droits* 127.

12. *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, Case 11/70, [1970] European Court Reports 1125 at 1149.

13. Orakhelashvili, *supra* note 3. See also ONUMA Yasuaki, "When Was the Law of International Society Born: An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 Journal of the History of International Law/Revue d'histoire du droit international 1.

the world or, at least, distinguishes Europe. First, when Europe is an actor, it necessarily—or logically—projects its own interests and values to the outside. However, one specific and fundamental element, which has become almost inherent, is that Europe, especially after World War II, has deliberately chosen the path of peace through law. The agreed construction, although it obviously implies a political will, rests on the utilization of a particularly extensive legal device, according to techniques which initially were and remain international law techniques. The law is thus not only a favoured tool for action but also the object of a belief, so much so that one cannot but wonder whether it has become a "political theology".[14] But, indeed, how could Europe not believe in the outside virtues of a tool that has both worked so well on the inside and warded off its demons? It is therefore not surprising that Europe is said to have a strong preference for an international rule-based system rather than a power-based system, a belief in the virtues of multilateralism which goes hand in hand with a preference for universalism, especially since fundamental values and notions such as peace, human rights, a hierarchy of norms, international community, and the role of the judge are at stake. This inventory of a common core can progressively be enriched and the ongoing European construction provides an important contribution.

What follows depends on the interpretation given to these views. One could argue, for instance, that "the [European] Union does not develop … specific concepts regarding international law. It shares the theories commonly accepted by the international community and claims their implementation in its relations with third parties."[15] It is also noteworthy that Europe does not claim the existence of a European international law, similar to the Latin-American international law which existed a century ago and gave rise to an important debate, including among scholars.[16] In other words, the European approach does not pretend to break away and its guideline rather seems to be a posture in favour of reinforcing the existing international legal order, paired with the implicit presupposition that its transformation is brought about by the notion of general interest, which also impregnates universalism. Henceforth the idea is not so much one of specificity, rather of adherence and support to a model which can be meaningful only if others also support it. This is in line with the analysis of regionalism laid out in the *Report on the Fragmentation of International Law*, which points out that while international law has always been subject to regional influences, there is no

> claim that some rules should be read or used in a special way because of their having emerged as a result of "regional" inspiration. On the contrary, these regional influences

14. Koskenniemi, *supra* note 3 at 120.

15. Jean-Paul JACQUÉ, "Une vision européenne du droit international?" in Ruiz Fabri *et al.*, eds., *supra* note 2 at 135.

16. Arnulf Becker LORCA, "International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination" (2006) 47 Harvard International Law Journal 283. In favour of this idea: Alejandro ALVAREZ, "Latin America and International Law" (1909) 3 American Journal of International Law 269. Against this idea: Hersch LAUTERPACHT, "The So-Called Anglo-American and Continental Schools of Thought in International Law" (1931) 12 British Yearbook of International Law 31; Hersch LAUTERPACHT, *The Development of International Law by the International Court* (London: Stevens & Sons, 1958).

> appear significant precisely because they have lost their original geographically-limited character and have come to contribute to the development of universal international law.[17]

This can be linked to the fact that "theories of interdependence and international regimes in international relations studies as well as the sociology of globalization point to the advantages of governance through units wider than states, including regional units".[18]

While this presentation is rather soothing, several paradoxes or ambivalences are nevertheless ill-concealed. First of all, a large number of studies focusing on a European approach are relatively recent and are set in the specific or clearly defined context—for the most part, the transatlantic context—of discussions opposing or bringing together the American and the European vision, especially on the issue of the use of force.[19] This can be understood as the expression of the fact that an identity is always built upon another one, and it is thus useful to understand the major reference of opposition. However, a broader debate emerges beyond this issue, a debate on international law and its "limits", which calls into question fundamental conceptions. In this regard, the European approach tends to associate the idea of defending the law with that of defending universalism and values of justice and morals against an instrumental approach. The reference to the universal, however, is ambivalent in the sense that the universal has no voice or "spokesperson" and is thus constantly prone to subjective appropriations which can conceal hidden intentions. As was pointed out at the beginning, the suspicion of an imperialistic temptation is thus always lurking. This is true not only because of the ghost of the past but also because of the discrepancy between discourse and action. The claim that Europe has built guarantees, precisely rooted in legal tools and the rule of law, is therefore not necessarily sufficient to dispel the mistrust fuelled by its historical heritage and the fear that the assertion of a European tradition could conceal the rebirth of conceptions and objectives which have nowadays been formally repudiated. In other words, it is not excluded that Europe still has an imperialistic temptation, although it is obviously clear—since this has become the great European taboo—that this temptation would never be realized through war. This incidentally puts Europe in a situation of relative weakness, which justifies even more its claim for law. However, this says nothing about the ends to which Europe intends to use it.

Second, we need to consider the institutional aspects and, regarding the EU, the necessity to take into account its specificities in international law-making and its

17. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (ILC), finalized by Martti KOSKENNIEMI, UN Doc.A/CN.4/L/682 (2006), at 104, para. 201[ILC Study Group Report].

18. *Ibid*., at 107, para. 207.

19. See, e.g., the proceedings of the *American-European Dialogue: Different Perceptions of International Law Symposium*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 10 February 2004. Notably, Rüdiger WOLFRUM, "American-European Dialogue: Different Perceptions of International Law—Introduction" (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) 255; and Hanspeter NEUHOLD, "Law and Force in International Relations: European and American Positions" (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) 263.

implementation. Indeed, although the EU is an international organization, the fact is that, unlike other international organizations, the EU has a voice and uses it either next to or in place of its Member States. Furthermore, we can observe "normative" incidences, for instance the development of mixed agreements which reconfigure the negotiation perimeters and bring about a new approach to treaty law, including the use of disconnection clauses. The example is less anecdotic than it seems. These clauses certainly do not express a clear separatist ambition which would undermine the allegiance to universalism and the role that Europe could play in its promotion. However, these clauses could very well serve the reappearance of federal clauses. Moreover:

> the real substance of [a] clause is not apparent on its surface, but lies in the regime referred to in the clause. It is the conformity of the substance of that regime with the treaty itself where the real point of concern lies. From the perspective of other treaty parties, the use of [a] disconnection clause might create double standards, be politically incorrect or just confusing.[20]

Furthermore, this is the external version of the "paradox … that Europe was built on the basis of treaties which exclude the use of international law between its members but require the use of international law with third parties",[21] a paradox which can lead to configurations such as exemplified by the *MOX Plant* case.[22] This carries the spectre of a "special" or "self-contained regime", in the sense given to this expression by reflection on the fragmentation of international law. To limit oneself to the observation of this compartmentalization, however, is to address only a part of the effects the European construction has on international law, considering that these effects are a part of the European approach to international law. In fact, the European approach is inseparable from the approach to international co-operation, and of its ways and means. To see only the aspects that compare Europe to a "super state" prevents us from acknowledging just how much the European construction has shaken and put into perspective the Westphalian structure of international law. The European construction has indeed trivialized multilevel co-operation and promoted the development of transnational networks. These networks in turn can serve as mechanisms to trivialize sovereignty, but are also vectors of influence, since all of them materialize and carry the idea of norm harmonization or even standardization. This leads us to the ultimate stage in the determination of what could be a European approach to international law.

IV.

This ultimate stage mainly rests on scholarly reflections that consider international law through the prism of European law. One could challenge the qualification of

20. ILC Study Group Report, *supra* note 18 at 151, para. 294.

21. Jacqué, *supra* note 15.

22. Yann KERBRAT, "Le différend relatif à l'usine MOX de Sellafield (Irlande/Royaume-Uni): connexité des procédures et droit d'accés à l'information en matière environnementale" (2005) Annuaire Francais de Droit International 607; Yann KERBRAT and Ph. MADDALON, "L'affaire de l'usine MOX devant la CJCE: la CJCE rejette l'arbitrage pour le règlement des différends entre etats membres (Commentaire de l'arrêt *Commission contre Irlande* du 30 mai 2006)" (2007) RTDE, No. 1, 154–82.

"ultimate stage" with the argument that, in the end, we are merely in the presence of what has been described as a "regional influence" on international law. However, this argument seems too reductive in the light of the structural visions that suggest that international law operates like European law. This approach presents itself not as a project for Europe but as a project for international law, and refutes the idea that Europe merely gives a new use to the classical tools of international law. Two specific demonstrations emphasize this approach. The first was given by Anne-Marie Slaughter and William Burke-White in an article whose significant title is "The Future of International Law is Domestic (or, the European Way of Law)".[23] This work is all the more noteworthy as it is an American analysis that suggests reflecting on the future of international law and its new functions by the yardstick of the logic that is specific to European law. In other words, it suggests conceiving international law as a law capable of modelling state policies and national law systems in the same way as that achieved by European law. That this is an instrumental approach ("Europe's weapon is the law" and the "European way of law is precisely the role that we postulate for international law generally around the world"[24]) does not jeopardize the fact that it meets the dominant belief and even the sacralization of the law in Europe, which is particularly strong among scholars. Furthermore, this approach does not discard the consideration of values. Much the opposite, since the tool is considered to serve a state model or political organization model (domestic institutions need to be reinforced, to serve as safeguards for national governments and to force them into action at the risk of being relinquished). Yet this is exactly what makes the analysis ambiguous, considering that the characteristic feature of a power approach is to seek a structuring which is identical to the one that is subdued.

The second illustration is European. The reflection on international law through the prism of European law can in fact be read into certain analyses of the constitutionalization of international law, or of certain areas of international law such as World Trade Organization law.[25] It is noteworthy that the "constitutionalist transplant" has been particularly nurtured by German scholars, although it has progressively planted its seeds elsewhere. Are we merely faced with a renewal of the recurrent temptation to project the supposed perfection of the national legal system on international law? The issue is obviously more complex, but the question nevertheless

23. Slaughter and Burke-White, *supra* note 11.

24. *Ibid.*, at 332.

25. Among others, see Jan KLABBERS, Anne PETERS, and Geir ULFSTEIN, *The Constitutionalization of International Law* (Oxford/New York: Oxford University Press, 2009); Ronald St. John MACDONALD and Douglas M. JOHNSTON, eds., *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (The Netherlands: Martinus Nijhoff Publishers, 2005); Deborah Z. CASS, *The Constitutionalization of the World Trade Organization—Legitimacy, Democracy, and Community in the International Trading System* (New York: Oxford University Press, 2005); Armin VON BOGDANDY, "Constitutionalism in International Law: A Proposal from Germany" (2006) 47 Harvard International Law Journal 223; Anne PETERS, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures" 19 Leiden Journal of International Law 579; Erika DE WET, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order" (2006) 19 Leiden Journal of International Law 611; Ernst-Ulrich PETERSMANN, "Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society" (2006) 19 Leiden Journal of International Law 633.

emphasizes how inseparable the issue is from the pursued objectives, which call for an individual assessment regarding their legitimacy.

At this point we have come full circle and the state of things seems less alarming. An approach is not only a manner of tackling certain issues with regard to the adopted point of view and the utilized method, but also the fact of going towards something, the motion by which something is approached. Therefore, concerning international law, scholars need to reflect on their own interest in launching this motion, if not in common at least with a better knowledge of one another at the European level. This is also the vector of a (re)conquest of authority at the scale of a Europe which is increasingly our space of identification on the international level. On this point, as was the case for international law, legal policy has preceded legal thought. Driven by its very own voluntarism through procedures and norms, which may very well be the outward sign of the EU's genius, the institutional Europe has built the foundation upon which a not only aggregated but shared European approach can be construed. At the very least, Europe seems to have built what the French call a "potluck",[26] a place where everyone is provided with what they have contributed.

26. "Auberge espagnole" in French, which is also the title of a French movie by Cédric Kaplisch about students sharing a slice of life during an Erasmus stay/exchange in Barcelona.

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